

The Code for Corporate Citizenship: States Should Amend Statutes Governing Corporations and Enable Corporations to be Good Citizens

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I. INTRODUCTION

There is a memorable scene in the Canadian documentary, “The Corporation,” where Sir Mark Moody-Stuart recounts an exchange between himself, at the time Chairman of Royal Dutch Shell, his wife, and a crew of Earth First activists who arrived on the doorstep of their country home.¹ The protesters chanted and hurled a banner over the Moody-Stuart’s roof that read “MURDERERS” referring to accusations against Royal Dutch Shell for complicity in crimes against humanity in Nigeria.² Acts of murder, torture, and arbitrary arrests and detention of any local who spoke out, were allegedly committed by Nigerian troops called in by Royal Dutch Shell, in association with its oil pipeline project.³ Interestingly, the response of the surprised Moody-Stuarts was not to call the police, but to engage in a civil dialogue with their uninvited guests, to share concerns about human rights and the environment, and to serve tea to the protesters on their front lawn.⁴ The

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1. THE CORPORATION (Zeitgeist Films 2004).

2. Karen Ballentine and Mark Taylor, *Business and International Crimes: Assessing the Liability of Business Entities for Gross Violations of International Law* 13 (Dec. 1, 2004), available at http://www.fao.no/liabilities/exe_summary.pdf (last visited June 3, 2005). This report assesses legal liability for gross violations of human rights that are founded on International law principles as well as domestic law of Canada, the United Kingdom, the United States, Norway, and France. The report was funded by the Canadian Department of Foreign Affairs and International Trade, Canadian International Development Agency, Department for International Development of the United Kingdom, International Development Research Centre of Canada, Government of Norway, Government of Switzerland, Government of Sweden, Rockefeller Foundation United Nations Foundation, Government of Norway, and Canadian Department of Foreign Affairs and International Trade.

3. *Id.*

4. THE CORPORATION, *supra* note 1.

scene highlights the complexity of placing responsibility for corporate misdeeds; there is rarely a villain or an individual who can be held accountable for the harms that corporations cause.

While corporations are comprised of individuals and are regarded as “persons” by law, they are not persons like you or me.⁵ There is no single brain behind a corporation. Rather, each individual actor from the employees to the executives and directors is driven by the duty to maximize shareholder value and makes day-to-day decisions for the entity’s survival and prosperity.⁶ The Earth First activists on Sir Moody’s lawn were without a villain in their protest, and their chants and banner would be misplaced on anyone’s front lawn. Changing corporate behavior requires a fundamental recasting of how corporate law works.

Corporations are important social actors. They are created by law and create products, services, jobs, and wealth upon which modern societies rely. Investments injected by corporations bring jobs, capital, and technology to communities, thereby raising living standards and creating derivative rights such as education, health and housing, and political freedoms.⁷ Modern corporations allow entrepreneurs to raise massive amounts of capital for large projects and research, which results in innovation and a wide range of products and services.⁸ However, these same corporations can also cause social harm. They are structured in such a way that it is possible for agents in the corporation to engage in morally objectionable conduct, for those agents to disown such conduct,⁹ and for the conduct to go unpunished.

Some scholars have classified this as a crisis in corporate social responsibility.¹⁰ Current debates have spurred resurgence¹¹ not only in the idea of corporate social responsibility, but also in innovative and practical ways to make corporate social responsibility a legal reality.¹²

5. See *Santa Clara County v. Southern Pac. R.R. Co.*, 118 U.S. 394 (1886) (likening a corporation to a natural person for the purpose of the Fourteenth Amendment).

6. See generally D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998).

7. David Kinley & Junko Tadaki, *From Talk to Walk: The Emergence of Human Rights Responsibilities for Corporations at International Law*, 44 VA. J. INT’L L. 931, 933 (2004).

8. Douglas Litowitz, *Are Corporations Evil?*, 58 U. MIAMI L. REV. 811, 830–31 (2004).

9. *Id.* at 834.

10. HARVARD LAW REVIEW, *Finding Strategic Corporate Citizenship: A New Game Theoretic View*, 117 HARV. L. REV. 1957, 1957 (2004) (citing *Scandal Scorecard*, Wall St. J., Oct. 3, 2003, at B1).

11. Attention to corporate social responsibility is not new; a considerable movement emerged in the 1970s aimed primarily at regulatory constraints. Kellye Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227, 1229 (2002).

12. See e.g., The Center for Corporate Policy Model Legislation, available at <http://www.corporatepolicy.org/topics/statelaws.htm> (last visited June 11, 2005) (providing a list of various corporation related bills in consideration around the United States).

One example of an innovative and practical way to change corporate behavior is the Code for Corporate Citizenship (“the Code”). The legislatures of California, Minnesota, and Maine have tabled adoption of the Code for consideration.¹³ The Code addresses unpunished corporate misdeeds at the source – the corporate fiduciary duty. This article suggests that the Code should be adopted in every state because the current configuration of the corporate fiduciary duty inadequately governs corporate decision-making at an unacceptable cost to society. Part II is a brief case study of how government regulation, as the sole external method of managing corporate decision-making, falls well short of preventing harm in the meat and poultry packing industry. This example serves to paint a picture of how unaccountable and irresponsible pursuit of profit at all costs can result in real harm. Part III discusses the shareholder primacy underpinnings of current corporate chartering law. While most corporations do not cause harm, laws of incorporation are almost universally written in such a way that shareholders’ interests are paramount and external costs are irrelevant. Thus there is the potential for social harm. Part IV outlines the Code of Corporate Citizenship and how certain abuses can be prevented by amending laws of incorporation and by broadening the duties of corporate directors. This section also addresses some of the initial criticisms of the Code. Part V concludes that the Code, though in need one slight amendment, should be adopted nationwide because broadening the duty of corporate decision-makers is the most effective way of enforcing socially responsible corporate behavior.

II. CASE STUDY: THE EXTERNAL COSTS OF THE MEAT-PACKING BUSINESS

Working in the meat and poultry packing industry is dangerous.¹⁴ In the United States, many workers face real peril of losing a limb or even their lives in unsafe working conditions.¹⁵ The increasing volume and speed of production coupled with close quarters, poor training, and insufficient safeguards create hazardous working in the meat and poultry industry.¹⁶ On each shift, workers make up to 30,000 hard-cutting motions with sharp knives causing massive repetitive motion injuries.¹⁷

13. S.B. 917, 2005–06 Reg. Sess. (Cal. 2005); S.F. 1529, 83rd Sess. (Minn. 2005); S. Paper 222, 122nd Leg., 1st Spec. Sess. (Me. 2005).

14. See generally HUMAN RIGHTS WATCH, BLOOD, SWEAT AND FEAR: WORKERS RIGHTS IN U.S. MEAT AND POULTRY PLANTS, (2004), available at <http://www.hrw.org/reports/2005/usa0105/usa0105.pdf> (last visited Feb. 6, 2005) [hereinafter BLOOD, SWEAT AND FEAR].

15. *Id.* at 30.

16. *Id.* at 33.

17. *Id.* at 36.

Workers who are injured on the job often do not receive compensation because companies fail to report injuries, delay and deny claims, and take reprisals against workers who file compensation claims.¹⁸

The meat and poultry packing industry has the highest rate of injury and illness in the manufacturing sector.¹⁹ A special investigative report in 2003 by the *Omaha World-Herald* has documented death and serious injuries in Nebraska meatpacking industry plants since 1999.²⁰ The report concluded that nearly one hundred night shift cleaning workers in the state meatpacking industry suffered amputations and crushings of body parts between 1999 and 2003.²¹ One Nebraska expert explained that: “despite the hardhats, goggles, earplugs, stainless-steel mesh gloves, plastic forearm guards, chain-mail aprons and chaps, leather weightlifting belts, even baseball catcher’s shin guards and hockey masks . . . the reported injury and illness rate for meatpacking was . . . 20 per hundred full-time workers in 2001. This is two-and-a-half times greater than the average manufacturing rate of 8.1 and almost four times more than the overall rate for private industry of 7.4.”²²

These severe injuries are just the tip of the iceberg. Distinct from the endemic problems of repetitive stress or musculoskeletal injuries are thousands of lacerations, contusions, burns, fractures, punctures, and other forms of traumatic injuries.²³ Workers on the job often face dismissal for filing workers’ compensation claims or organizing in an attempt to improve conditions.²⁴ With an increasing percentage of these jobs being held by immigrant workers, some of them undocumented, the risk of reporting hazards is even greater.²⁵

On October 9, 2003, thirty-one-year-old Jason Kelly died while repairing a leak in the “hydrolizer” equipment used to process chicken feathers at Tyson Foods’ River Valley animal feed plant in Texarkana, Texas.²⁶ Hydrogen sulfide, a poisonous gas created by decaying organic matter, was leaking from the hydrolizer while Jason Kelly was working

18. *See id.* at 57.

