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PANEL ONE: AN INTRODUCTION TO CORPORATE PHILANTHROPY: HISTORY, PRACTICE, AND REGULATION: IF NOT CORPORATE PHILANTHROPY, THEN WHAT?

Hayden W. Smith

PANEL ONE: AN INTRODUCTION TO CORPORATE PHILANTHROPY: HISTORY, PRACTICE, AND REGULATION

IF NOT CORPORATE PHILANTHROPY, THEN WHAT?

HAYDEN W. SMITH*

The title of this paper has two meanings. The first, as I have argued, and will continue to argue, is that we should not use the term "corporate philanthropy," for reasons set forth below. The second meaning arises from the discovery of abuses in charitable giving, as detailed in other symposium papers.

If abuses in corporate charitable giving are so blatant, widespread, and substantial as to pervert corporate giving in its entirety, then it will be appropriate to propose some form of government regulation in this area. However, any such regulation carries with it the inherent danger of negatively impacting the incentives for corporate giving to some degree. If some form of regulation is adopted, "Then what?" becomes a significant question. On the other hand, if abuses in corporate charitable giving are an isolated phenomena, unrelated to corporate contributions *per se* but instead are a result of broader abuses of executive power, then the remedy lies in other directions.

Given the extent and size of corporate charitable giving today,[1] it is somewhat astonishing to realize how recent a phenomenon it is. Emerson Andrews's account of the railroad companies' support of the YMCAs in the late nineteenth century does indeed suggest that the seeds of corporate charitable giving were planted more than one hundred years ago.[2] Nevertheless, as available data reveals, corporate contributions did not become significant until the last quarter of the twentieth century.[3]

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* Visiting Scholar, Program on Non-Profit Organizations, Yale University.

1. *See* AAFRC TRUST FOR PHILANTHROPY, AMERICAN ASSOCIATION OF FUND RAISING COUNSEL, GIVING USA: THE ANNUAL REPORT ON PHILANTHROPY FOR THE YEAR 1995, at 12 (Ann E. Kaplan ed., 1996) [hereinafter GIVING USA] (reporting corporate giving for the year 1995 at $7.4 billion).

2. *See* F. EMERSON ANDREWS, CORPORATION GIVING 23-26 (1952).

3. *See* GIVING USA, *supra* note 1, at 14; *see also* IRS Corporate Contributions Graph, *infra* p. 759; HAYDEN W. SMITH, NEW HAVEN: INST. FOR SOC. AND POLICY STUDIES, YALE UNIV., IMPROVED MEASURES OF CORPORATE CONTRIBUTIONS: ADJUSTMENTS TO THE IRS TAX FILE ON CORPORATE GIVING TO INCLUDE CORPORATE FOUNDATIONS, AND OTHER MATTERS (Program on Non-Profit Organizations Working Paper No. 169, 1991).

It is worth noting that the railroads' contributions were clearly intended to yield an important indirect benefit to the corporations themselves;[4] this motivation is indicative of something important, to which we will return shortly. However, first, some historical analyses and insights are indicated to provide some background for this subject matter.

I. A BRIEF HISTORY OF CORPORATE GIVING

Like the history of the world itself, the history of corporate charitable contributions is divided into distinct eras: a "prehistoric" era that dates from the dim past until the mid 1930s, and a modern era that dates from 1936 to the present day.

Virtually all of the available information from the "prehistoric" era is anecdotal. However, during World War I, many of the leading companies of the day are known to have provided assistance to the Red Cross and other war relief agencies.[5] While aggregate figures are unavailable, the amounts and the number of companies involved were small. In the following twenty years there was some scattered corporate support for the community chests that sprang up in the 1920s, but again, the amounts are believed not to have been large.[6]

The earliest aggregate figure we have is the amounts reported on corporate income tax returns for 1936. These returns followed the amendments to the Internal Revenue Code in 1935 that included a specific deduction for corporate charitable contributions. The aggregate figure then, and for the next three years, equaled only about $30 million for all corporations that reported.[7] Consequently, in statistical terms at least, 1936 marks the beginning of what we know about the structure of the corporate community in terms of its charitable giving. The statistics for corporate contributions are shown below.

