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Lisa Newton

Business Ethics in the Social Context

Law, Profits, and the Evolving Moral Practice of Business

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Prefatory Note

This book comprises teaching materials I began to put together for the sake of my colleagues in Philosophy and other liberal arts disciplines, in the late 1970s and 1980s. Why then, and why them?

The 1960s and 1970s had seen a number of private sector scandals, bribery at home and abroad (Lockheed Aircraft and others), discrimination in hiring and promotion, challenges to product integrity (Goodrich Brakes is a good example), Truth in Advertising (children's television came in for special opprobrium), and the early cases of environmental degradation (Reserve Mining, for instance). Ralph Nader had stirred the country to action with attacks on General Motors and other pillars of the corporate community. Suddenly Business, our hero through the 1950s, reverted in the media to a semblance of the villain excoriated by Marxists in the late nineteenth century and the 1930s. If business is evil because there is something seriously wrong with the entire capitalist endeavor, and the role it plays in American democracy, then we must abolish our present economic system and adopt a better one. No one at the time really wanted to think about that; it was decided that there were a few "bad apples" that had created the bad situations. In that case, what must we do? We must make sure that business students get a good education in Business Ethics, and the American Assembly of Collegiate Schools of Business required that all Business Schools incorporate Ethics in their business curriculum. But who would teach it? The Business faculty had little background in Ethics themselves, rather disliked it in fact, so the Philosophy Departments, with more tenured faculty than needed to offer courses students would take, was brought into the subject. These philosophers, mostly young, of course, had no background in business, but had inherited from their philosophical forebears (starting with Aristotle) a fine contempt for the system and its practitioners. Their education was not helped by the fact that the early textbooks in business Ethics, written by philosophers, tended to cast business as the villain in the plot from the beginning.

I put together these materials to address both those problems. I wanted to show my philosophical colleagues that, properly understood, the practice of business had a fine logical and ethical foundation, and enabled real improvement in the welfare and dignity of the individual and an increase in justice and equality in the society. Business was grounded in ethics, and morally worthwhile, especially from the

perspective of individual responsibility, from which I began all my work in ethics. But then, of course, as I brought the story of business to the present day, I went on to show how legal and economic development had produced a new situation, a new kind of corporate governance unimaginable in the time of Adam Smith, which lent itself to the kinds of abuses still associated with American business. (Enron comes to mind; within a decade of Enron, we had seen the undermining of all the assumptions that grounded of our financial system, leaving us climbing out of an economic hole of significant depth. But all that was in the future).

The problems of corporate wrongdoing, usually blown out of proportion, tend to land on the front pages of our newspapers (not to mention CNN), so the audience for a work that considers the ethical foundations of the business system has grown beyond my bewildered junior colleagues to include the intelligent citizenry. I have undertaken, in the present volume, to write in a manner readable by all, and trust that those beyond the walls of academia will find it as accessible as those within.

Introduction: The Nature of this Text

This is a book for those new to, or newly interested in, the subject of business ethics, the systematic examination of the ethical duties binding upon the practice of business. The subject has experienced something of a revival recently; possibly the unexpected reversals in the financial sector contributed to such new interest. There is no intention to present a comprehensive or detailed treatment of the subject; the discussion is necessarily simplified in the interest of brevity, and the cases selected are simply typical of the encounters between corporations and the general ethical principles that govern the practices of American business, free enterprise capitalism, operating in a democracy. This work is not a substitute for, or product of, a management workshop, with take-aways for practical application on the job; rather, it is an invitation to reflect on the progress, strengths, and vulnerabilities of the private sector in its operations, primarily in the United States.

The guiding perspective for this work is *personal responsibility*: the trait that allows a good citizen and a moral person to take ownership of the choices he or she has made, to be able to account to others for those choices, and to take an active part in dealing with their consequences, especially in those cases, increasingly frequent in an increasingly technological civilization, where the consequences are unexpected and possibly harmful to human health, economic interests, or the flourishing of the natural environment.

We will begin by taking on (very briefly!) the evolution of business itself as we would recognize it—*work* itself emerging from the despised activity of the slave to become the honorable activity of the burgher (with some stops in the monasteries in between), *private property* becoming the major protection of the liberty of the citizen, and the obligations of *contract*, freely undertaken, replacing the authority of Church and inherited social status. So brought to the modern world (in Chap. 1), we will take on the major categories of obligation for the contemporary business corporation, obligations to the internal constituencies, the employees (in Chap. 2), and obligations to all the external constituencies, especially customers and community (in Chap. 3).

If this overview does nothing more than make it possible for the reader to understand the latest controversies in the popular press, it will have achieved its purpose. But the subject of business ethics is fascinating in and by itself; possibly that reader might want to continue exploring the rich and varied literature in the field. That would be a consummation devoutly to be wished.

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Chapter 1
Can Business Be a Moral Enterprise?

Abstract The development of what we know as business is traced: from Aristotle's contempt for all economic enterprise, through the Christian redefinition of "work", into the Enlightenment with Adam Smith, into the United States with Thomas Jefferson and Benjamin Franklin, the Industrial Revolution, and the emerging centrality of the corporation. In the foundations of the financial system, the problems that struck in the 21st century can be glimpsed.

Keywords Aristotle · St. Benedict · Martin Luther · Jeremy Bentham · Adam Smith · Thomas Jefferson · Benjamin Franklin · David Ricardo · Work ethic · Free market · Invisible hand · Industrial revolution · Stock exchange · Karl Marx · Corporate social responsibility

Business ethics has often been characterized as an **oxymoron** (a contradiction in terms), and business persons as greedy graspers who will gladly set aside all other values to improve **the bottom line.** (Literally, the final line on the quarterly income statement; figuratively, the net profit or loss in dollar terms for any person or company.) There is little evidence that those who make a living in the business world are any better or worse than those of us who, for instance, teach in college; so why the prejudice? In this section we will try to **set out the moral configuration of business enterprise as a whole, as conceived by philosophers and economists who have tried to understand it as a whole**. We will try to see why we might be disposed to view business as somehow fundamentally good or otherwise, and if business turns out to be a moral enterprise, we will look for the central moral principles on which its goodness rests.

We will conduct this exploration in two series of steps. The **first series** of steps will trace the roots of the inherited moral opposition to business enterprise, the nature of work and the growth of the work ethic, the growth of the city and of commerce, the establishment of the rights of private property and contract, the discovery of the potential of the free market, and the emergence of business as a critical arena of moral growth and accomplishment, a place for the exercise of autonomy, prudence and responsibility. The **second series** will trace the birth of the modern corporation, the effects of the factory system, the separation of

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ownership and control, and the foundations of the moral dilemmas that confront business now.

The first series brings business from the ancient world to the modern.

1.1 From the Ancient and Medieval Worlds to the Modern

1.1.1 Aristotle and the Ancient World's Class System

If there may be a prejudice against the possibility of morality in business bred in our bones, it may be useful first to find out where that prejudice came from (and therefore what of it we should retain in our contemporary critiques of business). The Greek philosopher **Aristotle** (4th century BC), whom we take as the soundest of foundations for the political part of human life, is distressingly insensitive in his views of economics and the market. In the first book of the *Politics*, where he discusses the laws of the **household** (***OEconomica***), he distinguishes the **worthy occupations** by which a man may support his family from the unworthy ones. Hunting in all its varieties is worthy; fighting is worthy; farming and animal husbandry are worthy; ruling is worthy, and certain kinds of crafts will qualify. **All forms of commerce are unworthy**, with retail trade and banking catching the worst opprobrium.

Why banking? because in the practice of **usury** (collecting interest on loans*) it allows money to make more money*, ***"as if cold metal could breed!"*** (*Politics* I, x, 4; 1258b).

Why retail trade? because it focused a man's mind on money, and petty gain, and hoarding, and getting more and more, and all that was thoroughly bad for the character. Crafts, which focused on beauty, were acceptable; farming and herding, which produced necessary food in cooperation with nature, were good; and hunting, with the contest of skill and strength between hunter and prey, was positively enobling, as was any military endeavor.

As a final insult, **Aristotle classifies piracy—freebooting—as a form of hunting**, and therefore a worthy occupation, as if the merchant, along with all his goods and employees, were just another prey animal to be slaughtered for the hunter's glory and livelihood.

Why was Aristotle so intolerant of business folk? On a philosophical level, Aristotle characterized **money-making in all its forms as wrong because it was unlimited.** Natural appetites, good appetites that are required for human sustenance and procreation, are limited; I can eat only so much before I am satiated, and make love only so long before I must sleep. All nature, by extension, is limited: mountains, trees, and animals grow to their proper size and stop; all life is born, flourishes, and dies; winter is followed by spring until the end of time. All evil, as the Greeks understood it, was a type of ***hybris,*** arrogance, overreaching, exceeding the limits set by nature, as if winter should demand and seize the time of spring.

(Every Greek tragedy has the tragic hero, usually with the best intentions in the world, failing to understand his natural limits, overreaching, and thus bringing catastrophe on himself and his land.) But money has no limits. As long as I can add one to any number, wealth can increase. “You can’t be too rich,” we say, and for Aristotle, that saying in itself has to be a mistake: all goodness is established on a **mean,** limit or proportion, and nothing good can be without limit.

Aristotle had other reasons for despising business. The landed aristocracy, to which he belonged (or whom he served), had total contempt for the Athenian merchants, whom they regarded as an alien and inferior race given to taking advantage of honest farmers even as they traded the Athenian crops. Misunderstanding and mistrust between rural areas and urban, farmers and bankers, continues to this day, often with good cause; the interests are fundamentally at odds. In Aristotle’s time, there was the added complication, that Greek merchants tended originally to be native to the Middle East, the area now known as the Lebanon, and were racially distinct from the Hellenes.

Aristotle was not, as is sometimes thought, a “man of his time,” defending a rural and peaceful Athens against the Middle Eastern inroads of the traders; even as he wrote, Athens was a cosmopolitan city with a bustling worldwide trade, carried on by some of the most astute merchants the world has ever known. Aristotle was not describing the society in which he lived, but one that he preferred. Yet his inherited prejudice, against any occupation that dealt not with natural goods but with the institutions that traded in them, carried the day. **The Roman Church** adopted the prohibition on usury, and by doing that, significantly slowed the growth of commerce in the Middle Ages. (In the later development of its teachings on **Social Justice,** the Church developed a more extensive, and much more nuanced, critique of business practices.)

1.1.2 The Monastic Movement and the Work Ethic

At the end of what we know as the Ancient Period in Western History, about A.D. 500, the two social classes that Aristotle knew were firmly in place. There was a **horseback aristocracy,** ruling and fighting and playing and living on the labor of slaves and hired labor, and there was **everyone else**: merchants, craftsmen, farmers, and all manner of workers. Some of the merchants were very rich; but money could not save them from the scorn of the aristocracy—merchants, unlike gentlemen, had to **work** for a living.

Then, in 529 AD, St Benedict founded a Christian monastery at Montecassino. It wasn’t the first celibate colony founded for the purpose of religious retreat and enlightenment (many religious sects had those), but it was one of the first Christian ones, and that made a difference: Benedict’s idea was that instead of (only) begging to support a life of prayer and meditation, his **monks should work in the fields and at other tasks, to teach them humility.** (His model was the arresting figure of Jesus, towel wrapped around his waist, washing the feet of his disciples—the task

assigned to the lowest of the servants in the Judean household.) As a rule for Benedict's monks, the work assignments made sense. At first, most of them were aristocrats, from the ruling class, and working in the fields was the most humiliating thing they could think of. To leap forward almost a millennium, most of the monasteries that were formed in the first 1500 years of Christendom taught their novices that **for the sake of service to the Lord,** it was appropriate to imitate Jesus in the cheerful performance of all useful menial tasks—in short, **to work**. They did this work as part of their **vocation** (literally, "calling," the call directly from God to live in a certain way, to live the life that they felt the Lord wanted them to live), and so the **work, socially characterized as base and degrading, became noble and good.** This ethic, that embraced hard work in the world as something ennobling and even holy, played a vital part in the growth of the commercial and industrial civilization that followed.

1.1.3 The Elements of the New System: Burghers, Contracts, and Private Property

Where did this new civilization come from? Deprived during the Dark Ages of Medieval Europe of the rich urban patrons of the ancient world, skilled craftsmen—builders, carpenters, metalworkers, weavers, tailors, chandlers, glassblowers and the like—had gathered into **guilds** (associations formed for mutual protection and the increased prosperity of the craft, rather along the lines of early trade unions). These guilds established a **town-centered** life (as opposed to the life that centered on the castle of the feudal lord). When prosperity began to return to Europe, toward the end of the 12th century, it created among the wealthier nobles and their families a market for the goods of the Far East—silks and spices, ivory and aromatic woods. A **new class of merchants and traders** arose in the towns, to finance expeditions, by land and water, to the East to obtain these goods, and to sell the goods when they arrived in Europe. (Part of the history of the European Jews begins at this point. Unconstrained by the Aristotelian limits of the Roman Church, Jews could lend money at interest, and were essential as financial backers of these expeditions. If you've forgotten the risks and benefits of this trade, reread William Shakespeare, *The Merchant of Venice.* Note that the Merchant himself was a Christian.)

The merchants, agents and beneficiaries of that prosperity, soon joined the guilds of the craftsmen to form a **new class, a "middle" class between the feudal knights and the serfs who worked the land as tenant farmers.** The merchants set up their headquarters on the trade routes, and the craftsmen joined them. Where trade was heavy, gold was sure to be found, and bandits became interested; it was necessary to put strong walls around these towns to keep the bandits out, and the **burg** (walled town) became the center of business enterprise. (Hence the common name for the middle class, the owners of banks and manufacturing establishments: the *bourgeoisie*, or "burghers".)

What did these merchants have to guarantee that the ship they sent off to very distant ports in the East, with a large amount of their goods and money on board to engage in trade, would return to them, at least if it survived the ocean's storms, and that they would get the profit from the goods brought back? Very little, actually, except the power of the word—the captain's ***promise*** that in return for a salary (or more likely a share of the profit) he would not run off with the goods and sell them somewhere else. The agreement made—*quid pro quo*, mutual promising, an agreement to mutual performance of some specific agreement—was a **contract**. There had been contracts in the ancient world, of course, but through the intervening ages, Europe had relied almost entirely on authority, of Church or Feudal Lord, or tradition, to create obligation and to command performance. But there was **no tradition for the commercial class**; they had to make up their own ways of cooperating. In agreeing on the wording of a contract, merchant and captain **created an obligation**, specific to themselves, where there had been none before. So a series of contracts bound together the banker, who put up the funds for the voyage, the merchant who ordered the goods, the captain who set sail with European products in trade, and the distant merchants in storied lands who supplied the riches of the East for transport. The contract then was a chancy thing at best, with so much time and distance between agreement and performance. But enough of them worked so that the practice, of contract and performance, became an established way to conduct the business of business; by now, it is second nature, and **one of the strongest moral obligations we acknowledge, in or out of business**.

A contract is indeed a powerful thing. We all know about moral obligations—thou shalt do no murder, thou shalt not steal, etc. Moral obligations are **non-optional** (you don't have any choice about being bound by them), and everlasting—as long as families exist, there will be an obligation to take care of the children and honor the father and mother. But a contract *is* optional. You don't have to agree to a contract. But if you do agree, then you are under a very strong moral obligation to fulfill it—all the stronger because it was of your own free will that you made it. In a world whose major ancient institutions were dying or paralyzed in the throes of change, a world flooded with new possibilities, Europe suddenly discovered a moral principle capable of handling novel circumstances, one that could engage human reason to decide the patterns of human conduct. The political philosophers of the modern world carried this notion of contract into the discussion of the moral legitimacy of the state, in **Social Contract Theory,** discussion of which is beyond the scope of this book—but it forms the core of a powerful school of current political philosophy.

1.1.4 Utilitarianism and The Wealth of Nations

Most of the elements of an ethic of business had come together in the Protestant Reformation—**the sanctity of private property, the sanctity of contract, and the availability, through a nascent banking industry that could offer credit**

and collect interest on loans, of money for commercial purposes. Martin Luther, an ex-monk, took notice of the fact that the honest burgher, working to support his family, seemed to be doing exactly what the monks did as part of their vocation. Very well then, **it must be that *every* person had a vocation from God**, to work honestly, to produce excellent products, to earn a living in the sweat of his brow in the way for which he was best fitted. Add to that teaching the release from the Roman Church's prohibition of usury, so that Protestant bankers could now join their Jewish brethren in making commercial loans, and Protestantism dignifies the entirety of the commercial enterprise. A practical, middle-class religion, Lutheranism made enormous strides in the cities. Freed from the domain of the prevailing Church, philosophers also tried to capture the new spirit of Renaissance, Reason, and Enlightenment, and one of the best of them echoed perfectly the **practical calculations of the merchants. This was Jeremy Bentham (1748–1832), the founder of *Utilitarianism***.

Writing about half a century after Locke had established Property and Representative Government on a foundation of Natural Rights, Bentham started afresh. His definitions cut through two thousand years of ethical theorizing, echoing the ethical teaching of Epicurus (about 300 B.C.). This teaching is called **hedonism** (from '*edoni,* pleasure: hedonism is the belief that pleasure is the only good and pain the only evil.) He needed no Divine Command or Natural Law to discern what was right. **If people were made happy, enjoyed pleasure, from something, then it was good. If it caused pain, it was bad.** No agonies of doubt were necessary. People are their own best judges on what is pleasurable or not, so all you have to do is ask them what they like and what they don't like and you'll know what's right and wrong. By "the Common Good" we mean no more than the sum of individual goods. To see if a proposed piece of legislation will serve the Common Good, then, all you need to do is adopt a single unit of pleasure (say, one hour of pleasurable consciousness for one citizen) and apply the **felicific calculus** (a technique of adding units of pleasure and subtracting units of pain to come up with a Happiness bottom line) to get a sum that will tell you not only whether, on balance, the legislation will serve the common good, but also if it will do so better than any alternative.

The moral philosopher and economist **Adam Smith (1723–1790)** proceeded to apply Bentham's assumptions to the marketplace. Let us assume, said Smith, that Bentham is right; that apart from short and rarely significant bursts of **altruism** (the motivation to help others, with no thought for oneself), people are selfish. Most people, most of the time, want to find pleasure and avoid pain for themselves. In the marketplace, that disposition translates into a determined effort to advance one's own interests—to become wealthier, in terms of money, goods, and enjoyments. The fundamental "capitalist act", on this assumption is the **self-interested voluntary exchange** (the willing trade with another for the purpose of advancing one's own interests): two adults, of sound mind and clear purposes, meet in the market place, to which each repairs in order to satisfy some felt need. They discover that each has that which will satisfy the other's need—the housewife needs flour, the miller needs cash—and they exchange, at a price such that the

exchange furthers the interest of each. The **utility** (the increase in wealth brought about by this exchange) to the participant in the free market of the thing acquired must exceed that of the thing traded, or else why would he make the deal? So **each party to the voluntary exchange walks away from it richer.**

We might note at this point that the voluntary exchange, so conceived, perfectly satisfies the three generally accepted primary ethical imperatives, beneficence, justice, and respect for persons: since housewife and miller meet as **equals**, the trade is fair and satisfies the demands of **justice**; since they both choose to engage in the trade of their own **free choice**, and either could walk away from the deal, it satisfies the criterion of liberty, or **respect for persons**; and since they both increase their **welfare** by the trade, it satisfies the measure of **beneficence**. This kind of trade is ethical without qualification.

Adding to the value of the exchange is the **competition** of dealers and buyers; because there are many purveyors of each good, the customer is not forced to pay exorbitant prices for things needed (it is a sad fact of economics, that to the starving man, the marginal value of a loaf of bread is very large, and a single merchant could become unjustly rich. Note, this consideration of justice is what makes very high prices for essential goods after a catastrophe has disrupted normal markets, or "price-gouging," morally wrong). Conversely, competition among the customers (typified by an auction) makes sure that the available goods end in the hands of those to whom they are worth the most. So at the end of the market day, not only does everyone go home richer (in real terms) than when he came—the voluntariness of the exchange ensures that—but also, as rich as he could possibly be, since he had available all possible options of goods or services to buy and all possible purchasers of his goods or services for sale.

Sellers and buyers win the competition through high **efficiency** (ratio of quantity and quality of production to the costs of production: "the bang for the buck"), through producing the best quality goods at the lowest possible price, or through allotting their scarce resources toward the most valuable of the choices presented to them. It is to the advantage of all participants in the market, then, to strive for high efficiency, i.e. to keep the cost of goods for sale as low as possible while keeping the quality as high as possible. Adam Smith's most memorable accomplishment was to recognize that the general effect of all this self-interested scrambling would be to make the most possible goods of the best possible quality available at the lowest possible price. Meanwhile, sellers and buyers alike must keep an eye on the market as a whole, adjusting production and purchasing to take advantage of fluctuations in **supply and demand**. Short supply will make goods more valuable, raising the price, so the producers will make money; and that will bring more suppliers into the market, whose competition will lower the price, to just above the cost of manufacture for the most efficient producers. Increased demand for any reason will have the same effect. Should demand exceed supply, the price will rise until only as many buyers as there are products will be able to afford them. Should supply exceed demand, the price will fall to a point where the goods will be bought. Putting this all together, Smith realized that in a system of free enterprise, you have demonstrably the best possible chance of finding for sale

what you want, in good quantity and quality, at a reasonable price. Forget benevolent monarchs ordering things for our good, he suggested; in this system we are led as by an **"invisible hand"** to serve the common good even as we think we are being most selfish.

Smith pointed out that certain **virtues** (excellences; traits of character that enhance an individual's ability to perform his duties, live well and serve the public good) are presupposed by the operations of the free market. The whole system will not work at all unless the participants are **honest** in word and deed. That is, they tell the truth, especially about the invisible properties of their products for sale, they pay their debts and honor their contracts. The capitalism that he describes will not, in fact, work for very long unless the participants are **rational** (for these purposes, people are "rational" if they know what their own interests are and are not often subject to emotional outbursts that interfere with acting on them), **prudent** (foresighted, able to set aside present gratification for long term profit), **industrious** (hard-working, not lazy), **temperate** (moderate in their demands, not greedy), **thrifty** (or frugal, strongly disposed to save money; a kind of prudence), and for the most part in possession of some saleable skill that they can use to make a living. Above all they must be **responsible**: willing to follow up on their commitments and keep their contracts, making sure that their goods are as described and do no harm to anyone, and taking a full and active part to protect the community that underlies their own and their neighbors' business endeavors.

1.1.5 Benjamin Franklin and the Bourgeois Tradesman

Adam Smith's theory of economic enterprise and the "wealth of nations" came from a combination of the Natural Law tradition of the 17th and 18th century (exemplified by John Locke) and the empirical tradition represented by Jeremy Bentham. Locke was needed to establish the sanctity of Property and Contract; Bentham to establish the priority of self-interest in human relations. Smith translated the conclusions as so many elaborations of the Natural Law: the Law of Supply and Demand, which links supply, demand, and price; the law that links efficiency with success; and ultimately, the laws that link the absolute freedom of the market with the absolute growth of the wealth of the free market country.

The point of it all was **liberty**, or freedom—the natural liberty that every human had from God and Nature, and the liberty of exchange in the free market that would increase the wealth of the nation without limits. It is no accident that the currents of liberty, political and economic, came together in the English colonies in the New World. The colonies had been settled first as a business enterprise (the companies that colonized Virginia and Massachusetts Bay expected to make a profit trading the products of the New World), then become a refuge for Protestant burghers of various traditions (English Separatists, French Huguenots), and rapidly came to see themselves as an experiment in freedom. **The ferment of freedom came to a head simultaneously in several ways: recall that the year 1776 saw**

the publication of Bentham's *Fragment on Government* (an unsparing critique of the monarchy), Adam Smith's *The Wealth of Nations*, and the American Declaration of Independence.

The American colonists who agitated most for independence were the wealthy businessmen (like John Hancock) who found British taxation cutting severely into their profits. But the ethic of American business had been laid down 40 years previously, in the widely read issues of *Poore Richard's Almanack* by Benjamin Franklin (1706–1790). The Almanacs contain some tracking of the stars, predictions of eclipses, and remarks on the weather; but in the "vacancies" between the stars, Franklin provides a **strong restatement of the work ethic**, along with assurances that work will provide prosperity. "Keep thy shop, & thy shop will keep thee", he advised. He had no use for laziness: "Employ thy time well, if thou meanest to gain leisure", "Be always asham'd to catch thy self idle," and was sure that honest toil would always yield prosperity. The time invested in apprenticeship was well worth it; "He that hath a Trade, hath an Estate." In such proverbs, aphorisms, and sage advice on a multitude of subjects (don't forget "haste makes waste," and "Early to bed, early to rise, makes a man healthy, and wealthy, and wise"), Franklin addresses the small farmer and businessman who is assumed to make up the population of America, urging **prudence, industriousness, honesty, and lapsing repeatedly into simple praise for profitable trade.** Aristotle is repaid to the full: Franklin matches his boundless admiration for the small businessman with profound contempt for the foppish "gentlemen" who put on airs around the working folk.

So the business system in America certainly started out as a moral enterprise, specifically as the embodiment of that "pursuit of happiness" to which Thomas Jefferson, in the Declaration of Independence, assured us we had a right; the best and only way to promote the general prosperity, one of the purposes (according to the Preamble to the American Constitution) of the founding of this country; and a teacher of virtue, as Adam Smith and Benjamin Franklin understood it. This notion generalized seamlessly to the foundation of the political system of American democracy.

1.2 The Corporation and the Moral Dilemmas

Only in small remainders does business today resemble Franklin's village business. The ethical problems that assault the business world today and regularly show up in our headlines come with the increasing size of business and of the economic system generally. Today we often see "business," the "corporation," as villains. Business was not perceived by social critics as a villain in the United States until the 19th century—the age of the **limited liability corporation, the industrial revolution, and the civilization of the factory**. To the corporation and the ethical dilemmas that surround its operations we now turn, in the **second series of steps** to the present day.

1.2.1 The Nature and Workings of the Corporation

What is a corporation? A for-profit corporation, the kind with which this piece is primarily concerned, is a venture financed by **investors** (the people who put their money into the venture, at the outset or later on) for the purpose of making more money, for the purpose of getting a **return on investment (ROI)** as great or greater than they could get in any other allotment of their money. Once launched in business, a corporation is legally a *fictional person*—as Chief Justice of the Supreme Court John Marshall put it in 1819, **"an artificial being, invisible, intangible, and existing only in the contemplation of the law."** Intangible or not, it is a real thing, that outlives all its members, that can sue and be sued and make contracts like any individual; by a recent decision of the Supreme Court of the United States, it enjoys freedom of speech protected by law. It is the status as a legal individual of Exxon-Mobil or Pepsico or General Motors that has us assuming that they can have moral rights and obligations like any one of us.

Any individual or group can carry on business. Why would one form a corporation to do that? The answer lies in a curious point of legal history. Historically, corporations have been chartered by the state, and granted by the state the privilege of **limited liability**: the members of the corporation (the investors) are financially liable for corporate debts only to the extent of their investments. They can lose the money they put in, but the creditors of the corporation can't come after their personal funds to satisfy the corporation's debts. For a long time, that privilege **extended only to corporations chartered for some public purpose**, and if the corporation so chartered did not fulfill that purpose, their charter could be revoked.

From the sketch above of the enterprises that created international trade, you can see why commercial corporations were formed. **Each trip to the East put the investors terribly in debt,** and if the boat were to be lost, as many were, the creditors could come after the owners' personal funds, houses, and possibly their persons (remember that the Merchant of Venice, to pay off his business debt, nearly lost a pound of flesh nearest the heart!) **The East India Company**, established in 1600 by Queen Elizabeth I just to undertake the commercial exploitation of Asia, was one of the earliest and largest corporations. The Massachusetts Bay Company, formed to undertake the similar exploitation of the American Colonies, was another.

Corporations eventually took over the economic functions of the central government. The nations of early modern Europe were **mercantilist.** That is, they assumed that all economic dealings within their borders (or across them) should be monitored for the public good, and that it was part of the prerogative and duty of the state to charter only those corporations that would serve the national interest. Naturally, the officers of the state in charge of deciding who deserved a corporate charter and who did not tended to favor friends and party members, and **the entire approval process became cumbersome and corrupt.** After Adam Smith, the defenders of free enterprise pointed out that it was also entirely unnecessary. Let people make their own economic arrangements, they argued, and the public good

will be served. Furthermore, in the name of liberty, especially liberty of association, there should be **no reason why any group of persons should not be able to form a corporation if that is what they wanted to do**. So in the 19th century the process was streamlined; now all it takes to form a corporation is a form that any lawyer can supply, a fee for the state, and a few signatures. You and I could form one.

