University of Miami Law Review

Volume 37
Number 2 *Eighth Annual Baron de Hirsch Meyer Lecture Series: ALI Corporate Governance Project*

Article 5

1-1-1983

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Recommended Citation

Victor Brudney, *The Role of the Board of Directors: The ALI and Its Critics*, 37 U. Miami L. Rev. 223 (1983)
Available at: https://repository.law.miami.edu/umlr/vol37/iss2/5

The Role of the Board of Directors: The ALI and Its Critics*

VICTOR BRUDNEY**

I. LOOKING BACKWARD

In 1911, Mr. Justice Neville, in the English Chancery Division, described the board of directors of a corporation in the case before him:[1]

> The directors of the company, Sir Arthur Aylmer, Bart., Henry William Tugwell, Edward Barber, and Edward Henry Hancock, were all induced to become directors by Harbord or persons acting with him in the promotion of the company. Sir Arthur Aylmer was absolutely ignorant of business. He only consented to act because he was told the office would give him a little pleasant employment without his incurring any responsibility. H. W. Tugwell was partner in a firm of bankers in a good position in Bath; he was seventy-five years of age and very deaf . . . . Barber was a rubber broker and was told that all he would have to do would be to give an opinion as to the value of rubber when it arrived in England. Hancock was a man of business who said he was induced to join by seeing the names of Tugwell and Barber, whom he considered good men.[2]

These men were held not liable for losses sustained in a disastrous speculation in rubber plantations in Brazil. They had failed to make any inquiry into the truth of representations on which they relied in authorizing the corporation to buy the plantations, despite more or less explicit warnings to them of the falsehood of material parts of those representations. In Justice Neville's view:

> [A director] is, I think, not bound to bring any special qualifications to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes

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* Professor Brudney prepared this paper for, and delivered it at, the Eighth Annual Baron de Hirsch Meyer Lecture Series, University of Miami School of Law, March 4, 1983. Members of the *University of Miami Law Review* edited his remarks and footnotes for publication.

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1. *In re* Brazilian Rubber Plantations & Estates, [1911] 1 Ch. 425 (1910).

2. *Id.* at 427.

> which may result from such ignorance . . . . He is not . . . bound to take any definite part in the conduct of the company's business, but so far as he does undertake it he must use reasonable care . . . .[3]

American law today, although it requires no special competence of directors,[4] typically purports to demand more from them. The statutes often require "[a]ll corporate powers [to] be exercised by or under authority of, and the business and affairs of a corporation [to] be managed under the direction of, a board of directors."[5] Supplemented by case law, the statutes impose, to some indeterminate extent, obligations on directors to keep an eye on management's performance and to exercise their functions with prudence.

It is fair to say that, at least until recently, those legal admonitions were reflected in the public statements of the organized establishments of both the business[6] and legal communities.[7] The business establishment stressed the positive functions of directors more than did the legal establishment, but both recognized that it was an important function of directors to oversee and assess the conduct of corporate managers in pursuing lawful wealth-maximizing activities on behalf of stockholders. Both acknowledged that management's minimum obligations of care in pursuing wealth for stockholders were complemented by directors' duties of care in selecting and replacing management, in approving major plans or commitments, and in overseeing and assessing management's performance. Also, the organized business community appeared to believe that corporate structure should be molded to facilitate such performance by constituting the board principally of outside directors, with certain committees (particularly audit committees) similarly constituted.[8] Indeed such a board was repeatedly urged in the business literature of the 1970's as a shield to legitimate the power of management of large American corporations and to avoid gov-

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3. *Id.* at 437.

4. The requirement that proxy statements contain biographical information about directorial candidates, however, reflects the notion that stockholders should have an opportunity to assess, inter alia, the candidates' competence.

5. *E.g.*, MODEL BUSINESS CORP. ACT § 35 (1979); *see also* DEL. CODE ANN. tit. 8, § 141(a) (1983).

6. *See* The Business Roundtable, *The Role and Composition of the Board of Directors of the Large Publicly Owned Corporation*, 33 BUS. LAW. 2083, 2093-102 (1978).

7. *See* Committee on Corporate Laws, ABA Section of Corporation, Banking and Business Law, *Corporate Director's Guidebook*, 33 BUS. LAW. 1591, 1606-11 (1978) [hereinafter cited as *Corporate Director's Guidebook*].

8. *See* The Business Roundtable, *supra* note 6.

ernment regulation of the enterprises.

The critical, even hysterical, reactions of many business executives and their lawyers[9] to the American Law Institute ("ALI") Reporters' quite faithful interpretation[10] of current law on the duty of care and their adoption of those structural principles is therefore somewhat puzzling.[11] It is all the more puzzling because of the contradictory tones of the critics. Some of the criticism is addressed to a perceived greater exposure of directors to liability; it appears to fear that this will cause too much directorial intrusion into areas of managerial discretion, and suggests a preference for the music if not the words of Justice Neville. Other criticism suggests a potentially heroic role for directors and complains that the Reporters' proposals would thwart that role.

The core of the Reporters' proposals—the definition of the functions of directors[12] and the delineation of officers' and directors' duties of care[13] and of the scope of business judgment rule[14]—is largely a description of existing legal doctrine. If it is possible to quarrel with particular phrases,[15] the quarrels are

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9. *See, e.g.*, Lewin, *The Corporate-Reform Furor*, N.Y. Times, June 10, 1982, at D1, col. 3; Letter from Chairman of the Business Roundtable's Corporate Responsibility Task Force to the Business Roundtable, *reprinted in* DIRECTOR'S MONTHLY, Dec. 1982, at 5 [hereinafter cited as Business Roundtable Letter].

10. PRINCIPLES OF CORP. GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS (Tent. Draft No. 1, 1982) [hereinafter cited as RESTATEMENT].

11. The ALI Reporters' proposals on functions and duties of the board do not differ materially, if at all, from the views set out in the *Corporate Director's Guidebook*. *Compare* RESTATEMENT, *supra* note 10, §§ 3.02, 4.01 *with Corporate Director's Guidebook*, *supra* note 7, at 1600-04, 1606-11. The board functions recommended by the ALI Reporters in § 3.02(a) are strikingly similar to those recommended in the Final Report of the 54th American Assembly held at Arden House, Harriman, N.Y., on April 13-16, 1978. *See* CORPORATE GOVERNANCE IN AMERICA (54th American Assembly 1978); *see also* Committee on Corporate Laws, ABA Section of Corporation, Banking and Business Law, *The Overview Committees of the Board of Directors*, 34 BUS. LAW. 1837 (1979).