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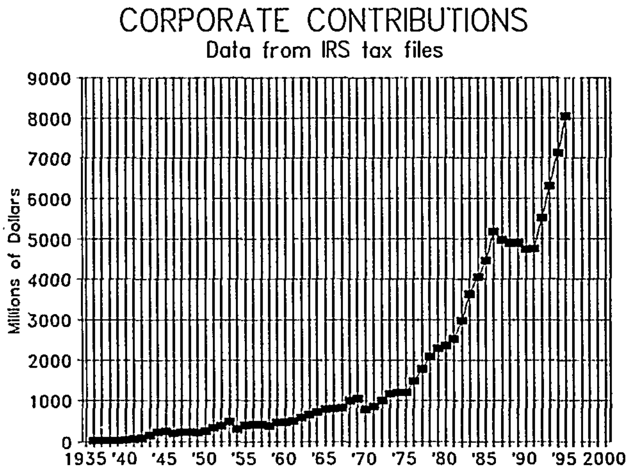
4. *See* ANDREWS, *supra* note 2, at 23-25 (describing how YMCAs offered "supervised, economical accommodations and some of the advantages of a club" to railroad workers).

5. *See id.* at 26-30.

6. *See generally id.* at 32-36 (describing giving to community chest organizations following World War I).

7. *See* SMITH, *supra* note 3.



U.S. Treasury Department, Internal Revenue Service.[8]

Once the Code had been amended, the stage was set for a rise in corporate charitable giving as the incentives for doing so emerged and more and more companies accepted charitable giving as a proper business activity. Thus, by World War II corporate giving had substantially increased, reaching a peak of around $266 million in 1945,[9] though falling in the immediate post-war years.[10] By the early 1960s, the total reached $500 million,[11] and by the early 1970s was over $1 billion.[12]

The most recent definable sub-era dates back only to the mid-1970s. Prior to then, corporate giving was in what we might call an unfocused state—not well organized, not well thought out, not well administered, not well known, and not well studied. The change began about the time of the

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8. Figures for 1994 and 1995 are estimates from the Council for Aid to Education based on survey information.

9. *See* ANDREWS, *supra* note 2, at 43 (describing record amounts of giving through the War years culminating in $266 million in 1945).

10. *See id.* at 43 (describing a decline in corporate contributions beginning in 1946).

11. *See* GIVING USA, *supra* note 1, at 88 (reporting that giving by corporations had increased to $740 million by 1965).

12. *See id.* at 88; Michael Useem, *Corporate Philanthropy*, *in* THE NONPROFIT SECTOR: A RESEARCH HANDBOOK 340, 341 (Walter W. Powell ed., 1987).

Filer Commission in the early 1970s[13] and reached a take-off point in 1975.[14] Since then, there has been an explosive growth of interest in the business community as a source of charitable giving, and an extraordinary growth in the actual amounts of corporate contributions.[15]

It is important to realize how rapidly corporate giving has grown in a comparatively short span of time; it has averaged slightly more than 10% per year compounded over the past sixty years, and much of that growth has been concentrated in just the last two decades.[16] The total now stands at roughly $8 billion.[17]

II. ENABLING INFLUENCES

The factors that account for this history are easy to identify. Prior to the 1920s, there were essentially three obstacles to corporate charitable giving: legal, economic, and philosophical.[18] One by one those obstacles were eliminated. In addition, of course, there has been a remarkable growth in the number and size of business corporations and a substantial growth in the aggregate profits of the corporate community.

The legal obstacles were slowly swept away by changes in both statute and common law, beginning with the adoption of the First Amendment to a state law in 1917 specifically empowering corporations to make charitable gifts,[19] continuing with the 1935 amendment to the Internal Revenue Code,[20] and ending in the 1950s with the two landmark common

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13. *See* W. Bruce Cook, *Fund Raising and the College Presidency in an Era of Uncertainty: From 1975 to the Present*, 68 J. OF HIGHER EDUC. 53 (1997) (stating that the Filer Commission was "organized in 1973 in order to document the significance of philanthropy in American life").

