

## INTRODUCTION TO TRANSCRIPT OF PROCEEDINGS

The *Stetson Law Review* is pleased to present this transcript of the proceedings of *Corporate Charity: Societal Boon or Shareholder Bust?* The *Law Review* hosted this Symposium on the Stetson University College of Law campus on November 8, 1997. The participants convened to discuss the past and future of corporate giving to charitable organizations. The panelists represented a broad spectrum of professional backgrounds and views on this subject, and contributed to a lively and entertaining exchange of ideas.

We have endeavored to capture and preserve the spirited, but good-natured, tone of the discussion. To that end, the discussion is presented almost exactly as it was transcribed by a court reporter. The remarks have been edited for grammar and clarity, and a few footnotes have been added, but the substance and style of the participants' comments remains unchanged.

An explanation of the event's format may be helpful. The faculty sponsor of this Symposium (Professor Charles Elson) and the program moderator (Frank Balotti) provided some introductory remarks, after which the other panelists each presented their views on this topic. Following these presentations, the participants entertained questions from audience members. We hope you will find the participants' ideas engaging and thought-provoking.

STEVEN DAVID SINGLETON  
Lead Articles & Symposia Editor

## TRANSCRIPT OF PROCEEDINGS — CORPORATE CHARITY: SOCIETAL BOON OR SHAREHOLDER BUST?

PROFESSOR ELSON: I want to welcome everyone to the Stetson symposium this morning, "Corporate Charity: Societal Boon or Shareholder Bust?" This is a symposium on the future of corporate philanthropy.

The origins of this symposium are really interesting, and it's very apropos that we're doing this in this particular room. About two years ago we had a speech here. The Nichols Foundation Distinguished Lecture Series sponsored a speech by Al Dunlap, who at that time was chairman of Scott Paper Company. In the course of his speech on corporate governance, Mr. Dunlap made a passing remark that he felt that companies should not give money away, that corporate philanthropy should be abolished and instead of money being given away by the corporation, he felt that it was up to the shareholders to give their own money away out of the profits that the company made for them. He said that he wasn't against philanthropy, but he was against corporations being philanthropic; he was for shareholders themselves being philanthropic so as to spread the wealth, so to speak. It got me thinking, and I think it got a lot of people thinking. The statement itself ended up being reported in the press,<sup>1</sup> and he had to comment on it for the next year or so, for better or worse. He nonetheless steadfastly defended the position, and it got a lot of people thinking.

Shortly after that speech, the National Association of Corporate Directors (NACD) came out with a recommendation in their report on director compensation that called for the elimination of charitable contributions benefits to corporate directors.<sup>2</sup> In other words,

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1. See Mickie Valente, *Scott Paper Boss on a Roll with Changes*, TAMPA TRIB., Feb. 4, 1995, at D1.

2. See NATIONAL ASSOCIATION OF CORPORATE DIRECTORS, REPORT OF THE NACD

corporate directors were being given life insurance policies by the corporations on whose boards they sat to delegate the corpus of the policy to the charity of their choice. The NACD recommended eliminating this particular perk. Again, this got this debate going.

Now, you have to go back historically to look at the origins of corporate philanthropy. Back in 1919, the Michigan Supreme Court decided a very famous case called *Dodge v. Ford Motor Co.*,<sup>3</sup> which involved Henry Ford of the Ford Motor Company and the Dodge brothers. In that particular suit, the court said that a business is not an eleemosynary institution; in other words, a business is not designed to be a charity. The case involved Henry Ford attempting to cut car prices and employ more people so he could earn less as a company but employ more and create a better society. The Dodge brothers, shareholders in the company, were rather disturbed at the fact that they wouldn't be making a profit, and they sued him. The court said that Henry Ford was wrong; that, in fact, the corporation is not an eleemosynary institution and was not designed simply to be a charity. The court said on the other hand, if you could demonstrate that giving money away contributed to the corporate purpose — that making a charitable contribution created greater profits and greater goodwill — they were allowable.

From that point on, effectively it was the accepted norm that corporations could make philanthropic contributions, charitable contributions. As corporations grew and society grew, it became expected, and corporations today fill a very important role in the charitable philanthropic structure of this country. Most charitable organizations take a lot of their income from corporate giving. Well, anyway, as a result of the offhand Dunlap comment, debate sort of began again on this point.

Now, the point was not always accepted. There have been periods in American history where this debate, over whether companies should give money away or not, has surfaced and resurfaced. Most recently the debate took place in the late '60s, early '70s, but disappeared again. The interesting thing about the debate that's just begun this time around is that the debate was occasioned not by individuals who typically one would think of as defending the corpo-

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BLUE RIBBON COMMISSION ON DIRECTOR COMPENSATION: PURPOSES, PRINCIPLES, AND BEST PRACTICES 16–17 (1995).

3. 170 N.W. 668 (Mich. 1919).

rate purpose. It came about through shareholder activists who saw or began to see charitable contributions as negatively affecting corporate governance and shareholder accountability. Because of this, we've had a resurfacing of this debate.

Now, this is, as far as I know, one of the first symposia of its kind to re-examine this issue. There was an academic symposium held at New York Law School a couple of months ago, but I don't think the focus was necessarily on the idea of the corporate charity or opposition to corporate charity coming from the shareholder activist movement.<sup>4</sup>

With us today to discuss this topic, we have a tremendous and broad range of viewpoints, which I think you'll find intriguing. Each of the viewpoints that are going to be represented here, you'll find come from individuals at the absolute top of their particular professions and their particular interests. I believe you will discover that the debate that comes out of this will be both lively and invigorating. What I'd like to do is introduce the panel. Then I'm going to turn it over to our moderator, who is Frank Balotti.

Let me start with the panel itself. First, there is Jim Hanks. Jim is no stranger to Stetson. Jim was here about six years ago when we conducted a symposium on stakeholders versus stockholders. His performance was so dynamic and impressive, he returns. Jim is a partner in the Baltimore law firm of Ballard, Spahr, Andrews & Ingersoll. He received his A.B. from Princeton University and his law degree from the University of Maryland Law School, where he was an editor of the *Law Review*. He received an LL.M. in 1969 from Harvard. From 1967 to '68, he was a law clerk to Judge Charles Fahy of the United States Court of Appeals for the D.C. Circuit. Jim is the author of a treatise on Maryland Corporation Law<sup>5</sup> and is the co-author, with Bayless Manning, of the rather well-known book *Legal Capital*.<sup>6</sup> In fact, I use it in my courses so that it is even hopefully better known as the result. Jim is a frequent writer and speaker on corporate government issues. He has served as counsel to numerous boards of directors and board committees; is a member of the Committee on Corporate Laws of the

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4. See *Symposium: Corporate Philanthropy Law, Culture, Education and Politics*, 41 N.Y.L. SCH. L. REV. 753 (1997).

5. See JAMES J. HANKS, JR., *MARYLAND CORPORATION LAW* (1990).

6. BAYLESS MANNING & JAMES J. HANKS, JR., *LEGAL CAPITAL* (3d ed. 1990).

American Bar Association; was formerly chair of the Section of Business Law of the Maryland State Bar Association; and most recently has been, for the last couple of years, an adjunct professor at Cornell Law School and prior to that, Northwestern Law School, where he teaches mergers and acquisitions, and is a member of the American Law Institute.

Sitting next to Jim is Margaret Blair. Margaret is a senior fellow in the Economic Studies program at the Brookings Institution in Washington. Prior to the Brookings Institution, she was at Yale University. Her fields of expertise include corporate governance, industrial policy, corporate finance, business ethics, corporate strategies, organizational theory, and financial market institutions. She graduated Phi Beta Kappa from the University of Oklahoma School of Communications and attended Yale University, earning her M.A. in 1985, her M. Phil. in 1988, and finally her Ph.D. in 1989. She had a previous career as a journalist with *Business Week* magazine and has worked as an economist for the Federal Reserve Bank in New York. She is the author of a very well-known book that came out about two years ago known as *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century*,<sup>7</sup> which reviewed the various corporate governance debates of the last decade and came out with some very interesting conclusions on corporate social responsibility, shareholder control rights, and the responsibility of boards of directors. She is a widely published, widely respected thinker on the subject of corporate governance, boards and the whole nature of the corporation itself. I think we're very lucky to have her down here today.

Sitting next to Margaret is Henry Manne. Henry is presently University Professor at the George Mason University School of Law in Arlington, Virginia, and Director of Development and Planning for the University. He previously served as Dean of the George Mason University Law School from 1986 to 1996. He is Chairman of the Board of Advisers of the George Mason University School of Law's Law and Economics Center, and really was one of the early pioneers in the use of economic analysis in the law, especially the corporate area. His work, I think most will tell you, is very widely credited with sparking the tremendous interest that we've seen out there

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7. MARGARET M. BLAIR, *OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY* (1995).

today in law and economics. Professor Manne received his B.A. in economics from Vanderbilt, his J.D. from the University of Chicago, and his J.S.D. from the Yale Law School. He wrote at Yale on insider trading while there and ended up becoming the author of a very famous, very controversial, very thought-inspiring book on the subject,<sup>8</sup> and is considered today probably one of the foremost authorities on the subject. His views on insider trading, as on many other corporate topics, have stimulated tremendous debate both within the academic and general legal communities. He is a Fellow of the American Bar Foundation, member of the Order of the Coif, Phi Beta Kappa, Phi Delta Phi, and the ABA's Committee on Federal Regulation of Securities, and the Legal Education Section of the ABA. And, of course, a member of the American Law Institute.

Then our moderator, Mr. Balotti. Frank is a distinguished member of the bar, member of the Wilmington, Delaware firm of Richards, Layton & Finger. He received his B.A. from Hamilton College and his law degree from Cornell Law School, where he was a member of Phi Kappa Phi and Order of the Coif. He has been an active member of the American Bar Association Section on Business Law, where he is a past chair of the Business and Corporation Litigation Committee. He served the American Bar Association Section of Business Law as a member of the Council, a member of the Committee on Corporate Laws, and a member of the Ad Hoc Committee on the American Law Institute's Corporate Governance Project, all incredibly significant positions within the ABA. He's a member of the American Law Institute and has published numerous works on corporation law for the Practising Law Institute and for such varied publications as *Business Law Today*, *Corporate Board*, *The Business Lawyer*, and the *Delaware Journal of Corporate Law*, and is the author of a very well-known treatise on Delaware corporation law.<sup>9</sup>

Moving on, Professor Mel Eisenberg is the Koret Professor of Law at the University of California at Berkeley, where he teaches corporations and contracts. He is extraordinarily well-known in the corporate community for really two great acts. First, as a practical theorist, he was the chief reporter of the American Law Institute's

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8. See HENRY G. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966).

9. See R. FRANKLIN BALOTTI & JESSE A. FINKELSTEIN, *DELAWARE LAW OF CORPORATIONS & BUSINESS ORGANIZATIONS* (3d ed. 1998).

*Principles of Corporate Governance*<sup>10</sup> and is currently a member of the committee on corporate laws of the ABA's Section of Business Law, a very honored position which I think he shares with Jim and Frank. Second, he is the co-author of Cary and Eisenberg, *Corporations: Cases and Materials*,<sup>11</sup> which is clearly the most widely-used corporations casebook in American law schools today and used extensively here at Stetson, and, in fact, was my corporations casebook in law school. So I thank Professor Eisenberg for all I've learned on corporations law. It was a good beginning. Professor Eisenberg also has authored a number of books on corporations law, including: *The Structure of the Corporation*,<sup>12</sup> *The Nature of the Common Law*,<sup>13</sup> and *Basic Contract Law*.<sup>14</sup> He covers all ends of the legal profession from contracts to corporations law. His expertise in both areas is substantial and is widely recognized. He received his Bachelor's degree from Columbia and his law degree from Harvard University. And, again, we are delighted to have him here as well.

Finally, there is Nell Minow, last and certainly not least. Nell is also a lawyer, but she made the smart move of no longer being a practicing lawyer. She is the principal of something known as LENS, which is a \$90 million — probably higher now, \$100 million? It's gone from \$90 to \$100 million. Shows how successfully her activism has resulted in financial growth. It's a \$100 million investment firm that buys stock in underperforming companies and uses shareholder activism to increase their value. Past LENS targets have included Sears, American Express, Kodak, Scott Paper, fortunately, and I guess today, WMX and several other large companies. Westinghouse I think is a target of yours too. Nell is considered the nation's foremost shareholder activist. She has done more to change the way boards work, the way CEOs operate, the way compensation structures for CEOs operate, than almost anyone else out there today. But in addition to that, she really is a terrific scholar in the

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10. See PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994) [hereinafter PRINCIPLES OF CORPORATE GOVERNANCE].