19. *Id.* at 30 (citing Jeremy Olson & Steve Jordon, *Special Report: The Job of Last Resort*, OMAHA WORLD-HERALD, Oct. 12, 2003, at 1A; Laurie Kelliher, *A Meat Story, Well Done: How the Omaha World-Herald Inspected a Tough Local Industry*, COLUMBIA JOURNALISM REVIEW, Jan. 2004, at 14).

20. *Id.* at 31.

21. *Id.*

22. *Id.* at 30 (quoting Donald D. Stull, *Testimony against Nebraska Legislative Bills 586 and 725*, Feb. 24, 2003) (Supported by employers, these bills would reduce workers’ coverage and benefits under Nebraska’s workers’ compensation statute).

23. *See id.* at 11.

24. *Id.* at 1.

25. *Id.* at 1.

26. *Id.* at 29.

on it.²⁷ According to a coroner's report his cause of death was "acute hydrogen sulfide intoxication."²⁸ Tyson Foods did not provide Jason Kelly respiratory gear to guard against poisonous inhalation, failed to label hazardous chemicals, and failed to train workers on how to detect chemicals in case of a leak.²⁹ Tyson Foods is now is contesting an Occupational Safety and Health Administration ("OSHA") citation and fine in connection with Kelly's death, arguing that the cause of death was not conclusively determined.³⁰ If Tyson's effort to contest the cause of death is successful, they will be relieved of paying the OSHA fine and there will be no financial incentive for the company to prevent a similar accident from occurring in the future.

The example of the meat packing industry may be extreme, but it clearly shows that something is not working in the way corporate decisions are regulated. Responsibility for workplace injuries and deaths lies not just with employers, but also with the current state of workplace health and safety laws. In the first place, regulations may be minimal. For instance, federal regulations of "line speed"³¹ in meat packing plants take into account only two factors: (1) avoiding adulterated meat and poultry products, and (2) not hindering companies' productivity and profits.³² Notably, the safety of workers is not a factor that must be considered when a company makes line-speed decisions.

Additionally, regulating agencies are often poorly funded. While an agency like OSHA is responsible for enforcing compliance with standards, its budget falls below what is needed to carry out its responsibilities effectively.³³ Given OSHA's limited resources and the huge number of workplace sites it covers, OSHA inspects less than one percent of United States' workplaces annually.³⁴ Moreover, OSHA is restricted to inspecting any single workplace only once in a century.³⁵

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.* (quoting Christopher Leonard, *436,000 Citation Disputed by Tyson*, ARKANSAS DEMOCRAT-GAZETTE, Apr. 27, 2004, at 1).

31. *See id.* at 24. Meat and poultry workers consistently cite the speed of the lines as the main source of danger. *Id.* at 33. Meatpackers try to maximize the volume of animals that go through the plant by increasing the speed at which animals are processed because processing speed is directly related to profits. *Id.* Workers labor amid high-speed automated machinery moving chickens and carcasses at speeds that are hard to imagine: four hundred head of beef per hour, one thousand hogs per hour, and thousands of broilers per hour. *Id.*

32. *Id.* at 33.

33. *Id.* at 28.

34. *Id.*

35. Specifically, once every 115 years. *See* CENTER FOR AMERICAN PROGRESS, THE BUSH ADMINISTRATION AND THE DISMANTLING OF PUBLIC SAFEGUARDS (May 2004), *available at*

Although OSHA is empowered to refer cases of willful employer violations causing worker fatalities to the Justice Department for criminal prosecutions,³⁶ it rarely exercises this power, even in situations of repeat the violations.³⁷ Furthermore, a willful violation is only a misdemeanor that carries a maximum six-month jail term.³⁸ In the past twenty years, OSHA has made criminal referrals to the Justice Department in just seven percent of more than one thousand workplace death cases due to willful employer violations.³⁹

Using OSHA and Tyson Foods as examples, it is evident that government regulation is ineffective at preventing harm that business decisions can cause. That Tyson Foods could potentially avoid liability for Jason Kelly's death and has no obligation to prevent the death of the next employee who cleans the hydrolizer, suggests that corporations are very unlike other "persons" in the law and can literally "get away with murder." Something has to change, and Code for Corporate Citizenship is an innovative and realistic step in the right direction.

III. CORPORATIONS TODAY: TO WHOM DO DIRECTORS OWE A DUTY?

Part of understanding how Tyson Foods may escape responsibility for Jason Kelly's death is based on the current corporate structure - specifically, to whom corporations owe a duty. The most common framework for understanding the duty of corporations to the shareholder is known as the shareholder primacy norm.⁴⁰ It is this norm, based on the maximization of profit at all costs, that ultimately allows corporations to externalize social costs with close to impunity and has led to a call for a framework shift that comes from many different groups, including the corporate community itself.⁴¹

A. Corporate Charter Laws and the Shareholder Primacy Norm

The structure of corporate law ensures that corporations generally operate in the financial interests of shareholders to the exclusion of other

<http://www.americanprogress.org/atf/cf/%7BE9245FE4-9A2B-43C7-A521-5D6FF2E06E03%7D/SPECIALINTERESTS.PDF> (last visited on June 3, 2005).

36. BLOOD, SWEAT AND FEAR, *supra* note 14, at 28.

37. BLOOD, SWEAT AND FEAR, *supra* note 14, at 28.

38. BLOOD, SWEAT AND FEAR, *supra* note 14, at 28.

39. BLOOD, SWEAT AND FEAR, *supra* note 14, at 28.

40. D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 278 (1998) (arguing that shareholder primacy is irrelevant to everyday business decisions); *see also* Testy, *supra* note 11, at 1232. Shareholder primacy retains its hegemony in much legal and business commentary on corporate governance.

41. *See e.g.*, Thomas Donaldson, *Defining the Value of Doing Good Business*, FINANCIAL TIMES, June 3, 2005, at 2.

considerations.⁴² This shareholder-centric view of corporate law is often referred to as shareholder primacy.⁴³ The basic premise is that the manager's greatest duty is to shareholders and maximizing their wealth.⁴⁴ Moreover, shareholders exercise control over corporations by electing directors, approving fundamental transactions, and bringing derivative suits on behalf of the corporation.⁴⁵ The shareholder primacy norm manifests itself as the corporation's pursuit of profit.⁴⁶ Since shareholders are also investors, their main objective is that the corporation's profits be maximized in order to acquire the greatest return on their investment.⁴⁷

Philosophically, the shareholder primacy norm is derived from neo-classical economics⁴⁸ and suggests that the best way for corporations to serve the social good is to benefit shareholders.⁴⁹ Put in basic terms, the argument is that focusing on increasing wealth increases social welfare by assisting in fulfilling the role of business in society.⁵⁰ Indeed, the only social good that corporations achieve is producing profit, and that is their only social responsibility.⁵¹ Society benefits when corporations increase shareholders' profits; an increase in corporate profit results in an increase of corporate taxes paid, increases in tax revenue results in more secure employees, and more secure employees creates a more stable community.⁵² Under the shareholder primacy norm view, corporate law also exists to serve shareholder interests.⁵³ This notion was first captured in *Dodge v. Ford Motor Company*:

A business corporation is organized and carried on primarily for the profit of stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in

42. Kent Greenfield, *New Principles for Corporate Law*, 1 HASTINGS BUS. L. J. 89, 89 (2005) (arguing for the adoption of new principles to govern corporations for the protection of the public good).

