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Comparisons Between Enron and Other Types of Corporate Misconduct: Compliance with Law and Ethical Decision Making as the Best Form of Public Relations

By Cheryl L. Wade[1]

Differences in Reaction to Various Types of Corporate Misconduct Offer Lessons About Corporate Realities

One of the most important lessons that Enron offers is that sometimes managers lie and boards fail to do their jobs. Enron's most valuable lessons relate to corporate governance, financial disclosure, accounting practices, and the management of pension funds. One of the most illuminating lessons that Enron offers, however, may be found in the reaction of jurists, legal scholars, the media, corporate professionals, elected officials, and the investing public to the Enron collapse. The general sense of public outrage is as large as the huge financial loss suffered by investors and employees.

There is a lesson to be derived from the differences in social, political, and legal discourse surrounding Enron and similar discourse and reaction to other types of corporate misconduct. The social, political, and legal outrage over Enron is far greater than the reaction to the other kinds of corporate wrongdoing that I describe in this essay. I focus primarily on the problem of racial discrimination, comparing the relatively mild public reaction to allegations of racial discrimination in the corporate workplace to the furor created by the Enron scandal.

The Enron scandal also demonstrates the power of public reaction to corporate wrongdoing. Some observers predict that the reaction of the public will lead to significant changes in financial reporting and auditing systems. Corporate managers care about their public image. Corporate lawyers should explain to managers that the best way to protect a company's public image is to comply with all applicable laws and behave in socially responsible ways. There may be greater monitoring of corporate misconduct relating to accounting practices in Enron's aftermath, but Enron should also result in greater vigilance with respect to other types of wrongdoing.

The lessons found in examining reaction to the Enron bankruptcy are illustrated when comparing public reaction to other types of misconduct. Some of the public is outraged, for example, by the allegations and subsequent admission by tobacco companies that they misled the public about the dangers of cigarette smoking. The pervasiveness of public outrage in this context, however, is not as extensive as the public's reaction to the Enron bankruptcy. Perhaps this may be explained by the conclusion of many that cigarette smokers themselves must bear responsibility for the choices they made to begin smoking.

Another instructive comparison can be made between reaction to the Enron bankruptcy and reaction to the Ford/Firestone controversy. Drivers perished, but neither company accepted responsibility. Each company placed blame on the other instead of coming together to find life saving resolutions.[2] There was public outrage, but the discourse about the Ford/Firestone controversy never rose to the level of the extensive legal, social, and political discussions that have taken place concerning Enron.

Racial discrimination in the corporate workplace and the public's reaction to such allegations are also informative, especially when compared to the Enron fallout. Hosts and callers into conservative talk radio shows complained about the interference of civil rights activists into the private matters of Texaco's business. One of the lessons learned by corporate attorneys from the allegations of racial discrimination at Texaco was that meetings and discussions that may be construed as discriminatory should not be memorialized. For some, the Texaco lesson was that incriminating evidence should be destroyed.[3] The racial discrimination suit filed against Texaco may never have been settled if a white Texaco officer, disgruntled about what he perceived as unfair age discrimination that was forcing him out of the company, had not turned over tapes that allegedly contained indisputable evidence of

Texaco's toxic culture of racism.[4] Evidence relating to the plaintiffs' racial discrimination suit was concealed; some was destroyed. The public outrage, however, about the obstruction of justice on the part of some of Texaco's officers paled in comparison to the public outrage at the charges that Enron and its accountants, Arthur Andersen, systematically shredded incriminating evidence.

Perhaps the public reaction to Enron is greater than public reaction to racial discrimination at Texaco because more people are affected by the Enron bankruptcy. Enron employees lost their jobs and some employees lost their savings. Other investors suffered huge losses as a direct result of the Enron collapse. The investing public in general suffered losses as the market reacted to investors' fears that the accounting practices of other companies potentially hid troubled corporate realities. The racial discrimination that occurred at Texaco was profoundly damaging to the self-esteem and well-being of large numbers of Texaco employees. This kind of discrimination in promotion and hiring perpetuates the legacy of inferiority that has plagued Americans of African descent since the times of slavery.[5] The harm to Texaco employees was profoundly egregious, but it did not reach beyond those employees and their families.

