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When a professor teaching corporate law, such as myself, thinks about reforming the curricula in order to reinforce the ethical principle of the lawyer as a "public citizen," the topic of corporate social responsibility comes to the fore. How can we get our students in corporate law classes to thoughtfully consider the role of corporate law and corporate lawyers in ensuring large corporations act in a way that benefits, rather than harms, employees, customers, and the broader community and environment within which the firm operates? It is the thesis of this essay that introducing comparative corporate law—in other words, looking at non-United States ("U.S.") company law—and examining the impact of the cross-border activities of multinational companies provides a superior means of accomplishing this goal.

Before developing this thesis, it may be useful to address a normative question: should corporate law care about corporate social responsibility? There is a strong current in academic commentary—particularly from followers of neo-classical economic reasoning—that the purpose of a business corporation is solely to produce goods and services in the most efficient manner so as to maximize wealth for its owners (shareholders), and that, in this manner, corporations maximize wealth for society as a whole.[1] It is, of course, true that business corporations are engines of economic activity whose purposes are to produce and sell goods and services, and that, all other factors being equal, the most efficient production and sale of goods and services equals a wealthier (if not always happier) society.

Nevertheless, this narrow view ignores a couple of critical considerations. One is distributional. Corporate law impacts the question of who gets how much of the wealth generated by corporations. Law has a legitimate concern not only with the total wealth produced by corporations, but also in helping to ensure that the distribution of this wealth reflects societal values—whether this value is equality or, less ambitious, that distributions reflect fully informed contracts rather than opportunistic exploitation. The other consideration lies in the need to be careful in defining and measuring the efficient production of wealth. To use a

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1. *E.g.*, Milton Friedman, *The Social Responsibility of Business is to Increase its Profit*, N.Y. TIMES MAG., Sept. 13, 1970, at 17.

simple illustration, if a company produces and sells lethal toys for children, few would say that this activity has produced wealth for society. Similarly, if a company's production significantly damages the environment, one cannot measure the impact of the company's activity on the total wealth of society without subtracting the damage to the environment in the calculation. Admittedly, one might argue that such concerns are the province of laws (such as product safety and environmental protection) other than corporate law. Yet, to assume that corporate law—the laws governing the selection, duties, and liabilities of those in charge of corporations and of the owners of the corporation—is irrelevant to these concerns is a bit like assuming that the laws governing the election of representatives in a democracy are irrelevant to the policies the government will ultimately follow.[2]

To turn from the normative to the concrete, how does corporate law address issues of corporate social responsibility, or, more broadly, the impact of corporations and the way they are governed on our society? This essay will explore three areas. In the first part, it will explore the shareholder primacy versus stakeholder model debate. This debate asks whether the purpose of a business corporation, as reflected in the duties of corporate directors and the manner of their selection, is simply to maximize wealth for its shareholders (within the limits imposed by laws generally), or whether the purpose, as reflected in the selection and duties of directors, is to promote the welfare of all those who have a stake in the corporation—including employees, customers, creditors and the broader community within which the company operates. In the second part, this essay will look more specifically at distributional issues—specifically at the role of corporate law in limiting the ability of those in charge of a corporation to seize a disproportionate share of the wealth generated by the company. Finally, in the third part, this essay will consider the impact of limited liability for the corporation's owners on the ability of other laws (such as product safety and environmental protection laws) to ensure responsible corporate conduct.

In each case, we will see that confining the discussion to laws and companies within the United States can result in a sterile classroom exercise in which students fail to fully appreciate the concrete possibilities for better approaches. It also fails to fully inform the students of the importance of corporate social responsibility in a global economy in which the actions of foreign multinationals can impact persons in the United States. By contrast, introducing discussion of other nations' company laws, and of the impact of multinational corporations,

2. *See generally* Joseph E. Stiglitz, *Multinational Corporations: Balancing Rights and Responsibilities*, 101 AM. SOC'Y INT'L L. PROC. 3, 45-46 (2007) (for a more extended discussion of why external regulation of corporations cannot completely prevent negative corporate actions irrespective of who owns and controls the corporation).

enlivens the classroom discussion by opening the students' minds to alternate approaches and to the totality of what is at stake.

