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THE CORPORATE LAWYER'S ROLE IN A CONTEMPORARY DEMOCRACY

Colin Marks*

Nancy B. Rapoport**

INTRODUCTION

The study of the effect that corporations have on society, including the sometimes negative impact of certain corporate activities, is not novel. As early as the 1930s, Adolph Berle and Edwin Merrick Dodd debated the idea that a business might wish to aspire to a higher goal than simply to turn a profit. Berle took the position that a corporation owes only a duty to the shareholders to maximize wealth, and Dodd suggested that the corporation should serve a social purpose as well.¹ Dodd's side of this debate has evolved into a concept known as Corporate Social Responsibility (CSR). Sometimes, when people refer to CSR, they are speaking of a broad responsibility that a corporation may have to give back to society—to be a good corporate citizen.

At first blush, the lawyer's role in CSR may seem to be a simple one: to ensure that the business client complies with the law. But such a blunt statement oversimplifies the lawyer's role in the corporate client's decision-making process.

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1. Larry Catá Backer, *Multinational Corporations, Transactional Law: The United Nations' Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility in International Law*, 37 COLUM. HUM. RTS. L. REV. 287, 298–99 (2006).

To illustrate this complexity, consider the recent corporate buyout of Anheuser-Busch Companies (AB) by InBev, SA (InBev). In June of 2008, InBev tendered an offer to AB to buy shares at \$65 per share.² This amount was not only well above what AB was trading for at the time (thirty percent higher than the stock traded in mid-May of 2008),³ but also was more than the price at which AB had ever been traded.⁴ Despite the high bid, however, AB's board refused to accept the offer.⁵ AB's articulated reason was that the offer undervalued AB's stock.⁶ It is also possible that AB may have refused in part over concerns about the effect that such a buyout might have on AB's corporate culture and nonshareholder stakeholders.⁷

The local community in St. Louis, Missouri, AB's corporate headquarters, was deeply concerned over the effect that a buyout by InBev might have.⁸ According to *Fortune* magazine, AB is one of the most admired companies in the United States, ranking number one in the beverage industry in all of the considered categories, including people management, social responsibility, and quality of management.⁹ InBev, however, is known as a company that is good at cutting expenses to strengthen the bottom line, which many feared might mean lost jobs and benefits.¹⁰ AB also is a very large sponsor of numerous athletic events and

2. Tim Jones, *Trouble Is Brewing in St. Louis; Belgian Firm's Bid for Anheuser-Busch Taps Deep Hostility in a City Where Beer—Make that Bud—Runs Through the Veins*, CHI. TRIB., June 27, 2008, § 1, at 1.

3. *Id.*

4. Muralikumar Anantharaman, *Anheuser Investors Say \$65/Share Would Be Fair Bid*, REUTERS UK, June 5, 2008, <http://uk.reuters.com/article/innovationNews/idUKN0530735120080605> (noting that after speculation of a buyout at \$65 per share circulated, AB stock rose to "an all-time high of \$58.56 on June 2").

5. *Anheuser-Busch to Cut Jobs, Raise Prices in Battle*, CHI. TRIB., June 28, 2008, § 2, at 3 [hereinafter *Anheuser-Busch*]; Jones, *supra* note 2.

6. *Anheuser-Busch*, *supra* note 5; Tom Bawden, *Anheuser Takes Legal Action over InBev's Bid*, TIMES (London), July 9, 2008, at 43.

7. Some also speculated that the refusal was based upon considerations of the Busch family legacy and the company's history of independence. *InBev Asks Judge for Speedier Judgment in Lawsuit Against Anheuser-Busch*, S.F. BUS. TIMES, July 9, 2008, <http://eastbay.bizjournals.com/eastbay/stories/2008/07/07/daily48.html>.

8. Jones, *supra* note 2; see also Emily C. Dooley, *Will Brewer's Philanthropy Go Flat?: Williamsburg-Area Groups Hope InBev Retains Busch Spirit*, RICH. TIMES DISPATCH (Va.), July 20, 2008, at D1 (noting concerns over the effect of a buyout in Virginia communities).

9. *Fortune, America's Most Admired Companies 2008: Anheuser-Busch*, <http://money.cnn.com/magazines/fortune/mostadmired/2008/snapshots/35.html> (last visited Feb. 21, 2009). The full list of categories includes: innovation; people management; use of corporate assets; social responsibility; quality of management; financial soundness; long-term investment; and quality of products/services. Anheuser-Busch ranked number one in all of these categories not only in 2008, but also in 2007 and 2006. See *Fortune, America's Most Admired Companies 2007: Anheuser-Busch*, <http://money.cnn.com/magazines/fortune/mostadmired/2007/snapshots/35.html> (last visited Feb. 21, 2009); *Fortune, America's Most Admired Companies 2006: Anheuser-Busch*, <http://money.cnn.com/magazines/fortune/mostadmired/2006/snapshots/109.html> (last visited Feb. 21, 2009).

10. Jeremiah McWilliams, *Making Bud a Global Brand Holds Key*, ST. LOUIS POST-DISPATCH, July 15, 2008, at A1 (noting that AB would become leaner once InBev applied "its trademark cost-cutting"); William Spain, *Will Sports Lose One of Its Biggest Boosters?*

leagues, spending \$218 million on sports advertising in 2007 (over \$100 million more than its next competitor, Coors).¹¹ Though such expenses could be justified in terms of marketing and public relations, such a large budget would be a likely candidate for reduction by InBev.¹²

The refusal by AB's board to accept the offer led to a firestorm of legal activity. InBev quickly took actions to begin a hostile takeover, moving to remove the current AB board and replace it with a board that was more favorable to an InBev buyout.¹³ AB instituted its own legal maneuvers, accusing InBev of making materially misleading statements about how the deal would be financed and seeking to block the buyout attempt under federal law, claiming that InBev's interests in Cuba prohibited it from owning and operating AB in the United States.¹⁴

Obviously, AB's decision to turn down the offer had legal implications that surely required the involvement of legal counsel, both before and after the rejection of InBev's offer.¹⁵ Furthermore, AB announced that it was going to undertake a series of actions, including offering early retirement to a number of employees, to help strengthen its own bottom line as a defense to the buyout¹⁶—actions that also likely required the assistance of counsel. Ultimately, InBev returned with an offer of \$70 per share, an offer that proved too good to refuse. AB announced, on July 14, 2008, that it was accepting the offer.¹⁷ Legal obstacles may remain, as the buyout could still face antitrust obstacles in both the United States and Europe, although this seems unlikely.¹⁸

Whether AB's initial refusal was based upon a pure desire to drive up the offer from InBev, or whether stakeholder and corporate culture concerns

InBev Takeover Spotlights Anheuser-Busch's Big Ad Budget, MARKETWATCH, July 18, 2008, <http://www.marketwatch.com/news/story/sportswatch-inbev-takeover-spotlights-anheuser-buschs/story.aspx?guid=%7B627AFDF4-E32B-460F-8CE8-195A5CC2D7BC%7D&dist=hplatest> (stating that an InBev buyout would lead to certain cost-cutting measures).

11. Spain, *supra* note 10.

12. Angus Lind, *Anheuser-Busch Sale Leaves Sour Taste, Beer Drinkers Say*, TIMES-PICAYUNE (New Orleans), July 21, 2008, http://blog.nola.com/anguslind/2008/07/anheuser-busch_sale_leaves_sour.html.

13. Jones, *supra* note 2.

14. Bawden, *supra* note 6; Gregory J. Corcoran, *A Beer Brawl Goes to Court*, WALL ST. J., July 9, 2008, at C3.

15. See Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 512, 543 (1994) (describing the various roles attorneys play in corporate takeovers and other corporate transactions). For a nice overview of the so-called "Revlon duty" when takeovers are possible, see Daniel Vinish, Comment, *The Demise of Clarity in Corporate Takeover Jurisprudence: The Omnicare v. NCS Healthcare Anomaly*, 21 ST. JOHN'S J. LEGAL COMMENT. 311, 328–32 (2006).

16. *Anheuser-Busch*, *supra* note 5.

17. Mike Hughlett, *This Bud's for Who? Belgians; Iconic American Brewery Acquired for \$52 Billion*, CHI. TRIB., July 14, 2008, § 1, at 1; Dirk Johnson, *Anger and Dismay at the Sale of a City Treasure*, N.Y. TIMES, July 16, 2008, at A12; Roger Vincent, *Budweiser Gets a New Nationality; InBev of Belgium Acquires the Owner of 'The King of Beers' for \$52 Billion*, L.A. TIMES, July 15, 2008, at C1.

18. Jeremiah McWilliams, *Companies Working Out the Details*, ST. LOUIS POST-DISPATCH, Aug. 19, 2008, at D1.

played a role as well, is difficult to discern. Regardless, this real-life example raises the question of how inextricably intertwined businesses are with their legal counsel. If we assume that some businesses do consider nonshareholder stakeholders in their decision-making processes, then attorneys should also play a role in how those interests are considered.