Not all corporations are formed for the purpose of making a profit. Charities, hospitals and universities are also incorporated, fulfilling the original purpose of the corporate charter. For the moment, let us leave the non-profit sector alone and concentrate on the "private sector" corporation, formed for the sole purpose of returning money to its investors—to take advantage of corporate freedom to carry on business and the limitations of investor liability to maximize the chances of personal profits while minimizing personal risks. **Corporations enjoy most of the freedoms available to humans (including free speech and participation in political campaigns**). Then can they be held morally responsible—requested to honor moral duties of (for instance) helping the poor or supporting the arts, required to control harmful emissions from the factories even beyond the level required by law, urged not to fire those who really need the jobs? Here a real problem arises. To understand the structure of the problem, let us look for a moment at the structure of the corporation.

When a corporation is started, it is wholly **owned** by the investors; its name and all its assets and all the product of its activity are property, and it is theirs. They can do what they (collectively) like with it and with the return it yields—save it, reinvest it, give it away. Let's suppose a company was started by ten investors; each would have a one-tenth **share** in the company (or one-tenth of the **stock** of the company), and presumably all decisions about what the company should do would be made by a majority vote among those ten. If the local fishermen asked the corporation to install some extra equipment so their toxic waste water wouldn't flow into the creek (equipment not required by law), or the local opera needed money and came to the corporation asking for a corporate contribution, the ten could take a vote among themselves on whether to install the equipment or contribute to the opera. **If they decided to spend the money, no problem—that's their right. It's theirs.**

Now, if they want to be about their other business, and so hire a manager to run the corporation in their absence, the manager has none of the rights of ownership. The owners are the **principals** in this engagement (strictly speaking, the owners collectively *are* the corporation, and the corporation is the principal), the manager is the **agent** of the corporation, and in this **agency** relationship the manager has a **fiduciary** obligation to the corporation to advance its interests. (The principal is the decision maker and initiator of the relationship; the agent is one who acts on behalf of another, not for himself; and a fiduciary relationship, [from *fides*, faith or trust] obligates the fiduciary to act for the interests of the **beneficiary**, the persons or institution for which he is the agent.) He can do only what he is instructed to do by the owners, and the owners have told him to run the business profitably, deduct his costs and salary, and send them the profits (the higher the better) as **dividends**, as a return on their investment. The owners have also, of course, told him to run the

business in strict **compliance with the law**, because going afoul of the law can be very expensive; in the worst case, the whole business might be shut down and all the investment lost. So he'll spend the money needed for compliance. But if the town asks for control of runoff into the creek beyond the letter of the law, or the opera asks him for money for the next production, he really should do nothing until he's had the opportunity to ask the owners. If they are far away, that may be difficult to do. If he cannot consult them, he may just have to continue doing what he was told, which is to increase the shareholders' wealth. **After all, it's not his money.**

The situation gets worse (for the creek and the opera) if the original owners decide not only to sell their shares to other parties, splitting them several ways as they do so, but also to issue more stock, selling it to the public at large, in order to raise capital. (Their small factory has been doing so well that they decide to build two more, and need a lot of money, more than they could borrow from a bank, to start building.) By this time the corporation will have assumed its contemporary form, run not by the shareholders directly but by a **Board of Directors**, elected by them, whose charge it is to further shareholder interests—in short, to increase their wealth by directing the managers to follow policies that will raise the value of the stock in **the market for stock**, the **Stock Exchange**. By the time several new issues of stock have been sold, there will be many thousands, ultimately millions, of shares of company stock outstanding, owned by the public, and the manager is never going to be able to get hold of all the owners. Since on the Stock Exchange the shares can be traded (ownership can change) every day, the idea of contacting the shareholders for advice about the pipe or the opera rapidly becomes absurd.

Can the manager assume that the shareholders might *want* to clean up the creek or contribute to the opera? He might be wrong, but for most of the corporation's history, he could certainly try. The shareholders, however many and anonymous they were, were at least individual human beings who could be presumed to want the community fishermen and opera patrons to think well of the company, and to possess at least a passing interest in the natural environment and the arts. Throughout most of the twentieth century, corporations could assume at least some responsibility for community support and protection beyond the letter of the law. More recently, even that presumption has been defeated.

1.2.2 Funds, Buyouts, and Takeovers: The Corporate Dilemma

In the latest transformation of the corporation, the whole structure of ownership has changed. Since the 1920s we have had **mutual funds**, investment pools, which give the small investor with neither the time nor the skill to manage his own investments the opportunity to participate in the stock market with an experienced manager to make the investment decisions. Since the 1930s, college endowments, workers' pensions and many other projects have been provided for by similar

funds, money pooled and saved for special purposes, run by **fund managers** whose job it is to make sure that the fund is properly administered—invested in ways that will make sure that it is there when it is needed and that it will grow, as much as possible. For most of the twentieth century, such public funds stayed out of stocks—they bought corporate or municipal **bonds** (loans to corporations or cities), because after the stock market crash of 1929, they seemed so much safer. Once the fund managers of these large public funds, endowment and pension funds, realized that the Stock Market was not going to crash again, or at least not catastrophically, and that the return on stocks was much higher than that on bonds, they started putting their funds into shares of the corporations publicly traded on the Stock Exchanges. By now, up to 80 % of our large corporations may be owned by these funds.

When there are 50 million shares of stock outstanding, the corporation's manager cannot poll the shareholders to find out if they want to give up some of their ROI to donate to the opera or cut back on toxic emissions into the creek. But at least in theory, that might be what individual shareholders want to do, and if the cause is very good, he may be justified in assuming that they do. With the funds as the owners, the corporation manager's freedom disappears. **The fund managers have no more right than the corporate managers to authorize charity, or public-spirited expenses beyond the letter of the law.** They were appointed to run their pension fund, or endowment fund, in such a way as to increase its monetary value for the sake of the retirees or the college. They cannot give to charity from the fund's money, and it is difficult to see how they could authorize one of the companies in which the fund is invested to give the money due the fund in dividends away as charity, or spend it unnecessarily on community benefits.

Let's review that structure. Who owns the corporation? The 50,000 teachers in the Public Schools of one of our great states, let us say, pool their pension money and hire an administrator to manage that money for their benefit. The teachers collectively, from whose salary the pension money came, are the **principal**, the fund manager is the **agent**, with a **fiduciary** obligation to the teachers, to increase the amount of money they'll have to retire on. The fund buys stock in a major U.S. company. Now the fund owns part of the company, and it becomes an owner/principal of the corporation. The corporation's CEO and other managers are now essentially the agent of the teachers' pension fund and all the other funds. *No one in this picture* has any right to install environmental equipment, contribute to the opera, or undertake any action at all beyond the requirements of law in the name of the corporation. **In this bizarre limiting case in the history of private property, no one who knows whose money that is has any power to spend it, while the actual principals—the state schoolteachers—have no idea that they are owners of that or any corporation. The money does not belong to anyone who can do anything with it. It is its own. It has developed an engine of its own, and a single direction—to make more money.** ***Cold metal has learned to breed.***

This transformation of ownership has led to some sad and confusing developments in U.S. corporations. Starting in the 1980s, a relatively small number of bankers, stock brokers, lawyers and other financial officers discovered that whole

businesses could be bought and sold in a matter of days, indeed, in a matter of hours. Since the fund managers watched the price of the stock minute by minute, and could buy stock, or sell all the thousands of their shares of a single company's stock, on a moment's notice, all a broker ("**raider"**) had to do was borrow a large amount of money, make a **tender offer** (an offer of a certain price per share in return for the owner "tendering," giving over, the stock in the corporation) on the open market to buy out a controlling share of a company for a price per share a few dollars at most over the going price, and the funds would take him up on the deal immediately. They *had* to: the managers had no choice but to advance the interest of the fund, and a few dollars or even a few cents per share is a huge amount of money when you own hundreds of thousands of shares. So to the extent that U.S. corporations were publicly owned, and actually owned by the big funds, they became very vulnerable to these sudden "unsolicited" sales—the "leveraged buyouts" and "hostile takeovers" of the last decades of the twentieth century continuing into the twenty-first.

The first result of any takeover is that the stock of the "target" company (the company taken over) rises, and the shareholders profit. But being "taken over" in this kind of "raid" does not work out to the advantage of the managers and workers of the target company in the long run, since the only way the raider could pay back his loan was by selling off parts of the company and laying off large numbers of employees. **The usual denouement of the affair was that the target company, weakened by loss of its assets and experienced employees, ended up a small part of some other company—and a business enterprise, product of the collective efforts and sacrifices of many people, often over many generations, is no more**. Yet doubts about the goodness of the consequences of these mergers cast no shadow on the clear rights of the major actors in these dramas. The corporation is no more than a piece of paper; ownership of it may change at any time; and it is the owners' right to do what they want with it.

Those doubts, however, are the source of a good many problems for business ethics. This chapter of the history of American business is still being written, and one of the enduring problems for business ethics concerns the fate of corporations and employees in a time when capital moves with the speed of light across all time zones and all national boundaries.

1.3 Factories, Workers, and Moral Protest

1.3.1 Thomas Malthus, David Ricardo, & the Iron Law of Wages

Adam Smith had predicted prosperity for the nation. Soon enough **Thomas Malthus (1766–1834)** outlined prosperity's dark side. **In his *Essay on Population* Malthus argued that every species increases until it outruns its food supply, at**

which time starvation brings its numbers down to the carrying capacity of its environment. Humans are no different. The undisciplined sexual behavior of humans inevitably produces more babies than the region can feed. Should Smith's predictions of increasing wealth actually come true, then, the inevitable result would be that more babies would survive infancy, and proceed to adulthood, eating more every year, until they had consumed the available food supply and people started to starve again. The famine will continue until it has brought down the number of potential parents to a point of reproduction low enough to live within the food supply. This must mean that human life is one long cycle of prosperity and famine, and that all people, despite temporary flashes of good living, will generally live a mouthful away from starvation.

How did Malthus' grim demographics influence the conduct of business? Benjamin Franklin knew business enterprise as an affair of small family farms and small shops, in small towns and small cities. It didn't stay that way. Adam Smith was the first to sing the praises of **division of labor** (the fragmentation of each task in production into a series of simple steps, so that even unskilled laborers can perform them) and consequently of the new industrial revolution, then starting.

Consider this: People need shoes. At the time Smith wrote, making shoes was a highly skilled affair. You needed experienced cobblers to fit and make shoes, and that meant that the pay for a cobbler had to be high enough to attract a skilled person from all other enterprises that might tempt him. The cobblers could charge what they liked (constrained by competition with other cobblers); if you did not want to pay what they charged, you could go without shoes. If you hired the cobblers for your shoe manufactury, and they did not like what they were being paid, they could walk off and they could not practicably be replaced. No one could become a cobbler overnight; and in practice, anyone who wanted to become a cobbler first had to persuade an existing cobbler to take him as an apprentice for several years. **Employer and craftsman had approximately equal power in any wages negotiation.**

Then **division of labor** was introduced. Now, if you wanted to make shoes, you could feed all the leather in at one end of a very long moving platform along which your workers stood. The first would cut the leather into shoe-size squares. The second, working from a mechanical pattern (a different one for each size and style) would cut the leather into shape—or three workers did that, each making one simple cut. The fifth punched holes for laces. The sixth inserted grommets. By the time the heel is nailed on and the laces inserted, upwards of sixty workers may have had a hand in the making of the shoe, each one performing repetitively a task that it took him only half an hour to learn. If one of the workers wants more wages or better working conditions, he can be fired on the spot. There are plenty more where he came from. That's what Malthus showed us.

David Ricardo (1772–1823), one of the first real economists, noted first that as long as the landowners (owners of the means of agricultural production) could exclude foreign grain from the English market (which they could, through the Corn Laws), they could charge as much rent to the producers as they wanted, and absorb all the "surplus value", the difference between what it costs to make a

product and what you can sell it for, in the nation. For the factory owners had to pay subsistence wages—dead people don't show up to work in the morning—and as long as the landlords charged high rent, the price of food would be high, wages would be high to pay for food, and the industrialist would make no profit. When the Corn Laws were repealed, the same reasoning fed Smith's law of supply and demand—interpreted here as the law of labor supply and wages—into the projections as given by Malthus, and **rapidly concluded that workers would, indeed, always live a mouthful away from starvation. There are more workers than jobs; all workers must work or starve; if any worker wants more than subsistence wages, there's another beside him willing to work for subsistence.** This condition only holds true, of course, as long as all jobs are unskilled, so the worker cannot profit by developing a rare and necessary saleable skill and charging more money for it.

So in the end, by the theory, the owners and investors in the factories will plow their profits back into profitable enterprises, building more plants and using capital equipment to substitute for human skill. That way they will make sure that all jobs in their factories can be performed by people without skills. As each worker becomes more **productive** (able to produce more of the product per period of time or labor, because of the aid of the factory's machines), surplus value increases, the owner's profit increases; at the same time, the worker's wages become more firmly fixed at the subsistence level. **Increasingly, the society is divided into two classes—the fabulously rich owners of the factories and the desperately poor workers**.

1.3.2 The Moral Response

The industrial revolution of the late 18th and 19th centuries followed much the same path in England and in the United States. In both places it resulted in a good deal of **human misery—16 h days of grinding toil, filth, and poverty for the workers, the blackening of the skies with smoke from the coal-fired machines, the noise and grime of the factories.** The industrial revolution did exactly what Adam Smith said it should—increased the wealth of the nations that experienced it—and exactly what his contemporaries had feared. The factories could make goods more quickly and much more cheaply than the village craftsman could, and usually, though everyone hated to admit it, of better quality in many ways. Parts were genuinely interchangeable (so the product could be easily repaired by its owner), manufacture was uniform and predictable, and for the making of heavy machinery, factories were capable of feats of strength beyond the capability of any craftsman. The move from shop to factory was irreversible for all but the most marginal goods.

Yet in the process, **all that Franklin and Jefferson had valued in business was lost**—the steady interaction with neighbors, providing instant feedback on community approval or disapproval, the contact with land and raw materials, the

direct service to the customer, the whole nexus of reward for hard work (in the factory, it hardly mattered how hard you worked—you got paid no more), and above all, the opportunity to exercise prudence and responsibility by running a business owned by the craftsman. All that had taught virtue in the farm and shop had been stripped out of the factory. The life of the worker was poor in that his work was poorly compensated, but in terms of opportunities to govern his own life and exercise responsibility in his life choices, his life was impoverished indeed.

The human misery caused by the Industrial Revolution, widely recognized precisely because it was concentrated in the towns and cities where everyone could see it, provoked moral outrage among a wide variety of educated citizens. The Romantic poets praised the farm, and nature, and the small shops in the small village, and condemned the ugliness of the factories on simple **aesthetic** grounds (reasons having to do with art and beauty). Faced with the drab consequences of greater efficiency in production, they created a whole new ethic—some would say a religion—of nature, and of earlier, simpler times, and of the whole escape to country life. Life in the factory was seen as degraded, demeaning, in many ways subhuman.

Charles Dickens, a Victorian novelist, wrote an influential tract called *Hard Times*, with no particular plot but an abundance of outrage. In it he condemned absolutely every aspect of industrial society—the dangerous machinery that took workers' hands and arms, the practice of employing helpless children, the filth of land, sky and water created by the factory's emissions, the relentless toil and exhaustion, the slave wages, the unimaginative industry-oriented educational system, the factory's unhealthy effect on the character and morals of worker and owner alike, the factory owners for maintaining such conditions, the government for tolerating them, the economists for justifying them, and the Utilitarian philosophers for providing the underlying ethical structure! All this criticism laid the basis for reform, which ultimately came in the form of wages-and-hours laws, the prohibition of child labor, environmental protection laws, and, ultimately, government agencies to enforce those laws and otherwise provide for safe and non-polluting worksites. But all this was in the future.

Meanwhile, reform would not satisfy one critic of the industrial revolution and the factory system. **Karl Marx (1818–1883**) an economist and political philosopher, was a follower in his youth of the German political philosopher G. W. F. Hegel, who saw the history of the world as a series of ideal ages, or stages. Each stage was called, as it took shape, a **thesis** (statement, or proposition) and each successive idea governed all events during the period of its ascendency. No thesis lasted forever: as soon as it reached its flowering, it generated its own **antithesis** (a stage whose ruling idea was a direct contradiction to the idea of the thesis). Then, in a third stage, both previous stages were swallowed up in a **synthesis** (an idea which combined the best of both thesis and antithesis in something totally new). Marx found this three-part succession very persuasive, and had been toying with ways to show how it applied to the 19th century society in which he lived. Eventually he concluded from his study of economics that Hegel had to be wrong. The phases of history were ruled not by ideas, but by the **material conditions** of

life (food, furniture, housing, and other products and evidences of wealth or poverty), and their evolution one from another came about as the ruling class of each age generated its own revolutionary overthrow. So he turned the dialectic "right side up again", creating "**dialectic materialism**".

Marx's theory, especially as it applies to the evolution of capitalism, is enormously complex; for the purposes of this book, it can be summarized simply. According to Marx, the **ruling class** in every age is the group that **owns the means of production** of the age's product. Through the seventeenth century, the product was almost exclusively agricultural, and the means of production was almost exclusively agricultural land: landowners were the aristocrats and rulers. With the coming of commerce and industry, the means of production became money itself, i.e. the capital invested by the merchants in their ventures. It was a short step to turn that capital to investment in the factories of the industrial revolution, and **in that step, the old "middle class" merchants and manufacturers became the ruling class.**

Life was not good for the workers, Marx observed; and **by the laws that had brought the economy to this point, the situation could only get worse.** It was in the nature of capital-intensive industry to concentrate within itself more capital. Its greater efficiency would, as Adam Smith had proved, drive all smaller labor-intensive industry (the shops of the craftsmen) out of business, and its enormous income would be put to work as more capital, expanding the domain of the factory and the machine indefinitely (at the expense of the cottage and the human being). **Thus would the wealth of society concentrate in fewer and fewer hands**, as the owners of the factories expanded their enterprises without limit into mighty industrial empires, dominated by machines and by the greed of their owners.

Meanwhile, Marx went on to argue, all this wealth was being produced by a new class of workers, the unskilled factory workers. Taken from the ranks of the obsolete peasantry, artisans and craftsmen, this new working class, the "proletariat", expanded in numbers with the gigantic mills, whose "hands" they were. So Marx took from Ricardo the vision of ultimate division of Western society under capitalism, **into a tiny group of fabulously wealthy capitalists and a huge mass of paupers, mostly factory workers.** The minority would keep the majority in strict control by its hired thugs (the state—the army and the police), control rendered easier by thought control (the schools and the churches). According to Marx, the purpose of the "ideology" taught by the schools and the churches—the value structure of Capitalism—was to show both classes that the **capitalists had a right to their wealth (through the sham of Liberty, Free Enterprise, and the utilitarian benefits of the Free Market) and a perfect right to govern everyone else (through the sham of Democracy and Equal Justice**). Thus the capitalists could enjoy their wealth in good conscience and the poor would understand their moral obligation to accept the oppression of the ruling class with good cheer.

Marx foresaw, and in his writings attempted to help bring about, the disillusionment of the workers: there will come a point when they will suddenly ask, *why* should we accept oppression all our lives? and the search for answers to this question will show them the history of their situation, **expose the falsehood of the**

ideology and the false consciousness of those who believe it, show them their own strength, and lead them directly to the solution which will usher in the new age of socialism—the **revolutionary overthrow of the capitalist regime.** Why, after all, should they not undertake such a revolution? People are restrained from violence against oppression only by the prospect of losing something valuable, and the industrial workers of the world had nothing to lose but their chains.

As feudalism had been swept away, then, by the "iron broom" of the French Revolution, so **capitalism would be swept away by the revolt of the masses**, the irresistible uprising of the vast majority of the people against the tiny minority of industrial overlords and their terrified minions—the armed forces, the State and the Church. After the first rebellions, Marx foresaw no lengthy problem of divided loyalties in the industrialized countries of the world. Once the scales had fallen from their eyes, the working class hirelings of army and police would quickly turn their guns on their masters, and join their natural allies in the proletariat in the task of creating the new world.

After the revolution, Marx predicted, there would be a temporary "dictatorship of the proletariat," during which the last vestiges of capitalism would be eradicated and the authority to run the industrial establishment returned to the workers of each industry. **Once the economy had been decentralized, to turn each factory into an industrial commune run by its own workers and each landed estate into an agricultural commune run by its farmers, the State as such would simply wither away.** Some central authority would certainly continue to exist, to coordinate and facilitate the exchange of goods within the country (one imagines a giant computer, taking note of where goods are demanded, where goods are available, and where the railroad cars are, to take the goods from one place to the other). But with no ruling class to serve, no oppression to carry out, there will be no need of state to rule *people*; what is left will be confined to the administration of *things*.

Even as he wrote, just in time for the Revolution of 1848, Marx expected the end of capitalism as a system. Not that capitalism was evil in itself; Marx did not presume to make moral judgments on history. Indeed, capitalism was necessary as an economic system, to concentrate the wealth of the country into the industries of the modern age. So capitalism had a respectable past, and would still be necessary, for awhile, in the developing countries, to launch their industries. But that task completed, it had no further role in history, and the longer it stayed around, the more the workers would suffer and the more violent the revolution would be when it came. **The sooner the revolution, the better; the future belonged to communism.**

Let us review the theoretical conclusions to this point

There is a possible world—Benjamin Franklin, Thomas Jefferson, and Adam Smith thought they lived in it, as a matter of fact—where the practice of business teaches virtue, provides wealth and comfort for individuals, families, towns and nations, and provides ultimate human fulfillment in the exercise of autonomy and responsibility in the conduct of one's private life and public affairs. Presupposed in this world is a system of *small* businesses—small farms, shops, crafts—competing for repeat customers in a place where everyone knows everyone and word gets

around fast if a product or service doesn't measure up. Its political extension was a system of *small* towns and cities, where everyone could know everyone at least a little, where all could gather within the sound of one speaker's voice.

But the actual world, from the end of the eighteenth century onward to the present moment, has not matched that system. Instead, we seem to have a world of large **publicly owned corporations** (see previous section), which by their nature are unable to be anything but profit-maximizing machines; of **heavily capitalized manufacturing**, especially in heavy industries (iron and steel, automobiles, mining, building materials) in which entry into the business is limited to those with access to large amounts of money; of **mass production**, wiping out the skills of craftsmanship and the responsibility of the craftsman for his product; and as a result of all this, *according to the theory,* the creation of a new class of worker, unskilled, dulled by repetitive work, living in abject poverty, ultimately only an appendage of a machine until he dies naturally or is violently cut off from his brutish livelihood. It would be nice if he could get his government to pass laws to protect him, or at least get the police and the courts to enforce the laws that are in place now, but these institutions are supported by the rich corporations and really work only for the rich corporations—and the corporations are bound, like it or not, to seek only greater wealth. So reform won't happen. The worker's only hope is to beat his screwdriver into a bayonet and join a violent revolution which will overthrow the government and put in place a benevolent dictatorship of comrades who have his best interest at heart and who will make sure to run the society for his benefit, maybe. That is where Marxist theory leaves us.

1.3.3 The Opening in the System

We are not at the point where the theory leaves us, of course. The society triumphantly deduced by Karl Marx has no resemblance to our own. Something got off the track between theory and practice. What?

Ordinarily we distinguish carefully between **empirical laws** (the laws of science, descriptions of matters of fact: generalizations about what, in fact, happens, most or all of the time. For instance, "If it rains, the streets get wet") and **normative laws** (moral rules, prescriptions that set standards for conduct: general precepts about what to do—share your toys, love your neighbor). Within **normative** laws we distinguish (after Immanuel Kant) between **hypothetical imperatives** (rules for what to do in order to achieve certain goals. For instance, "Eat an apple a day to stay healthy") and **categorical imperatives** (rules that always define appropriate conduct. For instance, "Do not lie, cheat, or steal".) Note that hypothetical imperatives, like empirical laws, can be shown to be false if the hypothesis fails to hold. If apples make us sick, it is no longer *true* that we should eat an apple a day to stay healthy.

Business theory also has laws, but sometimes it is hard to tell whether they are meant to be empirical or normative, and if normative, what kind. For instance, the

"law" formulated by Adam Smith, according to which the welfare of all the citizens and the prosperity of the nation will be increased without limit if only "the government" will stay out of the economy, appears to be an **empirical law**, which means that we could make observations that would tell us whether it is true or false. As a matter of fact, once the industrial revolution happened, the more "government" stayed out of the economy the poorer and more miserable the workers became; the workers were the vast majority; so the majority was suffering because of the operations of the system. That would suggest that the law was **not true**. But then why, Marxists were not the only ones to ask, would business theorists continue to pretend that it **is true**, except that it was in their personal interest to do so (and they wanted the rest of us to believe it so that their interest would continue to be served)? Or do they mean it to be **normative**—insisting on the desirability of non-interference even when it obviously fails to maximize happiness? When we argue that because of Smith, and Malthus, and Ricardo, workers' wages must remain at a totally miserable subsistence level, how do the theorists handle the fact that wages are not, in fact, at subsistence level? In response, often enough, the theorists argue that wages *should* be lower—that the reason we are losing out to China in manufacturing is just because our wages are "too high," and we should lower them. In short, the Iron Law of Wages was **normative, not empirical**—never mind the way the world turned out, the theorists seem to be arguing, all those workers *should be* living at subsistence level!

So when pointing out that the Laws of Economics adduced to govern business in the modern world are really a poor fit with the actuality of business practice, we don't know whether we have disproved the laws **empirically,** because they turn out not to apply in the early 21st century, or whether we are disregarding the **normative** laws because they seem to us not to be very good laws much of the time. (If the Iron Law of Wages decrees subsistence living for much of the nation while the few rich owners feast, what possible good is the Iron Law of Wages?) In either case, there came a time, early in the 20th century, when it seemed to enough of the nation that we would all be better off if profit-making corporations were kept in check and measures for the common good instituted, that laws were passed limiting the corporations in the more predatory of their economic activity, enabling labor unions to form and generally asserting civilian control over the economy on the same principle as civilian control over the military. The state remembered, somehow, for a brief moment, **that the political association has ultimate authority over the economy**, to regulate it for human good, not only for the comfort of the very rich. The whole theory to this point was set aside as not productive of the welfare of the nation.

1.3.4 The Human Factor: Legislation and Labor Unions

What, in fact, happened? Contrary to Adam Smith's theory and Marx's predictions, government did intervene on behalf of the factory worker, limiting the hours

that an adult worker could work and abolishing child labor altogether. Minimum wages were set and safety measures required in the workplace. Contrary to theory, labor unions were allowed to form in the 19th century, gained strength in the first half of the twentieth, and after World War II became very powerful; the combined power of owners, managers, police and Pinkerton men was insufficient to stop them. They in their turn negotiated a fine middle class lifestyle that became part of what we know as the "American Dream"; wages were sufficient to allow the worker's spouse to drop out of the workforce altogether (opening up jobs to returning veterans, and buying us several decades of social stability.) Meanwhile, communities began to hold their corporate establishments accountable for the damage done to the environment of the town, and the corporations often found ways to contribute to that opera. Why? In the name of the careful definitions we have laid out, how could they? There seem to be three answers to that question, two of them hopeful and the third not.

The shortest answer to the question is that the most rational corporation is still run by human beings who have to get along with their neighbors in town. Since corporate managers may actually draw on many sources for their decisions—ROI, certainly, but also precedent within the corporation, the feelings of their supervisors, and perceived threats of community resentment—and since, theory aside, they are not watched that carefully by the investors, they have in fact a certain amount of discretion, which they can use to help their community. On this answer, the corporation itself has no moral obligation to help the community, and may not have any right to do so, but the managers fly beneath the radar of the theory to deal with their fellow humans as community spirit inspires them. **The good opinion of the neighbors, especially of social peers and friends, has always been a powerful impetus to good conduct. Laws are not needed where continuing interaction with members of the same country club, alumni of the same schools, and members of the same church, serve as reminders of the expectations of the community.**

The second answer, subject of much of the "Business Ethics" academic literature, is that those corporations continue to have, and exercise, moral responsibility in the community, but that it is not the place of Marxists or academics (or Marxist academics) to tell the corporations what the moral obligations actually are. The process of determining corporate moral obligation (or corporate social responsibility) is a dialogical affair, incorporating the rights and interests of all the stakeholders—not just the shareholders, the owners of the corporations, but all the others: labor (unions), customers, government, and community interests—in business enterprise. Corporations, like other individuals and institutions, have moral obligations. The discussion of just what they are is a long-term enterprise. Much of the current literature of business ethics operates in this dialogue.

The third answer is a bit discouraging, for those of us in the field. It is that Adam Smith and the capitalists must triumph in the long run, for they have the logic of the market on their side. They have the predominant motive of self-interest on their side, built into the operations of all business, and we have decided as a nation (contra Aristotle) that such motives and operations are legitimate and

should be allowed to prosper. It follows that "labor unions" are nothing but inefficiency engines, and are doomed to the dust as soon as management can figure out where to do business that doesn't have them. It follows that all initiatives in corporate responsibility, undertaken by responsible managers, urged by forward-thinking governments, or extorted by NGOs, are temporary and stopgap. The logic of the market is unchanging and unbending, and we may expect that the pursuit of profit—consciously undertaken by capitalists or unconsciously executed by the mechanisms of the money itself (which has learned to breed)—will continue unabated. The claim of the capitalists continues to be that humankind will be served in the long run by the unfettered operations of the market, so the pursuit of profit continues its claim to be the morally best course—even if, when we examine the evidence, it does not seem to be true.