The most interesting difference in public reaction to Enron and Texaco is that most observers hesitated to believe that Texaco officers would discriminate or try to conceal evidence. Most were reluctant to hold the board accountable for failures in oversight of potentially discriminatory employment practices. This may be explained by differences in the nature of alleged wrongdoing at Texaco as compared to allegations of executive misconduct and directorial lapses at Enron. Misleading accounting practices and boards that do not seek enough information about the circumstances surrounding such practices are recognizable when investigated. Racial discrimination, on the other hand, is subtle, sometimes unconscious, and therefore, more difficult to detect.[6] Even when it is explicit, attempts to conceal it, when challenged, are extensive.

Because there was no social and political outrage concerning racial discrimination at Texaco, another corporate giant, Coca-Cola, paid an amount even larger than that paid by Texaco to settle a class action racial discrimination suit.[7]

Several commentators have spoken in recent months in less controversial terms about the lessons to be derived from the Enron debacle. For example, one writer suggests that many Americans have too much admiration for, and have placed too much power and confidence in, the corporate heads of large publicly-held companies.[8] "In the 1980's and '90's, Lee Iacocca, Sam Walton, Bill Gates, Andy Grove, Jack Welch, and their ilk became our new heroes."[9] The lesson this writer illuminates for the American public is the need to have more realistic expectations of entrepreneurs. We should not place them on pedestals.[10]

Another observer concludes that Enron offers lessons regarding the need for reform in several areas. Corporate financial reporting, auditing, and compliance with law systems must be enhanced. There should be better mechanisms in place for detecting fraud.[11] The specific suggestions made include taking "the job of choosing the auditors away from a company's bosses" and abating the practice of having one person serve as chairman of the board and chief executive officer at the same time.[12] The commentator also suggests that outside directors exert more influence.[13]

These are not new suggestions. It has been long assumed that directors who are not employed by the company and therefore not required to monitor their boss, the chief executive officer, will be better monitors. Commentators have written about the problems inherent in not separating the positions of chairman and chief executive officer. One of the board's most fundamental tasks is to monitor corporate officers. This monitoring function is severely impeded when the board's chairman is also the chief executive officer whom the board is expected to monitor. The other suggestions, such as not allowing the audited to choose the auditors, seem intuitively sensible. The fact that the suggestions are not new, however, is the real Enron lesson. "[T]he bigger lessons that Enron offers for accounting and corporate governance have long been familiar from previous scandals, in America and elsewhere. That makes it all the more urgent to respond now with the right reforms."[14]

Directorial and Managerial Fiduciary Breaches and Potentially Criminal Conduct at Enron

Newspaper accounts of the report drafted by members of a special committee of the Enron board formed after the company's problems became public suggest that at least some managers may have engaged in criminal wrongdoing.[15] William Powers, the special committee chair and dean of the University of Texas School of Law, concluded that Enron's board of directors breached its fiduciary duty of care owed the company's shareholders.[16]

The very culture at Enron risked the kinds of managerial breaches and possibly criminal conduct that occurred.[17] One former Enron manager observed that "[t]he environment was ripe for abuse. . . . It was completely hands-off management. A situation like that requires tight controls. Instead, it was a runaway train."[18] In fact, Enron's board did not hold the company's Risk Assessment & Control group accountable. The group that was supposed to serve as an internal mechanism to manage risky corporate conduct reported to Jeffrey Skilling, the executive who incited excessively risky conduct at Enron.[19] Jeffrey Skilling "created and embodied the in-your-face Enron culture, where risk-taking, deal-making, and 'thinking outside the box' were richly rewarded, while controls appeared loose at best."[20]

A great deal has been written about the fiduciary duty of care directors owe shareholders. One question raised by Enron's corporate governance lapses is how to measure satisfaction of the duty of care on the part of Enron's corporate officers. Reasonableness governs the duty of care owed by both directors and officers. The standard of care owed by officers and directors may be the same, but the amount of care owed by a company's managers of day to day affairs should be unavoidably higher than the amount of care owed by a company's outside directors with far less contact and involvement with the company.