12. RESTATEMENT, *supra* note 10, § 3.02.

13. *Id.* § 4.01.

14. *Id.* § 4.01(d).

15. One complaint focuses upon the requirement that a business decision must have "a rational basis" in order to come within the protection of the business judgment rule. *Id.* § 4.01(d)(3). Current law is authoritatively said to impose a similar requirement. *See, e.g.*, Arsht, *Fiduciary Responsibilities of Directors, Officers and Key Employees*, 4 DEL. J. CORP. L. 652, 660-63 (1979) [hereinafter cited as Arsht, *Fiduciary Responsibilities*]; Arsht & Hinsey, *Codified Standard—Same Harbor But Charted Channel: A Response*, 35 BUS. LAW. 947, 958 (1980); Caplin, *Outside Directors and their Responsibilities: A Program for the Exercise of Due Care*, 1 J. CORP. L. 57, 59 (1975); Veasey & Manning, *Codified Standard—Safe Harbor or Uncharted Reef? An Analysis of the Model Act Standard of Care Compared with Delaware Law*, 35 BUS. LAW. 919, 930-42 (1980). Section 35 of the Model Business Corporation Act also requires a rational basis. *See* Arsht, *Fiduciary Responsibilities*, *supra*, at 662; Arsht & Hinsey, *supra*, at 958; Veasey & Manning, *supra*, at 930-42; *cf.*

largely formal.[16] The aridity of those quarrels is emphasized if we

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Committee on Corporate Laws, ABA Section of Corporation, Banking and Business Law, *Changes in the Model Business Corporation Act—Amendments to Financial Provisions*, 34 BUS. LAW. 1867, 1882 (1979) (stating that the business judgment rule applying to directors' decisions to authorize shareholder distributions, pursuant to § 45 of the 1979 amended version of the Model Act, requires directors to have acted with a reasonable basis for believing that § 45 permitted the distribution) [hereinafter cited as Committee on Corporate Laws, *Changes in the MBCA*]. The requirement of a "rational basis" has also been viewed as imposing a lesser burden than other formulations of the business judgment rule. *See generally* Haft, *Business Decisions by the New Board: Behavioral Science and Corporate Law*, 80 MICH. L. REV. 1, 14-16 (1981) (discussing standards of liability). The disingenuousness of some of the critics of the rational basis requirement is reflected in the complaint of an inhouse counsel that " 'I don't know what "rational basis" is.' " Lewin, *supra* note 9, at D6, col. 6.

16. The functions of directors delineated in § 3.02 of the ALI proposals conform to functions theretofore asserted and proclaimed by business leaders. *See, e.g.*, Blough, *The Outside Director at Work on the Board*, 28 REC. A.B. CITY N.Y. 202 (1973); Conard, Mace, Blough & Gibson, *Functions of Directors under the Existing System*, BUS. LAW., Special Issue Feb. 1972, at 23, 39 (statement of Roger M. Blough). Initially, the ALI Reporters considered prohibiting the board of directors from "managing" in certain circumstances. *See* RESTATEMENT, *supra* note 10, § 3.02(b)(4). In practical terms, this prohibition would have been quite harmless, if only because it is unlikely that boards of publicly held corporations would have tried to "manage." The Reporters have withdrawn from this position. *See* R. Perkins, Background and Status of ALI Corporate Governance Project and Commentary on Papers of Professors Andrews, Demsetz and MacAvoy (Exhibits A, B and C. to Feb. 1983 Statement of the Business Roundtable) 15 (remarks at forum at the Association of the Bar of the City of New York, Mar. 14, 1983).

That the import of the statement of the duty of care in the performance of those functions does not differ from the current law is suggested by a comparison of § 4.01 of the ALI proposal with provisions in the Model Act and the New York corporation statute. *Compare* RESTATEMENT, *supra*, § 4.01 *with* MODEL BUSINESS CORP. ACT § 35 (1979) *and* N.Y. BUS. CORP. LAW § 717 (McKinney Supp. 1982); *see also* Committee on Corporate Laws, *Changes in the MBCA*, *supra* note 15, at 1884; *Discussion of Principles of Corporate Governance and Structure: Restatement and Recommendations, Tentative Draft No. 1*, 59 A.L.I. PROC. 406, 498-500 (statement of Professor Harvey J. Goldschmid), 527-28 (statement of Elliot Goldstein) (1982) [hereinafter cited as *Discussion of Restatement*]. To be sure, the ALI adds the requirement that a director or officer should make reasonable inquiry when acting upon corporate transactions or otherwise performing his functions. *See* RESTATEMENT, *supra*, § 4.01(b). Although that requirement is explicit in the statutory law of only one state, CAL. CORP. CODE § 309(a) (West 1977), there is no doubt, as the Committee on Corporate Laws recently suggested in modifying another provision of the Model Act, that directors' judgments are expected to be "informed." *See* Committee on Corporate Laws, *Changes in the MBCA*, *supra*, at 1882, 1884; *see also* Arsht, *Fiduciary Responsibilities*, *supra* note 15, at 660; *Corporate Director's Guidebook*, *supra* note 7, at 1602; *Discussion of Restatement*, *supra*, at 498-500 (statement of Goldschmid), 527-28 (statement of Goldstein); *see also* Barnes v. Andrews, 298 F. 614, 616 (S.D.N.Y. 1924). Indeed, few would doubt that, under the case law of every state, if a court could ever be persuaded that in fact the board failed to make reasonable inquiry in a matter on which it acted or should have acted, the court would hold that the board violated its duty of care.

Of larger import is the requirement that directors be reasonably concerned with the existence and effectiveness of monitoring programs, including law compliance programs. *See* RESTATEMENT, *supra*, § 4.01(b). To be "reasonably concerned" with a monitoring program leaves ample room for variations, depending upon the size, structure, and business of any accept the thesis long ago put forward by Professor Bishop and not since contradicted.[17] He pointed out that notwithstanding the estimable terms in which governing legal doctrine defines standards of required conduct by management, and by directors in the matter of overseeing managerial efficiency or performance, the law in operation has almost never found directors or management of nonfinancial corporations to be liable for violating those standards. And in the case of financial corporations, directorial liability for lack of care is generally not found unless the management to be policed has been improperly diverting assets to itself. It is difficult to take seriously, therefore, the complaints that, by stating no less ambiguously the ambiguities of the common law, the ALI would burden directors and management with a heavier duty of care, or would provide them with a less protective business judgment rule, than does present law. The ALI proposals leave the same play in the joints as does the law they restate. Directors and officers need feel no more constrained in the one case than in the other.