I. MAKING REAL THE SHAREHOLDER PRIMACY VERSUS STAKEHOLDER MODEL DEBATE

Discussions of the topic of corporate social responsibility often begin on a broad level with the decades' old debate[3] at the intersection of the purpose for which business corporations exist and the duties of corporate boards of directors (the persons with ultimate responsibility for managing the corporation).[4] Specifically, do business corporations exist simply to make money for their shareholders so long as the company acts within the law—often referred to as the "shareholder primacy," or "shareholder wealth maximization," norm?[5] If so, then the duty of directors is to do what they can to maximize profits for the shareholders, subject only to avoiding those actions by the company that violate specific laws.[6] Or, is the purpose of the corporation to promote the welfare of all those with a stake in its activities—including employees, customers, creditors and the broader community within which the company operates—often referred to as the "stakeholder model" or "stakeholder theory?"[7] If so, then directors have the discretion, if not the duty, to sacrifice maximum profits for the shareholder in order to promote or protect the interests of these other stakeholders.[8]

The typical corporate law casebook[9] introduces students to this debate through the classic opinion in *Dodge v. Ford Motor Co.*[10] The Dodge brothers were minority shareholders in Ford Motor Co.[11] Henry Ford owned a majority of the outstanding stock and dominated the board.[12] Ford Motor Co. at this time was unbelievably successful.[13] The Dodge brothers sued after Henry Ford announced

3. *See, e.g.*, E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1146-48 (1932); A.A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1365-68 (1932).

4. *E.g.*, Del. Code Ann. tit. 8 § 141(a) (West 2011); Model Bus. Corp. Act § 8.01(b) (1979) [hereinafter M.B.C.A.].

5. *E.g.*, Stephen M. Bainbridge, *Director v. Shareholder Primacy in the Convergence Debate*, 16 TRANSNAT'L LAW. 45, 45, 48 (2002).

6. *E.g.*, Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 440-41 (2001).

7. *E.g.*, Martin Gelter, *Taming or Protecting the Modern Corporation? Shareholder—Stakeholder Debates in a Comparative Light*, 7 N.Y.U. J.L. & BUS. 641, 662-63 (2007).

8. *E.g.*, Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 250-53 (1999).

9. *E.g.*, WILLIAM A. KLEIN, J. MARK RAMSAYER & STEPHEN M. BAINBRIDGE, BUSINESS ASSOCIATIONS: CASES AND MATERIALS ON AGENCY, PARTNERSHIPS, AND CORPORATIONS 270 (7th ed. 2009).

10. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).

11. *Id.* at 669-70.

12. *Id.* at 669, 671.

13. *Id.* at 670-71, 680.

that the corporation would not pay any more special dividends, but, instead, would retain the extra earnings for expansion.[14] Hence, much of the opinion deals with the discretion of directors when it comes to declaring dividends.[15]

What transforms *Dodge* into a classic is a side discussion the court undertook regarding the corporation's expansion plans. Statements by Henry Ford, both in and out of court, suggest that his reason for expanding the business was not to maximize profits, but, rather, stemmed from his desire to implement his economic and social views.[16] Specifically, Henry Ford expressed the opinion that the company should lower the price of its cars and expand its production, not to increase profits, but in order to enable more Americans to own a car and to provide employment for more persons.[17] The court took a different view of the permissible goals of a business corporation.[18] Such a corporation (as opposed to an entity organized as a non-profit corporation) exists, the court explained, "primarily for the profit of the stockholders."[19] The directors have great discretion in choosing the means toward that end, but the directors breach their duty if they act to change the end objective itself from profiting the shareholders to seeking to benefit others.[20] Countless corporate law professors use this language in *Dodge* to show their students that corporate law in the United States adheres to a shareholder primacy norm.[21] This, in turn, becomes the launching point for classroom debate as to the normative merits of this rule of corporate law.