14. *See generally id.*

15. *See* Harry Berkowitz, *Corporate Donations Meet the Bottom Line: Giving that 'Isn't Good For Business' Is Coming Under Greater Scrutiny*, NEWSDAY, Apr. 10, 1988, (Business), at 78; *see also* GIVING USA, *supra* note 1, at 88; SMITH, *supra* note 3.

16. *See* GIVING USA, *supra* note 1, at 88.

17. *See* COUNCIL FOR AID TO EDUCATION, CORPORATE SUPPORT OF EDUCATION (1996 and various dates).

18. This analysis was first articulated by Courtney L. Brown, Dean Emeritus, Graduate School of Business, Columbia University, in the early 1970s in an informal discussion with members of the American Institute of Certified Public Accountants.

19. *See* TEX. REV. CIV. STAT. ANN. art. 1349 (West 1917).

20. The Revenue Act of 1935, Pub. L. No. 74-407, 49 Stat. 1014 (codified in sections throughout the I.R.C. (1939)).

law cases in which the courts found such giving to be *intra vires*.[21] It is notable that since 1950 there have been only four legal challenges in this area. Two of these cases were "friendly" actions, and in the two adversarial cases, the courts refused to overturn the decisions of corporate management with regard to charitable giving.[22]

The economic obstacle was derived from the assumption of perfect competition that underlay both classical and neoclassical economic theories.[23] Under this assumption, there were no profits in the modern sense of the term; the market always sought an equilibrium at which the price of a product or service was just sufficient to pay for the cost of the factors of production—land, labor, and capital—and no more. For any business firm to give money to charity was thought to be an admission of profits, and tantamount to the admission of some undue influence over market prices. Only in the past fifty years have we come to accept the view that there is some virtue in corporate profits, that large concentrations of capital are necessary to mass production and mass marketing, and that some imperfection in the market is a small price to pay for the economies we all enjoy.

There have also been changes in our philosophical views of the role of the corporation in society. Not so many years ago, *laissez-faire* was very much the rule; within the lifetimes of some of us, there have been monumental changes to this view that have arisen from the social and political upheavals of the twentieth century. Today, we have come to expect corporations to be good citizens, to be socially responsible, and to

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21. *See* A.P. Smith Mfg. Co. v. Barlow, 98 A.2d 581 (N.J. 1953) *appeal dismissed*, 346 U.S. 861 (1953); Union Pac. R.R. Co. v. Trustees, Inc., 329 P.2d 398 (Utah 1958). For a general view of the evolution of public policy with respect to the authority for and the encouragement of corporate contributions, see Robert D. Rosman, *A Note on the Growth of the Law of Corporate Giving*, *in* EDUCATION AND THE BUSINESS DOLLAR 259 (Kenneth G. Patrick & Richard Eells eds., 1969); Harry J. Rudick, *The Legal Aspects of Corporate Giving*, *in* THE MANUAL OF CORPORATE GIVING 35 (Beardsley Ruml ed., 1987); ANDREWS, *supra* note 2; and Phillip I. Blumberg, *Corporate Responsibility and the Social Crisis*, 50 B.U. L. REV. 157 (1970).

22. The two "friendly" actions were *A.P. Smith Mfg. Co. v. Barlow*, 98 A.2d 581 (N.J. 1953), *appeal dismissed*, 346 U.S. 861 (1953) and *Union Pac. R.R. Co. v. Trustees, Inc.*, 329 P.2d 398 (Utah 1958). The two serious challenges were *Theodora Holding Corp. v. Henderson*, 257 A.2d 398 (Del. Ch. 1969) and *Kahn v. Sullivan*, 594 A.2d 48 (Del. 1991).