This essay tackles the overlap between CSR and a lawyer's ethical obligations in a democracy. First, we attempt to describe the various conceptualizations of CSR—a term that is often nebulous and that has been assigned multiple meanings by different people. After describing the various approaches to CSR, we move forward with a tripartite approach, *suggesting that CSR actually entails three different responsibilities: an economic responsibility, a legal responsibility, and an ethical responsibility.* We then conclude by discussing the lawyer's role in a business's corporate *ethical* responsibility and how that intersects with the other two responsibilities, advocating for a more robust and substantial role by the corporate attorney in steering the corporation away from unethical conduct that ultimately is not in the corporation's long-term financial interests.

I. AN OVERVIEW OF CSR

Before we discuss CSR and its relationship to the attorney's role in a democracy, we should clarify what we mean by CSR. In our own research, we've discovered that CSR means different things to different people.¹⁹ For instance, economists, business management academics, legal academics, and entities in the European community all have assigned varying meanings to CSR. CSR has thus been the topic of vigorous debates regarding what responsibilities, if any, a corporation has to society. Some hold the view that the only responsibility corporate directors have is to make a profit for their shareholders. Milton Friedman is one of the most famous proponents of this view, having explained that, in a free economy, "there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition, without deception or fraud."²⁰ An extreme, anti-Friedman

19. Colin P. Marks, *Jiminy Cricket for the Corporation: Understanding the Corporate "Conscience,"* 42 VAL. U. L. REV. 1129, 1149 (2008); Dirk Matten & Jeremy Moon, "Implicit" and "Explicit" CSR: A Conceptual Framework for a Comparative Understanding of Corporate Social Responsibility, 33 ACAD. MGMT. REV. 404, 405 (2008) (noting that "defining CSR is not easy"); Veronica Besmer, Note, *The Legal Character of Private Codes of Conduct: More Than Just a Pseudo-Formal Gloss on Corporate Social Responsibility,* 2 HASTINGS BUS. L.J. 279, 280 (2006) (noting that CSR means different things to different people).

20. MILTON FRIEDMAN, CAPITALISM AND FREEDOM 133 (2d ed. 1982); see also MILTON FRIEDMAN, *The Social Responsibility of Business,* in THE ESSENCE OF FRIEDMAN 36, 36–38 (Kurt R. Leube ed., 1987) [hereinafter FRIEDMAN, *Social Responsibility*]. As Archie Carroll points out, this representation of Milton Friedman is a little skewed, as Friedman conceded that the responsibility to make a profit was tempered by a duty to "conform[] to the basic rules of [the] society, both those embodied in . . . law and those embodied in ethical custom[]." Archie B. Carroll, *The Four Faces of Corporate Citizenship,* BUS. & SOC'Y

approach, then, would argue that corporations, which owe their very existence, including such identifying characteristics as limited liability, to society, must therefore also owe a reciprocal duty to nonshareholders.²¹

A. Business Management Literature and CSR

Business management literature provides a good starting point for developing a useful definition of CSR, because the subject has been explored extensively in a number of articles.²² Generally speaking, the business management literature defines CSR as a business's responsibility to the wider societal good beyond, but in addition to, the business's economic performance.²³ Professor Archie Carroll provides an oft-cited conceptualization of CSR in business management literature.²⁴ He categorizes CSR into four social responsibilities that businesses have to society: economic responsibilities, legal responsibilities, ethical responsibilities, and discretionary (sometimes called philanthropic) responsibilities.²⁵ The first category, economic responsibility, represents the basic responsibility of a business to be profitable.²⁶ The second category, legal responsibility, represents the responsibility of a business to operate within the "framework of legal requirements."²⁷ As Carroll explains, "[j]ust as society has sanctioned the economic system by permitting business to assume the productive role, as a partial fulfillment of the 'social contract,' it has also laid down the ground rules—the laws and regulations—under which business is expected to operate."²⁸ The third

REV., Sept. 1998, at 1, 2 (first alteration in original) (quoting Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, § 6 (Magazine), at 33).

21. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 264–65 (1992) (describing two characterizations of the corporation: the first view, whereby the corporation is viewed as the property of the shareholders and the second view, in which the corporation is a social institution "tinged with a public purpose"); see also Jill E. Fisch, *The "Bad Man" Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1601–02 (2006).

22. As Cynthia Williams has noted, "Legal academics have struggled to produce useful definitions of CSR, and in that effort may be well advised to look to the management literature." Cynthia A. Williams, *A Tale of Two Trajectories*, 75 FORDHAM L. REV. 1629, 1647 n.54 (2006).

23. Archie B. Carroll, *A Three-Dimensional Conceptual Model of Corporate Performance*, 4 ACAD. MGMT. REV. 497, 497–98 (1979); Matten & Moon, *supra* note 19, at 405.

24. See Aviva Geva, *Three Models of Corporate Social Responsibility: Interrelationships Between Theory, Research, and Practice*, BUS. & SOC'Y REV., Spring 2008, at 1, 2 (referring to Carroll's 1979 article on CSR, *supra* note 23, as a "foundational article on social performance"); Dirk Matten & Andrew Crane, *Corporate Citizenship: Toward an Extended Theoretical Conceptualization*, 30 ACAD. MGMT. REV. 166, 167 (2005) (noting that Carroll's 1979 model of CSR is widely cited).

25. Carroll, *supra* note 23, at 499; Carroll, *supra* note 20, at 1–2; Geva, *supra* note 24, at 5–7; Matten & Crane, *supra* note 24, at 167.

26. Carroll, *supra* note 23, at 500; Matten & Crane, *supra* note 24, at 167.

27. Carroll, *supra* note 23, at 500.

28. *Id.*

category, ethical responsibility, represents the "responsibility to do what is right, just, and fair."²⁹ Though ethical norms are embodied in both the economic and legal responsibilities, the ethical responsibility category is meant to embody society's "expectations of business over and above [any] legal requirements."³⁰ The final, and perhaps most controversial, category, discretionary or philanthropic responsibility, represents society's expectation that a business should assume social roles above and beyond its economic, legal, and ethical responsibilities.³¹ Examples of fulfilling a philanthropic responsibility could include making contributions to "various kinds of social, educational, recreational, or cultural purposes."³² Carroll describes activities in this category as including "making philanthropic contributions, conducting in-house programs for drug abusers, training the hardcore unemployed, or providing day-care centers for working mothers."³³ Because all of these examples are activities that would not be unethical *per se* if a business did not engage in them, they are thus discretionary.³⁴

Under Carroll's conceptualization, these categories are not mutually exclusive and are ordered by their "fundamental role in the evolution of importance."³⁵ One way to visualize this construct is as a pyramid, with economic responsibilities at the bottom, topped by legal responsibilities, then by ethical responsibilities, and finally, by discretionary responsibilities at the very top.³⁶ Other conceptual models have arranged these categories into other constructs, such as intersecting circles, where the categories overlap to some degree, or concentric circles, with economic responsibilities as the core (center) value circle and the other responsibilities—legal, ethical, and philanthropic—moving out to ever-wider circles wrapping around³⁷ the core of economic responsibilities.³⁸

Of all of the categories, the philanthropic responsibility is often one of the most debated among scholars.³⁹ As Carroll acknowledges, it is somewhat inaccurate to label something both as discretionary and as a responsibility.⁴⁰ Carroll maintains this category as a part of CSR, however, because he views society as expecting businesses to engage in such discretionary activities.⁴¹ Other commentators disagree on the discretionary nature of philanthropic activities and instead place them under the economic and ethical responsibilities or as an integral part, rather than a discretionary

29. Matten & Crane, *supra* note 24, at 167.

30. Carroll, *supra* note 23, at 500.

31. *Id.*

32. Matten & Crane, *supra* note 24, at 167.

33. Carroll, *supra* note 23, at 500.

34. *Id.*

35. *Id.* at 499–500.

36. Geva, *supra* note 24, at 5 fig.1(a).

37. *Id.*

38. *Id.* at 5–6 (summarizing conceptual models).

39. *Id.* at 9.

40. Carroll, *supra* note 23, at 500.

41. *Id.*

part, of CSR.⁴² Thus, the debate appears to center on whether CSR only includes, as its essential parts, the economic, legal, and ethical responsibilities, or whether CSR should also include philanthropic activities.⁴³ The first view seems consistent with the Friedman view that the responsibility of business is to make money, within the limits of the law and ethical custom.⁴⁴

Friedman himself seems to reject the concept of philanthropic/discretionary giving as essentially undemocratic.⁴⁵ He argues that when a corporate executive chooses to spend corporate funds on charity, that executive is spending someone else's money—the shareholders' money, via their interest in the corporation—for a general social interest.⁴⁶ By spending the shareholders' money, that executive essentially imposes a tax either on the customers, through higher prices, or on its own employees in the form of lower wages.⁴⁷ According to Friedman, this imposition of taxes and expenditure of proceeds is a government function that should be left to the legislature to impose.⁴⁸ Carroll's hierarchy does not take this position but simply leaves philanthropy as a discretionary, rather than essential, part of CSR.