Where, on this line of argument, do social justice and moral restraint re-enter the picture? Remember that the state, the political association, retains final authority over all other activities within it. The present set of economic arrangements in any state must be seen as no more than a strategy for advancing the general welfare. If it is not working, it is our duty to change it. **Well, is it working**? To answer that question, we will have to see how the capitalist enterprise turns out. For in accordance with our understanding of the doctrine of negligence, neither congruence with theory nor excellence of intention will rescue an act or policy from public accountability if its consequences are foreseeably harmful. Business is accountable, in the end, for all the effects of its operations; there are just many areas where we have not insisted they be so. If the capitalist project turns out for the worse for humankind, we must change or abolish it. In the decades to come, we will have to take that possibility more seriously than we have in the past.

Meanwhile, let us track the development of certain familiar practices defining business in our time. We may accept that Business in the 18th century was a moral enterprise in ways best described by Jefferson and Franklin. Business in the 21st century will have to be a moral enterprise in very different ways. In the course of the next two chapters we will track ten ways in which a fundamentally impersonal enterprise can be moral: ten imperatives, or, if you like, commandments, for business in our time.

In Chap. 2: The corporation satisfies its obligations to its **internal constituencies** by treating its employees fairly in all respects, respecting their rights to privacy, dignity, and integrity, protecting their health and safety, and adhering to fairness and justice in all decisions having to do with hiring, firing, promoting and disciplining.

1. **Non-Discrimination**: The corporation shall adhere to fair laws in hiring and promoting, with no discrimination among workers that is not clearly related to the job.
2. **Employee rights**: The corporation shall respect the employee's public and private rights, especially the right to privacy.

3. **Employee welfare**: The corporation shall protect the health and safety of the employees, and maintain a healthy and accident-free workplace.
4. **Employee dignity**: The corporation shall maintain a workplace that protects and nurtures dignity, free from physical or psychological harassment, free from degrading stereotypes.
5. **Employee Integrity**: The corporation shall provide channels through which employees may question and criticize company decisions and policy.

In Chap. 3: The corporation satisfies its duties to its **external constituencies**–customers, suppliers, local communities, national and international audiences, and the natural world itself–by providing excellent goods and services, by representing itself and its products honestly, by cooperating with civil authorities at all levels and in all places, and by cherishing the natural world as the condition for all human enterprises.

1. **Quality of the product**: The corporation shall do its work well, make safe and functional products and stand behind them.
2. **Veracity**: The corporation shall be truthful in all of its marketing and advertising, and direct its campaigns to audiences that can understand them.
3. **Citizenship**: At the local and the national level, the corporation shall carry on all of its transactions in compliance with the law and for the common good, with special sensitivity to local communities that rely on corporate payrolls to survive.
4. **Consistency**: The multinational corporation shall, to the extent possible, carry its ethical procedures abroad and try to follow them there.
5. **Stewardship**: The corporation shall protect and preserve the natural environment, defending the biosphere against its own actions and the actions of others.

Chapter 2
Employee Rights and Responsibilities: The Internal Constituencies of Business

Abstract The emerging consensus on the responsibilities that employers bear toward their employees is traced, through the cases and controversies that brought it into being.

Keywords Justice · Non-discrimination · Employer · Employee · Rights · Employee welfare · Employee dignity · Employee integrity · Sexual harassment · Whistle-blowing

2.1 Introduction

What are employees entitled to? A fair day's wage for a fair day's work, to begin with: they have a contract, written or implied, that indicates their wages and when they are to be paid, their benefits and what they have to do to qualify for them. The worker is worth his wages, and his employer is enjoined by law and by the Bible not to keep them back overnight.

But beyond contract, the employee has a spectrum of rights proceeding from general social and legal understandings of his position *vis a vis* an employer. We may summarize those clusters of rights under five headings or ethical imperatives: justice, privacy, workplace health and safety, dignity and integrity. Each of these headings specifies a condition worth preserving in the workplace, so that the worker may thrive and flourish as an individual and a responsible citizen. Dilemmas for the employer— and for the employee and the larger society—arise when the efficient and profitable conduct of business is made more difficult either by honoring the ethical imperatives or by providing the bureaucratic enforcement mechanism to implement them. Difficulties also arise, as we shall see, when our values for the workplace work against each other. Let us consider these rights-clusters in sequence.

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2.2 Justice

2.2.1 Non-Discrimination in Hiring and Promoting

2.2.1.1 The Law: Equal Employment and Affirmative Action

The law is very clear: if you are an employer, you will not decide who among your applicants is to get the job, or who among your employees is to get the promotion, bonus, preferment, educational benefit, or more desirable corner office, on the basis of criteria irrelevant to the job that is to be performed. There are two categories of decision on the basis of irrelevance, both of which can be called **prejudice** (a disposition to judge before knowing the facts, a bias that works in favor of some and against others regardless of the objective features and facts of the situation). First, less troublesomely, there is the ancient prejudice *in favor of* your relatives and your friends; second, more seriously, there is the ingrained prejudice *against* certain **power minorities** (groups which, while not necessarily numerically a minority in the employment situation or region, have traditionally not held decision making power. Incidentally, that makes the ones that have dominated the field—usually but not always white males—"majorities.") We will take these on in order.

A pattern of hiring your relatives is called **nepotism** (from the Greek word for "nephew": presumably, your brother has put pressure on you to hire his son). Many relatives are perfectly well qualified for the job, of course, and not everyone you hire has to be a relative: but in a nepotistic system, it is well known that family members (including spouses) will always control the business and no non-family member can ever be preferred to a family member. Nepotism is very widely practiced in some societies (India, for instance) where it is accepted as a matter of course; in certain kinds of small ("family") businesses, it is common everywhere. But in larger enterprises in modern European and American societies, nepotism is frowned upon, on two moral grounds: First, it raises serious questions of trust and competence, since it creates the presumption that the relative did not have to meet the same tests as a non-relative; and second, it destroys the hope, and often the morale, of any non-relatives who had been faithful to the company for a long term. **Cronyism** (systematic hiring and retaining and promoting friends who can be counted on for loyal support) is a variant of the same practice. Both are also contrary to the free-market criterion of efficiency, which requires that an objective decision procedure pick out the best qualified candidate for any function in the corporation; any publicly held company will be required by law to maintain fair standards in hiring, so that the shareholders will not be cheated by corporate officers doing favors for their families.

The more serious form of discrimination excludes or otherwise negatively impacts power minorities. Such discrimination is illegal: Following the Equal Protection Act of 1963 (which referred specifically to equal opportunity for women), Title VII of the Civil Rights Act of 1964 made it illegal

> to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.

(The amendment of the Act by the 1972 Equal Employment Opportunity Act kept this language.) The Age Discrimination in Employment Act (ADEA) of 1967 and the Americans with Disabilities Act (ADA) of 1990 extended protection to those over forty years of age and to those suffering from disabling handicaps. In some places, protected groups include those who have chosen alternative lifestyles and sexual orientation (gays and lesbians); but for the most part, non-discrimination laws cover only traits that are in no way chosen and cannot be concealed, like color and sex. Occasionally courts have ordered companies with a history of discrimination not just to abstain from discrimination from that point on, but also to take **affirmative action** to compensate for that history: that is, actively to seek out qualified candidates of the group that has been discriminated against, to hire them and to promote them; sometimes, companies have been asked to hire up to a certain **quota** or percentage of their workforce of the minority in question. **Affirmative action** by now has acquired another meaning: it encompasses any social programs, in the public or private sectors, intended to ensure that minorities enjoy all of the opportunities that any member of the power majorities might have, whether or not in compensation for past discrimination. During the late 1960s and early 1970s, all corporations contracting with the federal government were required to have such programs. The Equal Employment Opportunity Commission, established in 1972, required that all companies doing business with the United States had to issue a written equal employment policy and an affirmative action commitment, appoint a high-ranking officer in the company to implement it and to publicize it, and must keep careful track of the actual number of minority employees by department, job classification, and compensation, in order to flag any pattern of underrepresentation and discrimination. Should any such be found, specific programs with specific hiring and promoting "goals" (court decisions disagreed on whether a real "quota" could be adopted) had to be developed, implemented, monitored and audited for progress.

Certain glaring forms of discrimination can be identified and punished under this legislation. In November, 1996, for instance, Texaco, Inc., was forced to settle for $176.1 million (the largest such settlement in history) a racial discrimination lawsuit brought by their employees, only days after a company lawyer released tape recordings of executive suite meetings; the executives had been heard to express contempt for African American customs and an intention to conceal the evidence of discrimination against black employees. But in many cases discrimination is much more difficult to detect, and fair treatment difficult to enforce. If non-discrimination is adopted as a policy in pursuit of the value of a truly diverse workforce (derived from the ideal of universal equality), serious ethical issues are raised in the attempt to balance that value with others that seem equally important. Some of these issues will be covered in the next sections.

Often the only way to judge a policy, or an industry, or a nation, is by the results. How do black and white families fare in a country dedicated to racial equality? Very unequally, it seems: according to the White House's Council of Economic Advisors, in 1996 black and Hispanic families were further behind whites than they had been twenty years ago.

> The typical white family earned about $47,000 in 1996, almost twice that of blacks. Worse, the typical black household had a net worth of only about $4,500, a tenth of the white figure….About 95 % of black families own no stock or pension funds.
>
> …Unemployment among black men fell last year to 8.6 %, the lowest in 23 years, but nevertheless twice the jobless rate of white men.
>
> Since 1972 black family incomes have risen less than 10 %, at a time when white family incomes have risen almost 15 %…[1]

Meanwhile, back on the distaff side, while here too there has been progress, women do not earn the salaries that men do for the same work. Diane Harris, a business writer, argues that for executive women at least, the situation is improving: "In the 28 fields for which salary information was available by gender, women typically earn 85–95 % of what men in similar jobs take home…." That is better than the Bureau of Labor Statistics average on all jobs (blue-collar and white), which has women earning 74 cents to every dollar a man takes home.[2]

Clearly whatever the laws say, our society keeps blacks and whites, men and women, in different jobs, somehow, and on different pay scales. Three cases demonstrate how unjust discrimination lodges in common business practices and attitudes: in setting job qualifications, in collective bargaining agreements, and as inadvertent sex stereotyping in hiring and promotion decisions.

2.2.1.2 Three Cases of Bias

Griggs Versus Duke Power Company[3]

Prior to 1970, Duke Power Company of North Carolina required a standardized general education (aptitude or "intelligence") test of every job applicant for any Department other than their Labor Department. The wages of the Labor Department were the lowest, and transfer out of Labor was difficult. Eventually a group of black employees sued the company, arguing that the test was unfairly keeping them out of good jobs. The case was difficult to make. No one doubted that prior to 1964, when the Civil Rights Act was passed, Duke Power had openly discriminated against black applicants, routinely consigning them to low-paying jobs. But

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[1] *New York Times* editorial, Tuesday, February 17, 1998.
See also the article it is commenting on, by Richard W. Stevenson, ironically entitled "Black-White Economic Gap is Narrowing, White House Says," Tuesday, February 10, 1998, p. A16.

[2] Diane Harris, "How does your pay stack up?" *Working Woman* February 1996 21(2) p. 27 ff.

[3] 401 U.S. 424, 91 S.Ct. 849 (1971).

since 1964, all applicants had been subjected to the same requirements, a high school diploma or passing the test for any department but Labor, all applicants were graded fairly and assigned to jobs accordingly. It just so happened that Blacks always ended up not employed or in the lowest paying jobs.

Justice Warren Burger wrote the majority opinion. The test was unjust, he argued, on two grounds: first, the new requirement did not change the status of all the whites who had previously been hired without having to take it, who had obtained their jobs simply because they were white, and

> Under the Act, practices, procedures, or tests *neutral upon their face, and even neutral in terms of intent*, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices.[4]

Second, the blacks who took the test were at a significant disadvantage because they came from a school system still substantially segregated, and the black schools were known to be vastly inferior to the white schools. *But unjust or not*, he argued, if Duke could show a clear correlation between what the test was about and qualifications for the job, the test would pass Constitutional muster:

> Nothing in the Act precludes the use of testing or measuring procedures; obviously they are useful. What Congress has forbidden is giving those devices and mechanisms controlling force unless they are demonstrably a reasonable measure of job performance….Far from disparaging job qualifications as such, Congress has made such qualifications the controlling factor, so that race, religion, nationality, and sex become irrelevant. What Congress has commanded is that *any test used must measure the person for the job and not the person in the abstract.*[5]

The burden of proving that connection Duke could not meet; you did not need a high school diploma or the skills tested for on the aptitude test to do most of the jobs at Duke Power. On those grounds the test was ruled in violation of Title VII, and Duke Power Company was ordered to remedy the situation by hiring more blacks in all positions.

International Brotherhood of Teamsters Versus United States et al.[6]

This lawsuit was initially brought by a group of black and Hispanic truck drivers, arguing that their company and their union discriminated against them. They were largely correct; instance after instance was cited where their requests for transfer or promotion were ignored or denied, or where they were simply lied to about qualifications, application procedures, or the existence of jobs. Since the passage of the Civil Rights Act, most of that had stopped, yet few minority drivers had been hired or transferred to better positions.

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[4] Id at 430; emphasis supplied.

[5] Id at 436.

[6] 431 U.S. 324, 97 S.Ct. 1843, 52 L.Ed.2d 396 (1977).

This lack of progress, the employer argued, stemmed not from discrimination but from "low turnover." More accurately, it was a result of collective bargaining agreements that put disincentives in the way of the kinds of transfer the minority drivers wanted. Of course the disincentives now worked against white new hires and transfers as well as against minorities, but all the senior positions in a system that (by union preference) strongly favored **seniority** (years accumulated on the job, either with the company or in the present job) were already occupied by whites because of past discrimination. The situation was in many ways analogous to that in Duke Power Company, except in this case the company could claim that it was bound by the union contract. In the decision, handed down in 1977, Justice Potter Stewart stopped short of dismantling the seniority system as a method of controlling employment decisions, but made it clear that collective bargaining agreements would be subjected to the same scrutiny as employer's policies in the Court's efforts to end employment discrimination.

Price Waterhouse Versus Hopkins[7]

According to many of her co-workers, Ann Hopkins was one of the best partnership candidates that Price Waterhouse had seen for years. She had secured a $25 million State Department contract, after working on it for two years, and had run it herself. No one else who went up for partner in her year had anything like her track record. She apparently had no difficulty dealing with, and pleasing, the firm's clients; she was a competent project leader, she worked long hours and pushed herself and her staff very hard to meet deadlines, in short, she did everything her male colleagues did to make partner. So why was her candidacy put "on hold" for a year?

There was a suggestion that perhaps the partners who voted against her disliked her approach and behavior because she was a woman: not that they objected to women, and not that they objected to her behavior, her competitive drive and aggressiveness, salted occasionally with strong language—they liked those qualities in a man—but that they perceived those qualities as inappropriate *in a woman*. That kind of perception is known as **stereotyping**, in this case **sex stereotyping**: basing your judgment of a person or his or her skills on some stereotype you happen to have of persons of that type, kind, group, race or sex. When the partner delegated to explain the Policy Board's decision to Hopkins advised her, to improve her chances next year, to "walk more femininely, talk more femininely, wear make-up, have her hair styled, and wear jewelry,"[8] she took the case to court, and eventually won. The point here was not that the policies by which partners were chosen was invalid, nor yet that Price Waterhouse did not have the right to demand good "interpersonal skills" (Hopkins' weak point) of their partners, but

[7] 490 U.S. 228, 109 S.Ct. 1775 (1989).
[8] Id at 1782.

that it was clear that in this decision of the Board, sex stereotyping had taken place, and that made the decision discriminatory.

Job discrimination, in brief, is seriously wrong and illegal, and not only the blatant sort of job discrimination that characterized this country's history: the signs in the store windows at the start of the century reading "Irish need not apply," the Jewish quotas and exclusions of the 1930s and 1940s, the frank discouragement of blacks in all except agricultural and service categories of employment up through the 1950s. All practices that lock in the results of previous discrimination are seriously flawed, and all practices that stem from unwarranted stereotypes of power minorities are subject to review and reversal. The object of the law is to make sure that hiring and promotion (and transfer and compensation) decisions are made on objective and job-related criteria only, and the history of court decisions indicates a national intention to carry it out.

2.2.1.3 Affirmative Action and Justice

What do we do if a decision like the ones tracked above seems to create as much injustice as it ends? Let's continue the story of Duke Power, and look at one case where an allegation of "reverse discrimination" went as high as the Supreme Court.

Duke Power, Chapter Two

Employment in the construction sector of the power industry is cyclical: when times are good, plants expand and new ones are built, and the companies hire workers. When times are bad, they lay them off, keeping their names for recall when times get better; the workers are used to this. By 1974, three years after the Supreme Court decision in *Griggs v. Duke Power Co.,* Duke Power Company, with plants throughout the South, was faced with the necessity of laying off some thousands of construction workers. But there was a complication. When the Supreme Court decided that Duke Power had unfairly discriminated against black construction workers by imposing that aptitude test, it had instructed Duke Power to hire and black workers in all departments until the proportion of blacks to whites in the workforce was equal to the proportion in the general population in the regions in which they operated. Duke had complied with the order, and for several years had hired a large proportion of black workers, who were generally doing very well and beginning to be promoted to supervisory positions. All these affirmative action gains would be lost if the company laid off workers according to its usual formula, which respected seniority—that the last hired would be the first to be laid off.

The vice president who had to make the decision, Bill Lee, was faced with three demands: from management, to lay off all the worst performers and keep the best, of whatever seniority or race (*reward for merit*); from the senior workers, to lay off

in reverse order of hiring, by straight seniority (*reward for service*); and from the court decision and the newer laws, to preserve the proportion of black workers in the company (*diversity*). He could satisfy everyone to some extent: he began by laying off the worst performers, as far as the foremen could document; he went on to discharge all workers, of whatever race or competence, who had been hired during the last six months. But that didn't begin to reach the number he needed to lay off. For the rest, he would have to choose straight seniority or choose to keep the black workers.

In the end, he chose to keep the black workers, going to the worksites to explain his decision personally to the discharged white workers. His explanation appealed to justice: to the fact that those who had gone before him in the company, and the region, had indeed discriminated against blacks, and that it was their duty to try to provide some compensation for that now. The decision was accepted by the workers, and worked out better than he had anticipated: As a result of that choice, he told an interviewer 10 years later, the black workers were able to build up some seniority themselves, and the next time the company had to lay off workers, he could make up the lists on the basis of straight seniority while keeping the legal proportion of black workers.[9]

United Steelworkers Versus Weber[10]

Bill Lee's white employees understood his position and did not protest that their rights had been violated by a policy that essentially gave jobs to black workers that they might have expected to be theirs. When Brian Weber, a semiskilled worker at Kaiser Aluminum's plant in Gramercy, Louisiana, was denied admission to a skilled craft training program for most of the same reasons, he saw the matter differently: he sued for admission. His application had been denied in accordance with a collective bargaining agreement that Kaiser had made with United Steelworkers "to eliminate conspicuous racial imbalances" in the skilled craft positions; so although his scores on the qualifying test were higher than the scores of the senior black applicant (a friend of his named Kernell Goudia), the black applicant was accepted and he was turned down. He figured he was being cheated, so he brought his case to the law.

Five years later, Justice William Brennan delivered the opinion of the Court, upholding affirmative action plans against this kind of protest:

[9] See Kenneth Goodpaster's account of this case (Matthews, Goodpaster and Nash, *Policies and Persons*, McGraw Hill, 2nd edition 1991 pp. 128ff.), and the video of his interview with Bill Lee in 1984 (Harvard Business School Series).

[10] United Steelworkers of America, AFL-CIO-CLC vs. Weber, 443 U.S. 193, 99 S.Ct. 2721, 61 L.Ed.2nd 480 (1979).

> We need not today define in detail the line of demarcation between permissible and impermissible affirmative action plans. It suffices to hold that the challenged Kaiser-USWA affirmative action plan falls on the permissible side of the line. The purposes of the plan mirror those of the statute. Both were designed to break down old patterns of racial segregation and hierarchy. Both were structured to "open employment opportunities for Negroes in occupations which have been traditionally closed to them."[11]

So Weber lost his case. Brennan went on to note that the plan did not entirely shut down opportunities for whites, and was in any case a temporary measure.

Affirmative Action, Pro and Contra

When all is said and done, is "affirmative action"—a program of increasing minority representation in places where minorities are underrepresented, even if that means passing over members of the majority who would otherwise have gotten the job (raise, promotion)—really justified? The country as a whole is badly divided on the subject. The federal government has largely abandoned the strict affirmative action requirement of the 1970s. Some state legislatures adopted that federal affirmative action program, requiring all contractors to show efforts to recruit minorities; more recently (1996) California passed an anti-affirmative action initiative, Proposition 209, by a very narrow margin. It provides in part:

> Neither the State of California nor any of its political subdivisions or agents shall use race, sex, color, ethnicity or national origin as a criterion for either discriminating against, or granting preferential treatment to, any individual or group in the operation of the State's system of public employment, public education or public contracting.

The Supreme Court, as noted in the decision on *Weber*, had been willing to defend some, but not all, affirmative action programs as Constitutional; in *Memphis Firefighters v. Stotts*[12] the Court faced a situation identical to the one Bill Lee faced in the Duke Power layoffs, and came down on the other side: straight seniority won, and the affirmative gains were lost. The results-oriented "disparate impact" theory articulated by the Court in *Griggs v. Duke Power* above, justifying affirmative action programs by citing the inequality of the *result* of policies, rather than their intent, was contradicted 18 years afterwards, in *Wards Cove v. Atonio*[13] where the Court held that Title VII aimed only to remedy *intentional* discrimination.[14] Meanwhile, affirmative action is one of the most hotly debated topics in politics; like the abortion issue, it has become a conservative/liberal litmus test for any candidate for public office. Among political philosophers and ethicists, the battle rages just as furiously (if less publicly): some defend it as a proper form of

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[11] 443 U.S. 190, 218.

[12] Memphis Firefighters v. Stotts, 104 S. Ct. 2576 (1984).

[13] Wards Cove Packing Co. vs. Atonio, 490 U.S. 642, 104 L. Ed. 2d 733, 109 S.Ct. 2115 (1989).

[14] See Robert Belton, "The Dismantling of the *Griggs* Disparate Impact Theory and the Future of Title VII; The Need for a Third Reconstruction," 8 *Yale Law and Policy Review* 223.

compensation for centuries of wrong, and certainly no worse than the other forms of preferential treatment we accept; a smaller number attack it as unjust to those of the majority who are excluded from deserved benefits, as certain to stigmatize its beneficiaries as less than qualified in the public eye, as a source of resentment that will follow any favored by the policy through his or her career, and as improperly turning an area of law and justice into a political football.

Beyond Justice to Celebration

Possibly the best hope of agreement is to treat the whole issue of the hiring and promotion of minorities not as a matter of justice, but in a utilitarian framework, as a social and political ideal to be attained as far as possible. Homogeneity is easy; nothing is more soothing than working, playing, marrying, and dying in a group of people exactly like ourselves. But diversity—simply the presence in the workplace (at least) of many different types of people—has enough advantages to make it worth working toward:

(a) It salts the enterprise with genuinely different points of view, many of which will not have occurred to the majority members of the group, and therefore expands the number of insights and options available to the decision makers.
(b) It supports, by providing breadwinners for, a series of different communities, each of which can learn and contribute to its own culture, enriching the nation and preserving its pluralist heritage.
(c) In an increasingly multinational business atmosphere, it provides links and ambassadors to many nations with which American business is cultivating economic ties.
(d) Minority co-workers enrich and expand the minds of their majority colleagues, making them more curious, tolerant of differences, and interesting to be with.

The matter is infinitely complex, and those four reasons provide the merest beginning of a discussion of diversity beyond the scope of this work. Consider this: until recently, the U.S. was the only place in the world committed to the "melting pot" concept of nationality, where people of all ethnic backgrounds are supposed to become good Americans through assimilation into our culture. Until very recently, it has been the only nation in the world reluctantly committed to the "orchestra" (or, "mulligan stew") concept of nationality, where people of all ethnic backgrounds retain their cultural identity while participating in the civic life of an open society. Diversity as an ideal is very new to all of us, and its consequences will work themselves out only in the next millennium.

A Final Note on Economic Justice

“Economic justice,” inevitably a contested concept, should be mentioned only because wide disparities of income surely *feel*, to a worker, like any other of the “disparate results” mentioned by the Supreme Court in some of the racial discrimination cases. A while ago, for instance, Philip Purcell, then the top executive of Morgan Stanley/Dean Witter Discover, cashed in on stock options worth $36.4 million in the 12 months ended November 30, 1997. That was in addition to $14.4 million in salary, bonuses and restricted stock. Graef Crystal, a “compensation expert” from San Diego, pointed out that Purcell “could have taken an additional $43.2 million of exercisable options, but he chose not to. That would have given him $94 million. That’s a staggering amount.”[15] Yes. If workers of all races should be treated equally, should all levels of workers be treated equally? Is there some rule of proportionality that would say what relation the highest salary in the company should bear to the lowest, or what sacrifices the top ranking executives should be prepared to make before serious layoffs begin? At the outset, there is no real evidence that CEO salaries are related to shareholder wealth—recall that while corporate profits fell 4.2 % in 1989, for instance, CEO salaries went up 8 %. And when CEO bonuses are pegged to increase in the price of the stock, the result can be considerably worse for the employee: the quickest way to boost the price of the stock is to “downsize” the company, laying off labor, the highest of the cost factors, while the income still rolls in. With the ratio of income to cost radically changed, the profit soars, the quarterly report looks terrific, the stock leaps upward, and the CEO may find himself dandling a bonus in the tens of millions. (The knowledgeable investors depart at that point, it may be noted.) Surely this must be unjust? But there is nothing in that scenario that is illegal, and everything in it that increases the wealth of the shareholders—the first responsibility of the CEO. This question will remain to be addressed in the future.

2.3 Privacy and Civil Rights

2.3.1 The Rubber Hits the Road: Testing and Monitoring

2.3.1.1 General Purposes and Problems of Monitoring

Employees usually work within sight of many other workers, and generally do not mind being (informally) watched. This is good, because corporate employers have a legitimate interest in keeping track of what happens at the workplace, and in making sure that employees are spending their time on the company’s business and

[15] Peter Truell, “Morgan Merger Creates Windfall, at Least for Boss,” *The New York Times,* Saturday, February 21, 1998, p. D1.

not (save exceptionally) on their own personal business. Further, they have a duty to keep track of the workplace to make sure that the law is obeyed, that there are no hazards to health or safety, and that all employees are being treated with respect. Monitoring is also necessary to find out if training is effective (is the employee actually doing what he or she was trained to do?), to measure efficiency and effectiveness, to make sure customers are being treated in accordance with policy, to gather the data needed for objective evaluations and, in general, to control the quality of the performance for which the employer—the customer, ultimately—is paying. "Supervision," oversight, then, is part of any workplace that distinguishes clearly between employers and employees (universities, except for limited purposes, are not among these), and employees generally do not object to having their work overseen, directed, inspected, and occasionally rejected. That's the boss's job and prerogative.

But supervision of *work* respects a boundary around the *person* of the employee, a personal "space" that ought not to be entered by the boss without clear invitation, or at least permission, from the employee. The right to this space of noninterference is part of the general right of **privacy**, generally understood, in the words of Justice Louis Brandeis, to mean "the right to be left alone," and identified as one of the most valued rights of the citizen in a free country. What kinds of monitoring might be held to violate this boundary? When does "over-seeing" become "spying," and supervision become intrusion? We will take on three current issues: Electronic monitoring; drug testing; and genetic testing (and other health inquiries).

2.3.1.2 Electronic and Video Monitoring

The technology of monitoring continues its relentless advance: we can now store the data from computerized performance monitoring to review the number of keystrokes in an employee's day, to watch his or her computer screens, track the destination and length of telephone calls. There are computerized location badges that can tell the employer precisely where an employee is at any time, and allow precise measurement of time spent in the restrooms or at the water cooler (do they still have water coolers?) The problem with all this electronic monitoring, according to employees subject to it,[16] is that it is dehumanizing to be judged by a machine, that the machine cannot measure good work as opposed to much work, and that the devices regularly permit employers to read e-mail and notes stored on the computer for personal reference only. The trouble with video monitoring (which can be conducted with miniaturized cameras beamed through pinholes) is that it spies on employees in unguarded moments—scratching, yawning, slumping, squirming—and that a composite tape could easily be made from the product of

[16] Charles Pillar, "Bosses with X-Ray Eyes," *MacWorld*, July 1993.

the videos that would reflect very unfavorably on them, even if they were doing absolutely nothing wrong.