To be honest, I have found this debate as so presented to be largely a sterile academic exercise. The reason is it misconstrues corporate law in the United States because it misconstrues the impact of *Dodge* and cases like it. The court in *Dodge* ordered the payment of a special dividend; but this was only because Ford Motor Co. had plenty of money both to expand and to pay the dividend.[22] Yet, critically, the court refused to block the corporation's expansion plans, despite what the court had to say concerning Henry Ford's express motivations for those plans.[23] The court felt that the expansion plans might ultimately serve a business purpose and refused to substitute the court's judgment for the business expertise of the directors.[24] In other words, the court actually allowed Henry Ford to forgo

14. *Id.* at 671.
15. *Id.* at 682-85.
16. *Id.* at 671-73.
17. *Id.* at 672, 676-77.
18. *Id.* at 684.
19. *Id.*
20. *Id.*
21. *See, e.g.*, Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 166 (2008) (arguing against this practice as providing an inaccurate view of corporate law).
22. *Dodge*, 170 N.W. at 685.
23. *Id.* at 684.
24. *Id.*

obedience to the shareholder primacy norm on the off-chance that the shareholders might end up better off anyway.[25]

The practical upshot of cases like *Dodge* is that, by and large, courts have not scrutinized business decisions to see whether directors sacrificed profit maximization to advance the interests of employees, creditors, customers, and the community.[26] Instead, the courts almost invariably accept some rationale as to how the business decisions were in the long-range interest of the shareholders.[27] Indeed, even in those few cases in which outspoken individuals (like Henry Ford) might ignore legal advice and express "profit be damned" sentiments, courts seem willing, on their own, to conjure up profit maximizing rationalizations for the directors' actions.[28] Conversely, other than a duty to protect the interest of creditors in the event of insolvency, courts in the United States disclaim any duty of directors toward other stakeholders in the corporation.[29] The upshot is that the balancing of interests between shareholders and other stakeholders in the corporation, as a matter of corporate law, is pretty much left to the discretion of the board.[30]

Proponents of a stakeholder model over the shareholder primacy norm tend to applaud this deference granted by courts to directors on the ground that it gives directors the ability to mediate between the various stakeholders in the corporation.[31] One problem, however, is that if the law does not, in reality, generally command placing the interest of the shareholders first, practical politics might. Of all the stakeholders, the shareholders alone vote to elect the directors under corporate law in the United States.[32] Accordingly, the discretion to mediate between stakeholders is lodged in a group picked by only one of the stakeholders.

A common response to this rather fundamental problem of implementing the stakeholder model by vesting unchecked discretion in a board elected by only one of the stakeholders is to note that barriers exist in public corporations to shareholders effectively exercising their electoral franchise.[33] Specifically, under

25. *Id.*

26. *E.g.*, Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 775 (2005).

27. *E.g.*, A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953).

28. *E.g.*, Shlensky v. Wrigley, 237 N.E.2d 776, 780-81 (Ill. App. Ct. 1968) (the court speculates that helping the neighborhood by not installing lights in a professional baseball park will be better for the corporation by preserving property values, including the value of the ball park).

29. *E.g.*, N. Am. Catholic Educ. Programming Found., Inc. v. Gheewalla, 930 A.2d 92 (Del. 2007).

30. *See supra* notes 28-29 and accompanying text. About the only exception exists in the takeover context when the board is choosing between two cash bids for the company. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173 (Del. 1986).

31. *See, e.g.*, Blair & Stout, *supra* note 8, at 320-22; Kent Greenfield, *The Impact of "Going Private" on Corporate Stakeholders*, 3 BROOK. J. CORP. FIN. & COM. L. 75, 86 (2008) ("If management is more autonomous, it is possible for managers to use their autonomy to allocate more of the corporate surplus to employees and other stakeholders.").

32. *See, e.g.*, M.B.C.A. §§ 7.28(a), 8.03(c); Del. Code Ann. tit. 8 § 211(b) (West 2011).