This optional view of philanthropic giving contrasts with the second view of CSR, which is embodied in a growing trend suggesting that businesses have a responsibility beyond their legal and ethical responsibilities.⁴⁹ As one commentator notes, "[p]hilanthropy, which is usually understood as exceeding this minimum, appears to serve as the distinguishing point between the neoclassical economic position and the new widely accepted notion of corporate citizenship, which highlights the importance of corporate giving."⁵⁰ Thus, this newer line of thinking appears to embrace discretionary giving as an essential part of CSR that may possibly be subsumed under the other responsibilities.⁵¹

42. See Geva, *supra* note 24, at 6 tbl.1 (explaining how the intersecting and concentric circle models differ from Carroll's pyramid model).

43. This concept is sometimes referred to in the business management literature as "corporate citizenship" (CC). Matten & Crane, *supra* note 24, at 168. However, there exist various views as to what CC entails, with some commentators finding that CC is nothing more than a strategic attempt to ensure a stable environment, which in turn will ensure a profitable business. *Id.* Others, such as Carroll, have equated CC with CSR. *Id.* at 168–69.

44. FRIEDMAN, *Social Responsibility*, *supra* note 20, at 36–38; Geva, *supra* note 24, at 9.

45. FRIEDMAN, *Social Responsibility*, *supra* note 20, at 38–39.

46. *Id.* at 38.

47. *Id.*

48. *Id.* at 38–39. Friedman also appears to take the view that CSR is a very narrow category of giving that does not benefit the corporation. Friedman recognizes that a corporation may engage in charitable giving when it provides an advantageous tax deduction and garners good public relations. He is not critical of such practices but notes that it may be hypocritical to term such giving "socially responsible." *Id.* at 41. Thus, giving that falls within one of the other responsibilities of economic, legal, or ethical appears to be acceptable corporate behavior in Friedman's view.

49. Geva, *supra* note 24, at 9.

50. *Id.*

51. *Id.* at 6–9.

B. *The EU's CSR Framework*

The European Union (EU) has likewise struggled with the concept of CSR. However, the EU provided a starting point for the discussion when the European Commission⁵² issued a "Green Paper" regarding the promotion of a European framework for corporate social responsibility in 2001.⁵³ Beginning in the early 1990s, the European Commission started to take an active interest in CSR.⁵⁴ In March of 2000, the EU's Council of Ministers, meeting in Lisbon, made a renewed appeal for businesses to adopt a more sustainable approach to CSR.⁵⁵ The subsequent "Green Paper," which was released in 2001, was the product of the European Commission and is officially titled *Promoting a European Framework for Corporate Social Responsibility*.⁵⁶ The purpose of the Green Paper was to stimulate debate within the European community on how the EU "could promote [CSR] at both the European and international level."⁵⁷ To accomplish this objective, the Commission provided a definition of CSR and then asked various stakeholders to answer several key questions.⁵⁸

The Green Paper defines CSR as "a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis," and further clarifies that "[b]eing socially responsible means not only fulfilling legal expectations, but also going beyond compliance and investing 'more' into human capital, the environment and the relations with stakeholders."⁵⁹ The

52. The European Commission is the executive branch of the European Union (EU). It drafts proposals for new European laws, implements the EU's policies, runs its programs, and spends its funds. See The European Commission, http://europa.eu/institutions/instr/comm/index_en.htm (last visited Feb. 21, 2009).

53. Jan Wouters & Leen Chanet, *Corporate Human Rights Responsibility: A European Perspective*, 6 NW. J. INT'L HUM. RTS. 262, 273 (2008) ("[T]he real starting point for the EU's CSR policy was the issuing of the European Commission's . . . Green Paper on the promotion of a European framework for corporate social responsibility . . .").

54. Sorcha MacLeod, *Corporate Social Responsibility Within the European Union Framework*, 23 WIS. INT'L L.J. 541, 543-44 (2005).

55. Comm'n of European Union Cmtys., *Commission Green Paper on Promoting a European Framework for Corporate Social Responsibility*, COM (2001) 366 final (July 18, 2001) [hereinafter *Green Paper I*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0366:FIN:EN:PDF>; MacLeod, *supra* note 54, at 543-44.

56. *Green Paper I*, *supra* note 55; MacLeod, *supra* note 54, at 543-44; Marisa Anne Pagnattaro & Ellen R. Peirce, *Between a Rock and a Hard Place: The Conflict Between U.S. Corporate Codes of Conduct and European Privacy and Work Laws*, 28 BERKELEY J. EMP. & LAB. L. 375, 406 (2007).

57. *Green Paper I*, *supra* note 55, at 3; see also MacLeod, *supra* note 54, at 544.

58. *Green Paper I*, *supra* note 55, at 6-8, 22-23; see also MacLeod, *supra* note 54, at 544.

59. *Green Paper I*, *supra* note 55, at 6. This concern for the stakeholder rather than merely the shareholders is consistent with the common European perception that a corporation has duties that go beyond its own well-being. See Cynthia A. Williams & John M. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, 38 CORNELL INT'L L.J. 493, 494 (2005) (citing Ruth V. Aguilera & Gregory Jackson, *The Cross-National Diversity of Corporate Governance: Dimensions and Determinants*, 28 ACAD. MGMT. REV. 447 (2003)); *Stakeholder Capitalism: Unhappy Families*, *ECONOMIST*, Feb. 10, 1996, at 23 (discussing how public companies in Japan and

Green Paper then goes on to outline the various ways in which a business can practice CSR, such as acting responsibly toward its own employees,⁶⁰ managing its environmental impact and how it uses natural resources,⁶¹ and recognizing international human rights.⁶² The Green Paper then describes ways in which companies can implement and report CSR.⁶³ The Green Paper also asks how the EU could promote the development of CSR at the European and international levels and what the best means are "to develop, evaluate and ensure the effectiveness and reliability of corporate social responsibility instruments such as codes of conduct, social reporting and auditing, social and eco-labels, [and] socially responsible investing."⁶⁴ The Commission received over 250 responses to the 2001 Green Paper from business entities, trade unions, civil society organizations, and others, with approximately half of the responses coming from the businesses themselves.⁶⁵

Of particular interest to our discussion is the definition provided by the Green Paper, which seems to confine CSR to only voluntary activities. Thus, if we were to reference Carroll's four categories, the Green Paper definition would seem to exclude the economic and legal categories from CSR as being required and would only consider the ethical and philanthropic/discretionary categories as involving CSR. The responses

in continental European countries generally have a broader vision of the duty of their corporate managers, as one that encompasses the interests of other stakeholders, such as employees, suppliers, and the communities in which they operate).

60. *Green Paper I*, *supra* note 55, at 8–9.

61. *Id.* at 10–11.

62. *Id.* at 13–15.

63. *Id.* at 16–21.

64. *Id.* at 23. The Green Paper also posed to companies the following questions:

- What are the driving forces for companies to assume their social responsibility? What are the expectations behind such engagements? On which areas do these engagements focus? What is the benefit for companies?
-
- What are the most important best practice ways to implement and manage corporate social responsibility? What best practice exists for [small and medium enterprises]?
- How best can we take forward the invitation to business in the Commission's proposal for a sustainable development strategy to publish a "triple bottom line" in their annual reports to shareholders that measures their performance against economic, environmental and social criteria?
- What are the best ways to build links between the social and environmental dimensions of corporate social responsibility?
- What are the best means to promote further knowledge about the business case for corporate social responsibility and its value-added?

Id. at 22.

65. Comm'n of European Union Cmty's., *Communication from the Commission Concerning Corporate Social Responsibility: A Business Contribution to Sustainable Development*, at 3, COM (2002) 347 final (July 2, 2002) [hereinafter *Green Paper II*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2002:0347:FIN:EN:PDF>.

received to the Green Paper seem to reinforce this perception of what CSR entails—as the Commission described in a follow-up communication regarding the Green Paper:

Despite the wide spectrum of approaches to CSR, there is large consensus on its main features:

- CSR is behaviour by businesses over and above legal requirements, voluntarily adopted because businesses deem it to be in their long-term interest;
- CSR is intrinsically linked to the concept of sustainable development: businesses need to integrate the economic, social and environmental impact in their operations;
- CSR is not an optional “add-on” to business core activities—but about the way in which businesses are managed.⁶⁶

This “consensus” provides a somewhat schizophrenic view of CSR. On the one hand, it reinforces the concept of CSR as being voluntary in nature, which would contrast with the Carroll conceptualization of CSR as encompassing legal responsibilities. But the consensus view also emphasizes the need for companies to use CSR to create an economically sustainable operation, which would seem to be consistent with Carroll’s view that economic responsibilities are a part of CSR. It may be, therefore, that the EU community views legal requirements as a “given,” but that it views CSR as integrating and balancing the remaining responsibilities—economic, ethical, and philanthropic—on a voluntary, but in the long-term essential, basis.⁶⁷

Rather than debating the precise definition of CSR, however, the debate within the EU CSR arena has instead focused on voluntary versus mandatory CSR. Overwhelmingly, corporations and business entities favor making CSR activities and reporting voluntary, but many other stakeholders, such as NGOs and trade unions, desire a more regulated framework.⁶⁸ The European Commission has since released two follow-up documents to the 2001 Green Paper: one in 2002⁶⁹ and another in 2006.⁷⁰ Each follow-up expressed a desire to increase communication between

66. *Id.* at 5.