The issue of overly intrusive monitoring is really a matter of trust, and of restraint of idle curiosity. To what extent *must* the employer watch an employee, or arrange to have the employee watched, as part of an implied contract with the shareholders and the public, to ensure that law is being respected and the company's interests are being served? To what extent beyond that minimum may an employer monitor, without sending the signal that the employees are simply not trusted? In a typically enormous corporate setting, is there any way for an employee to *earn* the employer's trust? If there is not, can we say that, in the absence of bad behavior, it is a matter of *right* for an employee to be trusted? In this context a pervasive question begins to make sense: Is there something in the human mind that really wants to know too much? From the fact that technologically, the employer *can* know his secretary's number of keystrokes, does it follow that he should want to know that, that that information is of any use to him? The answer is probably not, and further, that the secretary will probably find out about the keystroke counting, and that it will decrease his or her efficiency slightly and his or her morale significantly; the probability, however, is that the employer will have that monitoring device installed.

The issue of trust has a more general form: What may an employer ask, and how may he ask it? What kinds of questions can show up on pre-employment questionnaires? Some states prohibit questions about religion or sexual orientation; others about encounters with the police that did not end in conviction for crime; others about marital status. With employee theft estimated at $10 billion annually, may an employer require that an employee take a lie detector test-on penalty of firing if he or she refuses? It's a reasonable way to find the thief: everyone knows that physiological changes accompany the kind of emotional stress that comes from stealing and lying about it, and the polygraph is a quick and cheap way to verify information and catch thieves. But the use of such tests raises very serious problems: first, they test for nervousness, not crime, and cannot catch calm criminals even as they incriminate nervous innocents; and second, they are humiliating and degrading, associated with a criminal element and law enforcement rather than a supportive workplace. For this reason, the legislatures of several states have passed laws restricting private use of polygraphs, joining the Federal Employee Polygraph Protection Act (1992) which prohibits private employers (except security firms and drug companies) from using polygraphs in pre-employment testing, and requires that if they are to be used when there has been a pattern of thefts from the company (for instance), the employee must have the test explained to him or her, along with the reason why the testing is being done and why this particular employee has been chosen for testing.

Perhaps the best way to approach the difficult questions of monitoring and testing is by a three-way test:

1. While normal supervision is necessary and welcome, concealed monitoring, electronic or visual, and testing (especially by mechanisms such as the

polygraph), are inherently repugnant. Are there really good job-related reasons for using them, or could the information be obtained other ways? *Always use the least intrusive methods to gather information.*

2. What kind of information is being looked for and collected? Is that information strictly job-related or does it include a fair amount of personal prying for information that just might come in handy some day? *Collect and store no information that is not directly relevant to the way the employee is doing the job for which he or she was hired.*
3. Who has access to this information? Only those on the job who need to know it to do their work of protecting the customer, the shareholder and the public, or anyone with access to the computer or to the boss? *No one should have access to employee information except those in the appropriate departments who really need to know it.*

2.3.1.3 Drugs and Drinking

Substance abuse is a national problem, a problem of any affluent society, especially when, as in the developed world in the 21st century, primary structures of family and community have been seriously eroded. The problem of substance abuse is not a problem created by business or the market. But corporations have to deal with the problem, for substance abuse creates intolerable conditions in any workplace: (1) the behavior of the abuser is often beyond his or her control, and may be injurious to co-workers, for whose safety in the workplace the employer is responsible; (2) job performance is predictably substandard, a recipe for actionable errors if the employee is manufacturing automobiles and a recipe for indefinitely extensive loss of life and property if the employee is driving one; (3) even when the employee is not operating machinery, or responsible for public health and safety, the substandard performance drags down the productivity, and morale, of the abuser's co-workers, who have to carry the abuser's job as well as their own. It should be noted that substance abuse damages job performance in any position requiring judgment; the oil tanker captain on alcohol and the subway operator on marijuana may get more publicity, but bond traders on cocaine can do just as much damage to the financial position of their clients as oil spills can do to Alaskan fisheries.

For all these reasons, corporations (and public services like police, firefighters, and transit operators) have adopted a variety of policies to test for drug use in the workplace. These are not simple policies to draft or enforce. It is worth looking at some of the difficulties:

The usual method is to test some body part or substance, usually urine, for the presence of the breakdown products of known controlled substances. But this method (1) does not distinguish between **workplace use** and weekend recreational use of drugs. To be sure, the unauthorized use of controlled substances is illegal

any time; but is it the employer's responsibility to crack down on weekend use of drugs, even though all behavioral effects will have worn off by the time the worker arrives in the workplace? (2) The method is not always **valid**—that is, it does not always accurately signal the presence of drugs. If the test yields a **false negative**, the employee continues unidentified and dangerous; if the test yields a **false positive**, the employee is unfairly plunged into very bad trouble. Of course the test can be repeated, however repeating the chance of the false positive. Suppose there were only one false positive in a hundred tests. 99 % accuracy is excellent, better, in fact, than we can actually achieve. In a workforce of 20,000, that's 200 false positives. A repeat test, also 99 % accurate, will still yield two false positives, and that's two totally innocent employees accused, tried, convicted, fired and probably unable to find another job. The actual statistics for the validity of the tests are much worse. Is this kind of error tolerable for the sake of the safety of the whole? (3) The method by which the urine must be obtained is notoriously **intrusive**: the employee must urinate into a cup *under the direct observation* of a supervisor; if a female employee is allowed to use a stall in the restroom, the door must remain open. Nowhere else in business practice, or indeed in the practice of any other institution, is the taboo against non-voluntary observation, overt or covert, of a person eliminating bodily wastes, violated for any person of sound mind and good health past the age of four. The fact that drug testing by this method is accepted anywhere is some indication of the importance that has been attached to the problem of substance abuse.

Monitoring for alcohol abuse raises many of the same dilemmas as monitoring for drug abuse, but at a lower level. The reasons why alcohol abuse cannot be tolerated in the workplace are the same, but the tests are far less intrusive: most able foremen can spot containers of alcohol when vials of drugs would be invisible, and can identify drinking on the job much more quickly than drug abuse; if testing has to be done, a much less intrusive (and more surely accurate) breath analysis can be performed; and alcohol is, very simply, a much more familiar problem to all concerned. Alcohol abuse becomes problematic for corporations when all supervisors are absolutely certain that an employee is abusing alcohol, and someone has to decide what to do about it. Before the passage of the Americans with Disabilities Act, an alcoholic employee would be given a chance to reform, and if that did not work, the employee was out. But alcoholism is now classified as a disabling disease, and no employee can be separated from the company until a series of efforts have been made to rehabilitate him. The employee may not be fired just because of a history of alcohol abuse: that is the effect of the ADA. There must be careful documentation of failure of performance on the job. If ultimately the employee cannot perform the job for which he or she has been hired, separation is possible; but the documentation of that performance has to be very, very good, as well as documentation of the efforts at rehabilitation.

In the new legal climate, most large corporations have found it advisable to institute Employee Assistance Programs. Based in the Human Resources Division, these Programs assign skilled counselors to help employees with a variety of problems, personal, emotional, and sometimes practical (housing and personal

finance, for instance), that are interfering with work. The workplace supervisor may send the employee to the Program, and in most jurisdictions may require the employee to keep the appointment; thereafter, the advice to the employee is confidential, and unless the employee consents to more extensive sharing of information, the supervisor may only know whether or not the employee has kept the appointment and whether or not the advice (whatever it was) is being followed. If either of those is negative, given a clear record of substandard performance, a procedure may be set in motion to dismiss the employee (usually including a set of steps, like suspension without pay, short of firing). An alcoholic employee may be fired; but it is no longer a simple matter to do so.

2.3.1.4 Testing and Monitoring of Health and Genes

In light of the intrusiveness of the standard drug test, alternatives to body fluid testing have been suggested.[17] One obvious alternative is hair sampling. It costs an employee nothing to pluck a single hair and give it to a supervisor (it will grow back!), observation to make sure it is the employee's own hair can be accomplished without direct viewing of the private parts or their functions, and traces of drugs can be detected in hair strands for up to 90 days after the employee has used them. Yet in 1996, two employees of Global Access Telecommunications in Boston, who had cheerfully submitted to urine tests, were dismissed for refusing to give hair samples. They argued that hair could be used to determine not only drug use but also a wide range of genetic data, including predispositions to disease or disabling conditions.[18] Identification of these predispositions—ranging from BRCA1, the gene for breast cancer, with a small but significant ability to predict onset of the disease, to the Huntington's Disease gene, which is 100 % predictive of Huntington's Disease—could lead to refusal of insurance benefits in the future. (Possession of the gene would allow the company to call the disease, should it materialize, a "pre-existing condition," treatment for which may still be non-reimbursable.)

In an era when health insurance is becoming increasingly cost-conscious, employee fears about employer awareness of health conditions are justified. An employee in New Jersey was fired from her small company because at her age (52), and with her history of arthritis, the company's health insurance would be higher than it could afford as long as she was on the payroll. Without her working there, the insurers were willing to offer a much lower price to cover the other employees, whose average age was 32. When she protested that her work record was excellent and that she was, in effect, being dismissed because of age and because of non-work related disability, both of which are illegal, she was informed

[17] "Alternatives to Body Fluid Testing," *HR Magazine* April 1992, p. 42.

[18] David Adams and Edward W. Maine, *Business Ethics for the 21st Century*, Mountain View CA: Mayfield Publishing Co. 1998. p. 169.

that it was not the employer discriminating, but the insurance company—and that it is perfectly legal for insurers to charge more for older people with established medical conditions. She had to find another job.

To be sure, such practices seem to contradict the original purpose of insurance, which was to spread the risk over a large pool of the older, younger, sicker and healthier employees, so that all could afford to be covered in case of catastrophic health emergency. But it occurred to the insurance companies long ago that they could earn higher profits in their health insurance business if they covered only those persons who would not get sick; at the least, they could improve profits relative to their competition if they made sure that their client pool was healthier than the competition's. If they could pay out significantly less in reimbursements to the insured, they would be favored with an agreeable choice: to increase the return to shareholders, to keep back a portion of profits to increase investments, or to increase market share by underselling the competition. Since this line of reasoning struck every player in the insurance market at once, the result was a strong effort at **creaming**: discovering, through careful research, which groups of potential customers enjoyed the best health, and arranging to insure all and only those. Barriers to insurance were immediately raised before the poorer workers, inner city residents, older workers, and any with a history of or predisposition to disease. And any information that the company can legally obtain can be used in the calculations.

Occasionally legislation is required to counter the determined quest for information on health and other conditions. It is now illegal to require a person to undergo a test for the presence of the **HIV** virus (the Human Immunodeficiency Virus) that leads to **AIDS** (Acquired Immunodeficiency Disease Syndrome, a serious collapse of the immune system that is often ultimately fatal), for two reasons: first, because the victims of the disease tended to be male homosexuals (who acquired the virus from unprotected intercourse) or intravenous drug users (who got it from sharing contaminated needles), both groups subjects of fear and contempt from the larger population; second, because for a long time the disease was inevitably lethal, the means of transmission were known only in part, and co-workers were terrified of infection. In the light of the inevitable stigmatization of an identified HIV carrier (in which the immediate loss of his or her health insurance would be only one of many worries), even before he or she became ill with AIDS, many states have ruled that no test for HIV may be required unless someone other than the suspected HIV carrier is at risk. (Also material to that decision was the fact that no treatment was effective in curing the disease, so it could not be argued that its detection was of benefit to the individual or society in the procuring of timely treatment.) As with other disabilities, any job decision for the affected employee must depend on work performance and nothing else; until the HIV positive employee is simply unable to do the job, the employer may not dismiss him.

With genetic research progressing rapidly—the current flap about "cloning" is only a symptom of a much wider sophistication of technique and genetic theory—the problem with health insurance is only going to worsen. With full genetic

information available, soon any insurance examiner will be able to predict which of the proposed insured will develop expensive chronic diseases, since asthma, arthritis, sickle cell disease, cancer, lupus, multiple sclerosis, Alzheimer's Disease, ALS (Lou Gehrig's Disease), and most disabling heart, lung and back disease have genetic components. The ultimate invasion of privacy—determination of precisely that molecular code that determines our individuality—is even now within the capability of those most likely to abuse it for their own profit. This may be one of the areas that market solutions only make worse; we may have to rely on very complex regulation and legislation to retain privacy in these matters.

2.3.2 Employment at Will?

Adam Smith's model makes every employment agreement a free and voluntary contract between worker and employer. From this model it follows that, absent contractual restrictions, the employee can leave at any time and the employer can separate the employee at any time. It all sounds very fair, and of course, it is not. The employer does not need any individual employee anywhere near as much as the employee needs the job. The only way to create a modicum of fairness in the workplace is to protect the worker in his or her employment, at least from arbitrary and discriminatory firing. That, fundamentally, is what this chapter is about. Workers may not be fired (or kept in positions beneath their ability) on grounds of disfavored minority status; workers may not be deprived of rights of privacy obtaining elsewhere in the society save as absolutely necessary to protect the workplace—and that "absolutely necessary" is under continuing negotiation.

But that, of course, is only half the story. We have laws in place now, for instance, that protect minorities in the workplace from the discrimination that history leads them (and us) to expect; citizens with disabilities are appropriately included in this protection. Yet one part of the result of that protection is that employers have a long, difficult, and expensive battle in front of them if they try to dismiss an alcoholic or emotionally disturbed employee who not only is not doing his or her job, but is making it impossible for co-workers to do theirs. What is the employer to do? Probably, seek some other form of legal protection—new judicial rulings, new legislation—that will protect the workplace from the intolerably disruptive employee. At the end, we settle for the knowledge that there is a pendulum swinging in employer/employee relations; the beauty of a free system is that it swings freely, and that common justice can always correct whatever imbalances common justice has created.

2.4 Protection of Health and Safety

2.4.1 Hazards in the Workplace

2.4.1.1 Where We're Coming From

For most of the human experience, we have accepted the fact that injuries occur in the course of making a living. In many of our older industries, whole regional cultures grew around the shared risks of the dominant occupation: the "Widow's Walk" and community support for the families of seagoing merchantman crews and fishermen who were lost at sea; the coal-mining towns where a man's status as seasoned miner was set by the tone of his black-lung cough, the cattle and logging towns where every family had lost at least one man to accident on the range or in the woods; and of course, the military installations around the world, where one of the oldest occupations led most predictably to death. Tracking the growth of health and safety provisions in the United States is, essentially, tracking the decreasing social tolerance for physical risk of any kind, just as we shall see in the next chapter's discussion of consumer risk and manufactured products.

The first century of modern industrialization, from about 1830 to 1930, saw manmade workplaces as dangerous as the seas, mines, plains and forests of our early industries. Exposed machinery amputated fingers and hands, massive steam explosions were common, and all the hatters in Danbury, Connecticut, ended their careers insane, with lethal brain damage from the fumes of the mercury used to process the felt for the hats—hence, "mad as a hatter." Contributing to a high accident rate and widespread health problems was the brutal pace expected of factory workers: 16 h days were the rule, Saturday work was often expected, and workers could be counted on to show up for overtime opportunities because wages were so low—the factory owners, if no one else, read David Ricardo. Early in this century several states passed wages-and-hours laws limiting the hours that women, at least, could work during a given day, and specifying a minimum wage. After several bouts with a Supreme Court that seemed determined to protect Adam Smith and Freedom of Contract in the face of impossibility, these laws were declared Constitutional and were followed by federal legislation on minimum wage and working conditions. By the 1930s further progress had been made: workers' ("workman's") compensation laws, awarding insurance payments to workers injured on the job (thereby incidentally preventing them from suing their employers for damages), at least provided support for the families of workers hurt on the job; meanwhile, labor unions had taken over the job of negotiating wages and working conditions, with the federal government setting only the barest minimums. By the late 1960s, however, it was clear that leaving the matter of protection of health and safety in the workplace to the private parties to work out and to insurance to pay for would provide insufficient protection; not enough workers were unionized, compensation schemes required waivers of legal rights and did nothing to make the workplace safer, while public tolerance for workplace

risk had fallen below the point where unions could be permitted, for instance, to bargain protection away in return for higher wages. So the Federal Government stepped into create its own superagency to monitor the protections, and OSHA was born.

2.4.1.2 OSHA

The **Occupational Safety and Health Act** (**OSHA**), passed in 1970, assigns the primary responsibility for protecting worker health and safety to the federal government, rather than to the states or private parties; its intention is to ensure "so far as possible every working man and woman in the nation safe and healthful working conditions," and it creates the **Occupational Safety and Health Administration** (also **OSHA**) to implement it. Every workplace must be kept free of recognized hazards that are likely to cause serious injury or death: the implications of that general purpose are spelled out in specific provisions for each industry. Machinery must be designed to shield fingers and hands from sharp surfaces or moving parts; where deleterious toxins are known or suspected, frequent inspection (sampling of the air) must take place to ensure that the amount is not high enough to cause harm, and so forth.

Changes in the law have not prevented industrial accidents, especially in industries working with substances whose lethal potential is not entirely known, and OSHA does not always protect the employee. The chemicals that are used in the manufacture of computer chips, for example, are known to be toxic, and often a safe level of such contaminants is difficult to determine; the composite plastics used in the skin of the Stealth bomber sickened some of the workers involved in its manufacture in the late 1980s and 1990s; while a worker whose job was stirring tanks of chemicals at a Film Recovery Services plant in Illinois suddenly became dizzy from the toxic fumes, went into convulsions and died. Was this a freak accident or a case of company negligence? OSHA and the local courts disagreed; OSHA fined the plant a few thousand dollars, while the state attorney general for Cook County sought, and obtained, convictions of three of the company's officers for murder and reckless conduct. Fires and explosions continue to claim lives in industrial accidents; are these all preventable? Is it OSHA's job to prevent them?

Reviews of OSHA's work are mixed. On the one hand, its critics assert that its regulations multiply like rabbits and significantly raise the cost of doing business by rapidly changing rules on trivialities—the size of toilet seats, for instance. Further, OSHA regulations can conflict with those of other agencies, as they did for awhile in meat packing plants: OSHA wanted the often bloody floors corrugated so workers would be less likely to fall, while the Food and Drug Administration (FDA) wanted them smooth so that they could be hosed clean to prevent infection. Overzealous enforcement of OSHA provisions has been blamed for the closure of small companies that could not afford compliance. (Of course, when the political shoe changes feet, the opposite criticism can be heard: during the administrations of industry-friendly presidents, enforcement funds and personnel

are slashed, and the agency is accused of neglect and ineffectiveness.) On the other hand, there is no doubt that the agency's existence, and the ever-present threat of unannounced inspections, have helped to keep the workplaces safer. And OSHA guarantees workers' rights that were unenforceable or "waived" under previous law: the right to know what hazards await them in the workplace, the right to refuse to accept risky assignments, the right to know the extent of their exposure to toxins, the right to petition for higher safety standards, the right to file complaints against their employers and request federal inspections of the workplace—and backing up all of these, immunity from discharge or other retaliation for exercising these rights.

OSHA shares the drawback of most attempts to manage business enterprises by federal legislation: it is behind the times, working only on the information that has survived the political process, and cannot weigh its own values against competing values in any particular situation. We can illustrate these drawbacks with three typical workplace-injury situations: lung damage from the inhalation of asbestos fibers, reproductive anomalies from exposure to lead and other chemicals, and "repetitive stress injuries."

2.4.2 Representative Dilemmas in Workplace Health and Safety

2.4.2.1 Asbestos: "Outrageous Misconduct" or War Effort?

Asbestos was thought to be a miracle fiber when it was discovered: a mineral that could be spun like cloth, light, durable, and absolutely fireproof, it rapidly became the standard of safety where protection from fire was concerned. As early as the 1930s, doubts about possible harm from breathing asbestos fibers had begun to surface, and a condition of "asbestosis," mild lung scarring from asbestos fibers, had been identified; but at industry request, these doubts were set aside in the interests of keeping the work moving and the people employed. The country's major exposure to asbestos occurred during the Second World War, when the U.S. Navy needed ships built quickly to replace those lost at Pearl Harbor. All the ships had to be insulated by asbestos, which was sprayed on inside the confined spaces of holds and compartments in the ship. Because of the warnings from the early studies of asbestos, the workers were usually issued masks to protect them from inhaling the fibers; but the workers found them uncomfortable and inconvenient, no one required them to wear them (especially when they cut into productivity), and they were generally ignored. Speed of production was essential.

About 30 years later, physicians noted the first cases of mesothelioma, a cancer of the lining of the chest attributable almost entirely to fibrosis—the scarring of the lungs by some durable fibers. After the first round of cases, it was clear that mesothelioma was significantly associated with former employment in one of

several industries, especially defense industries, that had used asbestos. It was clear to the lawyers contacted by some of the first victims that these sick individuals merited some sort of compensation for being put at risk for this deadly and painful disease. But who should pay? The workers could not sue the federal government, which had ordered those ships, because there had been no law protecting them from asbestos exposure (and therefore no negligence on the part of the government for not enforcing it), because the government cannot be sued without its consent, and most importantly because they were not working for the federal government—they were working for private contractors who had agreed to do the work to prepare the ships. Many of these were by this time out of business, and besides, any injury suffered on the job had to be compensated through workers' compensation laws, and no further suits against the employer could be brought. Whom to sue? The lawyers rapidly came up with an answer: the manufacturers of the asbestos, who knew or should have known that the stuff was dangerous and who did not sufficiently warn their customers to make sure that the workers applying it should be protected from inhaling it. The theory was wildly successful, and some excellent accounts of the ensuing asbestos battles supply the details.[19] But the bankrupting of Johns Manville, the major asbestos contractor, and the subsequent class action suits and settlements, do not address the ethical dimensions of the asbestos incident.

The reason most frequently offered, and widely accepted, for holding someone liable for putting someone else at risk, is that the risk was unknown to the victim and therefore not accepted *voluntarily* by the victim. Had the victim known about the risk ahead of time, the victim would never have consented to the exposure. But, first, can we take seriously the worker claims that "had they been informed about the hazards of asbestos, they would not have continued to work in those settings"? For if they cannot say that, a claim that the exposure was involuntary is not true. Second, to what extent is the industry "concealment" of the data, that showed asbestos to be dangerous, relevant or material to any judgment of praise or blame? Didn't the workers already know that you shouldn't breathe that stuff? Some testimony suggests they did. Third, the danger of mesothelioma and other forms of lung cancer turn out to be strongly correlated, in these workers, with the habit of smoking tobacco. We know that smoking causes lung disease and predisposes for many different kinds of cancer, asbestos or no asbestos. Should all asbestos workers who smoked be excluded from awards on grounds that we cannot tell if their disease is from asbestos or smoking, or have the awards docked proportionately to their smoking on some ground of contributory negligence? And fourth and most importantly, what kind of risk was involuntarily assumed by those workers—in comparison with the risk assumed by others in their positions? The United States right after Pearl Harbor was a military camp on a war footing; every

[19] See especially Paul Brodeur, *Outrageous Misconduct*, New York: Pantheon Books, 1984. Also Samuel S. Epstein, "The Asbestos 'Pentagon Papers'", in Mark Green and Robert Massie, Jr., Eds, *The Big Business Reader: Essays on Corporate America*, New York: Pilgrim Press, 1980. As the cases still wind through the courts, the issue continues.

young man who was not paralyzed, in another military service, or working in a war industry was drafted into the Army. So the alternative for the asbestos workers was military service, with a moderate risk of violent death within the next two or three years, against an asbestos risk, a mild risk of death by sickness 25 years into the future. Which risk would it have made more sense to assume? And just as the soldiers killed in the war did not have their rights violated, so, it could be argued, there was no violation of right in assigning these workers to spray asbestos. Of course risks could have been minimized, had the workers worn their masks; again, it can be argued that the workers contributed some negligence to the situation and to their ultimate disease. Asbestos, of course, continued to be used long after the war was over. But the proportionate risks and the problem of contributory negligence remain, even after the military draft was ended. The debate continues, in and out of court.

2.4.2.2 Women of Childbearing Years in Chemical Factories

For this issue, some knowledge of **ontogeny** (the developmental course of a fetus from fertilized egg to baby) is presupposed. If a woman is fertile, i.e. at that point in her monthly cycle when she is able to conceive a child, then there is a chance that some 24 h after intercourse, a sperm will meet up with a fertile egg and conception will take place. If either sperm or eggs are **mutated**, genetically changed by some process, there is a chance that a deformed child will be conceived; mutation might have taken place in response to a **mutagen**, a substance that causes mutations, somehow absorbed from the environment. The fertilized egg implants itself into the womb and starts to grow. Within the first month, before the embryo is visible to the naked eye and usually before the mother knows for sure that she is pregnant, all the body's systems start to form; organs, limbs, nervous system. Rapid formation of new systems goes on for the next month or so; after that, the course of growth is set, and the baby just finishes the job and gains weight for the next seven months. During those first two months the embryo is very vulnerable to interference with development by foreign substances that interrupt one or more of the terribly delicate processes of growth and formation; substances that harm the embryo by interfering with such growth are called **teratogens**, literally, "monster-makers." For if the embryo is exposed to those substances, the result may be major malformations of limbs (the teratogen in the drug thalidomide, for instance, kept arms and legs from growing normally), loss of kidneys, heart damage, or mild to severe nerve and brain damage; such children used to be called "monsters," and the name stuck.

Clearly it is a good thing to keep all adults who may sire or bear children from exposure to mutagens, and all embryos from exposure to teratogens. How does this task become part of the corporation's responsibility? Recall the workplace hazards cited above: among them were (more specifically) fumes of cyanide compounds, chlorine compounds, arsenic compounds and ambient lead, byproducts of the manufacture of plastics, film, paint, pesticides, airplanes and even computer chips.

Some of these substances are deadly, and they are carefully controlled with masks, suits, and special rooms; some are harmful, and they are regulated; some don't seem to do any harm at all, at sufficiently low concentrations. But the concentration that will seep into the germ cells and turn out to be mutagens—producing no harm to the adult but creating genetic chaos for the children—is not known; above all, the concentration that will hurt an embryo, should the mother be exposed to the substance and should the substance cross the placenta, is not known. One of the major controversies that arose in the conduct of business in the 1980s was, whether a corporation was justified in banning all women, but not men, from a workplace where some low concentration of a harmful substance was in the air. On the one hand, no one wanted a badly damaged baby born—a baby the corporation would probably have to pay for the rest of its life, after a jury heard the tearful mother blame the company and its teratogens for the damage done to her child. On the other hand, women have the same right to work as men; what if the mother objected to being forced to leave her job, or prevented from taking one, because of ambient chemicals?

Corporations argued vigorously about this issue, trying several means to reconcile the claims of justice with the safety of the child. Some corporations asked women to pledge that they would not have a baby while working there; when some of them got pregnant, the women claimed that the pledge forced them to seek abortions. That horrified the press, and the practice was dropped. Some plants barred all *fertile* women, women of childbearing age who had not received surgical sterilizations, from entering areas with chemical contaminants in the ambient air; younger women protested that they were being compelled to undergo sterilization on pain of losing their jobs. That did not sit well with the courts. Others required women in such jobs to sign a waiver saying that they understood the risks and would not sue. When a child with birth defects was born of one of those employees, she did not sue, but the child's grandmother did, on behalf of the child, arguing that it was the child who was affected and that the child had not signed anything at all. A woman may waive her rights, but not someone else's. Some reformers argued that any teratogen could also be a mutagen, and just as damaging to men as to women. Finally the Supreme Court decided the matter, in favor of absolute equality of men and women: anywhere a man may work, so may a woman. The effect was to restore peace and end experiments with discrimination; it also, occasionally, resulted in the closing of plants whose ambient air the management could not sufficiently clear of chemicals.

2.4.2.3 Repetitive Stress Injuries

Like the teratogens, "repetitive stress injury (RSI)" is a contemporary hazard, not known before the 20th century. It arises from work activities which might seem totally free from stress of any kind (apart the psychological stress of a boss demanding faster and faster work), like operating a word processor or checking out groceries at the supermarket. Automatic letter sorting machines, cash registers,

modern day assembly lines, switchboards, keyboards, all of which require the same motion, swiftly performed, all day, are to blame for any number of very physical ailments: tendonitis in any joint in the arm, wrist, or fingers, carpal tunnel syndrome, inflammations like arthritis, and a wide assortment of complaints about swelling, numbness, and much, much pain.

This type of injury raises dilemmas of honesty, of remedy, and of compensability. Unlike the industrial injuries of the past—mangled limbs, bashed heads—these injuries are hard for an employer to understand and impossible to verify. A secretary's complaint of "shooting pains up my hand and arm" may be the first step in a case that will cost the employer a fortune: the employee may need surgery, which may or may not work; there may be long-term disability and vocational rehabilitation to pay for, as the employee rests and prepares for another job. And there is no limit to these cases. According to a 1995 report from the U.S. Bureau of Labor Statistics, RSI accounted for 60 % of all workplace illness and even then, had cost more than $20 billion in worker's compensation. By that time, IBM was the defendant in 350 RSI lawsuits.[20] Given the uncertainties of the cure, should it even be tried? Given the uncertainties of the injury, the wide distribution of the complaints, and the likelihood of more in future, should insurance companies be especially stringent about compensating these cases? How much is real, how much sheer boredom from spending all day cooped up by a machine?

