COMMENT ON DUNFEE

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Professor Dunfee has done a singularly competent job in elucidating one of the recognized exceptions to the general proposition that, in the words of § 2.01 of the American Law Institute's *Principles of Corporate Governance: Analysis and Recommendations*, "a corporation . . . should have as its objective the conduct of business activities with a view to enhancing corporate profit and shareholder gain."[1] The exception is that a corporation may take into account ethical considerations even if they adversely affect shareholder value. He has provided a framework within which managers can make rational—and rationalized—decisions as to when ethical considerations may supersede shareholder interests.

As the Reporter for the *Principles of Corporate Governance* remarks, "[t]here is very little direct authority on the permissibility of taking ethical considerations into account in framing corporate action where doing so might not enhance profits."[2] This proposition is in many ways more difficult to articulate than is the exception relating to eleemosynary contributions, which is often dealt with explicitly in statutes.

The proposition that the managers of the corporation (executives and directors) have a primary and almost all-encompassing obligation to maximize shareholder value is one that many find difficult to accept. The debate is not a new one, and it did not start with the famous Berle-Dodd dust-up in the early 1930s. The seeds of this controversy had their origins in the very beginnings of the corporate form of economic enterprise. The earliest corporations, while they were generally organized by private citizens, nonetheless existed because of royal or parliamentary largesse, and, while they were permitted and often encouraged to make a profit from their activities, they were also adjured to serve some public purpose, such as the operation of a toll road, the provision of essential supplies, and so on.

Charting the limits for a manager in giving heed to ethical considerations is difficult. Separating out the manager's personal ethical instincts from those that should properly animate him as an official of the corporation is not an easy task. What one manager may perceive as "marketplace morality," even a "hypernorm," may appear differently in the eyes of another manager. The am-

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1. AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01(a) (1994).

2. *Id*. rep. note 5.

biguities are amply demonstrated in the examples that accompany the articulation of the general principle in section 2.01 of the *Principles of Corporate Governance*. In several instances, a set of hypothetical facts is stated, and conflicting conclusions are both justified under the principles set forth in the "black letter" principle.[3]

A recognition that a corporation and its management may depart from strict adherence to the profit-making purpose of the corporation opens up a large area of discretion for management. In a day when homelessness is a pervasive problem, it is easy to rationalize a substantial corporate commitment to easing the plight of the homeless. Such activity might be linked to making the community a more desirable place in which to live; that rationalization could easily mask simple sentimentality and the sympathy of a corporate official for the underprivileged.

Professor Dunfee would like his conclusions regarding the appropriate impact of moral considerations upon corporate decisionmaking to stand alone and not depend upon any corporate benefit deriving from adherence to community ethical perceptions. However, not infrequently in his article the corporate benefit—or detriment—creeps in. This is not inappropriate. The corporation flouting the prevailing ethical mindset in a community might very well suffer in its business. Corporate executives are probably more sensitive than they have ever been to the impact public opinion can have on their business. Newspapers, radio, television, and now the Internet make the dissemination of information about corporate conduct instantaneous and provide the mechanisms for mobilizing opinion and action quickly. Thus, what might in other days have been seen as an ethical response may simply be today's "good business." For example, the action of Johnson & Johnson in promptly withdrawing Tylenol when the first information of tampering appeared was unquestionably a highly ethical decision. However, it also proved to be a sound business decision in its ultimate effect on the Tylenol business.

Today, the public expects businesses, regardless of the form in which they conduct their affairs, to be sensitive to the hazards their conduct may pose to the public. However, management cannot always accede to community sentiment, which will often be selfishly protective of parochial interests. Thus, while the prevailing "ethical" conviction in a community may be that a corporation should provide generous severance pay for people whose employment ends when a plant is shut down, rarely will management be as generous as the community would wish. Going further, in such a situation, the prevailing "marketplace morality" might suggest the plant should remain open, even though it was incurring potentially ruinous losses.

In the *Principles of Corporate Governance*'s articulation of the "ethical" exception to the general principle of enhancing corporate profit and shareholder gain, a somewhat different and ambiguous notion is introduced. It states that

3. *See id.* cmt. h, illus. 11-12, cmt. i, illus. 13-14.

the corporation "[m]ay take into account ethical considerations *that are reasonably regarded as appropriate to the responsible conduct of business*."[4] As explained in the comment,

> [t]his does not mean that corporate officials can properly take into account any ethical consideration, no matter how idiosyncratic. Because such officials are dealing with other people's money, they will act properly in taking ethical principles into account only where those considerations are reasonably regarded as appropriate to the responsible conduct of business. In this connection, however, it should be recognized that new principles may emerge over time. A corporate official therefore should be permitted to take into account emerging ethical principles, reasonably regarded as appropriate to the responsible conduct of business, that have significant support although less-than-universal acceptance.[5]

The commentary recognizes the difference between officials' ethical principles and those that relate to the company's business: "If . . . it appears that an action that would be in the corporation's best economic interests would violate the official's personal ethical principles, but not ethical principles reasonably regarded as appropriate to the responsible conduct of business, the official's course would normally be either to take that action or to not participate in the decision."[6]

It is noteworthy that whatever ethical obligations a corporation may be said to have, there is no binding necessity that the corporation heed such ethical considerations.

The recognition that the profit primacy of corporate activity can be tempered by ethical considerations could lead to the "pluralist" notion that the corporation's responsibilities and obligations extend to constituencies other than the shareholders. This would be an unfortunate consequence of Professor Dunfee's worthy and learned argument for the principle that corporations may take into account ethical considerations and would, I think, distort his intention. While Professor Dunfee's argument could be extended to justify a pluralistic conception of the duties or function of a corporation, there is no indication that it is his purpose or intent to do so.

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4. *Id*. § 2.01(b)(2) (emphasis added).
5. *Id*. cmt. h.
6. *Id*.