67. Comm’n of the European Cmty., *Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility*, at 5, COM (2006) 136 final (Mar. 22, 2006) [hereinafter *Green Paper III*], available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2006:0136:FIN:EN:PDF> (“A common European understanding of what CSR means has emerged on the basis of the Commission definition of CSR as a concept whereby companies integrate social and environmental concerns in their business operations and in their interaction with their stakeholders on a voluntary basis.”).

68. *Green Paper II*, *supra* note 65, at 4; MacLeod, *supra* note 54, at 545 (citing *Green Paper II*, *supra* note 65, at 4).

69. *Green Paper II*, *supra* note 65.

70. *Green Paper III*, *supra* note 67.

corporations and stakeholders, as well as to increase transparency in CSR initiatives, but neither has adopted a regulatory framework.⁷¹ The Commission, however, has encouraged establishing codes of conduct and adherence by companies to standards such as the Organization for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.⁷²

C. Legal Scholarship and CSR

Legal scholars have similarly struggled with defining CSR. Underlying these discussions of CSR is a basic debate over how one should approach corporate law, which is framed by two opposing views.⁷³ On the one end of the spectrum is the camp that would appear to have a Friedmansque approach to CSR, i.e., that the corporation is in itself a social good and that the corporation does good by making money for its shareholders.⁷⁴ This first approach, sometimes referred to as a shareholder primacy norm, is consistent with the property or contract model of the corporation, in which the corporation is viewed as the property of the shareholders, and the purpose of the corporation is predominantly to increase the shareholders' wealth.⁷⁵ Though proponents of this view rarely define the view as a form of CSR, reflecting back upon Carroll's categories, the shareholder primacy norm would seem to be consistent with the economic and legal categories

71. *Id.* at 6 (promoting a European Alliance for CSR, but noting that that the Alliance is not a legal instrument); *Green Paper II*, *supra* note 65, at 7 (noting that CSR is "clearly a matter for enterprises themselves"); MacLeod, *supra* note 54, at 546–47 (noting that the *Green Paper II* "refers to frameworks, promotion, assistance, awareness, support, and good practice, but there is no indication that formal regulation is a possibility" (citing *Green Paper II*, *supra* note 65, at 7)).

72. *Green Paper III*, *supra* note 67, at 6–8; see also ORG. FOR ECON. CO-OPERATION & DEV., THE OECD GUIDELINES FOR MULTINATIONAL ENTERPRISES: REVISION 2000 (2000), available at <http://www.oecd.org/dataoecd/56/36/1922428.pdf>. The Organization for Economic Co-operation of Development's (OECD) website summarizes the guidelines as follows:

The Guidelines constitute a set of voluntary recommendations to multinational enterprises in all the major areas of business ethics, including employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, competition, and taxation.

OECD, Guidelines for Multinational Enterprises: About, http://www.oecd.org/about/0,3347,en_2649_34889_1_1_1_1_1,00.html (last visited Feb. 21, 2009).

73. Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 638 (2006).

74. Allen, *supra* note 21, at 265; Keith Michael Hearit, *Corporate Deception and Fraud: The Case for an Ethical Apologia*, in THE DEBATE OVER CORPORATE SOCIAL RESPONSIBILITY 167, 167–68 (Steve May et al. eds., 2007); Antonio Vives, *Corporate Social Responsibility: The Role of Law and Markets and the Case of Developing Countries*, 83 CHI.-KENT L. REV. 199, 207 (2008).

75. Allen, *supra* note 21, at 264–65; Fisch, *supra* note 21, at 1601–04 (contrasting the analogy of the corporation as the Holmesian bad man, which relies extensively upon a cost-benefit analysis in its decision making, to the more progressive view of the corporation as having obligations to nonshareholder stakeholders); Kent Greenfield, *Proposition: Saving the World with Corporate Law*, 57 EMORY L.J. 948, 962, 966 (2008); Hearit, *supra* note 74, at 167–68; Vives, *supra* note 74, at 207–08.

of CSR—with one caveat: some scholars, such as Frank H. Easterbrook, assert that even the legal responsibility is tempered by economic concerns. Indeed, in a 1982 article by Easterbrook and Daniel R. Fischel, they urge in a footnote that

managers do not have an ethical duty to obey economic regulatory laws just because the laws exist. They must determine the importance of these laws. The penalties Congress names for disobedience are a measure of how much it wants firms to sacrifice in order to adhere to the rules; the idea of optimal sanctions is based on the supposition that managers not only may but also should violate the rules when it is profitable to do so.⁷⁶

Although not all proponents of this first approach would agree with Easterbrook and Fischel's statement about obeying only important laws, that statement nonetheless highlights the importance of the shareholders' interests within the shareholder primacy norm.

The second view is of the corporation as a social institution "tinged with a public purpose."⁷⁷ This approach is concerned with not just the shareholders but also the nonshareholder stakeholders—a broad stakeholder model.⁷⁸ In the stakeholder model, corporations don't have an obligation to maximize societal wealth,⁷⁹ but they do have a duty to be good corporate citizens.⁸⁰ This more "progressive view" of corporate law is sometimes used interchangeably among legal scholars with the term "CSR."⁸¹ Returning to Carroll's categories, the stakeholder model would seem to embrace the ethical and, perhaps, the philanthropic categories of CSR as its hallmarks, but like the Green Paper's definition, the model seems also to assume legal compliance without contemplating that compliance as a category of CSR.

76. Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 n.57 (1982) (citing Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1192–94 (1981); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979)). As Cynthia Williams has observed, this view was rejected in an initial draft of the American Law Institute's *Principles of Corporate Governance* as "premised on a false view of the citizen's duty in a democratic state." Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1271–72 (1998) (quoting PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS § 2.01 cmt. f (Tentative Draft No. 1, 1982)).

77. Allen, *supra* note 21, at 265.

78. Fisch, *supra* note 21, at 1601; Marks, *supra* note 19, at 1148; Vives, *supra* note 74, at 207.

79. Greenfield, *supra* note 75, at 963.

80. Fisch, *supra* note 21, at 1601; Hearit, *supra* note 74, at 168 ("In effect, [CSR] . . . consists of organizational decisional processes that take into account the values of the wider community." (citations omitted)); Vives, *supra* note 74, at 207.

81. Engel, *supra* note 76, at 5–6 (noting that the term CSR "is most useful if taken to denote the obligations and inclinations, if any, of corporations organized for profit, voluntarily to pursue social ends that conflict with the presumptive shareholder desire to maximize profit"); Fisch, *supra* note 21, at 1601; Amiram Gill, *Corporate Governance as Social Responsibility: A Research Agenda*, 26 BERKELEY J. INT'L L. 452, 459–60 (2008).

II. CSR: THE LAWYER'S ROLE AND CORPORATE *ETHICAL* RESPONSIBILITY

As we see from the above discussion, CSR is not easy to define. For the purposes of this essay, however, we've chosen to adopt a framework similar to Carroll's categorical approach to CSR, but with some important distinctions. First, we've chosen to avoid using the term "category," as that term indicates a separation of components, as though each category could exist on its own. That view is inconsistent with our own view of CSR. Also, though we define CSR as including legal, economic, and ethical responsibilities, we exclude any separate philanthropic responsibility.⁸² Finally, rather than a pyramid structure in which certain categories are seen as more important than others, we conceptualize each responsibility as components that interact with each other in order to create a profitable and sustainable business.

A. *A Tripartite Approach to CSR*

The first responsibility that we discuss—economic responsibility—stems from the recognition that businesses are essentially good for society, placing goods and services into the market for consumers at competitive prices.⁸³ It also stems from the recognition that, unless a business is profitable, it is not sustainable and thus is incapable of helping society by providing further goods or services, by providing jobs to a community, or through other methods such as charitable donations.⁸⁴ We don't mean to say, however, that a business's economic responsibility eclipses its other responsibilities. As we discuss below, when long-term viability is sacrificed for short-term profits, the result is self-destructive and in fact counter to the corporation's actual economic responsibility. One way of checking to make sure that long-term economic responsibility is being satisfied, then, is to balance it with legal and ethical responsibilities.