43. Smith, *supra* note 40, at 278.

44. Testy, *supra* note 11, at 1231.

45. Smith, *supra* note 40, at 278.

46. Smith, *supra* note 40, at 278.

47. Smith, *supra* note 40, at 278.

48. Professor Benedict Sheehy, *The Importance of Corporate Models: Economic and Jurisprudential Values and the Future of Corporate Law*, 2 DEPAUL BUS. & COM. L.J. 463, 478 (2004).

49. HARVARD LAW REVIEW, *Developments in the Law—Corporations and Society*, 117 HARV. L. REV. 2169, 2177 (2004).

50. Sheehy, *supra* note 48, at 481.

51. Sheehy, *supra* note 48, at 480–81 (quoting Milton Friedman's famous statement "the one and only social responsibility of business – to use resources and engage in activities designed to increase its profits.").

52. Sheehy, *supra* note 48, at 481.

53. Sheehy, *supra* note 48, at 480.

the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.⁵⁴

Thus, *Dodge* tells us that the corporate fiduciary duty is simply that a corporate director must make decisions in the best interests of the shareholders.⁵⁵ Other stakeholders' interests do not enter the duty equation and, therefore, the corporation owes no inherent duty to these other stakeholders.⁵⁶ The duty is configured this way in every jurisdiction where corporations operate; interestingly, the corporate purpose embodied in each state's corporate chartering laws is almost identical.⁵⁷

The corporate fiduciary duty is made up of two specific duties: (1) a duty of care and, (2) a duty of loyalty.⁵⁸ Generally, the duty of care to the shareholders is to act as a normally prudent person in the same position in exercising decision-making and oversight functions.⁵⁹ Directors can be held personally liable if they cannot prove that they exercised requisite care.⁶⁰ The liability standard in such cases is gross negligence.⁶¹ Generally, the duty of loyalty owed to shareholders is that directors act, individually and as a group, in good faith and in the best interests of the corporation.⁶²

Thus, in California, for example, the duty of corporate directors is to act "in good faith, in a manner such director believes to be in the best interests of the corporation and its shareholders . . ."⁶³ In Minnesota and Washington State, a director must discharge duties in good faith and in a manner that the director "reasonably believes to be in the best interests of the corporation."⁶⁴ Delaware case law states that directors have an unyielding fiduciary duty to protect the interests of the corporation and stockholders alike.⁶⁵ Thus, even though corporate social responsibility and maximizing profit often converge,⁶⁶ the plain language of corporate

54. 170 N.W. 668, 684 (Mich. 1919).

55. See generally *id.*

56. Sheehy, *supra* note 48, at 501.

57. See *infra* notes 63–65.

58. FRANKLIN A. GEVURTZ, CORPORATION LAW §§ 4.1–4.2 (2000).

59. CG Hintmann, *You Gotta Have Faith: Good Faith in the Context of Directorial Fiduciary Duties and the Future Impact on Corporate Culture*, 49 ST. LOUIS U. L.J. 571, 579 (2005).

60. *Id.*

61. *Id.* This is the case at least in Delaware, where the majority of United States corporations are incorporated today. *Id.* at 572, 576.

62. *Id.* at 578.

63. CAL. CORP. CODE § 309(a) (2005).

64. MINN. STAT. § 302A.251 (West, WESTLAW through 2005 Sess.); WASH. REV. CODE § 23B.08.420 (West, WESTLAW through 2005 Sess.).

65. *Crescent/Mach I Partners, L.P., v. Turner*, 846 A.2d 963, 979 (Del. 2003).

66. See Donaldson, *supra* note 41, at 2.

chartering laws show that corporate directors are ultimately only duty bound to the corporation.

*B. The Current Corporate Fiduciary Duty:
Allowing the Externalization of the Social Costs of Doing Business*

It is the limited duty of corporate directors that creates an environment where a corporate decision may cause harm and allows the harmful conduct to go unpunished. Since directors only owe a legal duty to shareholders, directors may regard external interests as irrelevant in their decision making.⁶⁷ However, these external interests have a cost and society is often left with the bill. As a result, corporations can benefit from being part of society without being responsible for the costs.⁶⁸ Arguably, the corporate duty as it currently stands allows corporations to operate with a “deferred-cost” approach where social, environmental, and other costs are created with the hope that they will not be discovered or enforced through the legal system until shareholders have made their profits.⁶⁹

Additionally, limiting the corporate fiduciary duty to the financial interests of shareholders may prevent decisions that serve the greater society. For instance, if a board made a decision that benefited its employees financially but imposed long-term costs on shareholders, even if the benefits to the employees would far outweigh the costs, such a decision would violate the board’s duties under existing law.⁷⁰ This normative reality also explains why directors, as agents of a corporation, may behave differently than they might as individual citizens.⁷¹ Directors can demand that their subordinates “make the numbers” and pay little attention to how the subordinates do so.⁷² The directors’ continued employment, salaries, bonuses, and stock options depend on continuing profits.⁷³ The subordinates also know that their livelihood depends upon

67. See generally Robert Hinkley, *How Corporate Law Inhibits Social Responsibility*, BUSINESS-ETHICS: CORPORATE SOCIAL RESPONSIBILITY REPORT, Jan/Feb 2002, available at <http://www.commondreams.org/views02/0119-04.htm> (last visited Mar. 10, 2005).

68. Sheehy, *supra* note 48, at 503.

69. Sheehy, *supra* note 48, at 504. Additionally, because the United States’ economy is so reliant on consumer spending, the model depends on a robust economy and social security system to catch the fall-out in an economic downturn. Sheehy, *supra* note 48, at 502. Moreover, the exclusion of stakeholder interests has led to considerable anti-corporate backlash, which also comes at wasteful cost to the corporation. Sheehy, *supra* note 48, at 505.

70. Greenfield, *supra* note 42, at 100.

71. Greenfield, *supra* note 42, at 100 (“The human being who would not harm you on an individual, face-to-face basis, who is charitable, civic-minded, loving and devout, will wound or kill you from behind the corporate veil.”).

72. Hinkley, *supra* note 67.

73. Hinkley, *supra* note 67.

satisfying the profit motive.⁷⁴ Therefore directors and subordinates have little incentive to offer ideas that consider externalities or the public interest, unless those ideas result in profit.⁷⁵ Robert Hinkley,⁷⁶ author of the Code, has stated:

Corporate law thus casts ethical and social concerns as irrelevant, or as stumbling blocks to the corporation's fundamental mandate. That's the effect the law has inside the corporation. Outside the corporation the effect is more devastating. It is the law that leads corporations to actively disregard harm to all interests other than those of shareholders. When toxic chemicals are spilled, forests destroyed, employees left in poverty, or communities devastated through plant shutdowns, corporations view these as unimportant side effects outside their area of concern. But when the company's stock price dips, that's a disaster.⁷⁷

Not only is the current corporate fiduciary duty too narrow, it is largely unenforceable in practice. However, this was not always the case. *Smith v. Van Gorkom*,⁷⁸ a seminal decision related to director's duty of care, ushered in the change. In *Smith*, the stockholders of a company took class action against the board of directors, seeking rescission for a cash-out merger at a per share price that did not represent the intrinsic value of the company.⁷⁹ The Delaware Supreme Court held the directors liable for a breach of the duty of care because they made the unintelligent and uninformed decision to merge at too low a price.⁸⁰ Following *Smith*, many states passed statutes enabling corporations to adopt charter provisions to reduce or eliminate the liability of directors for a breach of their duty of care.⁸¹ Thus, the duty of care exists, but many corporations have chosen to eliminate it.⁸²

74. Hinkley, *supra* note 67.

75. Hinkley, *supra* note 67.

76. *See infra* note 116.

77. *See infra* note 116.

78. 488 A.2d 858 (Del. 1985) (finding director liability because the board's decision to approve proposed cash-out merger was not product of informed business judgment; the board acted in grossly negligent manner in approving amendments to merger proposal; and the board failed to disclose all material facts which they knew or should have known before securing stockholders' approval of merger) *overruled by* DEL. CODE ANN. tit.8, § 102(b)(7) (2004) (certificate of incorporation may contain a provision eliminating or limiting personal liability of a director with certain limited exceptions) *as stated in* Emerald Partners v. Berlin, 787 A.2d 85 (Del. Ch. 2001).