Enron managers such as Andrew Fastow, the company's former Executive Vice President and Chief Financial Officer, clearly breached fiduciary duties owed shareholders. Fastow breached the duty of loyalty because he had a material financial interest in the transactions between Enron and the investment partnerships he created and managed.[21] Other Enron employees who enriched themselves also breached fiduciary duties of loyalty.[22]

What about the Enron managers who did not reap pecuniary benefits from Enron's transactions with the suspect partnerships? They may not have breached the fiduciary duty of loyalty, but they may have breached the fiduciary duty of care they owe shareholders. One Enron executive observed that Jeffrey Skilling "surrounded himself with 'yes men.'"[23] It would be reasonable to argue that "yes men" breached the duty of care by invariably saying *yes* instead of adequately investigating, monitoring, and ensuring compliance with law.

One cannot ignore the troubling relationship between Enron's managers and board. "The directors have maintained . . . that they were misled by some Enron executives and were never told about critical transactions."[24] According to some newspaper accounts, transactions were hidden from the board.[25] At this point, the extent to which managers misled the board is unclear. There are clear allegations, however, that Kenneth Lay, the former chair of Enron Board of Directors, was "disengaged and unfamiliar with many aspects of his own company."[26] If this characterization of Lay's tenure as chairman of the board is accurate, he has in fact breached the duty of care he owes shareholders.

COMPARISONS BETWEEN THE ENRON BANKRUPTCY AND ANOTHER TYPE OF CORPORATE WRONGDOING: RACIAL DISCRIMINATION

Even if jurists, politicians, investors, and the public in general are surprised about the specifics of alleged wrongdoing at Enron, most believe that, whatever the facts, enhanced scrutiny of other publicly-held companies is warranted. There are significant similarities that I will enumerate in the paragraphs that follow between the Enron bankruptcy and the directorial and managerial conduct that led up to it and the racially toxic corporate cultures at Texaco and Coca-Cola that resulted in the filing of class action racial discrimination suits. In spite of the similarities, however, there was no outcry for enhanced monitoring of equal employment practices in the aftermath of the large settlements paid by Texaco and Coca-Cola.

The similarities between the Enron saga and the debacles at Texaco and Coca-Cola are numerous. Enron's bankruptcy and pervasive racial discrimination at Texaco and Coca-Cola are the results of corporate governance failures. Boards and managers failed to satisfy fiduciary duties and these failures led to shareholder losses.[27] Enron's shareholders, its employees, and the investing public suffered large pecuniary losses. Similarly, shareholder and non-shareholder groups, specifically employees, were harmed by pervasive racial discrimination at Texaco and Coca-Cola. Also, in both contexts, it was not clear when unethical conduct became illegal conduct. Were accounting practices and securities transactions at Enron merely misleading, or were they illegal? Were promotion denials for African American employees at Texaco and Coca-Cola the result of racial discrimination or merely the consequence of meritocratic decision making? Additionally, allegations of wrongdoing at Enron, Texaco, and Coca-Cola were answered by the denials of corporate executives and spokespersons *before* the allegations were adequately investigated.[28]

Another comparison is found in the fact that one of the problems that led to the public humiliation of Enron, Texaco, and Coca-Cola was the fact that the managers were not able to police themselves. One commentator observed that one of the lessons to be learned from Enron was that corporate managers should not be the ones to choose the auditors who are supposed to ensure compliance with law.[29] Similarly, part of the settlement of the racial discrimination litigation against Texaco and Coca-Cola included the appointment of a committee of individuals with no prior relationship with the company to oversee compliance with laws prohibiting discrimination for years after the settlement date. The boards and managers at Texaco and Coca-Cola could not be entrusted with ensuring corporate compliance. Moreover, egregious directorial and managerial misconduct and fiduciary duty breaches occurred at Enron, Texaco, and Coca-Cola in spite of the existence and applicability of securities laws, accounting standards, and anti-discrimination law. The final comparison is that Enron and Texaco attempted to destroy evidence of wrongdoing.[30]