Meanwhile, office supply designers are doing their best to lower the incidence of these complaints, by redesigning computer keyboards, chairs, desks, every other aspect of the workplace to be more human-body-friendly. Only time will tell if the ergonomic designs now being tried will make the workplace genuinely less stressful for those in it.

2.4.3 Safety and Health as Cultural Problems

Ultimately, health and safety have more to do with the attitude and lifestyle of the employee than they have to do with the stresses of the modern workplace. Some companies have made a fetish of safety consciousness, drilling safety and health protection rules into the employees (*Never* reach out to brace yourself on a working machine. *Never* lift with your back, always with your legs. *Always* wear your safety equipment. Etc.), rewarding units that are accident-free and low in absences, posting records of health and safety to encourage employees to remember the rules, and on occasion, even shutting down units found in violation of safety regulations until the violation is fixed—to make sure that the unit is operating in compliance with regulations, but also to send a clear message to all units that minor deviations from rule will not be tolerated.

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[20] Adams and Maine, *Business Ethics for the 21st Century*, Mountain View CA: Mayfield Publishing, 1998, p. 417, citing *National Law Journal* 2/20/95.

Beyond adherence to good rules on the job, the quest for employee health and safety can expand into a variety of "wellness" programs in the workplace: exercise rooms available to executives between tasks or meetings, with an exercise plan to go with them and a company physician to recommend individualized programs; diet and nutrition programs offered by the company cafeteria; rewards (in the form of better benefits, perhaps) for employees who agree to stay smoke-free or fat-free. Why might a company undertake these programs, which have nothing obviously to do with the company business or the bottom line? The answer lies in the cost to train and prepare new high-level executives for the corporation. It takes a very long time to bring a really good corporate officer on line, with up to date expert knowledge in the field, relevant people skills, and a deep understanding of the company's history and culture. If fitness and "wellness" initiatives can keep an executive active 15 more years than he would have been active otherwise, they pay for themselves. A wellness center, then, including fitness programs, may be one of the best investments a company can make.

2.4.4 Mommy Tracks

Since the first stirring of the women's suffrage movement, women have been working for equality with men in the public space and in the workplace. We have wanted to be hired, compensated and promoted, just as a man would be with our work skills. Women with children have asked no more than to be treated as men with children, and that was not an easy task. Expectations were different: A man who had a child was expected to become a better worker ("He'll settle down now that he's got the future to work for,") while women were expected to become worse ("with all those responsibilities at home she won't be able to handle responsibility at work,") so the father was favored for promotion or challenging assignments while mothers were passed over. It was a major accomplishment when women managed to persuade managers, usually with the help of the EEOC and a friendly judge, that considerations of family status were not relevant to job qualifications and must be ignored in job-related decisions. Like questions about minority status, religion, and sexual preference, questions about family status, e.g. how the prospective employee is going to handle the knotty problem of day care, are now barred by law from the entrance interviews.

We seem to have succeeded. Yet now that we have achieved equality, or are very close to achieving it, in all but very small pockets of resistance in American business, new questions seem to arise—specifically those questions we worked so hard to get rid of. Now, it has been argued, it is time for employers to take into account the special needs of women—for pregnancy leave, for maternal leave, for sick children at home. It has been suggested that women be able to opt for a "Mommy Track" at work, that will give them shorter hours (compatible with her children's school schedule), access to childbearing leave when they want it, and generally the freedom to tailor work demands to the home demands. Employers, it

is argued, not only may, but must, be aware of the needs women have to care for children and home, and must adjust work demands accordingly.

Proponents of the "Mommy Track" in business argue that women have been forced to set aside their real nature in order to compete with men in a man's world—a macho, sacrifice-all-for the-company, family-doesn't-count world which tears working mothers apart. To be sure, such a world is as wrong for men as it is for women. But men will stick with it indefinitely, until they can be shown that another, more balanced, approach is possible—and the only way to show them that is by living it. So put in the Mommy Track, in every company possible: let women at least live balanced lives where, as one of my colleagues puts it, priorities come first, right now, and when women have shown that balancing family and work demands is no hindrance to reaching the top posts in the company, maybe men will begin to join them, and the whole corporation will become more humane.

Opponents of Mommy Tracking argue that it is inappropriate in a free market system to have the company responsible to non-company interests of the employee, whether it be to make childbearing easier or to support an employee's outside consulting business; that it is unfair to male employees to give women benefits of shorter hours and unscheduled leaves if there are no career penalties attached, and unfair to female employees if there are; and that bringing the image of female employee as mother and helpmate to her husband to the fore in dealing with human resources concerns is a sure route to the return of job discrimination against females. Now that equality is won, why not live it, continue on to CEO, and find a good child care center along the way? It is unlikely, very unlikely, that a Mommy Tracker will ever reach a high post in any company; she lacks the reliability, the dedication, and the willingness to take on unusual challenges that are expected of the employees who will contend for the highest positions.

In sum: Women have always worked. As partners in the family farms of agrarian societies, as the craftsman of nomadic herding societies, as the farmers of hunting societies, women have borne an equal share of the economic production. In the eighteenth and nineteenth centuries, women and children worked alongside the men, as they always had. Only as the factories became more brutal, the hours longer, and, most importantly, their success more evident, did the wives of the bourgeoisie find it possible to retire to a life of lacemaking and chocolates, and a movement arise to exempt first children, then women, from the hardest work of the factory itself. By the turn of the century, an atypical, and probably unrealistic, ideal of "womanhood" held sway, in which the woman was solely the custodian of the Heart, the hearth and the home (a haven in a heartless world), while men had the work of the Head, braved the competitive wars and backbreaking work of the industrial age and the workplace in general. (That ideal never applied to the poor—the Irish and the blacks who supplied servants to the rich. Their women *always* worked.) The ideal of stay-at-home women was revived at maximum volume after the Second World War, when it became necessary to send women "home" from the factories that had supplied the war, in which they had been spectacularly successful, so that returning veterans could have jobs. The ideal prevailed through the 1950s, but by the end of the 1960s it was dead, and the older model prevailed:

women shall work beside men in whatever work the society does. Of course that leaves the home in some disarray, as previous, non-factory, work economies did not. What shall we do about that? As is probably evident from the foregoing, the role of the woman in the modern workplace is not yet settled.

2.5 Dignity, and Protection from Harassment

As a general principle, the workplace shall nurture **dignity**, and shall not tolerate assaults upon it. What is dignity? For our purposes, two meanings will suffice: first, empirically, dignity is an understanding of one's own self-worth resting on no external criterion but generated within oneself. Normatively, dignity is a characteristic possessed of every human being according to which he or she deserves respect from others. Putting the two together, we arrive at what we may call a social understanding of dignity: a presence in all persons of a recognition of self-worth, accompanied by an expectation that it will be recognized by others, fostered by respectful treatment by the entire society, individually and institutionally. For people to *have* dignity, others must (in general) *acknowledge* dignity; it is a social creation.

How does this apply to business? The workplace is a space in which the dignity of every employee must be recognized by every other employee, by every supervisor at every level, and by the institutional policies and structures built into the conduct of business. In practice, this means that while at work, no employee will be subjected to ridicule, annoyance, embarrassment or humiliation, in connection with the job or otherwise. (This proviso excludes any "embarrassment" felt by an employee in the course of normal instruction or correction of job performance: but it requires that any such instruction or correction be administered in a way minimally embarrassing.) This requirement is particularly difficult to implement or enforce in the normal conduct of business because, while the **formal structures** (rules and policies) of the company may insist on correct and respectful behavior at all times from all employees, the **informal structures** (customs and practices of the employees) may be sufficiently offensive to support legal action against the company, should any victimized employee choose to complain. The company's officers are generally held to be responsible for monitoring the "corporate culture," the informal, non-mandated, conduct of the employees toward each other, just to make sure that assaults on dignity are not taking place.

2.5.1 Sexual Harassment

What, in a corporate setting, might count as an assault on dignity? Certain easy examples come to mind: fraternity-type hazing of new employees by old ones, and the habitual use of racial or ethnic slurs, stereotypes, or derogatory names

("Mick," "Polack," and the unprintable word for African-American, for instance) in the course of the daily routine. The corporate culture is also manifested in logo, publicity, community relations and advertising copy, all of which should be free of stereotype and derogation. Probably the best example of workplace affronts to dignity is **sexual harassment**: the systematic humiliation or degradation, through stereotyping, of women, exemplified in unwanted sexual attentions bestowed as though they could not be refused, the conditioning (by a superior) of promotion or job on response to these attentions, or the creation of a workplace so sexist, so contemptuous of the talents of the women, as to render the workplace absolutely hostile to the women and their work. [As the Equal Employment Opportunity Commission (EEOC) pointed out in 1990, harasser and harassed do not need to be of different sexes. It is possible for men or women to be harassed in the same way by homosexual supervisors, and for men to have sexual favors demanded of them by a female supervisor. These cases are much less common.]

Sexual harassment has been held to fall into two major categories, as above: the first we call *quid pro quo* and arises when a woman is given to understand that the likelihood that she will advance in the company or in her career is conditional upon a favorable response to sex-laden suggestions by her superiors. Classically, the suggestions have been that the woman must engage in sexual intercourse, otherwise undesired on her part, with her superior, or see her job dead-end or disappear. But as we saw in *Price Waterhouse versus Hopkins* (above), it is just as insulting, and illegal, to condition promotion upon a woman's closer adherence to a "feminine" stereotype in dress, makeup, language and behavior.

Title VII of the Civil Rights Act of 1964 forbids discrimination on grounds of gender. In *Meritor Savings Bank v. Vinson,*[21] (1986) the Supreme Court found that the creation of a "hostile environment" through sexual harassment was a violation of Title VII; it was discriminatory even though there were no identifiable employment decisions conditioned on the woman's response to sexual advances. The EEOC went on to define sexual harassment:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to or rejection of this conduct explicitly or implicitly affects an individual's employment [*quid pro quo*]; (2) unreasonably interferes with an individual's work performance; or (3) creates an intimidating, hostile, or offensive work environment.

Who is to judge whether a workplace is "intimidating, hostile, or offensive"? That question was decided in 1993, in Sandra Day O'Connor's opinion in *Harris versus Forklift Systems*: It is hostile if a reasonable person would see it to be hostile, and if the victim perceives it to be so. It is not necessary to show that severe psychological damage has been inflicted on the victim; she is not required to stay on the job until she has a nervous breakdown in order to be compensated

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[21] 477 U. S. 57 (1986).

for damages.[22] Concededly, the criterion is subjective and difficult to interpret; but it accomplished its object, which was to put all businesses on notice that the way their employees treat each other at the office is to be taken very seriously.[23]

2.5.2 Fostering Dignity: Respect and Participation

In general, dignity can best be protected by respecting and honoring differences in the workplace. Just as the best non-discrimination rule for racial, ethnic and religious differences is the celebration of diversity, so the best rule for the prevention of harassment is a positive appreciation of different kinds of lives and lifestyles, lives with different priorities and perspectives. Women would certainly gain from such appreciation. So would gay and lesbian employees, whose legal protection against discrimination is sporadic at best, and varies from state to state. A corporate culture that incorporates such an attitude of appreciation of differences might also provide protection against very different sorts of harassment—the tendencies to retaliate against employees who manifest their differences publicly by participation in political and social associations outside the workplace, in feminist or gay activism. Political activity on the part of the employee is protected by law, of course, but there are few effective formal safeguards against informal sanctions against an employee perceived as "different" in a setting where "different" is a pejorative term.

It could be argued that the most effective way to show respect for employees is to invite their participation in workplace decision making. Including workers in workplace decisions on a democratic basis can be justified, John McCall argues, in five ways: (1) that the legitimate interests of all in the company are better protected by worker participation than by protective legislation; (2) that only an extensive system of democratic participation recognizes the dignity of persons as moral agents and rational decision makers; (3) that the worker's perception of his or her ability to influence corporate policy will result in higher productivity and a much higher level of responsibility and accountability, and (4) a much lower level of alienation and disaffection; and (5) that workplace democratic participation and

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[22] 114 S.Ct. 367 (1993) For an editorial underscoring this point, see "A Victory on Workplace Harassment," *New York Times* 11 November 1993.

[23] On June 26, 1998, the U.S. Supreme Court handed down a decision making the definition of "sexual harassment" much more precise and specifying the steps a corporation may take to limit its liability. Linda Greenhouse, "Court Spells Out Rules for Finding Sex Harassment: Makes Suits Easier to Win While Giving Employers a Defense," *The New York Times* Saturday, June 27, 1998, A1, A10 (excerpts from decision on p. A11).

responsibility is an essential training ground and reinforcement for civic participation and responsibility, good citizenship in the larger society.[24]

There have been some experiments along the lines of workplace democracy. One of the most famous was the "Bolivar Project," started in 1972 by Sidney Harman, then owner and CEO of Harman International Industries, and Irving Bluestone of the United Automobile Workers union. A far-reaching experiment in worker empowerment, it began by encouraging (and rewarding) workers to invent their own workspace and processes, and to join in creating new opportunities for workers: classes, day-care centers, gospel groups. Morale soared, productivity increased, and absenteeism declined. But by the early 1980s, the company began to get into trouble. One major cause of the trouble was human nature, specifically, laziness: the company had been letting workers decide their own incentive system, and eventually the workers in areas where work could be accelerated were asking to leave work early if they finished their work. That created tensions across the company with workers whose jobs could not be so tailored, lured workers who only wanted to go home early into the company, and tempted workers to cut corners to appear to have their work done. Firm management would have nipped this trend in the bud, but by that time firm management was no longer part of the corporate culture. The second major cause was the rapid change in the market for their major product, rear-view mirrors; new product materials and directions should have been adopted, but were not, leaving the company by the wayside. (Underlying both factors, speculated Harman and Bluestone—both out of the project by 1976—was the fact that neither the new owners of the company nor the old managers *really* bought the concept of worker democracy, and they were not sad to see the project fail.) But the experiment was not entirely a failure. By the time Harman Automotive went out of business on March 1, 1998, it had taught a whole generation of industry how to bring workers into management decisions, saving the GM Tarrytown plant for about 26 years, and making workplace empowerment one of the criteria by which companies can be judged.[25]

2.6 Integrity, and Respect for Moral Choices

We begin with a general principle and a general duty. The general *principle* is that, as above, employees are presumed to be rational moral agents; and the employee does not leave his critical intelligence in the parking lot. It should be respected. More to the point: the employee *cannot,* consistently with his dignity as a moral agent, avoid taking responsibility for situations that, morally, call for action when

[24] John J. McCall, "Participation in Employment," from Joseph R. DesJardins and John J. McCall, eds *Contemporary Issues in Business Ethics*, 3rd Edition. Belmont, CA: Wadsworth, 1996.

[25] Barnaby Feder, "The Little Project That Couldn't" *The New York Times* Saturday, February 21, 1998, p. D1.

the employee is the only one in a position to act. If he sees some wrongdoing, and fails to do something to stop it, he incurs guilt, the "guilt of silence" that has accompanied so many of the historic atrocities of the twentieth century.

The general *duty* for the corporation, then, is to provide channels through which employees may question and criticize company decisions, policies, and the conduct of company operations in general and on specifics in the areas that they have observed. Failure to provide such channels essentially disregards the critical intelligence and the moral agency of the employee, treating him as just another machine, or piece of office furniture. Confronted with a serious moral problem in the workplace—a practice that threatens some serious harm to someone, identifiable or not—in a setting that does not allow his concerns to be voiced, taken into account, or acted upon by the company, what is the employee to do? If there is no way to act responsibly through company channels, the only responsible course open to the worker is to tell others about it, to try to end the practice by publicity, even if it means bringing the whole corporate enterprise to a screeching halt. This effort to stop the game, to make everyone pay attention to what is going on, is called "blowing the whistle."

2.6.1 Blowing the Whistle: Definition and Justification

Employees and former employees of corporations often complain that the company is involved in wrongdoing—failing to inform the public about defective products, failing to inform the Nuclear Regulatory Commission about safety problems in nuclear plants, failing to inform the Environmental Protection Agency about environmental problems caused by the corporation's operations.[26] The corporations inevitably reply that the complainer, the "whistle blower," is exaggerating, wrong, misleading, out for his own glory only, and, in the case of former employees, disgruntled. Two questions are raised by such claims and counterclaims: First, how should an employee of a company involved in dubious practices decide whether to bring his concerns to some outside agency? and second, how may we determine whether or not such an employee's complaint is valid?

In his 1982 edition of *Business Ethics*, Norman Bowie presents the classic definition and set of criteria for the moral justification of blowing the whistle:

[26] See Alan F. Westin, *Whistle Blowing: Loyalty and Dissent in the Corporation*, New York: McGraw-Hill, 1981. Classic "whistle-blowing" cases include the accounts of engineer Roger Boisjoly and the explosion of the space shuttle Challenger, of Kermit Vandivier and Goodrich Brakes (Vandivier, "The Aircraft Brake Scandal," in Robert Heilbroner, *In the Name of Profit*, Doubleday, 1972, reprinted in *Ethical Issues in Business: A Philosophical Approach*, ed. Thomas Donaldson and Patricia H. Werhane, Prentice Hall 1979), and of Frank DeCamp and the Pinto. Incidentally, in all these cases, the engineers' objections did not come to public attention until after the events of which they warned.

> A whistle blower is an employee or officer of any institution, profit or nonprofit, private or public, who believes either that he/she has been ordered to perform some act or he/she has obtained knowledge that the institution is engaged in activities which (a) are believed to cause unnecessary harm to third parties, (b) are in violation of human rights, or (c) run counter to the defined purpose of the institution, and who informs the public of this fact.[27]

Note that it doesn't count as blowing the whistle as long as the complaint stays inside the company or within a small circle of peers in the industry or profession; the public must be involved, so the stakes are high. The presumption of this topic is that a certain amount of harm is going to be done when the whistle blows: the company gets a black eye in the press, the employees involved in the practice on which the whistle is blown are defamed and hurt, no one likes the whistle blower and his or her job is promptly in danger. Against that harm, the justifiability of blowing the whistle requires an argument, must bear the burden of proof. Bowie considers that the burden is met when:

(a) The whistle is blown from the appropriate moral motive—to save the innocent third parties from harm, to expose wrongdoing so that it can be dealt with by the proper authorities, or to restore the agency or firm to its proper course. A desire for attention is not a proper motive, which is why our response to whistle blowing changes so profoundly when we find that a book contract has already been inked. To be sure, the public can profit from knowledge of wrongdoing no matter what the motive of the informant, but given the ambiguity of findings of wrongdoing, as general policy, the public will be much better off with a predisposition to ignore tell-all publicity seekers no matter what stories they have to tell.
(b) Unless the whistle blower knows for sure that he will be fired, discredited, and barred from further information if he so much as hints of his concerns to his supervisors—or that some major explosion or other danger is imminent—all internal channels for expressing dissent must be exhausted before the whistle blower goes public. The officials of the company may honestly not know what is going on; even a minimum of loyalty to the firm requires that they be given a chance to right the situation before the irreversible damage of unfavorable publicity has occurred.
(c) The wrongdoing must be carefully documented, the evidence certain.
(d) The employee must give the matter careful thought, and be sure that the danger is real, the harm imminent, there is specific misconduct to cite, and there are no alternatives to blowing the whistle that will bring the matter to light and get it remedied.
(e) The employee has some chance of success. If the whole matter is doomed to failure, the employee is not obligated to destroy his career by blowing the whistle.

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[27] Norman Bowie, *Business Ethics*, Englewood Cliffs, NJ: Prentice Hall, 1982. Pp. 142 ff.

Of course, there is no way that we could say an employee is obligated, in response to wrongdoing in the workplace, to destroy his career—putting himself and his family at risk, distressing his friends, infuriating his erstwhile co-workers, entertaining the press and generally turning his life into a media circus for the short attention span of a scandal-hungry society. Unless it is clear that there is little danger to the whistle blower (and that is rarely the case) there cannot be a strong obligation to blow the whistle. That is why this topic turns on the notion of **integrity**, the singleness of life, character, and person that informs us at our best, that requires us always to act in accord with our moral principles, and thereby permits us to undertake courses of action that would scare us to death if we thought about them for a minute. Without integrity, an employee will not blow the whistle. Of course, without integrity, there's no telling what else he will or won't do.

The important point to remember is that some ready and relatively painless means of upward communication must be found. The employee must know how he can access the highest officers in the company to share his concerns; he must know that they are listening, and that they will act on his concerns one way or another. (By all means try a suggestion box, someone said, but make sure that the employee knows that the suggestions are being read.)

2.6.2 The Corporation and the Whistle

There are several reasons why a corporation might want to institute practices that make it unnecessary for employees to blow whistles. Any quick consequential analysis will yield the undesirable results of whistle blowing: the company's operations suffer short-term disruption because of the investigations triggered by the whistle and by the need to devote resources to the confrontation with an angry public and press; the company may be in trouble with the law and face fines or criminal or civil proceedings; employee morale plummets as the employees take sides with or against (usually against) the whistle blower; other stakeholders (shareholders, vendors, customers) may decide to make other business arrangements and hurt the company's long term interests. But there are worse consequences.

First, there are the undesirable results of the corporate governance practices that made whistle blowing seem the only recourse for the employee. If the corporation does not respect the employee's contribution to the ongoing dialogue of company operations, it not only places itself at risk for whistle blowing, but it loses the value of that contribution; the policies and practices that discouraged the whistle blower's communication will have discouraged all the other employees from joining the dialogue, and a good portion of their creativity, experience, cultural slants and ideas will have been lost to the company. A second consequence is the loss of employee enthusiasm, or "ownership," regarding the company mission and work, duplicating the morale problems incurred by any exclusion of the employees from the decision making process.

But the worst consequence of the whistle blowing scenario is the damage to the employees who confront the corporate evil, whether or not one of them blows the whistle, whatever they decide in fact to do. Consider the case of the *Challenger*, for instance. The story is well known: On January 28, 1986, the space shuttle *Challenger* lifted off from the launch pad at Cape Kennedy in Florida, flew seven nautical miles down range, and exploded, killing its seven astronauts, including a popular New Hampshire schoolteacher, Christa McAuliffe, chosen from all the nation for the honor of space flight. As it shortly became known, most of the Morton Thiokol engineers responsible for the spacecraft had advised against the flight, on grounds that in the unusually cold morning air (it had gone well below freezing during the night, and there was still ice on the launch pad), the O-rings (loops of rubber-like material between the segments of the booster rocket) might be too stiff to seal the joints in the rocket; if that happened, hot gases might blow by the rings and ignite with explosive force, destroying spacecraft, crew, and the entire launching apparatus. (The engineers had assumed that the explosion, if it came, would be at the liftoff.) They were listened to, but eventually overruled by senior management at Morton Thiokol, who in company with the agency that ran the space program, the National Aeronautics and Space Agency (NASA) felt that they could tolerate no more embarrassing delays. After the explosion, Congress wanted to know what had gone wrong; against the advice and pleas of his colleagues, engineer Roger Boisjoly, the first to notice the erosion of the O-rings in previous flights, and responsible for the task force working to solve the problem, told the Rogers Commission exactly what had gone wrong, and that he and others had tried to stop the flight but had been overruled.

As a result, Boisjoly was isolated and shunned in his workplace, sent away from the centers of decision, removed from projects in which his expertise would count, deprived of his functions; soon enough, he had to resign. He lost his job, income, security, career, and very nearly his sanity. The fate of the employees who stayed may be worse: now they know not only that their failure of courage (or, in the case of the managers, failure of wisdom) caused the death of the astronauts, but having done nothing about it since, and having done nothing while the one person who did try to do something was persecuted by the company, they must carry that guilt, compounded by their silence with regard to Boisjoly, with them forever.

Boisjoly's action, even though taken after the fact of the explosion, still constitutes external whistle blowing: "a disclosure by organizational members of illegal, immoral, or illegitimate organizational acts or omissions to parties who can take action to correct the wrongdoing."[28] There was no correcting the wrongdoing for Christa McAuliffe and her shipmates, but there was much that could be done to make sure that it did not happen again: in future, NASA could worry less about media embarrassment and more about safety checks, the engineers and the managers could spend more time learning to understand each other's preoccupations,

[28] Marcia Miceli, Janet P. Near, and Charles R. Schwenk, "Who Blows the Whistle and Why?" *Industrial and Labor Relations Review* 45:113 (October, 1991).

and the hierarchically-organized company could figure out some way to empower employees to pursue ethical concerns to the end, instead of being asked to bottle them in the name of corporate (and agency) convenience. A good company will make sure that its employees can follow their consciences, no matter how much delay and disruption those consciences threaten to spawn. Ultimately, when management realizes the inevitability of confronting employee consciences in tight situations, management will learn to have the confrontation much earlier in the decision process, when things are easier to change, and next time the disaster may be avoided.

2.7 Conclusion

What, then, does the corporation owe its employees? The general duty may be summed up as **mutual responsibility**—the corporation must exercise responsibility over the areas which it controls (the physical conditions of the workspace, the monitoring devices and policies in place), while the employees must take responsibility for that portion of the work that is in their control. Each of the imperatives of this chapter is really a mutual imperative, binding not only (as is traditional in business ethics) on management and Boards of Directors, but also on the employees individually and, to a lesser extent, collectively.

For **justice** to obtain in the corporation, not only must hiring and promoting practices reflect non-discrimination and, where appropriate, affirmative action, but the employees must work informally to create an accepting and empowering working situation. For **privacy** and other individual rights to be honored in the workplace, management must learn to trust the employees, but *a fortiori* the employees must be trustworthy, not taking advantage of the hands-off (or eyes-off) policy for behavior that would hurt the company's interests. For **health and safety** to be protected, management can only make a start at keeping the workplace safe; workers must learn safety consciousness and create a work atmosphere where protection is taken very seriously. **Dignity** also is preserved as much by co-workers as by front office policy; the climate of dignity is created not by rules but by thousands of acts of respect among employees of all levels. **Integrity** must not only be permitted but encouraged; in a world that seems to have forgotten the notion, employees cannot always be expected to know how to live with integrity when they enter employment. In a company that depends on employee integrity to survive, as most companies do, it is imperative to include some lessons on integrity near the beginning of employment.

What would a lesson plan look like, for these integrity lessons? On the assumption that they would be for top managers and every level beneath them, they cannot include the specifics of anyone's job, and they certainly cannot contain how-to material for handling, supervising, outwitting, intimidating, or spying on each other. That's one of the advantages of a course designed for the whole

company. Experience suggests a three-item curriculum, elaborated in any way that may seem useful to the company:

1. Primarily through the discussion of cases (supplemented by some limited instruction on the terminology of ethics), help each employee acquire the **wisdom** to see ethical problems when they arise—to discern injustice and insult as they happen, to foresee problems from unsafe practices, to know when rights and welfare are being violated.
2. Through empowering policies and direct encouragement (accompanied by some very specific instructions to the first-level managers), help each employee acquire the **courage** to speak out about problems when they are first noticed, and to follow up to make sure something is done about them.
3. That said, and done, continue the lesson, primarily through the relation of stories that trace signal events over time to show both short and long-term consequences, to help each employee acquire the **patience** (or temperance, for traditionalists) to recognize that in the best of circumstances, while minor changes that avert disaster may certainly be hoped for (let's put off the flight for a few days and maybe it will get warmer), radical changes in corporate structure and practice are not going to happen quickly. Action that continues a controversy beyond reason and beyond effect can only harm the company and therefore everyone who has a stake in it.

Employees must know, in short, how to take responsibility, how to recognize a problem, how to act effectively to solve it, and how to lay it to rest to minimize harm to others. The corporation is, after all, a world unto itself; it absorbs the best part of the lives of those who work in it, commanding their obedience, their social support and their individual creativity. Their lives are lived as part of it, and if they are to be truly human lives—lives of choice and responsibility—the corporation must be an arena of responsibility for all its human participants.

Chapter 3
Customers, Community, and World: The External Constituencies of Business

Abstract A survey of the varied responsibilities that business carries towards its external constituencies, protecting them from harms that business enterprise might unintentionally cause.

Keywords Product quality · Warranty · Truth in advertising · Disclosure · Good citizenship · Consistency abroad · Moral codes · Manufacturing standards · Stewardship of natural environment

The other half of the corporation's obligations concern the constituencies beyond the plant walls: customers, suppliers, local communities, national and international audiences, and ultimately the natural world itself. The duties to the people outside are much the same as the duties to the people inside: they must be treated fairly, with respect for culture and differences, with concern for the health and safety of all who deal with the company. The duties may be summarized under five headings:

1. *Quality of product and service*, and the willingness to back up the product with warranty and keep track of it, possibly to the place or manner in which it is finally disposed of;
2. *Truth and sensitivity in the representation of the corporation and its products*;
3. *Good citizenship* in all the communities in which the corporation functions, including candor and cooperation with the government(s) and governmental agencies with which the corporation must deal;
4. *Consistency in the application of moral codes and standards abroad*; and
5. *Stewardship* of the natural environment. We will take these on in that order.

