Engage, Embed, and Embellish: Theory Versus Practice in the Corporate Social Responsibility Movement

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Introduction

One of the most striking developments in the business world over the last decade has been the emergence of a coherent and energetic "corporate social responsibility" movement.[1] This article reports the results of an empirical study of that movement. "CSR," as it is universally referred to, has as its theoretical base the notion that the responsibility of a corporation extends beyond the traditional Anglo-American objective of providing financial returns to its shareholders. Instead, CSR proponents have argued, the legitimate concerns of a corporation should include such broader objectives as sustainable growth, equitable employment

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[1] For an introduction to the CSR movement and its theoretical underpinnings, see RUTH V. AGUILERA, DEBORAH E. RUPP, CYNTHIA A. WILLIAMS & JYOTI GANAPATHI, PUTTING THE S BACK IN CORPORATE SOCIAL RESPONSIBILITY: A MULTI-LEVEL THEORY OF SOCIAL CHANGE IN ORGANIZATIONS (Univ. of Ill. Ctr. for Int'l Bus. Educ. & Research, Working Paper No. 04-0107, 2004) *available at* http://www.ilir.uiuc.edu/lubotsky/AguileraRuppWilliamsGanapathiJuly04final.pdf.; Ronen Shamir, *Between Self-Regulation and the Alien Tort Claims Act: On the Contested Concept of Corporate Social Responsibility,* 38 L. & SOC'Y REV. 635, 643-49 (2004).

practices, and long-term social and environmental well-being.[2] Corporate managers, it is argued, should consider not only their shareholders in making their decisions but also a variety of "stakeholder" constituencies, including employees, residents of communities affected by their activities, governments, and organizations advocating for various social and environmental interests.

The CSR movement has manifested itself in a variety of ways. On the legal front, it has thus far had limited impact in this country. Although Enron and related disasters have led to legislation to make corporate conduct more transparent, the focus has been principally on financial issues.[3] In Europe and the United Kingdom, however, the CSR movement has been a major factor in moving corporate disclosure in the stakeholder direction. On the Continent, stakeholder interests have long enjoyed greater recognition than in the "Anglo-Saxon" corporate world,[4] as evidenced by the requirements in some European countries of labor representation on boards of directors and facility-level works councils.[5] Building on this tradition of stakeholder thinking, several countries now require direct attention to stakeholder interests through highly

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[2] *See* Brian R. Cheffins, *The Metamorphosis of "Germany, Inc.": The Case of Executive Pay*, 49 AM. J. COMP. L. 497, 498–501 (2001) (providing an overview of the shareholder–stakeholder divide).

[3] *See* Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 611–15 (2001).

[4] For an introduction to the extensive literature on this topic, see Ruth V. Aguilera & Gregory Jackson, *The Cross-National Diversity of Corporate Governance: Dimensions and Determinants*, 28 ACAD. OF MGMT. REV. 447 (2003), which proposes a theory that explains the differences between the Continental European stakeholder model and the British and American shareholder model.

[5] *See* Catherine Barnard et al., *"Fog in the Channel, Continent Isolated": Britain as a Model for EU Social and Economic Policy?*, 34 INDUS. REL. J. 461, 473 (2003)(describing the German situation).

detailed disclosure of social and environmental risks and impact.[6] Those countries with the most expansive disclosure regulations are the very countries where a stakeholder concept of the firm has been most dominant: France, Germany, the Netherlands, Belgium, Norway, Denmark, and Sweden.[7] At the European Union level, though progress has been uneven, the trend has been in the same general direction.[8] The EU's own gradual turn in the direction of mandatory disclosure is clearly based on the broader European penetration of the stakeholder concept.

The United Kingdom has become an especially interesting case as it pursues what we have elsewhere described as a "third way."[9] In some important respects, the United States and the U.K. continue to share corporate law values. These include broad-based, dispersed share ownership, in contrast to Europe and Japan, which feature ownership by families, dominant shareholders, or banks.[10] The United States and Britain both have well-developed securities

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[6] We have described and analyzed these European developments in detail in Cynthia Williams & John M. Conley, *An Emerging Third Way? The Erosion of the Anglo-American Shareholder Value Construct*, __ CORN. J. INT'L L. __ (forthcoming 2005). For general background on expanded social and environmental disclosure, see Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1273–1299 (1999).

[7] *See* Aguilera & Jackson, *supra* note 1, at 454-57.

[8] For a review of these EU-level developments, see Williams & Conley, *supra* note 6, at __.

[9] *Id.*

[10] *See* Rafael LaPorta et al., *Corporate Ownership Around the World*, 54 J. OF FIN. 471 (1999) (presenting empirical evidence illustrating the different corporate ownership patterns in various countries).

markets[11] and depend on financial transparency, stock market valuations, and the market for corporate control to promote managerial accountability.[12]

In other respects, though, the U.K. is beginning to diverge from the American model in pursuit of a long-term "enlightened shareholder value" perspective which incorporates significant elements of European stakeholder theory. This divergence is driven in substantial part by institutional interests that can be loosely characterized as elements of the CSR movement.[13] These interests include the British government; institutional investors, particularly pension funds and insurance companies (which are increasingly concerned about climate change and other long-term environmental risks); and nongovernmental organizations ("NGOs"). The pressures that such institutions bring to bear have yet to be felt anywhere near as strongly in the United States.

