

# STAKEHOLDERS AND SUSTAINABILITY: AN ARGUMENT FOR RESPONSIBLE CORPORATE DECISION-MAKING

TARA J. RADIN\*

## INTRODUCTION

It has been argued that the problems in corporate America today stem from the failure of corporate law.<sup>1</sup> In general, the claim is that corporate law fails to provide adequate incentives for appropriate behavior.<sup>2</sup> In part, this is due to the fact that corporate law has remained virtually stagnant since its inception more than a century ago, even though society

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\* Tara J. Radin teaches Legal Studies and Ethics at The Wharton School of the University of Pennsylvania.

<sup>1</sup> Kent Greenfield, Professor of Law, Boston College, Remarks at the William & Mary Marshall Wythe School of Law Environmental Law and Policy Review Symposium: Corporate Governance (Feb. 4, 2006). See also KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (forthcoming Jan. 2007). But see Cynthia A. Williams & John M. Conley, *Triumph or Tragedy? The Curious Path of Corporate Disclosure Reform in the U.K.*, 31 WM. & MARY ENVTL. L. & POL'Y REV. 317 (2007) [hereinafter Williams & Conley, *Triumph or Tragedy*] (arguing that disclosure requirements can help compensate for inadequacies in the current legal framework). See generally Kathleen Hale, Note, *Corporate Law and Stakeholders: Moving Beyond Stakeholder Statutes*, 45 ARIZ. L. REV. 823, 827-28 (2003) (arguing for the creation and strengthening of "stakeholder statutes"); 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, 500-02 (2005) [hereinafter Williams & Conley, *Emerging Third Way*].

<sup>2</sup> Professor Greenfield also argues that corporate law runs amiss in purposefully excluding non-stockholder constituents (stakeholders) from the governance process. See Kent Greenfield, *Does Corporate Law Protect the Interests of Shareholders and Other Stakeholders? September 11th and the End of History for Corporate Law*, 76 TUL. L. REV. 1409 (2002).

By law and norm, the corporation cares about one thing, money. Anything that is not money is set aside unless it is in service of that one thing. Instead of creating a governance system that would help internalize the concerns of society in general, or of customers, or of employees, the system of corporate governance in the United States sets up shareholder interests as supreme and centralizes decision making so that those interests are served. Other stakeholders are left to depend on mechanisms external to the firm—contract and regulation—both seriously imperfect, to protect their interests.

*Id.* at 1416. This arguably impairs corporate operations in that emphasizing short-term profits often runs counter to long-term interests, including profitability.

and its expectations have ostensibly changed.<sup>3</sup> American corporate laws, therefore, do not provide the sort of guidance that businesses today need.<sup>4</sup>

This argument is especially troublesome in the context of the natural environment, especially with regard to the deterioration of the biosphere and the depletion of natural resources. In some circumstances, the law is emerging as a possible solution,<sup>5</sup> and many people claim that, at least in the United States,<sup>6</sup> the legislature should intervene<sup>7</sup> to motivate corporations to be more environmentally responsible.<sup>8</sup>

While it is true that the legal system in the United States is extensive, it is also true that it is flawed. The system is largely reactive, and it lacks the ability to anticipate and prevent corporate wrongdoing. Perhaps this is as it should be. The recent failures of corporate America—as evidenced by the events leading to the downfall of Enron, WorldCom, and elsewhere—are not the fault of the legal system,<sup>9</sup> but of corporate managers'

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<sup>3</sup> By “remained virtually stagnant,” what is meant is that the key legal principles have remained constant with little variation. See Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L.J. 87, 87 (2005) [hereinafter Greenfield, *New Principles for Corporate Law*]. Even though constituency statutes were passed beginning in the 1980s, they have neither been applied nor challenged in any meaningful way. See *infra* Part II.B.3.

<sup>4</sup> This is particularly true with regard to social issues. See Lynn Sharp Paine, *Law, Ethics, and Managerial Judgment*, 12 J. LEGAL STUD. EDUC 15 (1994) [hereinafter Paine, *Ethics and Managerial Judgment*] (“[L]aw is most often a lagging indicator of social ethics.”).

<sup>5</sup> See generally Steven Ferrey, *The Eagles of Deregulation: The Role of the Courts in a Restructured Environment*, 32 ENVTL. L. 297 (2002) (discussing the positive role of the legal system in promoting protection of the environment).

<sup>6</sup> See, e.g., Williams & Conley, *Emerging Third Way*, *supra* note 1 (“Moreover, the United States and the UK both exhibit a form of shareholder capitalism, under which the purpose of the corporation is to maximize shareholder wealth, in contrast to the European stakeholder view, according to which managers need to balance the interests of multiple constituencies when making decisions.”).

<sup>7</sup> See *id.* at 494 (pointing out that Europe has adopted a much more progressive view of corporate governance than exists in the United States and is more receptive to managerial decision-making that incorporates consideration of stakeholder concerns).

<sup>8</sup> There are at least two different views regarding how legislation should approach environmental protection. On the one hand, Robert Hahn and Robert Stavins argue in favor of introducing positive incentives to encourage organizations to engage in environmentally-responsible decision-making. See Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era from an Old Idea?*, 18 ECOLOGY L.Q. 1 (1991). Cindy Schipani, on the other hand, points to the potential liability—including criminal liability—that can accompany environmental irresponsibility. See Cindy A. Schipani, *Taking it Personally: Shareholder Liability for Corporate Environmental Hazards*, 27 J. CORP. L. 29, 62 (2001).

<sup>9</sup> *But cf.* Richard B. Stewart, *A New Generation of Environmental Regulation?*, 29 CAP. U. L. REV. 21, 27-38 (2001) (arguing that a revised regulatory framework could prove

abdication of their moral responsibilities.<sup>10</sup> In short, had these companies been managed properly, organizations would not have needed laws to distinguish right from wrong. The same can be said with regard to managers' sensitivity to and acknowledgment of their responsibility for the natural environment.<sup>11</sup>

This reflects deeper issues in society associated with the tension between ethics and compliance. Ethics tends to be linked to both moral and social issues, such as the effect of human conduct on the natural environment, whereas compliance refers to adherence to society's accepted rules and standards.<sup>12</sup> The importance of moral bearing versus attention to law in issues of responsibility is manifest, for example, in the confusion and frustration resulting from legislation such as Sarbanes-Oxley (commonly referred to as "SOX").<sup>13</sup> With SOX, there has been a distinct shift from ethics to compliance.<sup>14</sup> While ethics and compliance should work hand in hand, the cumbersomeness and costliness of complying with laws and regulations tend to create a shift away from ethics and toward a compliance culture in many organizations.<sup>15</sup> Put simply, organizations become so preoccupied with compliance that they either de-emphasize or completely fail to acknowledge or address their moral responsibilities.<sup>16</sup>

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effective in increasing environmentally responsible behavior, suggesting that the problem is not with legal regulation in general, but with the implementation of the current regulatory model).

<sup>10</sup> The responsibility for corporate behavior lies with the corporations themselves and with society for not creating adequate incentives for different behavior. Kathleen Hale, *supra* note 1, at 826.

<sup>11</sup> This was Ray Anderson's premise in changing the direction of his company, Interface, Inc. He asserted that it was simply the right thing to do. See RAY C. ANDERSON, MID-COURSE CORRECTION: TOWARD A SUSTAINABLE ENTERPRISE: THE INTERFACE MODEL (1998). See *infra* Part IV.C.

<sup>12</sup> See David Bell, Work-Life Resource Center, As We See It Working with Integrity: Ethics for the UCSF Community (Sept. 2006), <http://www.ucsf.edu/wrklife/pdf/Integrity-Sept%202006.pdf>.

<sup>13</sup> See Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2007)).

<sup>14</sup> See Seymour Trachimovsky, *Sarbanes-Oxley and Canadian Counterparts: Any Prospects for Improved Corporate Ethics?*, MGMT. ETHICS, Fall 2003, at 1, available at <http://www.ethicscentre.ca/EN/Fall2003.pdf>.

<sup>15</sup> See Oliver Williams, *Focus On Ethics Can Dispel Cynicism*, BUS. DAY, July 2, 2004, [http://www.nd.edu/ucba/011221/press/2004/07\\_ethics\\_williams.shtml](http://www.nd.edu/ucba/011221/press/2004/07_ethics_williams.shtml) ("Perhaps the most dramatic example of new transaction costs for business is the 2002 US Sarbanes-Oxley law: it has raised auditing expenses by 200%-300%.")

<sup>16</sup> This is disappointing in that good ethics training enables companies to spend less time on compliance. Compliance is about following rules. Ethics, on the other hand, is about

This is a problem because organizations inundated with compliance issues are often ill-prepared to address unanticipated, morally-questionable situations when they arise. To respond to complex business issues—to deal with crises such as 9/11, for example—businesses and their managers must be able to exercise proper judgment without over-reliance on the law.<sup>17</sup> This is especially true with regard to situations involving the natural environment, which are inherently complex and defy complete coverage by the law.

Indeed, concern for the natural environment has become a pivotal issue for businesses today.<sup>18</sup> Companies have found that legislative approaches go only so far in assisting managers in dealing with the complexity of the natural environment and have come to rely more and more heavily on managerial discretion in dealing with it and the laws governing it.<sup>19</sup> Managers, in turn, increasingly need to be able to interpret and apply existing environmental laws appropriately and responsibly. Moreover, it is essential that they develop discretion because there is no formula—no single, universal rule—that will enable them to deal effectively with their concerns. Managers instead must navigate uncharted territory by weighing competing interests to determine how to address challenging business issues involving the natural world. All this means is that there is less need for regulation and more need for managers to have a clear

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making responsible decisions even in the absence of rules. If people are trained and encouraged to make well-reasoned decisions on their own, then, in most situations, their decisions will be consistent with existing rules. In other words, if organizations invest in ethics training, they should not need to spend as much time on compliance because it follows naturally. See Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.-Apr. 1994, at 106. In this seminal article, reprinted in numerous business ethics textbooks, Professor Paine distinguishes between managing for “compliance” and managing for “integrity.” *Id.* at 106. She contends that a key difference lies in that emphasizing integrity results in responsible conduct beyond mere compliance with rules, regulations, policies and laws. *Id.* at 106-07. “The payoff is a work force better educated in the law. Trained employees can be cost-effective.” Mark Voorhees, *All Training, All the Time*, NAT'L L.J., Jan. 24, 2000, at B8.

<sup>17</sup> See Tara J. Radin, *700 Families to Feed: The Challenge of Corporate Citizenship*, 36 VAND. J. TRANSNAT'L L. 619, 665-70 (2003) [hereinafter Radin, *700 Families to Feed*] (describing some of the ways in which organizations reached out to one another in the wake of tragedy).

<sup>18</sup> See ROGENE A. BUCHHOLZ, PRINCIPLES OF ENVIRONMENTAL MANAGEMENT: THE GREENING OF BUSINESS (1993). See generally Benjamin J. Richardson, *Enlisting Institutional Investors in Environmental Regulation: Some Comparative and Theoretical Perspectives*, 28 N.C. J. INT'L L. & COM. REG. 247, (2002) (emphasizing the consequences of business decisions to the natural environment).

<sup>19</sup> See Richardson, *supra* note 18, at 248.

understanding of ethics and a sense of responsibility for the influence of their businesses on the natural environment.

It is important to keep in mind at this point that corporate managers are not creatures set apart from society and the natural world. They have the same interest as other living creatures in preserving the biosphere. While managers are charged with responsibility for the directions that companies take, managers are at the same time living organisms, as well as customers, employees, and stockholders of the companies they serve. Attending to social issues such as the environment thus translates into reconciling concerns shared with other living organisms as well as with the firm's various constituents or stakeholders. This is not to say that every manager feels the same about the natural environment or issues involving it, but that, in aggregate, managers have a vested interest in the preservation of the natural environment, as all other living creatures do and the corporation's stakeholders do as well.<sup>20</sup>

It seems, then, that responsible organizational decision-making in response to concerns relating to the natural environment is critical.<sup>21</sup> Accordingly, Part I of this Article argues against a legislative approach to protecting the environment,<sup>22</sup> and claims that the ever-increasing promulgation of rules and regulations results in an unhelpful, compliance-driven culture that is excessively expensive, time-consuming, and cumbersome in application.<sup>23</sup> It will also show that this kind of approach represents a distraction from the sort of creative thinking that brings about innovations beneficial to business, society, and the natural environment.

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<sup>20</sup> Instead of contributing to the already existing morass of regulatory entanglements (particularly with regard to environmental regulation), we, as a society, need to send the clear message that we care, provided that we do in fact care. If the purpose of legislation is to protect societal interests, we need to show that the environment is something that matters to our society.

<sup>21</sup> This thinking is similar to the argument articulated by Tara Radin and Martin Calkins with regard to global labor practices. They assert that one way to change behavior is to provide more positive role models. See Tara J. Radin & Martin Calkins, *The Struggle Against Sweatshops: Moving Toward Responsible Global Business*, J. OF BUS. ETHICS 261, 269-71 (2006).

<sup>22</sup> But see Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 640-44 (2002) (arguing that corporate law can serve as a valuable regulatory tool); Cynthia Williams, *Text of Remarks on Panel: "Codes of Conduct and Transparency,"* 24 HASTINGS INT'L & COMP. L. REV. 415 (2001) (emphasizing the importance and value of monitoring corporate behavior).