Possibly the objections are addressed to the articulation of propositions that are only implicit in the courts' opinions. Explicit statement of the propositions in a text may give executives (and some lawyers) a sense of more definite restriction, or more specific command, in limiting discretionary behavior.[18] Possibly the chief executive officers or directors never realized that the law embodied those obligations—however porous—when the obligations were to be sought in the thickets of case law or even when they were contained in the statute books. Or possibly, as the Chief Reporter for

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particular corporation and upon any demonstrated need for such a program in view of past history, present personnel, and the program's cost. Again, notwithstanding the language in the *Allis-Chalmers* decision, Graham v. Allis-Chalmers Mfg. Co., 41 Del. Ch. 78, 85, 188 A.2d 125, 130 (Del. 1963); *see also* Bates v. Dresser, 251 U.S. 524 (1920), there is little reason to believe that under current law in Delaware or elsewhere, any set of facts that would induce a court to find a failure by the board to be reasonably concerned with such programs would not equally produce a judicial decision that the board had violated its common law duty of care. *Cf.* Small, *The Evolving Role of the Director in Corporate Governance*, 30 HASTINGS L.J. 1353, 1360 n.35 (1979).

If there is room for debate over whether the requirement of reasonable concern for a monitoring program effects some shift in emphasis in the prevailing law, no change at all is imported into existing law by requiring explicitly that officers and directors make reasonable efforts to cause their corporation to obey the law. *See* RESTATEMENT, *supra*, § 4.01(c); *see also infra* text accompanying notes 54-64.

17. Bishop, *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078 (1968).

18. Articulating the provisions gives them publicity and may bring to the forefront of consciousness possibilities that are kept in the background of the mind when they are not expressly set forth.

the ALI put it, some of the critics prefer the law "to remain murky and nebulous because . . . they can get away with a lot more."[19]

With respect to broader objections to the ALI Reporters' recommendations, including their structural proposals for a majority of outside directors, and audit, compensation, and nominating committees similarly composed, still other motivation is possible. In January 1982, the Chairman of the Business Roundtable Task Force on Corporate Responsibility wrote a curious letter to the members of the Roundtable.[20] He urged them to oppose the ALI's adoption of the reported proposals, including previously widely publicized Roundtable recommendations for the composition and structure of boards. In the course of the letter he asserted that the ALI "project had its roots in the '70s as part of the effort to meet federal incorporation and similar proposals."[21] And he went on to suggest that "[i]f the effort to adopt that kind of legislation was unsuccessful in the halcyon days of the activists, it is difficult to regard that concern as having much validity now or, for that matter, in the foreseeable future."[22]

In short, the ALI project was no longer a useful foil to the efforts by "activists" to effect "reforms." Since the Business Roundtable's proposals for corporate governance had roots similar to those attributed to the ALI project, perhaps they also are now no longer needed. Or maybe they should simply be put in the closet, to be taken out and used if, despite the leadership of corporate business by the Roundtable's members, we again encounter "the halcyon days of the activists."

Whatever the motives for the objections to the ALI structural proposals, plainly a sensitive nerve is touched by the notion of combining a requirement of outside directors and a structure of special committees, with a reminder that directors have a supervising or assessing role[23] to perform and are not just friendly advisers

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19. *Discussion of Restatement*, *supra* note 16, at 457-58 (statement of Professor Stanley A. Kaplan).

20. Business Roundtable Letter, *supra* note 9.

21. *Id.* at 5.

22. *Id.*

23. The rationale of the objections to the ALI proposals is somewhat strained. The articulated point is that the proposals would rigidify, or at least deny necessary flexibility to, corporate structure. In theory, what constitutes a productive structure for some, or even most, corporations could be a counterproductive structure for others; therefore, the law should not require a single structure for all companies. But law formulated according to that theory effectively strikes at minimum standards.

It is true that the ALI Reporters' structural proposals would mandate what the Roundtable recommended as appropriate but not universally required. But boards structured acto management.

II. SHOULD DIRECTORS HAVE OBLIGATIONS—OR SHOULD THEY SERVE STOCKHOLDERS ONLY BY BEING CREATIVE PARTICIPANTS WITH MANAGEMENT?

The reactions provoked by touching that nerve are sometimes strident[24] and, as noted earlier, sometimes contradictory. But almost all the criticisms[25] appear to seek one result—reduction, if not elimination, of the board's responsibility for monitoring management's performance; and some seek a return to the legal world of Justice Neville and William McKinley.[26]

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cording to those proposals are "already almost the fact." Andrews, *Rigid Rules Will Not Make Good Boards*, HARV. BUS. REV., Nov.-Dec. 1982, at 34, 36. Boards with a majority of outside directors compose at least 80% of the boards of large publicly held corporations. *See* RESTATEMENT, *supra* note 10, § 3.03 comment a, at 72 (citing various surveys). There are audit committees in almost 100% of those corporations. *See id.* § 3.05 comment a, at 85-86 (citing various studies). And the New York Stock Exchange conditions listing on the existence of audit committees comprised solely of independent directors. NEW YORK STOCK EXCHANGE, LISTED COMPANY MANUAL § 303.00 (1983). The existence of these boards and committees thus erodes most objections based on the claimed inflexibility of requiring them. The case is no better for that objection to be ALI Reporters' weaker proposal for compensation committees. *See* RESTATEMENT, *supra*, § 3.07(a) (directors on the compensation committee of large publicly held corporations may not be officers or other employees of the corporation, and a majority may not have significant relationships with the corporation's senior executives). The case for novelty is somewhat more substantial with regard to the ALI proposal for nominating committees, which would apply the outside-director requirement to all publicly held corporations, regardless of size. *Id.* § 3.06(a)(1).