Perhaps the best example of the growing influence of CSR thinking in the U.K. is the ongoing process of promulgating a new code concerning the disclosure of environmental and social risk. On May 5, 2004, after an extensive public consultation process, the British government introduced draft regulations that will require 1,290 British-based companies listed on the London Stock Exchange ("LSE"), or on the New York Stock Exchange ("NYSE") or NASDAQ, to publish an annual Operating and Financial Review and Directors Report

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[11] *Id.* at 491-511.

[12] *See* Barnard et al., *supra* note 5, at 469-73 (2003) (discussing the efficiency of the corporate control market as an accountability mechanism).

[13] For an analysis of these institutional pressures, see Ian Jones & Michael Pollitt, *Understanding How Issues in Corporate Governance Develop*, 12 CORP. GOV. 162 (2004).

("OFR").[14]   The OFR, which is the culmination of a decade-long process of prestigious commissions examining corporate governance, will require companies to identify and disclose material social and environmental risks.[15]

Over the same period, the British government has also taken steps to promote CSR consciousness among institutional investors. In both the United States and the U.K., institutions comprise more than half of the equity market.[16]   In the U.K., however, pension funds and insurance companies, which are necessarily focused on the long term, are the dominant institutions. This country's institutional sector, by contrast, is dominated by mutual funds, which may have a shorter-term outlook.[17] Investors with a longer-term perspective are more likely to see a company's social and environmental behavior as material to investment decisions. Building on this openness to non-bottom line considerations, the British Government has sponsored a series of "best practices" codes for institutional investors that urge—but do yet require—them to "intervene" in the companies whose stock they own, by voting or otherwise, when doing so might enhance the value of the investment.[18] Several important institutional investor organizations have also adopted codes that call on members to demand increased corporate disclosure on both financial and CSR issues.[19]

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[14] The Draft Companies Act 1985 (Operating and Financial Review and Directors' Report) Regulations 2004.

[15] This process is analyzed in Jones & Pollitt, *supra* note 13.

[16] *See* Williams & Conley, *supra* note 6, at __.

[17] *See id.* at __.

[18] *See id.* at __.

[19] *See id.* at __.

Beyond these European legal developments, the influence of the CSR movement can also be seen in the voluntary behavior of corporations, particularly in the area of reporting. A significant number of global firms, both in the United States and abroad, go well beyond what is required in reporting publicly about social and environmental issues. Many of the world's largest companies have started to produce social, environmental, or sustainability reports (which integrate social, environmental, and financial information) in addition to their required financial reports. Between 1999 and 2002, the percentage of *Fortune* Global Top 250 companies that produced a separate social, environmental or sustainability report increased from thirty-five to forty-five; and these figures compare to only ten percent of the Global 500 in 1993.[20] In 2002, twenty-nine percent of these reports were independently verified, most often by accounting firms, versus nineteen percent in 1999.[21] These statistics reflect worldwide trends that began in the early 1990s.[22] Moreover, these aggregate percentages may understate the significance of the reporting phenomenon, given much higher rates in some of the countries with the largest economies. Thus, in Japan, seventy-two percent of the top 100 companies publish social reports; in the U.K., forty-nine percent; thirty-six percent in the United States, and between thirty and forty percent in Northern Europe.[23]

Many of the same companies that are issuing social and environmental reports have also altered the way they interact with their stakeholder critics, especially the NGOs–environmental,

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[20] KPMG International Survey of Corporate Sustainability Reporting 2002, at 9 (2002). The KPMG Sustainability Group has been doing international surveys of sustainability reporting for over a decade, and so has time-series data describing this phenomenon, but has changed its measurement database over that time, which is why we cannot compare the reporting rates among the Global 250 in 1993 to reporting rates for the Global 250 in 2002.

[21] *Id.* at 18.

[22] The percentage of the top 100 companies in each of nineteen countries that produced social reports increased from thirteen in 1993 to twenty-three in 2002. *Id.* at 12.

[23] *Id.* at 14.

labor, human rights, and other issue-advocacy organizations—that are often their most strident critics.[24] As a representative from a leading British scientific research organization put it in a recent interview, "multinational businesses have had to respond to a changing paradigm."[25] Instead of adversarial standoffs, one now often sees "engagement" and "partnerships," with NGOs helping corporations to identify issues, produce and audit reports, conduct "dialogs" with diverse stakeholders throughout the world, and address specific problems.

A critical question is whether these developments will prove to be nothing more than trends in corporate *communication*. That is, do these activities reflect, or at least portend, an important shift in managers' perceptions of their social responsibilities, or are they simply efforts at public relations and reputation building? Reasonable minds might differ about the substantive effects of this paradigm shift, but the forms of conducting multinational business have clearly changed over the last ten years.

The many participants in this changing paradigm comprise the contemporary CSR community. They include a new class of CSR professionals within for-profit companies; yet another new class of outsiders who consult with companies and audit their nonfinancial reports; executives at pension funds, insurance companies, and other institutional investment organizations who believe in socially responsible investing; like-minded independent investment managers to whom institutional portfolios may be entrusted; those who work for and on behalf of NGOs, from the largest and most visible (Greenpeace and the World Wildlife Federation, for

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[24] These interactions are described in Part II *infra.*

[25] Our interview attribution conventions are described *infra* notes __ and accompanying text.

example) to the smallest local advocacy group; and government officials worldwide whose mandate covers social and environmental issues.

We have elsewhere dealt in great detail with the legal changes that the CSR movement has helped to bring about.[26] In this Article we report on a companion empirical study of the movement in action that employs the methods of anthropology and linguistics. Using the techniques of business ethnography,[27] we have, over the past two years, interviewed people involved in every aspect of CSR, attended CSR events as ethnographic observers, participated in "stakeholder dialogs,"[28] and performed linguistic analyses of corporate CSR reports.