The difference in public reaction to the Enron bankruptcy on the one hand, and the allegations of racial discrimination on the other hand, present a significant and meaningful dissimilarity. The public's outrage in reaction to Enron is an interesting contrast to the much quieter reaction of the public to the details that led up to the filing of racial discrimination litigation against Texaco and Coca-Cola. Elected officials and the public demanded greater vigilance and examination of the accounting practices of companies other than Enron. "Even companies once considered above suspicion are being subjected to increasing scrutiny."[31] There were no public calls for enhanced scrutiny of the equal opportunity employment practices of companies other than Texaco and Coca-Cola after the two class actions were settled. There was no demand for heightened vigilance of companies with few or, more often than not, *no* people of color in their ranks of senior executives or on their boards of directors.

"Legal observers say the Enron litigation could be a catalyst for important changes in business policy."[32] "Senators have already called for mandatory diversification in 401(k) plans, and [a bankruptcy specialist] believes new accounting rules will follow. Public company disclosure requirements could also be refined."[33] It is predicted that the investors' reaction in the aftermath of the Enron bankruptcy will lead to significant changes in mandatory disclosure. "[I]nvestors are demanding better, more frequent, and more expansive information about companies' financial health."[34] Compare the reform predicted in Enron's aftermath to the lack of change in the aftermath of the Texaco and Coca-Cola settlements. First, there is no disclosure required by the Securities and Exchange Commission regarding discrimination or any other social issues, and there was no call for reform in this regard even in light of the egregiously discriminatory conduct endured by Texaco and Coca-Cola employees. Second, there was a brief fall in Texaco's stock value when taped evidence of the discriminatory conduct became public, but the company suffered no enduring financial harm.[35]

One of Enron's most important lessons is that greater scrutiny of directorial and managerial conduct and decision making is warranted. Enron's other valuable lesson is that investor reaction and public and political dissatisfaction with corporate conduct is an effective way to enhance corporate social responsibility and compliance with law. Corporate boards and managers are rightfully concerned with their public image. They invest time and money on public relations. One of the best public relations tools, however, is the kind of corporate social responsibility that includes compliance with law and ethical corporate conduct.

Public Relations, Charitable Contributions, and Compliance with Law

In the aftermath of the September 11 attack on the United States, an ostensibly heightened sense of corporate social responsibility emerged. The chief executive officer (CEO) of Cantor Fitzgerald, one of the companies formerly located in the World Trade Center, wept while he gave a television interview describing the devastating losses suffered by his company, the employees who perished, and their families. Every New York area newspaper in the days and weeks after the attack carried full-page messages expressing profound sorrow. What purpose did this outpouring of corporate emotion serve? Did these "advertisements" comfort the public? Were the sentiments expressed sincere?

Cynicism regarding the sincerity of corporate managements' public responses to the attack seemed justified. After all, the newspaper messages, while carefully designed *not* to look like advertising, all contained the companies' logos or names. Moreover, shortly after his tearful television appearance, and within two weeks after the attack, Cantor Fitzgerald's CEO stopped salary payments and suspended medical benefits for the survivors of perished employees. The families affected by this decision responded publicly, granting television interviews complaining about the severed salaries and benefits. In the aftermath of this bad publicity, Cantor Fitzgerald's CEO rescinded his decision to stop salaries and benefits.

Whether the corporate responses were sincere or not, the nation needed to read the newspaper and billboard messages expressing sorrow and patriotism from corporate citizens. They expressed sentiments we all shared, but as individuals, few of us were able to afford to pay for such public displays of sadness and grief. Corporations, acting as agents for the flesh and blood people who compose them, had the money and the incentive to provide this public and very expensive form of mourning. This observation illustrates the very important public role played by private enterprise.