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3.1 Quality

3.1.1 Introduction

The first duty of any association that provides a good or service for sale is to do what it is doing well. The products should be safe, durable, and beautiful; the services should be promptly and cheerfully performed; what is done should be done right the first time. At the least, the company should be able to stand behind, guarantee, anything it makes or does.

In simpler times, the entire duty of the company could be summed up in the commitment to quality, or excellence. The quality of the product or service, recognized and appreciated by the customers, would keep the customers satisfied, and keep them coming back, assuring the company's profits. As we recall, that was why Adam Smith was so sure that competition among suppliers would increase the real wealth of the people indefinitely: he assumed that customers were interested in the highest quality goods for the lowest price, and were able to tell exactly what they were getting. Quality, and the reputation for it, provided the foundation for fulfilling the rest of the obligations to the larger community: with a good product, the advertising can tell the truth, the suppliers and the local community are assured a continuing enterprise to provide support for them, and there is no reason to fudge on compliance with laws. Incidentally, that same commitment and reputation was the best start to fulfilling the company's duties to its employees, for it ensured them adequate resources for wages and benefits, and reason to take pride in their work.

For purposes of this chapter, a **consumer** is any person who (buys and) uses goods and services marketed and sold by another (In some cases, we have to distinguish between the **customer**, the buyer who chooses and purchases the goods for sale, and the **user**, or ultimate consumer, who actually puts the product to its end use: Parents are often the customers while children are the users of, for instance, sugar-coated cereal. "Consumer" covers both; "ultimate consumer" is the user). How is the manufacturer of any product accountable to the consumer? The first kind of product guarantee is called a **warranty**: essentially, a promise made by the manufacturer to the consumer, that the product is as it is presented. The most general kind of warranty is the **implied warranty of merchantability**, the universal promise that the product is as it appears to a reasonable person to be, and will do what it is obviously intended to do. A saw will cut wood; a bicycle will not fall apart as soon as someone sits on it; a radio has working parts; if there are light switches in the new house, there is an electrical system to which they are connected.[1] Beyond that, there may be any number of **express warranties**, in which a manufacturer specifically promises a particular level of performance.

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[1] *Don't laugh*. A friend of my sister's married a very successful builder who had an odd habit of moving to different parts of the country every two years. Seems he made his money by building lots of houses, putting in faucets and switches but not putting in plumbing or electricity, selling them all in a short period of time, closing out the company and moving on. He stayed out of

He will be held to that standard on account of the warranty. Warranties may cover anything that a manufacturer could be held responsible for: the design of a product, its construction, and any or all of its component parts. By law, a manufacturer may also be held responsible for the labels attached to the product and the instructions and warnings that come with it, which must be clear and easy to read.

Our courts have noted that the link between the quality of the product and the fortunes of the company is not as clear as it once was, in part because the product is simply too complex to be examined by the consumer for defects, and in part because our more articulated system of product distribution often places the manufacturer at several removes from the ultimate consumer. The resulting dilemmas have made the judgments of product quality, product safety, responsibility for both, and liability for misfortunes that occur in the use of the product, considerably more complicated. Certain principles of responsibility for product quality and safety are ancient and well-known: for instance, we have a moral **duty not to harm** each other, intentionally or otherwise. Intentional harm is clearly wrong, and since the elaboration of duties in the Biblical text of *Exodus* it has been a principle of community life that we must be careful not to hurt others unintentionally either: even colloquially, we recognize a duty to exercise **due care**, the carefulness expected in order to make sure that people don't get hurt. That principle is expressed in our law: the Anglo-American Common Law has held since the 17th century (at least) that if a person acts **negligently**—carelessly or neglectfully—in such a way as to injure another, that other may recover from the careless one the damage that has been caused. **Negligence**, as a **cause of action**–reason to sue, with expectation of recovery–includes four elements, each of which must be proved by the plaintiff for the suit to be successful:

1. The defendant must have had a **duty** to the plaintiff;
2. There must have been a **breach** of that duty: the defendant failed to perform the duty, or failed to perform it to a required standard;
3. There must have been **harm** to the plaintiff;
4. The **breach** must have been the **proximate** (nearest) **cause** of that **harm.**

An infinitely large number of possible breaches of normal duties are included under the umbrella of "negligence": failure to shovel the sidewalk in front of your house, on which the postal worker slips and hurts himself; failure to operate machinery in a safe manner; failure to supervise a nurse who allows a patient to fall out of bed; and the like. Since the establishment of this legal category, it has been accepted that "harming" someone through negligence may include giving, or selling, that person a defective product, which causes damage to the person when used; there is a positive duty to make a product safe. As can be imagined, the scope of the duty is as wide as the range of human activity, and as problematic: Is the

(Footnote 1 continued)
lawsuits and jail (for awhile) because no one figured out what was wrong until his company was bankrupt and he was out of town.

manufacturer under any duty to a burglar who steals the chainsaw and hurts himself with it? Is a homeowner negligent if he allows a rotting tree to stand until it falls in a storm on the neighbor's car?

Amid the confusion, we can track at least one important trend: where vendor–buyer relations are concerned, the responsibility for the safety of the consumer has been transferred from the consumer himself to the company that made the product. For example, consider the family car.

3.1.2 The Safety of the Car

Until the beginning of this century, if a product you bought was defective, you could recover damages under **contract** law from the person you bought it from, who had promised to sell you a safe product in exchange for your payment and then failed to fulfill his promise. That understanding made sense in Benjamin Franklin's day when the person who made the product also sold it. But by the time a wheel fell off Donald MacPherson's Buick, the retailer (dealer) he had bought it from had not made it, nor had that dealer any way of finding out that the product was defective. Yet the only *contractual* relationship was between MacPherson and the dealer. Could MacPherson hold Buick responsible? The court in *MacPherson v. Buick Motor Car* (1916)[2] held that he should be able to, not only because the manufacturer would be better able to bear the burden of remedy for defective products than the hapless retailer, but primarily because it was possible to bring this case into the category of "negligence," and so acknowledge another legal duty, that of **due care**, on the manufacturers. On the doctrine of "due care," manufacturers and customers are not Adam Smith's equally knowledgeable bargainers meeting in the marketplace. The manufactured product is assumed to be something of a mystery to the buyer, and therefore the manufacturer has the responsibility to exercise special care to make sure that it is made properly, and will present no hazard to the consumer.

MacPherson reversed Adam Smith's guiding principle for the free market, ***caveat emptor*** (Let the buyer beware), which had clearly become unrealistic in the days of complex manufactured products. From that point, the maker of the product was responsible for taking care that the product was properly made. But the burden was still on the consumer of the product to show, in case of product failure, that the manufacturer was guilty of negligence—had negligently failed to perform some required operation in the production of the car, and that that failure was the proximate cause of the injury to the consumer. This burden was lifted, and placed on the manufacturer, in succeeding cases, most notably *Henningsen vs. Bloomfield Motors*[3] (New Jersey 1960) and *Greenman v. Yuba Power Products* (California

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[2] *MacPherson v. Buick Motor Car*, [New York Court of Appeals].

[3] Henningsen v. Bloomfield Motors.

1963)[4] in which it was established that injured consumers could be awarded damages even if there had been no provable negligence in the manufacture of the product. The courts in effect decided that a consumer has a *right* to expect that the products offered for sale are reasonably safe when used for their intended purpose.

So the decisions held that a car must be safe when used by ordinary people in ordinary ways—not just "appropriately safe" within the confines of the market, but *safe*. In 1960, Ralph Nader, an articulate critic of the American automobile companies, wrote *Unsafe At Any Speed*, a critique of the Corvair in particular, but also more generally all automobiles on the road at that time, showing that features adopted purely for marketing purposes rendered the car more dangerous than the consumer probably expected.[5] At no point did he claim that there had been negligence in the making of any individual car, or that statistics showed a particular car to be alarmingly misengineered. It was simply that, under certain circumstances *that motorists could avoid but probably would not*, accidents happened. From that conclusion, it was a short step to the Pinto case.

The Pinto was a small "subcompact" car developed by the Ford Motor Company, in 1970; by dint of strong pressure, Ford President Lee Iacocca got the car on the market by 1971. It was developed in response to higher gasoline prices and stronger competition from Japan in the small car market; it was under 2,000 pounds and under $2000 to buy. At that price, and that gas economy, suitable for four passengers, a generally agreeable car overall, the Pinto sold well, competing well in its class. Then in 1977 Mark Dowie, a freelance journalist, published an expose of the Pinto, "Pinto Madness," in the journal *Mother Jones*, claiming that the gas tank of the Pinto blew up when struck from the rear, and that the inferior construction of the Pinto in this regard had been responsible for "500 burn deaths," although "the figure could be as high as 900."[6] In 1978, three girls, two sisters and a cousin, were killed in Indiana when a speeding van rear-ended their Pinto, stopped on a highway, and it caught fire. Their families sued, and the Elkhart County prosecutor brought the Ford Motor Company up on charges of reckless homicide[7]; by then, because of Dowie's article, there was a pile of evidence that Ford may have cut corners and "written off" a certain number of victims in order to get this economical car on the market. On the other hand, as the defense attorney was quick to point out, the Pinto was very probably as "safe" as the other subcompacts, a kind of car that Americans seemed to like; that the "burn death" figures were squishy at best and probably no worse than others of its class; and that it was somewhat unusual, when a heavy van, neglectfully operated (the driver was clearly responsible for the accident), smashed into a stopped car, to charge the manufacturer of the car, instead of the driver of the van, with liability

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[4] Greenman v. Yuba Power Products.

[5] Ralph Nader, *Unsafe at Any Speed*.

[6] Mark Dowie, "Pinto Madness," *Mother Jones*, September/October 1977.

[7] *State of Indiana v. Ford Motor Company*, U. S. District Court, South Bend, Indiana, 15 January 1980, 75–138.

for the injuries. This is not the place for the details of the case.[8] Suffice it to say, that although Ford was acquitted in the case, the costly recalls and civil settlements to which the company was subjected sent a very clear message: from now on, the manufacturer will be responsible for whatever happens in or with or as a result of his automobile, and predictably, that will give us safer cars.[9]

That case has been extended: Ford was again the defendant when a jury awarded two sisters $62 million for injuries received when the Bronco II in which they were riding as passengers turned over. Who was at fault? Of course, the driver was trying to pass two cars at once by going off the road, an illegal maneuver; but the kind of "sport utility vehicle" exemplified by the Bronco has a high center of gravity anyway, and a consequent tendency to flip when going around corners at high speed. The jury found against Ford in this civil case, underlining the trend toward manufacturer liability.[10] Incidentally, this case is part of the most recent chapter in the family car controversy, which is still being written: those popular sport utility vehicles occasionally do in their drivers and passengers, but are much more likely to cause substantial injuries in any other automobiles they may strike in the course of an accident, simply because they are much heavier than the average car (One reason for their popularity is the impression among young families that if an accident should happen, the people in the sport utility vehicle, especially the children, will be more likely to emerge from the accident unscathed. On this logic, we will all soon be driving Sherman tanks). If you drive a standard, medium weight car, and you are injured in an accident where the other vehicle is a heavyweight sport utility vehicle and the other driver is at fault, whom should you sue to compensate you for your injuries? On the older understanding, you should sue the driver of the other car; on the Pinto doctrine, you should sue the manufacturer of your own car, on grounds that it is negligence to put a medium weight vehicle on the same road with sport utility vehicles; common sense would suggest that you sue the manufacturer of the sport utility vehicle for putting on the road a car dangerous to others. Insurance companies are beginning to come to that understanding, and the SUVs may soon be very expensive to own.

The family car may be an appropriate platform for the really serious questions about product quality and safety. First, how safe is safe enough for a prudent person to use the product? The requirement of "zero risk" will keep us indoors all our lives, and it is true that we often take enormous risks (rock-climbing, etc.) just for the fun of it. But does that mean we have no right to complain about cars that carry risk with their low price tags? Second, possibly more importantly, how far into the field of consumer choice should government agencies step in order to ensure safety? By government "agencies," we may understand agencies of every

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[8] See Lisa H. Newton and David P. Schmidt, *Wake Up Calls*, Belmont, CA: Wadsworth Publishing, 1996, Chapter 2, "The Case of the Ford Pinto," pp. 47–60.

[9] Reginald Stuart, "Ford Won in *Pinto* Case, but The Memory Will Linger On," *New York Times*, 16 March 1980, sec. 4 p. 20.

[10] Adams and Maine, *op.cit*, p. 414; *National Law Journal* 2/5/96.

branch of government—legislatures tempted to "protect" constituents by demanding standards of safety, executive branch regulatory agencies enforcing those standards, or courts, shifting the burden of loss from the victims of accidents to the manufacturers of the automobiles involved in them. On the one hand, we want some legal guarantee that the complex product we buy will not cause damage to us, or to our passengers; on the other, we still want to be able to choose our car among competing products on a free market, according to our notion of the optimal balance of safety and economy.

This area of the law is still evolving; as other aspects of our lives become safer (through immunizations and good sanitation, for instance), our tolerance for accidents involving consumer products decreases, approaching zero as a limit. The result of the lowered tolerance has not always been what we would have wanted. Fearing liability, towns have closed playgrounds (children might get hit by swings, or fall off the monkey bars), high diving boards have been taken from swimming pools, churches have closed soup kitchens for the poor, fearing lawsuit if someone should be injured in a fight. It is not so in other nations: in Germany, for instance, lawsuits for accidental injury are unusual, and rarely successful. In a typical case, a child accidentally injured in a Koblenz swimming pool was awarded no damages even though supervisors were admittedly away from their posts at the time; the appeals court affirmed the lower court decision not to hold the pool liable, remarking "that children must learn responsibility and that supervisors might hinder development if they watch too closely."[11] Given the rich opportunities for exploration at the German playgrounds and zoos, some American parents might wish the U.S. to move in the direction that Germany has taken. At some point a balance will have to be reached, between protection of safety and permission to assume responsibility, but it is not apparent from here just where that will be.

3.1.3 Strict Liability

As a result of the Pinto doctrine, a new understanding was introduced to the relationship between buyer and manufacturer, approximating **strict liability.** The doctrine of **strict product liability** requires the maker of a product to compensate the user of that product for injuries sustained because defects in the product made it dangerous, *whether or not* the manufacturer was negligent or deviated from normal process in making the product. Still, strict liability is not **absolute liability**: the burden is on the manufacturer to show that the product was not defective if used in the ordinary way, but that burden can be borne, at least in theory, if it can be shown that the user did not exercise ordinary care and prudence in using the product.

[11] Edmund L. Andrews, "Where a Lawsuit Can't Get Any Respect," *The New York Times*, Section WK, p. 3, Sunday, March 15, 1998.

In deciding to hold manufacturers responsible for almost all injuries incurred in the use of a product, the courts (and on occasion legislatures) employed a set of moral calculations worth noting: to be sure, it is not always *fair* to hold a manufacturer responsible for injuries that no one could have foreseen, after the product has been made with all appropriate care. Nevertheless, manufacturers are *in the best position* to modify the product so that such injuries will not occur in the future, and to think out the possibilities for other types of injuries. Let the burden fall, then, on the one most clearly in position to make sure that there will be fewer burdens in the future.

There are problems with this approach. Mark Peterson, a college student, was awarded $12.65 million in a suit against Goodyear Tire and Rubber Company, brought because an improperly repaired tire had blown out and caused an accident, rendering him quadriplegic. To be sure, he was probably driving too fast, and the tire had been improperly repaired by a garage nearby; but these portions of responsibility were ignored by the jury.[12] And most famously, Stella Liebeck brought suit against McDonald's (the fast food chain), for serving their coffee too hot, when she was burned on legs, thighs and buttocks after balancing a just-bought cup of McDonald's coffee between her legs, while driving to work, while she pried off the top to add cream and sugar; the car hit a bump, the coffee spilled, and the burns were, by all reports, very bad, requiring skin grafts. So she sued McDonald's for not adequately warning her that the coffee was "unreasonably" hot, and recovered $160,000 in compensatory damages and $2.7 million in punitive damages (later reduced to $480,000; the actual final settlement was out of court, for an undisclosed amount).[13] Those who attempt to put a good face on the verdict insist that it was really McDonald's callous attitude toward Stella Liebeck that was to blame for the enormous sum, and they have a point; it took a very long time for McDonald's lawyers to take seriously a lawsuit brought by a customer who spilled her coffee because she was trying to pry the safety cap off to add cream and sugar to the coffee which was wedged between her legs while she was in a moving car. The point of the jury's award, the jury later explained, was to send a message to fast food establishments that *all* customer complaints were to be taken seriously, and in that, I'll warrant, they succeeded.

What has happened in these cases is that the principle above—let the burden fall upon those in the best position to make sure it doesn't happen again—has been modified to, let the burden fall into the "deepest pockets," the party in the best financial condition to insure anyone who gets hurt, no matter whose fault the injury was. After all, there is little a tire company can do to make sure that its tires are always repaired properly, or that MacDonald's can do to make sure the coffee isn't spilled by the customer. It makes a certain amount of sense, it could be argued, to let rich corporations be the insurers of anyone who gets hurt, although surely a

[12] Adams and Maine, *op.cit* p. 414, citing *National Law Journal* 2/5/96.

[13] William H. Shaw and Vincent Barry, *Moral Issues in Business*, 7th edition (Belmont, CA: Wadsworth, 1998) pp. 486–487.

more efficient system (involving more taxes and fewer lawyers) could be devised to accomplish this objective. But there is no consensus that there should be such insurance, and in the absence of consensus, these results cast a pall over too many areas of ethics: they weaken our assumption that consumers and intermediaries are responsible adults too, and must share responsibility for the vicissitudes of life; they drive up insurance rates for all of us; and they cause the same sort of demoralization that the fantastic CEO bonuses are thought to cause—the generalized belief that these people have won a rigged lottery, and that perverse human decisions are making life a lot less fair than the natural lottery of luck would have it.

3.1.4 A Case of Corporate Versus Consumer Liability: The Silicon Implant

The problem of assuring product quality and safety is significantly increased in the area where unproven new technology and luxury products intersect. If a product is a necessity—including in this category a home, food, clothing, and likely the family car—we may be offended when the product fails to perform satisfactorily, and may recover from the manufacturer the expense we have been put to in repairing the damage it caused, but we can hardly make the most effective argument for compensation for injuries and further damages—that we did not need this product, and *had we been warned of the possibility of injury, we would never have bought it*. That counterfactual lies at the heart of the most expensive lawsuits: that the victim was sold a bill of goods, induced by false promises to make a purchase that he or she would never have made otherwise, and therefore deserves full compensation plus punitive damages from the company that is responsible for the promises as well as the product.

Of all the product controversies that have featured consumer lawsuits, the most distressing to the scientific community, and potentially the most damaging to whatever is left of a purchase on justice in the court system, is the Silicon Breast Implant controversy. Breast "implants" of some sort have been around for awhile, used as prostheses in reconstructive surgery after breast removal (usually as part of treatment for breast cancer). During the 1960s, Dow Corning (a combination company of Dow Chemical and Corning Glass, founded in 1943 to produce silicon products) discovered a way to make silicone gel for mammary prostheses. Over a million women have had such prostheses, and not just for reconstruction after breast cancer surgery; by 1990, most of them were for cosmetic purposes only—for "breast augmentation" for healthy clients who had become convinced that larger breasts would advance their social and professional standings.

Then, during the 1980s, complaints began to be heard: women who had had implants were suffering from unspecified diseases characterized by pain, fatigue, and other vague symptoms. Some of the implants may have been leaking silicon

into surrounding tissue. There was concern that silicon breast implants might be implicated in connective tissue disease, one of several autoimmune disorders in which the body's immune system attacks its own connective tissue. Then in 1991, Mariann Hopkins claimed that her breast implants had ruptured and left her suffering from pain, weight loss, and fatigue. The jury awarded her $7.3 million dollars. A litigation industry promptly developed, with groups of lawyers processing large numbers of potential clients (women who had had breast implants) through private clinics staffed by young physicians recruited for the purpose of documenting their symptoms.

What was the evidence of connection between implant and disease? There had been many complaints of "implant-caused" disease, with symptoms so vague and shifting that it was very difficult to find out what really might be the matter. The only real and diagnosable disease specified as possibly connected to the alleged leakage of the implants was connective tissue disease, and a decisive study conducted by the prestigious Mayo Clinic showed that there was no scientific evidence backing up any such connection (i.e. the number of women who had breast implants *and* had connective tissue disease, a not uncommon condition, was about what would be predicted by chance).[14] Yet even as more and more scientific studies, collected in the wake of that initial survey, showed that there was no likely connection between implant and disease of any kind, the plaintiff's lawyers mounted more and more successful campaigns against these findings, or rather, against the decisive weight the defendants wanted them to obtain in court. By 1995, when Dow Corning filed for bankruptcy on account of the cases brought against it, at least some parties had taken an unshakeable stand against the company and against the literature that supported its position.[15] After Dow Corning filed for bankruptcy, the lawyers turned their attention to Dow Chemical, one of the parent companies, on grounds that Dow Chemical must surely have known what Dow Corning was doing and therefore shared responsibility for it. Their first effort yielded a verdict of $14.1 million against the company, even though the maker of the prostheses was a totally separate company, even though all the scientific evidence available to the court showed there was no connection between implant and disease, and even though even then there was evidence that false data had been cooked up for the plaintiffs' lawyers by disreputable laboratories—rendering it likely that many claims were based on a tissue of lies.[16]

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[14] Marcia Angell, backed up by an article (later a book) by Marcia Angell, Editor-in-Chief of the *New England Journal of Medicine* and a first-rate scientist, **need further cite.**

[15] At least some of these identified themselves as feminists, and strongly believed that most problems affecting women had their origins in exploitative practices by men—in this case the sale (by men) of surgical devices (made by men) to enhance the sex objects of a male oriented world that likes large breasts (which are of no particular advantage to women)—and therefore called for compensation of the women by the men, the male-dominated corporations who had made the devices.

[16] Shaw and Barry, *Moral Issues in Business* 7th edition p. 485.

David Kessler, then head of the Food and Drug Administration (which is responsible for the safety of all medical products on the market), in response to the fears voiced by women with implants, reclassified the implants from “Class II” to “Class III” devices, meaning that test data on the safety and effectiveness of the implants had to be submitted to the FDA. He also asked the FDA panel of advisors to reconsider the breast implants; in 1992, he declared a moratorium on the insertion of the implants until entirely new data had been submitted in good order, and the devices had been proven safe. Under the circumstances, Dow simply did not try to resubmit an application to the FDA; it’s out of that market for good, and it may close its whole medical department.

This particular case has spawned a very wide range of secondary effects, probably totally unforeseen by any of the actors in the drama to this point. For instance, there is now a shortage of silicon for medical purposes. Dow had been a major supplier, and along with all the other suppliers, had stopped manufacture of silicon because of the lawsuits. That means that all the other manufacturers of medical products that use silicon—artificial joints, heart valves, catheters, pacemakers—have also had to curtail production while new sources are located, and must price and label their products in future in contemplation of spillover lawsuits, even though no safety problems have come up with their product line. For another instance, promising medical advances which also use silicon implants have been abandoned as a result of these lawsuits—for instance, the long-acting contraceptive Norplant, which promised much greater reproductive control for women in circumstances where ordinary contraceptive protection is difficult, which is now virtually off the market, threatened by the same type of lawsuit.

The effects of the breast implant controversy on the operations of our legal system are more devastating than the effects on the medical industries. Consider the evidence of these cases against the traditional elements of “negligence,” set out above: there is no doubt that the defendants were under a duty to the plaintiffs to make a safe product. But there is no evidence that the duty was breached (even the leakage from the implants is expected in a certain number of cases and is harmless, and the plaintiffs were aware of that); there is no evidence that there was any harm suffered—the “disease” of which many women complained had vague and shifting symptoms, and could very well have been psychosomatic, and the actual incidence of connective tissue disease was what would be predicted for a sample of women the size of the implant group; there is abundant evidence, replicated several times, that there is no proximate cause, no cause of any kind, in fact no connection at all, between the implant and the disease; and in the case of the lawsuits against Dow Chemical, it is not clear that the defendant in the suit was any party to making the product. Yet the juries continued to make awards. We seem to have reached a new phase of what used to be called “negligence” law, and it is not clear that our legal system is set up to deal with it.

3.1.5 Making Policy on Safety and Quality

Meanwhile, back at the company, extravagant lawsuits aside, how should a corporation set the scope of its responsibility for its products? The Tylenol case provided an unusual, and inspiring, standard, and bears retelling. Tylenol, as most people know, is a harmless painkiller manufactured by Johnson & Johnson, often preferred to competing products because its use is not associated with intestinal bleeding and other problems common to the species; it is freely sold over the counter in all drugstores and supermarkets. Then in 1982, seven people in the Chicago area died from cyanide poisoning; when the substances they had consumed were examined, the cyanide turned out to come from Tylenol capsules. Amid the shock, the company took action: it recalled 31 million bottles of Tylenol, notified half a million doctors and hospitals to discontinue use of the capsules, set up a toll-free hotline to answer questions, and asked customers to bring back partly used or unused bottles of capsules to trade for free tablets. Any information the company got was immediately made public; all employees and retirees were kept informed, interviews were granted to TV talk shows and to the business journals *Fortune* and *the Wall Street Journal.* The whole affair cost the company in the tens of millions of dollars, and it had been perfectly clear to almost everyone from the beginning that the company and its employees were innocent of any connection with the cyanide: the tainted bottles had had such diverse origins and the cases so closely spaced geographically that the contamination had clearly taken place in the retail stores themselves. Yet Johnson & Johnson executives were unanimous in accepting responsibility for protecting the public from any more poisoning, fault or no fault.

As a business strategy, the company actions worked: the brand name Tylenol was saved, capsules were replaced by caplets (not susceptible to the same adulteration), and the reputation of the company for honesty and responsibility, strongly enhanced by its handling of this crisis, gave new luster and appeal to their products. Observers attribute this triumph to the corporate culture of Johnson & Johnson: the half-century corporate commitment to a one-page statement of values called the "Credo," inculcated in every employee to the top of the company, succeeded in this instance in overcoming the universal tendency to defend, evade responsibility, and cover up all embarrassing stories for the sake of saving company profits.[17] As a case of responsible action in the field of for-profit enterprise, the company actions work even better; this example must be incorporated in any account of business enterprise from a responsibility perspective.

Some other good came out of the incident: when a copycat crime involved Tylenol some years later, much less had to be done in the way of public relations, a

[17] For Tylenol story see "The 1982 Tylenol Poisoning Episode," in Ronald M. Green, *The Ethical Manager: A New Method for Business Ethics*, (New York: Macmillan 1994) 208–219. See also Robert F. Hartley, *Business Ethics: Violations of Public Trust* (New York: Wiley, 1993) 295–309. For further information see *Economist* April 8, 1995, 57, and August 19, 1995, 56.

smoothly run police investigation promptly caught the perpetrator, and meanwhile, new universal anti-contamination regulations placed plastic wraps and seals over most consumer products, making the crime that much more difficult to repeat. Meanwhile, the business community had learned that it is indeed possible for a company to act swiftly, decisively and credibly, without a hint of defensiveness or damage control, to protect the public against possible harm from its product; the company will be believed, and the situation will be resolved.

Is a new kind of **product stewardship**, responsibility for a product, in order at this time? The ideal may be an understanding of product stewardship that takes it from cradle to grave, placing the manufacturer in charge of the product from the moment it leaves his back door to the moment it is ultimately consumed and its remainders placed in the proper disposal or recycling site. We would have to do some reordering of priorities and assumptions, but the Chemical Manufacturers Association has promulgated just such an ideal for its constituents[18]: no chemical has left the domain of manufacturer responsibility until it has finally been consumed or disposed of, until it is nonexistent. The adoption of this policy would entail a new kind of **product paternalism** (adoption of public rules and policies on just who may buy what products, made for the protection and benefit of the purchaser) analogous to the laws forbidding the purchase of alcohol and cigarettes by minors, since if the manufacturer is to be held liable for what a consumer does with a product once bought, defective or not, he surely must be able to keep the product out of the hands of those who would abuse it. In the more cautious manufacturing of the next millennium, this policy may be further explored.

3.1.6 For Now: Two Practical Guides for Behavior

Universal cradle-to-grave product stewardship may, ultimately, be the standard required by a responsibility perspective, but that standard will need as a foundation some major institutional changes. For the time being, it might make more sense to try to inculcate two clear convictions in corporate executives, corporate employees, and the vast consuming public:

(a) We are required by the fundamental ethics of business practice to do our work well, to insist that only top quality merchandise emerge from our manufactories, and to blow the whistle (see previous chapter) on any practice that frustrates that standard. This requirement is really the **craftsman's ethic**, the work ethic that treats trade as a vocation, a holy calling, into which we may pour all our pride and for which we are entirely willing to be held accountable.

[18] As part of its Responsible Care commitment.