The legal responsibility recognizes that society expects corporations, as "people" in the legal sense, to be just as bound to the rules as are natural people.⁸⁵ As Carroll has summarized, businesses exist because society has sanctioned their existence, and thus part of this "social contract" is that businesses in turn have an obligation to operate within the legal framework

82. This approach is actually an adoption of a more recent incarnation of Carroll's conceptual model that he himself proposed in a co-authored 2003 article. See Mark S. Schwartz & Archie B. Carroll, *Corporate Social Responsibility: A Three-Domain Approach*, 13 *BUS. ETHICS Q.* 503, 508 (2003).

83. Carroll, *supra* note 23, at 500.

84. Archie B. Carroll, *The Pyramid of Corporate Social Responsibility: Toward the Moral Management of Organizational Stakeholders*, *BUS. HORIZONS*, July–Aug. 1991, at 39, 41 (noting that if the economic responsibility is not met, the other considerations become moot).

85. Over in Europe, the Code of Conduct for European Lawyers was adopted by the Council of Bars and Law Societies of Europe (CCBE) in 1988. It requires lawyers to have a duty not just to their clients, but also to the public and the courts. See CCBE CODE OF CONDUCT FOR EUROPEAN LAWYERS R. 1.1 (2006), available at http://www.ccbe.eu/fileadmin/user_upload/NTCdocument/2006_code_enpdf1_1228293527.pdf.

that society has created.⁸⁶ Taking a formalistic view of the purposes of a corporation, one could say that because the broadest statement of corporate purpose that can be claimed is to conduct "any lawful business," to conduct illegal activity would be *ultra vires*.⁸⁷ Considering the bad press, legal fees, fines, and loss of stock value that can accompany a corporate scandal, legal responsibility is a corporate responsibility if for no other reason than that the failure to attend to legal responsibilities can adversely affect the corporation's economic responsibilities. But the legal responsibility is much more nuanced than mere legal compliance, as it also entails the possible avoidance of litigation (which also clearly overlaps with the economic and ethical responsibilities) as well as shaping the law through lobbying efforts.⁸⁸

Finally, the ethical responsibility component recognizes that corporations, just like natural people, should act above bare legal obligations.⁸⁹ This concept is often embodied within "norms [that] have been accepted by the organization, the industry, the profession, or society as necessary for the proper functioning of business."⁹⁰ The ethical responsibility also recognizes that corporations should act morally, as judged by how society views their actions and with a concern for nonshareholder stakeholders.⁹¹ A caveat here: we are not adopting a full-fledged stakeholder norm by including an overarching, specific ethical responsibility within this definition of CSR. We can't: neither of us is convinced, for reasons that we discuss below, that there is any way of defining an appropriate "ethical" responsibility that would fit all corporations. Economic, legal, and ethical responsibilities all interact with one another; indeed, any one of these responsibilities, taken alone and to the extreme, could demonstrate poor CSR.⁹²

86. Carroll, *supra* note 23, at 500.

87. FRANKLIN A. GEVURTZ, CORPORATION LAW 315 (2000).

88. The ability of corporations to influence legislatures through lobbying presents a rather large ethical question for attorneys representing corporate clients: if some conduct is prohibited by law, should the corporation simply lobby to change the law? Jill Fisch has suggested that the lawyer's role in representing a politically active corporation requires scrutiny of the motives of the corporate directors as well as an analysis of the short- and long-term affects of such lobbying efforts. Fisch, *supra* note 21, at 1612-13. Fisch also suggests that such lawyers "should facilitate the corporation's evaluation of the effects of its political role by increasing transparency and accountability both within and without the corporate structure." *Id.* at 1613.

89. Carroll, *supra* note 23, at 500.

90. Schwartz & Carroll, *supra* note 82, at 512. Friedman also noted a responsibility to operate with legal and ethical norms. FRIEDMAN, *Social Responsibility*, *supra* note 20, at 37.

91. Carroll, *supra* note 84, at 41. In other words, we believe that, because corporations have no single internal voice to view what is moral, they must act in socially acceptable ways.

92. Cf. John Llewellyn, *Regulation: Government, Business, and the Self in the United States*, in THE DEBATE OVER CORPORATE SOCIAL RESPONSIBILITY, *supra* note 74, at 177, 179 ("To prosper, organizations need to have success on three distinct performance dimensions: the legal, the responsible, and the profitable."). There is also support for this approach in the Delaware caselaw, at least in the context of a corporate takeover. In *Unocal Corp. v. Mesa Petroleum Co.*, Unocal's board of directors rejected a tender offer that it viewed as grossly

We tried to come up with a diagram to illustrate our view that CSR must balance these three equally weighted components, and (after rejecting pie charts, triangles, and other easy-to-draw diagrams) we came up with the image on the following page (the CSR "circle"), with each component a necessary part of the whole.⁹³

Here's how that three-part interaction might work. Take, for example, the corporation that is so obsessed with creating shareholder wealth that it breaks the law and stretches loopholes beyond any intended legitimate use, just for the purpose of increasing short-term profits. If such behavior reminds you of Enron (or any one of a dozen or more corporate scandals), we're not surprised. That's exactly what Enron did, by—among other things—successfully lobbying the SEC to approve mark-to-market accounting for Enron's use and then contorting and manipulating that normally legitimate method of accounting in ways that ultimately misled its investors.⁹⁴

The trick, of course, lies in balancing the ethical responsibilities of CSR with the legal and economic responsibilities. Taken to the extreme, a corporate director or manager could—while flying the flag of CSR—improperly use corporate monies to simply help his or her own pet charities,

inadequate and instead chose to make an exchange offer for its own stock. 493 A.2d 946, 949–51 (Del. 1985). In upholding the board's decision, the Delaware Supreme Court stated,

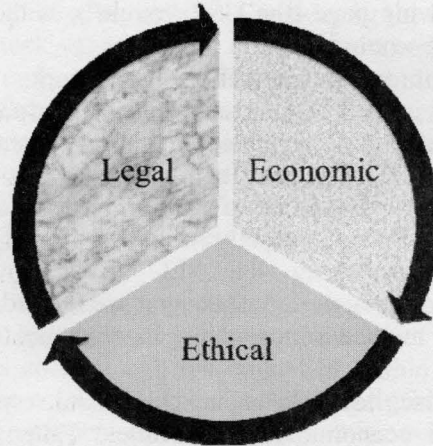
A further aspect [of the business judgment rule] is the element of balance. If a defensive measure is to come within the ambit of the business judgment rule, it must be reasonable in relation to the threat posed. This entails an analysis by the directors of the nature of the takeover bid and its effect on the corporate enterprise. Examples of such concerns may include: inadequacy of the price offered, nature and timing of the offer, questions of illegality, the impact on "constituencies" other than shareholders (i.e., creditors, customers, employees, and perhaps even the community generally), the risk of nonconsummation, and the quality of securities being offered in the exchange.

Id. at 955 (citation omitted). However, while the Delaware Supreme Court seemed to recognize that other constituencies could be taken into account, in a decision later that year, the court clarified its statement in *Unocal*, stating, "A board may have regard for various constituencies in discharging its responsibilities, provided there are rationally related benefits accruing to the stockholders." *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 182, 185 (Del. 1986) (citing *Unocal*, 493 A.2d at 955) (concluding that, because the corporation was not protecting itself from a hostile takeover, but rather choosing between two outside bidders, the rationale for considering outside constituencies was inapplicable). Thus, taken together, these opinions could be viewed to support the notion that other stakeholders' interests may be considered, so long as they are balanced with, and not counter to, the economic benefit of the shareholders. See GEVURTZ, *supra* note 87, at 310 ("In other words, we are evidently back to the notion that one must rationalize looking out for other constituents as ultimately benefitting the shareholders.").

93. One of NBR's colleagues, Rachel Anderson, had a lovely analogy about the three components of CSR. Her analogy sees the corporation through a CSR lens as a sort of locomotive, driven by the directors and officers, fuelled by the corporation's economic responsibilities, riding on the railroad track of the corporation's ethical responsibilities, with the corporation's legal responsibilities keeping the corporation riding on the track instead of derailing. Interview with Rachel Anderson, Assistant Professor of Law, William S. Boyd Sch. of Law, Univ. of Nev., Las Vegas, in Las Vegas, Nev. (Nov. 24, 2008).