The results of this research, which we believe to be without precedent, are significant on many levels. Most obviously, our findings are valuable as a deep description of what the preeminent legal realist Karl Llewellyn called "law in action,"[29] a cataloguing of the behaviors and motivations of the participants in a new and important sociolegal movement. We compare the theory and practice of the CSR movement by addressing such questions as what these participants seek to accomplish, whether they are achieving those ends, and what the social consequences of their activities—both intended and inadvertent—may be. As lawmakers in this country are encouraged to emulate Europe in mandating, or at least encouraging, the corporate behaviors and transparency urged by CSR activists, they would be well advised to attend to those consequences.

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[26] Williams & Conley, *supra* note 6.

[27] Our research methods are described in Part I *infra.*

[28] This term is defined in Part II.B.2 *infra.*

[29] KARL LLEWELLYN & E.A. HOEBEL, THE CHEYENNE WAY __ (1942)

On a more theoretical level, our findings also constitute an early case study of what has been called "the new governance."[30] According to new governance theory, the democratic state is in the midst of a shift to a "post-regulatory" model characterized by a weakening of top-down governmental regulation of in favor of a diffusion of rights and responsibilities among governments, private companies, NGOs, and other interested parties. Power, in other words, is to be spread and shared. This is precisely what the CSR movement seems to be demanding and, up to a point, to be producing. But the critics of the new governance question the processes—or lack thereof—for selecting those who will share this diffused power, and ask how these people and institutions will be held accountable. These turn out to be questions that CSR protagonists are asking of themselves, with no consensus about the answers. In many respects, then, understanding the realities of CSR provides a unique opportunity to test new governance theory against practice.

In Part I of the article we explain out empirical methods in more detail. In Part II we set out and analyze the results of our ethnographic interviews and observations. Part III presents our discourse analysis of CSR reporting and considers its implications. Part IV discusses new governance theory in greater detail and assesses CSR practice as a test case. The Conclusion reviews both the promise and the dangers posed by governance on the CSR model. Our overriding concern is that the diffusion or power promised by both new governance and CSR theorists may amount to nothing more than the subtle reinforcement of existing power relationships.

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[30] *See infra* notes __ and accompanying text.

I.   The Method of Business Ethnography

We have approached these issues through a variation on the ethnographic method. Made famous by such public intellectuals as Margaret Meade, ethnography is "participant observation": in simplest terms, going to the place to be studied, "living with the natives," sharing their way of life, and observing their customs and rituals, all in an effort to see the world through their eyes.[31] For much of the history of the discipline, Western anthropologists have focused their attention on so-called traditional societies[32] in the non-Western parts of the world. Accordingly, anthropology's most-read books include such titles as Meade's *Coming of Age in Samoa*[33]; Bronislaw Malinowski's *Argonauts of the Western Pacific*,[34] which described the epic open-ocean canoe voyages of the people of Melanesia; and E.E. Evans-Pritchard's *The Nuer*,[35] an account of life in a tribe of Sudanese pastoralists. As part of multifaceted turn toward introspection, however, the current generation of anthropologists has devoted much more attention to the ethnographic study of their own societies.[36] As part of the same trend, anthropologists have also begun to examine the cultures of business and other contemporary

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[31] *See* CONRAD PHILLIP KOTTAK, CULTURAL ANTHROPOLOGY 11, 20, 34-40 (8th ed. 2000).

[32] To an anthropologist, "traditional" implies a relatively small society, whose members know each other on a face-to-face basis, at a premodern stage of technical and economic development. *See generally* RAYMOND SCUPIN, CULTURAL ANTHROPOLOGY 285-86 (4th ed. 2000) (discussing concepts of premodernism and traditionalism).

[33] MARGARET MEAD, COMING OF AGE IN SAMOA (1928).

[34] BRONISLAW MALINOWSKI, ARGONAUTS OF THE WESTERN PACIFIC (1922).

[35] E.E. EVANS-PRITCHARD, THE NUER (1940).

[36] *See* KOTTAK, *supra* note 36, at 39-40, 51-54. The trends toward introspection and the examination of one's own culture are epitomized by the title that one of the most famous twentieth-century anthropologists gave to a 1990s textbook: PAUL BOHANNAN, WE, THE ALIEN (1992). Parallel developments have included a major reevaluation of anthropology's received wisdom and a dramatic increase in the numbers of professional anthropologists who are members of societies previously studied by Westerners. For leading examples of these developments, see, respectively, JAMES CLIFFORD & GEORGE E. MARCUS, WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY (1986); and GANANATH OBEYESEKERE, THE APOTHEOSIS OF CAPTAIN COOK: EUROPEAN MYTHMAKING IN THE PACIFIC (1992).

institutions. The anthropologist member of this team has, for example, conducted ethnographic studies of lawyers and witnesses in American criminal trials,[37] lay people trying to navigate the small claims court system in this country,[38] and institutional investment organizations.[39]

As we have applied it here, the method has involved participant observation of gatherings and activities of the CSR community as well wide-ranging interviews of people within corporations, NGOs, investment funds, institutional investment organizations, and public relations firms and other consultancy organizations.[40] In the course of their field projects, anthropologists have always devoted a significant amount of time to lengthy, qualitative interviews of a diverse group of members of the society they are studying. Working from a general and flexible topic outline, anthropologists prompt their interlocutors (traditionally called "informants") to set the specific agenda, moving from topic to topic as they see fit, giving various topics such emphasis as they may choose, and commenting freely on their cultural outlook and practices. The theory of the ethnographic interview is that, in addition to the substantive information that may be provided, the informant's selection of some topics, avoidance of others, and relative emphasis on particular subjects is itself an invaluable form of data. To enhance the value of these data even further, in recent years many anthropologists have

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[37] *E.g.,* John M. Conley et al., *The Power of Language: A Multi-Disciplinary Study of Language in the Courtroom*, 1978 DUKE L. J. 1375 (1978); JOHN M. CONLEY & WILLIAM M. O'BARR, JUST WORDS: LAW, LANGUAGE, & POWER (1998).