<sup>23</sup> But see David W. Case, *Corporate Environmental Reporting as Informational Regulation: A Law and Economics Perspective*, 76 U. COLO. L. REV. 379, 379-81 (2005); David B. Spence, *The Shadow of the Rational Polluter: Rethinking the Role of Rational Actor Models in Environmental Law*, 89 CALIF. L. REV. 917, 918 (2001).

This Part also demonstrates how excessive legislation threatens to preclude organizations from developing and instituting new processes and procedures. Examples from accounting, with regard to Sarbanes-Oxley,<sup>24</sup> illustrate the huge costs associated with compliance that can cause organizations to become so bogged down that they are effectively prevented from doing anything out of the ordinary beyond mere compliance.

Part II suggests that an approach involving increased reliance on managerial responsibility is preferable to a legislative approach and consistent with a widely accepted stakeholder view of the firm. Although corporate law has traditionally emphasized stockholder primacy,<sup>25</sup> current thinking about the law and the role of business in society emphasizes attention to stakeholder considerations.<sup>26</sup> Moreover, present American law (specifically, the business judgment rule) not only grants managers considerable discretion as to the sources that they may consider to influence their decision-making,<sup>27</sup> today's so-called "corporate law" (and "law" more generally conceived) is replete with stakeholder-specific legislation that prioritizes various interests and concerns over profit generation.<sup>28</sup> Reframing our understanding of the firm in accordance with a stakeholder-based relationship view is therefore consistent with both underlying legal principles and societal interests.

Having established the importance of a stakeholder approach to business and corporate law, Part III turns to concerns linked to the natural environment and explains the notion of "sustainability"<sup>29</sup> and the

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<sup>24</sup> Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2007)).

<sup>25</sup> The law previously favored a stockholder view of the firm, and was traditionally viewed as a hurdle for managers to overcome when making decisions that might even appear to run counter to profit-maximization. *See infra* Part II.A.

<sup>26</sup> *See infra* Part II.C.

<sup>27</sup> Cynthia A. Williams & John M. Conley, *Is There an Emerging Fiduciary Duty to Consider Human Rights?*, 74 U. CIN. L. REV. 75 (2005) [hereinafter Williams & Conley, *Human Rights*] ("According to the majority of corporate law professors in the United States, a corporation's primary, and possibly exclusive, goal is to maximize shareholder wealth within the confines of the law.").

<sup>28</sup> *See infra* Part II.B.3.

<sup>29</sup> *See* PAUL HAWKEN, *THE ECOLOGY OF COMMERCE: A DECLARATION OF SUSTAINABILITY* (1993).

Sustainability is an economic state where the demands placed upon the environment by people and commerce can be met without reducing the capacity of the environment to provide for future generations. It can also be expressed in the simple terms of an economic golden rule for the restorative economy: Leave the world better than you found it, take

interconnectedness of the natural environment with social and economic development.<sup>30</sup> This Part also challenges the legal permissibility of managerial decision-making that neglects this interconnectedness, and proffers a normative and descriptive framework to assist managers in addressing issues of sustainability effectively and successfully.

Finally, Part IV illustrates the ways in which a proper response to environmental concerns not only coheres with the law, but also leads to certain best practices in business. Part IV also offers examples of individuals and organizations that have distinguished themselves as leaders in the area of sustainability. The Article then concludes by emphasizing the shared positive bottom line for businesses, communities, and society in general that occurs when organizations and their managers approach sustainability responsibly and proactively.

#### I. THE ARGUMENT AGAINST EXCESSIVE LEGISLATION

Society's inclination when addressing common problems—particularly those related to perceived threats—is to legislate solutions. While this provides the consolation of doing something rather than nothing, it does not always bring about optimal solutions. At a minimum, it results in a bloated legal system such as the one that exists today. Even so, the current legal framework does provide significant benefits, including support and direction (positive and negative) for corporations.<sup>31</sup>

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no more than you need, try not to harm life or the environment, make amends if you do.

*Id.* at 139; see also David Monsma & John Buckley, *Non-Financial Corporate Performance: The Material Edges of Social and Environmental Disclosure*, 11 U. BALT. J. ENVTL. L. 151, 170 (2004) (“The terms ‘sustainable development’ or ‘environmental sustainability’ are now well established in the lexicon of environmentalism.”). *But cf.* THINKING ECOLOGICALLY: THE NEXT GENERATION OF ENVIRONMENTAL POLICY (Marian R. Chertow & Daniel C. Esty eds., 1997) (explaining how “sustainability” differs from traditional approaches to concerns about the natural environment).

<sup>30</sup> See Allen L. White, *Sustainability and the Accountable Corporation*, 41 ENV'T 30 (1999) (explaining how sustainability is not an oxymoron as it might seem); see also Surya Deva, *Sustainable Good Governance and Corporations: An Analysis of Asymmetries*, 18 GEO. INT'L ENVTL. L. REV. 707, 708 (“Sustainable good governance, a paradigmatic fusion of two buzzwords, ‘sustainable development’ and ‘good governance,’ is a new emerging currency.”); Judith Perhay, *The Natural Step: A Scientific and Pragmatic Framework for a Sustainable Society*, 33 S.U. L. REV. 249 (2006).

<sup>31</sup> See, e.g., Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577, 580-81 (1990) (pointing out that corporate law is only one source of legal restrictions and protections for corporations; for example, the Bill of Rights applies to corporations).

Two prominent examples of legislative solutions offered in response to troublesome societal situations are the Federal Sentencing Guidelines ("Guidelines") of the 1980s<sup>32</sup> and the Sarbanes-Oxley Act of 2002.<sup>33</sup> In the wake of corporate wrongdoing and lack of self-restraint, Congress responded in both situations with legislation aimed at compelling responsible decision-making.

The Guidelines accomplished this task initially to some degree by treating organizations more favorably if they had instituted ethical codes of conduct.<sup>34</sup> The Guidelines do not, however, distinguish between organizations with effective ethics programs and organizations with ethics programs in name only.

SOX was similarly passed because of widespread concern about increased corporate crime, but this time in response to a barrage of major corporate accounting scandals involving companies such as Enron, Tyco International, and WorldCom.<sup>35</sup> SOX effectively created a new set of accounting rules for publicly-held companies.<sup>36</sup> The primary goal of SOX was to create a heightened level of transparency and accountability for corporations.<sup>37</sup> It demands that companies meet new financial reporting standards, many of which entail increased oversight by public accountants.<sup>38</sup> This is particularly evident in Section 404, which details "[m]anagement assessment of internal controls."<sup>39</sup> According to this provision, upper management must not only certify the accuracy of financial statements, but must also take responsibility for any inaccuracies in those statements.<sup>40</sup> Complying with Section 404 has translated into billions of dollars in

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<sup>32</sup> See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended at 18 U.S.C. §§ 3551-59, 3561-66, 3571-74, 3581-86, & 28 U.S.C. §§ 991-98 (2006)). The sentencing guidelines were established to create uniformity in sentencing practices and provided for reduced fines and avoidance of sanctions for multiple reasons, such as the presence of a written code of ethics. See U.S. SENTENCING COMM'N, FIFTEEN YEARS OF GUIDELINES SENTENCING 11-13 (2004), available at [http://www.ussc.gov/15\\_year/chap1.pdf](http://www.ussc.gov/15_year/chap1.pdf). See also Elletta Sangrey Callahan et al., *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AM. BUS. L.J. 177 (2002).

<sup>33</sup> Sarbanes-Oxley Act of 2002, Pub. L. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C. (2007)).

<sup>34</sup> See *supra* note 32.

<sup>35</sup> Robert Prentice, *Enron: A Brief Behavioral Autopsy*, 40 AM. BUS. L.J. 417, 440-41 (2003).

<sup>36</sup> *Id.*

<sup>37</sup> U.S. SENTENCING COMM'N, *supra* note 32, at 11-13.

<sup>38</sup> Sarbanes-Oxley Act of 2002 § 404. See Prentice, *supra* note 35, at 441-43.

<sup>39</sup> Sarbanes-Oxley Act of 2002 § 404.

<sup>40</sup> *Id.*

increased costs, primarily for new technology and internal control systems.<sup>41</sup> In the financial services industry alone, for example, companies are finding that the amount of time they spend on compliance is dwarfing time being spent actually doing business.<sup>42</sup>

A similar phenomenon has emerged in the context of environmental regulation. Regulations have again proliferated and taken on a life of their own. The situation has become one where, as Michael Ray Harris points out, “[t]raditional environmental regulation has proven inadequate in resolving our country’s environmental problems.”<sup>43</sup> Cynthia A. Williams echoes this sentiment with her concern that organizations no longer consider what is responsible; instead, she contends, they now assess regulation in terms of the cost of compliance versus the cost of penalties associated with non-compliance.<sup>44</sup>

In addition, today’s regulatory framework has become so complex that it seems intimidating to some companies.<sup>45</sup> This means that some organizations could be spending more time on compliance than on the business at hand. As Lucia Ann Silecchia points out, even the “good” companies are having trouble keeping up with all of the regulations: “[M]any say that even ‘good’ companies cannot possibly be in compliance with *all* environmental statutes and regulations.”<sup>46</sup> All of this suggests that businesses and the societies in which they operate would do well to figure out ways

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<sup>41</sup> See Paula L. Green, *Costly Compliance*, GLOBAL FIN., Apr. 2005, [http://www.gfmag.com/2005/Apr/c\\_ci/fe\\_art05.php](http://www.gfmag.com/2005/Apr/c_ci/fe_art05.php).

<sup>42</sup> *Id.*

<sup>43</sup> Michael Ray Harris, *Promoting Corporate Self-Compliance: An Examination of the Debate Over Legal Protection for Environmental Audits*, 23 ECOLOGY L.Q. 663, 664 (1996).

<sup>44</sup> This is known as “law-as-price” theory. Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265 (1998). Professor Williams, however, is not opposed to increased regulation. In fact, she advocates mandatory social reporting. See Williams & Conley, *Triumph or Tragedy*, *supra* note 1.

<sup>45</sup> See Spence, *supra* note 23, at 931.

Critics charge that the environmental regulatory apparatus is so complex that compliance with regulatory requirements is unreasonably difficult. In a recent survey of corporate environmental managers, nearly half reported that their most time- and energy-consuming duty is trying to determine whether their companies are in compliance with the law, with seventy percent believing perfect compliance is impossible.

*Id.*

<sup>46</sup> Lucia Ann Silecchia, *Ounces of Prevention and Pounds of Cure: Developing Sound Policies for Environmental Compliance Programs*, 7 FORDHAM ENVTL. L.J. 583, 590-91 n.14 (1996). See also Harris, *supra* note 43, at 666 (noting the types of costs associated with compliance).

to tilt the scales away from excessive legislation so that companies can pay more attention to their core businesses.

Further complicating matters is the increasing globalization of business. As a result of the internet and the growing mobility of people of means, few major corporations today can afford to limit their business dealings to a single geographic region.<sup>47</sup> Such sprawl creates significant obstacles for legislative approaches to problems, as legislators and regulators must take into account the presence of multinational competitors to whom the rules might not apply.<sup>48</sup> This can undermine the effectiveness of local legislation and impede the competitiveness of locally-based corporations in the global marketplace.<sup>49</sup>

Even if these hurdles are overcome, there remains significant concern that the regulations will replace independent business decision-making. Some people maintain that the Guidelines, initially intended to promote integrity, at least initially facilitated a retreat into mere compliance.<sup>50</sup> The argument here is that compliance replaced good business judgment as compliance cultures became the norm and stifled moral imagination<sup>51</sup> and true business leadership.

The seriousness of the ramifications of this shift can be seen in corporate responses to certain recent crises. In these types of situations, successful and inspirational responses are self-initiated, not mandated from outside.<sup>52</sup> In the early aftermath of 9/11, businesses reached out to

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<sup>47</sup> See, e.g., Richardson, *supra* note 18, at 273 ("The globalization of banking, insurance, and investment services has diminished the power of governments to regulate institutions.").

<sup>48</sup> See, e.g., Cynthia A. Williams, *Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry*, 36 N.Y.U. J. INT'L L. & POL. 457, 457 (2004) ("One of the persistent concerns in discussions of corporate accountability over the last decade has been the mismatch between transnational business enterprises and national systems of legal control.").

<sup>49</sup> This was, in fact, one of the early criticisms of the Foreign Corrupt Practices Act. See generally Diane Caggiano, Note, *The Foreign Corrupt Practices Act: The Case for Multilateral Cooperation*, 5 NEW ENG. INT'L & COMP. L. ANN. (1999), <http://www.nesl.edu/intljournal/vol5/caggiano.htm>.

<sup>50</sup> Paine, *Ethics and Managerial Judgment*, *supra* note 4. See also David Hess et al., *The 2004 Amendments to the Federal Sentencing Guidelines and Their Implicit Call for a Symbiotic Integration of Business Ethics*, 11 FORDHAM J. CORP. & FIN. L. 725, 726 (2006) (arguing that the changes to the Guidelines, which went into effect on November 1, 2004 "set the benchmark for proper corporate conduct" by emphasizing organizational culture above mere programs and initiatives).