Corporate reactions to the September 11 attack militate in favor of a broader theory of what corporate social responsibility should be. Contractarian goals of shareholder wealth-maximization were achieved to the extent corporate managers made the right public relations moves. The right corporate response could engender favorable public sentiment for a company, leading to long-term profits derived from loyal consumers to whom the subliminal messages were aimed. Corporate managers used the broadest of *communitarian* goals—the healing of a nation—to accomplish the *contractarian* goal of eventual long-term shareholder wealth-maximization. Corporate reactions to the September 11 tragedy presented a view of non-shareholder constituencies inextricably linked to traditional corporate constituents. Post-tragedy publicity highlighted the interconnectedness of shareholders, officers, and directors on one hand, and non-shareholder constituencies such as employees, suppliers, creditors, consumers, and the communities in which the companies do business on the other. This time, however, communitarian efforts were aimed at a national community.

This broader view of communitarianism requires a broader view of corporate social responsibility. It leads to the observation that socially responsible conduct should be the imperative not only of corporate officers and directors but also of corporate lawyers and consumers. Corporate lawyers can play a role in achieving shareholder *and* social wealth maximization. Also worthy of examination is the role of the community in general, and of consumers in particular, in enhancing corporate social responsibility. First, however, a closer examination of what corporate social responsibility should mean is required.

The traditional notion of corporate communitarianism is that officers and directors may consider the interests of non-shareholder constituencies such as suppliers, creditors, consumers, employees, and communities in which the company does business when making business decisions. Related to this philosophy is the traditional notion of corporate social responsibility that encourages charitable corporate conduct. The impact of corporate activity on non-shareholder constituencies is regulated by state and federal labor, discrimination, commercial, securities, banking, environmental, and consumer laws. Traditional theories of corporate social responsibility encourage companies to go beyond that which is required under the law for the benefit of these non-shareholder constituencies. It is a request that corporations do something extra for the world in which they do business. The most typical example is the practice of charitable giving. Corporations make charitable donations perhaps to be good citizens, but the public relations value of corporate giving is obvious.[36] Less obvious in a profit-maximizing sense is the type of corporate social responsibility that may benefit non-shareholder groups affected by corporate activity in a way that does not have broad public relations value.

Another kind of socially responsible or irresponsible behavior can be found in corporate responses in the face of alleged wrongdoing on the part of corporate employees and managers. Finally, there is a kind of corporate social responsibility that is mandated under labor, discrimination, commercial, securities, banking, environmental and consumer laws that should be distinguished from the kind of corporate social responsibility that asks businesses to achieve social good even when it is not required by law.

What are the corporate governance issues that arise when considering the various types of corporate social responsibility suggested above? Corporate lawyers can help corporate boards and managers make decisions that diligently ensure compliance with law. External law that governs private corporate conduct is often open to conflicting interpretations. For example, while it is clear that Title VII prohibits workplace discrimination,[37] discriminatory conduct is not easily recognized. Discrimination in the workplace may be unconscious; it is often covert and subtle; therefore, it is difficult to detect. Corporate lawyers can help managers interpret the law in a way that ensures responsible behavior towards employees. This means that corporate lawyers will have to help change the way corporate boards make decisions and supervise the conduct of corporate officers. Lawyers must encourage corporate directors to avoid the psychological pitfalls of group decision making that prevent the adequate monitoring of corporate compliance with law. Moreover, community activists can play a role that enhances socially responsible corporate behavior by publicizing and protesting against corporate conduct that harms employees or other constituencies.

Similar opportunities for corporate lawyers and community activists to encourage corporate social responsibility are present in the context of discrimination against consumers and communities in which companies do business. Traditional considerations of the impact of corporate activity on non-shareholder constituencies have focused on the decisions made by corporate officers and directors. In this respect, the broader model for potential participants in, and contributors to, efforts aimed at enhancing corporate social responsibility described above would require an element of self-responsibility on the part of consumers who can make decisions about where they shop, making discrimination against consumers and environmental hazards in minority communities less than profit-maximizing. Consumers can decide not to patronize companies that discriminate. Community activists can organize boycotts against such companies.