[38] *E.g.,* JOHN M. CONLEY & WILLIAM M. O'BARR, RULES VERSUS RELATIONSHIPS: THE ETHNOGRAPHY OF LEGAL DISCOURSE (1990).

[39] *E.g.,* WILLIAM M. O'BARR & JOHN M. CONLEY, FORTUNE & FOLLY: THE WEALTH AND POWER OF INSTITUTIONAL INVESTING (1992).

[40] For a more detailed discussion of the ethnographic method and its use in business contexts, see O'BARR & CONLEY, *supra* note 39, at 1-10 (1992).

engaged in highly detailed linguistic analyses of the precise ways in which informants choose to express themselves, in the belief that language and thought are inextricably intertwined.[41]

Our objective has been to investigate the meaning of "corporate social responsibility" to people in corporations and their various stakeholders, and the potential impact, within a company and beyond, of a firm's undertaking CSR initiatives. We are two years into this project, attending CSR events as ethnographic observers and interviewing people at various levels of the relevant organizations. We have attended five major CSR conferences in the United States and Europe, watching, listening, and conducting follow-up interviews as CSR activists from the corporate and nonprofit sectors gather to debate issues, inform each other, and develop practical plans for action. We also participated on one month-long online conference. We have been involved in three "multi-stakeholder dialogs," two lasting a day or a day-and-a-half, and one lasting six months. This latter dialog among companies, NGOs, and labor unions included three days of meetings in-person and then online communications in work groups between the face-to-face sessions. We have conducted thirty-two interviews of corporate CSR specialists, consultants, institutional investors, investment advisors and money managers, government officials, journalists who cover CSR, and representatives from a wide range of NGOs.[42] Finally,

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[41] *See, e.g.,* CONLEY & O'BARR, *supra* note 38 (linguistic analysis of narratives told by small claims court litigants); SUSAN F. HIRSCH, PRONOUNCING AND PERSEVERING: GENDER AND THE DISCOURSES OF DISPUTING IN AN AFRICAN ISLAMIC COURT (1998). For an introduction to the relationship between language and thought, see JOHN J. GUMPERZ & STEPHEN C. LEVINSON, RETHINKING LINGUISTIC RELATIVITY 1-18 (1996).

[42] We were able to tape-record some of interviews. For the remainder of the interviews and observations, we have relied on the analysis of our ethnographic notes. We did not promise anonymity in our interviews, and our observations of CSR events were not carried out under any conditions. Nonetheless, in keeping with what believe to be the spirit of the interviews, we do not name persons or organizations except where we were asking questions about a publication or public statement by that person or organization. In reporting on our observations of CSR events, we have identified speakers and organizations where the identification is material to our analysis.

as we discuss in Part IV, we have used the methods of discourse analysis to study CSR reports issued by two multinational corporations. Several significant themes have emerged.

II.   The Practice of Corporate Social Responsibility

A.   The Language and Culture of the Movement

A "CSR community" has clearly emerged both in the United States and Europe, constituting itself as a coherent cultural entity complete with rituals and language. This reality was vividly illustrated at the outset of the project. In November 2003, we attended the annual meting of Business for Social Responsibility, an umbrella organization in the Unites States that brings together companies ranging from the Fortune 50 to local boutiques, CSR consultants, advocacy groups of many stripes, religious organizations, socially responsible investment advisors, journalists, and an eclectic mix of interested individuals.[43] The group, which numbered approximately 1,000, gave rapturous welcomes to–and asked adulatory, softball questions of– such keynote speakers as celebrity CEOs Carly Fiorina, then of HP, and Mike Eskew of UPS, and the conservative-turned-liberal columnist and talking head Arianna Huffington. Three days of breakout sessions dealt with such topics as "North v. South: How CSR Standards Impact Economic Development," "Diversity and the Bottom Line," "Addressing the Impact of Your Core Product: Kraft and Obesity," "Case Studies in Effective Government Engagement," and "Embedding CSR."

We were repeatedly struck, indeed set aback, by the behavioral homogeneity of so diverse a group. At the simplest level, the group *looked* homogeneous, with virtually everyone affecting a mellow-casual look (a grade less formal than corporate casual) that made the

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[43] The meeting was held November 11-14, 2003 in Los Angeles.

gathering look more like a Howard Dean rally than the high-powered business meeting that in many respects it was. The discourse was uniformly affirming, congratulatory, and therapeutic; *process*, *journey*, *dialog* (as noun or verb)*, facilitating, verified* (on one occasion combined into "facilitated and verified dialogue"), *embedding,* and *message* were recurrent terms and dominant themes. Regardless of whether the speaker was the "Vice-President for People and Culture" at a fashion boutique or a tobacco company scientist, we did not hear a single question that was even challenging, let alone hostile. From all available evidence, this was a gathering of believers, a movement in progress. Everyone is trying to do the right thing, and the major issue is continued self-improvement Interviews of speakers and participants during breaks in the conference confirmed this impression; the language and demeanor were virtually identical to what we observed in the group sessions. Much of the talk focused on "us," presumably in reference to the CSR movement.