11. WILLIAM L. CARY & MELVIN ARON EISENBERG, CORPORATIONS: CASES AND MATERIALS (7th ed. 1995).

12. MELVIN ARON EISENBERG, THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS (1976).

13. MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW (1988).

14. LON L. FULLER & MELVIN ARON EISENBERG, BASIC CONTRACT LAW (5th ed. 1990).

corporate governance area. She has, in addition to being an activist, authored a number of works on the subject of corporate governance; several books that were incredibly popular when they came out: one known as *Power and Accountability*,<sup>15</sup> which was a great book that came out several years ago, and most recently *Watching the Watchers: Corporate Governance for the 21st Century*.<sup>16</sup> Though my favorite, I've got to admit, and I'm an academic, is her casebook, *Corporate Governance*,<sup>17</sup> that was published back in 1995. It is really a standard reading for any academic course in corporate governance. So Nell bridges the gap between academe and practical experience. And as you will learn from her presentation, her practical experience combined with that academic knowledge has resulted in tremendous change in the way companies are structured. She also served as a member of all the NACD commissions on director compensation, director professionalism, executive compensation, and I think board succession as well.

MS. MINOW: Evaluation.

PROFESSOR ELSON: Board evaluation. And we are delighted to have her down in St. Petersburg as well. I welcome you all here. I'm delighted you're here on a Saturday morning. I think it's going to be an engaged, exciting debate. All of these speakers are really good speakers, so get ready, buckle your seat belts. It's going to be a good show.

With that, I will turn it over to Frank, who will then guide us through the program.

MR. BALOTTI: First of all, I'd like to thank Charles and thank Stetson for the opportunity to be here. It's a real privilege for a practicing lawyer, a mere practicing lawyer, to be on a panel like this and to be with such respected and well-known people.

I also want to tell you very briefly what we're going to do this morning. Each of the panelists will present his or her view for about ten or fifteen minutes. Then we're going to have a panel discussion, which I hope will be lively. We're going to then use the balance of the time to entertain questions from the audience. I encourage each of you to think of questions. If you're my age, you'll want to write

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15. ROBERT A.G. MONKS & NELL MINOW, *POWER AND ACCOUNTABILITY* (1991).

16. ROBERT A.G. MONKS & NELL MINOW, *WATCHING THE WATCHERS: CORPORATE GOVERNANCE FOR THE 21ST CENTURY* (1996).

17. ROBERT A.G. MONKS & NELL MINOW, *CORPORATE GOVERNANCE* (1995).



them down rather than try and remember them, because it's going to be over an hour before we get to your questions. Write them down, and be sure and ask them. We're not going to interrupt the speakers during their presentations for questions either from the panelists or from the audience, but there will be ample time at the end, and we hope that you will participate. That's what makes a forum or a symposium like this lively and fun — participation by everyone in the room.

With that said, let me pick up a little bit where Charles left off and introduce the topic of corporate giving. Corporate philanthropy, corporate giving, is part of our national policy, and as far as I know, it's part of the policy of every state. Our laws, both federal and state, encourage corporate giving. Under the Internal Revenue Code, corporations are given a deduction for charitable contributions.<sup>18</sup> As far as I know, in every state that taxes the income of corporations, corporations are likewise given a deduction for charitable contributions. There are statutes in all states, at least all states that I'm aware of, that empower corporations to make charitable gifts, normally gifts to educational and charitable institutions.

What are we talking about in terms of money? Because if we're dealing with \$50 or \$100 a year, it hardly justifies our being here. Actually, the potential for corporate giving is enormous. If you use the IRS maximum deduction of ten percent of pre-tax profits, which some courts look to as a reasonable guide to judge the amount of giving that a corporation should be involved in, if you look at that ten percent limit, 1995, I think, is the last year in which the IRS has reported the amount of money that corporations made in pre-tax profits, \$560 billion. Now it's over \$600 billion in corporate profits. That means we now have something like, oh, pick a number, \$60 billion available to be given away by U.S. corporations as charitable contributions. Sixty billion dollars, in my book, is a large number, a very large number, probably more than at least most of the panelists made last year. Actual corporate giving is in the range of \$7 to \$9 billion, depending on how you count corporate foundation money, et cetera.<sup>19</sup>

Now, all of this money, \$7 to \$8 billion, potential for \$60 billion,

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18. See I.R.C. § 170 (1994).

19. See Adam Bryant, *Companies Oppose Idea of Disclosing Charitable Giving*, N.Y. TIMES, Apr. 3, 1998, at A1.

is given away by corporations without shareholder approval, without any disclosure. Current accounting rules do not require disclosure of this money that's being given away. The proxy rules and the other securities laws do not require disclosure to the shareholders of the fact that their money was given away by the directors. If you take a true gift, not one where the corporation receives favorable advertising but a true gift — this is money, shareholders' money, that is given away with nothing received by the corporation in return — basically today, there is no accountability.

It occurred to me to ask the question: Why would corporations want to do that? I don't know how many of you saw this ad in the *Wall Street Journal* on October 27. [It says,] “Help us find the most generous company in America.”<sup>20</sup> There's a contest to see which American corporation can give away the most of its shareholders' money.

Americans are the most philanthropic people on earth. In 1996 we gave more than \$150 billion to charities and other worthy causes. Nearly 80 percent of that was given by individuals. While those numbers are an astonishing expression of our collective altruism, less than 6 percent of that sum was given by U.S. corporations.<sup>21</sup>

They didn't give away enough of the shareholders' money. So now we're going to have a contest. Who cares about that contest?

There's another article from the *Wall Street Journal*.<sup>22</sup> This one starts off with, “After donating tens of millions of dollars in software, Microsoft Corp. for the first time was crowned the nation's top giver last year.”<sup>23</sup> It goes on. “IBM was stunned.”<sup>24</sup> IBM's complaint: Microsoft wasn't playing fair because it used retail prices to value the products that made up the bulk of the donations. IBM is a corporation. Can a corporation be stunned? No. Maybe Lou Gerstner was stunned. So this tells me that there's a contest between Bill Gates and Lou Gerstner to see who can be crowned the top giver of their

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20. *Help Us Find the Most Generous Company in America* (Advertisement), WALL ST. J., Oct. 27, 1997, at A11 (soliciting nominations for a contest sponsored by the Newman's Own Company and *George* magazine).

21. *Id.*

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

23. *Id.*

24. *Id.*

shareholders' money. And if that's not enough, there's a quote in here from one Barbara Dingfield, Microsoft's manager of corporate contributions. Seems to me the shareholders get hit twice. Microsoft hands their money out, then Microsoft pays somebody to hand the money away.

So with that unbiased and completely neutral view of corporate giving, I want to start the presentations from the panelists. We're going to start with Nell, for several reasons. First of all, Charles was rude enough to make her last, so I'll make her first. Second of all, those of you who know Nell know that she will not be controversial at all. So we're going to start off with a softball. Nell, with that . . .

MS. MINOW: Thank you very much. My house is located about equal distance between two different grocery stores that are essentially identical, so I used to have no preference about which one I would go to. One of them started a program whereby you collect your register tapes and turn them in for free computers for our children's school. I think you can all imagine that I all of a sudden became extremely loyal to that grocery store. To my mind, that's a very good example of a corporate charitable program that does exactly what it's supposed to do. It not only benefits the community but it benefits the community in a way that helps its own bottom line and that's very related to the kind of business it's in, the kind of consumers that it serves.

Charles, I think, told just about everything about my entire life, but he did leave off a couple of things. I'm also on the board of two nonprofit organizations. One of them is our local public TV station, WETA in Washington, D.C., which produces not only the Ken Burns shows but also the *MacNeil/Lehrer News Hour* and *Washington Week in Review* and programs like that.

Believe me, we could not survive without corporate contributions. We only get fourteen percent of our money from the U.S. government. The rest is those interminable pledge nights and corporate contributions. We like to joke at public TV, that the worse situation corporations face, the better it is for us because, of course, the ones who give us money are the ones who are in great and pressing need for improving their public persona. So Archer-Daniels-Midland, thank you. We appreciate it.

So I am sometimes very much in favor of corporate philanthropy. It's just that I worry very much about the potential to which it can be abused. One classic abuse which Charles referred to is the

idea of endowed chairs in the name of your directors. This was a very, very major factor in the slothfulness of the directors at RJR Nabisco. They were so busy cutting ribbons at the various things that were donated in their names that they sort of forgot to pay attention to the fact that the company spent \$162 million trying to invent a smokeless cigarette without ever telling them about it. So I'm very much opposed to that.

I actually attended a sales pitch by the company that developed this program for endowed chairs in the names of the directors, and they knew I was there. I mean, I wasn't hiding anything. Nevertheless, they presented the sales pitch. They talked about how great it was and about how important it is and about how directors have many other demands on their time, and sometimes it takes a little bell and a whistle to get them to come on the board. At which point I said, "Okay, people, when the director tells you that he won't come on your board unless you endow a chair in his name, that's where you look for the button on your desk marked 'eject,' that one that opens up the trap door under the chair in which he's sitting, because he is telling you that he doesn't need to be on that board and that he doesn't believe in the company, and you don't need him on your board." They went on, however, completely ignoring me, with the sales pitch. They mentioned two items that I want to draw your attention to. One was, at that time, one of the advantages of this program was it didn't need to be disclosed on the proxy. The other was that not only could the donation be made to a university, but if that was not good enough for the director, it actually could be made to any 501(c)(3) entity, even the director's private foundation. So I think that there's a great potential for abuse there.

We looked at one company once, where the head of the compensation committee was a provost at the local university. That seemed nice — they're almost like the clergy. I mean, they don't have the kind of conflict of interest that you look for in somebody's outside counsel or their investment banker. Then we found out that, guess what, Mr. CEO was the chairman of the board of trustees of the university, and Mr. CEO's company was not only the largest charitable donor to the university but also the largest contributor of research funds. Therefore, of course, there were conflicts of interest. That's the kind of thing I worry about.

When Mel and I were talking last night about his presentation, I mentioned that I was going to talk about a particular instance, and

he then exclaimed, "But that's the worst case in all of American history." That is true. I will tell you right now, this is not a typical case because it's absolutely horrible. However, the point of discussing it is if this kind of a case can exist, it tells us something very important about the system and about the way that the fail-safes are not so fail-safe. That is the case, of course, of the Armand Hammer Museum.

I got a phone call one day from a woman who voted all the proxies for Citicorp, and she started screaming in my ear. She said, "Unbelievable, unbelievable!" I said, "What is it? What is it?" She said, "Have you seen the Occidental Petroleum proxy?" I said, "No." She said, "Well, take a look at it!" So I looked at it, and it said that Occidental Petroleum was informing — not asking the shareholders to vote on this — they were informing the shareholders that they would be paying \$375,000 for the second volume of Dr. Hammer's autobiography to be written, or should I say hagiography to be written. I'd like to point out that the first volume, which covered the first ninety years of his life, had already sold very well. There wasn't a lot that he had done from ages ninety to ninety-three, but apparently it was worth \$375,000 to get somebody to write it.

Furthermore, they were going to spend \$74 million to build the Armand Hammer Museum. Dr. Hammer had already promised the art to the Los Angeles County Museum. They had actually built a wing for it, but he imposed demands on them that were inconsistent with worldwide curatorial standards. I mean, could he have a life-size portrait of himself in the entryway? Yes. Could he have his name on everything in the world? Yes. But then he started saying all of his pictures had to be hung together, and no other pictures could be hung with his, and no pictures could be deaccessioned at any time. It started to get a little bit too much. They said, "Gee, Dr. Hammer, we don't know." He said, "All right, I'm taking my ball, my bat, and my Leonardo da Vinci and I'm going home, and I'm going to build my own museum with the shareholders' money," the way he did everything else.

So he decided he was going to spend \$74 million. He put in the proxy statement a description of the fact that it was approved by disinterested, independent outside directors. Who were they? Well, like him, they were all over ninety years old. One of them was Al Gore, Sr. You may have heard of his son. Al Gore, Sr., later on in depositions was asked: "Did you have independent counsel advising

you on this?" He said, "Oh, yeah, we definitely did." "And how did you find this independent counsel?" "Well, Dr. Hammer recommended him to us." "And did he advise you on the tax consequences of this proposal?" "What?" That was his response. So they were not really on top of this thing.

I was very upset about this, but I didn't know there was anything I could do about it until I read in the newspaper that there had been a shareholder lawsuit filed. I was young, and I was dumb, and I believed in being a lawyer, and so I got very excited. I thought this was the real thing. I didn't know about Delaware. (I'm sorry, Frank.) So I called the lawyer, Mr. Prickett, and I said, "Hi, my name is Nell Minow, and I work with a lot of big institutional shareholders, and we just think this is great that you're challenging this museum, and we want to get involved." He said, "Well, honey, that's just great of you to do that because I really need your help." I said, "Great." "No, no," he said, "because we're going to settle the case, and you can come in and support the settlement." I said, "That's great. The suit was filed a week ago. You're settling it already. You mean they're not going to build the museum?" He said, "No, they're going to build the museum, but we've got some very significant concessions. We really worked hard on getting these concessions."