23. *See* Thomas C. Arthur, *The Costly Quest for Perfect Competition: Kodak and Nonstructural Market Power*, 69 N.Y.U. L. REV. 1, 11 (1994); Geoffrey P. Miller, *The Rise and Fall of the Classical Corporation*, 59 U. CHI. L. REV. 1677, 1686 (1992); *see also* NEIL H. JACOBY, CORPORATE POWER AND SOCIAL RESPONSIBILITY 198-99 (MacMillan 1973).

behave in ways that enhance the quality of life for their employees, customers, and communities.

These obstacles to charitable giving are in a continuous state of change, as this symposium itself illustrates. The status quo needs to be challenged, if for no other reason than to either reinforce or change, if necessary, the accepted means by which we accomplish our desired end.

III. CORPORATE PHILANTHROPY, QUESTION MARK

Accompanying this evolution in our thinking about the role corporations play in society and the growth of the concept of corporate social responsibility, has been a tendency to label a corporation's charitable activities as "corporate philanthropy."

I happen to believe that this label is a misnomer, which makes me part of a very small minority. In my view, the term "corporate philanthropy" is really a kind of oxymoron, much like other terms such as "jumbo shrimp," "postal service," "military intelligence," and, that real gem, "athletic scholarship." Aside from its name, I believe that there is really no such thing as corporate philanthropy.

This belief, however, may be nothing more than a tempest in a teapot, and I do not want to belabor the point beyond reason. To be sure, we can call corporate giving anything we want, and as long as everyone knows what the term means, no problem for discussion's sake exists. Nevertheless, to use the term philanthropy in connection with corporate charitable contributions is to impute an element into the rationale and character of these corporate activities that really does not—and perhaps should not—exist. As a consequence, using the term "philanthropy" leads to interpretations and expectations on the part of many that will inevitably be wide of the mark.

The first point to be made is that the purposes for which business corporations are created are several billion light years away from philanthropy. In fact, they are almost at the opposite end of the universe. Unlike private foundations, which are created for the express purpose of giving money for charitable purposes—which is the essence of philanthropy—business corporations are essentially artificial persons created by means of a contract, or charter, among and between other persons (stockholders) who pool their resources for a common purpose—namely, for the production and distribution of goods and services, hopefully at an acceptable profit in relation to the resources invested. The distinction between the for-profit world and the not-for-profit world is a real one.

Secondly, I am a bit of a purist, and I do not like to label anything in such a way that it is misleading to anyone not familiar with the subject. We can call janitors "sanitation engineers," or prison guards "corrections officers," and there is perhaps no harm done. However, philanthropy implies a certain amount of altruism in motivation, and the absence of altruism in "corporate philanthropy" invariably leads to widespread cynicism even though the act of giving money to charity results in a demonstrable social good. There is already enough cynicism about the corporate community without adding this albatross to its burdens.

With very few exceptions, if any at all, corporate giving is not motivated by altruism. One eminent legal scholar of this subject put the matter very forcefully when he said:

> Corporate activity in the social sphere is not, in fact, altruistic. It does not represent a purely voluntary and gratuitous act of generosity. It does not reflect a partial transmutation of the corporation into an instrument of social progress. [Rather,] it reflects a tactical judgment as to the most advantageous manner for the corporation to conduct its business in the light of the climate of opinion in which it must function. Nor is justification of the validity of corporate action in terms of its being "good business" outmoded. On the contrary, this is the fundamental test of whether the action—even though involving gratuitous expenditures—is intended to fulfill the objectives of the business.[24]

That states my case as well. I very much approve of, and encourage, corporate contributions to nonprofit organizations and institutions in health, education, welfare, the arts, and other similar charitable areas, as well as other actions which, although not involving monetary expenditures, provide assistance to such organizations and institutions. But such actions should never be construed as altruistic in motivation nor philanthropic in character.