<sup>51</sup> The term "moral imagination" refers to the process of developing creative solutions to common problems. See, e.g., PATRICIA H. WERHANE, *MORAL IMAGINATION AND MANAGEMENT DECISION-MAKING* (1999).

<sup>52</sup> See generally Radin, *700 Families to Feed*, *supra* note 17, at 650-51.

one another, for example, by opening their doors to share space with clients or competitors even before the government had time to react.<sup>53</sup> The same held true after the devastation of Hurricane Katrina.<sup>54</sup> Again, businesses pitched in before government bureaus could activate effectively. For example, Wal-Mart got necessary supplies to victims quickly while promising displaced employees jobs at other locations.<sup>55</sup> In addition, Wal-Mart set up a gift registry through which storm victims could register for needed items and family, friends, and caring strangers could direct their donations appropriately.<sup>56</sup>

The inclination to rely on laws to resolve society's problems ironically might stem from management approaches that endeavor to disassociate individuals from their personal values; the most effective management approaches seem to be those that draw upon the values of individuals deeply invested in such problems.<sup>57</sup> The same holds true for businesses, which have admittedly been slow to adapt.<sup>58</sup>

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<sup>53</sup> See Families and Work Institute, Employer Response to September 11 Tragedy, <http://www.familiesandwork.org/announce/EmployerResponses.html> (last visited Mar. 1, 2007) (listing companies' responses to 9/11).

<sup>54</sup> This is not to suggest that everyone rose to the occasion following Hurricane Katrina, but there are notable examples of companies that did. See, e.g., Cisco Systems, Inc., Cisco and Society: Crisis Relief, [http://www.cisco.com/web/about/ac227/ac222/society/crisis\\_relief/](http://www.cisco.com/web/about/ac227/ac222/society/crisis_relief/) (last visited Mar. 1, 2007) (discussing Cisco's response to Hurricanes Katrina and Rita). Cisco President and CEO John Chambers said: "I believe that those corporations that are most successful have an obligation to give back to the communities in which they operate . . . Cisco is committed to being a good corporate citizen. It is not just the right thing to do—it is also good for business." News Release, Cisco Systems, Inc., Good Citizenship Benefits Corporate Bottom Line (Nov. 7, 2005), [http://newsroom.cisco.com/dlls/2005/corp\\_110705.html?CMP=AF17154](http://newsroom.cisco.com/dlls/2005/corp_110705.html?CMP=AF17154). See also *The Pharmacy at Wal-Mart: Community Support: Wal-Mart Steps Up in Time of Need*, CHAIN DRUG REV., Jul. 24, 2006, at 65 (detailing Wal-Mart's support of New Orleans following the devastation by Hurricane Katrina).

<sup>55</sup> See Brian Grow, *A Wal-Mart Becomes a Lifeline*, BUS. WK. ONLINE, Sept. 7, 2005, [http://www.businessweek.com/bwdaily/dnflash/sep2005/nf2005097\\_1818\\_db017.htm](http://www.businessweek.com/bwdaily/dnflash/sep2005/nf2005097_1818_db017.htm).

<sup>56</sup> Press Release, Wal-Mart, Wal-Mart Opens Gift Registry for Hurricane Katrina Victims (Sept. 12, 2005), <http://www.walmartfacts.com/articles/1977.aspx>.

<sup>57</sup> One of the unfortunate themes that has traditionally characterized business is that of a disconnect between wealth creation and personal values, with the customary view being that personal values should not enter the workplace. In an address delivered at the University of Hartford's 1991 annual convocation, Ben Cohen, co-founder of Ben & Jerry's ice cream, criticized the prevailing focus on profits by most of corporate America and the implicit expectation that employees "check their values at the door every day when they come to work." Mary Agnes Carey, *Ice Cream King Has Taste for Human Needs; Human Needs Flavor Ice Cream King's Talk*, HARTFORD COURANT, Sept. 12, 1991, at D1. Cohen went on to say that "[a]side from money, business is valueless . . . . It seems to be if an individual has a responsibility to the community, businesses, which are a collection of individuals, have a responsibility to the community." *Id.*

<sup>58</sup> See DEBRA E. MEYERSON, *TEMPERED RADICALS: HOW PEOPLE USE DIFFERENCE TO INSPIRE CHANGE AT WORK* (2001) (asserting that employees do not have to check their values at the door to keep their jobs).

During the past decade, many of the companies that have distinguished themselves are those that recognize the inherent value people bring to their organizations by not checking their personal values at the door, but by allowing their personal values to influence business decision-making in new and creative ways.<sup>59</sup> This only makes sense; organizations hire people because of their particularized skill sets and personalities. For individuals to attempt to make decisions without reference to such factors is to deprive organizations of the qualities for which those specific individuals were hired.<sup>60</sup>

Although the law might be blind, we want our business organizations and their managers to be anything but blind. Instead of legislating the bottom line, it seems to make sense—morally, legally, and in terms of good and successful business thinking—to rely on firms to choose for themselves how they will respond to the hurdles associated with the natural environment and the finiteness of natural resources.<sup>61</sup> The challenge,

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<sup>59</sup> See Laura Koss-Feder, *The Good Works Perk*, TIME, Jan. 22, 2001, at B1, available at <http://www.time.com/time/magazine/article/0,9171,95235,00.html> (identifying footwear manufacturer Timberland as a leading company). According to Ken Freitas, Vice President of Marketing for Social Enterprise, people seeking jobs at Timberland “realize that you don’t have to check your values at the door when you join this company.” See also Oliver Williams, *supra* note 15 (“Business leaders are first of all human beings and only secondarily managers of wealth creation. To check your human values at the office door is to invite chaos. This is one lesson we have learned in the past five years.”).

<sup>60</sup> See Seyla Benhabib, *The Generalized and the Concrete Other: The Kohlberg-Gilligan Controversy and Moral Theory*, in WOMEN AND MORAL THEORY 154 (Eva F. Kittay & Diana T. Meyers eds., 1987).

<sup>61</sup> But see Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227 (1995) [hereinafter Orts, *Reflexive Environmental Law*]; Eric W. Orts, *A Reflexive Model of Environmental Regulation*, BUS. ETHICS Q., Oct. 1995, at 779 [hereinafter Orts, *A Reflexive Model*] (“[A] theory of reflexive law proposes an alternative approach to law reform. It focuses on enhancing self-referential capacities of social systems and institutions outside the legal system, rather than direct intervention of the legal system itself through agencies, highly detailed statutes, or delegation of great power to courts.”). Instead of avoiding legislation, Professor Orts argues in favor of a reflexive model, which enlists “intermediate social institutions” in the effort of regulation. Contrasted with the traditional command-and-control model, it is valuable in that it links the key stakeholders involved with potential solutions to the problem. Orts, *Reflexive Environmental Law*, *supra*, at 1232. “Reflexive environmental law . . . seeks to tie businesses, which are a major source of many environmental problems, more closely to environmental solutions.” *Id.* at 1338-39. This sort of legislative approach would be preferable to alternative legislative approaches, but even Professor Orts proffers it as an “ideal type.” *Id.* at 1252. The non-legislative approach is thus proposed in this paper as a viable and real alternative. However aspirational it appears, it provides a starting point for businesses and an opportunity for them to take charge of their relationships with the natural environment instead of waiting for a suitable legislative answer.

it seems, lies in finding ways to create incentives and motivate managers to draw upon their own moral resources when addressing business concerns such as these.

## II. VIEWS OF THE FIRM

Determining how to create these sorts of incentives and motivational tools—those that allow and encourage managers to draw upon their own values and talents—depends upon how the firm is viewed. Expectations of corporations are inherently colored by mental models and preconceptions regarding the nature of the firm and its role in society.<sup>62</sup> The prevalent view of the firm characterizes it as merely a vehicle for profit maximization.<sup>63</sup> A more robust understanding of the firm—one that captures the full range of relationships in which the firm is embedded—provides the foundation for a potentially non-legalistic response to business problems, including those involving the natural environment and sustainability.

### A. *Stockholder View of the Firm*

The traditional view of the firm prioritizes stockholders, as illustrated by Figure 1.<sup>64</sup> During the mid- to late-1960s, businesspeople increasingly began challenging the role of the manager with regard to prescribed non-involvement in matters deemed “social,” such as pollution, inflation, and poverty.<sup>65</sup> While these problems affect society as a whole, some people have argued that businesses are better positioned than individuals to tackle these types of concerns effectively and successfully.<sup>66</sup> Advocates of the stockholder view of the firm have nevertheless

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<sup>62</sup> See PETER M. SENGE, *THE FIFTH DISCIPLINE: THE ART AND PRACTICE OF THE LEARNING ORGANIZATION* 8-9 (1990) (suggesting that the aggregate of an individual’s experiences creates a “mental model” of inherent biases that color how he or she views the world); see also PETER M. SENGE ET AL., *THE FIFTH DISCIPLINE FIELDBOOK* 235 (1994) (“Mental models are the images, assumptions, and stories which we carry in our minds of ourselves, other people, institutions, and every aspect of the world.”).

<sup>63</sup> See Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32, 32-33.

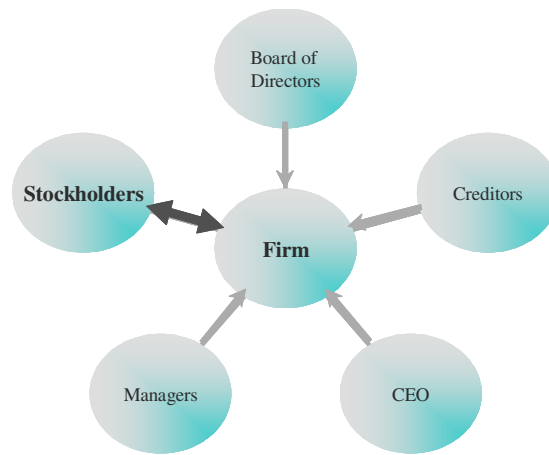
<sup>64</sup> See, e.g., Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911 (1996); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998).

<sup>65</sup> See generally Friedman, *supra* note 63 (responding to calls for business “social responsibility”).

<sup>66</sup> See Tara J. Radin, *Stakeholder Theory and the Law* (Aug. 1999) (unpublished Ph.D. dissertation, Darden Graduate School of Business Administration, University of Virginia) [hereinafter Radin, *Stakeholder Theory and the Law*] (on file with author).

maintained that it is not the place of managers of firms to dabble in social responsibility. They contend that managers should—indeed they are obligated to as a matter of fiduciary duty—focus on maximizing stockholder returns.<sup>67</sup>

FIGURE 1  
Stockholder View



Milton Friedman, a noted free-market economist, has been the chief spokesman for this view, which he articulated most prominently in an article that has for more than thirty years remained among the most often cited references for the stockholder theory of the firm. *The Social Responsibility of Business Is to Increase Its Profits* initially appeared in the *New York Times Magazine* on September 13, 1970, and has subsequently been reprinted in a wide variety of sources.<sup>68</sup> Interestingly, while it was published in the popular press as a news article, it addresses, and is tenable to, both scholars and practitioners, and remains the leading encapsulation of the stockholder theory of firm management.

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<sup>67</sup> See Friedman, *supra* note 63.

<sup>68</sup> *Id.*

In sum, Friedman denounces any discussion of “social responsibilities” for business.<sup>69</sup> As the investors, stockholders are entitled to the corporation’s residual profits.<sup>70</sup> The interests of all other constituents are preempted by preexisting arrangements.<sup>71</sup> Profits are to be provided to stockholders, just as products and services are delivered to customers, paychecks are distributed to employees, and so on.<sup>72</sup> Friedman concludes: “[T]here 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.”<sup>73</sup>

Friedman’s conclusion is echoed in the more recent opinion expressed by Albert Carr:

[A]s long as a company does not transgress the rules of the game set by law, it has the legal right to shape its strategy *without reference to anything but profits*. . . . A wise business man will not seek advantage to the point where he generates dangerous hostility among employees, competitors, customers, government, or the public at large. But decisions in this area are, in the final test, decisions of strategy, not of ethics.<sup>74</sup>

This statement captures the underlying belief that has traditionally characterized thinking about business: that business decisions are driven by profits and only profits, and that ethics are virtually irrelevant (with the exception of deception, fraud, and so on).<sup>75</sup>

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<sup>69</sup> *Id.* at 33.

<sup>70</sup> *See id.*

<sup>71</sup> *See id.*

<sup>72</sup> *See id.*

<sup>73</sup> *Id.* at 124 (emphasis added).

<sup>74</sup> Albert Z. Carr, *Is Business Bluffing Ethical?*, 46 HARV. BUS. REV. 143, 149 (1968) (emphasis added).

<sup>75</sup> *See id.* at 149.

B. *Evolution of Legal Thinking*

Jurisprudence in the United States has involved at least a century of debate about the nature of business and the significance of stockholders and other stakeholders.<sup>76</sup> The controversy between the common law view—that the managers of a corporation serve only as fiduciaries for stockholders—and the growing acceptance of obligations to non-stockholder claimants actually came to the forefront in the early part of the twentieth century.<sup>77</sup> Since then, there has evolved a conflation of the requirement that businesses have a profit-generating motive<sup>78</sup> with the perceived requirement that businesses (more properly, business managers) should focus on profit maximization.