33. *See, e.g.*, Blair & Stout, *supra* note 8, at 252-56.

the corporate law system of shareholders voting at the shareholder meeting in person or by proxy, shareholders would need to incur significant expense soliciting proxies from their fellow shareholders in order to put forth a slate of candidates in opposition to those proposed by the current incumbents—whose proxy solicitation is paid for by the corporation.[34] This gives shareholders—for whom it is far easier to simply sell their shares if dissatisfied with current management—limited incentive to do anything other than rubber stamp the slate put forth by the incumbents.[35] Relying on this reality to prevent the shareholder franchise from producing shareholder primacy in the running of the corporation, proponents of the stakeholder model in the United States may be led to oppose corporate reform proposals that attempt to empower the shareholders in the exercise of their voting rights, such as by allowing shareholders to place their nominees' names on the company's proxy solicitation.[36]

This, in turn, leads one to ask who actually selects directors if this is not done by the shareholders. The answer is the corporation's management, especially the CEO.[37] Yet, this means that discretion to mediate between corporate stakeholders is still left in the hands of a group selected by only one of the stakeholders—this being the senior corporate management. The resulting power balance may do more to enrich senior management through lucrative compensation than it does to help employees, customers, or the community and environment.[38]

Are there alternate corporate law approaches to which we can introduce our students that have real impact in protecting the interest of other stakeholders of the corporation, such as employees? In fact, there are if we look to corporate law outside the United States.

To begin with, we might ask students whether it is possible to have a law in which directors do not simply have discretion, but rather have an enforceable duty to consider the interests of other stakeholders such as employees. The typical discussion of such a proposal in a U.S. law school classroom is likely to dismiss the idea as completely impractical. The worry is that directors will be sued no matter what they do—as every decision is likely to favor one stakeholder over another, prompting the unhappy stakeholders to sue.[39] Exploration of the law in other nations, however, might prompt students to reconsider this facile

34. FRANKLIN A. GEVURTZ, CORPORATION LAW § 3.1.3b, 207-09 (2d ed. 2010).

35. *E.g.*, Lucian A. Bebchuk, *The Myth of the Shareholder Franchise*, 93 VA. L. REV. 675, 682-83 (2007) (reporting the small number of contested proxy solicitations).

36. *E.g.*, Lynn A. Stout, Op-Ed., *Corporations Shouldn't Be Democracies*, WALL ST. J., Sept. 27, 2007, at A17.

37. *E.g.*, James D. Westphal & Edward J. Zajac, *Who Shall Govern? CEO/Board Power, Demographic Similarity, and New Director Selection*, 40 ADMIN. SCI. Q. 60, 78 (1995).

38. *See* Antoine Reberioux, *Does Shareholder Primacy Lead to a Decline in Managerial Accountability?*, 31 CAMBRIDGE. J. ECON. 507, 508 (2007).

39. *See, e.g.*, ABA Comm. on Corporate Laws, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2270 (1990).

assumption. Specifically, one can ask the students to consider the law in the Netherlands.

Under Article 26 of the Netherlands Enterprise Councils Act, worker councils can challenge decisions by a Dutch corporation's management before a specialized court in Amsterdam.[40] The court is empowered to block implementation of the decision if the entrepreneur, in balancing the interests involved, "could not in all fairness have arrived at the said decision."[41] The court has applied this standard to block corporations from closing down divisions and profitable (and even unprofitable) subsidiaries in the Netherlands.[42] Commonly in these cases, the court's objection to the decision's reasonableness stems not from the decision's substantive merits, but from the process that management utilized in making the decision—for example, whether the management had explored other alternatives.[43]

Of course, this check on process still leaves the ultimate balancing of interests to the discretion of the board. Is there a way to change the composition of the board so it includes persons more inclined to favorably consider the interests of employees or other stakeholders beyond the shareholders and senior management? Here, once again, other nations show such a thing is possible.

Corporate laws in Germany and a number of other European nations provide for employee representation on corporate boards.[44] The label for this is "co-determination"—since the notion is that both capital and labor are thereby involved in determining corporate policy.[45] Looking at Germany for the most noted example, under the 1952 Works Council Constitution Act, all German firms with more than 500 employees must have a board (unless the firm is conducted as a sole proprietorship or a partnership composed of natural persons), one-third of whose members are elected by the employees of the firm who work in Germany.[46] The 1976 Co-Determination Act requires all German firms with more than 2000 employees to allow the employees working in Germany to elect half of the members of the supervisory board (the size of which depends upon how many persons the company employs).[47] The ability to elect half the board

40. MODEL RULES OF PROCEDURE FOR WORK COUNCILS, Article 26(5) (2003) (Neth.).

41. *Id.*

42. *E.g.*, Eddy Wymeersch, *A Status Report on Corporate Governance in Some Continental European States*, *in* COMPARATIVE CORPORATE GOVERNANCE—THE STATE OF THE ART AND EMERGING RESEARCH 1045, 1082 (Klaus J. Hopt et al. eds., 1998); Winfried van den Muijsenbergh, *Corporate Governance: The Dutch Experience*, 16 TRANSNAT'L LAW. 63, 69-70 (2002).