79. *Smith*, 488 A.2d at 863, 866.

80. *Id.* at 864.

81. *Smith*, *supra* note 6, at 289. Thirty-eight states currently have such provisions. *Smith*, *supra* note 6, at 289 n.52.

82. *Smith*, *supra* note 6, at 289.

Additionally, the legal impact of the director's fiduciary duty is minimized by the business judgment rule.⁸³ The business judgment rule embodies the idea that courts should not question whether a business decision was good or bad because courts are not experts in business.⁸⁴ Rather, a business decision by a director is presumed to have been made in the best interests of the company,⁸⁵ so long as the actions taken by directors can be attributed to a rational business purpose.⁸⁶ The business judgment rule is a presumption that shareholders must overcome to make a director liable for breaching either the duty of care or loyalty.⁸⁷ In fact, the business judgment rule is an almost impenetrable shield for directors of public corporations although, theoretically, it does not cover decisions that cause egregious losses.⁸⁸ However, in practice this exception has not resulted in awards of money judgments against corporate directors.⁸⁹

Even though the fiduciary duties are largely unenforceable against directors, the shareholder primacy norm, which informs the fiduciary duties, still influences corporate decision making. While one might be hard pressed to find a director who openly claims that he or she is driven purely by a duty to maximize profits,⁹⁰ there is little else that can explain why directors make decisions that cause grave harm with impunity. Because shareholders are protected by the limited liability of directors and thus suffer only a portion of the costs of bad decisions, they tend to prefer decisions that may have a high risk of failure but also a high payout, regardless of the cost to society.⁹¹

Finally, government regulation is an insufficient "check" on corporate behavior. Regulations are written by outsiders to the corporation and work by first allowing harm and then dealing with the

83. Hintmann, *supra* note 59, at 574. There are four main rationales for business judgment rule: (1) the courts recognize that even the most honest and well-intentioned director can make an improvident decision; (2) the courts recognize the inherent risk involved in business decisions, therefore the rule alleviates the fear of judicial second-guessing and allows the directors broad discretion in making company policy; (3) the rule keeps courts from ruling on business decisions when they are less equipped to hand such decisions than directors; and (4) the business judgment rule ensures that directors, and not shareholders, control the corporation. Hintmann, *supra* note 59, at 574.

84. See Smith, *supra* note 6, at 292.

85. See, e.g., Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984) (stating that the business judgment rule is a "presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company.").

86. Smith, *supra* note 6, at 286.

87. Hintmann, *supra* note 59, at 579.

88. Hintmann, *supra* note 59, at 579.

89. Smith, *supra* note 6, at 287 (citing *Gagliardi v. Trifoods Int'l, Inc.*, 683 A.2d 1049, 1052 (Del. Ch. 1996)).

90. Smith, *supra* note 6, at 291.

91. Greenfield, *supra* note 42, at 103.

aftermath.⁹² These regulations also do not require corporations to change their internal policies to prevent harm.⁹³ It is generally understood that it is cheaper to prevent harm than it is to clean it up afterwards, and it is often better to place responsibility to avoid a problem on the person in the best position to prevent harm effectively and efficiently.⁹⁴ While some industry regulating laws contain severe penalties, they also are often criticized as having no “teeth,” making enforcement almost impossible.⁹⁵

To summarize, state laws of incorporation generally restrict the breadth of concerns that a corporate agent must consider before deciding a course of action. Thus, state laws do not prohibit corporate actors from making decisions where the costs are externalized in ways that can result in social and individual harm.⁹⁶ Fixation on shareholder interests can result in managerial decisions that are overly risky from society’s perspective.⁹⁷ Although the pursuit of profit does not necessarily cause harm, Jason Kelly is an example of how a duty to act only in the interests of profit maximization can create irreparable harm. The legal foundation for such a duty that allows for this harm, and allows for it to go unpunished, must change.

C. The Call for Change to the Status Quo is Not Limited to External Stakeholders

The call for change hails from many forums. There are numerous federal lawsuits pending against United States corporations asserting claims under the Alien Tort Claims Act⁹⁸ for alleged complicity in human rights abuses perpetrated by governments of the country in which

92. Greenfield, *supra* note 42, at 107.

93. See Greenfield, *supra* note 42, at 107.

94. Greenfield, *supra* note 42, at 107.

95. See, e.g., Jeffrey R. Escobar, *Holding Corporate Officers Criminally responsible for Environmental Crimes: Collapsing the Doctrines of Piercing the Corporate Veil and the Responsible Corporate Officer*, 30 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 305 (2004) (discussing the problems of criminal liability under the Resource Conservation Recovery Act and the Comprehensive Environmental Response, Compensation, and Liability Act).

96. Greenfield, *supra* note 42, at 103.

97. Greenfield, *supra* note 42, at 103.

98. 28 U.S.C. § 1350 (1789). “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.” The statute lay dormant for many years until it was revitalized in 1980 with *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980), and other cases of torture that took place in foreign nations but were tried in United States courts. See generally Jason Jarvis, *A New Paradigm for the Alien Tort Claims Statute under Extraterritoriality the Universality Principle*, 30 PEPP. L. REV. 671 (2003).

these corporations do business or source goods.⁹⁹ There has also been a case against Nike by a member of the public alleging that Nike has made false statements about its workplace practices in third world countries.¹⁰⁰ The *Nike* case has left uncertain what can and cannot be communicated to the public without creating potential liability.¹⁰¹ These cases indicate creative tactics used to seek recourse for some of the more egregious corporate acts and also signal a growing awareness within the legal community of the need to change the way corporations make decisions. However, activity is not limited to the courts.

Local and international legislatures have passed various measures aimed at addressing the problems associated with the singular duty to act in the shareholder's best interests. Some states in the United States have adopted non-shareholder constituency statutes,¹⁰² which allow managers to consider the effects of any action upon employees, suppliers, and customers of the corporation and others when making decisions.¹⁰³ In May 2001, the Securities Exchange Commission ("SEC") clarified that shareholder divestment campaigns and boycotts can be considered material, thus subject to disclosure under SEC rules.¹⁰⁴ In 2001, France passed legislation mandating disclosure of social and environmental issues in corporate annual reports.¹⁰⁵ Belgium, France, Germany, Sweden, and the United Kingdom each have enacted laws requiring pension funds to disclose how social, ethical, and environmental issues are taken into account in employer investments.¹⁰⁶ In August 2003, the

99. See e.g., *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Bano v. Union Carbide Corp.*, 273 F.3d 120 (2d Cir. 2001); *Bigio v. Coca Cola*, 239 F.3d 440 (2d Cir. 2001); *Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161 (5th Cir. 1999); *In re S. African Apartheid Litig.*, 346 F. Supp. 2d 538 (S.D.N.Y. 2004); *The Presbyterian Church of Sudan v. Talisman Energy Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

100. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002), *cert granted*, 71 U.S.L.W. 4602 (U.S. June 26, 2003) (No. 02-575). The California Supreme Court held that Nike was not entitled to First Amendment protection for public statements that were made in defense of workplace practices in third-world production facilities. *Id.* at 319. After granting certiorari and holding oral arguments, the U.S. Supreme Court returned the case to the California trial court without decision, after which the suit was settled. *Id.*

101. *Id.* at 319.

102. Ronn S. Davids, *Constituency Statutes: An Appropriate Vehicle for Addressing Transition Costs?*, 28 COLUM. J. L. & SOC. PROBS, 145, 156 n.47 (1995) (listing various state statutes). Since the early 1980s, approximately thirty states have enacted corporate constituency statutes; Delaware has not enacted such legislation. JESSE H. CHOPER ET AL, *CASES AND MATERIALS ON CORPORATIONS* 42, (5th ed. 2000).

103. Smith, *supra* note 6, at 289. These statutes generally do not, however, provide for a cause of action based on decisions of directors and they do not contemplate any significant change to the board's decision making process. Smith, *supra* note 6, at 290.

104. Danette Wineberg & Phillip H. Rudolph, *Corporate Social Responsibility: What Every In House Counsel Should Know*, 22 No. 5 ACC DOCKET 68, 72 (2004).