It is true also that the ALI's prescription of committee function and structure is detailed—perhaps too detailed. *See id.* §§ 3.05(a)(2) (audit committee), 3.06(a)(2) (nominating committee), 3.07(b)-(c) (compensation committee). But for the most part, the terms of the proposals are flexible enough to meet all business requirements of large publicly held corporations—other than the requirement that their managements be free from accountability and allowed effectively to perpetuate themselves and pick their successors. The obvious ease (i.e., modest cost) with which such corporations can meet the structural requirements proposed by the ALI raises the question whether the objection based on inflexibility is not really an objection to the merits, i.e., to the desirability of having so large a bevy of outside directors looking over the shoulders of management.

24. *See* authorities cited *supra* note 9.

25. Objections addressed to the perceived increase in exposure to liability of directors who fail to monitor adequately are made in support of both (a) the claim that the ALI proposals would hamper performance by directors of a broad, constructive role and (b) the claim that the proposals would press directors to intrude counterproductively into areas of managerial discretion.

26. Some of the critics appear to fault the Reporters for not adopting a mode of statement that is currently fashionable among those who seek the form, but not the substance, of restraints on insider conduct that are designed to protect public investors. The suggestion is to retain the common law's vague and general prohibitions and to couple them with specific statutory provisions offering safe havens for corporate insiders. The result would be not to enhance, or even preserve, substantive protections for investors, but to assure insiders im-

The objection of largest import is the claim that assigning a monitoring function impedes, or indeed precludes, the evolving new role of the board as a constructive participant with management. Professor Andrews suggests that one hope for improvement of performance by American corporations lies in the productive interaction of the board and management, an interaction that he sees developing in many boardrooms.[27] He points out that the board is, or should be, an institution composed of people who have affirmative roles to play in a creative partnership with management to enhance the firm's productivity and profitability. Possibly, as he suggests, requiring monitoring and sanctions is counterproductive to the efforts of a board seeking to combine creative and control functions.

Possibly, as he also suggested at the May 1982 ALI meeting,[28] it is even "insulting" because it assumes that boards and managements may be doing less than their best for stockholders. Professor Andrews is familiar with the performance and aspirations of board members, and he may be right about most.[29] But it does not follow

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munity for certain behavior. And, by implication, the process would permit behavior that the law might have prohibited before the safe harbors were made available. This kind of "regulatory" approach is strange enough when adopted by the Securities and Exchange Commission under administrations dedicated to saving costs by curtailing the protection that the law offers to investors. But if a political agency like the SEC may (correctly or incorrectly) see the election returns as charging it to move from a regulatory approach to a facilitating approach, one wonders to what pressures it is appropriate for the ALI to yield in balancing investor protection and managerial independence.

27. Andrews, *supra* note 23, at 39-40; *cf.* Haft, *supra* note 15, *passim* (advocating a peer-group role for the board in its relationship with management).

28. *Discussion of Restatement*, *supra* note 16, at 446.

29. Unfortunately, Professor Andrews is not as familiar with the law of derivative suits. The ALI proposal is complex, and in some respects it more significantly obstructs plaintiffs' opportunities to hold management accountable than did the law of a decade ago, or even the law of last year. To suggest that the proposal embodies "implied encouragement of derivative actions," Andrews, *supra* note 23, at 38, simply misstates the effects and intent of the proposal.

From the viewpoint of management and directors, the most serious objections to the proposal are that § 7.03 seeks to contain the recent eruption of new law authorizing independent directors to terminate derivative suits, and opts for a change patterned after the Delaware alternative, which is a less drastic departure from the historic common law. *See infra* note 33 and accompanying text. The line of new decisions authorizing termination by independent directors originated in suits against management for "questionable" overseas payments, a context that confronted courts with the awkward question whether to allow stockholders to hold management liable for seeking to enhance stockholder wealth or to appear to condone the alleged misbehavior. *See* Gall v. Exxon Corp., 418 F. Supp. 508 (S.D.N.Y. 1976); Auerbach v. Bennett, 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979). The utility of the termination device for managements charged with conflicts of interest was not lost upon managements' lawyers; and many courts have not distinguished the contexts in which the derivative suit arose. *See, e.g.*, Abramowitz v. Posner, 672 F.2d 1025 that many directors, and more than occasional managements, do not do less than their best, or indeed that their best is adequate. And it certainly does not follow that either management or directors should enjoy special relief from the legal requirements that the common law has traditionally imposed upon the role assigned to them (and that they proclaim for themselves) as agents for the stockholders as a group.

Professor Andrews simply aims at a wrong target when he faults lawyers for focusing on downside returns resulting from managerial negligence and not on upside returns from managerial creativity. It is not within the power of the law or lawyers to produce either maximum positive performance by management or a creative partnership between directors and management. Nor is it the function of the law to legislate maximum managerial efficiency. Possibly, to use Hurst's phrase on American corporate law during the nineteenth and first third of the twentieth century, it could operate to effect a "release of energy"[30]—albeit at the expense of those a free market could victimize. But in the late twentieth-cen-

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(2d Cir. 1982); Gaines v. Haughton, 645 F.2d 761 (9th Cir. 1981), *cert. denied*, 454 U.S. 1145 (1982); Lewis v. Anderson, 615 F.2d 778 (9th Cir. 1979), *cert. denied*, 449 U.S. 869 (1980). Prior to the expanded use of the termination device, it was possible, although not easy, for a stockholder to enforce the substantive legal restrictions on managerial self-dealing or on other culpable misconduct toward shareholders, at least if all of the directors were involved in the misbehavior or condoned the misconduct. Even if only a majority of the directors were involved, the derivative action in many contexts might survive the opposition of the noninvolved directors. *See* Coffee & Schwartz, *The Survival of the Derivative Suit: An Evaluation and a Proposal for Legislative Reform*, 81 COLUM. L. REV. 261, 265 (1981); Dent, *The Power of Directors to Terminate Shareholder Litigation: The Death of the Derivative Suit?*, 75 NW. U.L. REV. 96, 102-04 (1980); Note, *The Business Judgment Rule in Derivative Suits Against Directors*, 65 CORNELL L. REV. 600, 606-07 (1980).