What, you may ask, is the alternative? In my view, there is nothing wrong with terms like "corporate charitable contributions," "corporate giving," and even "corporate social responsibility." However, to convey a corporation's motivation, the term that comes closest to reality is "enlightened self interest;" which provides both a proper rationale for these activities and an accurate characterization of them. And, in my experience, this term accurately describes what most of the large, public corporations in this country are involved in when they make charitable contributions.

I use "enlightened" because corporate executives now take a long-term view of their companies' relationships with the rest of society. There is a widespread belief that, while contributions may reduce current, short-term profits, there are valuable long-term benefits that accrue to corporations from charitable giving. In short, most senior executives

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24. Blumberg, *supra* note 21, at 207.

believe that by engaging in charitable giving the corporation will be better off in the long run than it would be if it did not.

I use "self interest" because corporate executives are not concerned about the causes they support *per se*, so much as they are concerned with the welfare of the corporation itself. To "do well by doing good" is not an empty phrase. Contributions programs can be, and in virtually all cases are, structured in such a way as to provide the maximum benefit to the corporations themselves, while at the same time supporting a broad array of charitable organizations. That benefit need not be immediate, direct, and tangible, and there need not be any explicit quid pro quo involved in corporate gifts. All that is necessary is an identifiable corporate benefit, be it deferred, indirect, and/or intangible.

It is worth remembering that business profit is the only component of our national income that can be negative. When any company's earnings drop below zero, and it is by no means an uncommon occurrence, the primacy of the corporate welfare sooner or later—but invariably—leads to sharp cuts in charitable giving. Such actions are often destructive of the corporate wish to be regarded as a good citizen, and for that reason, among many others, nearly 2,000 of the largest corporations have established their own sponsored foundations. These foundations have a pool of resources—now in excess of $6 billion in total—to act as a buffer in such circumstances.

Let me enumerate some of the elements of enlightened self interest, not that all are present in the policies of every major corporation today, but that all typify the policies of American corporations collectively.

1) Society has allowed and made it possible for corporations to be created, and society also provides the climate in which business can prosper. It is, therefore, an obligation on the part of the corporation to return part of its profit to society.

2) Business has a vital stake in the health of society, and society's problems ultimately become corporate problems. It is, therefore, a matter of corporate self interest to contribute to the solution of those problems. The current corporate interest in pre-college education is a good example.

3) In the absence of private, voluntary solutions to pressing social problems, their solutions will become the exclusive province of government and this will ultimately lead to higher rates of taxation. In addition, most, if not all, efforts of government to deal with social problems are regarded as inherently wasteful and inefficient. It is, therefore, incumbent on corporations to take private action to forestall government action by default and to bring the resources and know-how of business to bear on those problems. This is, by the way, the reason why charitable giving is often referred to as voluntary taxation.

4) The needs of business for certain things can best be met by giving support to the organizations and institutions that provide them. In order to ensure an educated and healthy labor force, for example, corporations give financial support to colleges, universities, hospitals, and a broad array of health services. A not-so-small footnote to this is embodied in the rationale for corporate support of major research universities. Most of the advances in applied research and development—the lifeblood of corporate success in an era of rapid technological change—are made possible by the fallout from basic research, and basic research is heavily focused on the nation's campuses.

5) The long-run welfare of the corporation is intimately tied to the culture, the quality of life, and the underlying philosophies of the people on whom it depends—employees, suppliers, customers, regulators, and the public at large. It is, therefore, a matter of corporate self interest to support those organizations and individuals that preserve and enhance our social fabric.

There are others, but I will not enumerate them here. These few examples serve to illustrate the kinds of considerations that are explicit in varying degree in the policies of most business corporations that have well-structured contributions programs. Those programs carry the thought processes one step further by concentrating on those specific organizations in which the corporate self interest is most acute.

After all, corporate giving is not an abstraction. It is made up of hundreds of thousands of relatively small gifts to a wide variety of charitable organizations. Since no company, no matter how large, can support all charities, each company must make choices, and typically each selects those organizations that are deemed to have some relevance to the corporation.