I said, "Okay, great, what are they?" He said, "Okay, first of all, Dr. Hammer is going to make an irrevocable gift of the art." I said, "Gee, he did that already with L.A. County, but okay, he's going to give the art to the Armand Hammer Museum. That makes sense." Next, he said, "Future outlays to the museum are going to be limited to some percentage of I don't know what." I said, "Yeah." He said, "Now, this one is very important. This is very important." In fact, a year later they actually had the chutzpah — does everybody know what that means? — chutzpah to put a witness on the stand who testified that this next thing was worth \$10 million. I want you all to listen to this part very carefully. The museum would be called the "Armand Hammer Museum," but the building it was in would be called the "Occidental Petroleum Building." That was worth \$10 million. Did you all get it? Do you want to know something? When they finally opened the museum, they forgot to put the sign on that said the Occidental Petroleum Building. Do you think somebody owes us \$10 million?

I said, "Yeah, and the rest of the settlement?" "The lawyers are going to get 1.4 million."

MR. BALOTTI: Lawyers' kids don't have to eat?

MS. MINOW: I said, "Okay, I'm not happy." So I called up my two good friends at the California Public Employees Retirement System and the Pennsylvania Public Retirement System, and we went in and we challenged the settlement. We had a wonderful adventure for about a year and got to go appear in court and got to depose Dr. Hammer and found out that he actually purchased some of the artwork with the shareholders' money, which was retroactively ratified by the directors. If a clerk does that, it's embezzlement. If the CEO does that, it's the business judgment rule. By that time the museum was built. It cost \$120 million including Dr. Hammer's coffin parachute. He got paid seven years' worth of salary for dying, and it all went to the museum. The curator, Hillary Gibson, had been his girlfriend, had never worked in art before. The museum is now there. I'd invite all of you to go see it and the mediocre art that it contains. *Business Week* asked me if the museum had any benefit whatsoever to shareholders. I replied, "If it's really, really popular and everybody drives to get there, maybe it will affect the price of petroleum."<sup>25</sup>

So when we talk about corporate philanthropy, sure, it can be very, very nice. It can be good for the community and good for the company. We have to worry about the conflicts of interest though. You worry about Tropicana donating arithmetic books to schools that say if you add one pint of Tropicana orange juice to another pint of Tropicana orange juice. You worry about corrupting the directors. And you worry especially about a system that permits this unconscionable use of the shareholders' money for a completely disastrous result. Thank you.

MR. BALOTTI: Well, after that scurrilous presentation, we will now turn to a responsible presentation, I'm sure, from Margaret.

MS. BLAIR: Thank you, Frank. I always hate to follow Nell. Nell tells such lively stories. And, of course, you all know that economists are people who have all of the brilliance and technical skills of accountants but none of the scintillating personality. I'm going to try to make up for that. I think I'm the only economist on the panel. I know I'm the only person who is not a lawyer. So you have to put

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25. See Ronald Grover, *What's Good for Armand Hammer May Not Be So Good for Oxy*, BUS. WK., Mar. 26, 1990, at 35 (stating: "The only benefit Oxy is going to get is if anyone buys their gas to get to the thing.").

up with me. I'm not going to attempt to take on any fine points of the law.

The rationale for the symposium is that in the last couple of years, the whole question of whether corporations should be allowed and maybe even encouraged to donate corporate resources to philanthropic causes has been raised again. Of course, it's been settled in the law for a long time, but there are some shareholder activists and academic elites who have raised this question again in recent years, some of whom are using tools of economics to think about the law. Well, I want to talk today about two reasons why I think this whole corporate philanthropy issue has come up again lately. One of these, I think, is morally legitimate in the sense that it's brought forward by well-meaning people, but I think they're not using an intellectually valid approach to thinking about the problem. The other reason is more intellectually honest, I think, but I have my doubts about the soundness of the moral claims behind it.

So let me start with the first reason. For most of the last couple of decades, the academic discussions of the economic role of corporations and of corporation law has been dominated by a view of corporations that probably was put forth most succinctly by Milton Friedman in his essay twenty-seven years ago, whose title says it all. The title is *The Social Responsibility of Business Is to Increase Its Profits*.<sup>26</sup> Now, I think Friedman would be willing to accept a small amendment to the title, in light of our more enlightened understanding of the notion of present value. That would be to substitute "share value" for "profits." But nonetheless, I think he would still, in our era, definitely subscribe to the paradigm that has dominated the debates about corporate governance over the last two decades. That paradigm is that a corporation is a bundle of assets that belongs to shareholders and that officers and directors act as agents of shareholders, and therefore the right way to think about corporation law is in terms of a principal-agent model.

Basically, I believe the proponents of this paradigm are well-meaning, but that the paradigm itself is deeply flawed intellectually. Let's start with the premise that a corporation is a bundle of assets that belongs to the shareholders. All three of our previous speakers have, at some point in their presentation, used the phrase

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26. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, (Magazine), at 32.



“the shareholders' money.” Okay. Let's ask the question: Whose money is it?

The premise that a corporation is a bundle of assets that belongs to the shareholders is demonstrably false. A large part, by some estimates in the current market more than half, of the value of the corporate sector in the United States, as measured by the value of their securities, currently comes from something other than property, plant, and equipment. Let me give you an example. When IBM acquired Lotus, IBM paid something like — I didn't go back and check the numbers on this, but I've got the right order of magnitude here — IBM paid something like \$4.6 billion for Lotus. They could only come up with something like \$1.2 billion worth of ownable assets behind that \$4.6 billion. That included intangibles, like copyrights, as well as tangible property. Well, IBM didn't want to have \$3.4 billion worth of goodwill on its books when it made that acquisition. So it hired some consultants who went into Lotus. They went up and down and all through it, and they came back and they reported — a 200-page report that concluded — that Lotus had \$1.8 billion worth of something called “technology in progress.” This is a new accounting term — “technology in progress.” Now, I don't know for sure what technology in progress is — and I'm not saying it's not a legitimate course of value, I'm sure it probably is — but, I'd lay odds that most of what went in there, what those consultants were calling technology in progress, goes down the elevator every night and walks out the door and goes home.

The notion that those assets belong to shareholders, it seems to me, is a perversion. There are assets there, but it's ludicrous to speak of the assets of most modern corporations as being the property of shareholders. In legal terms, we all know shareholders don't even own the hard assets of the firm. In fact, the economic function of corporation law that distinguishes it from partnership or contract law is that it creates a fictional legal entity that holds the property rights to the important inputs and to the outputs of the enterprise, at least until those outputs are distributed. I'll elaborate in a minute on the special economic function that is served by taking property rights away from the participants in the firm and vesting them in the firm itself. What shareholders get in exchange for the resources they contribute, and over which they yield property rights, is a specialized kind of claim on certain kinds of distributions and some extremely limited governance rights. Period. That's it. They do not

own the underlying assets.

So the notion that a corporation's assets are the property of shareholders is intellectually dishonest, and any thoughtful legal scholar or economist knows it. So let's not start the conversation about corporate philanthropy from that premise. It's just a false premise.

The second false premise that's built into the dominant paradigm is that directors and officers of corporations are "agents of shareholders." This notion seems to follow naturally from the corporation as a bundle of assets premise, but even apart from the falsity of that premise, the law has never supported that notion. Under the law, officers and managers are agents of the corporation itself. Directors are *sui generis*. They are not agents at all but are more like trustees in their duties. They're certainly not agents of shareholders. Directors owe a duty of loyalty and a duty of care to the corporation. They do not owe a duty of obedience to shareholders.

Now, some legal scholars might respond to the objections that I'm raising here by saying, "Well, you know, technically you're right, but the principal-agent model is still a useful metaphor for understanding corporation law." But I don't think it is a good metaphor, because I don't believe that it accurately characterizes the central underlying problem that corporation law is designed to solve.

Now, let me offer a different metaphor. If you want a metaphor from economic theory, I'll give you a different metaphor. A corporation is a legal device that helps to resolve the contracting problems that arise in team production. What's team production?

The problem that we have in team production was first identified by Alchian and Demsetz,<sup>27</sup> whose piece is often cited as the primary source for the notion that a firm is a nexus of contracts. In that paper, they talk about a particular kind of economic problem. The problem arises in situations that have two characteristics. First of all, it's a productive process that involves very difficult to measure, or difficult to monitor, inputs from a number of different people. Secondly, the output is nonseparable.

Now, what is nonseparable? What is this jargon I'm dragging in here? Nonseparability means that you cannot determine which part of the output is attributable to which input. You've got a pool of

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27. See Armen A. Alchian & Harold J. Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972).

output here, but there's no way you can say, well, this particular person is responsible for this piece. It's not like piecework, where you can just count up how much each person did. They did it together. There's a pool of output that's created by the joint efforts of a number of participants or team members. But the team members cannot simply be compensated for the value of their contributions by paying them a share of the output that they produced.

Well, this problem has not been studied as much by economists as the principal-agent model has, and so we don't have as many good stories about how you solve this problem. But in an important paper in the 1980s,<sup>28</sup> Professor Bengt Holmstrom demonstrated that in a classic team production problem, it's impossible to write an ex ante contract that provides for dividing up the rents by some ex ante sharing rule; that allocates all of the output; and, that doesn't generate a free rider problem. That is, it doesn't create a problem in which it's to the benefit of team members to say, "Well, I'll let everybody else do the work. I'm already going to get  $1/n$  of this output anyway, so I might as well just put up my heels and let everybody else do the work." If there's no ex ante sharing rule, then, if you say, "Well, we'll create the output and then we'll figure out how to divide it up," then you run the risk that the output basically is dissipated in rent-seeking behavior.

I believe this kind of contracting problem is pervasive in the modern economy, and I think when we understand it, we begin to understand the emergence of a distinct law in the Twentieth Century for public corporations that's different from the law of closely held corporations or from partnerships or from trust law, for example.

Basically, the handful of scholars who have worked on this problem have focused on one possible solution, that of simply assigning property rights to one member of the team. Property rights means that one person gets to make all the decisions. The problem with that is that if you really need complex and difficult-to-monitor inputs from all of the other participants, the parties who don't have property rights can lose their incentives to make the necessary effort or investment.

So an alternative solution that's emerged in very recent economic work is the idea that one way to create a solution to this team

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28. See Bengt Holmstrom, *Moral Hazard in Teams*, 13 BELL J. ECON. 324 (1982).

production problem, or the contracting problem associated with it, is that all of the members of the team yield property rights to an external third party. They all say, "Okay, I can credibly commit that I'm not going to rip you off, and you can credibly commit that you're not going to rip me off in this team production exercise, because we're both going to work together, but we're going to let so-and-so up there make the final decision on how the output gets divided up." This I believe is the central function of the board of directors, and I think this helps explain a lot of aspects of corporation law that are simply not very well explained by a principal-agent model.

A lot of my arguments are coming out of a paper that I've just recently written with Professor Lynn Stout.<sup>29</sup> We argue basically that the essence of what is accomplished when you form a corporation is the yielding of property rights and decision rights to an internal hierarchy at the top of which is a board of directors who are supposed to be independent of all of the influences from all the different stakeholders to a certain extent. Obviously, it's never perfect, but it functions. They yield decision rights, which helps to control the rent-seeking behavior and gives you a solution to the contracting problem. Now, in our model, team members generally work out the division of economic rents among themselves and the board serves as a kind of court of final appeal that balances the interests of all the team members in an effort to keep them together and to keep production going.

But, this balancing act may involve the board of Chrysler, for example, at some point saying, "Well, we're going to appease Kirk Kerkorian by raising the dividend, but we're not really going to let him take control of the board just because he's out there making noises." Now, if he gets enough of the shares, he could take control of the board, but short of that, we're not going to just roll over and play dead because he's out there making noises. Alternatively, if things get really bad enough, we can make Robert Allen step down at AT&T. I mean, the board ultimately just has to play this balancing role. This is, in fact, the way most boards actually operate.

Now, our model is consistent with the way corporation law actually works. The law gives boards, gives directors, enormous discretion. Courts will not second-guess a decision made within the corpo-

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29. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. (forthcoming 1999) (manuscript on file with authors).

rate hierarchy about transfer pricing between subsidiaries or the division of a bonus pool or whether to pay a dividend or how much dividend to pay. These are matters that are left completely to the discretion of the board. Our model says they ought to be.

The relevance of this for the question of corporate philanthropy is not any debate about whether corporations ought to or ought not to be a major source of revenue for our nonprofit sector. In fact, they're not. Giving by private individuals and foundations is the predominant source of revenue by far for our nonprofit sector. But nonetheless, there is a little money that comes in from the corporate sector.

Apart from that question, the point of my argument is simply to say that directors and officers need to be given discretion, enormous discretion, to negotiate with, to appease, to accommodate all the participants in the corporation, and that to do this, they have to have independence under the law from all of the team members, not just independence from management. They also have to be independent of overweening pressure by shareholders as a group, or by individual shareholders.