Corporate lawyers can help directors and senior executives understand that in large companies unlawful or discriminatory conduct on the part of some employees may be inevitable. This should be easier in the aftermath of Enron. It is more difficult, in Enron's aftermath, to claim surprise about directorial and managerial wrongdoing. Lawyers can help corporate managers respond more appropriately to inevitable allegations of wrongdoing. Lawyer's can help corporate managers protect the public image of their companies by encouraging them to make socially responsible choices that include diligent compliance with applicable law.

Conclusion

Corporate officers and directors care deeply about the public images of their companies. Even though there is no empirical evidence that links charitable giving to profitability,[38] companies continue to make charitable donations and efforts as a way of ensuring a positive public image.[39] Since companies are rightfully concerned with public relations, one strategy for achieving social justice is to publicize corporate wrongdoing that harms non-shareholder groups.

Corporate lawyers should help their clients to understand that charity is helpful, but charity alone is not sufficient. The greatest social contributions that companies can make relate to the corporate governance decisions that have a potentially adverse effect on non-shareholder constituencies such as employees, consumers, and communities in which the companies do business. Good corporate citizenship should start with greater internal monitoring of compliance with law. This is applicable to the laws that prohibit racial discrimination as well as the laws relating to accounting and financial disclosure.

Any public relations benefit derived from a company's charitable donations can be completely eviscerated by company wrongdoing. Enron provides a compelling example of the paradox of corporate charitable giving while at the same time engaging in conduct that harms shareholders, employees, and other non-shareholder constituencies, including the national community. While some Enron managers decided to donate significant portions of the company's funds to various charities,[40] other Enron managers personally enriched themselves at the expense of the company's shareholders and non-shareholder constituents.[41]

Important changes in business policy and governance will occur in Enron's aftermath. Corporate governance reform, however, should not be limited to matters relating to a company's financial health. Enron teaches us that heightened scrutiny may be warranted in other contexts of corporate wrongdoing such as racial discrimination.

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[2] *See generally* Keith Bradsher, *Firestone to Stop Sales to Ford, Saying it Was Used as Scapegoat,* N.Y. TIMES, May 22, 2001, at A1; Keith Bradsher, *Firestone Engineers Offer a List of Causes for Faulty Tires,* N.Y. TIMES, Dec. 19, 2000, at C1.

[3] One attorney advised corporate managers to avoid allegations of employment discrimination by prohibiting the taping of meetings. The attorney also advised that companies destroy documents as part of a regular routine. *See* Karen Donovan, *Winston & Strawn's How-To; Avoid a Texaco Prob,* NAT'L L.J., Dec. 16, 1996, at A4.

[4] *See* BARI-ELLEN ROBERTS & JACK E. WHITE, ROBERTS VS. TEXACO: A TRUE STORY OF RACE AND CORPORATE AMERICA 274–75 (1998). *See also* Jack E. White, *Texaco's High-Octane Racism Problems: Piles of Cash and Substantial Reforms Fail to Reverse the Call for Boycott*, TIME, Nov. 25, 1996, at 34, 34–35.

[5] There are recent examples of the legacy of inferiority. *See, e.g.*, CHARLES MURRAY & RICHARD HERRNSTEIN, THE BELL CURVE (1994) (advocating that social services be distributed according to whether such services will actually improve the lives of the recipients and arguing that because African Americans are genetically less intelligent, an increase in social services may not provide corresponding benefits). A City College professor in New York City has lectured and written about his opinion that African Americans are intellectually inferior to whites. *See* Deborah Squiers, *Judge Allows Professor's Suit over Inquiry; Alternate Class Offered Due to Teacher's Views*, N.Y. L.J., Dec. 18, 1990, at 1; William Gifford, Jonathan Groner & Michelle E. Klass, *Levin v. Harleston, et al.*, LEGAL TIMES, Dec. 24, 1990, at 13; Richard J. Cattani, *On Alienation, Racism, and Hate*, CHRISTIAN SCI. MONITOR, Sept. 11, 1991, at 19.