Thus, local charities are preferred, almost exclusively, over those not located in areas where a company has facilities or personnel. The hi-tech industries focus a major part of their giving to research institutions and engineering schools, those in the pharmaceutical field emphasize research hospitals and medical schools, those in the food industry favor organizations dealing with nutrition, the financial services industries concentrate their support on schools of business administration, and so on. The multinational companies are, not surprisingly, the only ones making any serious contributions outside the United States.

All this is as it should be. The extraordinary diversity of the business community virtually ensures that when each company gives according to its own enlightened self interest, the aggregate of corporate contributions will serve the collective welfare of the corporate world as a whole. This is, it should be noted, virtually identical to the situation that characterizes the charitable giving of individual citizens; each of us chooses which charities to support, in what amounts, and for what purposes, and the aggregate of our giving does in some strange way serve our collective welfare. I doubt that any of us would have it otherwise.

Let us now look at a few facts about the corporate community and its charitable contributions. Today, there are approximately 4 million entities that file corporate income tax returns, probably the best available measure of the size of the corporate world.[25] Roughly 20% of them claim deductions for contributions and gifts.[26] This is not to say that 80% of all corporations are necessarily remiss in acting in their own self interest. The figure, as I have stated it, is misleading, for several reasons.

The first is that while there are 4 million corporate entities, only about 12,000 of them are sufficiently large and have a sufficiently large number of stockholders which would require them to register with the Securities and Exchange Commission (SEC) as public enterprises.[27] That leaves some 3,988,000 companies that have less than $3 million in assets and/or less than 500 stockholders, the SEC's threshold for requiring registration.[28] For those 12,000 public companies, many of which are household names, the percentage that claim deductions for contributions and gifts is not 20%, but well over 90%.[29]

Secondly, as to the corporations that make up that 80% not reporting any contributions, roughly half of them, large and small, report a net loss for tax purposes. That means they cannot legally claim any deductions for charitable giving on their tax returns.[30] We must remember, too, that the

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25. *See* INTERNAL REVENUE SERVICE, U.S. DEPARTMENT OF THE TREASURY, CORPORATION INCOME TAX RETURNS, STATISTICS OF INCOME (1990).

26. *See* HAYDEN W. SMITH, COUNCIL FOR FINANCIAL AID TO EDUCATION, A PROFILE OF CORPORATE CONTRIBUTIONS 4 (1983).

27. *See* MICHAEL P. DOOLEY, FUNDAMENTALS OF CORPORATION LAW 22-23 (1995).

28. Section 12(g)(1) of the Securities and Exchange Act of 1934 requires registration of companies having "total assets exceeding $1,000,000 [now $5,000,000] and a class of equity securities . . . held of record by 500 or more . . . persons." RICHARD W. JENNINGS ET AL., SECURITIES REGULATION 151 (7th ed. 1992).

29. *See* Thomas Vasquez, *Corporate Giving Measures*, *in* 3 RESEARCH PAPERS SPONSORED BY THE COMMISSION ON PRIVATE PHILANTHROPY AND PUBLIC NEEDS 1839-52 (U.S. Department of the Treasury, 1977). *See generally* SMITH, *supra* note 26. The former is an analysis of the IRS corporate income tax file for 1970, and the latter is a similar but expanded analysis of the IRS tax file for 1977. Unpublished research using the 1981 and 1982 tax files indicates no significant change in the proportion of all companies reporting charitable contributions.

30. Prior to 1983, corporate charitable contributions could be deducted only to the extent they did not exceed 5% of income subject to tax. This provision was amended by the Economic Recovery Tax Act of 1982 to increase the ceiling to be deducted to 10% of income subject to tax, effective with the 1983 tax year. Obviously, if income subject

tax return indicates only the contributions that a company reports, and that will, in many cases, be different from the contributions that it actually made. If, for example, loss companies do in fact give, the law allows them to carry over the contributions amounts not claimed for up to five years, to be used as deductions in a year when they report a profit.