The novelty in the strand of law that has been developing during the last several years is that courts have ruled that if uninvolved and "independent" directors, generally appointed after the alleged misbehavior, seek dismissal of the action, their decision must be respected as an exercise of business judgment. The general theme of the opinions is that if the directors (1) are that disinterested, (2) use a reasonable method and effort in inquiring into the alleged misbehavior, and (3) conclude that the interests of the corporation will be served best by terminating the suit, then the suit must be dismissed because their business judgment is unreviewable. *See, e.g.*, Auerbach v. Bennett, 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979). The Supreme Court of Delaware, for reasons it deems sufficient, has retained a safety valve for stockholders. It insists that courts be empowered to take some sort of look at, or to review, the judgment of the independent directors and the merits of the charges. The Delaware requirements are not explicit or very clear, but they certainly are modest. *See* Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981). The New York alternative points to the effective elimination of stockholder derivative suits and erosion of the mandates of substantive law that those suits were designed to enforce. *See* Joy v. North, 692 F.2d 880, 889 (2d Cir. 1982), *cert. denied* 103 S. Ct. 1498 (1983).

30. J.W. HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES 3-32 (1956); *see also id.* at 7.

tury world of dispersed investors and people's capitalism, the legal arrangements of our society also have a legitimating function. Managerial power must be accountable to something. The American tradition requires accountability at least to stockholders. For the most part the law purports to provide for such accountability by prescribing minimal standards designed to forbid harmful conduct and discourage nonperformance by managers or directors. To be sure, in doing so its mandate should not be so strict as to inhibit positive performance or achievement of efficient results. But if current law does not embody such mandates, neither do the ALI Reporters' proposals.

One implication of the proclaimed tension between the board's creative and control functions is to weaken the board's monitoring role so as effectively to erode its power to hold management accountable to stockholders.[31] If the interest of obtaining productive contributions from the board of directors requires substantially eliminating minimum standards of care and personal liability for the board, management is to be freed from the instrument that traditionally is supposed to police the stockholders' agents. And to the extent that management is relieved of the need to meet, or of liability for failure to meet, such standards of care, management will be held accountable to nothing but the market.

Attainment of that nirvana is also the apparent goal of those critics who would effectively eliminate stockholders' suits against those who violate standards of care. They oppose even the iron lung that the ALI Reporters offer[32] in which to preserve the increasingly moribund derivative suit from the death sentence of the New York courts.[33] And as a second line of defense, they seek to

31. Another implication is for the board to repose its creative function elsewhere. A group of paid advisers or consultants could fulfill the creative function, while the board keeps its overseeing and assessing function. Or, if the newly evolving creative function requires the superior status of board membership to maintain its effectiveness, a segmented board may be fashioned—one part to be creative and the other to do the monitoring. The history of large American business corporations reveals a remarkable capacity to adapt corporate form and internal governing apparatus to changes in markets, technology, and the general economic environment. *See* A. CHANDLER, STRATEGY AND STRUCTURE: CHAPTERS IN THE HISTORY OF THE INDUSTRIAL ENTERPRISE (1962); A CHANDLER, THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1977). Presumably, new organizational forms and changes in incentives for, or motivation of, management will occur as the environment in which the firm operates changes—leaving more (or less) room for the board to function as both monitor and stimulus to management.

32. *See* RESTATEMENT, *supra* note 10, § 7.03 (procedures for terminating derivative suit).

33. The ALI Reporters declined to accept the position of the New York Court of Appeals expressed in Auerbach v. Bennett, 47 N.Y.2d 619, 393 N.E.2d 994, 419 N.Y.S.2d 920

dilute any serious consequences to directors and officers from assimilating the modest Delaware law on derivative suits. The suggestion is that the Reporters' proposal limiting the amount of personal liability to which officers and directors may be exposed for negligent breach of the duty of care[34] does not go far enough—even though that limitation will eliminate much of the initiative for plaintiffs' lawyers in search of a fee.

As one critic has suggested, perhaps monetary sanctions on directors for violation of the duty of care are simply not feasible, notwithstanding liberal indemnity and insurance protection.[35] If such sanctions are imposed, potential directors may be discouraged; and because if invoked they are so likely to overkill, they are judicially nullified by relaxation of the strictures of substantive law, so that violations are rarely found. It may be that nonmonetary sanctions are the most that can be imposed on outside directors for failing to police managerial competence or diligence. Other sanctions can be envisioned, such as court-ordered removal and publicity, or injunctions for fixed periods against further service as a director of any publicly held corporation; but the effectiveness of such sanctions is problematic, and, in any event, few are advocating them.[36] Moreover, even if those modest sanctions would encourage serious policing efforts, they would leave directors subject to the same practical limitations that currently paralyze their ability to fill adequately any kind of overseeing role in these matters.

For years it has been noted that outside directors are significantly handicapped in performing their asserted duty of overseeing or keeping an eye on management's wealth-maximizing pursuit. They have little time or inclination for such a task in view of their origins and obligations to the other activities from which their livelihoods come. No less important, they have no staff.[37] And even if

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(1979). Instead, § 7.03 favors the position of Zapata Corp. v. Maldonado, 430 A.2d 779 (Del. 1981). *See* RESTATEMENT, *supra* note 10, § 7.03 comment a, at 304.

34. *See* RESTATEMENT, *supra* note 10, § 7.06(d)-(e).

35. *Discussion of Restatement, supra* note 16, at 545-47 (statement of William F. Kennedy); *see also* Conard, *A Behavioral Analysis of Directors' Liability for Negligence*, 1972 DUKE L.J. 895, 914.

36. *See* Coffee, *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981).

37. To enable outside directors to fulfill their functions, the ALI proposal authorizes them to call upon corporate staff for information or, in special circumstances, to hire independent staff for assistance. *See* RESTATEMENT, *supra* note 10, § 3.04(a)-(b). Leaders of the business community, *see, e.g.*, The Business Roundtable, *supra* note 6, at 2103-04, and of the bar, *see, e.g.*, *Corporate Director's Guidebook, supra* note 7, at 1611, have urged that outside directors have both powers. Those powers are to be distinguished from the more

they had time and staff, serious questions exist as to whether using them would result in counterproductive intrusion on managerial discretion. Experience with the more active intrusion of directors in many nonprofit enterprises suggests that such board activity presents its own problems and may induce the executive to function less, rather than more, effectively. The dilemma posed by the need to strike the balance between control and slack in fulfilling a board's monitoring role productively has been a subject of debate at least since Arthur Goldberg's epistle on leaving Trans World Airlines in 1972.[38] Thorny questions remain.