105. *Id.* at 74.

106. *Id.*

United Nations issued its “Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights,” which serves as a kind of “Code of Ethics” for global companies.¹⁰⁷ These are simply guidelines, however, with no provisions or mandate for enforcement.

A sense of the need for change is also coming from within corporations themselves. A recent global survey commissioned by the World Economic Forum in 2003 concluded that for most business leaders, there is a compelling case for taking action on issues related to corporate citizenship.¹⁰⁸ The report states that it makes good business sense to be a good corporate citizen on two grounds: first, it makes sense for a company to have a clear purpose and set of values; second, businesses prosper in societies that are prosperous.¹⁰⁹ Seventy percent of Chief Executive Officers (“CEOs”) surveyed in 2002 agreed that corporate social responsibility is vital to the profitability of any company.¹¹⁰ A survey of executives from 350 major companies in Europe found that seventy-eight percent agree that integrating responsible business practices can significantly improve profitability.¹¹¹ The state of research in this area is still young, but it has been found that Corporate Social Responsibility¹¹² leadership companies have outperformed their peers financially and have better employee relations, community relations, and products and diversity measures.¹¹³

Finally, the need for change is recognized by the general citizenry. A September 2000 *Business Week* Harris Poll asked Americans which of the following two propositions they agreed with more strongly: That corporations should have only purpose – to make the most profit for their shareholders – and the pursuit of that goal will be best for America in the

107. *Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*, U.N. Subcomm’n on the Promotion and Prot. of Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12/Rev.2 1 (2003), available at [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/E.CN.4.Sub.2.2003.12.Rev.2.En?Opendocument) (last visited Feb. 8, 2005).

108. See generally, TASK FORCE OF WORLD ECONOMIC FORUM CEOs, JOINT STATEMENT, GLOBAL CORPORATE CITIZENSHIP: THE LEADERSHIP CHALLENGE FOR CEOs AND BOARDS CEOs 10 (2002), available at http://www.weforum.org/pdf/GCCI/GCC_CEOstatement.pdf (last visited Feb. 8, 2005).

109. *Id.*

110. *Id.*

111. Wineberg, *supra* note 104, at 78.

112. See Donaldson, *supra* note 41, at 2. “Corporate Social Responsibility,” or CSR, is a much used, but rarely defined, term that incorporates such things as concern for the environment, obligations to employees, sourcing from developing countries, host country government relations, relationships with local communities and regulating gifts and sensitive payment. Donaldson, *supra* note 41, at 2.

113. See Donaldson, *supra* note 41, at 2–3.

long run; or, that corporations should have more than one purpose. They also owe something to their workers and the communities in which they operate, and they should sometimes sacrifice some profit for the sake of making things better for their workers and communities.¹¹⁴ Ninety-five percent of respondents chose the second proposition.¹¹⁵ The general public would prefer that corporations do something that they are not duty bound to do – to have concern for the public interest.

In short, it is increasingly recognized across society that corporations should have a degree of accountability beyond that which is owed their shareholders. These sentiments encourage not only the idea of corporate social responsibility but also innovative ways to make the concept a practical reality. One promising solution is the Code for Corporate Citizenship.

IV. THE CODE FOR CORPORATE CITIZENSHIP:
A PROPOSAL FOR CHANGE THAT DEALS WITH THE PROBLEM
OF CORPORATE MISBEHAVIOR AT ITS SOURCE –
THE CORPORATE FIDUCIARY DUTY

This section describes the Code for Corporate Citizenship. It also covers how and why the Code for Corporate Citizenship can address the fundamental problems with corporate law by expanding the corporate fiduciary duties. It ends by addressing some of the main criticisms against the Code and concludes that the Code should be adopted, albeit with a minor amendment.

A. The Code and How the it Works

The Code for Corporate Citizenship¹¹⁶ proposes to amend state corporate charter legislation by expanding the duties of corporate directors to include a duty to safeguard certain social interests.¹¹⁷ The Code imposes both civil and criminal strict liability on corporate directors who breach the duty and defines the duty as “the responsibility of the directors to manage the corporation in a manner that does not cause damage to the environment, violate human rights, adversely affect

114. Arnie Cooper, *Twenty-Eight Words that Could Change the World*, THE SUN, Sept. 2004, at 8, available at http://forums.seib.org/corporation2020/documents/Resources/Hinkley_Interview.pdf (last visited Feb. 6, 2005).

115. *Id.*

116. Sometimes referred to as the “Code for Corporate Responsibility,” the Code was developed by Robert Hinkley, a securities attorney who says that corporations act as they do for one simple reason: they are bound to make profit for shareholders. This inhibits executives and directors from being socially responsible. *Id.*

117. See THE MODEL UNIF. CODE FOR CORP. RESPONSIBILITY, at http://www.citizenworks.org/enron/corp_code-text.php (last visited Sept. 6, 2005).

the public health or safety, damage the welfare of communities in which the corporation operates, or violate the dignity of the corporation's employees."¹¹⁸

The Code leaves a duty to shareholders in place, not tampering with decades of tradition in corporate governance law, but appending a clear statement of another longstanding legal tradition - that one may not use one's property to damage others.¹¹⁹ Section Two of the Code stipulates that:

In the case that any corporation under this [chapter] causes damage to the environment, violates human rights, adversely affects the public health or safety, damages the welfare of communities in which the corporation operates, or violates the dignity of its employees, any person damaged by such action, may either in law or in equity . . . sue either the corporation or any person who was a director of the corporation at the time the damage occurred.¹²⁰

Specific provisions of the Code include exemptions, damages, contributions, penalties, and the like.¹²¹ Exemptions from liability are included in Section Three.¹²² Section Four allows for damages to represent the greater of the actual damages suffered by the plaintiff, or three times the savings which accrued to corporation as a result of damage to the public interest as defined in Section One¹²³ and also allows for optional punitive damages.¹²⁴ The Model Code specifies contribution for damages,¹²⁵ controlling liability and joint and several liability,¹²⁶ a statute of limitations, and a fifteen year window between enactment and

118. MODEL UNIF. CODE FOR CORP. RESPONSIBILITY: DUTY TO SAFEGUARD THE PUBLIC INTEREST § 1 (2005).

119. Marjorie Kelly, Address at the Minnesota Senate Hearing (Feb. 14, 2004), at <http://www.c4cr.org/article16.html> (last visited June 27, 2005).

120. MODEL UNIF. CODE FOR CORP. RESPONSIBILITY: CIVIL LIABILITY FOR DAMAGE CAUSED TO THE PUBLIC INTEREST § 2 (2005).

121. See e.g. MODEL UNIF. CODE FOR CORP. RESPONSIBILITY: EXEMPTIONS FROM LIABILITY IN CERTAIN CASES § 3 (2005); CONTRIBUTION § 5 (2005); LIABILITY OF CONTROLLING PERSONS § 7 (2005); AND CRIMINAL PENALTIES § 9 (2005).