94. Marks, *supra* note 19, at 1155.

with little to no benefit to the economic welfare of the business.⁹⁵ The larger the business, of course, the more owners there are who could be adversely affected.⁹⁶



So where does the corporation's lawyer come in? Certainly, the chief legal officer can, should, and will influence the corporation's legal decisions.⁹⁷ We believe, though, that lawyers should take on more responsibility in terms of influencing the corporation's *ethical* decisions—a move that we'd like to encourage.⁹⁸

B. *CER*: Corporate Ethical Responsibility and the Bare Minimum

Let's rule out the idea that CSR includes the requirement that corporations must reach certain sky-high ethical standards. For one thing, no one could ever agree on what lofty ethical aspirations a given corporation should achieve.⁹⁹ Should it apply the principles espoused by

95. *Id.* at 1145. Such decisions would also normally be protected by the business judgment rule, so long as a business justification could be made in good faith, such as increased publicity and good will for the product. *See id.* at 1138–39, 1145–47.

96. When a business has many shareholders who will be affected, that situation will differ significantly from when there's a sole proprietorship where the decision maker is also the owner.

97. Of course, a chief legal officer's ability to influence the conduct of the organization will depend on, for example, her ability to have access to the people who have real power within that organization. *Cf., e.g.,* Deborah A. DeMott, *The Discrete Roles of General Counsel*, 74 *FORDHAM L. REV.* 955 (2005); Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 *FORDHAM L. REV.* 983 (2005).

98. Nothing in any state's ethics rules would prevent a lawyer from giving extralegal—i.e., ethical—advice. *See, e.g.,* MODEL RULES OF PROF'L CONDUCT R. 2.1 (2007) (“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”).

99. As Rachel Anderson has pointed out,

What if we view the corporation as an agent of its shareholders? Then, if we believe that agents have fiduciary duties to their principals, why would we not

the CEO? By the board of directors? By a majority shareholder?¹⁰⁰ (And don't get us started on other types of business organizations—our thoughts about ethical compliance apply to them, too.) Even if a corporation could agree on a particular set of ethical principles during a specific period, what would happen when the composition of the officers, directors, or majority shareholders changed?

Perhaps, instead of staking out the high ground of ethical aspirations, we should settle for staking out the floor of permissible corporate behavior. Even though we can't agree on how the "perfectly ethical" corporation might behave, we certainly know how the minimally ethical corporation should behave. It shouldn't bend the interpretation of laws past the breaking point of believability. It shouldn't create Rube-Goldberg-esque deals of impenetrable complexity in order to obfuscate a transaction's true purpose, especially if that purpose borders on the illegal. In other words, it shouldn't try to stay so close to the line between legal and illegal that its shadow falls completely on the illegal side of the line.

The profession has tried setting floors and ceilings before, in other circumstances. The American Bar Association's (ABA) Model Code of Professional Responsibility devised Canons (general guiding principles), Ethical Considerations (aspirational goals), and Disciplinary Rules (floors of acceptable conduct).¹⁰¹ Of these three layers of guidance, only the Disciplinary Rules were actually enforceable.¹⁰²

Admittedly, the ABA moved on to the Model Rules of Professional Conduct,¹⁰³ in part because the tripartite formula of Canons, Ethical Considerations, and Disciplinary Rules was clunky and somewhat confusing.¹⁰⁴ The Model Rules, unlike the Model Code, have a single set of principles, which make them easier to understand and enforce. The comments to the Rules interpret the Rules and also provide some aspirational guidelines as well.¹⁰⁵

believe that corporations have ethical duties to their shareholders? Going even further and taking into consideration the historical development of the modern corporation, we might even argue that corporations are, albeit perhaps indirectly, agents of society whereby either the state granting the charter of incorporation or the society as a whole would be the principal, in which case, corporations would arguably have ethical duties to nonshareholder stakeholders as principals via the state.

Comment from Rachel Anderson to authors on an earlier draft of this essay (Nov. 29, 2008) (on file with authors).

100. See Fisch, *supra* note 21, at 1603 ("The corporation cannot readily adopt the moral perspective of its individual constituents. . . . [V]arious corporate stakeholders may have differing moral perspectives."); Marks, *supra* note 19, at 1149 ("[I]t may not be the case that what one corporate manager chooses to do is based on the same 'moral sense' as other decisionmakers within the company." (citing Fisch, *supra* note 21, at 1603)).

101. See MODEL RULES OF PROF'L CONDUCT Table of Contents (2007).

102. See MODEL CODE OF PROF'L RESPONSIBILITY Preliminary Statement (1983), available at <http://www.law.cornell.edu/ethics/aba/mcpr/MCPR.HTM>.

103. See MODEL RULES OF PROF'L CONDUCT Table of Contents (2007).

104. See MODEL RULES OF PROF'L CONDUCT Preface (2007).

105. See *id.*

What if we were to enact a Model Code of Ethics for Corporations? Individual corporations don't have a problem enacting codes of conduct for their employees,¹⁰⁶ although some of them have a devil of a time actually following their own codes of conduct.¹⁰⁷ We'll leave a Model Code of Ethics for another day (and another article), but even if a corporation adopted such a code, the Chief Legal Officer inside the corporation would still have to find a way to enforce that code—and there's the rub. Everything still comes down to a concept with which lawyers have been struggling for eons: what, exactly, are the limits of a lawyer's duty to the client?

In the post-Enron et al. world of corporate scandals, it's clear that many of the lawyers involved in those scandals believed that their jobs were to be the corporations' hired guns.¹⁰⁸ The businesses wanted to push the envelope (or rip the envelope wide open), and the lawyers did their best to facilitate what the clients wanted.¹⁰⁹ Many of the deals were legal but bad for business in the long run. And some of the deals didn't even pass the blush test of being legal, at least in retrospect.

These lawyers—all of whom are very smart people—were bright enough that they could have understood, as an intellectual matter, when they were coming close to the ethical line (or crossing over it) at a client's behest.¹¹⁰ Lawyers now facilitate deals to the point that complicated deals require lawyer involvement.¹¹¹ We abandoned the concept of lawyer independence

106. See, e.g., GOOGLE, INC., CODE OF CONDUCT (2008), available at <http://investor.google.com/conduct.html>; NIKE, INC., CODE OF CONDUCT (2007), available at http://www.nike.com/nikebiz/nikeresponsibility/tools/Nike_Code_of_Conduct.pdf.

107. Recall the recent corporate scandals at Enron, WorldCom, Tyco, Global Crossing, etc. See ENRON AND OTHER CORPORATE FIASCOS: THE CORPORATE SCANDAL READER (Nancy B. Rapoport, Jeffrey D. Van Niel & Bala G. Dharan eds., 2d ed. 2009) [hereinafter ENRON AND OTHER CORPORATE FIASCOS] (discussing how lawyers were involved in these various scandals). In what can only be called the apex of irony, Enron's own corporate code of ethics embraced "Respect," "Integrity," "Communication," and "Excellence." See ENRON CORP., CODE OF ETHICS 5 (2000), available at <http://www.thesmokinggun.com/graphics/packageart/enron/enron.pdf>. Of course, Enron's actual behavior was nothing like the behavior described in its code of ethics.

108. In fact, a lawyer is not supposed to be anyone's hired gun. See, e.g., *In re Aston-Nevada Ltd. P'ship*, 391 B.R. 84, 103 (Bankr. D. Nev. 2006) (stating that a lawyer should not "succumb to the so-called 'butler-style' of representation, under which the sequaciously servile lawyer does whatever the client wants and then cites that client's command as a shield to the improper actions"). Sadly, a lot of lawyers are in prison because they didn't understand these concepts. See, e.g., Michael Kunzelman, *Former HMO Executives Get Prison Terms in Fraud Case*, LAW.COM, Nov. 14, 2008, <http://www.law.com/jsp/article.jsp?id=1202426014056>; *Lawyer for Broadcom Co-Founder Enters Guilty Plea in Backdating Probe*, LAW.COM, Nov. 11, 2008, <http://www.law.com/jsp/article.jsp?id=1202425928530>.

109. See, e.g., Final Report of Neal Batson, Court-Appointed Examiner at 48-55, *In re Enron Corp.*, 370 B.R. 583 (Bankr. S.D.N.Y. 2007) (No. 01-16034), available at http://141.150.158.82/media/Final_Report_Neal_Batson.pdf.

110. Sung Hui Kim does a superb job of discussing the various pressures brought to bear on a lawyer's inclination to do the right thing. Kim, *supra* note 97; see also Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451 (2007).

111. See Painter, *supra* note 15, *passim*.

(the professional separation of lawyer from client) a long time ago, moving instead to "lawyer interdependence,"¹¹² as Richard Painter so aptly describes the modern practice of corporate law. Modern deals need a lawyer's touch.¹¹³

We think that the move from independence to interdependence has been triggered in part by competition and fear. Over the past several decades, the cost of running large law firms has increased exponentially. At these types of firms, associate salaries have skyrocketed,¹¹⁴ nonperforming partners have been eased out or even thrown out,¹¹⁵ and some business, including some legal research work, has been outsourced to other countries, where the work can be performed much less expensively.¹¹⁶ The largest firms are virtually indistinguishable from each other in terms of pedigree of lawyers, quality of work product, and multiplicity of office locations. Therefore, one way in which they can compete is by their willingness to yield to their clients' demands. In other words, if "Law Firm A" refuses to issue an opinion letter or structure a deal the way that BigCorp wants it, "Law Firm B" will be happy to steal BigCorp away by finding a way to do what BigCorp "needs." This increased competition for clients, in a market with some (not yet reached) upper limit on hourly rates, will tempt lawyers to talk themselves into compromising their boundaries.¹¹⁷ As William Butler Yeats has said, "[t]he centre cannot hold."¹¹⁸

112. *See id.*

113. *See id.* at 538-53.