1. *Dodge v. Ford Motor Co.*<sup>79</sup>

The stockholder view of the corporation asserts that corporations are purely private enterprises with the single goal of wealth maximization for the owners of shares.<sup>80</sup> The idea here is that corporate funds are limited and, if they are poured into philanthropic or other outside activities under the guise of doing something “socially responsible,” funds are not being directed toward their proper end (stockholder ownership).<sup>81</sup> This is the view seemingly accepted by the court in the Dodge decision,

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<sup>76</sup> See Tara J. Radin, *From Imagination to Realization: A Legal Foundation for Stakeholder Theory*, in 4 RE-IMAGINING BUSINESS ETHICS: MEANINGFUL SOLUTIONS FOR A GLOBAL ECONOMY 31 (Moses Pava & Patrick Primeaux eds., 2002) [hereinafter Radin, *From Imagination to Realization*] (discussing the evolution of legal thinking regarding stockholders and other stakeholders).

<sup>77</sup> See *id.*

<sup>78</sup> See *Tuttle v. Buck*, 119 N.W. 946 (Minn. 1909). The court in *Tuttle* held that a profit motive is essential for an activity to be considered “business” in the eyes of the law:

To divert to one's self the customers of a business rival by the offer of goods at lower prices is in general a legitimate mode of serving one's own interest, and justifiable as fair competition. But when a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort.

*Id.* at 948.

<sup>79</sup> 170 N.W. 668 (Mich. 1919).

<sup>80</sup> See Friedman, *supra* note 63, at 33.

<sup>81</sup> See *id.*

where the court held that a corporation's primary purpose is profit maximization for the stockholders.<sup>82</sup> The court indicated that a corporation and its managers owe a fiduciary duty to its stockholders, and that the corporation's primary purpose is profit maximization for the stockholders.<sup>83</sup> In this decision, the court effectively nullified Henry Ford's discretionary powers to use corporate profits for the benefit of employees and consumers, for that interfered with profits being returned to stockholders.<sup>84</sup>

## 2. Dodd vs. Berle Debate

In 1932, an ongoing debate between Merrick Dodd and Adolf A. Berle, Jr., conducted in a series of articles published in the *Harvard Law Review*, brought the controversy between stockholders and stakeholders to greater public awareness.<sup>85</sup> In his article, Dodd argued that managers act with the trust of the entire community, and that corporations provide "a social service as well as a profit-making function" for society.<sup>86</sup> Managers therefore have fiduciary obligations which, instead of being limited to stockholders, should extend to a broader range of constituents. These constituents are now commonly referred to as the firm's "stakeholders."<sup>87</sup>

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<sup>82</sup> *Dodge*, 170 N.W. at 684. In *Dodge*, the court held that the purpose of a corporation is profit maximization:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.

*Id.* at 684.

<sup>83</sup> *See id.* at 683-85.

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

<sup>85</sup> *See* A. A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARVARD L. REV. 1049 (1931) [hereinafter Berle, *Corporate Powers*]; A. A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1372 (1932) [hereinafter Berle, *For Whom*]; E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?* 45 HARV. L. REV. 1145, 1148 (1932).

<sup>86</sup> *See* Dodd, *supra* note 85, at 1148.

<sup>87</sup> *See id.* at 1153-63. The words "stakeholders" and "constituents" tend to refer to the same entities, though "stakeholder" is often interpreted more broadly. "Stakeholder," however, is the word used most frequently by businesspeople, while "constituent" tends to appear in legal drafting and literature. *See infra* Part II.C.

Berle, in reply, argued that this sort of view of managers and corporations potentially opens the floodgates to widespread abuse.<sup>88</sup> He contended that, absent the legal obligation of managers to protect the financial interests of their stockholders, there is a serious danger of managerial indiscretion.<sup>89</sup> Berle, therefore, cautioned against the notion of corporate "social responsibility" because it does not fall within an appropriate scope of corporate undertaking.<sup>90</sup> As Berle notes:

Unchecked by present legal balances, a social-economic absolutism of corporate administrators, even if benevolent, might be unsafe; and in any case it hardly affords the soundest base on which to construct the economic commonwealth which industrialism seems to require. Meanwhile . . . we had best be protecting the interests we know, being no less swift to provide for the new interests as they successively appear.<sup>91</sup>

In the end, Berle's views prevailed, and courts and legislatures in the United States since then have tended to subscribe to the position that the maximization of stockholder wealth benefits stakeholders more than alternate courses of action.<sup>92</sup>

This is not to say that Berle entirely "won." Although his position seemed to prevail initially, scholars and practitioners have continued to question the relationship between managers and constituents (stakeholders). Indeed, Berle himself subsequently conceded the point to Dodd more than twenty years later and noted: "[M]odern directors are not limited to running business enterprise for maximum profit, but are in fact and recognized in law as administrators of a community system."<sup>93</sup>

Since the Dodd and Berle debate, business and law in the United States have moved beyond the *Dodge* decision both in theory and practice.

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<sup>88</sup> Berle, *For Whom*, *supra* note 85.

<sup>89</sup> *Id.* at 1367-69.

<sup>90</sup> *Id.* at 1367.

<sup>91</sup> *Id.* at 1372.

<sup>92</sup> *Id.* at 1367-68. Berle goes on to say that because of the large amount of money invested by many Americans in stock, representing the stockholder interest ultimately serves the greater good. *Id.*

<sup>93</sup> See A. A. Berle, Jr., *Foreword* to *THE CORPORATION IN MODERN SOCIETY*, at xii (Edward S. Mason ed., 1960). Berle clarified, however, that he was merely conceding that this was the way the law developed, not that he believed it to be the "right" way. *Id.*

Corporations clearly serve societal roles beyond pure stockholder wealth-maximization, with the tempered support of both legislators and jurists. State and federal legislation identifies and affords protection for competing concerns, and judges often sanction unconventional corporate activities, as long as they cannot be construed as causing direct interference with shareholder profits, by deferring to managerial discretion.<sup>94</sup>

Although the *Dodge* decision has never officially been overturned, it has, in practice, been set aside. It is no longer followed or accepted as binding precedent; it is merely a landmark in legal theory.

### 3. Constituency Statutes

During the 1980s, many states gradually adopted “constituency statutes.”<sup>95</sup> These statutes—drafted in virtually identical language—expressly permit managers to consider the interests of certain “constituents” (stakeholders) under certain circumstances.<sup>96</sup> Although these statutes have rarely, if ever, been applied, their emergence reflects a significant and meaningful shift in legal thinking in that they acknowledge the interests of non-stockholder constituents.

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<sup>94</sup> Radin, *700 Families to Feed*, *supra* note 17, at 647 (citation omitted). See *Reed v. Burton*, 73 N.W.2d 333, 336 (Mich. 1955).

It is not the function of the court to manage a corporation nor to substitute its own judgment for that of the officers thereof. It is only when the officers are guilty of wilful abuse of their discretionary powers or of bad faith or of neglect of duty or of perversion of the purpose of the corporation or when fraud or breach of trust are involved that the court will interfere.

*Id.* (citing *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919)).

<sup>95</sup> Radin, *700 Families to Feed*, *supra* note 17, at 644 (citing Marjorie Kelly, *Laws Require Directors to Take Wider View on Takeover Offers*, STAR TRIB., Nov. 27, 1995, at C1). See also Joseph Biancalana, *Defining the Proper Corporate Constituency: Asking the Wrong Question*, 59 U. CIN. L. REV. 425 (1990); James J. Hanks, Jr., *Playing with Fire: Nonshareholder Constituency Statutes in the 1990s*, 21 STETSON L. REV. 97 (1991); Katherine Van Wezel Stone, *Employees as Stakeholders Under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45 (1991).

<sup>96</sup> Radin, *700 Families to Feed*, *supra* note 17, at 644. The emergence of constituency statutes prompted a barrage of law review articles exploring their meaning. See, e.g., Timothy L. Fort, *Corporate Constituency Statutes: A Dialectical Interpretation*, 15 J.L. & COM. 257 (1995) (considering the value of constituency statutes); Gary von Stange, Note, *Corporate Social Responsibility Through Constituency Statutes: Legend or Lie?*, 11 HOFSTRA LAB. L. J. 461, 488 (1994) (explaining that stakeholders will have to be given standing to sue to enforce their rights if constituency statutes are to have any merit).

#### 4. The Role of Fiduciary Duty

Another important consideration is the notion of fiduciary duty, which is often assumed to preempt attention to stakeholders.<sup>97</sup> As Richard Marens and Andrew Wicks point out, “[c]ourts did not historically encumber corporate management with a fiduciary duty toward company stockholders in order to privilege shareholders vis-à-vis other stakeholder groups. Rather, it was designed to prevent self-dealing on the part of directors and top management that fell short of criminal behavior such as embezzlement.”<sup>98</sup>

While the notion of fiduciary duty does serve to prevent self-serving managerial behavior, it was not intended to preclude managerial consideration of non-stockholder stakeholder concerns. According to Marens and Wicks, “[w]hen conflict of interest is not at issue, no case law or corporate statute argues that management’s fiduciary duty should be equated with a right of stockholders to oversee managerial decision making.”<sup>99</sup> They further assert: “[M]eeting fiduciary duties to shareholders does not entail that managers must side with shareholders and against stakeholders. Firms have the legal autonomy to act proactively and advance the interests of a number of stakeholders simultaneously.”<sup>100</sup> Therefore, stockholders are not afforded inherent legal priority.

#### C. Stakeholder View of the Firm

In contrast with the stockholder view, a stakeholder view of the firm recognizes that stockholders are but one group of relevant constituents. According to this view, a “stakeholder” is any individual or group who affect, or is are affected by, the operations of the firm.<sup>101</sup> Stockholders are stakeholders, but so, too, are employees, customers, and a wide range of others.

Although this sort of thinking dates back at least a century, the term “stakeholder” has only been used in this way since 1984, when R. Edward Freeman authored *Strategic Management: A Stakeholder*

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<sup>97</sup> See, e.g., *Edgar v. MITE Corp.*, 457 U.S. 624 (1982).

<sup>98</sup> Richard Marens & Andrew Wicks, *Getting Real: Stakeholder Theory, Managerial Practice, and the General Irrelevance of Fiduciary Duties Owed to Shareholders*, 9 BUS. ETHICS Q. 273, 275 (1999).

<sup>99</sup> *Id.* at 276.

<sup>100</sup> *Id.* at 287.

<sup>101</sup> R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* 52 (1984).

*Approach.*<sup>102</sup> In this book, Freeman did what no one else had yet successfully attempted: he confronted the vague “stakeholder” notion head-on and developed a pragmatic, comprehensive analysis of business and its stakeholders according to business functions, products, markets, activities, and duties. Whereas past scholars and practitioners had referred to stakeholders in passing or had merely assumed a shared understanding of the term, Freeman consciously introduced and articulated the basis for a theory that competes head-on with the commonly accepted stockholder theory of the firm.<sup>103</sup> The choice of the word “stakeholder” was intentional. He asserted:

Words make a difference in how we see the world. By using “stakeholder,” managers and theorists alike will come to see these groups as having a “stake.” “Stakeholder” connotes “legitimacy,” and while managers may not think that certain groups are “legitimate” in the sense that their demands on the firm are inappropriate, they had better give “legitimacy” to these groups in terms of their ability to affect the direction of the firm.<sup>104</sup>

Although Freeman does not prioritize stakeholder concerns, he does indicate that they can be mapped and illustrated in a constellation vis-à-vis their position to the firm (and each other), as shown in Figure 2.<sup>105</sup> Through this sort of stakeholder map, a firm can identify the general groups of stakeholders, along with the specific stakeholders that populate those groups. McDonalds, for example, has general stakeholders, including the government, competitors, employees, and customers. Within the general group of competitors are fast food chains such as Burger King, Wendy’s, and Hardees. Stakeholder maps help reveal the level and type of interaction with and between stakeholders.<sup>106</sup>

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

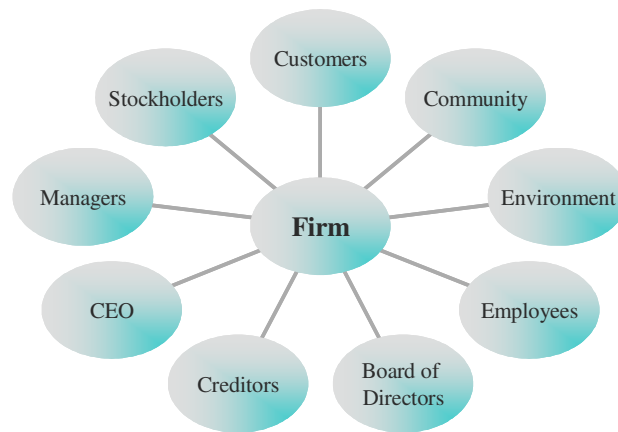
<sup>103</sup> See Radin, *700 Families to Feed*, *supra* note 17, at 639.

<sup>104</sup> FREEMAN, *supra* note 101, at 44-45.