122. MODEL UNIF. CODE FOR CORP. RESPONSIBILITY: EXEMPTIONS FROM LIABILITY IN CERTAIN CASES § 3 (2005). No director is liable if damage complained of was the direct result of an action approved by the Board of Directors that the director voted against, or the decision was made before the director became a member of the board. *Id.* The article does not apply to corporations the annual revenues of which are less than \$5 million. *Id.*

123. MODEL UNIF. CODE FOR CORP. RESPONSIBILITY: DUTY TO SAFEGUARD THE PUBLIC INTEREST § 1 (2005).

124. MODEL UNIF. CODE FOR CORP. RESPONSIBILITY: EXEMPTIONS FROM LIABILITY IN CERTAIN CASES § 3 (2005).

125. MODEL UNIF. CODE FOR CORP. RESPONSIBILITY: CONTRIBUTION § 5 (2005).

126. MODEL UNIF. CODE FOR CORP. RESPONSIBILITY: LIABILITY OF CONTROLLING PERSONS § 7 (2005).

enforcement to allow corporations to adjust their practices in accordance with the Code.¹²⁷ Finally, the Code allows for injunction of future violations of the act and penalties for past violations by the attorney general in the public interest,¹²⁸ and assigns criminal penalties in addition to any civil penalties when any director willfully violates Section One.¹²⁹

B. The Code: More Effective than Regulation

The Code will be enforced in the same way that securities laws are enforced; investors will be able to bring private lawsuits against a company and its directors, irrespective of the company's intent or motive.¹³⁰ The Code will contain provisions for private actions by members of the public and actions by the attorney general on the public's behalf.¹³¹ The threat of civil litigation and possible criminal sanctions is intended to be a powerful deterrent to violations of the Code.¹³²

Directors likely will change the way they run their companies. In the same way the securities laws passed in the 1930s caused companies to be more cautious in the way they offered securities to the public and distributed information to investors on an ongoing basis, companies post-Code adoption will be much more cautious in the decisions they make that impact the greater society.¹³³

Unlike laws that prohibit specific behavior for the purpose of protecting the public interest, the Code addresses the cause and not the symptoms of corporate misbehavior. For instance, in the Tyson Foods case study it is evident that OSHA standards do not protect the needs of employees in the meat and poultry packing industry. First, the regulations are too lenient to be effective.¹³⁴ Second, OSHA penalties are applied after the fact and, because Tyson Foods is disputing liability for incidents like the death of Jason Kelly, there is nothing to suggest that Tyson will take action to remedy the circumstances that caused the accident.¹³⁵ Third, OSHA and other similar agencies have budgetary, resource, and political constraints that prevent them from proactively ensuring compliance.¹³⁶ Lastly, existing regulations can run counter to

127. MODEL UNIF. CODE FOR CORP. RESPONSIBILITY: LIMITATION OF ACTIONS § 6 (2005).

128. MODEL UNIF. CODE FOR CORP. RESPONSIBILITY: ATTORNEY GENERAL § 8 (2005).

129. MODEL UNIF. CODE FOR CORP. RESPONSIBILITY: CRIMINAL PENALTIES § 9 (2005).

130. Robery Hinkley, *28 Words to Redefine Corporate Duties: The Proposal for a Code for Corporate Citizenship*, MULTINATIONAL MONITOR, Jul.-Aug. 2002, available at <http://multinationalmonitor.org/mm2002/02july-aug/july-aug02corp4.html> (last visited Nov. 8, 2004).

131. *Id.*

132. *Id.*

133. *See id.*

134. BLOOD, SWEAT AND FEAR, *supra* note 32.

135. BLOOD, SWEAT AND FEAR, *supra* note 30.

136. BLOOD, SWEAT AND FEAR, *supra* note 34.

the corporate fiduciary duty because they ask the corporation to consider more than the pursuit of profit.¹³⁷ Thus, the only option for agencies is to take legal action; yet, any legal action must contend with a response from a multimillion dollar company with comparatively greater resources. Companies like Tyson have the resources to lobby against further regulation detrimental to their interests.¹³⁸ The ultimate result is an agency that is ill-equipped to properly prevent future tragedies.

C. Criticisms of the Code and Counterarguments

The Code is on the table for consideration in California, Minnesota, and Maine. Opponents claim the following problems with the Code: (1) it is too vague, (2) it will drive up corporate overhead by increasing the possibility of litigation, and (3) it will cause an exodus of business away from states that adopt the Code to states that choose not to adopt the Code. Each of these criticisms will be addressed in turn.

1. The Duty in the Code is too Vague

The criticism that the Code is too vague has two prongs. First, critics claim that the terms that define the amended fiduciary duty are too vague and will lead to constitutional challenges under the void for vagueness doctrine.¹³⁹ Second, critics contend that, even if the Code is not unconstitutional, the terms will result in layers of litigation to determine its meaning.¹⁴⁰ One senator in the California Senate expressed his concern:

Almost any corporate act is likely to have an impact on “the welfare of the communities in which the corporation operates.” The provision is so vague that it could easily become a double-edged sword used against responsible corporations. For example, who is to say that a company that agrees to a “closed shop” or closes one plant in favor of another more environmentally friendly is not also materially impacting the welfare of the communities in which it operates?¹⁴¹

The constitutional law of vagueness is a matter of due process.¹⁴² In general, a law is void on its face if it is so vague that persons “of

137. See generally *supra* text accompanying notes 40–66.

138. See, e.g., TYSON FOODS, INC., 2004-2005 INVESTOR FACT BOOK, available at http://media.corporate-ir.net/media_files/irol/65/65476/reports/04_05_factbook.pdf (last visited June 11, 2005) (reporting that Tyson Foods, Inc. made \$26.4 billion in sales for 2004).

139. Stephen J. Redner, *Sarbanes and the States*, MONDAQ BUSINESS BRIEFING, Jan. 6, 2004, available at 2004 WLNR 12284306.

140. *Id.*

141. *Id.*

142. U.S. CONST. amends. V, XIV. See also *Village of Hoffman Estates v. Flipside*, 455 U.S. 489 (1982).

common intelligence must necessarily guess at its meaning and differ as to its application.”¹⁴³ For criminal statutes, if the statute is so vague as to criminalize an innocent act, a conviction under the statute cannot be sustained.¹⁴⁴ Vagueness occurs when a legislature states its proscription in terms so indefinite that the line between innocent and condemned conduct becomes a matter of guesswork and persons are not given fair notice of what to avoid.¹⁴⁵ Objections to vagueness under the due process clause rest on lack of notice and may be overcome by showing that a reasonable person would know that his conduct was at risk of being prohibited.¹⁴⁶ The assessment for constitutional vagueness is not conducted in a vacuum, and it is not the academic study of words but whether fair notice has been given.¹⁴⁷

The degree of vagueness that the Constitution tolerates, as well as the importance of fair notice, depends in part on the nature of the statute.¹⁴⁸ For instance, economic regulation is subject to a less strict vagueness test because its subject matter is often more narrow.¹⁴⁹ A business may have the ability to clarify the meaning of the regulation by its own inquiry to ensure complicity since much may be at stake.¹⁵⁰ Vagueness is also tolerated to a slightly greater degree in civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe.¹⁵¹

The constitutional vagueness objection to the Code is weak because the Code regulates corporations. A corporation, by its nature, is expected to plan its activities carefully; corporations are subject to rules of accounting, securities, and the like,¹⁵² and are accustomed to consulting relevant regulation for clarification in advance of acting. The Code has a built-in fifteen year adoption period that would give ample time for consultation.¹⁵³ Tolerance for vagueness is greater when corporations are the subject of the legislation because corporations are expected and accustomed to do their homework. Thus, it is unlikely that a corporation will have to engage in guesswork to ascertain the extent and meaning of the Code and will have fair notice of how to conduct its operations.

143. See *Connally v. General Constr. Co.*, 269 U.S. 385 (1926).

144. See *Winters v. N.Y.*, 333 U.S. 507 (1948).

145. See *American Communications Ass'n, C.I.O., v. Douds*, 339 U.S. 382 (1950).

146. *Maynard v. Cartwright*, 486 U.S. 356 (1988).

147. *American Communications Ass'n, C.I.O.*, 339 U.S. at 412.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Village of Hoffman Estates v. Flipside*, 455 U.S. 489, 498 (1982).

152. See *American Communications Ass'n, C.I.O.*, 339 U.S. at 412.

153. MODEL UNIF. CODE FOR CORP. RESPONSIBILITY: LIMITATION OF ACTIONS § 6 (2005).

Despite the criticism that the terms used in the Code are so vague as to make compliance impossible, similar concepts in other areas of law have not failed for vagueness, and courts have interpreted them easily. Take for example the “public policy exception” to the at-will employment doctrine.¹⁵⁴ The at-will doctrine provides that an employee can unilaterally leave employment and an employer can unilaterally terminate employment for any reason, no reason, or even for a morally bad reason.¹⁵⁵ The public policy exception to the at-will doctrine allows a wrongful termination cause of action for an at-will employee whose employment is terminated when the termination is believed to violate “public policy.”¹⁵⁶ Public policy is defined as the principle that no one can lawfully do that which tends to be injurious to the public or against the public good.¹⁵⁷ One state Supreme Court stated that there is no precise definition of what constitutes clearly mandated public policy.¹⁵⁸ Consequently, public policy determinations are ultimately made on an ad-hoc basis by the high court of the jurisdiction.¹⁵⁹ These determinations, while ad-hoc, are not left to judicial imagination.¹⁶⁰ Most states considering whether the “public policy” exception should apply have looked for clear direction from constitutional, legislative, or regulatory schemes since they provide existing expressions of policy.¹⁶¹ Thus, while there is no concrete interpretation of “public policy” and there are jurisdictional differences as to the source of “public policy,” courts are able to devise what conduct implicates public policy and to decide wrongful termination cases accordingly.