So I wouldn't make a blanket statement about whether philanthropic giving by corporations is a good or a bad thing, but I suspect there are many instances when, in fact, it's a useful tool for building goodwill and for solidifying important relationships with communities where corporations operate. Nell gave us several examples of that. It may also be a tool by which corporate executives or even rank and file workers are indirectly compensated. What's wrong with giving a guy a life insurance policy? That's a form of compensation, you know. What's wrong with that form of compensation relative to some other form of compensation? If he or she wants to say, "Well, I'm going to dedicate the proceeds from this life insurance to endow a chair." What's wrong with that? Why is that such a big issue? These are simply tools that managers and directors can have at their discretion as part of this balancing act that they have to perform.

So my central point is not that philanthropy is good or bad, but that it is essential to the function of the way corporation law works that officers and directors be given discretion.

Now, I said there was a second reason why I thought corporate giving is being raised as a question again in the 1990s after so many decades in which the law has clearly allowed it. My second reason, I

think, is probably not based on the same sort of false intellectual premise as my first reason, but I have some doubts about it. The second reason is simply that financial interests in this country have gained considerable economic and political power relative to other interests in the corporation in the last fifteen years, certainly relative to the power they had in the '60s and '70s and early '80s when we went through the last round of debate about corporate social responsibility.

There are two factors that account for this, at least two. One is that the economic clout of capital had grown enormously in the 1980s because we were in a period in which supply of capital was short relative to demand. We had huge government budget deficits that were absorbing a substantial part of the savings of the economy, and real interest rates were higher than they had ever been in any period since we've been recording them — throughout a large period of the 1980s. The return on capital meanwhile was quite low. In that kind of an environment, you've got enormous pressure from the financial markets to get the return on capital up in the corporate sector. They (the suppliers of capital) were able to exercise that power because they had options. They had options that they hadn't had in the first twenty or thirty years after World War II. They could go overseas with their money, and it was safer to invest overseas than it had been. They could invest in government bonds and get seven or eight percent in real terms. I mean, that's not bad.

The second reason is that the financial interests developed quite a bit more political power during the 1980s because the coming together of large amounts of capital in the big financial institutions meant that shareholders were able to solve their collective action problem more freely. So we've had a period in which shareholders as a class have had more power than they've had in any period prior to fifteen years ago. This is simply a fact of our historic circumstances. It's not a statement about the moral premises of who should have power. It's just a fact about who has power right now.

MR. BALOTTI: Well, thank you, Margaret. I think Margaret's example contains a form of corporate decisionmaking where a board of directors is making decisions based on its perceptions of the interests of all of the stakeholders in the corporation. While she didn't use the words, it sounded very much like that doctrine that we all love and really have grown to enjoy, the business judgment rule. On the other hand, we are now focusing on the directors' responsibilities

being primarily to those whose money they are handling, despite Margaret's comments that I'm using that inaccurately. The shareholders are still the ones who put the money in the corporation. That's Nell's focus.

Now I'd like to turn to just another poor old practicing lawyer from down in Baltimore eating his crab cakes, and turn to Jim Hanks and see if he can give us any help on these two opposing views.

MR. HANKS: I think the expression is "Recovering Lawyer." It's great to be here in Florida in early November. I thought I was going to be in Florida in late October, but then the Cleveland Indians got in the way of the Baltimore Orioles. But it's nice to be here a couple of weeks later, because I thought I was going to be on another trip that just didn't materialize.

It's always a little bit humbling to be on the same panel not only with a lot of the other distinguished members of this panel but with my good friend Frank Balotti. Frank and I have known each other for a number of years. The first year I taught at Cornell Law School, I invited Frank to come up and teach one of my classes, just one out of thirty-nine classes, and he did, and it was terrific. I didn't really realize how terrific he was until I got my student evaluations at the end of the course and one of them read, "Get rid of Hanks and bring back Balotti."

MR. BALOTTI: I wrote that one.

MR. HANKS: So it's with a bit of trepidation that I'm sitting here on the same panel with him again today. Then there is Mel Eisenberg. I, like many of you, read Mel's book, not voluntarily, when I was in law school. I guess I assumed that somebody that wrote a book that I used in law school would be dead by the time I was out of law school twenty-eight years. But, as you can see, Mel is very much alive. Moreover, I discovered he's only a couple of years older than I am, so imagine how old he was when he wrote that book. A lot of you may not know this, but early in Mel's career, he was a member of the Warren Commission staff. He'll be taking questions afterwards about the conspiracy theory, which you may hear more about in this panel.

Then there's Henry Manne. I was the moderator of a panel on insider trading a few months ago at Cornell. I discovered that while Henry is very modest, he's very immoderate or at least immoderately. So, Frank, I wish you a lot of luck keeping Henry in

line.

MR. BALOTTI: I have a rope here, Jim. It will work.

MR. HANKS: I notice that you've got him sitting next to you. Maybe there's a reason for that, a short leash, perhaps.

When I was invited to speak at Stetson, I was really delighted to accept the invitation, not only because I have been here, as Charles said, several years ago and had a wonderful time at this wonderful law school that Charles is doing so much to enhance, and together with Marleen O'Connor, two of the most energetic corporate law academics in the country. But I was also glad to accept because the invitation came several months in advance, so it gave me a good deal of time to prepare and talk and think about what I wanted to say, which was a real treat because last week I spoke at some panel where I got called the night before and I was told, "So-and-so can't make it, could you come up and take his place?" I said, "This is the night before. You want me to be in New York, and speak tomorrow morning?" "Well, yeah, we understand, but we'd really be grateful if you could take his place." I thought of a story involving Woodrow Wilson when he was governor of New Jersey. He was awakened in the middle of the night by one of his aides, who said, "Governor, the state highway commissioner has just died." Wilson, who was still kind of groggy with sleep, tried to absorb this. Governor Wilson replied, "Well, I'm very, very sorry to hear that, but I have to ask you, young man, why did you wake me up in the middle of the night to tell me this?" His aide said, "Well, actually, Governor, this is a little awkward, but I would like to take his place." Wilson said, "If it's all right with the undertaker, it's all right with me." So imagine how I felt last week. It's nice not to feel that way today.

This is a problem that I face regularly in my practice, the issue of giving to philanthropies. It's a difficult issue for a number of reasons. First, as a nation we have as part of our history, I think, a real tradition of helping other people. That's been referred to earlier. I was involved a few years ago in doing some fundraising for Harvard Law School in Europe. I was surprised to discover very, very little tradition of private support of colleges and universities over there. We went around and talked to a lot of people, and it was sort of like a big surprise to them that we were coming around asking for money for an educational institution. So philanthropy and charity and helping one another is, I think, deeply ingrained in our history



as part of our culture. There's been a lot of it in the press lately. Frank showed that advertisement. There's been a lot of publicity about Ted Turner's gift to the United Nations.<sup>30</sup> Maybe now there's getting to be a can-you-top-this feeling among the public or among wealthy people. Ted Turner said he's going to start calling people, all his rich friends, one by one.

So it's something that we face every day, and it has been, I think, characterized by an aura of benevolence and good and acceptance, maybe a little bit too uncritical acceptance, certainly when it comes to giving away money that belongs to corporations.

As I see it, there are three major problems in this area. First, if we're going to talk about charitable contributions in terms of benefit to the corporation, it seems to me the first problem is how do you determine whether there is a benefit and, if so, whether it's enough.

One of the problems about talking about charitable giving at the corporate level in terms of benefit is that there's what I would call a risk of disingenuousness or overreaching, trying to prove that a benefit exists when the existence of a benefit, if it exists at all, may be very conjectural, not only as to its existence but as to its amount.

That then leads to the second problem, and that is, should we permit corporations to make contributions even assuming that there is no benefit? So, if we try to moot the first problem, that is, the problem of a nexus or the existence of some benefit to the corporation, then should we allow corporations to make contributions without any demonstrable benefit to the corporation? Incidentally, in this regard, I'd like to associate myself in every way with what Margaret had to say about the relationship between the corporation, its assets, and its stockholders. I think that's quite right, but one can accept everything that she said, as I do, about the corporation owning the assets, not the stockholders, about officers and employees being agents of the corporation, not the stockholders, about directors being *sui generis*, maybe quasi trustees, and still have the difficult issue of determining how the director should act in any given situation, including charitable contributions.

Well, if we answer the second question in the affirmative; that is, that corporations should be permitted to make charitable contributions without any benefit, then we get to what I think is the third

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30. See, e.g., Anne Faircloth & Caroline Bollinger, *Fortune's 40 Most Generous Americans*, FORTUNE, Feb. 1998, at 88.

and most difficult question of all. That is, should the board do it, even assuming that there is no benefit? Now, in part, I think one can view this question in terms of how one views the nature of the corporation. One can view the corporation as simply a surrogate human being; that is, we know it's a separate legal person. I disagree with you, Margaret, in your referring to it as a fictional legal entity. It's not a fictional legal entity at all. It is a separate legal person. But, if we try to get beyond that simply legal characterization, if we view the separate legal personality of the corporation as a surrogate human being or as a surrogate composite human being that is capable of eleemosynary impulses, capable of generosity, we could then logically, if one accepted that premise, get to the result that the corporation, as a surrogate composite human being capable of generosity, ought to be able to act on that impulse, the way you or I could act on some impulse to generosity, by making a charitable contribution. On the other hand, if we regard the separate legal person, known as a corporation, as a business enterprise, as a profit maximizing enterprise, then it seems to me the question becomes much more difficult.

Now, I tried to approach this question in just the last moment or so by talking about the nature of the corporation. There's another way of looking at it, of course, and that is to look at what the law says, to look at what the statutes say. As Frank indicated in his introduction, the statutes vary. There are some statutes that treat charitable contributions as basically no more than any other corporate act that the corporation may undertake. You can find them generally in one of the sections early on in the corporation statute of a state that says the corporation shall have the power to do various things, and then they list about twenty different things, including sue, be sued, make contracts, borrow money, and somewhere in there, probably toward the end, because it was probably added on in the last twenty or thirty years, it will say something like "make charitable contributions."<sup>31</sup> In some states like my own, Maryland, it will add on something like "make charitable contributions with the approval of the board of directors."<sup>32</sup> Then there are a couple of

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31. *See, e.g.*, ARIZ. REV. STAT. ANN. § 10-302 (West 1997); MICH. COMP. LAWS ANN. § 450.1261 (West 1997).

32. *See* MD. CODE ANN., CORPS. & ASS'NS § 2-103 (1996) (stating that "a Maryland corporation has the general powers, whether or not they are set forth in its general

states like New York and California that specifically state that it is permissible for the corporation to make charitable contributions even though there is no benefit to the corporation.<sup>33</sup> So they confront directly this issue that I posed at the outset; that is, even assuming that there is no economic benefit to the corporation, should a board do it? They say a board may do it.

Now, that, of course, is not the same as saying that a board should do it. These statutes give the board the power to do that, but they still don't answer the basic question that I posed at the outset about whether a board should exercise that power. In that sense it seems to me that the statutes in New York and California are the most aggressive or we can think of them as being the most aggressive. I don't mean to use that term in a negative way, but we can think of them as being the most expansive, shall we say, in terms of giving a corporation the power to make charitable contributions because they delink from that power any requirement that there be any benefit to the corporation.

Well, just because those statutes exist and give the corporation that power doesn't mean that the board is freed up from its obligations under other statutes in the same state or under case law, as in Delaware, to act in certain ways.

I think most of the people here in the audience know that in many states, including the twenty or so states that have enacted the Model Business Corporation Act, which I believe includes Florida, I'm not sure, and in several other states that have not enacted the Model Act in its entirety but have enacted the Model Act provision on director conduct, there is a statute that requires that directors act in certain ways.<sup>34</sup> In those states, directors must act in good faith, with a reasonable belief that what they are doing is in the best interests of the corporation, and with the care of an ordinarily prudent person in a like position under similar circumstances.<sup>35</sup> In Del-

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charter, to: . . . (13) If authorized by its board of directors, make reasonable gifts or contributions out of profits.”).

33. *See, e.g.*, CAL. CORPS. CODE § 17003 (West 1997) (allowing corporations to “[m]ake [charitable] donations, regardless of specific corporate benefit”); N.Y. BUS. CORP. LAW § 202 (McKinney 1997) (empowering corporations to “make [charitable] donations, irrespective of corporate benefit”).

34. *See* MODEL BUS. CORP. ACT ANN. § 8.30, at 8-175 (Aspen Law & Bus. 1996 Supp.) (listing 36 states, including Florida, that have adopted the Model Act standard of care for directors).

35. *See id.* § 8.30.

aware, there is no statute on director conduct, but there is case law that, I think it's fair to say, provides a standard of director conduct that, for our purposes, is not significantly different than the Model Act standard. Would you agree with that, Frank?

MR. BALOTTI: Yes.

MR. HANKS: So now here we have a situation where we have, in a couple of states like New York and California, a statutory provision that says that a corporation has the power to make charitable contributions even if there is no benefit to the corporation. In those same states and many other states, we have a provision, either by case law or statute, that says directors must act in the best interests of the corporation.