[6] This kind of discrimination in promotion and hiring perpetuates a legacy of inferiority that has plagued Americans of African descent since the times of slavery. As Professor Charles Lawrence explains:

> Americans share a common historical and cultural heritage in which racism has played and still plays a dominant role. Because of this shared experience, we also inevitably share many ideas, attitudes, and beliefs that attach significance to an individual's race and induce negative feelings and opinions about nonwhites. To the extent that this cultural belief system has influenced all of us, we are all racists. At the same time, most of us are unaware of our racism.

Charles Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 322 (1987).

[7] *See* Greg Winter, *Coca-Cola Settles Racial Bias Case*, N.Y. TIMES, Nov. 17, 2000, at A1.

[8] Michael Elliott, *The Incredible Shrinking Businessman,* TIME, Feb. 4, 2002, at 26, 26.

[9] *Id*.

[10] *Id.* "A lesson from Enron: we would be wise to entrust . . . responsibility to those with their feet on the ground, not on a pedestal. Even if we built it for them." *Id.*

[11] *The Lessons from Enron*, ECONOMIST, Feb. 9, 2002, at 9.

[12] *Id.*

[13] *Id.*
[14] *Id.*
[15] *Decoding Enron*, N.Y. TIMES, Feb. 5, 2002, at A24.
[16] *See* Katie Fairbank & Jim Landers, *Lay Knew Enron Was Hiding Losses, Investigator Says Ex-CEO Leaves Board; Congress May Subpoena Him to Force Appearance*, DALLAS MORNING NEWS, Feb. 5, 2002, at 1A. According to Powers, "[t]here was a fundamental default of leadership and management. Leadership and management begin at the top, with the CEO, Ken Lay. In this company, leadership and management depended as well on the chief operating officer, Jeffrey Skilling. The board of directors failed in its duty to provide leadership and oversight." *Id. See also 'Yes Men' Make up Boards that Miss Enron-Type Failings*, USA TODAY, Feb. 21, 2002, at 16A.
[17]*See* John A Byrne, *The Environment Was Ripe for Abuse*, BUS. WK., Feb. 25, 2002, at 118.
[18] *Id.* at 119.
[19] *Id.*
[20] *Id.*
[21]*See* WILLIAM C. POWERS, JR., ET AL., SPECIAL INVESTIGATION COMM., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMM. OF THE BD. OF DIRS. OF ENRON 7–8 (2002) (also known as the Powers Report).
[22] *Id.*
[23] Wendy Zellner, *Jeff Skilling: Enron's Missing Man*, BUS. WK., Feb. 11, 2002, at 38, 39.
[24] Reed Abelson, *Enron's Many Strands: The Board*, N.Y. TIMES, Feb. 4, 2002, at A20.
[25]*See, e.g., Enron's Many Strands: Excerpts from Testimony Before House Subcommittee on Enron Collapse*, N.Y. TIMES, Feb. 5, 2002, at C4.
[26] Julie Mason, *Lay Told Analysts of Faith in CFO; Enron Placed Fastow on Leave the Following Day*, HOUSTON CHRON., Feb. 21, 2002, at A1.
[27] The losses suffered by Texaco's shareholders were temporary.
[28] *See* Zellner *supra* note 23, at 40; Anne Mulkern, *Ignorance Lay's Excuse, House Documents Show*, DENVER POST, Feb. 20, 2002, at E1.
[29] *See The Lessons from Enron, supra* note 11.
[30] "FBI agents moved in when document shredding was discovered inside Enron's Houston headquarters." Michael Duffy & John Dickerson, *Enron Spoils the Party*, TIME, Feb. 4, 2002, at 19, 19.
[31] Daniel Kadlec, *Under The Microscope*, TIME, Feb. 4, 2002, at 28, 29.
[32] Jenny B. Davis, *Shirts and Suits*, A.B.A. J., Feb. 2002, at 22, 22.
[33] *Id.* One commentator's suggestion for reform included asking retired chief executives to "help clean up the mess in Corporate America." Jeffrey Garten, *Let Retiring CEOs Help Clean up Corporate America*, BUS. WK., Mar. 4, 2002, at 26, 26.
[34] Amy Barrett, *Slammed*, BUS. WK., Mar. 4, 2002, at 34, 34. It is predicted that market forces "will force executives in boardrooms across the country to wrestle with exactly how much new information to reveal [and] the question of how to flag changes for investors without causing their stocks to tank." *Id.*
[35] For example, immediately after an inflammatory taped conversation among Texaco executives that may have been laced with racial epithets became public, the company's stock declined in value. *See, e.g.,* Michael Brush, *Despite Small Relief Monday, Texaco's Stock Suffers on Negative News*, 1999 (previously published on the Internet) (on file with the author). The tape revealed that Texaco executives planned to destroy evidence that the company had discriminated against minority employees.
[36] *See* Jayne W. Barnard, *Corporate Philanthropy, Executives' Pet Charities and the Agency Problem*, 41 N.Y.L. SCH. L. REV. 1147 (1997); Peter Dobkin Hall, *Business Giving and Social Investment in the United States 1790–1995*, 41 N.Y.L. SCH. L. REV. 789 (1997).