43. van den Muijsenbergh, *supra* note 42, at 70.

44. FRANKLIN A. GEVURTZ, GLOBAL ISSUES IN CORPORATE LAW 63 (2006).

45. ANDREAS CAHN & DAVID C. DONALD, COMPARATIVE COMPANY LAW 308 (2010).

46. Betriebsverfassungsgesetz [BetrVG] [Works Constitution Act], Oct. 11, 1952, Bundesgesezblatt, Teil I [BGBL. I] at 681 (Ger.). In 2004, the DrittleGB replaced the BetrVG, leaving the substantive provisions the same. *E.g.*, CAHN & DONALD, *supra* note 45, at 308-09.

47. Mitbestimmungsgesetz [MitbestG] [Co-Determination Act], May 4, 1976, Bundesgesetzblatt, Teil I [BGBL. I] at 1153 (Ger.).

under the 1976 Act does not quite give parity to employees, however, given that the representatives of the shareholders on the board can elect the chair, who has the power to cast a tie-breaking vote.[48]

Not only does introducing comparative corporate law demonstrate to the students that corporate laws actually exist under which stakeholder interests receive real protection, but the fact that Dutch, German, and other foreign corporations subject to such laws still manage to thrive, demonstrates that such laws are not completely impractical. Indeed, there have been a number of efforts to study empirically the impact of co-determination on corporate profitability.[49] The results are mixed and subject to the typical social scientist disputes about appropriate methodology.[50] Some studies, however, show an improvement in corporate functioning of companies with co-determination as a result of greater employee acceptance of corporate decisions.[51]

II. ESTABLISHING AN ALTERNATE APPROACH TO ISSUES OF EXECUTIVE COMPENSATION AND INCOME INEQUALITY

One issue of social justice that seems not to have attracted as much attention in corporate law classes in the United States is the growing income inequality in this country. The top one percent of earners in the United States went from receiving less than 9% of the nation's pretax income in 1976 to receiving 23.5% in 2007.[52] While addressing such income inequality at first glance seems the subject of a course in tax policy, the role that compensation of senior corporate executives appears to have played in this phenomenon[53] makes this relevant to corporate law. Specifically, CEOs in major U.S. corporations went from making 42 times the earnings of their companies' average worker in 1980 to making 531 times as much as the average worker in 2001.[54]

Of course, corporate law classes will address the limits (such as they are) imposed by corporate law on executive compensation in the United States.[55] In

48. *Id.* (shareholder representatives elect the board chair in the event that two-thirds of the entire board cannot agree on who should be chair).

49. *E.g.*, Elmar Gerum & Helmut Wagner, *Economics of Labor Co-Determination in View of Corporate Governance*, *in* COMPARATIVE CORPORATE GOVERNANCE—THE STATE OF THE ART AND EMERGING RESEARCH 341, 348-51 (Klaus J. Hopt et al. eds., 1998).

50. *Id.*

51. *E.g.*, Warner Kirsch, Wolfgang Scholl & Gunter Paul, *Mitbestimmung in der Unternehmenspraxis* (Munich 1984), *cited in* Elmar Gerum & Helmut Wagner, *Economics of Labor Co-Determination in View of Corporate Governance*, *in* COMPARATIVE CORPORATE GOVERNANCE—THE STATE OF THE ART AND EMERGING RESEARCH 441 (Klaus J. Hopt et al. eds., 1998).

52. *E.g.*, Frank Rich, Op-Ed, *Who Will Stand Up to the Superrich?*, N.Y. TIMES, Nov. 13, 2010, at WK8.