<sup>105</sup> Although Freeman did not initially emphasize the interrelatedness of stakeholder concerns, there is a growing emphasis today on the relational component, between stakeholders and the firm, as well as between stakeholders themselves. See *infra* Part II.D.

<sup>106</sup> See Radin, *From Imagination to Realization*, *supra* note 76, at 31 (explaining how stakeholder thinking dispels common misunderstandings because: (1) stockholders are not the only legitimate stakeholders; (2) stockholder interests are not inherently primary; and (3) stakeholder relationships are not only bilateral).

FIGURE 2  
Stakeholder View



Freeman thus formally introduced “stakeholders” in a business context and explained their significance to business strategy.<sup>107</sup> He made sense of the term’s scattered history, and presented a clear and operable framework for management to follow, he turned the vague concept of “stakeholder” notion into the more concrete approach and began a conversation about a more expansive understanding of the nature of the firm.<sup>108</sup>

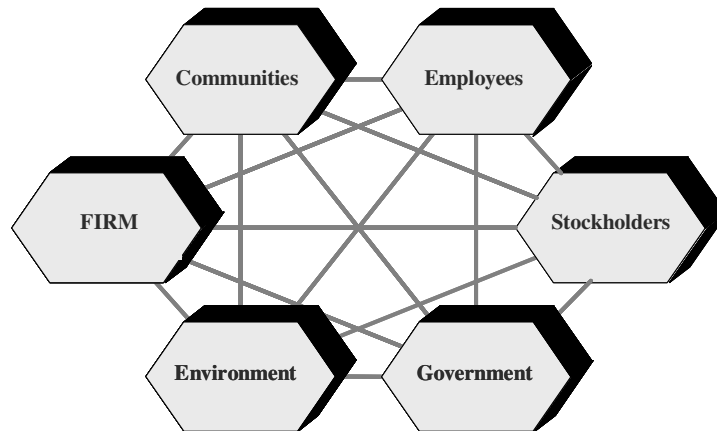
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<sup>107</sup> See Eric W. Orts, *A North American Legal Perspective on Stakeholder Management Theory*, in 2 PERSPECTIVES ON COMPANY LAW 165 (Fiona Patfield ed., 1997). According to Orts, the term “stakeholder” was used on various occasions prior to 1984, but those tend to be overlooked. *Id.*

<sup>108</sup> The introduction of the term “stakeholder” provoked the development of a new stream of scholarship. See, e.g., Thomas Donaldson & Lee E. Preston, *A Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65 (1995); Kevin Gibson, *The Moral Basis of Stakeholder Theory*, 26 J. BUS. ETHICS 245 (2000); Andrew C. Wicks et al., *A Feminist Reinterpretation of the Stakeholder Concept*, 4 BUS. ETHICS Q. 475 (1994).

*D. Relationship View of the Firm*

FIGURE 3  
Relationship View<sup>109</sup>



During the past thirty years, stakeholder theory has evolved from the mere identification of stakeholders into a more developed inquiry into the nature of stakeholder relationships and their influence on each other and firms.<sup>110</sup> Increased emphasis has been placed on the relationships themselves and on how those relationships are intermingled.<sup>111</sup> Figure 3 illustrates a relationship view of the firm. In this rendering, the firm is removed from the center and treated on par with other stakeholders, all of which exist in relationships with one another. The firm, in turn, is affected by these relationships, even those in which it is not directly involved.

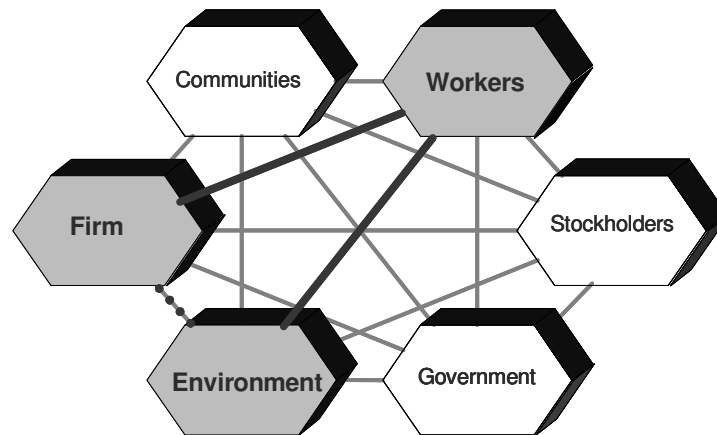
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<sup>109</sup> See Radin, *700 Families to Feed*, *supra* note 17, at 643.

<sup>110</sup> See Radin, *Stakeholder Theory and the Law*, *supra* note 66; Radin, *700 Families to Feed*, *supra* note 17, at 641-42; Sandra Waddock & Neil Smith, *Relationships: The Real Challenge of Corporate Global Citizenship*, 105 *BUS. & SOC'Y REV.* 47 (2000).

<sup>111</sup> See Waddock & Smith, *supra* note 110, at 48-51.

FIGURE 4  
Stakeholder Relationships



Take, as an illustration, the firm and two stakeholders: workers (employees) and the environment.<sup>112</sup> As Figure 4 shows, the firm has a relationship with workers (e.g., salary and workplace conditions). The firm also has a relationship with the environment, such as through its use of natural resources, its promulgation of consumerism, the donations it makes through environment-related charities, and so on. Workers, too, have relationships with the environment, and these relationships often differ from those between the environment and the firm. At times, workers and firms are divided on approaches to the natural environment. For example, if workers have an interest in some sort of environmental concern and the firm behaves irresponsibly toward the environment, workers can react, either by protesting, lobbying legislators, or quitting. In the converse, particularly responsible behavior by the firm can result in increased worker loyalty from environmentally-conscious workers and/or disloyalty from workers who do not have an interest in the environment. The relationships between workers, firms, and the environment are both distinct and interrelational, with each stakeholder having separate relations with each other and with others within the cluster.

<sup>112</sup> This assumes that the environment is considered a stakeholder. See Robert A. Phillips & Joel Reichart, *The Environment as a Stakeholder? A Fairness-Based Approach*, 23 J. BUS. ETHICS 185 (2000); Mark Starik, *Should Trees Have Managerial Standing? Toward Stakeholder Status For Non-Human Nature*, 14 J. BUS. ETHICS 207 (1995).

Consider, as an example, Koramsa, a clothing manufacturing company in Guatemala.<sup>113</sup> Levi Strauss & Company (“LS&Co.”)—a customer and potential competitor of Koramsa—has negotiated with the government of Guatemala in support of more stringent local labor laws compliant with International Labor Organization (“ILO”) standards.<sup>114</sup> Workers in Guatemala generally (stakeholders of all the companies doing business there) benefit from LS&Co.’s initiatives. Koramsa, a company that wishes to operate as a responsible employer, also benefits from LS&Co.’s actions because now all industry-related companies are required by law to pay the costs associated with responsible employment. LS&Co. has effectively elevated the acceptable standards of behavior for an entire industry through its initiatives. It is essential to recognize that stakeholders have relationships with each other and that those relationships can have an influence on the practices outside the firm itself, as LS&Co.’s actions have here. In this situation, the effect was beneficial; the reverse could be true. Had the reverse been true—for example, if LS&Co. was lobbying for a negative change—Koramsa would want to be aware of this, possibly to counter LS&Co.’s efforts.

This example of LS&Co. and Koramsa reflects a move away from an exclusive fixation on stakeholder-specific characteristics to a more complex and accurate examination of the web of relationships in which firms are embedded and the ramifications of their intersections. Focusing on the relationships involved and identifying areas for cooperation in this way has proved successful in many areas, such as with issues involving globalization where nongovernmental organizations (“NGOs”) have spearheaded numerous successful partnerships with corporations. The dynamics of these sorts of relationships are still being investigated.<sup>115</sup>

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<sup>113</sup> Tara J. Radin, *Levi Strauss and Co.: Implementation of Global Sourcing and Operating Guidelines in Latin America*, in *RIISING ABOVE THE SWEATSHOPS: INNOVATIVE APPROACHES TO GLOBAL LABOR CHALLENGES* 249, 274-80 (Laura P. Hartman, Dennis G. Arnold & Richard E. Wokutch eds., 2003).

<sup>114</sup> *Id.*

<sup>115</sup> See, e.g., Tara J. Radin, *Chiquita Brands International, Inc.: Values-Based Management and Corporate Responsibility in Latin America*, in *RIISING ABOVE THE SWEATSHOPS: INNOVATIVE APPROACHES TO GLOBAL CHALLENGES*, *supra* note 113, at 353 [hereinafter Radin, *Chiquita Brands*]. See generally Petra Christmann & Glenn Taylor, *Globalization and the Environment: Strategies for International Voluntary Environmental Initiatives*, 16 *ACAD. MGMT. EXECUTIVE* 121 (2002); Stuart L. Hart & Mark B. Milstein, *Creating Sustainable Value*, 17 *ACAD. MGMT. EXECUTIVE* 56 (2003); Russ Linden, *A Framework for Collaborating*, 31 *PUB. MANAGER* 3 (2002); Waddock & Smith, *supra* note 110.

The American legal system is consistent with this sort of relational stakeholder thinking.<sup>116</sup> Considerable legislation exists that names specific stakeholders and prioritizes their interests above those of stockholders.<sup>117</sup> In fact, analysis of the law reveals the network of interconnected stakeholder relationships that underlie corporations. Firms are required to attend to the concerns of stakeholders because of the importance of these relationships to the ongoing existence of the firm.

### III. THE ENVIRONMENT

During the last twenty years, diverging arguments have emerged in support of businesses having responsibilities for the natural environment. Throughout this period, appeals have been made to both moral<sup>118</sup> and economic<sup>119</sup> considerations. Among the chief concerns that have arisen has been the legitimacy and standing of the natural environment as a stakeholder and the ways the environment relates to business and its various constituents.<sup>120</sup>

While the status of the environment as a stakeholder has not been fully resolved, the relationship view of the firm is helpful in addressing some of the more pressing concerns relating to human influence on the biosphere.<sup>121</sup>

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<sup>116</sup> See Radin, Stakeholder Theory and the Law, *supra* note 66.

<sup>117</sup> See *infra* note 129 and accompanying text.

<sup>118</sup> See, e.g., CHRISTINE PIERCE & DONALD VAN DE VEER, PEOPLE, PENGUINS, AND PLASTIC TREES: BASIC ISSUES IN ENVIRONMENTAL ETHICS (2d ed. 1994).

<sup>119</sup> See, e.g., MARK SAGOFF, THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW, AND THE ENVIRONMENT (1988); see also ROBERT L. NADEAU, THE WEALTH OF NATURE: HOW MAINSTREAM ECONOMICS HAS FAILED THE ENVIRONMENT (2003) (arguing that environmentalism and economics need to be brought together and asserting the need for an environmentally conscious economic theory); ORG. FOR ECON. COOPERATION & DEV., INTEGRATING ENVIRONMENT AND ECONOMY: PROGRESS IN THE 1990S (1996).

<sup>120</sup> See *supra* note 112 and accompanying text.

<sup>121</sup> It is not possible to attend to stakeholders without attending to stakeholders' concerns. Thus, with respect to the environment, it matters little whether the environment itself is considered a stakeholder or as a resource important to stakeholders; either way, a stakeholder approach demands attention to and respect for the environment. See BILL DEVALL & GEORGE SESSIONS, DEEP ECOLOGY: LIVING AS IF NATURE MATTERED 7 (1985) (explaining some of the challenges associated with developing "ecological consciousness"); see also *supra* note 112 and accompanying text.

A. *The “Separation Thesis” and the Environment*

Addressing environmental concerns from a stakeholder perspective demands addressing the so-called “separation thesis,” or the notion that business and ethics represent distinct functional areas.<sup>122</sup> The term derives from an article by R. Edward Freeman, published a decade after *Strategic Management*, in which he asserts that one of the key problems in business thinking is the view that business and ethics are isolated from one another.<sup>123</sup> This impoverishes both our understanding of business and our understanding of ethics.

In most instances, this type of approach will enhance the efficiency of the organization; one example of this is the compartmentalization of the functional areas of business. In its efficiency, however, it risks missing the big picture. More troubling, it can leave out altogether certain functional areas that do not contribute obviously to the bottom line, one of which is ethics. In terms of business and ethics, the “separation thesis” implies that business and ethics are distinct and non-overlapping;<sup>124</sup> business is concerned with the financial bottom line without consideration of ethics, while ethics is concerned with individual adherence to moral norms devoid of the contingencies of business.<sup>125</sup>

The separation thesis as it relates to business and ethics is mistaken chiefly because the firm’s bottom line is influenced by a multitude of interrelated decisions and effects,<sup>126</sup> most of which are associated with significant ethical concerns. The same holds true for issues involving the natural environment, where, again, the effects of decisions are multiple, interrelated, and embedded with ethical concerns.

A variation of the separation thesis also impedes proper understanding and application of law. In reference to business, the most common references are to “corporate law,” as if it were a separate and discrete body of law. Although often regarded as relating only to internal governance, it

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<sup>122</sup> See R. Edward Freeman, *The Politics of Stakeholder Theory: Some Future Directions*, 4 BUS. ETHICS Q. 409, 412-14 (1994).