Indeed, there is good reason to believe that boards have neither the power nor the disposition to displace inefficient management except in a crisis approaching the catastrophic.[39] And except for that circumstance, boards in general are said to have been unable to perform effective monitoring of managerial competence.[40] To combine recognition of the practical limits on the board's possible role as monitor with a disinclination to impose standards for monitoring and sanctions for failure to meet those standards raises the question whether some other kinds of control mechanisms are needed.

It is not graven in stone that a corporation must have a board of directors charged with overseeing management's efficiency or diligence on behalf of investors. It is entirely conceivable for a legal order to contemplate directors whose only role in such matters is to serve as constructive partners or friendly and inspiring advisers or even merely nominees of management. In such an order, the board could be expected to allow management to be self-perpetuating, with the capital markets offering the only discipline. At least one school of thought seeks no mechanism other than the market to discipline management and apparently believes that directors should function simply as instrumental aides to management in such a system.[41] And the Securities and Exchange Commission has

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demanding suggestion (made by others) that outside directors have their own permanent staff. *See, e.g.*, Goldberg, *Debate on Outside Directors*, N.Y. Times, Oct. 29, 1972, § 3, at 1, col. 3. To seriously object to either of the powers that the ALI recommends, however, is effectively to object to giving outside directors any obligatory overseeing functions.

38. *See* Goldberg, *supra* note 37, *passim*.

39. *See* M. Mace, Directors: Myth and Reality (1971); Mace, *Directors: Myths and Reality—Ten Years Later*, 32 Rutgers L. Rev. 293 (1979).

40. *See* authorities cited *supra* note 39. Professor Andrews also acknowledges the limitations on the capacity of contemporary boards to perform monitoring functions. *See* Andrews, *supra* note 23, at 38-39. Recognition of those limitations no doubt accounts for the porosity of current law in matters of directors' duty of care.

41. *See, e.g.*, Hessan, *The Modern Corporation and Private Property: A Reappraisal*,

recently raised the question whether to eliminate entirely the board of directors of mutual funds,[42] on grounds that some might find broad enough to cover elimination of boards of all large corporate enterprises.

Notwithstanding the efforts of the academic free marketers and their associates in the business community, there has not yet been demonstration[43] or acceptance of the proposition that the markets alone provide an adequate mechanism for narrowing managerial discretion so as to press management to improve its efficiency, much less to press management to perform optimally for the stockholders of their corporations. Indeed the proposition that the markets alone are enough to discipline management has rarely been urged by formal agencies of the business establishment in the past. On the contrary, they have sought to convince the public that the legitimacy of managerial power and necessary constraints on its discretion derive from management's responsibility or accountability to stockholders (and possibly the public), and that directors are the key instrument in enforcing or overseeing such responsibility. Independent directors to monitor management have been urged as such a legitimating factor for a corporate system that during the past decade has revealed unsuspected depths of managerial corruption and a breadth of managerial discretion that permits much less than optimal performance. Opponents of the ALI Reporters' proposal appear reluctant to espouse explicitly alteration of that theory, although the dilution of the legal norms that they urge would go a long way to substitute the capital markets for directors.

Apart from the impact such substitution would have on the

26 J.L. & ECON. 273 (1983).

42. *See* SEC Investment Co. Act Release No. 12,888, [1982-1983 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 83,303 (Dec. 10, 1982).

43. On the contrary, even if markets are assumed to be efficient, the size of premiums offered in leveraged buy-outs and straight going-private transactions suggests substantial managerial slack and very ineffective policing of management's performance by the market. The comparable size of the premiums offered in third party takeovers supports that suggestion. Doubtless some, and possibly all, of the increase in the size of the premiums since enactment of the Williams Act, Pub. L. 90-439, 82 Stat. 454 (1968) (codified as amended at 15 U.S.C. §§ 78*l*-78n (1982)), and state anti-takeover legislation is attributable to the impediments generated by governmental intervention. But the notion that the market threat of takeover induces significant improvement in managerial efficiency is not self-evident. The lack of any demonstrated contraction of premiums over the last ten years in the takeover movement raises questions about the salutary effect of takeovers in reducing slack. Doubts about the notion that bidders have "better" managements than their targets are not allayed by the recurrence of takeovers like U.S. Steel's acquisition of Marathon Oil and the Martin Marietta, Bendix, Allied Corporation, United Technologies transactions.

public's perception of the protection that boards of directors offer to investors, there are other reasons for concern with its possible consequences. Serious questions are being raised by sober people about how effectively managements of large American corporations perform their profit making functions—and about how adequate the market is to induce proper performance by them.[44] The efficacy of the market as a disciplining force is not wholly evident from the foreign loan policies of the managements of some American banks. The success of foreign competition in manufacturing fields once dominated by American companies stimulates questions about management's performance, and about who or what polices management in the interests of stockholders. The pre-recession solvency problems of some of our large manufacturers, retailers, and airlines also raise such question. Currently popular are complaints about the costs of the alleged short-term perspectives that limited stock market horizons and the limited term of managerial tenure impose upon corporate executives. If those complaints have any validity, the absence of internal monitoring with a longer time horizon is significant. To be sure, recent history does not demonstrate that internal policing by outside directors, at least as heretofore chosen, offers a cure for those complaints or for any of the others. But if not monitoring by outside directors, then by whom?

Government intervention—largely federal—on behalf of stockholders is the traditional response to institutional arrangements that impair the market's ability to prevent insiders from overreaching in dealings with their corporation or its securities. It is not necessary to advocate the extreme (or any) forms of such intervention[45] in order to speculate about the possibilities. One scenario that might replace the powerless board as the instrument for encouraging managerial compliance with minimum standards of efficiency would be a corps of government-appointed ombudsmen. Internal revenue agents were at one time assigned in teams for periods of several years to review the federal income tax returns of particular large corporations. They made their offices at corporate

44. Hayes & Abernathy, *Managing Our Way to Economic Decline*, HARV. BUS. REV., July-Aug. 1980, at 67.

45. One can, by a stretch of the imagination, envision substantive rules under which all or part of management's compensation would be expanded or curtailed as performance (over some period, by some margin or with acceptable explanations) meets or fails to meet some fulcrum quantity. *See* Investment Advisers Act of 1940, § 205, 15 U.S.C. § 80b-5 (1976). The difficulties in defining such a system and making it operational are enough to preclude consideration of such possibilities, unless no other effective accountability technique is acceptable.

headquarters and, to the extent necessary for the job, poked around in the entrails of the firm—examining the documents underlying claimed items of income and expense, comparing one year's underpinnings with another's, and ending up with a report on deficiencies or overpayments. To be sure, the operation, not to mention the creation, of such a corps of monitors of managerial performance would present stubborn if not intractable problems—how to find or define a pool of persons qualified to serve as such monitors; what incentives to offer them; what standards they should apply in determining management's minimal obligations to stockholders; how they should function in administering such standards as they divine; and what sanctions they should be empowered to impose if they find managerial shortcomings.