53. JACOB S. HACKER & PAUL PIERSON, WINNER TAKE-ALL POLITICS: HOW WASHINGTON MADE THE RICH RICHER—AND TURNED ITS BACK ON THE MIDDLE CLASS 39, 61-66 (2010).

54. *E.g.*, Nicholas D. Kristof, Op-Ed., *Our Banana Republic*, N.Y. TIMES, Nov. 6, 2010, at WK10.

55. *E.g.*, KLEIN ET AL., *supra* note 9, at 376-95.

such a discussion, a professor with a broader societal view might raise the impact of executive compensation upon income inequality in the United States. Here too, however, such a discussion may come across as an abstract exercise unless the students have some basis for comparing whether there is a realistic alternative. Once again, comparing the corporate law in other countries can demonstrate there is an alternative.

Specifically, the gap in the United States between the compensation of CEOs and other senior management, as compared with compensation for the average worker in their company, dwarfs the differential found in many other countries.[56] For example, in Germany, the average CEO received only 11 times the pay of an average employee in his or her company in 2000.[57] While this difference between the situation in the United States and in other countries no doubt results from a variety of factors, it is certainly possible that corporate law plays a role.

Having students read a pair of cases decided at about the same time by courts in the United States and Germany illustrates the role corporate law might play. In *In re The Walt Disney Company Derivative Litigation*, Delaware courts held directors of The Walt Disney Company did not breach their duty—despite having approved or acquiesced in actions that resulted in Disney paying around $130 million to the former president of the company in exchange for a year accomplishing little as Disney's number two executive.[58] By contrast, in *The Mannesmann Case*, the German Federal Supreme Court held that directors of the German company, Mannesmann AG, breached their duty to the company when they awarded a bonus of approximately $17 million to the outgoing CEO—whose actions apparently played an important role in gaining over $50 *billion* for the Mannesmann shareholders.[59]

Interestingly, the difference in outcome between these two cases is not tied to a difference in the legal rule applied by the two courts. In both cases, the courts applied a standard of deference to decisions by the directors, which, in the United States, is known as the "business judgment rule."[60] Moreover, one might attempt to reconcile the two courts' application of this standard by pointing to differences in the situations before the courts—*Disney* involved termination pay provided for under an employment contract, while *Mannesmann* involved a gratuitous bonus. Even so, looking at the cases carefully, it is difficult to shake the conclusion that had Disney been a German corporation, or Mannesmann been incorporated in

56. Susan J. Stabile, *Enron, Global Crossing and Beyond: Implications for Workers*, 76 ST. JOHNS L. REV. 815, 829 n.63 (2002).

57. *E.g.*, John C. Coffee, Jr., *Gatekeeper Failure and Reform: The Challenge of Fashioning Relevant Reforms*, 84 B.U. L. REV. 301, 331 n.86 (2004).

58. *In re* The Walt Disney Co. Derivative Litig., 906 A.2d 27 (Del. 2006), *aff'g* 907 A.2d 693 (Del. Ch. 2005).

59. Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 21, 2005, 4 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 522 (524), (2006) (Ger.).

60. *Walt Disney Co.*, 906 A.2d at 52; 4 BGHZ 522 (Ger.).

Delaware, the results would have been different. Specifically, the skepticism with which the German court in *Mannesmann* dissected the question of whether paying the challenged bonus could produce any offsetting advantage for the company[61] seems at odds with the deferential way in which the Delaware court accepted the board's actions in *Disney*.[62] Indeed, in *Zupnick v. Goizueta*, the Delaware Court of Chancery applied a highly deferential interpretation of the business judgment rule in order to uphold the sort of bonus based upon extraordinary past accomplishment, which had been condemned by *Mannesmann*.[63]

The difference in these courts' application of the business judgment rule to executive compensation may, in turn, stem from broader differences in philosophy which students can consider. The greater apparent willingness of German judges to second-guess business decisions in *Mannesmann* and other German cases is symptomatic of a political and economic philosophy of greater government intervention in managing economic matters,[64] while the deference of Delaware courts is consistent with a philosophy more willing to put trust in private ordering and markets.[65] Moreover, the reaction of the German judges in *Mannesmann* also may reflect, as well as preserve, a culture both within German companies and in the broader society that is much more attuned to equality in wealth distribution than is the corporate and broader social culture in the United States.[66]

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61. The court went so far as to dismiss the incentive effect that a termination bonus might have on the remaining managers because the takeover meant a change in management, even though the company taking Mannesmann over had approved the bonus and so its newly installed management team might have been given an incentive for good performance by the bonus. For a more extended discussion, see Franklin A. Gevurtz, *Disney in a Comparative Light*, 55 AM. J. COMP. L. 453, 464 (2007).