<sup>123</sup> See *id.* at 413 (arguing that commentators should “drop[] the idea that we can meaningfully talk about business and ethics by keeping the concepts, ideas, and theories of each autonomous”).

<sup>124</sup> *Id.* 412-14.

<sup>125</sup> See *id.*

<sup>126</sup> See *supra* Part II.C-D (discussing the stakeholder and relationship views of the firm, both of which recognize that more than just stockholder concerns affect the firm’s bottom line).

in fact involves both internal and external relationships.<sup>127</sup> The reality is that the laws of the United States are overlapping and interconnected, just as are the relationships that comprise business.<sup>128</sup> Thus, while “corporate law” refers to those laws specific to the creation of and organization of corporations and their agents, it coexists alongside other federal and state legislation. Viewed from this angle, it is clear that “the law” is not partial to stockholder primacy; in fact, there are innumerable examples of instances where the interests of specific stakeholders are prioritized over the interests of stockholders.<sup>129</sup> An example of this occurred in the case of *Shlensky v. Wrigley*,<sup>130</sup> where the court upheld the right of managers to choose not to install bright lights in a baseball stadium—which would have been bothersome and offensive to neighbors—even though they would seemingly have had a positive impact on profitability by increasing the number of games that could be played.<sup>131</sup>

The “separation thesis” fails as a successful operative principle regarding business and its legal environment.

### B. *Three Fundamental Questions*

If the separation thesis is false and business and the natural environment are as tightly conjoined as business and ethics, then at least three questions about how firms can and/or should address the environment in their business decision-making arise.

#### 1. Is it Permissible for Firms to Contribute Resources to Environmental Efforts?

This question addresses the permissibility of firms considering the natural environment in their strategic planning, in particular with

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<sup>127</sup> See Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (with Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1282 (2001) [hereinafter Greenfield, *Ultra Vires Lives*] (“[T]he notion that the obligation to obey the law is at the heart of the corporate contract means that corporate law cannot be thought of as concerned only with the internal governance of the firm.”).

<sup>128</sup> See *id.* at 1282-83.

<sup>129</sup> Radin, *Stakeholder Theory and the Law*, *supra* note 66, at 338-47 (noting specific legislation such as the Foreign Corrupt Practices Act, the Americans with Disabilities Act, and the Family Medical Leave Act). *But see* Freeman, *supra* note 122, at 415-18 (calling for new corporate laws that would generally mandate consideration of stakeholder interests).

<sup>130</sup> 237 N.E.2d 776 (Ill. App. Ct. 1968).

<sup>131</sup> *Id.*

regard to the influence of the environment and considerations linked to sustainability on short-term profitability. It also introduces the legitimacy of redirecting funds that would otherwise be channeled toward stockholders or other direct business purposes, and the permissibility of investing in research in areas such as alternative energy sources, engaging in costly waste reduction procedures, manufacturing lower margin environmentally-friendly products, and so forth.

While a stockholder approach to this question might simply focus on the bottom line, a relational stakeholder approach devoid of the “separation thesis” would charge that firms are morally responsible for the environment as a legitimate stakeholder. It would claim, moreover, that a firm has reciprocal relationships with a wide range of stakeholders who care about the environment and that these concerns warrant the firm’s attention to environmental issues. Further, short-term costs can be outweighed by long-term financial benefits.

2. Is it Consistent with Existing Laws for Firms to Contribute Resources to Environmental Efforts?

This question asks whether it is legal for firms to contribute resources to environmental efforts. In doing so, it draws attention to laws linked to corporate governance that allow for and require significant managerial discretion. In addition, specific environmental regulations explicitly require attention to the environment, and it can easily be argued that investment in the environment is consistent with the spirit of those regulations and other laws that prioritize attention to specific categories of stakeholders.

Since companies hire managers in lieu of robots in order to access the complex set of values and talents that humans possess, it is beneficial for the firm’s bottom line for decision-makers to be empowered to integrate their inherent moral and strategic intuitions in their business decision-making. Firms have found that attention to such concerns is not inconsistent with profit generation. To the contrary, as numerous examples illustrate, firms increase their profitability and place themselves at a competitive advantage when they take such considerations into account.<sup>132</sup> As pharmaceutical mogul George W. Merck stated: “We try

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<sup>132</sup> See, e.g., *supra* notes 113-14 and accompanying text (discussing LS&Co.’s negotiations to secure more stringent labor laws abroad); Daniel Fisher, *GE Turns Green*, FORBES, Aug. 15, 2005, available at <http://www.forbes.com/business/forbes/2005/0815/080.html>.

never to forget that medicine is for the people. It is not for the profits. The profits follow, and if we have remembered that, they have never failed to appear."<sup>133</sup> The same holds true for their concern for the natural environment: it makes good business sense to support laws that encourage managerial discretion and creativity with regard to environmental responsibility.

### 3. Could it Be Considered Mandatory for Firms to Contribute Resources to Environmental Efforts?

This question explores the difference between permissibility and obligation. It asks whether firms are obligated to support or enhance the environment, and whether firms need to support other stakeholders who are concerned about the environment. Again, firms are morally and legally responsible to stakeholders based, at least in part, on reliance considerations. Because society relies upon the natural environment and because some natural resources are finite, it is incumbent upon society to carefully steward natural resources. Since firms as an aggregate use substantial amounts of natural resources, and because they often have the power, control, and finances to protect natural resources (when compared with isolated individuals), they are obligated to use their wherewithal to protect natural resources for the benefit of the societies in which the firms are embedded.<sup>134</sup> The extent and manner of these efforts is left to the discretion of individual firms. What can be considered mandatory is that firms have the obligation to consider the ramifications of their behavior on shared resources such as the natural environment.

### C. *Three Guiding Principles*

The answers to these questions such as those above indicate that environmental responsibility on the part of firms is desirable. These

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<sup>133</sup> Raymond V. Gilmartin, Chairman, President, and CEO of Merck & Co., Inc., Innovation, Ethics and Core Values: Keys to Global Success, Address before the Harvard Magazine/Conference Board (Oct. 20, 1998), in 65 VITAL SPEECHES OF THE DAY 209, 210 (1999) (quoting George Merck, former CEO and Chairman of Merck & Co., Inc.). See also Amory B. Lovins et al., *A Road Map for Natural Capitalism*, HARV. BUS. REV., May-June 1999, at 145 (illustrating how environmentally-responsible business decisions translate into profits).

<sup>134</sup> Paul Hawken & William McDonough, *Seven Steps to Doing Good Business*, INC., Nov. 1993 at 79, 80 ("[C]orporations, because they are the dominant institution of the planet, must squarely face and address the social and environmental problems that afflict humankind.").

answers do not, however, specify how this responsibility should manifest itself or to what degree.

1. Firms Are Obligated to Attend to the Environment.

The first principle is straightforward: Firms are obligated to pay attention to the environment. How they do this is their choice, left to their discretion. At a minimum, they must comply with existing rules, regulations, and industry requirements. The reasons for this mandate are twofold.

First, there is the pragmatic view: It is important for firms to attend to stakeholder concerns in order to maintain satisfied stakeholders with whom they are engaged in relationships. Second, they have moral duties based on a principle of “do no harm.”<sup>135</sup> Since firms are aware of their potential for causing harm, the potential harm is to shared resources, and because firms typically have the resources and power to mitigate that harm, they are required to do so.

2. The Nature of a Firm’s Obligation Is Generally Discretionary.

According to this principle, the nature and extent of a firm’s obligation—beyond mere compliance—is largely discretionary. The manner in which a firm responds to environmental concerns is therefore flexible. Environmentally responsible efforts on the part of firms tend to be categorized along a spectrum, displayed in Figure 5, which is both normative and descriptive.<sup>136</sup> At a minimum, firms are morally obliged to “do no harm” and remain in compliance with the law. While not specifically definite, this position encompasses the sort of exploitation that leads to

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<sup>135</sup> See T.M. SCANLON, WHAT WE OWE TO EACH OTHER 224 (1998).

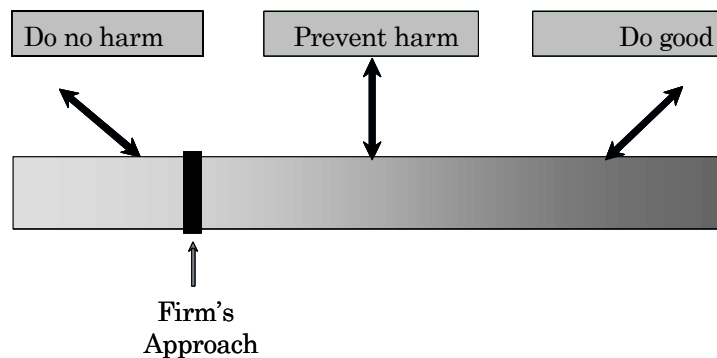
One principle stating our duties in such cases would hold that if you are presented with a situation in which you can prevent something very bad from happening, or alleviate someone’s dire plight, by making only a slight (or even moderate) sacrifice, then it would be wrong not to do so.

*Id.*

<sup>136</sup> It is not uncommon to refer to environmental ethics in terms of “shades of green.” See, e.g., NEIL CUNNINGHAM ET AL., SHADES OF GREEN: BUSINESS, REGULATION, AND THE ENVIRONMENT (2003); R. Edward Freeman et al., *Shades of Green: Business, Ethics and the Environment*, in THE BUSINESS OF CONSUMPTION: ENVIRONMENTAL ETHICS AND THE GLOBAL ECONOMY 339 (Laura Westra & Patricia H. Werhane eds., 1998); Kate Rawles, *The Missing Shade of Green*, in ENVIRONMENTAL ETHICS 535 (David Schmidtz & Elizabeth Willott eds., 2002).

tragedies such as “Love Canal.”<sup>137</sup> It does not mean that firms are not permitted to partake in the earth’s resources, but that they should do so moderately and in accordance with existing laws.

FIGURE 5  
Shades of Green



In the indeterminate middle is the notion that some firms choose to be proactive in deciding to prevent harm while others are merely reactive. The proactive approach considers investments in research, waste management, development of environmentally responsible products, and so forth. A number of companies have engaged in this approach and have adopted systemic product and/or process redesigns to make positive contributions to society and the environment.<sup>138</sup> While some companies engage in such undertakings because they consider it their moral obligation, others do so for self-interested reasons and find that doing so gives them a competitive advantage.<sup>139</sup>

<sup>137</sup> See Eckardt C. Beck, *The Love Canal Tragedy*, EPA J., Jan. 1979, <http://www.epa.gov/history/topics/lovecanal/01.htm> (discussing the effects of the chemical pollution and the protective measures put in place by various legislation).

<sup>138</sup> See, e.g., Peter Day, Presenter, BBC Radio 4 and BBC World Service, General Electric Goes Green, <http://news.bbc.co.uk/1/hi/business/4204194.stm> (last updated Sept. 1, 2005) (describing General Electric’s “Ecomagination” project).

<sup>139</sup> *Id.*

3. There Are Circumstances That Create Mandatory Obligations for Firm Behavior Toward the Environment Beyond Mere Compliance.

The third principle suggests that there are situations where a firm's obligation could be considered mandatory. Such situations are not the norm, but occur in circumstances when a particular firm is specially suited for the role.

In general, it is unusual for society to impose positive obligations, particularly on firms. Firms represent voluntary participation in the economy. In other words, investors and owners are motivated to participate generally by the opportunity to profit from certain enterprises. It is therefore generally considered inappropriate to impose correlative burdens that might detract from investment in such enterprises and thereby interfere with the economy.

At the same time, some degree of responsibility needs to be assigned in order to remedy harm or potential harm. Economists such as Ronald Coase<sup>140</sup> and Guido Calabresi<sup>141</sup> have argued in favor of efficiency in lieu of attempting to identify fault. According to their views, what matters is identifying the entity that can most efficiently resolve a problem, not necessarily the one that contributed the most or bears the greatest responsibility.

Coase has argued that firms exist only because of their inherent efficiency.<sup>142</sup> It would seem, then, that coordinated and/or collective corporate initiatives will and should arise when they are recognized as more efficient than costly alternatives.<sup>143</sup> Further, Calabresi has asserted that an effective and efficient way of dealing with harm is to impose the burden on the individual or entity who or which is in the best position to discover the problem and most cheaply avoid harm.<sup>144</sup> In fact, while it can be argued that we all aware of environmental harm, corporations are in the best

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<sup>140</sup> See Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937) (arguing that firms emerge because of their efficiency when intra-firm transactions are more efficient and less costly than external transactions).

<sup>141</sup> See, e.g., GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970).

<sup>142</sup> Coase, *supra* note 140, at 390-98.

<sup>143</sup> While it may be costly and inefficient for a single corporation to take responsibility for the natural environment, as more corporations participate in sustainability efforts, the pendulum swings. It may become more costly not to participate, particularly if customers and other stakeholders recognize the importance of sustainability.

<sup>144</sup> See generally CALABRESI, *supra* note 141.

position to avoid such harm because they are the ones engaging in some of the most destructive behavior. It would thus seem logical and appropriate to impose on corporations a mandatory obligation beyond mere compliance when they are specifically in the best position to avoid the harm.