114. *See, e.g.,* Debra Cassens Weiss, *Wal-Mart Refuses Law Firm Fee Hikes, Cites High Associate Salaries*, A.B.A. J., Nov. 5, 2007, http://abajournal.com/news/wal_mart_refuses_law_firm_fee_hikes_cites_high_associate_salaries/.

115. *See, e.g.,* Debra Cassens Weiss, *Jenner & Block Asks About 10 Partners to Leave*, A.B.A. J., Oct. 21, 2008, http://abajournal.com/news/jenner_block_asks_about_10_partners_to_leave.

116. *See, e.g.,* Arin Greenwood, *Manhattan Work at Mumbai Prices*, A.B.A. J., Oct. 2007, at 36.

117. Smart lawyers are led astray all the time. *See, e.g.,* MILTON C. REGAN, JR., *EAT WHAT YOU KILL: THE FALL OF A WALL STREET LAWYER* (2004); David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye, Scholer*, 66 S. CAL. L. REV. 1145 (1993).

118.

Turning and turning in the widening gyre
 The falcon cannot hear the falconer;
 Things fall apart; the centre cannot hold;
 Mere anarchy is loosed upon the world,
 The blood-dimmed tide is loosed, and everywhere
 The ceremony of innocence is drowned;
 The best lack all conviction, while the worst
 Are full of passionate intensity.
 Surely some revelation is at hand;
 Surely the Second Coming is at hand.
 The Second Coming! Hardly are those words out
 When a vast image out of *Spiritus Mundi*
 Troubles my sight: somewhere in sands of the desert
 A shape with lion body and the head of a man,
 A gaze blank and pitiless as the sun,

Inside counsel face their own particular pressures. Depending on to whom an inside lawyer reports, he or she is likely to face substantial push back from the management in the business unit for any naysaying of potential business deals. Many within the corporation believe that it's not the lawyer's job to tell them "no," but to help them make a deal happen, no matter how questionable the deal may be.¹¹⁹ Unlike outside counsel, who have the chance to diversify their client base, inside counsel have but one client. Therefore, strong push back and alienation from the client means, at best, a miserable work environment and, at worst, withdrawal (or firing) and unemployment.¹²⁰

To make matters worse, inside and outside counsel are humans (all lawyer jokes aside); as such, they're subject to various cognitive errors that allow them to talk themselves into making bad decisions. Not only are lawyers subject to cognitive dissonance errors (which make them more susceptible to subconsciously persuading themselves that it's "right" for them to do something that they know is wrong),¹²¹ but they are also subject to errors based on social pressure (which makes them more susceptible to going along with an obviously incorrect decision if the rest of the group also chooses the incorrect decision)¹²² and errors based on the idea that "someone else" will take care of ferreting out any bad acts (the "bystander effect").¹²³ Therefore, as pressure ramps up for lawyers to get deals done,

Is moving its slow thighs, while all about it
 Reel shadows of the indignant desert birds.
 The darkness drops again; but now I know
 That twenty centuries of stony sleep
 Were vexed to nightmare by a rocking cradle,
 And what rough beast, its hour come round at last,
 Slouches towards Bethlehem to be born?

WILLIAM BUTLER YEATS, *The Second Coming*, in *THE COLLECTED POEMS OF W.B. YEATS* 187, 187 (Richard J. Finneran ed., 1996). We also like this quote: "A truth that's told with bad intent / Beats all the Lies you can invent." WILLIAM BLAKE, *Auguries of Innocence*, in *THE COMPLETE WRITINGS OF WILLIAM BLAKE* 431, 432 (Geoffrey Keynes ed., 1966).

119. See *supra* note 97; text accompanying *infra* notes 121–23.

120. At least one of us (NBR), though, has observed that inside counsel usually are more risk averse than outside counsel when it comes to ethically risky behavior. At the April 2008 ABA Business Law Section's meeting in Dallas, Texas, NBR spoke with several high-level inside counsel, and each one of them expressed the view that they would prefer that members of their companies stayed as far away as possible from taking ethical risks. As one of them said during a presentation at that conference, "I would rather [my company's] employees took our Code of Ethics seriously enough that ethics issues never even needed to go up to my level. I want them to do the right thing without having to think about it." Statement of anonymous participant at American Bar Association Section of Business Law Spring Meeting, Dallas, Texas (Apr. 10–12, 2008).

121. See, e.g., Kim, *supra* note 97, at 992–1024.

122. See *id.* Cynthia Williams has suggested that when law students, professors, and attorneys accept the "premise that social welfare will be increased by individuals simply pursuing their own self-interest," a view that she associates with the law and economics movement, that belief will encourage ethical lapses by lawyers. Williams, *supra* note 22, at 1649.

123. In the famous story of Kitty Genovese,

or get the stock price up, or meet analysts' expectations, this set of cognitive errors will bear on the lawyers' facilitation of any questionable ethical decisions that the corporations may want to make.

C. How Lawyers Could Set the Tone for Better Corporate Ethical Decision Making

1. Improving the Reporting Structure to Safeguard Corporate Ethical Responsibility

We don't want to sound too pessimistic about the idea that corporations could make better ethical decisions—or about the idea that lawyers could play a significant role in such decision making. Both of us believe that lawyers could be one source of safeguarding the corporate “conscience.” (We don't, however, want to let the board of directors off the hook for safeguarding that conscience.) But if lawyers are to assist in safeguarding the corporate conscience, they must become more central to the corporate “core” for decision-making purposes. In that regard, we've found one approach useful in thinking about how to make lawyers more central.

In their book *Reframing Organizations: Artistry, Choice, and Leadership*,¹²⁴ Lee Bolman and Terry Deal suggest that thorny problems are best examined from four different “frames”: the structural frame, the human resources frame, the political frame, and the symbolic frame. Think of the structural frame as the “organizational chart” frame—who reports to whom.¹²⁵ The human resources frame involves relationships: how people feel about where they work and what they're doing.¹²⁶ The political frame involves knowing the people who know what make things tick (and where the bodies are buried).¹²⁷ The symbolic frame is the story of the organization: its myths and culture.¹²⁸

Using the Bolman-Deal frames, then, we can get a feel for what types of access a lawyer would need in order to have some real input into a

For more than half an hour 38 respectable, law-abiding citizens in Queens watched a killer stalk and stab a woman in three separate attacks in Kew Gardens.

Twice the sound of their voices and the sudden glow of their bedroom lights interrupted him and frightened him off. Each time he returned, sought her out and stabbed her again. Not one person telephoned the police during the assault; one witness called after the woman was dead.

Martin Gansberg, *37 Who Saw Murder Didn't Call the Police*, N.Y. TIMES, Mar. 27, 1964, at 1. Some posit that the witnesses didn't call the police because they each assumed that someone else would do so. See, e.g., Robert J. Rhee, *Corporate Ethics, Agency, and the Theory of the Firm*, 3 J. BUS. & TECH. L. 309, 326 & n.116 (2008) (discussing the social science research on the Genovese case).

124. LEE G. BOLMAN & TERRENCE E. DEAL, *REFRAMING ORGANIZATIONS: ARTISTRY, CHOICE, AND LEADERSHIP* (4th ed. 2008).

125. *Id.* at 45–116.

126. *Id.* at 117–64.

127. *Id.* at 191–246.

128. *Id.* at 247–78.

corporation's decisions.¹²⁹ Structurally, she would have to report to people with power—but she would have to have enough power of her own to be able to stand up to the business side of the corporation when the business side wanted to step over the line, legally or ethically.¹³⁰ (Our guess is that the Chief Legal Officer would need to have direct access to the board of directors, and the board would have to be able to do a good job of supervising the company's actions—an issue which is increasingly in doubt.¹³¹) From a human resources frame and from a symbolic frame, the Chief Legal Officer would have to be able to set a tone where the business people know that the corporation doesn't want them even to come “close to the line.” And from a political frame, the Chief Legal Officer would need to have the ear (and the support) of the key players in order to make sure that her opinion as to the merits of proposed decisions carried significant weight.