The other half of the nonreporting corporations is comprised of a mass of very small business entities that are corporate in name only. Indeed, they are proprietorships and partnerships in disguise, organized as corporations for legal convenience and perhaps tax advantage, but essentially enterprises that are indistinguishable from their individual or family owners. In these cases, it is a matter of convenience or personal preference whether their owners' charitable giving is handled through their personal or corporate bank accounts.[31]

For the roughly 800,000 companies that do report contributions for tax purposes, the total of their giving for 1996 amounted to roughly $8 billion, which is approximately 1.5% of the profits before taxes of all corporations. This dollar figure is to me, very impressive, for it was only 20 years ago that the total first topped $2 billion.[32] And the percentage of the pretax profits figure was only half as large in 1980 as it is today.[33]

Clearly the corporate community has compiled a notable record of responsiveness to the times, and its support of the charitable world has become a vital element in enabling it to deal as effectively and humanely as it does with the problems of the day. Let us laud the corporations of the country for their generosity, but, please, let us not call it philanthropy.

IV. THE MATTER OF CHARITABLE ABUSES

It is hardly surprising that among 800,000 corporations reporting charitable contributions, some of them have engaged or are engaging in practices that constitute an abuse of the right to give to charity and to deduct such giving from taxable incomes. The corporate world is large and diverse, and its history is rife with examples of corporate leaders who have perverted their power for personal gain in monetary and reputational terms. Fortunately, such rogues are relatively few in number; there are many, many more saints.

In the vast majority of the cases, abusive behavior goes hand in hand with excessive power. The individuals involved tend to be aggressive and ruthless in treating the public corporations they head as personal fiefdoms.

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to tax is zero or less, no contributions may be deducted at all.

31. For a more complete description of the defects in the IRS tax files as an accurate measure of corporate giving see SMITH, *supra* note 3.

32. *See* GIVING USA, *supra* note 1, at 88.

33. *See id.*

They arrogate to themselves the titles of chairman, president, and chief executive officer; they hand pick the members of their governing boards; they wheel and deal as though the companies they head are their personal property; they engage in many practices of questionable business character; they often flout the legal restrictions that apply to corporations; and they seldom tolerate dissent from their subordinates. In short, they are ethically and morally bankrupt.

Such individuals pervade our society. One finds them not only in business but also in government, the military, academe, medicine, law, the church, and virtually every other walk of life. They abuse their constituencies, their colleagues, and even their friends and families. When their behavior is merely egregious, they sooner or later are normally stripped of their positions. When their behavior is illegal, they are called to account and, if convicted, punished.

In the corporate arena, the abuse of charitable giving, while typical of the behavior of such individuals, is relatively rare. Since 1936, some $103 billion in corporate money has been given to charity and deducted from corporate taxable incomes.[34] While no one knows exactly how many separate corporate gifts comprise this figure, an average gift of $1,000—which is typical—would imply roughly 100 million gifts.[35] It is hardly surprising that out of a total of this magnitude there have been several cases of outright abuse. However, if there were as many as 1,000 cases of abuse, they would constitute only one thousandth of one percent of the estimated total of gifts.

But even one case is one too many. As other papers prepared for this Symposium indicate, there is clearly the potential for abuse and one can easily find examples that are on the wrong side of ethical behavior. It is, therefore, appropriate to speculate on the ways and means for policing this area.

One existing remedy lies with the courts. Shareholders, who are the ultimate "victims," can and often do take legal action against perceived abuses of corporate power. As to alleged abuses in the area of charitable contributions, however, this kind of action is quite rare. Research reveals only four cases of shareholder challenges in the courts since 1950, and two of those were "friendly" cases that sought to establish precedent rather

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34. *See* SMITH, *supra* note 26, at 8 (reporting statistics of annual corporate giving from 1936 to 1981); *see also* Nancy J. Knauer, *The Paradox of Corporate Giving: Tax Expenditures, the Nature of the Corporation, and the Social Construction of Charity*, 44 DEPAUL L. REV. 1, 13 (1994) (reporting statistics of annual corporate giving from 1980 to 1992).