The public policy exception to the at-will doctrine is an example of how courts can define a phrase that would otherwise appear vague. A similar approach could be used by courts to define the terms that comprise the expanded fiduciary duty of the Code such as “human rights,” “damage to the environment,” “public health and safety,” “community welfare,” and “employee dignity.” Definition of such terms could be sourced from federal and state constitutions, statutes, regulations, judicial opinions, and applicable international law.

154. See generally, Frank J. Cavico, *Private Sector Whistleblowing and the Employment-at-will doctrine: A Comparative Legal, Ethical, and Pragmatic Analysis*, 45 S. TEX. L. REV. 543 (2004).

155. *Id.* at 550. All states, except Montana, are “at-will” jurisdictions.

156. *Id.* at 547.

157. *Boyle v. Vista Eyeware*, 700 S.W.2d 859, 871 (Mo. App. 1985).

158. *Jacobson v. Knepper & Moga, P.C.*, 706 N.E.2d 491, 493 (Ill. 1998).

159. Cavico, *supra* note 154, at 591.

160. Cavico, *supra* note 154, at 591.

161. See *Milton v. IIT Research Inst.*, 138 F.3d 519, 523 (4th Cir. 1998). However, there is some difference among jurisdictions as to whether judicial opinions can also be the basis of what constitutes “public policy;” see also Cavico, *supra* note 154, at 550.

To define the term “human rights” for the purpose complying with the Code, corporations could look to judicial decisions for direction. The United States has heard and resolved claims of what are classified as human rights abuses under the Alien Tort Claims Act.¹⁶² This Act allows for aliens to bring tort claims for violations of human rights abuses that have taken place outside of the United States, inasmuch as the claims exist as part of the “law of nations.”¹⁶³ Granted, litigation under the Alien Tort Claims Act has been limited to the most egregious human rights abuses such as torture, summary executions, sexual assault, forced labor and slavery.¹⁶⁴ However, alien tort claims litigation indicates that the term “human rights” is not so vague that a corporation would have to guess as to its meaning since the courts have already defined it in other contexts.

A definition of “human rights” could also derive from sources of international law or treaties signed and ratified by the United States.¹⁶⁵ These include the International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights.¹⁶⁶ Further, the United States has signed the United Nations Declaration of Human Rights which specifically lists what is protected by the covenant, such as the right to be treated equally by the law, to life, liberty, and security of the person; right to privacy; freedom of assembly; and the right to be free from torture, forced labor, and slavery.¹⁶⁷ Thus, if states were to adopt the Code, there are existing standards and definitions of what are “human rights” that could easily set the boundaries of corporate behavior.

Further, if corporations were to claim that the Code’s duty is too vague, they might refer to their own “Code of Ethics” for guidance. For instance, Unocal Corporation’s code¹⁶⁸ declares that it will respect human rights in all its activities.¹⁶⁹ The Gap¹⁷⁰ states that it has over

162. 28 U.S.C. § 1350 (1798).

163. *Id.*

164. Kinley, *supra* note 7, at 941.

165. For a list of international treaties related to human rights that the United States has signed and ratified see Office of the United Nations High Commissioner for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties* (June 9, 2004), available at <http://www.unhchr.ch/pdf/report.pdf> (last visited Mar. 10, 2005).

166. *Id.*

167. Universal Declaration of Human Rights, G.A. Res. 217 A(III), (December 10, 1948), available at <http://www.un.org/Overview/rights.html> (last visited Feb. 8, 2005).

168. Unocal is one of the world’s largest energy resource and project development companies, with \$8.2 billion in revenue reported for 2004. To view the Unocal report online, see <http://www.unocal.com/aboutucl/glance.htm> (last visited June 11, 2005).

169. UNOCAL, CODE OF CONDUCT (February, 2004), available at http://www.unocal.com/ucl_code_of_conduct/index.htm.

ninety employees around the world who work to improve labor conditions.¹⁷¹ Tyson Foods says it is committed to conducting its operations in a manner which respects and preserves the natural resources of the areas in which it lives and works.¹⁷² The 2000 signatories to the United Nations Global Compact say that they embrace ten core principles respecting human rights, labor rights, and protection of the environment.¹⁷³ Insofar as vagueness requires that a reasonable person knows that his or her behavior is at risk, the existence of these “Codes,” “principles,” “compacts,” and “statements” suggests that a corporation would know when its behavior is at risk.

Similarly, the duties to protect the environment, employees, and public health and safety in the Code are not so vague that a corporation would not have fair warning as to their meaning. States that incorporate the Code could begin by using standards that already exist in the relevant regulatory scheme. This suggestion does not make the Code redundant because there is a fundamental difference between after-the-fact regulations and before-the-fact, proactive protection of the environment, public health, and safety.¹⁷⁴ After-the-fact regulations can be bypassed and do not prevent an accident from happening again. Take for instance, the lack of warnings of poisonous gases in the hydrolizer mentioned in the above case study.¹⁷⁵ If Tyson Foods successfully avoids liability for Jason Kelly’s death, there is no incentive for the corporation to incur the cost of providing warnings in the future since Tyson loses nothing by not warning. On the other hand, if the corporation were held directly liable for making the decision not to warn of dangerous chemicals, it would

170. Gap Inc. operates three brands of apparel: The Gap, Banana Republic, and Old Navy and reports revenues of \$16.3 billion, *available at* <http://www.gapinc.com/public/About/about.shtml> (last visited June 11, 2005).

171. *See* THE GAP, SOCIAL RESPONSIBILITY, *available at* http://www.gapinc.com/social_resp/social_resp.htm (last visited Mar. 10, 2005).

172. *See* TYSON FOODS, INC., TYSONCARES ABOUT THE ENVIRONMENT, *available at* <http://www.tysonfoodsinc.com/cares/environment/default.asp> (last visited June 11, 2005).

173. United Nations Global Compact, *available at* <http://www.unglobalcompact.org> (last visited Feb. 8, 2005). The United Nations Global Compact has over 2000 signatories, including twelve of the “Fortune 500.” The ten core principles for each signatory is to: (1) support and respect protection of internationally proclaimed human rights, (2) make sure it is not complicit in human rights abuses, (3) uphold the freedom of association and the effective recognition of the right to collective bargaining, (4) eliminate all forms of forced and slave labor, (5) abolish child labor, (6) eliminate discrimination in employment, (7) support a precautionary approach to environmental challenges, (8) undertake initiatives to promote greater environmental responsibility, (9) encourage the development of environmentally friendly technologies, and (10) work against all forms of corruption including extortion and bribery. *Id.*

174. *See supra* Part III.B.

175. *See supra* Part II.

ensure that future accidents would not recur because of the high costs associated with liability.

This is not to say that all of the additional duties that the Code adds to the corporate fiduciary duty are clear and unambiguous. The duty to protect “community welfare” may pose a problem of interpretation because it is not currently regulated like public occupational health and safety, the environment, and employment relations.¹⁷⁶ A reasonable person may not know how to comply with such a duty. For instance, from where would a court define the geographical limits of a community? Also, in the event that a corporation leaves a community, for how long does its duty to that community last? Does the duty to the community go beyond engaging in fair employment practices, ensuring health and safety, and protecting the environment already covered in the Code? The duty to protect the community welfare is vague, as well as redundant, and should be severed. However, this does not make the entire Code infirm for vagueness.

In summary, the criticism that the Code is unworkable because its expanded duty to the environment, employee dignity, public health and safety, human rights, and community welfare is vague is generally without merit. Such terms have long been defined in sources such as existing regulations, case law, international law, and from the currently unenforceable socially responsible and self-imposed corporate “codes of behavior.” Thus, claims that the Code’s duties are vague are unwarranted and should not prevent the Code from being adopted.