If the idea of a corps of ombudsmen seems too paternalistic or too costly, an adaptation of suggestions for a few government-appointed representatives on the board may be more palatable.[46] It has been suggested that independent directors be appointed by government, or at least with the consent of a court or agency, in response to actual or potential unlawful behavior by incumbent management. And comparable appointments have been made on occasion.[47] Substantial as is such an intrusion on managerial and investor autonomy, it has been suggested principally in the limited circumstances of law violation or generic industry problems affecting the public. The notion is so confined presumably because it is assumed that management is otherwise monitored by a board that attends to its obligation with respect to minimal performance by management. If those minimal obligations are further reduced, the scope for government-appointed directors may be seen to be expanded to monitor more than compliance with law. Once again, any such intrusion presents difficult problems of personnel, standards, incentives, staffing, operation, and remedies.

The ALI Reporters do not seek,[48] and few of their critics urge,

46. Stone, *Public Directors Merit a Try*, HARV. BUS. REV., Mar.-Apr. 1976, at 20. For development of the theme on a broader base and with further reach, see Weiss, *Social Regulation of Business Activity: Reforming the Corporate Governance System to Resolve an Institutional Impasse*, 28 U.C.L.A. L. REV. 343 (1981).

47. *See* Solomon, *Restructuring The Board of Directors: Fond Hope—Faint Promise?*, 76 MICH. L. REV. 581, 592 n.44 (1978); Comment, *Court-Appointed Directors: Ancillary Relief in Federal Securities Law Enforcement Actions*, 64 GEO. L.J. 737 (1976); Comment, *Equitable Remedies in SEC Enforcement Actions*, 123 U. PA. L. REV. 1188, 1210-14 (1975).

48. Professor John C. Coffee, Jr., one of the ALI Reporters, noted that the Reporters are not proponents "of state regulation, or of close bureaucratic review of corporate transactions, or of broader enforcement powers being given to state agencies." *Discussion of Restatement*, *supra* note 16, at 531.

such an arrangement or consider it preferable to a stockholder-chosen board that is obliged to monitor and sanctioned for failure to do so. But if the board is relieved of its monitoring role and its obligations are diluted, the basic questions remain: How can the legitimacy claimed for the allocation of power in the corporate structure be established? What other mechanism of accountability should be fashioned?

III. OTHER DIRECTORIAL FUNCTIONS CHALLENGED BY THE CRITICS OF THE ALI REPORTERS' PROPOSALS

The challenges to the ALI Reporters' proposals raise other questions about the board's function. The Reporters' proposals address only one of the several functions claimed for boards of directors—overseeing management's performance in matters of enterprise efficiency.[49] But some of the objections to the Reporters' proposals rest on premises that affect more than that role and extend to another of the board's functions—policing management's integrity.

The vast bulk of stockholder litigation against management and directors originates in claims of conflict of interest. That is the grist for the lawyers' mill. Stockholder challenges to management's performance of its duties of care are rarely made. Such litigation as has occurred over directors' obligations of care generally has focused on directors' failure to police management's conflicts of interest. The objections to the ALI Reporters' proposal to preserve some small vestige of derivative suits,[50] therefore, appear to be aimed as much at the continued vitality of requirements of managerial integrity as at the duty of care.[51]

To be sure, eliminating the derivative suit does not necessarily mean eliminating formal strictures on conflicts of interest or self-dealing. But if, as critics suggest, the director's sensitive relationship with management obstructs a meaningful monitoring role in matters of efficiency, it presents an even larger obstacle to inter-

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49. *See* RESTATEMENT, *supra* note 10, § 3.02.

50. The Reporters' proposal distinguishes between derivative suits alleging violation of the duty of care and those charging violation of the duty of loyalty. But the developing case law that the proposal would curb includes suits charging conflicts of interest and violations of other loyalty obligations. Those criticizing the proposal as too drastic do not appear to make the distinction.

51. It does not detract from this conclusion that the cost to society from managerial shortcomings in matters of integrity may be modest compared to the damage resulting from managerial failures in matters of efficiency or law compliance.

preting and enforcing strictures against self-dealing by his managerial colleagues. And his function would all but disappear if derivative suits against him in this area were effectively eliminated. If independent directors cannot validate managerial self-dealing behavior by effectively policing such transactions, and stockholders cannot enforce legal requirements by derivative suit, then more intensive policing by government is invited—either externally by law enforcement agencies or internally by appointed watchdogs, and in either case by much more rigorous prohibitions of conflicts of interest than now govern.[52]

Finally, some critics of the ALI Reporters' proposals raise a troublesome argument that is at odds with another widely proclaimed role of the board of directors. The Reporters' proposals are appropriately modest in the standards they urge for corporate social responsibility.[53] But the one component of social responsibility that even opponents of that general concept acknowledge as a proper concern is the need for corporations to comply with law. And as has been observed elsewhere, whatever the limits of the capacities of independent directors, the most significant role that they can play is in the matter of encouraging corporate compliance with law.[54]

The ALI Reporters suggest explicitly that a corporation "is obliged, to the same extent as a natural person, to act within the boundaries set by law."[55] The point of that stricture, which surely adds nothing to the common law, is to negate the notion that a corporation may properly fail to adhere to a given rule if a cost-benefit analysis satisfies its management and directors that probable corporate gains outweigh either probable costs (measured by dollar liability imposed for engaging in such conduct) or probable

52. In this connection it may be instructive to note the suggestion by representatives of the British financial community for more extensive government intervention. That community, which currently appears to suffer from substantial incidents of fraud and scandal, operates within a jurisprudence that discourages private actions and relies principally on cumbersome government criminal sanctions. According to *The Times* of London, "Many in the City believe its tattered image owes more to government failure to tackle fraud than to inherent dishonesty among those who make their living there." The Times (London), Feb. 8, 1983, at 20, col. 2. The Council for the Securities Industry claims that " 'the greatest weakness of the present system lies in what is a governmental responsibility—the failure to deal effectively with commercial and financial frauds.' " *Id.*

53. *See* RESTATEMENT, *supra* note 10, § 2.01.

54. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1 (1979); *see also* Brudney, *The Independent Director—Heavenly City or Potemkim Village?*, 95 HARV. L. REV. 597, 656 (1982).

55. RESTATEMENT, *supra* note 10, § 2.01(a).

corporate losses (measured by potential liability discounted for likelihood of detection).

Individuals, whether conducting their own businesses or otherwise, also may make such cost-benefit analyses. But individuals are subject to two more powerful deterrents to unlawful behavior than are large public corporations. Personal sanctions may be visited on the individual; hence in calculating the costs, the individual has more to fear than does the corporate officer or director. And more important, the individual has values other than maximizing his wealth and can freely trade off wealth maximization for the personal satisfaction of law compliance.

Corporate officers operate in a more complex equilibrium. In theory, they are under pressure to maximize stockholder wealth and have no obligations to satisfy, if indeed they could measure, stockholders' utiles from law compliance. In practice, the institutional structure in which corporate officers function reinforces their theoretical obligations to press for economic returns.[56] Hence there is much less scope for them to yield corporate profitability for, and considerably more institutional pressure on them to choose such profitability over, the personal satisfaction of conduct that stops far short of the law's prohibitory line.

Moreover, the individual businessman is more likely in normal course to know facts alerting him to problems of, and to be responsible for, illegality in the business than are the persons at the apex of large and complicated corporate structures. The purpose of articulating the latters' obligation to be concerned with compliance is to raise their consciousness level—an effort that is justified by the size of the organization, the resulting impediments to assigning responsibility and to the upward flow of information,[57] and the tilt of institutional pressures on corporate actors.

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56. *Cf.* J. Treadway, Speech to American Bar Association Securities Law Committee (Mar. 2, 1983), *summarized in* 15 SEC. REG. & L. REP. (BNA) No. 9, at 421 (Mar. 4, 1983) (middle-level executives have been falsifying financial statements, because of pressure to meet profit goals).

57. Organizational complexities and the impediments to both upward and downward information flows permit illegal behavior for which it is often difficult to attribute individual culpability. *See* M. ERMANN & R. LUNDMAN, CORPORATE AND GOVERNMENTAL DEVIANCE: PROBLEMS OF ORGANIZATIONAL BEHAVIOR IN CONTEMPORARY SOCIETY (2d ed. 1982); C. STONE, WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR (1975). For a discussion of the problems of the upward flow of information to top decisionmakers, see R. CYERT & J. MARCH, A BEHAVIORAL THEORY OF THE FIRM 109-10 (1963); E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS 122-24 (1975); Coffee, *Beyond the Shut-Eyed Sentry: Toward a Theoretical View of Corporate Misconduct and an Effective Legal Response*, 63 VA. L. REV. 1099, 1137-38 (1977).

In recognition of those differences, to mention nothing of the history of wholesale corporate law violation revealed in the aftermath of Watergate, the ALI Reporters' proposal explicitly defines the duties of officers and directors to include being "reasonably concerned with the existence and effectiveness of . . . law compliance programs,"[58] and making "reasonable efforts to cause [their] corporation . . . to obey the law."[59] As the ALI report points out, those provisions add little, if anything, of substance to directors' obligations under prior law.[60] Moreover, those so-called obligations are little more than precatory, for the ALI proposal with respect to derivative suits virtually precludes their enforcement by stockholders. Indeed, one ALI Reporter so indicated.[61] If, as has been suggested, the Securities and Exchange Commission should back away from requiring disclosure in such matters under the securities laws,[62] it is all the more necessary to stimulate internal concern with effecting law compliance.

Yet several critics of the ALI Reporters' proposal have focused on its articulation of the board's obligation to be concerned with law compliance, and object to such a proposal. For the most part, these critics are lawyers[63]—suffering from what can charitably be called a neurotic fear of articulation. It is hard to understand the basis for objecting to so mild a requirement. Perhaps, the Reporters' proposal calls attention to an unpleasant past and to equally unpleasant possibilities in the future. Doubtless, most large corporations eschewed such possibilities. But, unfortunately, many did not. How to induce compliance with law by any association or group, including large business corporations, implicates some of the more bedeviling problems that afflict our society today.[64] To suggest the mild nostrum of requiring the directors to pay some attention to whether the corporation is in compliance with the law is simply not enough to justify objections from lawyers.

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58. RESTATEMENT, *supra* note 10, § 4.01(b).

59. *Id.* § 4.01(c).

60. *See id.* § 4.01 comment a, at 142-43.

61. *See Discussion of Restatement*, *supra* note 16, at 530-36 (statement of Professor John C. Coffee, Jr.)

62. J. Fedders, Speech to the Federal Regulation of Securities Committee, ABA Section of Corporation, Banking and Business Law (Nov. 19, 1982), *reprinted in* 14 SEC. REG. & L. REP. (BNA) No. 46, at 2057, 2057-58 (Nov. 26, 1982).

63. At least one nonlawyer critic also appears to share this fear. *See* Andrews, *supra* note 23, at 38.

64. *See* Coffee, *supra* note 36; Stone, *Large Organizations and the Law at the Pass: Toward a General Theory of Compliance Strategy*, 1981 WIS. L. REV. 861; Vaughan, *Toward Understanding Unlawful Organizational Behavior*, 80 MICH. L. REV. 1377 (1982).

That it may provoke noisy objections from some executives against lawyers who " 'tell us how to run our business' "[65] is perhaps understandable. But, it is not inappropriate in this context to recall an admonition made almost half a century ago by then-Justice Harlan Stone speaking about managerial departures from the fiduciary principle. His observations about a financial era then drawing to a close are certainly not less applicable to corporate failures to comply with legal prescriptions during the past decade or so. He said:

> [W]hen we know and face the facts we shall have to acknowledge that such departures from . . . principle do not usually occur without the active assistance of some member of our profession, and that their increasing recurrence would have been impossible but for the complaisance of a Bar, too absorbed in the workaday care of private interests to take account of these events of profound import or to sound the warning that the profession looks askance upon these, as things that "are not done."[66]

Today, the language of the admonition seems quaint. But its substance is no less compelling now than it was then.

65. Lewin, *supra* note 9, at D6, col. 5.
66. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 9 (1934).