Despite its egalitarian tone, the movement clearly has its stars. At the BSR gathering, the CSR team from British American Tobacco was at the top of the A-list. Their breakout session on "Stakeholder Engagement: Learning from Experience" was the subject of intense anticipation. The presentation, delivered by a strikingly diverse four-member panel brought from BAT's locations around the world, to the accompaniment of sophisticated PowerPoint slides, played to a packed room.[44] The question period featured universal praise for BAT's engagement of stakeholders ranging from European health authorities to South African office workers to Central American farmers. When the formal session concluded the audience crowded onto the stage to

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[44] The BAT group was led by its CSR head, an Englishman who had been a medical researcher in a prominent scientific institute. It included a Central American man, an Australian woman, and a white South African man.

continue the discussion. Only the clearing of the room for the next session enabled the BAT people to extricate themselves and dash off to their next venue.

A somewhat different sense of the CSR movement emerged in February 2005, when we observed a conference sponsored by *Ethical Corporation* magazine entitled "Business/NGO Partnerships and Engagement: How To Make Sure Everyone Gets What They Want." Held at a hotel in London, it was considerably smaller than the BSR gathering, with about 200 attendees. Perhaps because of the British venue, it was also considerably more formal, with business suits the order of the day. Other aspects of the gathering exhibited both similarities and differences with the earlier American meeting.

The language was the same. Indeed, the two key words in the conference title, *partnerships* and *engagement,* had figured prominently in the discourse in Los Angeles. *Process* and *dialog* were also recurrent words and themes. By contrast, however, the language of affirmation, congratulations, and therapy that were so prominent in Los Angeles was largely absent in London. This difference was probably attributable to the narrower purpose of the London meeting. Whereas the Los Angeles conference had been a big-tent gathering of CSR enthusiasts, the London conference was focused on the nuts-and-bolts activity of organizing and managing partnerships in which an NGO advises and monitors a corporation in the area of the NGO's expertise—the environment, labor, human rights, etc.

This difference in purpose probably also accounted for a slight difference in tone between the two conferences. Every discussion we heard in Los Angeles was uniformly positive, but there was considerable tension in the air at the London sessions. Even when successful partners appeared on stage together to discuss and analyze their arrangements, each side took

considerable care to preserve its separate identity. One especially striking pairing involved the executive director of Greenpeace UK and the CEO of the British power company npower.[45] Although the particular "engagement" involved the monitoring of an offshore windmill project, the Greenpeace representative anticipated skepticism about his organization's involvement with a company that also generates nuclear power. He repeatedly stressed that Greenpeace remains a "campaigning NGO," always ready to take "direct action" in support of its "fairly radical policy positions." Speaking preemptively, he acknowledged "the risk of selling out." Aggressive questions from the floor indicated that his concern was well-placed.

Another session entitled "When Agreements Do Not Work Out" produced a level of hostility that would have been unthinkable at the Los Angeles gathering. The featured speaker was a former CSR executive from Asia Pulp and Paper ("APP"), an Indonesian company that has been targeted by environmentalists for its alleged destruction of rainforests. He analyzed the company's failed environmental partnership with the World Wildlife Federation ("WWF"). In neutral tones, he discussed the "language barriers" that can arise between NGOs, which speak an "aspirational language," and companies, which must speak a "specific language of performance." The barrier becomes particularly daunting, he said, with respect to the definition of success or failure. He also discussed the inherent difficulties in developing a relationship with an NGO that may have its own stakeholders all over the world: "Who are you actually dealing with?"

During the question period, his remarks elicited an attack from a woman in the audience who worked for the WWF. She asserted that "APP kept on talking while they logged the rainforest," and contrasted APP's behavior with that of other companies with which WWF had

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[45] *See infra* note 68 and accompanying text.

engaged. The APP man responded that "the differences between companies on the ground are very small," and arise "on the basis of style of engagement." He concluded that he was "personally hurt by WWF's failure to make meetings and return calls."

The point of these details is that they reveal an important distinction between CSR engagement in theory and in practice. At the theoretical level, the CSR movement is a monolith of like-minded people who engage in a uniformly positive rhetoric. When it comes time to practice the theory, however, as the London conference suggests, CSR practitioners are subject to the same pressures as business and political partners. The new governance is, after all, governance, with all its attendant complexities.

A final and striking point is that, at conferences and in interviews, we have observed a convergence the speaking styles of the corporate and the nonprofit participants in the CSR movement. The corporate participants are entirely comfortable with the jargon of the NGO world, with its feel-good, therapeutic focus on process. But at the same time, NGO executives are now routinely talking about their respective "brands." Indeed, in one interview, a representative from a well-known environmental organization dismissed a somewhat rowdier competitor as "unbranded." NGO people also regularly discuss adapting the corporate concept of "accountability" to their own organizations, seeking various kinds of "bottom lines" to apply to their activities. And even as they themselves function as stakeholders, they are beginning to acknowledge that they, too, have stakeholders who may have divergent views of the

organization's mission.[46] We explore some of these substantive themes in the sections that follow.