(b) "There is a general risk in life," said a German judge, explaining his nation's disinclination to reward product-liability lawsuits, "And if you try to avoid all of life's risks, you avoid its rewards as well."[19] We are not living in a safe world. No one gets out of it alive, and the hazards along the way are to be expected and, ultimately, accepted. Accidents happen, including outrageous freak accidents. Furthermore, we are not living in a fair world. The freak accidents that happen to us leave us *unfairly* disadvantaged in comparison with our contemporaries and fellows who suffered no such accident, and often there is no way of really recovering value afterwards. Sometimes, it is not worth the hassle—worth it to us as individuals or worth it to us as a society—to attempt to shift the terrible burden from such accident to broader shoulders, or deeper pockets. Sometimes the blows of fate have simply to be endured, as they have been for 50,000 years. A generation raised to think it was universally entitled and universally insured must learn otherwise. Beyond the requirement that consumers as well as manufacturers take responsibility for their actions, consumers may have to develop a peculiarly old-fashioned endurance. The requirement of such quiet endurance is really the requirement for **patience**, the ability to suffer outrageous misfortune cheerfully, a virtue for which our generation is not famous. It is time to relearn it.

Let these two imperatives be combined—adherence to the craftsman's ethic on the part of the manufacturer and the practice of patience on the part of the consumer—and we may be able to find a balance of expectation that will not require lawsuits to enforce. Such resolution awaits a new century.

3.2 Truthfulness, or Veracity

Once a good product is made, how shall we make sure that lots of people buy it? **Marketing** is about the presentation of the product; its purpose is to place the product before the consumer, as attractively as possible, accompanied by a message that will make the consumer want to buy it. The quality of the marketing effort will determine whether or not even a very good product will survive in the open market—it must sell, in sufficient quantity at sufficient price, to cover the costs of manufacture and return a profit to its investors, or it is destined for oblivion. The moral tension in all aspects of product marketing is between the duty of the company to make a fair representation of its product while competing successfully in a market system, and the right and duty of the consumer to exercise prudence in making choices of what to buy in that market. The standard appropriate to both law and ethics is that of the "reasonable person," the prudent consumer with a normal knowledge of the ways of the world, quite capable of

[19] Andrews, *op.cit*.

evaluating an honestly presented product in terms of its worth generally and its value to him, given its price and his circumstances. In a society of imbeciles, there would be no marketing—nor, for that matter, a market; the intelligence of the consumer is essential and is presupposed. Truth, then, is the focus of any discussion of marketing: the company's duty to tell it, and the consumer's duty to understand it. We will take on this topic under three heads: the presentation of the product itself, the content of the messages sent about the product, and duty to tailor that presentation to audiences with less experience dealing with the market.

3.2.1 Packaging and Labeling

When a product is designed for sale, it is designed to be attractive to the consumer. Its properties are designed with a known market in mind, and all optional aspects of it—color, shape, decoration—are coordinated to complement the image that that product carries with it to the market (Toilet soaps, but not hammers, come in pink). After the design of the product itself, the first message to the consumer is the label that identifies it by name, company logo, size, weight, or quantity, and the like. Historically, the label on a product has been no more than an attractive picture and name, to place a trusted brand before the consumer and to encourage purchase with pictures of smiling faces.

It has become considerably more than that at present. In response to the increased complexity of products of all sorts, a variety of consumer protection legislation has demanded more and more consumer-friendly information on the label. All poisonous substances must be so labeled. If a machine has sharp or moving parts that may cause injury, a stern and clear warning label must be located near those parts. If the product is edible, the label must contain a complete nutrition chart, spelling out calories, fat content, sugar content, salt and vitamins per serving. Such clarity usefully replaces the previous barrage of buzz-words that decorated the supermarket shelves, most of them promising that the product would not damage heart or waistline– "light" (or "lite"), "Low fat/cholesterol," "Sugar-free," and so forth. Pharmaceutical labels must contain an approved statement of what the product is expected to do, as well as warnings against harmful use (that will be infinitely elaborated in the package insert, an extension of the label).

Similar candor now attaches to packaging; the time-honored practice of putting small amounts of product in a large and colorful box, for instance, is now rendered useless by the required supermarket shelf information on actual price per unit of weight or volume of product. Those responsible for the packages are still perfectly free to call them "Extra Large Economy Size," not to mention "35 % more absolutely free!," but there are ways for intelligent consumers to see what they are buying, and that is all to the good.

Even at this stage of the presentation of the product, ethical questions arise. If a product is being prepared for sale to American consumers under American law in an American supermarket, consumer protection is built into the situation, and,

I would argue, consumer sophistication may be assumed. But in other conditions, many of the same considerations arise as in the product quality controversies. The manufacturer must exercise care to make sure that the presentation is honest, that the nature of the product is clear from the package, and no misleading claims, explicit or implicit, appear on package or label.

3.2.2 Sales and Advertising

3.2.2.1 The Salesman's Lot

Where does the salesman's duty of candor leave off and his duty to sell the product begin (or vice versa)? Long before there was any federal law on the subject, it was generally believed that all products should be presented honestly, and generally conceded that many products were not. Sales practices presumably required little scrutiny when goods were sold personally by the maker or dealer to a customer relied on for repeat business; but in the anonymity of mass markets, where contact with each consumer may be the last, sales personnel may feel that they can afford to move the product at whatever cost in consumer understanding. The "used-car salesman" was famous for persuading unwary customers to buy "as is" automobiles that would barely make it down the street; those who sell roofs and building siding know that a customer will make only one such purchase in 30 years, so repeat business can be ignored; in complex products like computers, the salesperson may be reasonably confident that the customer who asks for advice is in no position to criticize it when he gets it.

The consumer faced with a salesperson may not only be ignorant of the product's true features and (for him) true worth, but also at a disadvantage in dealing with the interpersonal situation. The salesperson is highly motivated to get the sale—his job or income may depend on it—and highly skilled in putting a product in a favorable light. The customer arrived in the store in order to buy some such product, so is favorably disposed to being sold. The question often becomes one of price, or features, or terms, and on these matters the customer may have no preconceived boundaries. The ingredients of the face to face contact between customer and salesperson surely include an exchange of questions and information, but may also include a witches' brew of psychological pressure tactics—the sale ends today, there's only one of these left, the new law requires you to have only this kind or risk lawsuit, I've arranged to add several desirable features to this model available at no extra cost and available nowhere else, I've put my job on the line to get you this deal, another customer is looking at it right now, sign here. Unaccustomed to adversarial bargaining relationships of any kind, the customer may well be overwhelmed by the onslaught. Are such tactics justifiable as "part of the game" of salesmanship? If not, must employers forbid their use, even if it means telling sales personnel to walk away from sales that could be obtained by their use (knowing that the competition has no such scruples)? If they are

justifiable up to a point, where does the salesperson's duty not to exploit others dictate an end to such tactics?

We expect that sales personnel will act responsibly in their jobs, balancing their need to succeed in making sales with their disinclination to take advantage of a weak or ignorant person who will really derive very little advantage from the product. But in general, in all situations where customer confronts salesperson, the only protection that consumers may expect from their own ignorance and weakness is their knowledge that they are ignorant and weak, along with certain basic rules of thumb available to all:

1. Do not decide now. The last day of the sale is very likely to be followed by a new sale tomorrow. And it is really unlikely that that poor young salesgirl will be fired just because you don't buy that computer today.
2. Take every piece of literature you can find on the products available, including price lists.
3. Use the time gained by not deciding now to take the literature to someone with expertise on the subject; reconsider your own needs for the product. Do not ignore the possibility that, given what you have found out about the price, you do not need the product at all.

These are not just tactical rules for self-defense in adversarial situations; they are part of the general duty of prudence, of the consumer's duty to shepherd his own resources for the sake of fulfilling his responsibilities to self and family. And, we may add, his responsibility to the business system, to keep it honest.

3.2.2.2 Advertising to Grown-Ups

Advertising is just salesmanship in print, and takes the moral dilemmas of salesmanship a step further by increasing the anonymity. Interpersonal morality decreases to zero when no person is in sight, and the advertising copy is broadcast anonymously to a researched or presumed "market" of millions of faceless people. Advertising is very big business, with hundreds of billions of dollars spent annually in all forms of media advertising; recently, Procter and Gamble spent $1.1 billion on television advertising alone, followed by Phillip Morris with $730 million, General Motors with $728 million, and PepsiCo with $611.5 million.[20] Very little of this advertising is designed to convey real detailed information to the consumer; to obtain such information, consumers go to Consumers Union (or read the latest edition of *Consumer Reports*). Advertising occasionally does convey real information about new products available; and the unimaginative weekly fliers from the supermarket do convey real information on the week's prices. But most of those billions of dollars are spent for a more subtle purpose: to portray the product in a certain light, specifically as that, and that alone, which will fill a

[20] *Business and Society Review* 93 (Spring 1995) p. 77.

recognized gap in a consumer's life. Since the whole enterprise of advertising, under that description, treads on dubious ethical ground, it bears examining.

For purposes of this text, we will pass quickly over obvious offenses that do no harm to anything but our faith in human nature: the transparent use of ambiguity in not-quite-deceptive advertising, puffery, little visual deceptions and put-ons.[21] Some philosophers have treated advertising ambiguity as a serious moral offense, citing the "danger of misleading" consumers and often calling for stricter regulations[22]; we find it difficult to believe that a consumer would make serious and permanent consumption decisions on a clever turn of phrase. Visual deceptions are rightfully forbidden—the product must be shown as it is, and as the consumer will buy it—but again, it is hard to believe that a consumer would not draw his own conclusions after one trial of inexpensive products that are often the subjects of the deception.

The more serious problems of advertising begin when a whole product line is developed and sold to meet needs that are themselves the product of advertising manipulation. We may begin from the unarguable premise that advertising exists to persuade us to buy products that we would not buy otherwise—if we would buy it anyway, why spend the money to advertise? The purchases contemplated by the advertiser are those in which a one brand of a necessary product (toothpaste or light bulbs) is chosen from among indistinguishable competitors, where the advertising exists to create a brand preference, or those in which an essentially unnecessary product is purchased. For the former case, a brand name must be given an image more favorable than the competitors' images, and that image kept before the public. The task is substantial, but essentially mechanical, by the books (For a variant, there are cases where a necessary product must be given a positive image to encourage consumer use: adult diapers, for example). For the latter case, the task is much more challenging and imaginative: A need must be created, either extended from existing needs or created out of whole cloth, and the product shown to satisfy that need.

Possibly some examples will clarify the job description: there is an enormous market, approximately $100 million at present, in deodorants of many kinds—deodorant soaps for general body odor, mouthwashes to make the breath smell sweet (or minty), the underarm deodorants favored by athletes, and the "feminine" deodorants for odors elsewhere in the body. There's a consensus among consumer advocates that given good health and normal bathing, these products are entirely unnecessary. The advertising preys on terrors of giving social offense, of being

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[21] "The ingredient doctors recommend most," for instance, which turns out to be in all competing products as well; "helps prevent cavities," how much help? "the shaving cream that can soften sandpaper," as long as the sandpaper has been soaked for 80 h—the sandpaper in the ad was sand on plexiglass; "the chunkier soup," with marbles in the display model to make it look chunkier yet; "Guess which car is the Volvo?" when the other cars that had been crushed by the truck in the ad had actually had their frames weakened for dramatic effect. In that last case, Volvo fired the ad agency on grounds that the ad might actually have deceived people.

[22] See, for instance, William Shaw and Vincent Barry, *Moral Issues in Business* 7th edition p. 474.

rendered at once ridiculous and disgusting by others' perceptions of an unpleasant body odor, and those millions of dollars are spent to protect us from that terror. I suppose we may call expenditures on such products a type of "insurance." What is troubling about the insurance is that it would not be contemplated without the artificial creation of social insecurity by the very advertising that sold us the product. This is what John Galbraith has called the "dependence effect," pointing out that we cannot defend production as "satisfying wants and needs" if the production process creates the needs as a by-product. The need for more and ever more consumer products–"autos, appliances, detergents, cosmetics"—is an artifact of a society that has emphasized private goods over public goods, and ended in significant confusion of priorities.[23] At the extreme, there are entire lines of products that are sold only as participants in fantasies—most perfumes or after-shave lotions, for instance, or the clothing in specialized catalogs. Does an agreeable fantasy provide a reason to buy?

Where mature and healthy consumers are concerned, what would a responsibility perspective suggest in the ongoing debate over the morality of advertising?[24] In general, that deliberately and unambiguously deceptive advertising should be forbidden, for instance, claims that complex products like consumer electronics and automobiles will perform tasks that they cannot perform. Beyond that, advertising should be left alone. It is not the duty of the company to provide Consumer Union information about every virtue and drawback of its products in comparison with all others on the market. The purpose of the advertisement is to get the consumer to try the product, once, and after that, to decide on rational grounds if the purchase should be repeated. Advertisements are often artistic and interesting, if only to keep the potential purchaser's attention long enough for the brand name to get across; for the same reason, they are often funny, memorable, musical, and of greater entertainment value than the programs they interrupt. By reason of their repetition, they provide us with a common vocabulary and set of sayings, much as the Bible used to do for our forebears; they finance our access to news, sports, and films; and they do, occasionally, tell us about a new product we might enjoy.

Section 5 of the Federal Trade Commission Act grants the government broad powers to protect the consumers from "unfair or deceptive acts or practices." How should these powers be applied? From the above, sparingly. Outside of outright deception that the consumer cannot be assumed to be able to detect and correct, we waste government time and taxpayer money chasing down attempts at manipulation through ambiguity and puffery. For the most part, as consumer products play a large part in our lives, so the fantasies created about them enrich our lives. Advertising belongs. Enjoy it.

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[23] John Kenneth Galbraith, *The New Industrial State*, New York: Signet, 1967, p. 219. See John Kenneth Galbraith, *The Affluent Society*, 3rd ed. New York: Houghton Mifflin, 1976, p. 131.

[24] For the kernel of the debate, we have to go back to the 1950s and 1960s, to Vance Packard's *The Hidden Persuaders*, the first edition of Galbraith's *The Affluent Society*, Samm Sinclair Baker, *The Permissible Lie*, New York: World Publishing, 1968, and Theodore Levitt, "The Morality (?) of Advertising," *Harvard Business Review* 48 (July–August 1970):84–92.

3.2.2.3 Advertising to the Unsophisticated

We expect adults, at least the adults in our society, to take responsibility for themselves and to shape their own responses to advertising and marketing accordingly. The case is different with juveniles. For "children," the under-10 group whose viewing habits can be controlled by their parents, strict regulations have been adopted for advertising (including, for instance, the stipulation that a toy advertised for sale on television may not be shown coming alive, or doing other things it cannot do; youngsters may not be assumed to be able to distinguish reality from fantasy). But no such regulations would make any sense for teenagers, who are exposed to all advertising available to adults. Ought we to be concerned about the content of advertising for the sake of the youngsters, if not for ourselves?

A certain amount of evidence suggests that we should. For instance, the body image of young girls is known to be problematic: unsure about their bodies and their futures as they enter upon the changes of puberty, their self-esteem plummets at the age of thirteen or fourteen. Contributing to this insecurity is the fact that they are likely to begin to gain weight as they reach their mature height. At this point they are assaulted with advertising images of the beauty of slimness, the dangers of ugly fat, and of course, the merits of whatever diet plan is being sold (Diet products now comprise a multimillion dollar industry all by themselves). Clothing advertisements reinforce the value of the willowy figure, models and movie stars display the advantages of being thin, and partly as a result of this barrage, many too many of our young women develop eating disorders, anorexia and bulimia especially, unheard of until the advent of industrial society replaced work images with leisure images, that compromise their physical health and put them in a cycle of humiliation and desperation that severely warps their ability to attain psychological maturity and moral character. Should this vulnerable group be protected from these messages?

Other advertising campaigns influence, and possibly harm, young people of both sexes. For the socially insecure (all teenagers by definition), smoking cigarettes and drinking alcohol have been systematically associated with images of sophistication, maturity, and success—especially but not exclusively success with the opposite sex. Cigarette advertising is now very severely restricted, and alcohol ads banned in many contexts. But favorable messages remain available; should all of them be banned?

The first answer to both questions is that the advertisements, and the companies that design them and the companies that make the products and pay for the ads, are secondary targets at best. The first priority for action lies outside the field of business entirely, in the worlds of family, school, church and community. It has never been easy for young people to grow up to be responsible adults. But every society until the present day has addressed itself vigorously to the problem of escorting children into adulthood, and has come up with rules, rituals, milestones, tests, quests, skills training and other preparation that has laid a clear, if difficult, road before the adolescent, leading in understandable steps to adulthood as the society defines it. We, on the other hand, seem to have no clear idea of what an adult should be, and *a fortiori* no clear idea of how a child should become one. We send

our children a truly bewildering array of mixed messages on all the important matters—sex, work, wisdom, and God—so it is hardly surprising that our messages about body image and product consumption are similarly confused. The advertisers seem to be the only ones with confident messages about what will make an adolescent seem, and be, “cool,” popular, sophisticated, and blissfully happy.

What can we ask of the advertiser, beside a promise not to tell outright lies in the process of puffing the product? We can ask that he not target the young people. Not that it is the advertiser’s fault, or the fault of the business community as a whole, that our adolescents are so inordinately confused about all aspects of their developing bodies, minds and souls, and hence inordinately vulnerable to the attractions of products that promise to make the transition to adulthood easier; but that it is at least his responsibility not to make matters worse. Banning cigarette and alcohol advertisements completely, banning diet program ads from the teen magazines–even removing these messages from our lives and our children’s lives completely–might be a very good idea. It will not solve the basic problem, of what we want our children to grow up to be and how we want them to get there. When we know the answers to *those* questions, it might be a good idea to recruit the best advertisers we have, to help us get the ideas across.

3.3 Good Citizenship

3.3.1 Responsiveness to the Local Community

James Bere of Borg-Warner used to argue, in the mid to late 1970s, that the corporation is always a “guest” in the community, and must behave itself accordingly: quiet and non-polluting in its habits, obedient to all the local rules, alert to opportunities to help out the hostess and the local charities, and prepared to leave, if it does leave, the land and streams as clean and beautiful as they were when it arrived. Other expectations of the community may be even closer to the surface, and the scenarios of betrayal of those expectations have become familiar.

Two of the most common are the plant-closing and discount retailer scenarios. In the case of a manufacturer, it could be argued that when the corporation has lured families to the area with the promise of jobs, fed a substantial payroll into the community for years, made promises to suppliers and the local retail businesses of continuing patronage, it has incurred an obligation not to close down the plant without very good reason (Marginally higher profits elsewhere do not count as a very good reason). For the economic impact is substantial: From the 1960s to the 1990s, New England and the Middle West have both seen their economic bases suddenly remove themselves, leaving behind the poverty-stricken offspring of the workers who had come to work in the plants, and a wake of urban problems as a permanent inheritance. At first, the industries left for the more congenial sunbelt or the nearby suburbs, raising the hope that the problems left behind could be dealt

with by governments—if no longer the local government, then the regional or national government. Now, the corporations go overseas, and those jobs (and the economic viability to deal with the problems) are gone for good.

More recently, another scenario of unfavorable local impact has unfolded, created this time by shifts in retailing rather than manufacturing. The large retail establishments (Wal-Mart, for instance), create similar disruptions in the small and mid-sized towns that they prefer: after destroying large areas of undeveloped land to set up their store and adjoining strip mall, their discount businesses rapidly dispossess the traditional small stores of the area, leaving the picturesque downtown areas shuttered and derelict; if the profit margin does not reach expectations in the allotted time, they leave as quickly as they came, leaving their neighbors on the strip mall similarly orphaned. Downtown does not recover: the small establishments' owners and workers are gone for good, and the customers have already got used to driving for their shopping—so they stay in the car to the next town, and shop at the mall there. Without an economic base, after all leave who can, the small town is reduced to the post-office where the welfare checks come in.

What responsibility does business—specifically the manufacturers heading offshore and the retailers building their malls—have for ameliorating these scenarios? Given the expectations the manufacturers have built up in their towns, and the efforts they have made to convince the town fathers of their commitment to the town in the course of seeking tax relief, zoning waivers or permissions to expand, the nation might require, through federal legislation, that a responsible business will not close a significant plant until four conditions are met: (1) there must be very good reason why this plant is non-viable as it is, (2) efforts with the workers and with the local community must have been made to make the plant viable again; if those do not work and the plant must be closed, (3) there must be adequate notice, and (4) everything possible must be done to cushion the blow to the displaced workers and the community. As for the major retailers, no matter what is asked of them, the fact remains that the responsibility for the welfare of the town and its citizens lies with the local government, and it is not beyond the power of that government to set terms for the arrival of the new retail outlets. Terms might include, for instance, (1) that the store locate downtown in culturally appropriate architecture, (2) that it house its cars in multilevel parking garages that can be shared with other merchants, and (3) that the owners or franchisees take an active and responsible part in the civic activities of the town. A responsible retailer may welcome the chance to work with local government to enhance the downtown area and serve the town to more than inexpensive consumer goods; an irresponsible retailer should not be wanted in the town anyway.

What responsibilities does a going business have in its local community? We have suggested, by way of example, that two requests a business might honor are to keep the local stream free of pollution–specifically, cleaner than the law requires–and to contribute to the local opera. A typical small business, entirely owned and operated locally, is free to invest as much of its income stream as it likes in the local community, on grounds that the building of local good will is crucially important to its success. The plant, or outlet, of a much larger publicly

owned company may have a harder time justifying such outlays, for reasons suggested above: the owners, such as they are, must be expected to want higher profits above all, and cannot be assumed to have any interest at all in the local natural or cultural environment. Typically, a responsible corporation, owned by the public or by distant partners, will allot money to the local community anyway: the money to clean up the stream on the rationale that if there is no law protecting that stream now, there might well be soon, and that if a site is found polluted when that law is passed, they will have to clean it up under the watchful eye of the government, and that will be *very* expensive; and the money to the opera on grounds that it is something enjoyed by the employees. In some of the more imaginative community relations plans, the corporation does not necessarily choose the opera, or anything at all; rather, the cultural events in which their employees volunteer their time or make contributions will be chosen for corporate generosity. Such contributions, which "follow the employee," serve to make the employee look good in the community, to encourage the employees to pick volunteer assignments (and local charities to seek out company employees as volunteers), and to call attention to the company's generosity—since the employee is likely to mention it in the course of his dealings with the charity. Such a policy is more effective in many ways than having a CEO, or a small committee, pick the charities on grounds of what *they* would like.

3.3.2 Honesty in Financial Transactions

It would seem obvious enough that it is the corporation's duties to carry on financial transactions in compliance with the law and for the common good. In the world of high finance, however, where new ways of making profits come into being much faster than the law can catch up to them to regulate them, the law may be obscure and the common good may be a matter of sharp disagreement.

3.3.2.1 Insider Trading

A case in point is **insider trading**, generally defined as the sale or purchase of a publicly owned company's stock by persons privy to information about company plans or fortunes which is not (yet) generally available to the public; the assumption is that such sales and purchases advance the interests of the insiders, sometimes substantially. There have been those who argue that insider trading is the swiftest way to get the new information to the market, and that government interference with such transactions is counterproductive.[25] (They go on to point

[25] Henry Manne, for instance. See "SEC<Professor Split on Insider Trades," *Wall Street Journal*, March 2, 1984, p. 8.

out that most countries with stock exchanges do quite well without such interference.) But there is a broader spectrum of opinion that holds insider trading to be seriously wrong, on several moral grounds.

Take the case of Texas Gulf Sulphur, for instance: In the early Spring of 1963, Texas Gulf performed some test drilling near Timins, Ontario, and found a body of rich ore. Company officials decided to minimize its importance, blandly describing the drilling site as a "prospect" in the initial press release on April 12. Then they got to work buying company stock, and calling selected friends and relatives to tell them to buy stock too. When a more accurate press release came out four days later, describing the drilling site as a "major discovery," they all reaped handsome profits—made out like bandits, as we say, which indeed they were. Now, what had they done wrong? First, they had **misappropriated** company property, since that's what company-generated information is. Given the results from the drillings, they were, as officers, under a **fiduciary** obligation to the company to use that information for the company's benefit and not their own (according to the same rules that govern company telephones and computers). That obligation required them to make the information available to the press as soon as it was verified, to allow all investors to bid for the company's stock. Instead, they kept it for themselves for a crucial interval, so that they could make money on it. That's stealing. Second, they had **tipped** others to the news, and thereby made the "tippees" (as they are called), willingly or unwillingly, parties to the theft. On both those grounds, they were in violation of the Securities and Exchange Commission's 1961 ruling, that corporate insiders (officers and directors of a corporation) in possession of material non-public information were required to disclose that information or to refrain from trading.[26] Accordingly, the SEC charged that all those Texas Gulf officers were in violation of the Securities and Exchange Act of 1934, and the courts backed them up, ruling that the first press release was "misleading to the reasonable investor using due care."[27] The courts then ordered the officers and directors *and all the tippees* to pay into a court-administered fund used to compensate investors who had sold their Texas Gulf Sulphur stock after hearing the disappointing first news. That conclusion identifies the third reason why insider trading is wrong: it tilts the investment playing field, depriving some investors of advantages available to others, unfairly depriving them of an equal chance to make money through investments.

Why do we want the playing field of investments to be as level as possible? Because the economic fortunes of the country, eventually, depend on our faith in the country's businesses and the availability of capital to build and expand them, and a perception that Wall Street is completely rigged in favor of a few malefactors of great wealth (as it was, for awhile, in the 1920s) will drive capital out of the market. So insider trading is generally held to be wrong, on the two theories

[26] See *In re Cady, Roberts,* 40 SEC 907 (1961).

[27] "Texas Gulf ruled to Lack Diligence in Minerals Case," *Wall Street Journal* (Midwest Edition), February 9, 1970, p. 1.

suggested above. According to the misappropriation theory, you are guilty of insider trading if

(a) You trade a corporation's security (shares of stock, for instance)
(b) while in possession of material (important) nonpublic information about that corporation,
(c) that was obtained in breach of fiduciary duty (the duty to put the company's interests before your own).

According to the "tipper-tippee" liability theory, you are guilty of insider trading if you know or *should have known* that

(a) The information on which you trade is material nonpublic information,
(b) and was given to you in the breach of a fiduciary duty owed (to his company) by the tipper.[28]

It is not always easy to sort out what chain of information constitutes that knowledge. Clearly, if a piece of paper with material nonpublic information about a company blows past you on the street, and you act on it to your profit, *that* is not insider trading, since there was no breach of duty in your acquisition of the piece of paper.

3.3.2.2 The Savings and Loan Collapse

Ethical problems resulting from the intricate relationship among government, financial institutions, and the people who run them are probably best shown in the S&L crisis.[29] Savings and loan institutions (S&Ls—also, ironically, called "thrifts") were set up as single-purpose banks to lend money for mortgages on family homes. The S&Ls got the money to lend from savings accounts, on which they paid a fixed rate of interest (those interest payments were their *costs*); they lent it out to buy homes, charging a fixed rate of interest on the loans (those mortgage payments were their *income*). Like any business, they had to keep income higher than costs, and their ability to do that depended on mortgage interest rates exceeding (by a comfortable margin) the interest on savings accounts. Running a thrift was supposed to be an easy application of the rule of 3-6-3: pay 3 % on the savings accounts, collect 6 % on the mortgages, and be on the golf course by 3:00 in the afternoon, and the directorships of the S&Ls did not

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[28] Newton and Schmidt, *Wake-Up Calls*, Belmont, CA: Wadsworth, 1996, pp. 83–101. See Gary L. Tidwell and Abdul Aziz, "Insider Trading: How Well Do You Understand the Current Status of the Law?" *California Managment Review* 30:115–123 (Summer 1988). And stay tuned! New decisions on this aspect of the law are not uncommon.

[29] This account is taken largely from Newton and Schmidt, *op.cit*, pp. 103–115. See also, L. William Seidman, *Full Faith and Credit*, New York: Random House, 1993; Martin Lowy, *High Rollers: Inside the Savings and Loan Debacle*, New York: Praeger, 1991.

attract the outstanding talent of the financial world. The fact that mortgages were fixed rate and long term, while savings accounts could be emptied at any time, points to trouble in store if interest rates generally started going up, which they did in the 1970s. When depositors realized that their money could earn much higher interest elsewhere, they started pulling it out of the S&Ls, who appealed to the government for help. The government was glad to help:

First, it let them raise the interest rates they could pay out for deposits. As soon as that rate exceeded the fixed rates of the mortgages, of course, the S&Ls started to lose money. The new Reagan administration, opposed to regulation as a matter of philosophy, offered further help.

Second, it allowed the S&Ls to diversify investments in order to increase the rate of return. No longer bound to home mortgages, they could invest in commercial real estate, and eventually in futures, options, and high-interest "junk" bonds (The higher the interest, the higher the risk of losing the principal).

Third, it let the S&Ls use a new set of Regulatory Accounting Principles (RAP), concededly less stringent than the traditional Generally Accepted Accounting Principles (GAAP) previously in use by the accountants charged with auditing the S&Ls. Just by presenting their numbers under the new rules, an S&L that was going broke could appear to be in good financial shape.

Fourth, Reagan appointees made it clear to the regulators that overzealousness in auditing would not be rewarded in that administration; supervision became accordingly lax.