Without paying attention to each of these four frames, a lawyer's advice could easily get lost in the shuffle of everyday corporate life. Reporting structures need to solidify a lawyer's ability to give advice. Without giving a lawyer the power structure to make sure her advice gets real consideration, the miscreant corporation (and the corporation focused only on short-term gains) will be able to marginalize the lawyer's advice. Even a good corporation with well-meaning officers and directors will push back on legal advice from time to time. The question is not whether officers and directors will push back. The question is what the lawyer can do about the anticipated push back. How can the lawyer help the corporation stay on the right side of the law?

There are always line-drawing problems when it comes to giving legal advice. For one thing, a client may want to “test” the line or urge that the line be moved in some way.¹³² For another thing, the line may not be well-

129. As Rachel Anderson points out, it's the difference between “whether the lawyer is functioning as a scribe (servant) or an advisor (counselor).” Comment from Rachel Anderson to authors, *supra* note 99.

130. See, e.g., 15 U.S.C. § 7245 (2006). Standing up to one's organization can be a career-limiting move, cf. Fred C. Zacharias, *Coercing Clients: Can Lawyer Gatekeeper Rules Work?*, 47 B.C. L. REV. 455, 466 (2006) (“Threatening disclosure, for example, may enhance a lawyer's immediate position or power in an organization, but in the long run may cause the organization to confide in, and depend on, the lawyer less frequently or to a lesser extent.”), but standing up to the client is part of the lawyer's job. The hard part is overriding the lawyer's temptation to persuade herself that she doesn't need to stand up to the client—in other words, overriding the lawyer's tendency to talk herself into believing that what the client wants to do is the right thing to do, see *supra* notes 119–23 and accompanying text.

131. Jonathan Macey makes a persuasive argument that boards of directors aren't particularly good at ensuring good corporate governance. See generally JONATHAN R. MACEY, *CORPORATE GOVERNANCE: PROMISES KEPT, PROMISES BROKEN* (2008). If that is true, and we think that it is, then having access to the board of directors, in and of itself, won't do much to improve a corporation's ethical responsibility.

132. Lawyers are entitled to argue for a good faith change in the law. See MODEL RULES OF PROF'L CONDUCT R. 3.1 (2007) (“A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.”).

defined at all when the client wants to take a particular action. And, of course, some clients (and some lawyers) couldn't even locate the line between right and wrong with a map and a divining rod. For this last group (those who couldn't find the line if it were directly in front of them and labeled "LINE IS HERE"), we propose a bright-line test for legal advice: if the advice uses the word "technically" in order to be accurate, then that advice is far too close to the line for comfort. So, for example, if an opinion letter suggests that a transaction will comply with the relevant regulations only if the words are read out of context and counter to the purpose of the regulations, that opinion letter likely will have some variant of the word "technically" in it, and it is too close to the line.

Bob Gordon, during this Symposium, pointed out that lawyers' training pushes them in the direction of softening any lines that might exist, either by construing the "line" to allow the desired behavior or by lobbying for (or assisting the lobby in) changing the line to permit the desired behavior.¹³³ After all, the downside risk of the client getting caught for misbehavior is not particularly large, and the upside risk is that the client gets what it wants.¹³⁴

2. Fine-Tuning the Incentives for Corporate Ethical Responsibility

Even without the Bolman-Deal frames analysis, one important factor in shaping behavior is the use of incentives. Organizations reinforce decisions by rewarding certain kinds of decisions and punishing others. Some of those incentives will lead to appropriate—and even innovative—behavior; others, unfortunately, will lead to dysfunctional behavior. For example, Enron rewarded the decisions of electricity traders to ship power out of California, only to import power in at higher prices later, by giving the traders large bonuses and significant power during the semi-annual performance reviews (known around Enron as "rank and yank.")¹³⁵ Jeff Skilling's appeal to the U.S. Court of Appeals for the Fifth Circuit hinged in part on his argument that his decisions at Enron were tailored to fit Enron's

133. See, e.g., Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 146 (2004) ("In other words, Friedman, given his view of markets, ultimately concedes that managers have no choice but to maximize profits. A manager is not 'free to choose' social responsibility, or at least not more than once. The situation of markets eliminates that freedom.").

134. Or, to be more precise, the officer or director of the corporate client gets what he wants, such as excessive compensation or bonuses that don't relate to performance. The officer or director has "IBG, YBG" ("I'll be gone, you'll be gone") in the back of his mind, especially given the frequency of job-hopping among executives. For example, Robert Nardelli fled to Chrysler after eviscerating Home Depot. See, e.g., Nick Bunkley & Micheline Maynard, *Chrysler Looks Outside to Turn Its Fortunes Around*, INT'L HERALD TRIB., Aug. 7, 2007, at 1.

135. Cf. Tom Fowler, *Enron's Implosion Was Anything but Sudden*, HOUS. CHRON., Dec. 20, 2005, <http://www.chron.com/disp/story.mpl/special/enron/2655409.html>.

goals and not to steal from Enron in any way.¹³⁶ The old saying of “garbage in, garbage out” works as well for corporate behavior as it does for computer programming.

If we could get the “garbage” out of corporate decision making, perhaps we could come up with a reasonable code of conduct—one that sets forth minimally acceptable ethical behavior. Assuming that the Chief Legal Officer had the status and power to enforce that code,¹³⁷ what would such a code look like? For one thing, the code would stress that no one, from the highest-ranking employee on down, would come even close to the line (ethically or legally).¹³⁸ For another, the corporation would enforce the code consistently: no exceptions for key players (or anyone else).¹³⁹ And the enforcement would be public, so that all of the employees would understand what happened when someone played too close to the line. Just as important, employees who made ethically good choices would receive public rewards. An organization’s culture is formed by both positive and negative reinforcement.

Few corporations, though, could achieve this ideal world. The less-than-ideal world—the one in which we live—poses the classic problem: How do we draw the line between “normal” aggressive and creative lawyering that benefits the corporation from lawyering that facilitates unethical behavior by the corporation? How do we keep the corporation from justifying virtually any behavior by arguing that the behavior is necessary to increase shareholder value? Given current corporate law, how do we convince a board of directors that valuing stakeholder interests is consistent with shareholder value?

CONCLUSION

It’s possible that no viable structure and no fine-tuned incentives could help corporations or their lawyers locate the line between right and wrong. After all, lawyers are as human as anyone else, and humans have an

136. See Kristen Hays, *Focus on ‘Honest Services’: Pros, Cons of Argument Take Center Stage in Skilling’s Appeal*, HOUS. CHRON., Apr. 3, 2008, at 1, available at <http://www.chron.com/disp/story.mpl/special/enron/5670281.html>.

137. We know, we know: it’s like “assum[ing] a can opener.” In an earlier article, one of us explained that reference this way:

Here’s the version that I know: A mathematician, an engineer, and an economist are stranded on a desert island with only one can of food and no can opener. The mathematician writes all sorts of complex formulas in the sand in an attempt to discover one that will open the can, but none of the formulas leads to anything. The engineer tries to build a can-opening machine out of the stones and grass on the island, but the machine isn’t strong enough to open the can. In despair, the mathematician and the engineer turn to the economist, who’s grinning proudly. “No problem,” says the economist. “We can open the can easily. Just assume a can-opener.”

Nancy B. Rapoport, *Our House, Our Rules: The Need for a Uniform Code of Bankruptcy Ethics*, 6 AM. BANKR. INST. L. REV. 45, 96 n.242 (1998).

138. *But see* text accompanying *supra* note 132.

139. Thanks to Rachel Anderson for pointing out this “no exceptions” concept.

uncanny ability to talk themselves into thinking that “wrong” is “right.” On the other hand, to the extent that any type of structure or incentives could help the well-meaning lawyer do the right thing, an expanded role of the corporation’s duties might clarify some questionable issues for a corporation’s lawyer. If the purpose of a corporation is not only to provide short-term financial benefits to the shareholders but is also to improve the corporation’s long-term health by adding issues of legal propriety and ethical norms to the corporation’s economic interests, then perhaps caselaw will develop over time that supports decision making that takes these other interests into account.

Short-term thinking was part of what caused Enron and other corporate scandals of its time, as well as the current financial free fall.¹⁴⁰ The decisions that corporations make—including the decisions to change the law or break the law for financial gain—have ripple effects that go beyond the business world. Those consumers today whose houses are worth less than the amount they owe on their mortgages, or who have been laid off because their companies’ financial prospects are failing, or who have seen the value of their retirement funds vanish almost overnight—all of these people—suffer from the ripple effects of bad corporate decision making. In turn, we all suffer when Congress makes ill-calibrated, knee-jerk reactions to these corporate scandals. Not only are the “causes” of problems not fixed, but the “fixes” cause yet more problems. Perhaps, just perhaps, lawyers could help prevent the next round of corporate scandals by being willing to say no to bad ideas and bad decisions. Perhaps lawyers could become not just the guardians of corporate legal responsibility, but of corporate ethical responsibility as well.

140. See generally ENRON AND OTHER CORPORATE FIASCOS, *supra* note 107.