62. The court dismisses both the unfortunate incentive effect of a contract under which the executive gets more money for being terminated (so long as it is not for egregious cause) than if he stays, and the prospect that Disney might have attempted to utilize uncertainties about its right to terminate for cause without paying the termination claims to negotiate a lower payout. *Id.* at 465-66.

63. Zupnick v. Goizueta, 698 A.2d 384 (Del. Ch. 1997).

64. *E.g.*, Harold Baum, *Change of Governance in Historic Perspective: The German Experience*, *in* CORPORATE GOVERNANCE IN CONTEXT: CORPORATIONS, STATES, AND MARKETS IN EUROPE, JAPAN, AND THE U.S. 6-8 (Klaus J. Hopt et al. eds., 2005).

65. *E.g.*, *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968 (Del. Ch. 1996) ("If the shareholders thought themselves entitled to some other quality of judgment than such a director produces in the good faith exercise of the powers of office, then the shareholders should have elected other directors.").

66. *E.g.*, *Umfrage: Gerechtigkeit vor Freiheit*, ZEIT ONLINE (Dec. 2, 2006, 9:44 AM), http://www.zeit.de/news/artikel/2006/12/02/83097.xml (article reporting on a survey by the German newspaper, *Welt am Sonntag*, which found that a majority of Germans (58% versus 34%) prefer "social justice"—i.e. income equality—to economic freedom).

III. BRINGING HOME THE CONSEQUENCES OF LIMITED LIABILITY FOR MULTINATIONAL BUSINESS ENTERPRISES

One argument against addressing corporate social responsibility concerns within the realm of corporate law is that other areas of law should address this issue. In other words, employment, labor, and occupational safety laws should protect corporate employees, consumer protection laws should protect consumers in their dealings with corporations, environmental laws should protect the environment from detrimental corporate activities, and so on.[67] Yet, such laws can only compel responsible corporate behavior to the extent jurisdictions can force companies to comply with such laws or else pay the full damages and fines resulting from the violation. Here, however, the basic rule of corporate law that the shareholders (owners) of a corporation are not personally liable for the company's debts—in other words, have limited liability[68]—can constrain a jurisdiction's ability to ensure compliance or full compensation.

A professor can use domestic cases[69] or make up hypothetical examples involving domestic companies to illustrate for students how limited liability may allow owners of a corporation to externalize costs—including damages and fines resulting from violation of laws—which the company's activities impose upon society and so tempt irresponsible corporate actions. Indeed, the recent financial crisis—in which bank shareholders were able to profit from years of increasing speculation with depositors' money,[70] all leading to massive government bailouts when the risks came home to roost—illustrates the moral hazard for society, created, in part, by limited liability.[71] Examples from the global activities of so-called multinational corporations, however, help the students appreciate the scope of the problem.

To understand the nature of the problem created by multinational corporations, it is useful to start by noting that the phrase "multinational corporation" is something of a misnomer. Specifically, the typical multinational business enterprise involved in international business transactions is normally not a single corporation, but rather a group of affiliated corporations tied together in parent-subsidiary relationships.[72] Under these circumstances, if a subsidiary

67. *E.g.*, Franklin A. Gevurtz, *Getting Real About Corporate Social Responsibility: A Reply to Professor Greenfield*, 35 U.C. DAVIS L. REV. 645, 661 (2002).

68. *E.g.*, M.B.C.A. § 6.22.

69. *E.g.*, Walkovszky v. Carlton, 223 N.E.2d 6 (N.Y. 1966) (cab company operating with minimum liability insurance and few other assets).

70. *E.g.*, William W. Bratton & Michael Wachter, *The Case Against Shareholder Empowerment*, 158 U. PA. L. REV. 653, 720-21 (2010) (banks that took the most risk in the run-up to the 2008 financial crisis had the best stock performance).