This leads to a set of criteria that can frame those situations in which there can be construed a mandatory obligation for environmental responsibility.<sup>145</sup> First, there must be a specific need for change as manifested in actual or foreseeable harm. Second, there must be proximity, through either a direct or indirect link; the firm must be a participant in the problem or a direct beneficiary. Third, the firm must have the capability to change products or processes without it becoming overly cumbersome to the firm. Lastly, there must be some sort of comparative advantage. The firm must be particularly situated to address the harm. When these four criteria are met, it can be said that a firm has a specific obligation to engage in environmentally responsible behavior to address harm to the natural environment.

#### *D. Sustainability and Fiduciary Duties*

Corporations often resist the imposition of mandatory duties, particularly those that appear to challenge the primary fiduciary duty (trust-based obligation) managers have to stockholders. This resistance manifests itself as a pervasive corporate reluctance to address a wide range of social issues that corporations are well suited to address. On the one hand, it seems reasonable for managers to construe their fiduciary duties narrowly in terms of profit maximization. At the same time, however, responsible managers cannot reasonably escape consideration of the stakeholder concerns that indirectly (if not directly) affect the bottom line.

Further, managers can actually leave stockholders vulnerable to legal liability by not paying close attention to stakeholder concerns through corporate violations or neglect. On this basis, Cynthia A. Williams and John M. Conley have argued that managers are responsible for considering human rights for example.<sup>146</sup>

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<sup>145</sup> For a similar approach to mandatory duties in the area of corporate responsibility, see generally Thomas W. Dunfee, *Do Firms With Unique Competencies for Rescuing Victims of Human Catastrophes Have Special Obligations? Corporate Responsibility and the AIDS Catastrophe in Sub-Saharan Africa*, 16 BUS. ETHICS Q. 185 (2006).

<sup>146</sup> Williams & Conley, *Human Rights*, *supra* note 27 (“Given the continuing vitality of ATCA litigation, directors’ fiduciary duties now include a duty to be aware of human rights risks and potential violations within a company’s global operations and to develop policies and management procedures to reduce the risks of such violations.”).

Not unlike stakeholders, the manager's ancillary duties sometimes seem unrelated to the firm. Just as with attention to stakeholder concerns, however, managers are remiss if they overlook or minimize the importance of those duties. Examples of such duties include the oversight to make sure companies are good neighbors, are providing jobs for people in the locales in which companies are situated, and are making sure to contribute to (or at least not diminish) the physical infrastructure of their host communities. Another important duty managers have is to make sure their companies positively influence (or at least are not diminishing) the natural environment.

In all situations, managers have fiduciary duties indirectly related to their duty to stockholders. This is so for no other reason than that managers must be concerned with the well-being of stockholders, and that stockholders can be held legally liable for their neglect of the surrounding community or the natural environment.<sup>147</sup>

In short, the environment is an inescapable business concern today.<sup>148</sup> While corporate responses are currently voluntary, the responsibilities of corporate managers are not: they are imperative. As Bruce Ledewitz warns:

The state of the world is not good, or, since the world will be here long after we're gone, I should say the state of the world upon which people depend is not good. Long predicted and feared environmental problems are now cascading upon us. Not a day goes by, it seems, without news of catastrophic global warming or collapsed fisheries or depleted resources or diminished topsoil or lack of fresh water or diminished biological diversity—and on and on.<sup>149</sup>

If Ledewitz is correct that the natural environment is being harmed by large-scale human actions, then corporations are likely to be held accountable, and this imposes on managers a moral duty based on their fundamental fiduciary obligation to stockholders to protect the natural

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<sup>147</sup> Cindy A. Schipani, *Taking it Personally: Shareholder Liability for Corporate Environmental Hazards*, 27 IOWA J. CORP. L. 29, (2001) (arguing the importance of corporations taking environmental considerations into account, even in the absence of specific laws, because law is a moving target). Since the 1990s, there has been criminal enforcement of American environmental statutes. See Silecchia, *supra* note 46, at 583-84.

<sup>148</sup> BUCHHOLZ, *supra* note 18, at 2. See also Monsma & Buckley, *supra* note 29.

<sup>149</sup> Bruce Ledewitz, *The Constitutions of Sustainable Capitalism and Beyond*, 29 B.C. ENVTL. AFF. L. REV. 229 (2002).

environment.<sup>150</sup> Beyond that, failure to address environmental concerns can result in financial distress for the firm, including bankruptcy.<sup>151</sup> If it is the fiduciary responsibility of managers to protect the interests (and profits) of stockholders, the only way they can do that is to consider how the firm affects, and is affected by, the natural environment.<sup>152</sup> Not only can the corporation's approach to sustainability influence short- and long-term profits, the corporation faces expensive tort litigation, while stockholders face criminal sanctions, if the corporation does not behave responsibly.<sup>153</sup>

### *E. Stakeholders, Sustainability, and Citizenship*

To understand fully the manager's responsibilities for the natural environment, it is important to be familiar with the central goal of the environmental movement, that is, the notion of "sustainability."

Sustainability, as it is used here, is the integrated, systemic, lasting effect of attention to the natural environment. It encompasses everything from the local neighborhood to the planet and the well-being of all living things. It emphasizes investments in the future rather than one-time actions. In addition, it reflects a process or way of thinking about environmental issues and responsibilities.<sup>154</sup>

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<sup>150</sup> See, e.g., Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 5 DUKE L.J. 879, 882 (1988) ("The fiduciary's duties go beyond mere fairness and honesty; they oblige him to further the beneficiary's best interests."). Further, "[f]iduciary obligation has a number of characteristics that classify it among the law's most exotic species." *Id.* at 923.

<sup>151</sup> Joanne Grossman & J.T. Smith, *Winning Strategies: Beating the Odds When You're Betting the Company*, CORP. LEGAL TIMES, Oct. 1997, at 42. See also Russ Banham, *Hazards of the Deal*, CFO MAG., May 2000, at 91 (pointing out that firms are now investing in insurance because of the recognized risks linked to environmental concerns).

<sup>152</sup> See, e.g., Shameek Konar & Mark A. Cohen, *Information as Regulation: The Effect of Community Right to Know Laws on Toxic Emissions*, 32 J. ENVTL. ECON. & MGMT. 109, 112 (1997) ("Green consumers' may decide to boycott products of high polluting firms or otherwise look for alternatives."). It is, therefore, essential for managers to take these sorts of considerations into account if, for no other reason, because they have a significant impact on the corporation's bottom line.

<sup>153</sup> See Nancy K. Kubasek et al., *The Role of Criminal Enforcement in Attaining Environmental Compliance in the United States and Abroad*, 7 U. BALT. J. ENVTL. L. 122 (2000).

<sup>154</sup> See BRIAN NATTRASS & MARY ALTOMARE, *THE NATURAL STEP FOR BUSINESS: WEALTH, ECOLOGY AND THE EVOLUTIONARY CORPORATION* 29 (1999) ("It may not be possible to do everything you would like to do right away, but at least make a start and do what you can—now!").

Sustainability is similar to stakeholder thinking (particularly the relationship view of stakeholder theory) in that both build upon existing relationships, interconnectedness, and synergies.<sup>155</sup> The key concept in both is the notion of “systems thinking,”<sup>156</sup> which provides both the rationale for why corporations need to pay attention to sustainability and the ways they might go about doing so.<sup>157</sup> Each corporation is itself embedded in a web of relationships, and at the same time, part of a “networked economy.”<sup>158</sup> Stakeholder thinking and sustainability also overlap with the concept of “citizenship,” which concentrates on the responsibilities of individuals in social (community-based) and political systems.<sup>159</sup> The emphasis here lies on the individual’s rights and responsibilities as they are derived from the individual’s affiliation with particular communities or social systems. According to this understanding, protection of the non-human natural environment reflects a common concern regarding resources shared by a social system or systems. As a result, the responsibility likewise becomes shared by the citizens of a particular place.

At present, individual citizenship has made room to accommodate corporate citizenship. Borrowing from common understandings of individual citizenship, the notion of corporate citizenship holds that business organizations have rights and responsibilities comparable to those of individuals.<sup>160</sup> This means that corporate citizens are expected to contribute

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<sup>155</sup> See Benedict Sheehy, *Scrooge—The Reluctant Stakeholder: Theoretical Problems in the Shareholder-Stakeholder Debate*, 14 U. MIAMI BUS. L. REV. 193, 240 (2005) (“The current and expanding stakeholder views may permit us to limit the externalizing of social and environmental costs done in favor of maximizing shareholder wealth, and ultimately save our planet from destruction by the reluctant shareholder.”).

<sup>156</sup> See, e.g., JEFFREY PFEFFER, *THE HUMAN EQUATION: BUILDING PROFITS BY PUTTING PEOPLE FIRST* (1998); Alexander Laszlo & Stanley Krippner, *Systems Theories: Their Origins, Foundations, and Development*, in *SYSTEMS THEORIES AND A PRIORI ASPECTS OF PERCEPTION* (J. Scott Jordan ed., 1998); Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1195 (2002) (“Team production analysis of the corporation begins by recognizing that corporate production often requires inputs from a number of different groups. Shareholders alone cannot make a firm—creditors, employees, managers, and even local governments often must make contributions in order for an enterprise to succeed.”).

<sup>157</sup> See, e.g., Alyson C. Flournoy, *In Search of an Environmental Ethic*, 28 COLUM. J. ENVTL. L. 63 (2003).

<sup>158</sup> Gary S. Guzy, *Reconciling Environmentalist and Industry Differences: The New Corporate Citizenship “Race to the Top”?*, 17 J. LAND USE & ENVTL. L. 409, 414 (2002).

<sup>159</sup> See SIMON ZADEK, *THE CIVIL CORPORATION: THE NEW ECONOMY OF CORPORATE CITIZENSHIP* (2001).

<sup>160</sup> See, e.g., Carey, *supra* note 57.

to the communities in which they operate and to be considerate of their interactions with other community members. By implication, this means that they are expected to be respectful of the claims of others with regard to the use of natural resources and the shared reliance on the environment. Corporate citizens take on these sorts of responsibilities, not necessarily because of particular feelings about the natural environment, but because of the recognized interdependence of community members and the need for an overall respect for such shared, finite resources.<sup>161</sup>

#### IV. STAKEHOLDERS, THE ENVIRONMENT, AND GOOD BUSINESS DECISION-MAKING

A key contribution of stakeholder thinking to environmentalism and sustainability is the way it assigns responsibilities to firms. Stakeholder thinking is particularly helpful in showing the webs of moral and legal duties that intersect. Stakeholder thinking also reveals how firms have moral responsibilities to stakeholders in general.<sup>162</sup>

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<sup>161</sup> For examples of this progressive corporate law, see Greenfield, *Ultra Vires Lives*, *supra* note 127; Williams & Conley, *Human Rights*, *supra* note 27. See also Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250-51 (1999) (contending that, since “corporate assets belong not to shareholders but to the corporation[,]” all stakeholders share “an interest in [the] enterprise’s success”).

<sup>162</sup> See, e.g., JOSHUA DANIEL MARGOLIS & JAMES PATRICK WALSH, *PEOPLE AND PROFITS? THE SEARCH FOR A LINK BETWEEN A COMPANY’S SOCIAL AND FINANCIAL PERFORMANCE* (2001); LYNN SHARP PAINE, *VALUE SHIFT: WHY COMPANIES MUST MERGE SOCIAL AND FINANCIAL IMPERATIVES TO ACHIEVE SUPERIOR PERFORMANCE* (2003); Sandra A Waddock & Samuel B. Graves, *The Corporate Social Performance-Financial Performance Link*, 18 STRATEGIC MGMT. J. 303 (1997); see also Marc Gunther, *Tree Huggers, Soy Lovers, and Profits*, FORTUNE, June 23, 2003, at 98 (contending that, even in the absence of abundant empirical evidence, there are strong arguments in favor of corporate social responsibility, particularly with regard to sustainability and the natural environment).

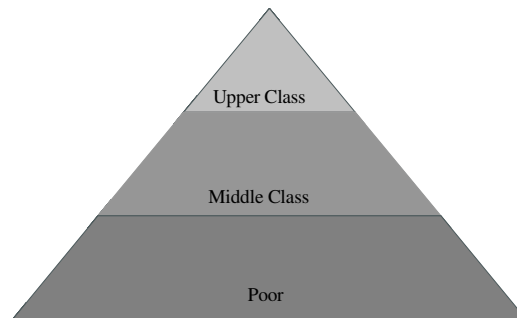
The lack of hard evidence doesn’t mean the theory of corporate responsibility is wrong. If reputation and brand matter as much as experts say, companies with a mission that goes beyond making money will do better when it comes to recruiting, retaining, and engaging their workers and attracting loyal customers.