So right there it seems to me that even the most expansive charitable contribution statutes have not gotten to the point where you can say directors should make or cause the corporation to make charitable contributions, because I think even the most expansive interpretation of those very expansive charitable contribution statutes would not claim that they have overridden the directors' general duties to act in the corporation's best interests. So then, what's a director to do when faced with this sort of situation in the law? Well, I think this situation is not unlike the situation facing directors in a lot of states, not including, significantly, Delaware and, for my purposes, Maryland, which have so-called nonstockholder constituency statutes.<sup>36</sup>

These statutes have been enacted in about thirty states, not including Delaware and Maryland, as I said. These statutes provide generally that boards of directors may take into account the interests of constituencies like creditors, customers, local communities, employees, other than the stockholders. Some of them are limited to takeovers, a lot of them are not limited to takeovers, but they purport to give the directors power to act or do things that are not necessarily in the stockholders' best interests. In fact, there are even a few of them that specifically say that they can take into account nonstockholder constituencies' interests even though those interests may be antithetical to the stockholders' interests.

Now, I think these statutes are the road to hell for a number of

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36. For a detailed discussion of nonstockholder constituency statutes, see James J. Hanks, *Playing with Fire: Nonshareholder Constituency Statutes in the 1990s*, 21 STETSON L. REV. 97 (1991).

reasons, several of which are laid out in an article I wrote several years ago for the *Stetson Law Review*.<sup>37</sup> For one thing, and I think this is the most important, and I don't want to get too far afield into nonstockholder constituency statutes, except insofar as I think they present the same problem as charitable contribution statutes. The major problem that I see with them is that they are virtually standardless: They give no guidance to a director as to how to act. Let's look at that in the nonstockholder constituency context.

I can tell you, and I think that just about every member of this panel can tell you, because I think we've either been corporate directors, as I know Charles has and is and Frank is and Nell, or we have counseled lots of corporate directors, I can tell you that it is very difficult as a director to figure out what's in the best interests of the corporation, even if you have not been empowered to take into account nonstockholder constituencies. It's a tough job if you approach it correctly. Even if you limit yourself just to considering the stockholders' interests, it's a tough job. What do you do, for example, if you've got, as one of my clients does, six classes of preferred stock and six classes of common stock, all with differing rights? How do you sort out what's in the best interests of the corporation and therefore the stockholders in a situation like that? Even in the situation where you have only one class of stock, common stock, how do you figure out what's in the best interests of the stockholders when you know that your body of stockholders includes several hundred thousand beneficial owners, some of whom are ninety-three-year-old widowers and widows and some of whom are risk-prone entrepreneurial twenty-five-year-old Stetson law students who are trying to make their tuition by playing the market? It's a very tough job.

Now, move that over to charitable contributions, where one cannot show a benefit to the corporation. If you're a director in a state that says that's okay, but you still have an obligation to act in the best interests of the corporation, how are you going to show that a contribution to a charity by the corporation, much less a major one, a significant one, is in the best interests of the corporation?

One way conceivably is to say, well, there are some checks on the process. One is the election and removal of directors. If I don't like what the directors are doing with my money, if they're giving

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37. *See id.*

too much of it away [receiving note passed from Mr. Balotti] — you know what's on this note — “I'll just vote to remove them or not reelect them.” Well, I don't know — maybe Nell does — of some situation in which some shareholder has actually even proposed, much less successfully proposed, removing directors because the directors voted for charitable contributions. I doubt if there are any anywhere, certainly not in a public contest, where that has been successfully done.

Second, if one were to say, nevertheless, that that power were a sufficient check on the directors' action in this regard, it still doesn't answer the question: Why is what they've done in the corporation's best interests? It just says, we can get them out after a year, assuming the board isn't staggered.

Even if one were to accept all that, though, one would need to know that these contributions had been made, and there is no requirement in state corporation law, at least, even in those states that permit these types of charitable contributions, that there be disclosure. It is interesting to note, however, that as recently as last week, Congress has asked the SEC to study whether public companies should be required to disclose their charitable contributions and whether shareholders should be allowed to participate in deciding who receives such contributions and in what amounts. This is as a result of some legislation that's been introduced, a couple of bills in the Congress.<sup>38</sup>

Finally, I think that even if one had a good disclosure, one should also have a good process for determining what contributions the corporation should make. There should be some sort of process of review, perhaps some sort of board committee. There should be safeguards against conflicts of interest. Some of you who are sports fans may have read about the former manager of the Baltimore Orioles instructing one of his players to pay a fine to the charity in which his wife was a paid fundraiser. You can take that over to the corporate context very quickly.

Let me just conclude by saying that I think that if we're going to make any progress in this area at all, we've got to have the sorts of things that I described, some sort of checks, some sort of disclosure,

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38. See H.R. 945, 105th Cong. (1997) (requiring companies to seek input from shareholders concerning charitable contributions); H.R. 944, 105th Cong. (1997) (requiring disclosure of charitable contributions).

and, finally — and maybe we can get into discussing this more later in the “Q and A” and afterwards — some sort of enhanced scrutiny standard maybe like the *Unocal* standard,<sup>39</sup> so that we guard against what I think is, as I indicated at the outset, a lot of disingenuousness or overreaching in finding a supposed benefit to the corporation arising out of a charitable contribution and also so that, in the words of the *Unocal* case, we try to insist upon some sort of reasonably related benefit to the corporation before the directors authorize the expenditure of its funds.

MR. BALOTTI: Thank you very much, Jim. We're going to take a break now for fifteen minutes, let everybody get up and circulate. This is halftime. The ball will be kicked off in exactly fifteen minutes.

(Brief recess.)

MR. BALOTTI: I'd like to start the second half of the program with Mel Eisenberg, who is, as you know, one of the principal authors of and the reporter for the ALI project. I'm hopeful that Mel will be able to give us some comments concerning the ALI corporate governance project in this area.

PROFESSOR EISENBERG: Thank you. Thanks, Charles, for inviting me, and thank you all. I do want to talk to you about the ALI *Principles of Corporate Governance* approach to this issue, although I don't want to restrict myself to that.

I think the comments so far, especially Margaret Blair's comments, point out how much this issue of philanthropy is embedded in and illustrates problems concerning larger concepts of the corporation. Now, I agree with some of Margaret Blair's analysis but not a lot of it, and I'm not going to get into a discussion now about the nature of the corporation because that's certainly not what this panel is principally about.

So while I agree that the question of philanthropy flows probably from that issue, I don't want to get into a long discussion about that issue, and instead I'm just going to simply assert a contrary position to the one that I think Margaret Blair is suggesting, and that is, that the corporation should have as its objective the conduct of business activities with the view to enhancing corporate profits

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39. *See Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 958 (Del. 1985) (noting that a challenged stock repurchase, which was authorized by Unocal's board of directors, was “reasonable in relation” to Mesa's threatening and perceivably coercive tender offer).

and shareholder gain. Now, I've got all kinds of reasons for that. We can discuss them later. But I'm just going to assert from that. And that assertion is embodied in section 2.01(a) of the *Principles of Corporate Governance*.<sup>40</sup> Let's call that the maximization objective. However, that objective doesn't completely tell us the story about how a corporation should conduct itself. It is explicitly made subject to several conduct norms which are set out in section 2.01(b).<sup>41</sup>

I want to go through some of these norms because it's important, I think, to disentangle philanthropy from some other related nonmaximization issues. Section 2.01(b) has three nonmaximizing norms of conduct. These are not objectives of the corporation. These don't relate to objectives. The objective is to maximize. Then the question is: To what extent do we find exceptions or to what extent do we constrain that objective? These three norms have to do with legality, morality, and then a more generalized norm concerning public-welfare, humanitarian, educational, and philanthropic purposes. I want to go through these one-by-one.

The first norm is that the corporation is obliged, to the same extent as a natural person, to act within the boundaries set by law, even though that is not maximizing — in fact, even though that reduces corporate profits. We don't want a society in which a very major player, perhaps the most major player, that is, the corporation, is lawless or at least is making judgments without regard to law. Cost-benefit analysis may very well factor into a decision by the legislature as to what the law should be. Once that decision is made, the corporation should not make a decision as to whether the benefits of disobeying the law would be greater than the cost. We give a couple of illustrations in the *Principles of Corporate Governance*.<sup>42</sup> One is a case in which Corporation A is trying to get a contract from Corporation B. A Corporation B executive makes clear that with a bribe, the contract will be, in fact, awarded to Corporation A. The bribe would be illegal. Corporation A makes a calculation that the cost of the bribe in terms of the likelihood of detection and the fine that would be paid is much less than denial of the contract. So on a strict cost-benefit analysis, it should pay the bribe and get the contract. That's on a strict cost-benefit analysis. But it shouldn't do

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40. See PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 10, § 2.01(a).

41. See *id.* § 2.01(b).

42. See *id.* § 2.01 illus. 7; see also *id.* § 2.01 illus. 10.



that. It should obey the legal norm that prohibits bribery. Other illustrations can easily be summoned. I think this issue of legality, therefore, we can put to one side. Here is an example of a conduct norm that doesn't involve maximization but I think probably all or most could agree should be followed.

The second conduct norm that I mentioned is morality or ethics. Section 2.01(b)(2) says that the corporation, even if profit and gain are not thereby enhanced, may take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business. Again, we don't want executives to be checking their morality at the door. You don't become an amoral person when you become an executive, or you shouldn't. We don't want a society like that. Again, I think it's useful to consider an illustration. I'll take one here from the *Principles of Corporate Governance*.<sup>43</sup> *B* is a publicly held corporation. A longtime manager is forced to retire because of serious injuries sustained in an automobile accident. *B* has a pension plan covering the manager, but the plan was installed only recently. The manager's benefits are only thirty percent vested. *B* is about to liquidate. It buys a pension — it buys an annuity policy for the manager to bring the manager's income, retirement income, up to a reasonable amount. It does so on the basis that this is a morally proper thing to do. Again, I think that's correct. Now, there's no benefit here to the corporation. We specifically drew the illustration to exclude a benefit because the corporation is about to be liquidated. I don't think the corporation should be precluded from doing this morally proper action. I think most people probably would agree on that, but maybe not. We'll find out in the “Q and A.”

So, again, I want to put that to one side. So we now put law to one side, and put morality to one side, in narrowing the focus on what we mean by philanthropic conduct. We don't mean, I think, every nonmaximizing act. We don't want to include every nonmaximizing act within the caption “philanthropy.”

Now, the last and most difficult of these conduct norms is section 2.01(b)(3), and that's the one I want to focus on. Subsection (b)(3) says even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business, may devote a reasonable amount of resources to public welfare, hu-

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43. See *id.* § 2.01 illus. 2.

manitarian, educational, and philanthropic purposes. Now, notice here philanthropic is one of a list: public welfare, humanitarian, educational, *and* philanthropic.

Again, I think there are few relatively easy cases here. One is a case, the kind of case that Nell mentioned, at least maybe implicitly, where General Motors subsidizes Ken Burns in making his great documentaries for public television. Now, General Motors gets a benefit out of this. First, it gets its name associated with the documentary. Second, under the current rules of public television, as I understand them, the sponsor gets to put a fifteen-second commercial before and after the documentary. Ken Burns doesn't see it quite that way. I noticed in the paper that he was reported as saying that General Motors is his Medici family. That is, it's his great public benefit sponsor. Now, why is General Motors doing this? As I said, it gets a benefit, sure. Maybe there's also some public spiritedness in there. It's hard to disentangle. I don't think we want to disentangle it. It doesn't matter what you count it as, because there is a clear benefit. So I think we can put this kind of case to one side as well.

Another relatively easy case is where the corporation acts in aid of government. For example, perhaps the easiest case is where we are at war and corporations are asked to make certain kinds of contributions to the war effort. Probably there would not be too much dispute about the propriety of that, within reason. I'll get in a moment to what I mean by within reason.

Perhaps a little less controversial, but I think not too controversial, would be cases where the government acts in the spirit of clearly defined public policy. For example, there might be an anti-discrimination statute — anti-gender discrimination, anti-race discrimination. The corporation may take actions that are within the penumbra of that statute, further the purpose of the statute, although not required by the statute. Again, this may not be a maximizing action. It may be. It may very well be that the corporation could show all kinds of reasons why it would benefit the corporation to do this. But the corporation may say, “Look, there's a clear public purpose enunciated by the legislature to remediate gender discrimination or race discrimination, and we want to further that purpose even if it means going somewhat beyond the explicit requirements of the statute.” Now, again, perhaps there would be controversy about that. My guess is not too much. I don't think that's the kind of thing

that concerns people.

What concerns us here, I think, is the residuum. Humanitarian, educational, philanthropic purposes. What do we do about this residuum? Before I get to that, let me say that I've been talking up to now about qualitative concerns and saying, well, you don't have to be worried about this kind of thing and that kind of thing. I should also point out that even when we get to this residuum, we're probably not talking about a lot of money. Frank points out, like the good lawyer he is, that we might be talking conceivably about \$61 billion, ten percent of corporate income. But in fact, corporate giving seems to run around one percent, maybe a shade under, maybe a shade over, one percent of the pre-tax income, meaning even a smaller amount of post-tax income. Presumably, some, maybe even a lot of that giving falls under the categories I've already discussed.