2. Adopting the Code: An Increase in Litigation?

The second criticism against the Code is that expanding individual liability for directors will lead to an increase in litigation.¹⁷⁷ The argument posits that additional liability for corporate directors is “bad for business” and ultimately bad for society.¹⁷⁸ Opponents argue that implementation of the Code will drive up the cost of doing business and will decrease the number of businesses that are willing to take the risks, will decrease overall business, jobs, investment, innovation, and wealth generation.¹⁷⁹

176. See e.g., Occupational Safety and Health Act, 29 U.S.C. §§ 651–678; 42 U.S.C. § 9607(a) (1994).

177. See S.B. 917, 2003-2004 Reg. Sess. (Cal. 2003), at http://info.sen.ca.gov/pub/03-04/bill/sen/sb_0901-0950/sb_917_cfa_20040121_120529_sen_comm.html (last visited Sept. 6, 2005).

178. CALIFORNIA CHAMBER OF COMMERCE, GOVERNMENT RELATIONS: JOB KILLER BILLS 2003, <http://www.calchamber.com/index.cfm?navid=441> (last visited Sept. 6, 2005).

179. *Id.*

While the possibility of litigation and liability is a very strong component of the desired deterrent effect of the Code, increased litigation will not necessarily result for three reasons. First, the business judgment rule provides an example of the deference and protection afforded directors.¹⁸⁰ The rule basically stands for the proposition that courts should exercise restraint in holding directors liable or otherwise second guessing business decisions which produce poor results.¹⁸¹ While the rule has been interpreted differently in different jurisdictions,¹⁸² in the majority of states a director's standard of care is much lower than that of ordinary negligence.¹⁸³ In Delaware, for example, the business judgment rule amounts to a reduced standard of care, that is, corporate directors should not act in a way that is grossly negligent in making its decisions.¹⁸⁴ Ultimately, the Code will not result in increased litigation because it does not seek to alter the standard of care or overturn the business judgment rule. Rather the Code will only include more within the scope of a director's duty of care.¹⁸⁵ Secondly, directors can, and do, protect themselves and the corporation from the cost of liability by purchasing insurance protection.¹⁸⁶ Accordingly, a director will be pressured to act in such a way as to keep insurance premiums at a minimum. Finally, the criticism that the Code will result in increased litigation disregards the very potent deterrent effect that the Code will have in altering the behavior of corporate decisions makers. These corporations will act in advance to protect themselves against possible future liability.

3. Adopting the Code: an Exodus of Business?

The final argument against adoption of the Code is that the change will cause corporate flight.¹⁸⁷ This argument, while it may be convincing,

180. See *supra* discussion of the business judgment rule in Part III.B.

181. Gevurtz, *supra* note 58.

182. Gevurtz, *supra* note 58.

183. Gevurtz, *supra* note 58.

184. Aronson v. Lewis 473 A.2d 805, 812 (Del. 1984), *overruled by* Brehm v. Eisner, 746 A.2d 244 (Del. 2000).

185. See MODEL UNIF. CODE FOR CORP. RESPONSIBILITY, *supra* note 118. Some have argued that there is no real reason why the standard of care for corporate directors is any lower than what an attorney or a physician owes clients. See Gevurtz, *supra* note 63.

186. As many as ninety-five percent of "Fortune 500" companies maintain directors and officers liability insurance today. See FINDLAW FOR LEGAL PROFESSIONALS, DIRECTORS AND OFFICERS LIABILITY INSURANCE OVERVIEW, available at <http://profs.lp.findlaw.com/insurance/insurance1.html> (last visited June 11, 2005).

187. That is, that a corporation, acting in its own best interest, will take its business elsewhere if the incorporating state's laws are burdensome.

is speculative and difficult to support or deny without empirical evidence.

The California Senate Committee considering the Code has suggested that if California were to amend its corporate chartering legislation in accordance with the Code, it will discriminate against the few companies that are incorporated in California and will cause an exodus of business to states without the Code.¹⁸⁸ The Senate committee has suggested that it would be more prudent for California to consider such an amendment once other states have done so, or at least after Delaware has done so.¹⁸⁹

Without discussing the practical difficulties that exist for most corporations to “shop” for locations to reincorporate, there are a few responses to this argument. First, there is something inherently suspicious about protecting a corporation who would change the state of its incorporation just to avoid potential liability for committing human rights abuses or damaging the environment. Many corporations act as good citizens without the additional duties of the Code.¹⁹⁰ The Code aims to alter the behavior of those few that do not. Second, there are very strong business arguments for corporations to act as good citizens and to support the adoption of the Code.¹⁹¹ This business value is not limited to the positive press that comes from an honest concern for the public interest in a corporation.¹⁹² Studies conclude that corporations that operate with the public interest in mind are more successful than those that do not.¹⁹³ Third, the fact that corporations can shop for locations to incorporate is problematic and might be best addressed via other means. That is, comparatively favorable corporate law in one place, which attracts corporations that are located in other states, allows the favorable states to externalize the true costs of its corporate rules onto other states and other nonshareholder stakeholders.¹⁹⁴

188. CALIFORNIA CHAMBER OF COMMERCE, GOVERNMENT RELATIONS: JOB KILLER BILLS 2003, <http://www.calchamber.com/index.cfm?navid=441> (last visited Sept. 6, 2005).

189. S.B. 917, 2003-2004 Reg. Sess. (Cal. 2003), at http://info.sen.ca.gov/pub/03-04/bill/sen/sb_0901-0950/sb_917_cfa_20040121_120529_sen_comm.html (last visited Sept. 6, 2005).

190. See Donaldson, *supra* note 41, at 2; Cooper, *supra* note 114, at 11. The vast majority of companies are small, family owned businesses. They already operate more or less without violating the public interest. If they are not good citizens, they'll get a bad reputation and will soon be out of business. Cooper, *supra* note 114, at 11.

191. Cooper, *supra* note 114, at 11. “A recent analysis of 95 empirical studies on corporate social performance and corporate financial performance by Harvard’s Joshua Margolis and JP Walsh at the University of Michigan showed that about nine times as many studies revealed a positive correlation between corporate social performance and corporate financial performance as those that indicated a negative one.”

192. Clive Crook, *The Good Company*, THE ECONOMIST, Jan. 22, 2005, at 3.

193. Donaldson, *supra* note 41, at 2.

194. See Greenfield, *supra* note 42, at 101.

V. CONCLUSION

Implementing a series of warnings about hydrogen sulfide gas in the hydrolizer at Tyson Foods would have impacted Tyson's bottom line. Tyson Foods was under no affirmative obligation to take any measures to warn employees of the dangerous gases. Unfortunately, the absence of such measures impacted Jason Kelly and his family in the most serious way. Despite the fact that someone in the chain of command may have known that warnings were needed, that the cause of death was asphyxiation from the gases, and that Tyson Foods is contesting liability, it would not do Jason Kelly's family any good to hold a protest on the Tyson CEO's front lawn. The problem of corporate misbehavior is bigger than just the decisions of individual actors. Because the duty that corporate law places on corporate directors is narrow and the regulatory scheme of managing corporate behavior is insufficient, corporations may cause grave harm by externalizing the costs of doing business.

Corporate law has assumed the role of upholding the shareholder primacy model. Corporate law exists simply to maximize shareholder wealth. Corporate law must change if society no longer wants to bear the costs of corporate misdeeds.

The Code for Corporate Citizenship is the best way to deal with corporate misdeeds because it expands the accountability of corporate directors and causes them to make decisions with more than just profit maximization in mind. The Code recognizes the ultimate purpose of the corporation but also recognizes that the corporation is part of society. The Code will allow directors to make decisions with their "director's hats" on in the same way they that would with their "citizen's hats" on. The Code will help prevent corporate misdeeds by introducing liability for violating the duty to society. Most importantly however, it will deter directors from making decisions that result in harm. Criticisms of the Code are not strong enough to counter the very real need for change that will make corporations better citizens. Although the Code for Corporate Citizenship is currently under consideration in only a handful of states, it should be adopted in every state.