Fifth, Congress increased the deposit insurance limit from $40,000 to $100,000 for each account, through the Depository Institutions Deregulation and Monetary Control Act of 1980. That provision assured depositors that they could not lose their money (up to $100,000), rendering unnecessary any prudent evaluation of the solvency of the S&L holding their deposits—which was convenient, because the switch from GAAP to RAP (above) probably made it impossible anyway. Depositors put their money in the S&L promising the highest interest rates, most likely the one taking the greatest risks with the depositors' money, at no risk to themselves.

The system was set up for a crash. One of the most spectacular implosions was that of Lincoln Savings of California, whose owner, Charles Keating, had indicated only an interest in continuing home mortgages when he took over the bank in 1984. When the Home Loan Bank Board counseled the S&Ls to diversify investments, Keating obligingly diversified into takeover stocks, junk bonds, hotels, financial futures, and high-risk loans, up to 62 % of Lincoln's assets by 1986. During that time, Lincoln had gone from about $600 million in loans to nearly $6 billion, and had reported profits in every quarter since Keating took it over. Employee morale was kept high with special perks, bonuses, and low-interest mortgages for their own houses. When the Federal Savings and Loan Insurance Corporation finally took over Lincoln Savings in 1989, it found an investment portfolio consisting of vacant land (for which the bank had paid far too much), half-built hotels, disastrously weak junk bonds and large numbers of unsold homes.

Lincoln's failure was one of over seven hundred S&L failures, presenting the American taxpayer with a bill amounting to $220 billion dollars (according to one estimate) in deposit insurance liabilities.[30] Eventually criminal liability attached to Charles Keating and his officers. But criminal mischief does not account for all the failures. The prime enabler of this financial disaster was a system of interlocking guarantees that ensured that no one could, or would, take responsibility for the prudent management of the thrifts. There is no way the traditional low interest could hold depositors, and the government was not about to make up the difference by funding the mortgages (which might have been cheaper in the long run); by law, the thrifts could not suddenly announce that all those fixed-rate mortgages were really variable rate and start charging higher interest; the search for higher interest loans inevitably meant riskier loans; and the Act of 1980 compounded the problem—by 250 %, to be exact—by insuring two and a half times the traditional deposits. The thrift officers were not up to the challenges of these new portfolios, and could not see that they had any choice but to scramble for high-interest obligations that would, at least on paper, show the bank bringing in more income than it was paying out in costs.

The only guardians of prudence not caught up in the imperatives of this cycle were the professional accounting firms that were supposed, through their annual audits, to warrant the solvency and sound practices of the banks for the assurance of the government and the investors. They had failed spectacularly to perform this duty, and when the Lincoln Savings disaster became clear, it was the accountants, Ernst and Young, that the Office of Thrift Supervision went after. In November, 1992, at the end of extended negotiations, Ernst & Young agreed to pay the U.S. government $400 million to settle claims that it had improperly audited federally insured banks and S&Ls that later failed. At least three hundred banks for which Ernst and Young had issued reassuring reports (clean audits) had gone bankrupt, and the government's argument was that the accounting firms, which are charged with monitoring the financial health of the nation's businesses, ought to have tumbled to the fact that something was going wrong and said something about it. It is, OTS claimed, the traditional task and responsibility of the accounting profession to be the watchdog against just such bungling and crime, and appropriate to hold the accountants answerable for its proper fulfillment. There are those who hold that it was unfair to hold accountants responsible for the crimes of others, when all they were trying to do was serve their clients well; on the other hand, it could be argued that the judgment, small as it was in comparison to the whole S&L debacle, was a welcome reminder that those set to guard should take the job seriously.

[30] Kenneth H. Bacon and Lee Berton, "Ernst to Pay $400 Million Over Audit of 4 Big Thrifts," *Wall Street Journal* 24 November 1992, A1, A16.

3.4 Consistency in Application of Principles Abroad

A fourth constituency of the corporation is the world itself. Just at the point that the American corporation had begun to accept the "new social contract" of corporate responsibility, including the increasingly fashionable codes of ethics, suddenly business globalized. The framework of globalization of all business transactions had begun in the 1970s, but until the end of the 1980s it operated still in the cold war framework that limited commercial transactions to those that served national purposes—or at least insisted that cold-war national interest rhetoric be used to describe international business transactions. Now that the cold war is over, we must address business ethics abroad much as we do at home—as no doubt influenced by politics, but not a simple subset of political purposes. From that perspective, the basic premise of international ethics for the corporation is simplicity itself: Don't leave your moral principles in the airport (or the suitcase). It is the corporation's duty, to the extent possible, to carry ethical procedures abroad and try to follow them there; the problem comes when the principles seem to be in direct contradiction to the customs of the country. We will consider three representative cases of international dilemmas.

3.4.1 Bribery, Extortion, and Other Irregular Payments

Should a corporation engage in **bribery**, the practice of offering payments to officials in return for new contracts or other favorable treatment? It has been argued that where it is accepted local custom to offer gifts and payments in return for business, it is only good manners to respect that custom—when in Rome, do as the Romans do. Further, it seems pointless to lose business abroad to competing countries that have no such scruples. On the other hand, bribery is wrong, and corrupts both the foreign official and the corporation offering the bribe; and practices illegal in the United States ought not to be taken abroad. Often the facts of the local customs are difficult to discern; consider the case of Lockheed Aircraft. The CEO of Lockheed Aircraft Corporation was convinced by his Japanese partners that it was customary and necessary in Japan to make substantial payments in order to persuade Japan's national airline to purchase the Tristar aircraft; mindful of his company's future and the future of its workers' jobs, he eventually paid out $22 million in bribes. Yet when the truth came out, it was his Japanese partners who went to jail, and the government of Japan went into crisis. In The Netherlands, Prince Bernhardt had to resign all government duties after accepting a similar bribe. Make sure you're dealing with the right Romans.

On the evidence that nearly 400 U.S. companies had made large payments to foreign governments in the mid-1970s, amounting to some $300 million, Congress passed the Foreign Corrupt Practices Act of 1977, essentially forbidding all forms of bribery, much to the distress of many experienced cosmopolitan businesspersons.

Amendments permitted the payment of **grease**, small payments to lower level officials as fees just to do their jobs, and in the anti-regulatory climate of 1988 permissions and immunities from prosecution were expanded. The situation persists in many nations, where government officials expect to support themselves and their families on the proceeds of bribes. Is such payment part of responsible business practice? The following considerations may be worth bearing in mind: first, the imperative to take business away from unscrupulous competitors grounded on national interest is much less persuasive if the competitors are other U.S. corporations, which they usually are; second, "respecting local custom" is no benefit to a nation that is struggling, against the current of its own history, to achieve rational and honest government; and third, corruption is a poor respecter of intra-organizational Chinese Walls—what is accepted practice abroad inevitably colors what happens at home. This area of business practice is still evolving, even as are the nations that have customarily been the recipients of the bribes.

3.4.2 Sweatshops: Workers' Rights in the Developing Nations

One of the major developments of the post-Cold War world is the rapid increase of the offshore manufacturing platforms, as new entrepreneurs, often in the developing world, discover that they can produce goods for the United States far less expensively than American workers can. Consider the case of Nike, a well-known maker of fashionable athletic equipment and clothing, especially sneakers—possibly, after the Winter Olympics at Nagano, the best known in the world. The athletic shoe division accounts for about $3.77 billion in annual sales, and every shoe is made offshore, primarily in Asia, through independent local contractors; Nike plants employ nearly 500,000 workers in Indonesia, China and Vietnam (Nike had 47 % of the U.S. market share at this writing. Reebok, with $1.28 billion in sales and 16 % of the market, Adidas with $500 million and 6 %, along with several others,[31] also have their shoes made abroad: Indonesia alone has more than 25, 000 workers employed making athletic shoes for American companies). The Asian subcontractors are famous for the "sweatshops" in which the shoes are manufactured. The employees in China make about $73 a month, and the company provides dormitories and meals; in Vietnam, they can make as little as $40 a month and must buy their own meals.[32] In Indonesia, the workers, mostly young girls, earn as little as $0.15 per hour, work 11 and 12 h a day in airless factories, and are often abused by the factory supervisors. Labor laws that require better conditions and higher wages are routinely ignored; government and factory posts are often occupied by the same people, and enforcement varies from lax to non-existent. The yearly endorsement honorarium that Nike pays to Michael Jordan

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[31] *TIME*, March 30, 1998, p. 51.

[32] Ibid, p. 52.

(about $40 million) exceeds the yearly income of the entire Indonesian athletic shoe workforce. The arrangement works for the benefit of the American consumer and especially for the benefit of Nike: shoes that cost $5.60 to produce in Asia retail in the U.S. for more than $70.[33] Nike, to its credit, has accepted responsibility for the conditions under which its products are made and is attempting to address the problem; but how much can it do? The global free market system draws capital to the least expensive labor market, and simple market calculations can show the futility of protective legislation that would keep high paying jobs in the manufacture of athletic shoes in the United States *or* require the improvement of working conditions abroad; the governments of the less developed countries in which the factories are located are eager to get foreign investment, and compete vigorously with each other for the contracts; the workers are eager for the wretched jobs, which are in many cases better than the abject poverty available to them otherwise; and efforts on the part of one company to set a higher standard for working conditions, on threat of withdrawing from the country, risk offending the nation it is attempting to influence, abandoning workers who have come to depend upon it, and setting itself at a competitive disadvantage in the sale of its product. It is not an encouraging prospect. Should the principles that would govern working conditions in the United States be followed to the letter abroad, no matter how unrealistic they may seem? Is it the responsible course of action to allow developing nations to set their own rules on working conditions, even tainted by government corruption? Again, a responsible corporation would have to look not only at the present government of a country in which it contracts for manufactured goods, but at the aspirations of the people: the model of the prosperous middle class democracy will not be attainable until the nation can put a viable economic floor under their workers. Ideally, a multinational corporation would be able to set an absolute minimum of guarantees for its employees: at least physical security and subsistence must be guaranteed, and fundamental rights to property and education honored.[34] Where the ideal cannot be met, a responsibility persists for amelioration of the workers' conditions wherever possible.

3.4.3 Sales and Marketing to the Developing Nations

If corporations find it difficult to carry on business without exploitation in the manufacture of their products abroad, we may expect to find many of the difficulties in the sales and marketing of those products. The Nestle case is illustrative of the parallel, with an extra political twist.[35]

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[33] John R. Boatright, *Ethics and the Conduct of Business*, 2d edition. Englewood Cliffs, NJ: Prentice Hall, 1997. P. 390.

[34] See Thomas Donaldson, *The Ethics of International Business*.

[35] The description of the Nestle case is taken in large part from Newton and Schmidt, *Wake-Up Calls*, op.cit, pp. 61–81.

Nestle is a multibillion dollar food company, specializing in milk products, based in Vevey, Switzerland. Beginning in the 1920s, Nestle had marketed worldwide a line of infant formula, a breast milk substitute for women who could not or did not wish to nurse their infants. Efforts to market breast milk substitutes in the developing nations increased in the 1960s, when birthrates in the West generally leveled off. Nestle marketed its formula by all the usual means adopted in the developed world–posters of happy babies sitting beside cans of formula and the like–but also developed some innovative marketing practices adapted to nations without a history of consumer sophistication. Prominent among these was the deployment of "mothercraft nurses," sales personnel placed in hospitals to make themselves useful by teaching new mothers how to bathe and care for their babies, to distribute product samples and to mention the advantages of infant formula to supplement or supplant breast feeding. By the late 1970s, Nestle claimed sales of about $750 million in the developing nations, leaving its competitors to share the other half of the market. Business was booming; the product was just what a newly urbanized middle class woman needed, whose office job did not permit her to nurse an infant every 4 h.

Opposition to Nestle's marketing of infant formula began with a U.S. government pamphlet written in 1966 by Dr. Derrick Jelliffe, entitled *Child Nutrition in Developing Countries.* In it Jelliffe argued that breast milk was the best food for the newborn infant (which no one denied), and that the sale of breast milk substitutes in poor lands did positive damage, according to a scenario which rapidly became a classic: Jelliffe pictured the uneducated and timid mother in the developing nation pressured by the sales personnel to use formula instead of nursing because nursing was "old-fashioned"; then, once the use of formula had begun and the breast milk dried up, unable to resume nursing when she realized that the formula was too expensive for her to afford; then forced to overdilute the formula to save money; with polluted water that she did not know needed to be boiled. The result of the over dilution is malnutrition, the result of the polluted water is diarrhea, and between the two of them they can spell death for a weak child. His scenario was backed up by anecdotes of pediatric observations of such diarrhea and malnutrition connected to bottle feeding; health workers had dubbed the syndrome "bottle illness." Accordingly, Jelliffe concluded, those who sold formula to mothers in these nations were to blame for the worldwide decrease in breastfeeding, and the resultant disease and death for ten million children in developing nations, by Jelliffe's estimate. His scenario, and resulting condemnation of Nestle for providing the formula, were picked up 7 years later by two pediatricians in the U.K. in an article, "The Baby Food Tragedy," in *The New Internationalist*, elaborated upon by groups of activists in the U.K. and in Germany, eventuating in a book *Nestle Totet Babys* (*Nestle Kills Babies*). Three years later, on July 4, 1977, a U.S. activist group called the Infant Formula Action Coalition (INFACT) announced a boycott of all Nestle products.

In its innocence of any factual basis, the Nestle case is an eerie precursor to the breast implant controversy, above. First, there was no evidence that breastfeeding had decreased worldwide, especially in the developing nations (From the 1930s

through the 1960s, there had been a sharp decrease of breastfeeding in the U.S., to less than one-fifth of all new mothers choosing to breastfeed; that was followed by an increase to 50 % in the late 1970s; but there was no evidence at all for the developing nations). There was no evidence that the infant death rate had increased in the developing nations (Jelliffe admitted that his "10 million" was an "estimate," meant to be "symbolic"), and no good data for a baseline to support such evidence. There was no evidence that the observed cases of "bottle illness" were connected to infant formula; no one knew what was in those bottles, but it was probably powdered cow's milk distributed as part of U.S. AID programs. There was no evidence that the women choosing formula over breastfeeding were uneducated, influenced in their choice by advertising, or pressured into it by sales personnel. There was, in fact, none of the evidence that would be needed to back up any part of the plausible scenario first advanced by Jelliffe. There was no evidence at all that Nestle had done anything but sell a high-quality product at its usual selling price to willing buyers. And to compound the bewilderment of the observers, there was no evidence that the boycott was or ever could be economically effective against Switzerland-based Nestle S.A., the company that was actually making and marketing the formula, as opposed to its wholly owned United States subsidiary, Nestle, Inc., the only target of the boycott, which had nothing to do with the formula. Yet the boycott recruited Dr. Benjamin Spock to its cause, had hundreds of marches and rallies, and persisted until 1984 in the United States, with something of the inevitability of the court decisions in the breast implant case.

Political activism resembles litigation; it has internal motives of its own not susceptible to modification by the facts, it is very expensive, and there seems to be no way to prevent it, confront it, or reason it to a halt. When engines without brakes start cruising the business scene, we know that there has been a failure of responsibility somewhere; as is typical in such cases, the scenario, the outrage, and the action taken against the corporation make no sense unless we assume that the consumer of the product, in this case a new mother in a developing nation, is totally incapable of taking responsibility for her own decisions, a proposition that remains to be proved. In the case of product litigation, we have called for responsibility from the lawyers, to recognize their responsibility for the runaway engine; we must also ask it of the political activists who would assume the role of conscience to the nation.

3.5 Stewardship of the Natural Environment

It is difficult to overstate the importance of the present effort to protect the natural environment. In the first half of this century, that effort might be understood as an attempt to preserve natural beauty, woods and songbirds for human enjoyment, and air and water not contaminated with substances that would damage human health. By now the protection of the environment is directed not so much as the

preservation of healthy and beautiful surroundings for humans here now, but the protection of the good health of the **biosphere** as a whole, the entire interlocking system of topsoil, plant life, oceans and ocean life, and the composition of the atmosphere itself, including the ozone layer, seen as one interdependent living system. Said another way: for the first half of the century, we were worried about keeping Nature's face clean and her hair brushed; now we are worried that continued deterioration of her lungs may lead to general organ failure and death—our death. For instance, when John Muir pleaded for the preservation of the sequoia (giant redwood) forests of California in the 1920s, he did it in terms of the majesty of Nature and our spiritual need for wilderness in our lives; now, seeing the results of the destruction of the forests, we would plead on grounds that the destruction of the topsoil consequent upon clearcut logging operations will result in mudslides on the steep slopes which will wipe out villages in an hour,[36] the destruction of the salmon industry, the extensive loss of forest-dependent species (of which the spotted owl and the marbled murrelet are only the indicators), and the permanent desertification of the mountains, resulting in significant loss of oxygen production in that area. We are worried, in short, about the long-term sustainability of the living processes that make human life possible. In a world where the number of humans is increasing exponentially and the amount of cropland, forest, and ocean is not, the general duty to protect the natural environment, and the corporation's part in fulfilling that duty, take on a new urgency. Ultimately, we may have to reform the free market's custom of regarding all of the natural world as the "resources" and "raw materials" to be fed into the bottomless maw of the consumer culture, and that will take a conceptual, and moral, revolution.

Consideration of the general moral duty of stewardship of the environment is beyond the scope of this book; our treatment of the corporate interface with the dilemmas of the environment, and the corporate share of that duty of stewardship, must be very brief. In this section we will simply note three aspects of that interface:

1. there are ways that corporation and environment can both profit from simple changes of policy (the "win–win" scenarios),
2. there are many more areas where some kind of compromise will have to be reached between company agendas and environmental needs (the "win-lose" scenarios), and
3. there are some areas where the natural tendency of our customs will damage both business and environmental interests (the "lose–lose" scenarios).

We will suggest that the first scenarios should be implemented, the third brought to a swift halt, and the second negotiated in sincerity, good faith, and concern for the tenth generation after us.

[36] This is already starting to happen. See lawsuit:

3.5.1 The Win–Win Scenarios

There are areas where good business practice is also the best practice for the environment. For instance, 3M's "Preventing Pollution Pays" initiative recovered materials that were being flushed away (or sent up the stack) as waste products, and recycled them to save money. In that case a single company adopted practices that brought them into compliance with law, improved community relations (recall the trout stream above), and recovered enough material to make cost-effective the investment in anti-pollution technology. The same logic created our recycling programs: if we can recycle our newsprint, we'll unclog the landfills and save money on pulp; if we can recycle our aluminum cans, we'll get them off the highway and save money (in this case, a lot of money) on processing; if we can recycle our plastics, which are for all intents and purposes immortal in any landfill, we work a tremendous waste disposal saving and create new products at the same time. Town recycling programs are much less efficient than the one-company recycling, because so many transactions have to take place (and therefore have to be incentivized): consumer demand for the recycled product has to be created, firms have to be started up that will buy the waste and turn it into products to meet that consumer demand, and collection and transfer programs have to be put in place. Sometimes, it is very hard to demonstrate that these programs will pay for themselves in the short run. Patience is necessary, for the long run is usually not only cleaner but profitable.

The big win–win scenario for the corporation and the environment begins with the recognition that people really do value a clean and beautiful natural world, and for a variety of reasons. Health is usually the strongest one: since the publication of Rachel Carson's *Silent Spring,* fear of the effect of "chemicals" in the environment has been a powerful motivation for environmental protection. But there are others, among which the strongest in the long run is the simple desire to live in a beautiful setting. As the industry of America turns away from smokestack manufacturing and toward pure information, there is less need to build facilities that pollute the surrounding streams and air, and much more need to preserve pleasant places for people to build their homes, since in all likelihood that's where they'll be working in a few years.

3.5.2 The Win–Lose Scenarios

Much more common on the interface of corporation and environment is the trade-off: there is no way to paint the options such that both parties win. There are only better and worse ways to negotiate between the economic imperatives and the environmental imperatives, to make sure that as much as possible is preserved for both sides. Some trades are not difficult. Toward the second quarter of this century, for instance, the oil industry discovered that if they added ethylated lead to

gasoline, the automobiles performed better. Then we started getting incidents of lead poisoning from the automobile emissions. Solution: ban all lead from gasoline, as required by the Clean Air Act of 1970. The result was an immediate drop in the ambient lead, followed by a drop in lead poisoning events; for a relatively small cost in performance, we got an enormous gain for the environment.

That is what is called "picking the low-hanging fruit": the first 50 % of the pollution is usually very easy to control. After that, it gets harder, and stopping the last 5 % of the pollution may be astronomically costly. For instance, when we discovered that DDT, an all-purpose insecticide, was harming birds in the U.S., we banned it, along with closely related chemicals used for the same purpose. The birds recovered. But where are we willing to say, that the pesticide must be tolerated for the sake of its value? DDT all but wiped out malaria worldwide in the years following World War II; it increased the yield of crops worldwide, especially in tropical developing nations, substantially contributing to the world's human food supply; and some form of insecticide is absolutely required to combat the pests that attend the large monoculture crops of agribusiness USA. We can diminish the use of pesticide, but we cannot stop it, unless we are willing to see the world food supply drop significantly. On the other hand, the pesticide sprayed on the crops runs off into the stream and kills the fish; the same fishermen who objected to the factory's pollution will object to the farmers' use of pesticides, for the same reason. We can ask only that the parties to each dispute negotiate in good faith for the solution appropriate to each area.

3.5.3 The Lose–Lose Scenarios

The worst scenarios play themselves out where business imperatives, imperfectly understood, destroy the natural environment and natural resources mindlessly, unable to place restraints on what they are doing to nature. These scenarios are among the "engines out of control" mentioned above; these are areas that would be described by their participants as compelled by law or economics, where no one seems to be in a position to think about, or take responsibility for, what is going on, when what is going on is horrible. Most of these scenarios build for years and erupt in a moment. For instance, the 1984 explosion of the pesticide plant in Bhopal, India, which released large amounts of methyl isocyanate into the air, killing thousands of local residents, while started by a single employee, was made possible as the consequence of years of cost-cutting on safety devices. Each cut was justified as a savings at the time, backed up by complacency (since no untoward event had ever happened); all together, they added up to disaster. Exactly the same scenario played out in Prince William Sound five years later, when the *Exxon Valdez*, led by an impaired captain, an unqualified helmsman, and a crew under strength by reason of cost-cutting, fetched up on Bligh Reef and spilled about 11 million gallons of oil in the pristine waters of the Sound. The same cost-cutters had, year by year, reduced the safety equipment and ready crews to handle an oil

spill, so none of the promised spill-containment measures actually took place. Again, who controls the cost-cutters, when safety is at stake? The events ended up costing Union Carbide India and Exxon much more than they would have spent had they kept their safety provisions in good shape.

Sometimes the scenarios of loss begin and continue with corporate action, even as the public howls its protests. Such a scene is the work of Pacific Lumber, taken over in a hostile takeover by Charles Hurwitz's MAXXAM Inc. in 1985, who immediately set to work in the systematic stripping of the slopes of Humboldt County of all their *sequoia sempervirens*, the tallest of trees, some of which were 2000 years old. There was immediate protest. After the company had violated several court orders to desist from cutting the oldest trees, the company even had its license to conduct logging operations suspended for awhile. Yet it continues to destroy the trees, with the free market as its justification, and a state and a forest service dependent on the industry do not appear to be able to stop it.

3.5.4 Assuming Stewardship

It is possible for a corporation to be responsible in its stewardship of the environment. An instructive example is found in the contrast between the chemicals manufacturing industry's reaction to the Bhopal disaster and Exxon's reaction (there has been no oil industry reaction) to the *Exxon Valdez* disaster.[37] Exxon agreed to pick up the oil that had been spilled and now had washed ashore on the beaches of Prince William Sound, an apparent acceptance of responsibility; then, to the dismay of Alaska and the volunteers who had arrived to help with the cleanup, it did its best *not* to find oil to clean up, to play down the need for cleaning (by not bringing in very much cleaned up oil), to bring the whole operation to a halt and forget it. They had a better model to work from, had they chosen to use it: five years earlier, when Bhopal joined Love Canal as the chemicals industry's evil contributions to the world, the Chemical Manufacturers Association (CMA) had announced a turnaround for the industry: they affirmed their intention to make the entire industry safe. They started out with low-hanging fruit: a provision that if there was a chemicals spill, the nearest chemicals plant would respond with the specialized equipment and neutralizers to handle the crisis, *regardless of whose chemicals those were or how the spill came about.* That provision saved hours in responding to a crisis, ended bickering, and reassured the neighborhoods that they were sincere in trying to protect the land and the humans in it. They went on to promise to recruit a local advisory committee for every one of their plants, to alert all police and fire departments in the area of their plants as

[37] Complete accounts of these two disasters, and the corporate reactions, can be found in Lisa H. Newton and Catherine K. Dillingham, *Watersheds 2: Ten Cases in Environmental Ethics*, Belmont, CA: Wadsworth Publishing Co., 1997.

to the nature of the chemicals stored there, and to help them with a yearly drill to combat the worst-case scenario for that plant. These initiatives, collectively known as the Community Awareness and Emergency Response Program (CAER), were adopted and made compulsory for all members of the CMA; the Canadian members eventually generalized the ethical thinking of CAER to all other issues for the industry–truth in advertising, health for the employees, product stewardship and environmental concerns–called it "Responsible Care," and operates on its principles to this day.

3.6 Conclusion

In Chap. 2, we considered what a responsibility perspective would make of the relationship between employers and employees in a corporation. We suggested a model of **mutual responsibility**, dividing responsibility between management and employees within the corporation. From the inside, the corporation is multiple: Board, managers, professionals (accountants, etc.), consultants, supervisors, workers. But for this chapter, the corporation is a single individual, acting as one *vis-a-vis* external constituencies, external stakeholders whose welfare depends in some way upon the responsible operation of the corporation. For the purposes of this chapter, we have considered the corporation as an individual, with a personal philosophy, engaging the external world on the basis of responsibility. What does the responsible corporation do?

For the corporation to maintain the **quality** of its product or service, it will do its work well, to a standard of excellence, and maintain strong communication channels with its customers to make sure that its standards are being met. The search for **honesty** should be a continuous process of examining all corporate communications in marketing, advertising, and public relations, to make sure that the corporation is as it presents itself, and that it preserves its transparency in all its operations. **Citizenship** will present dilemmas; the corporation has a duty to the shareholders to maintain profits and to increase the value of the stock, and if it serves these objectives to pull out of a New England town and head to Indonesia, how can the corporation decide not to move its plant? And while cooperation with one's government is certainly desirable, it may be very unclear what kinds of trades of stock are ruled out by law, and very difficult to operate for the benefit of one's clients in the pea-soup fog of government regulation and deregulation. Being a good citizen, beyond mere compliance with clear law, will never be simple for the corporation. **Consistency** abroad is like the law of contract: it depends upon reliance. It is the job of the multinational corporation in the first instance to establish what its position will be regarding everything from bribes to working conditions, and to stick with its position (save as improving governmental conditions in the LDC's make it possible to meet a higher standard of working conditions). The duty of **stewardship** of the environment is difficult and evolving, more nebulous than even multinational obligation. Certain obligations are clear: reduce or eliminate

pollution, preferably by recycling its elements; conserve resources; do not, next time you're looking to increase profits, do it by cutting costs in your environmental protection area. The rest is changing: does the corporation have a positive duty to preserve wilderness, the Eastern forests, the ozone layer, the spotted owl? There is no easy answer; if the corporation is to deal honestly with its external constituencies, it should reach some conclusion on all of these matters.

What form should that conclusion take? For all its dealings, internally and externally, the controlling philosophy of the corporation can usually be best expressed in a **mission statement**. Mission statements constitute the Code of Ethics for the corporation; actions consistent with the statement are ethically acceptable for that corporation, actions that are not, are not.

How will we write the mission statement? Let us make the controlling concept the notion of **responsibility**, consistent with the rest of the text, and then formulate, in general terms, the content of a responsibility perspective for this purpose. It should turn on three general propositions:

1. **Warranty**: The corporation is, exists, makes things, provides services, and takes responsibility for its decisions and its work. Whatever it does, or makes, or provides, must conform to a standard of excellence appropriate to the field, and mechanisms must be in place to make sure that they are met.
2. **Community**: The corporation is a community within itself, composed of its internal constituencies, and it exists in the larger community. It recognizes its obligations to all stakeholders, with special attention to obligations created by law and obligations within a large circle of community members. The principle of Justice governs its internal as well as external workings.
3. **Foresight, or Prudence**: With respect to all dealings with its employees, its community, its operations abroad, and the natural environment wherever its operations are located, the corporation will maintain careful oversight with all activities on these sites, to the extent possible, especially where concerns of the health and safety of the stakeholders may arise. It will make all decisions in accordance with the best interests, not only of the present stakeholders, but of those seven generations in the future.

The exact wording of the mission statement, of course, will have to be tailored to the individual company. But the theme of concern for the long-term consequences of all its policies, practices, and acts, and the willingness to own those consequences, will be central to the corporation's understanding of itself and to its relations with its world.