MR. HANKS: Mel, if it's one percent of pre-tax income, it's going to be an even higher percentage of post-tax income, right, not lower.

PROFESSOR EISENBERG: Well, it's deductible.

MR. BALOTTI: Tell you what we're going to do. We're not going to debate that subject. Go ahead, Mel.

PROFESSOR EISENBERG: In any event, it's a small amount, whether it's a little larger or smaller than one percent. It's a relatively small amount because, as I say, you've got to net out from that all these issues which we're not concerned about, for example, advertising — like contributions to PBS, the furthering of statutory purposes and so forth.

So now we get to this residuum. Now, basically there's two ways you could deal with this residuum, yes and no. You could say nothing is permitted except what we've already covered. No contributions to philanthropy except what we've already covered. Why? Well, we've heard some reasons why. You've got considerable scope for abuse, as shown by the Armand Hammer case. You have the question whether the corporation should be doing anything except maximizing, at least beyond the categories I've stated. I don't take that position, the ALI didn't take that position. It's a perfectly reasonable position. It's a wrong position, I'm just saying on balance I wouldn't take it, and actually I think Nell wouldn't either. Although Nell is emphasizing the problems you can very easily get into if you allow contributions in this residuum area, that doesn't mean that we don't want to allow it. I think it means we want to control it.

Now, one control is the one I've mentioned, the one that's em-

bedded in section 2.01(b)(3), and that is that the amounts would be reasonable. How do you define reasonability? The comment to 2.01 defines it largely in terms of two concepts. One is nexus. This again is something Nell has mentioned. The nexus between the activity that is involved in the contribution and the corporate business. Again, Nell has given examples of conduct with a relatively close nexus. The looser the nexus, the harder it is to justify a contribution and especially a large contribution.

The other reasonability standard is what is being done in the trade, so to speak. That is, what is the level of corporate giving generally? If the level of corporate giving generally is one percent pre-tax, then we ought to be very wary about saying giving is reasonable when it gets up to ten percent.

So we have these two criteria. Let me exemplify those criteria with two more illustrations from the *Principles of Corporate Governance*, which concern contributions to a museum. Under one of the illustrations,<sup>44</sup> *M Cement Company* — here we picked a cement company deliberately because they've got to act locally — has all of its facilities in the West Coast. It cannot practicably make sales outside the region. On the basis of philanthropic considerations, it makes an anonymous donation of \$3.1 million to a local history museum in New York City. We say that's improper. That's not reasonable — there's virtually no nexus, and the amount is very large. On the other hand, in another illustration<sup>45</sup> we say if *M* makes a \$1000 contribution, that's okay. Again, there's no nexus, but the amount is so small that it's reasonable given the infinitesimal proportion to earnings, which are given as \$13 million a year.

Now, a related issue concerns humanitarian considerations. You remember the example I gave just a few minutes ago about paying for an annuity to the employee who was injured? Well, one way to justify that would be on the basis of ethical considerations, but another way would be on the basis of humanitarian considerations, humanitarian considerations that are related to the corporation's business.

Another example we give is a company that has a losing division. It has three profitable plants and one losing plant or losing division. The question is, "What can it do?" It decides to sell the

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44. See PRINCIPLES OF CORPORATE GOVERNANCE, *supra* note 10, § 2.01 illus. 15.

45. See *id.* § 2.01 illus. 16.

division. We say one of the things it can do is to run the division for three months post-sale in order to cushion the impact on the employees who are going to be discharged. We say what it could not do is to keep running that losing division indefinitely. Again, there's a reasonability limit that justifies a humanitarian concern for short-time aid to the employees but not for permanent aid to the employees.

Now, I want to introduce at this point a concept which was actually not used in the *Principles of Corporate Governance*, and that is the concept of reciprocity. A lot of the examples I have given you could be reconceived in terms of reciprocity; that is, not a benefit that will be *derived* from making the contribution but a benefit that is *recognized* in the contribution.

There was just a very interesting Delaware case in which Coca-Cola gave a huge amount of restricted stock and stock options to its now-deceased CEO.<sup>46</sup> In the proxy statement it said "We're doing this because of all the benefits he's given to the corporation." In other words, it was not the standard rationale for compensation: If we give him this much, we'll get this much back. The company said, "We're going to reward him for what he's done for us." There was a shareholder suit. Vice Chancellor Jacobs dismissed the suit and said it is a legitimate object of compensation to reward the past benefit. Similarly, it is a legitimate object of corporate giving to reciprocate for benefits. So, for example, in the cases I have given involving the employees, the corporation can be conceived of as reciprocating for the contributions the employees made, just as Coca-Cola was reciprocating for the contributions that the CEO made. In giving contributions to charities like Community Chest or Red Cross in the community in which the corporation is operating, the corporation can be conceived as reciprocating for the benefits that the corporation receives from operating in a community that has these kinds of advantages, that has these kinds of programs.

So I guess I'll just close by first reiterating that we're talking about relatively limited problems, once we get all the issues out of the way that I think should be gotten out of the way. Secondly, I think that in this residual area, contributions or other uses of resources are appropriate if they are reasonable and that reasonability

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46. See *Zupnick v. Goizueta*, 698 A.2d 384 (Del. Ch. 1997).

has to do with nexus and general corporate practice.

MR. BALOTTI: Thank you, Mel. One little comment. Roberto Goizueta needed the money because between 1979 and 1996, giving fair value to his options and everything, he had only been paid a little bit less than a billion dollars by Coke. So he needed the money. That was the reason.

MS. MINOW: I don't think Mel is speaking of that as a charitable contribution.

MR. BALOTTI: With that, we'll turn not to our clean-up hitter — because Mel was fourth — but to our last presenter today, and that will be Henry Manne. I know that Henry will be far more responsive to our notes indicating it's time to wrap things up. He probably won't even need one.

MR. HANKS: Let me wish you a lot of luck, Frank. If you think you had a tough time shutting Mel and me down, you've got your work cut out for you with Henry.

PROFESSOR MANNE: I always start off with the best intentions in the world, but the stuff gets so interesting, I can't stop talking.

A solicitor for the United Way got an audience with the CEO of a large local corporation. The solicitor said to him, "Our records indicate that while the corporation has made substantial contribution, that you personally, while having made \$800,000 in salary and bonuses last year, gave nothing." The CEO looked to him and said, "If your records indicate that, I want to know do your records indicate that I have an aged invalid mother who needs round-the-clock care from several different functionaries? Do your records indicate that I have a sister whose husband died, leaving her destitute with six children all under the age of ten? Do your records indicate that I have a brother who was in an accident, became a paraplegic, needs a series of enormously expensive kinds of surgery and care?" With this, the solicitor was terribly abashed and apologetic, but the CEO kept going. He said, "And if I haven't given them a cent, why should I give you any?"

I wanted to tell that story, but I had to think of some reason why it was really relevant to the point that I was going to make. It wasn't too hard to find, because it seems to me that a proper understanding of this whole area requires much greater consideration of individual foibles, interests, preferences, and rights than we've really been talking about.

The subject has been addressed in very abstract terms or in very detailed regulatory legal terms, as indicated by Mel Eisenberg's discussion of the ALI approach.

Jim Hanks said at one point that the subject is very difficult and complex. He's absolutely right. But it wasn't always so difficult. It is an old subject. You are participating in a grand American historical tradition. The subject that this panel is discussing, with a lot of the same terms used even, was debated in Colonial America. The issue came up in a slightly different context of whether corporate charters would be given to private companies without charging them with certain public responsibilities, but that was merely the first of the American involvement with the problem of the "soulless corporation"; this entity, indeed, as it grew, this monster that only makes a few greedy people very rich and doesn't do anything for the rest of us! That debate in one form or another has recurred publicly I think almost every twenty-five or thirty years. Certainly in my lifetime it's had several reincarnations.

Just as an aside, the very first piece that I ever wrote for publication when I became a law professor forty years ago was on this subject. Pollution was beginning to be an issue of "corporate social responsibility," as the phrase had it; safety, both consumer and employee safety, some aspects of employment discrimination, all were beginning to be talked about as private responsibilities of the private corporations. If you notice the list I just gave, you noticed what's happened to those private responsibilities. They've all become the subject of very substantial government regulation. And thereby really hangs the tale, I think, of what this whole thing is about.

At the time of *Dodge v. Ford Motor Co.*,<sup>47</sup> it was relatively easy for the courts to take a strong position that charity had no seat at the board of directors, the directors are the agents — that was the terminology they were familiar with — of the shareholders, and the shareholders are the residual claimants entitled to anything left over after pure legal contractual obligations are paid. This was consistent with other aspects of corporation law at the time, such as a very strict ultra vires doctrine that prevented corporations from getting into new areas of endeavor even though they looked very

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47. 170 N.W. 668 (Mich. 1919).

profitable. All of that can be seen as efforts to restrain the business judgment of the board and the managers.

As the debate on corporate social responsibility kicked up, particularly in the '30s in the Depression when villains had to be found, the courts began to relax many constraints on managers. Actually the ultra vires standard had generally been overturned by statutes earlier.

But something else began to happen that made this area very complex: the growth of government regulation, a tremendous growth of the involvement of private corporations with governments at every level — local, state, and federal. In the '30s there was an explosion of regulation in all fields that obviously changed the culture and the nature of the economy and the nature of the society in the United States. It couldn't help but have some impact on a subject like this.

Now, I want to back up a little in order to explain how corporate executives managed to use this to their own benefit. I want to back up and give a little economics in this area. If the public corporation involved is operating in an extremely competitive industry, the room for true corporate charity is next to nil. There is no money left. In fact, indeed in the extreme perfect competition model, one penny misspent and the company is in bankruptcy. Well, we know that's not a realistic model, but it serves the purpose of explaining what forces are at work. But we also know that there is a lot of money sloshing around within corporations that doesn't have to be paid for inputs; that is we know, that everything doesn't have to be at a precisely competitive equilibrium price for the system to work. But the question is: What happens to this money sloshing around? We have technical terms for it in economics that I won't bother you with.

The traditional view was that the money belongs to the shareholders. But the reason it was sloshing around was that the shareholders couldn't get it. They complained when they saw it being used for something else, and early on they won those arguments, as in *Dodge v. Ford Motor Co.*<sup>48</sup> Increasingly, however, they couldn't win. Dividend policy became a matter of strict business judgment, and the shareholders couldn't reach those extra funds. So what could shareholders do to grab more? Everybody in this whole picture, as

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48. 170 N.W. 668 (Mich. 1919).



Margaret is explaining, is a stakeholder. It's true. It's not really useful to talk about it in clear lines of principal and agent, because everybody wants to get his and her hands on that extra money, the amount that goes beyond what was specifically contracted for. The "everybody" includes communities, it includes the managers, it includes the manager's alma mater, it includes a large number of activities.

Now, Margaret suggests that the board of directors is an appropriate arbiter to allocate this pool of money that really is not essential to make allocational efficiency in the economic sense work. That is, it's just a surplus that may go to anyone. It doesn't really impact their future economic decisions. But I don't have the confidence that Margaret suggests in the board of directors to do this. I think her theory holds together, it's perfectly logical, but like so many things, it may run afoul of the reality of how this will work in practice.

This brings me back to the point I said I would come to. That's corporate management's involvement with big government. Lobbying by corporations, as a result of the tremendous expansion in business regulation that started in the '30s, was obviously a valid business expense. Vast sums are spent to this day on these efforts. Anyone who has been around Washington is aware that businesses are very, very active in lobbying both regulatory agencies, members of Congress, the White House, or you name it. Such expenditures passed muster with the courts. By and large, the courts saw lobbying as intended to get favorable legislation for the benefit of the shareholders. It may, of course, actually have had a mixed motive as some of the other charitable giving problems do.

At some point a clear divergence between the political interest of managers and the political interest of almost everyone else involved in the corporation developed, and those managers could no longer be counted on to devote themselves in their lobbying activities exclusively to the interests of the shareholders. This schism came to the fore in the period of active hostile takeovers, the period of very active mergers and acquisitions that got hot in the '70s, and got very hot in the '80s. All over this country there were very wealthy, very powerful, very confident CEOs and top managers of large corporations peeing in their pants because they were scared to death that they hadn't run the corporation effectively enough to stave off a hostile takeover. This was the device that ultimately gave the shareholders the power to say, "we are the residual claimants

and if we don't get everything the corporation can generate, out you go, and we'll put somebody in who does follow that practice." Well, this is a very hard process on corporate managers. It makes them very insecure. They don't even know if they can afford their country club dues the following year or the payments on the yacht.