B.   The Substance of CSR Discourse

1.   Who Counts as A Stakeholder?

Beyond these issues of look and feel, the substance of the discourse at these and other conferences and in our interviews has also been revealing. In Los Angeles in 2003, for example, much discussion involved the organization of stakeholder dialogs: who participates, in what venues, and in what form. An obvious question is who counts as a stakeholder. As someone asked the BAT representatives in Los Angeles, "Who are the key players?" We would immediately include employees, residents of communities where the company has a significant presence (or "footprint"), and the governments of affected locales. Our informants within corporations, even in the United States, almost always list employees, customers, and community residents as stakeholders. [47] To this list the conference participants added, uncritically, "civil society," which tends to be used synonymously with "NGOs."[48]

In all of our observations and interviews, we have heard surprisingly little analysis of how particular NGOs become stakeholders in particular companies. One obvious way is by

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[46] As one of the BAT representatives succinctly put it during the Los Angeles conference, "stakeholders have stakeholders."

[47] Most of these people name employees first, sometimes ranking their interests ahead of those of shareholders. This is, of course, contrary to the traditional Anglo-American legal premise of shareholder primacy. For an analysis of the corporate law implications of expanding the corporation's constituency beyond its shareholders, see Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statues,* 61 GEO. WASH L. REV. 61 (1992).

[48] At one of the 2005 London conference panels, the research director of an educational NGO criticized this common usage, arguing that "civil society" includes both cause-oriented NGOs "and think tanks, church groups, and even the media."

"campaigning" against the company and then being approached to enter into a "partnership," as in the Greenpeace-npower case just discussed. Others gain de facto stakeholder recognition from a company after campaigning against it, thought they are not offered formal partnerships. We have heard of other instances in which companies invited NGOs into partnerships because of their visibility and apparent expertise on particular issues, such as rainforest protection, climate change, or labor rights. Neither in our observations nor our interviews (where we have posed the question directly), however, has anyone set out any explicit criteria for deciding who gets a seat at the stakeholder table. Instead, some have acknowledged that it depends largely on an NGO's ability to make noise. This reality tends to vindicate the concerns of new governance critics about the legitimacy and accountability of participants.[49]

2.   What Is "Stakeholder Dialog?"

Stakeholder dialogs are structured discussions among company participants, members of civil society, employees, community members, and advocacy groups. The specific goals of the dialogs vary depending on the company and the social issues it faces. In general, though, they have the goal of creating a forum and a format for two-way communication. Stakeholders provide information to the company about their views while the company has a context outside advertising or formal public relations to express its views about contested social issues. "Engagement" through stakeholder dialog is treated as a great good throughout the CSR movement. NGOs and socially responsible investors demand it, and, at least in Europe and the U.K., governments encourage it,[50] and may even delegate their regulatory roles to such dialogs.[51]

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[49] *See infra* notes __ and accompanying text.

[50] *See supra* notes __ and accompanying text.

Dialog with non-shareholders is seen as the process through which the concerns of the powerless are heard.

But even as dialog gives stakeholders a voice in corporate deliberations, it offers companies a way to control the way in which that voice is exercised. This point initially occurred to us during the British American Tobacco presentation at the 2003 BSR conference, when one of the company's representatives described the stakeholder dialog as beginning with the "mapping and classification" of stakeholders. BAT speakers also talked of using consultants to select stakeholder participants by determining "who exactly the key players are"; extensive preparation in order to "systematize" the dialog; achieving "consistency across regions" in order "to avoid sending different messages to different parts of the world"; and being careful to "provide stakeholders with clear parameters to show if the company was really doing what it had committed."[52]

The good news is that all of these approaches are perfectly rational, if not inevitable steps in organizing a potentially chaotic conversation with a host of self-proclaimed stakeholders. But this might also be construed as the bad news. To organize is to discipline, to control, and to

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[51] One such "regulatory dialog" involved the American and British governments convening stakeholders to establish voluntary principles for security arrangements to be used by the extractive industries (oil, gas, and mining). One participant in this dialog told us that the U.K. government would host most of the meetings, but would do little more than bring industry and investors and NGOs together, "give them a nice tea, and then tell them to go off to a conference room and figure the problem out, and reports back when they had a solution." *See* Cynthia A. Williams, *Civil Society Initiatives and "Soft Law" in the Oil and Gas Industry,* 36 N.Y.U.J. INT'L POLITICS 457 (2004)(analyzing this case); Shamir, *supra* note 1, at 645 (discussing "soft law" solutions generally).

[52] At the same time, BAT's CSR reports indicate that a number of key stakeholders, in particular members of health advocacy organizations, refuse to participate. *See infra* notes __ and accompanying text.

limit. As the social philosopher Michel Foucault and others have argued, becoming engaged with the state comes at a cost.[53] To be recognized by the apparatus of the state often means to acquiesce in, if not surrender to, its principles of classification and rules of engagement, to give up a part of one's autonomy.[54] These same principles may apply to the corporation, a creature of the state that–especially in the case of the large, multinational company—mimics it in many important respects. Indeed, new governance theory recognizes the corporation as a partner of government in the post-regulatory paradigm.[55] From this perspective, what a company like BAT characterizes as the value-neutral "facilitation" of stakeholder dialog can be seen as an exercise in control—control over who participates, how things get said, and, consequently if indirectly, what gets said. Although intent may be irrelevant to effects, this issue does bring into focus a question that remains central in evaluating CSR: what are the motivations of the companies that are participating?

        3.   How Serious Are the Participating Corporations?

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[53] *See, e.g.,* MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF PRISON 222 (1977, orig. 1975):

> Historically, the process by which the bourgeoisie became in the course of the eighteenth century the politically dominant class was masked by the establishment of an explicit, coded and formally egalitarian juridical framework . . . . But the development and generalization of disciplinary mechanisms constituted the other, dark side of these processes. The general juridical form that guaranteed a system of rights that were egalitarian in principle was supported by these tiny, everyday, physical mechanisms, by all those systems of micro-power that are essentially nonegalitarian and asymmetrical that we call the disciplines. . . .