[37] *See* 42 U.S.C. § 1981 (2000).
[38] *See* Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 41 DEPAUL L. REV. 1 (1994); Hall, *supra* note 36.
[39] There has been, however, a decline in charitable donations made by companies. Hall, *supra* note 36.
[40] For example, Enron donated money to a charity for underprivileged British young people interested in entrepreneurship. *See* Jonathon Carr-Brown, Nicholas Hellan & Adam Nathan, *Shockwaves in the Corridors of Power,* SUNDAY TIMES (London), Feb. 3, 2002. Enron also contributed to the AIDS Foundation Houston. *See* Shelby Hodge, *AFH Fund-Raiser is an 'Investment of a Lifetime,'* HOUSTON CHRON., Dec. 4, 2000, at 4. Interestingly, Enron has been accused of misconduct with consequences that extend beyond financial matters. The company was accused of human rights abuses in India at a power plant site. *See* Michael Davis, *Report Links Enron To Abuses at Power Plant Site in India; Houston Company Says Claims by Human Rights Group Are Distorted,* HOUSTON CHRON., Jan. 25, 1999, at 13.
[41]There are other companies that engage in the paradox of corporate charitable giving while engaging at the same time in corporate decision making that harms non-shareholder groups. For example, Coca-Cola makes charitable contributions domestically and internationally. *See, e.g.,* Neil Shoebridge, *The Selling Revolution,* BUS. REV. WKLY., Nov. 30, 1998, at 50. At the same time, the company suffered a public relations nightmare as a result of widespread racial discrimination within the company. Similarly, Mitsubishi makes charitable donations to enhance its corporate image. *See* Jonathan Burton, *Japanese Firms Use Philanthropy to Build Image,* CHRISTIAN SCI. MONITOR, July 23, 1992, at 8. Mitsubishi's image was tarnished, however, when employees filed discrimination suits that the company settled. Phillip Morris also makes extensive charitable donations, but it suffers a poor public image because of corporate decision making in the past that misled consumers about the dangers of cigarette smoking. Phillip Morris has donated money to women's golf and the arts. *See* B. Pramberg, *Eisenhower Cup Winners back in Time for Open,* COURIER-MAIL, Nov. 19, 1996, at 39; Anita Anandarajah, *For Art's Sake,* NEW STRAITS TIMES (Malaysia), Jan. 20, 2001, at 4. Recognizing that its public image has been irrevocably tarnished, Philip Morris plans to change its name. *See* Michael Stetz, *Philip Morris Name Change Viewed with Suspicion; Anti-Tobacco Forces Say Firm Buying Good Will,* SAN DIEGO UNION-TRIB., Dec. 31, 2001, at B1. Interestingly, one of the charities to which Philip Morris contributes is the provision of scholarships for young people who participate in rodeo. Some criticize the company for sponsoring the rodeos as a way to reach a potentially lucrative market for its products—teenagers. *See* Todd Wilkinson, *Fight Over Teen Tobacco Use Moves into 'Marlboro Country,'* CHRISTIAN SCI. MONITOR, Dec. 3, 1998, at 2.