35. *See* SMITH, *supra* note 26, at 14 (stating that 1977 statistics indicate that about 70% of all corporate contributions ranged from $0 to $1000).

than to obtain remedy.[36] In the two *bona fide* cases, the courts refused to overturn the decisions of management. Clearly, this is not an area in which shareholders seem disposed to take legal action, and when they do the courts do not seem disposed to intervene.[37]

An alternative remedy lies in government regulation, comprising at a minimum, disclosure of the amounts, the donees, and the purposes of all corporate charitable gifts, just as private foundations (including corporate foundations) are now required to disclose. Such regulation will require careful cost-benefit analysis, otherwise the cure could be worse than the disease. There are companies, especially those with sponsored foundations, that already disclose fully the details of their giving programs. Any conceivable regulation will have no effect on them or their propensity to give. There are other companies that, for whatever reasons, prefer not to make such disclosures; regulation in this area will engender policy decisions with respect to the continuance of their existing contributions programs.

It would be hard to believe that all such companies would discontinue their charitable giving in its entirety just because of new regulation in this area, although it is very likely that some companies would do so. It would be equally hard to believe that all such companies would accept regulation in this area without making any changes in their contributions programs, although it is very likely that some companies would do so. The only possible impact of regulation on the incentives for giving, therefore, is negative, so that the net result of these diverse decisions would be some decrease in corporate charitable giving. Just how great a decrease is impossible to predict.

I sincerely doubt that many of us would regard the making of corporate charitable contributions to be repugnant, antisocial, or contrary to the best interests of the body politic. While we do need to examine this phenomenon and recommend any changes that appear necessary, we also need to bear in mind the old maxim about throwing out the baby with the bath water.

Corporate giving is essentially voluntary in nature, just as individual giving is voluntary. Despite the incentives and the encouragements we give to corporate giving, it is a fact that corporate contributions account for only about 5% of total philanthropy, roughly the same share as the grants made by noncorporate private foundations.[38] The vast bulk of charitable giving, including charitable bequests, comes from individual

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36. *See supra* note 21 and accompanying text.

37. *See supra* note 21 and accompanying text.

38. *See* GIVING USA, *supra* note 1, at 12 (reporting that corporate contributions account for 5.1% of total philanthropy).

donors and their families.[39] We also need to look at corporate giving to see what might be done to eliminate fraud, self-dealing, bribery, self-aggrandizement, and other abuses that are as manifest as those in the corporate community.

V. AN EXPENSE OF DOING BUSINESS, OR A SHARE OF PROFITS?

As this introduction reveals, there is an ambivalence in our thinking about the character of corporate charitable giving. While it is clear that it involves the decision of management to make voluntary expenditures of money and other property that nominally belongs to shareholders, it is not clear whether such giving should be regarded as a cost of doing business or as a share of profits.

The Internal Revenue Code clearly regards it as an ordinary and necessary cost of doing business. This is indicated by the place where the corporate deduction for contributions was inserted in the Code.[40] One finds it in § 170, which is in Part VI of Subchapter B of Chapter 1.[41] Part VI includes all sections from § 161 to § 196, and especially § 162, which allows for the deduction of all the ordinary and necessary expenses paid or incurred in carrying on a business.[42] The remainder of the sections in Part VI deal with the details of various kinds of deductible expenses, of which charitable giving is only one. But it is, to the best of my knowledge, the only ordinary and necessary business expense for which there is a ceiling on the amount based on income subject to tax.

At the same time, corporate charitable giving is widely viewed by shareholders and others as being a share of profits. Which is it—a business expense or a share of profits? This is a question that needs and merits further investigation.

39. *See id.* Personal giving historically accounts for more than eighty cents of each charitable dollar. *See id.* at 4.

40. *See* I.R.C. § 170(a)(1) (1994) (stating that "[t]here shall be allowed as a deduction any charitable contribution").

41. *See id.*

42. *See id.* § 162(a) (allowing a deduction for ordinary and necessary expenses paid or incurred in the course of business).