For a general discussion of Foucault's point, see CONLEY & O'BARR, *supra* note 37, at 7-9 (1992).

[54] For example, in an ethnographic study of working-class Americans seeking redress from the legal system, the anthropologist Sally Engle Merry has documented the "paradox of legal entitlement." The use of the legal system empowers such people, but it can also result in the encroachment of the state on their privacy and autonomy; entitlement can lead to dependency. SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 172-82 (1990).

[55] *See* Part IV *infra.* For an example of this new reality, see *supra* note __.

Our interviews of corporate CSR specialists and their consultants are providing a window on the day-to-day world of CSR in practice. As might be expected, what we have heard is calmer, more reflective, and sometimes more cynical than what is said in the revival-like atmosphere of a large gathering. Nonetheless, the content is consistent. People think CSR is here to stay and is effecting a meaningful change in corporate behavior. Both corporate CSR specialists and consultants believe that the executives they work for take it seriously. It is widely believed that if a company adopts appropriate processes for talking with stakeholders and reporting its performance then salutary outcomes will ensue.

Interestingly, the jury of CSR insiders is still out on the economic benefits to be derived from good corporate citizenship. With the exception of those in the socially responsible investment business, we have not heard anyone make a robust claim that CSR can be shown to boost the traditional bottom line. One corporate CSR specialist told us that his very large agricultural company had seen a measurable effect on reducing pesticide use, but the number he cited was orders of magnitude short of materiality. Other people within companies have discussed positive effects on employee recruitment and retention as well as customer loyalty, but, surprisingly to us, most have mad no serious efforts to quantify these perceived benefits. Nonetheless, everyone with whom we have spoken believes that CSR will prove itself to be economically efficient, at least in the negative sense of heading off such things as labor unrest, customer defections, costly environmental problems, and, importantly, government interventions.[56] As far as consumers are concerned, however, every person we have heard or

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[56] For two recent examples of potential bottom-line effects, *see Ethical Corporation Magazine*, "Study Reveals Corporate Social Responsibility a Major Factor in Overseas Investment and Purchasing," Press Release of January 20, 2004 (www.cswire.com/article/cgi/2410.html) (reporting study by CSR consulting firm that suggests that multinationals take CSR issues into account in selecting suppliers and business partners);

interviewed has agreed with the proposition that they (except for an affluent niche) will not pay more for responsibly-produced products.

Against this background of general corporate optimism, our field work has also suggested a number of cautionary notes. An initial observation is that the very existence of a coherent CSR movement may invite insincerity. A company could learn the culturally appropriate behaviors and participate in the CSR discourse without significantly changing their real-world behavior. In this view, CSR participation is little more than a show of voluntary reform intended to head off government mandates, preempt NGO attacks, and succor favor with the minority of CSR-conscious consumers. One proponent of this view has described corporate participants in CSR as "struggling to structure it around voluntary self-regulation and to position themselves as authoritative players within it."[57]

The response to this concern is that since reporting is a fundamental tenet of CSR a corporate *poseur* would not escape detection for long. The counter-response, however, is that the bulk of what is reported is itself process; indeed, the substance of CSR seems to be process. Despite a great deal of talk about emerging CSR "metrics," the things that command attention among those we have observed and interviewed are, as we noted above, such intangibles as dialog, the embedding of CSR "in the corporate DNA," and embarking on journeys. We have heard corporate CSR people ask, "What should we be doing to *demonstrate* we're a socially

World Economic Forum, "Why Global Citizenship Matters for Shareholders: A Survey of CEOs," Press Release of January 8, 2004 (www.cswire.com/article.cgi/2377.html) (survey indicates that 70% of CEOs believe that mainstream investors will factor CSR into their investment decisions). For a review of the argument that CSR may be a threat to economic growth, see *A Matter of Priorities for Europe: NGOs and Unions Are Upset with the New Economic Commissionfor Its Renewed Focus on Jobs and Economic Growth,* ETHICAL CORP., Feb. 2005, at 9.

[57] Shamir, *supra* note 1, at 655.

responsible company?" Others have spoken of the need "to avoid sending different *messages* to different parts of the world" and, perhaps most tellingly, have characterized themselves as "stewards of our *reputation.*" When one considers this reality against the background of an active and growing CSR communication industry,[58] at least some skepticism is warranted.

In fact, some CSR insiders have expressed a concern that *others* may be "gaming the system," as a corporate CSR manager put it to us. This individual, who is particularly knowledgeable about labor practices in China, worried aloud about the difficulty of translating stakeholder dialog into lasting improvements in the workplace. He noted that a socially responsible American buyer of Chinese goods might listen to its worker-stakeholders, impose a code of conduct on its suppliers, get their promised compliance, and even engage a third-party CSR auditor to perform monthly inspections, only to hear through back channels that the suppliers were reverting to business as usual the other 353 days of the year. Remarkably, the week after our informant had discussed this problem in the abstract, the *New York Times* reported the very same behavior in the Chinese toy industry.[59] If Chinese manufacturers can learn and manipulate the rules of CSR discourse with such evident facility, then there may be reason to wonder if others, closer to home, are doing similar things.