71. *See generally* Claire Hill & Richard Painter, *Berle's Vision Beyond Shareholder Interests: Why Investment Bankers Should Have (Some) Personal Liability*, 33 U. SEATTLE L. REV. 1173, 1179-83 (2010).

72. Kojo Yelpaala, *Rethinking the Foreign Direct Investment Process and Incentives in Post-Conflict Transition Countries*, 30 NW. J. INT'L L. & BUS. 23, 41-42 (2010) (multinational enterprises engage in foreign

conducts its operations in a manner that causes significant environmental damage, harms its workers through unsafe working conditions, or injures consumers by selling dangerous products, only the subsidiary's assets may be at risk to pay the damages. So long as the other affiliated corporations have limited liability, the bulk of the assets of the multinational business enterprise may be beyond reach.[73]

To give the students a concrete example of the impact of limited liability with so-called multinational corporations, I use a pair of cases involving a multinational business enterprise, whose actions resulted in numerous personal injuries and deaths in a former colony, and whose parent companies, established under the laws of the mother country, escaped paying damages. Only in this litigation, the former colony is the United States, and the parent corporations were English companies. The cases are *Craig v. Lake Asbestos of Quebec, Ltd.*,[74] and *Adams v. Cape Industries*.[75]

These opinions involved an English company (Cape Industries—itself a subsidiary of another English company, Charter Consolidated), which, through its subsidiaries, mined asbestos in South Africa and sold the asbestos in other countries.[76] To sell the asbestos in the United States, Cape formed an Illinois subsidiary.[77] The Illinois subsidiary operated in rented offices, had all of four employees,[78] and the liability insurance the subsidiary carried (if indeed it carried any at all) seems to have been woefully inadequate.[79] After waves of lawsuits by persons suffering lung disease from coming into contact with asbestos, Cape dissolved the Illinois subsidiary, allowed default judgments against itself in the United States, and then contested jurisdiction when the injured parties attempted to enforce the judgments in English courts,[80] all the while continuing for several more years to sell asbestos in the United States through a new, nominally independent, Liechtenstein corporation.[81] In the end, the English court refused to pierce (or "lift" in the English parlance) the corporate veil of the Illinois subsidiary in order to uphold the jurisdiction of the U.S. courts and enforce the default judgments against Cape,[82] while a U.S. court refused to pierce the

direct investment through subsidiaries).

73. Janis Sarra, *Oversight and Financing of Cross-Border Business Enterprise Group Insolvency Proceedings*, 44 TEX. INT'L L.J. 547, 550 (2009) (separate entities manage assets and operations to reduce the risk that claims against one subsidiary will reach assets, as claims against one subsidiary will only attach to that subsidiary in most instances).

74. Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145 (3d Cir. 1988).

75. Adams v. Cape Indus. Plc., [1990] Ch. 433 (C.A.) (Eng.).

76. *Lake Asbestos*, 843 F.2d at 147; *Adams*, [1990] Ch. 433 at 434 (Eng.).

77. *Adams*, [1990] Ch. 433 at 434 (Eng.).

78. *Id.* at 472.

79. *Id.* at 449.

80. *Id.* at 434, 449.

81. *Id.* at 450.

82. *Id.* at 544.

corporate veil of Cape to enforce the judgments against its parent corporation, Charter (which appears to have had assets in the United States).[83]

What makes this pair of cases so compelling as a classroom experience is not simply how they introduce the dangers posed by the jurisdictional and liability limits behind which multinational business enterprises can hide their assets, but also how they shift from the stereotypical pattern in which U.S. companies are sued for the acts of their subsidiaries abroad. In so doing, they avoid an instinctive defensive jingoistic reaction on the part of U.S. law students, who see the moral hazard posed in the United States by this state of the law.

IV. CONCLUSION

These three examples show the power of using comparative corporate law and the activities of multinational corporations to enrich the typical corporate law course's consideration of issues of corporate social responsibility. Since introducing such materials into my Business Associations course, I no longer find discussion of corporate social responsibility a sterile academic exercise.

83. Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 152 (3d Cir. 1988).