Nothing ever happened in the history of American business and finance that so completely panicked the top business community as the breakout of the hostile takeover. They developed a whole series of defenses, some at state legislative level, many through the SEC, some through congressional action, and a lot through court decisions. They fought it at every level they could. One of the arguments they made to keep the outsiders from taking over control and ousting them from their positions was that the outsider would move the corporation out of its present community. That's basically the same argument you hear in the international trade area, that we can't have free trade because people will lose jobs. It has just about as much economic validity as that myth that keeps coming up year after year. Obviously we have a large continental-sized free market, and this was an effort of some people to restrict the trade within that market to the ultimate detriment of the larger community, even though one particular local community might benefit for a while by getting this kind of subsidy.

The directors and managers who were under threat learned that they could use that idea. There was only one problem. The older rules didn't allow that sort of decision, even under the business judgment rule. So we began to see what Jim explained earlier, stakeholder statutes, now in twenty-nine states. The stakeholder statutes were nothing more than part of the general effort on the part of managers to protect themselves and their seats. They were always advanced in terms of corporate responsibility, charity, saving the community, good works, all of that. Indeed, I don't question that occasionally there were mixed motives in this. Unfortunately, the courts missed the turn in this whole area. They failed to understand the degree and the seriousness of the managerial conflict of interest with the shareholders. They tolerated a lot of this activity. Now, the managers at the same time were using corporate money to lobby for legislation that was very, very hostile to the interests of the shareholders. That's where we are today.

That is why this has become an extremely complicated area. It's very difficult to trace what's going on. It's very difficult, as several

speakers have commented, to know when a given payment represents charity and when it represents a perfectly rational business expense. The courts traditionally said, "Well, we're just not going to bother with that; it's a matter of business judgment." Other mechanisms, such as takeovers, kept the problem at a controllable size. Well, we've lost those mechanisms today, so you're seeing more money sloshing around in the companies that's available for "non-business" purposes. Out of the woodwork come all the would-be beneficiaries saying, "Gimme, gimme, gimme, I want that money." They're in favor of these anti-takeover laws because that means that they have more money to make some claim to. At any rate, that's what I think is causing this panel to be held today. Twenty-five years from now, there will be something else.

MR. BALOTTI: Thank you, Henry. Because we have gone on in listening to these very interesting comments of our panelists longer than I think Charles and I anticipated, we're not going to have a panel discussion followed by a question and answer period. I think we'll just get up and slug it out right here. What we will do instead is just have one question and answer period. The panelists can jump in and ask questions. I hope that those of you who wrote down questions and remembered where you put them will ask some questions of the panelists.

But before we get to that, I am the moderator. I am the chair. I have certain prerogatives. One that I want to use right now is to fix the misimpression that Nell left with you — and I'm sure it was unintentional — that the courts of Delaware did not adequately vet the process before them and to comment on the Armand Hammer case a little bit.

You have to remember the context in which the case came before the judge. As Nell mentioned, there was a settlement. And people can disagree violently, as they apparently did in this case, as to whether a settlement is adequate or not. The question is whether or not the shareholders in a class action or the corporation in a derivative action are getting enough in a settlement for the claims that are being released.

This was close for the judge. On the merits he said, "If the court was a stockholder of Occidental, it might vote for new directors. If it was on the board, it might vote for new management. If it was a member of the special committee, it might vote against the museum project. But its options are limited in reviewing a proposed settle-

ment to apply Delaware law to the facts.”<sup>49</sup> A settlement is not the time when judges have the opportunity to reach out, make new law, to fashion new rules on the substantive controversy.

As to the \$10 million benefit created by changing the name of the museum from the Armand Hammer —

MS. MINOW: The building.

MR. BALOTTI: — the building, you're right, the building to the Occidental Building, that was the position of the plaintiffs' lawyers, and we all know how credible plaintiffs' lawyers are. So the court —

MS. MINOW: That's why judges are supposed to —

MR. BALOTTI: What did the judge say, Nell? “Although the Court views this estimate with a good deal of skepticism, it seems clear that Occidental will receive goodwill.”<sup>50</sup> Well, that's clear. The question is whether there's enough goodwill to satisfy the claims that are being given up. “I therefore find that the benefit to the stockholders is sufficient to support the settlement and is adequate, if only barely so.”<sup>51</sup>

Close question. You put on top of that the normal law in most jurisdictions that settlements are to be encouraged. The judge cut the plaintiff's fee, in my mind, not enough. To discourage this kind of settlement, one ought to cut the plaintiff's requested fee to a bare bones minimum. This was cut significantly but not to a bare bones minimum.

So I'm sure Nell left you with this impression erroneously, as I said, and I just wanted to comment on it. Now, without giving Nell an opportunity to respond, we're going to move right on.

MS. MINOW: Just like the Delaware court.

MR. BALOTTI: You had an opportunity. You just didn't use it very effectively in Delaware. Now, we'll move on —

MS. MINOW: We didn't hire his firm. Other than that, that was the problem.

MR. BALOTTI: That was the problem. There would have, of course, been a different result had that been the case, but we charge clients, unlike the firm that she used.

We want to move on now to questions. I would prefer to use

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49. *See* Sullivan v. Hammer, No. 10823, 1990 Del. Ch. LEXIS 119, at \*12 (Del. Ch. Aug. 7, 1990).

50. *See id.* at \*\*19–21.

51. *See id.*

ones from the members of the audience because I think that will be more entertaining for everyone concerned. I do have a few fall-backs in the event that you've all been sleeping through the entire presentation, which I have not seen. Questions from you-all. Yes, sir.

FROM THE AUDIENCE: In view of the fact that one of the major points coming out of Washington is the soft money and hard money, et cetera, one point that came out was that corporations are giving, quote, unquote, contributions to exempt organizations, not-for-profit organizations, who in turn use those funds for enhancing a particular candidate, party, or combination thereof. Are any of you familiar with how that is done on any large scale? Because they somehow or another never develop that other than alluding to it.

MS. MINOW: Those are not charitable organizations. However, there's a distinction there. That's not tax deductible. They are 501(c)(4) or something like that.

FROM THE AUDIENCE: Like trade associations.

MS. MINOW: Well, and also they do lobbying. They are involved in the political process. So that doesn't count as philanthropy.

FROM THE AUDIENCE: Would you please comment on the pros and cons of corporate giving which results from matching gifts programs in the light of the shareholders as well as the employees and the general benefits of the corporation?

MR. BALOTTI: Anybody have a thought on that?

MR. HANKS: It's hard for me to see how analytically it's different from any other corporate contribution. Seems to me that the justification is that it encourages employees to be philanthropic, but it's hard for me to see how having philanthropic employees makes the corporation run better.

MR. BALOTTI: Well, one other thought, though, about it, Jim, is that in this instance it's the employees, not the corporation, picking the recipient of the corporation's largess.

MS. BLAIR: I think that's a key point, too, because I think this should be viewed as a form of compensation for the employees.

MS. MINOW: That's exactly right.

MS. BLAIR: And that strikes me as a perfectly legitimate form of compensation, legitimate legally, morally. There may be forms of compensation for employees that may do a better job of getting them focused on the goals of the corporation, but nonetheless, I don't see why that form of compensation should be treated differently under the law or morally than health insurance or pension benefits or

something like that.

MR. BALOTTI: An interesting question, to which I do not know the answer, is where corporations take the deduction for that expense on the return. I know enough about tax law that I can't even prepare my own returns, so don't bank on what I'm about to say, but charitable contributions, I think, are deductible under section 170.<sup>52</sup> Section 162 is the section that contains ordinary and necessary business expenses.<sup>53</sup>

If matching contributions are deducted under section 162, that tells you at least what the corporation's view of the expenditure is, that it's an employee benefit, I would think, rather than a charitable contribution. All corporations that are bumping up against the ten percent limit in section 170, of course, will try and push many of these expenses into section 162. So while it may be an indication, you have to look and see if the corporation is bumping up against the ten percent limit in section 170.

MS. MINOW: One other factor to consider. I think, generally speaking, a widespread program like that enhances employee loyalty and public spiritedness, and I think it can be very worthwhile. There are some companies that have abused these programs by making them available only to the very top management, and it's just a way for them to manipulate the process, and so I'm opposed to that, but a widespread program I think is a good thing.

MR. BALOTTI: But looking at pictures in the museum next door is not good for employees. That should be very helpful.

MS. MINOW: I will leave that to the audience to consider whether that's a fair statement of my position.

MR. BALOTTI: Oh, I don't mean to be fair, Nell.

MS. MINOW: *That* is a fair statement.

MR. BALOTTI: Other questions from the audience.

FROM THE AUDIENCE: Mr. Hanks talked about balance and how difficult it is for the board of directors to balance the interests of shareholders and employees and directors themselves in making a charitable contribution, and I guess my question addresses the issue of disclosure that was very briefly mentioned. I'm wondering how the board can take into consideration the interests when they don't know what the interests are, and could the board members possibly

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52. See I.R.C. § 170 (1994).

53. See I.R.C. § 162 (1994).

be a little concerned that shareholders aren't quite as rationally apathetic as once was thought?

MR. BALOTTI: Jim, that one is tossed to you, I believe.

MR. HANKS: Well, I'm not sure that they do know how to do that. I think that was really part of my point; the main part of my point. It's very difficult for them to know what's in the best interests of the corporation. Even if you are to use the stockholders as a proxy for what's in the best interests of the corporation, it's very difficult to know what's in their interests, particularly where you've got multiclassed corporations or a large number of shareholders within one class. Then if you throw on top of that, that they've got to take into account the interests of creditors, employees, local communities and customers and all these sorts of things, to the extent that they've not already taken those into account in deciding whether to build a new plant or close a plant or start up a new product line, I don't know how you'd ever do it.

On top of that, most of these other constituencies have ways to protect themselves without the additional problem of telling the board that they can take nonstockholder constituency statutes into account or nonstockholder constituencies into account.

Employees have contracts, sometimes labor union agreements. Creditors have contracts. If you don't think that banks can take care of themselves when they lend money to corporations and have 160-page single-spaced loan documents, I can't think of a constituency that's better able to take care of itself than the creditors.

Local communities have the taxing power. If they don't like what a corporation is doing, they can tax it. If the corporation doesn't want to pay that level of taxes, it can move. But on top of all this, to tell corporations that they have the power, or the board of directors has the power, or maybe it should take into account these nonstockholder constituencies after the corporation has already satisfied whatever contractual obligations, or legal obligations, or statutory obligations it's got to all these constituencies, and it's got to throw that into the mix with the stockholders. I certainly wouldn't want to invest in a corporation where the residual wealth that I thought belonged to the stockholders was going to be subject to a second bite at the apple on behalf of all these other constituencies.

I think that the charitable contribution, the philanthropic contribution issue, is very closely allied to that. If you invest in a corporation, and you know the board of directors might, after everything

else is done, decide to take even a reasonable amount, in the ALI's formulation, and contribute it to some charity, that would certainly affect my investment decision. Which is why I say if we're going to have it at all, if we're going to allow boards of directors to do this at all, we've got to have some sort of checks, some sort of disclosure, so that people know what they're investing in.

PROFESSOR EISENBERG: I think we should clarify the statutes. I don't like these statutes myself, but they don't for the most part say that the corporation must take these constituencies into account.

MR. HANKS: No, that's right. There is one, Connecticut, that does say that, says it is a must.<sup>54</sup>

PROFESSOR EISENBERG: For those that don't require taking constituencies into account, I think that they are best construed as consistent with the practice before the statutes and consistent with the ALI position, which is that they can be taken into account but only where the nexus is present and the amounts are reasonable.

Jim, you know, I don't know what your portfolio is, but my guess is that you do this right now. I mean, the corporations to which you are — in which you hold shares directly or indirectly, I'm sure are doing just the things that you said you wouldn't invest in a corporation that does them.

MR. HANKS: I'm sure they are, but I wish I knew more about it. Incidentally, let me say that I think I made clear in my initial comments this morning that what I am not talking about — and I don't think any of us up here are talking about — are situations in which there is a clear demonstrable benefit to the corporation.

One of my clients, Sara Lee Corporation, is — and Nell's father is a member of the board of that corporation — is very active in a lot of philanthropic enterprises. There's a Sara Lee Foundation. There's the Sara Lee Frontrunners Award, which are prominently featured in their annual report. These are the 1996 Frontrunners. The 1997 Frontrunners were announced last week: Justice O'Connor, Katherine Graham. Sara Lee gets a lot of publicity out of it, not just in its annual report but around the country, full-page ads. Some of you may have seen them in major newspapers. To me, that's a no-brainer as far as the benefit to Sara Lee Corporation because most

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54. See CONN. GEN. STAT. ANN. § 33-756(d)(2) (West 1997).



of Sara Lee's activities, inasmuch as it's a consumer oriented company, with a large amount of sales oriented toward women consumers; most of its philanthropic activities are oriented toward women and children, which are very closely tied into the business. I have no problem with that.

MR. BALOTTI: Margaret.

MS. BLAIR: It seems to me that your point is extremely well-taken and that actually the evidence is that the vast preponderance of corporate charitable giving meets that characteristic. There have been a number of studies that have attempted to look at this. Most charitable giving, in fact, meets that standard.