*Id.* at. 104. See also Radin, *Chiquita Brands*, *supra* note 115 (illustrating the interconnectedness between environmental concerns, social responsibility in general, and good business practices). In the example of Chiquita, that company’s change in perspective (in terms of becoming environmentally responsible) has caused tremendous fallout throughout the entire banana industry, namely that expectations are evolving to virtually require similar approaches be taken by Chiquita’s competitors; however, Chiquita now has a head start. See *id.*

An important aspect of linking stakeholder theory to the environment emerges in its challenge to conventional ways of thinking about business. Discussions about sustainability and the environment emphasize the multiple ways business negatively influence the biosphere using their current practices. This invites discussion about innovative, non-conventional ways of satisfying human wants and needs and challenges prevailing mental models with the potential for new business opportunities. Specific examples illustrate how environmental responsibility can turn into a competitive advantage.<sup>163</sup>

A. *The Bottom of the Pyramid*

FIGURE 6  
Economic Pyramid<sup>164</sup>



One of the chief proponents of the need to reconceptualize business strategy is C.K. Prahalad, who argues that the oft-assumed target of business is misplaced.<sup>165</sup> Prahalad maintains that most businesses focus on

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<sup>163</sup> See, e.g., Pratima Bansal, *Evolving Sustainably: A Longitudinal Study of Corporate Sustainable Development*, 26 STRATEGIC MGMT. J. 197 (2005); see also Gunther, *supra* note 162, at 98 (“When DuPont makes a strategic decision, . . . the company poses a question . . . [that] should be on every 21st-century CEO’s agenda: ‘How do you bring the economics together with the environmental and societal needs so that they are all part of your business strategies?’”).

<sup>164</sup> For a more detailed depiction of the “economic pyramid,” see C.K. PRAHALAD, *THE FORTUNE AT THE BOTTOM OF THE PYRAMID: ERADICATING POVERTY THROUGH PROFITS* 4, fig.1.1 (2005).

<sup>165</sup> See *id.*

providing goods and services to the middle and upper class and overlook the poor.<sup>166</sup> Using real-world examples, he argues that the poorest socioeconomic group affords businesses with tremendous opportunities in terms of profit, market penetration, global expansion, and so on. In economic terms, as the pyramid in Figure 6 illustrates, the poor represent a lucrative and virtually untapped resource for businesses. In Prahalad's words:

If we stop thinking of the poor as victims or as a burden and start recognizing them as resilient and creative entrepreneurs and value-conscious consumers, a whole new world of opportunity will open up. Four billion poor can be the engine of the next round of global trade and prosperity. . . . What is needed is a better approach to help the poor, an approach that involves partnering with them to innovate and achieve sustainable win-win scenarios where the poor are actively engaged and, at the same time, the companies providing products and services to them are profitable.<sup>167</sup>

Prahalad's suggestion merits serious consideration because there are many more people at the bottom of the pyramid than elsewhere, especially at the top.<sup>168</sup> In addition, many of the poorest people have fundamental needs that can be addressed without large capital investments. These can be satisfied in many instances by the economies of scale afforded by globalization, for example. Moreover, attention to the poor helps elevate the standards of the socioeconomically disadvantaged to not only alleviate widespread hardships, but also to potentially relieve the stress on social welfare systems.

Muhammad Yunus echoes many of Prahalad's sentiments, and he gives testimony to the wealth of profits that can be generated at the bottom of the pyramid through his experience with Grameen Bank of Bangladesh. This micro-credit institution elevates the status of impoverished people, especially women, by making small loans without the requirement of collateral.<sup>169</sup> The community itself is collateral. Although

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<sup>166</sup> See *id.* at 1-4.

<sup>167</sup> *Id.* at 1-4.

<sup>168</sup> See *id.* at 4. But see Aneel Karnani, *Fortune at the Bottom of the Pyramid: A Mirage 2* (Ross School of Bus., U. of Mich., Working Paper No. 1035, 2006) (asserting that viewing the poor as "consumers" is insufficient; to make a difference, the poor must be turned into "producers").

<sup>169</sup> Grameen Bank, <http://www.grameen-info.org/bank/index.html> (last visited Mar. 1, 2007).

the system is at the same time simple in concept and complex in its rendering, the underlying premise is that poor people have skills that are underutilized because of their lack of capital. By providing them with capital, poor people are able to act on their potential, and this thereby facilitates the prosperity of their families and, by extension, their communities. By most accounts, the Grameen Bank is regarded as a tremendous success, and the notion of micro-lending has spread worldwide.<sup>170</sup> Grameen has done well as an institution, too, in that during the three years between 2002 and 2005, the bank's assets nearly doubled from \$361 million to \$678 million.<sup>171</sup> As of 2005, the bank boasted 5.58 million borrowers, 1,735 branches, and a 21.22% return on equity.<sup>172</sup>

### B. *Cradle-to-Cradle*

While Prahalad and Yunus provide examples from less developed countries, William McDonough offers an alternative perspective on how organizations can approach sustainability with an eye toward profits in developed countries such as the United States. He advocates what he calls a "cradle-to-cradle" approach that is essentially a comprehensive redesign of products and/or processes.<sup>173</sup> In contrast to traditional "cradle-to-grave" approaches where resources are used once and then discarded, the cradle-to-cradle approach advocates the use of perpetually recyclable or compostable materials.<sup>174</sup> According to McDonough, "Pollution is a symbol of design failure," and ways to reduce wasteful pollution are ways to increase production efficiency.<sup>175</sup>

Small and large companies alike have adopted McDonough's approach to sustainable business.<sup>176</sup> One of the most impressive examples of the implementation of his approach is the site restoration of Ford Motor

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<sup>170</sup> See generally Kofi A. Annan, The U.N. Secretary General Messages on the Lunch [sic] by H.E. The Prime Minister Of Bangladesh of the International Year Of Microcredit (n.d.), <http://www.grameen-info.org/Media/mediadetail2.htm>.

<sup>171</sup> Past Nine Years of Grameen Bank (1997-2005), <http://www.grameen-info.org/bank/nineyearGBTaka.htm> (last modified July 24, 2006).

<sup>172</sup> See *id.*

<sup>173</sup> See Jena McGregor, *William McDonough: Design for Living*, BUS. WK., June 12, 2006, at 18.

<sup>174</sup> *Id.*

<sup>175</sup> Rebecca Smith, *Beyond Recycling: Manufacturers Embrace 'C2C' Design*, WALL ST. J., Mar. 3, 2005, at B1 (quoting William McDonough).

<sup>176</sup> See *id.*

Company's River Rouge Complex in Michigan, which reflects cradle-to-cradle thinking throughout the entire facility.<sup>177</sup> Kodak's single-use camera is another example of cradle-to-cradle product design.<sup>178</sup> In this case, Kodak redesigned its production system to account for the entire life cycle of cameras. Kodak now not only produces cameras, it also recovers them at the end of their lifecycle in an elaborate continuous loop system.<sup>179</sup>

Not unlike Prahalad's "Bottom of the Pyramid" and Yunus' Grameen Bank, McDonough's "cradle-to-cradle" design reconceives the notion of a business externality. Manufacturers often create cost reductions by pushing nonessential processes onto society by rendering them external to the company (hence the term "externality"). Waste, for example, may be externalized in this manner as pollution. McDonough, in contrast, espouses the view that companies can and should take ownership of their processes.<sup>180</sup> He thus shows companies how to internalize processes formally considered waste-producing.<sup>181</sup> Accordingly, he argues that such processes result in win-win situations—long term profits for companies coupled with advances toward sustainability—that benefit society.<sup>182</sup>

### C. *Restorative Commerce*

Perhaps the most dramatic application of McDonough's ideas is found in the "restorative" commercial approach implemented by Interface, Inc. This company, founded by Ray Anderson, is a global leader in the design, production, and sale of carpeting.<sup>183</sup> Unlike other carpet producers, Interface attempts to be a good citizen of the earth by instituting restorative commercial systems.<sup>184</sup> In Anderson's words, "[b]eing restorative means to put back more than we take, and to do good to the Earth, not just no harm."<sup>185</sup> Interface's goals are long-term and, although it is recognized as

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<sup>177</sup> McGregor, *supra* note 173, at 18.

<sup>178</sup> David Newcorn, *Cradle-to-Cradle Catches on*, PACKAGING WORLD MAG., Sept. 2003, at 107, available at <http://www.packworld.com/view-16493>.

<sup>179</sup> *Id.*

<sup>180</sup> See McGregor, *supra* note 177, at 18.

<sup>181</sup> See *id.*

<sup>182</sup> See generally *id.* (describing the environmental benefits and cost savings of the facilities McDonough has designed).

<sup>183</sup> Interface Inc., Who We Are, <http://www.ifsia.com/who/> (last visited Mar. 1, 2007); Interface Inc., Who We Are: Founder, <http://www.ifsia.com/who/founder.html> (last visited Mar. 1, 2007).

<sup>184</sup> Interface Inc., Our Goals, <http://www.ifsia.com/goals/> (last visited Mar. 1, 2007).

<sup>185</sup> ANDERSON, *supra* note 11, reprinted at Ray C. Anderson: An Attempt at Sustainable Development, <http://onlineethics.org/environment/rcanderson.html> (last visited Mar. 1, 2007).

a leader in sustainable business today, the company has not achieved its goals yet. Interface has, nevertheless, made significant progress from the time it was not at all “green.”

It has been only about a decade since Anderson spearheaded an effort to harness technology and transform carpet-making into a process less resource-dependent. The catalyst for this initiative was Paul Hawken’s *The Ecology of Commerce*.<sup>186</sup> Hawken’s words stunned Anderson into recognizing his company’s destructive role toward the environment.<sup>187</sup> As he grew to view himself as a plunderer of the earth’s resources, he immediately set about reducing his company’s petroleum dependence.<sup>188</sup> For Anderson, this sort of approach was not just the morally right thing to do, it was also good for business.<sup>189</sup>

In 2005, Interface introduced a production process that enabled the company to recycle old carpeting.<sup>190</sup> Interface now considers this a

dream come true . . . . We can now mine the landfill instead of siphoning off more oil. But it’s also good business. Now, we’re not just *willing* to take back old carpet, we’re *eager* to take it because Cool Blue [the production equipment responsible for the recycling process] can turn it into profit.<sup>191</sup>

Interface has inherited a rich legacy from Anderson. His company has turned a product into a service, and now, instead of selling carpet tiles, Interface leases them. As carpet tiles wear out, they are replaced and the old tiles are remanufactured as part of an endless loop process.<sup>192</sup> Waste has been reduced and this has dramatically decreased the company’s reliance on raw materials.<sup>193</sup>

The experience at Interface has been tremendously positive. In the five years between 2000 and 2005, Interface tripled its use of recycled or bio-based raw materials and grew its use of renewable energy

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<sup>186</sup> HAWKEN, *supra* note 29 (arguing that a connection exists between the health of the environment and the well-being of the economy).

<sup>187</sup> See ANDERSON, *supra* note 11.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> INTERFACE, INC., FASHION FORWARD: INTERFACE, INC. 2005 ANNUAL REPORT 12 (2005).

<sup>191</sup> *Id.* at 12.

<sup>192</sup> Interface Inc., The Seven Steps: Closing the Loop, <http://www.interfacesustainability.com/seven.html> (follow “closing the loop” hyperlink) (last visited Mar. 1, 2007).

<sup>193</sup> See generally INTERFACE, INC., *supra* note 190, at 12.

from 6.4% to 21.7%.<sup>194</sup> At the same time, it cut its waste (material sent to landfills) by 50%.<sup>195</sup> Net sales are growing and the company is looking healthier and healthier.<sup>196</sup> In the end, Interface exemplifies the value—psychically, environmentally, and financially—of the greening of business.

## V. Bottom Line

All of these examples reflect the value of sustainable business to the financial bottom line of organizations, communities, and the globe. They also illustrate that businesses do not need laws to provide workable models of sustainable business.<sup>197</sup> Moreover, they illustrate how reliance on the law can be problematic in that it remains short-sighted and flawed. While laws might have failed businesses, the inherent problem is not the law: it is the reliance of businesses upon laws and the expectation that legislation can and should determine responsible decision-making.

Moving forward, it is possible to continue to strive to improve the legal framework, but there will virtually always be an inevitable “lag effect.” An alternative is thus to endeavor to influence the norms of acceptable and expected business behavior. Fiduciary duties, prescribed by law, are interpreted according to existing norms. In effect, these norms—the fiduciary duties of managers and corporations—become the foundation for corporations and managers living up to and abiding by society’s standards and expectations.<sup>198</sup>

Environmental responsibility is about justice, not charity. As a corporate citizen that can and does affect the lives of others, the firm has an obligation to act as a responsible citizen by acting in such a way as to protect the natural environment. Furthermore, good business decision-making—decisions that can translate into profits—demands attention to stakeholder concerns about issues such as the environment.

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<sup>194</sup> *Id.* at 12.

<sup>195</sup> *Id.* at 12.

<sup>196</sup> *Id.* at 10-12.

<sup>197</sup> *But see* Greenfield, *New Principles for Corporate Law*, *supra* note 3 (arguing for the adoption of five new foundational principles in corporate law).

<sup>198</sup> *See* Williams & Conley, *Human Rights*, *supra* note 27, at 104.

“Law” presumes enforcement by the state; a “norm” is separate from the state and its enforceability is less certain and more complex. In small-scale societies, things like shaming, fear of bad reputation, and the possibility of needed sustenance being withheld (as in a reciprocal economy) are all robust mechanisms for the enforcement of norms.

*Id.*

It is important to keep in mind that, while corporations are a legal fiction, the individuals who populate them are very real. While the corporation might not care about the environment as human beings do, its stakeholders are dependent upon a habitable environment for their survival. Sustainability, then, is not just the way of the future; it is what will provide a future.