So we're only talking about one percent of pre-tax profit in the first place, and of that, the vast majority of it can be justified along the following lines. But the real question, the important question, is not is it difficult for directors to make these decisions and to do this balancing act. You're damn right it's difficult. The real question is, and the relevant question is: If they don't do it, who would you like to have making those decisions? You want to take those decisions to the courts and let the courts make those decisions? I don't think that would be a good idea.

MR. BALOTTI: Let me make one comment. If you buy the two assumptions in your question — number one, that the directors “have to,” “should,” however you want to characterize it, take into account the interests of the other constituencies and, secondly, that the directors are not informed as to the interests of all the constituents — you have to ask the question, “Should the directors be making the decision? Have the directors satisfied their duty of care in finding out, ascertaining all information reasonably available before they make the decision?”

So I think your question is really loaded with care, duty of care problems. Charles?

PROFESSOR ELSON: I have a burning question. Can a corporation be profitable and successful without charitable contributions?

MS. MINOW: You're a director of Sunbeam. You tell me.

PROFESSOR ELSON: The record speaks for itself.

MR. BALOTTI: But you haven't disclosed it, so how do we know what it is? Other questions. Yes.

FROM THE AUDIENCE: I have a question for Charles and Nell, since you're very active in the institutional shareholder movement. I really liked Margaret's point about the political aspects of

our view of the corporations and how institutional shareholders now have a lot more power and the role of the media in looking at what you do. I mean, every week your names get in *Business Week* or the *Wall Street Journal*. How is this going to play out? You're going against charitable contributions, part of our culture. Charitable contributions are all-American apple pie. So, on the one hand, perhaps the shareholder value mantra is being taken a bit too far.

So I really have two questions, one specific of Nell: How do you vote on shareholder proposals requesting information about sweatshops or child labor abroad? And, second, a broader question: Are you concerned about political backlash that shareholder value is being taken too far?

MS. MINOW: I always vote in favor of resolutions asking for information. Some of them ask for other things, and I abstain on those. With regard to a backlash, despite Frank's joshing, I think that it's fair that anybody would describe my position today as pretty moderate. I didn't get up here and say, "Well, by gosh, no charitable contributions at all." I think it is very fair to tie charitable contributions to shareholder value.

I want you to think for a minute about, to use Margaret's word and your word, about the political aspect of charitable giving. Charitable giving may be as American as apple pie, but think about corporate CEOs and think about whether you really want them establishing public policy about where these dollars should go. I think it's very fair to expect them to be responsive to the people who provide the capital. I think with a position that is as moderate as the one that I've staked out, which is that charitable giving is not only fine, it's highly beneficial under the right circumstances, I am not in any way concerned about the backlash.

PROFESSOR EISENBERG: I guess I would like to see two rules implemented. One would be a disclosure rule. It's hard for me to see why there shouldn't be disclosure of contributions. It's hard to see how it could hurt the corporation. The other would be a rule that the corporation, the publicly held corporation, could make no contributions to any organization in which a director was involved.

MR. BALOTTI: Mel, let me ask you about that one. It is the rare local United Way organization that doesn't have a DuPont executive or somebody sitting on the board or involved. Would you prohibit the DuPont Company from making a contribution to the United Way simply because there's a DuPont fellow on there for a year?

PROFESSOR EISENBERG: Well, that's fair. So I guess you then —

MS. BLAIR: Another question. If the executive doesn't believe in that organization enough to give a little time to it, you'd want him to contribute corporate resources to it?

PROFESSOR EISENBERG: Well, let me handle one question at a time though. As to Frank's question, if United Way is the only organization like that — and my guess is there aren't too many — we just exempt those that are.

MR. BALOTTI: But who's going to make the decision? Who's going to draft the rule that you can't make contributions to charities where there's a director on the board except the following?

PROFESSOR EISENBERG: Well, let me — we're good lawyers. The two of us will draft it. Secondly —

MR. HANKS: Before you go on to your second point, why can't there be a good easy middle ground here and instead of having a complete prohibition like you said, just have a rule that the corporation cannot make any gift to any charity with which one of its directors is affiliated unless the independent directors on the board approve the gift and the —

PROFESSOR EISENBERG: Come on. You know just as well as I do, Jim, that the independent directors are not going to spend a lot of time reviewing that kind of —

MR. HANKS: No, I don't know that. That's the rule for other —

MR. BALOTTI: [Throwing up hands] I'm losing control!

PROFESSOR EISENBERG: Let me answer your question.

MR. BALOTTI: Mel is up.

PROFESSOR EISENBERG: Let me answer that question by answering Margaret's question. We've got lots of charities out there. There's a sort of a competition among charities just like there's a competition among corporations.

I think that if the CEO is involved with the Metropolitan Museum of Art, fine, then you've got to contribute to the Museum of Modern Art (MOMA), if the CEO is involved with the MOMA, then you contribute to the Met. We're not going to, I think, have a lot of problems in diverting the contributions from one charity to another. I'd say therefore we wouldn't need this palliative independent director approval. It would solve a lot of the problem of the pet charity and giving for the wrong reasons, and I think except for Frank's point, which I'm sure we could draft away, I don't see any big losses.

MS. MINOW: I'd like to comment on that. I don't know how many of you remember Secretary Edwards, the dentist who was the Secretary of Energy and is now the dean of a medical school. He was asked by somebody in the local press why he served on ten boards, including one where I'm currently trying to get him thrown off. He responded, "Oh, because it's wonderful for the university; I get big fat checks from all of those companies."

Now, what kind of a director is he going to be if that's how he sees his role? So as always, I completely agree with Mel.

MR. BALOTTI: Let me try a middle point with you, Mel, and that is, what if we have a rule that says where a plaintiff can allege sufficient facts to show that the gift is to a pet charity or for the purpose of aggrandizing Armand Hammer, the CEO, or a director, that the board bears the burden of showing that the contribution is not waste?

PROFESSOR EISENBERG: Well, that's better than nothing. Let me make disclosure — let me make disclosure, and that is, I just came up with this rule this morning, so it's hardly fully articulated. But again, Frank, yes, I guess it would be better than what we have now, but again I would say that — you know, let's take the university setting. I'm not worried that GM can't give to Columbia, because it can give to Harvard and Dartmouth and so forth and so on. I just don't see where we need all this protection for charitable giving. As I've said earlier, I think it's okay in a proper context but I don't see why we can't make as sure as possible that it's not a conflict of interest situation.

Now, another possibility is we could have some *de minimis* limit and say no contributions over \$1000. That might — a limit might be set which would pick up a United Way problem too. It would help them with disclosure.

MR. BALOTTI: Yes. In the back of the room.

FROM THE AUDIENCE: With all due respect to Professor Eisenberg — I loved your book, by the way — how can you characterize giving as for the wrong reason? Isn't the end result that the charity gets the money, and wouldn't the way to combat this be full disclosure with all charitable contributions so that people can decide for themselves the rationale?

MR. BALOTTI: The question, if I can restate it, is: How can you characterize giving to a charity as for the wrong reasons because the end result is a charity — and let's say we're talking about a 501(c)(3)

organization receives the money.

PROFESSOR EISENBERG: That's a very good question. There is a line in Eliot's *Murder in the Cathedral*: "The last temptation is the greatest treason: To do the right deed for the wrong reason."<sup>55</sup> But I'm not sure I agree with that line. What you're saying is: "If it's the right thing, what's the problem?"

On the other hand, what I'm suggesting is not that the money cannot be used for charitable purposes but that it be given to some other equivalent purpose. In other words, as I said, instead of giving to the — if you want to give money for art, well, you don't give it to the Met because your CEO is on the board of the Met, you give it to the MOMA or the Frick or something else.

So your point is very good, and I'll have to think about it, but my offhand reaction is that the money will still be given to art and it's just a question of what art it's given to.

MR. HANKS: May I add something to that? This is exactly what Davey Johnson, the manager of the Orioles, said in the last several days when he was criticized for having directed the Alomar fine to a charity for which his wife was a paid employee. He said, "I don't understand what's so bad about what I did. All I did was see that some money got to charity."

Well, what he did that was bad was he took money that would otherwise have possibly gone somewhere else and made sure that it went to something that his own spouse had an interest in. I thought that Peter Angelos' reaction to it, being a good lawyer, was exactly right; that it was wrong, and he did the wrong thing. The fact that the recipient was a charity didn't make it any less wrong.

MS. MINOW: You can give money for the wrong reasons. It's one thing if it is intended to enhance a tarnished reputation. That's fine. But if the wrong reason involves some corruption of somebody who is supposed to be in an oversight position, then I think you've got a more serious problem. I think disclosure is usually a good solution, but when you've got conflicts of interest, I think you're better off with prohibition.

MR. BALOTTI: One last question. Yes, sir.

FROM THE AUDIENCE: Getting away from the primary thrust; namely, why shouldn't the shareholder get increased divi-

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55. T. S. ELIOT, *MURDER IN THE CATHEDRAL* 44 (1935).

dends and give contributions to the charity he or she wants to give it to? That I thought was the primary thrust of this.

I only want to bring out — I'm not smart enough to give you the answer, but there are numerous cases all over the country in regard to public utilities like the electric company, the gas company, the telephone company, that are giving contributions, and the customers, not the shareholders, have sued, arguing basically the same point: why should the telephone company, which is a monopoly, give to whoever they decide to give to? Give us reduced rates, because they have a guaranteed return of capital by the state public utility. That's their argument, which is similar to what we're discussing.

Why should the corporation decide which charity to give to rather than all these sophisticated other arguments of the 501(c)(3) corporations?

MR. BALOTTI: That I think is a very good summary of what we've been doing here today. I hope we've accomplished some provocation of thought processes on this. That very good summary is: Why is it the corporation that makes the decision as to where charitable dollars will go as opposed to increasing distributions to shareholders, or in the case of regulated utilities, lowering rates and putting more money in the hands of consumers or shareholders and allowing them to make the contribution?

There is one, I think, very simple answer. If you increase my dividends by \$2.00, you're not going to promote me to write a check for \$2.00 to the United Way. So there's a quantity problem with that aside from all of the other philosophical questions.

With that, I'm afraid that we have to bring our program to a conclusion. And on behalf of all the panelists, I would once again like to thank Stetson for having us here, and particularly Charles for making all of this possible. Charles.

PROFESSOR ELSON: Well, several things. First of all, it's always nice when your final question kind of brings you back to where you started, which is, in fact, where we began.

I think something important to note that might have gotten lost in the shuffle, while I cannot speak for Al Dunlap — Al Dunlap does a perfectly good job of that himself — on the other hand, I think it's important to clarify his position a little bit, if I can, or really what got this whole debate going. His point was not that there shouldn't be charity or there shouldn't be charitable contributions. In fact, I think individually he's been extraordinarily charitable to a number

of organizations. His point was that who decides who gets the money, the charitable dollars. His theory was, look, the corporation is there to make a profit for the shareholders so that they can give to whatever causes they like. The idea is, he said, "Look, I may favor a certain cause. I might favor the U.S. Military Academy at West Point, but that's not necessarily true that everyone else I'm working for does. Why should I direct that contribution to my favorite charity as the CEO as opposed to making others money so that they can, in fact, support their own charities in their own way."

I think sometimes the message, that central message, gets a little lost in the decibels and distorted with the volume of the conversation. So I think it's important to think of that as you look at this. It's not so much that charity is not. Charity is the American way. It's critical for the existence of this system that we have private philanthropy. The question is: Who should be doing the philanthropy, the corporation or the individuals who invest in the corporation?

It's been a terrific panel. I mean, we've had some tremendous debate, presentations. I can't think of a better group of individuals with a better range of viewpoints to initially present this issue to the public. So first of all, I want to thank the panelists. Actually, I want to thank our moderator and our panelists. They have done a superb job. My very lofty expectations, which hit about the ceiling of this room, were not only met, but they were exceeded, so we're about 300 feet up there. So thank you to our panelists.

I'd also like to say a couple words of thanks to another group, particularly the *Stetson Law Review*. The members of the *Stetson Law Review* really put this event together. They devoted a tremendous amount of time, effort, and hard work to make this event work. The Articles and Symposia Editor, Mr. Steve Singleton, the Marketing Editor, Mr. Anthony Porcelli, and their group did an absolutely spectacular job. I want to take a quick moment to thank them and the staff at Stetson for their remarkable effort.

Two other quick thank yous. Obviously this couldn't be possible without the participation of one's colleagues. Professor Marleen O'Connor and Professor Darby Dickerson did a hero's job in this, and without thanking them and acknowledging them, this wouldn't have been possible. So thank you.

You'll notice as you go out there in the reception area, there is also an event that must be noted today. Today is one of our

panelist's birthday. Margaret Blair, there's a cake out there for you. Happy birthday. This is for Margaret Blair from the *Stetson Law Review*.

So we'll have a reception afterwards. But thank all of you for coming out today. Spending a Saturday morning listening to a group of academics and nonacademics talk about charitable contributions is a little bit like a root canal. But not really, no. Our audience, you were terrific for being with us today. We applaud you and appreciate you.