Similar skepticism emerged as we participated in an online conference during the last week of January and first week of February in 2004. Sponsored by the World Bank, it was

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[58] Subscribers to the various electronic CSR news and reporting services (as we are) receive regular invitations to conferences on CSR public relations, communications, and reputation management. One of the most useful of these services, London-based CSRWire Weekly Alerts, regularly carries this legend: "Your company has a story to tell that sets it apart—CSRWire delivers it. Contact us at sales.csrwire.com for information on how CSRWire can work for you."

[59] Joseph Kahn, *Ruse in Toyland: Chinese Workers' Hidden Woe*, N.Y. TIMES ONLINE, Dec. 7, 2003 (www.nytimes.com/2003/12/07/international/asia/07CHIN.html?th).

entitled "E-conference on the Possibilities and Challenges of Corporate Social Responsibility Among Small and Medium Enterprises."[60] Although no conference roster was distributed, the postings suggested that a majority of participants came from the public and nonprofit sectors, with substantial representation of the underdeveloped world.

As evidenced by its frequent citation, the conference seemed strongly influenced by a report that had just been issued (on January 21, 2004) by Christian Aid, a respected British relief agency. The report, *Behind the Mask: The Real Face of Corporate Social Responsibility*,[61] is a scathing indictment of the CSR movement generally and several companies in particular, including British American Tobacco, Shell, and Coca-Cola. Christian Aid defines CSR as "a catch-all term increasingly used by business, which encompasses the voluntary codes, principles and initiatives companies adopt in their general desire to confine corporate responsibility to self-regulation."[62] It characterizes the whole movement as a disingenuous public relations exercise: "corporate enthusiasm for CSR is not driven primarily by a desire to improve the lot of the communities in which companies work. . . Rather, companies are concerned with their own reputations, with the potential damage of public campaigns directed against them, and overwhelmingly, with the desire–and the imperative-to secure ever–greater profits."[63] Noting the emergence of what we characterized above as the "CSR community," the report observes that

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[60] The World Bank has not issued any post-conference report. Although we participated without any understandings concerning confidentiality, we see no reason to identify participants or their organizations when quoting their remarks. Hard copies of all quoted remarks are on file with the authors. We copy-edited the kinds of minor typographical errors that are common in rapid-fire email correspondence. We use brackets to mark instances in which we added or changed a word that had obviously been omitted or mistyped. We have not marked corrections to punctuation.

[61] Christian Aid, *Behind the Mask: The Real Face of Corporate Social Responsibility* (Jan. 21, 2004), available at www.chrsitianaid.org.uk/indepth/0401csr/csr_behindthemask.pdf.

[62] *Id.* at 5.

[63] *Id.*

London "is now awash with PR consultants, social auditors, firms providing verification or 'assurance' for companies' social and environmental reports, and bespoke investment analysts all vying for business."[64]

Several of the participants in the World Bank conference made direct reference to the Christian Aid report, or to an article in *The Economist* that described it. A representative of a for-profit CSR consultancy took a shot at the messenger–"*The Economist* is very much against CSR so anything they write on it should be taken with a very large pinch of salt"–and defended the multinationals that are prominent in the CSR movement: "Those companies who are brave enough to engage with CSR, to do something and put their heads above the parapet will get shot at–this is an early price of engagement." Others retorted quickly and strongly. For example, an American of uncertain affiliation criticized "overly optimistic reports by many leading companies." He argued that "[r]ather than dismissing this with 'a large grain of salt' because it is reported by *The Economist,* we should embrace and discuss the point being reported that corporations and their suppliers have to raise [their] equitable social standard globally through enforcement of their own or face the inevitable calls . . . ."

Numerous other correspondents, especially those from the underdeveloped world, took up Christian Aid's point about the primacy of economics. Echoing the comments quoted above

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[64] *Id.* at 8. The report specifically accuses Shell of making false promises of responsible behavior in Nigeria, and Coca-Cola of depleting village wells in India. *Id.* at 2, 22-33, 44-49. In a chapter called "Hooked on Tobacco," BAT is attacked for allegedly jeopardizing farmers' health in Kenya. *Id.* at 34-43. Referring to BAT's much-praised stakeholder dialog, *see supra* notes __ and accompanying text, Christian Aid criticizes BAT for imposing "rules in which participants are unable to reveal discussions to outsiders" and for "the lack of NGO and campaigning-group participants." *Id.* at 12 (quoting interview with Jeff Collin and Anna Gilmore of London School of Hygiene and Tropical Medicine); *see also* Jeff Collin & Anna Gilmore, *Corporate (Anti)Social (Ir)Responsibility: Transnational Tobacco Companies and the Attempted Subversion of Global Health Policy*, 2(3) GLOBAL SOCIAL POLICY 354 (2002).

about labor practices in China, they emphasized how unrealistic CSR may seem to small and medium enterprises (SMEs) trying to establish themselves in multinational supply networks. A comment by a representative of a Nigerian NGO was both pointed and poignant: the "challenge of being [a] socially responsible SME is not valid when their possibilities of existence [are] close to zero." A person from another African NGO said that "here in Nigeria, SMEs are currently locked up with big issues on funding and how to secure loans for themselves . . . so any mention of CSR is strange to a good [number] of them."

The postings by a person describing himself as "a CSR practitioner responsible for ethical supply chain management" in a British retail company were especially interesting because of the breadth of his perspective. Speaking of his company's suppliers, he confirmed that "most SMEs, particularly in the developing world, are under severe pressure on cost/price, leaving little money, time or empathy for CSR." In addition, "many workers state that the most important CSR issue FOR THEM is the fair payment of wages. . . . A shiny new factory with great health and safety but miserable wages is still a miserable factory." Ultimately, "a race to the bottom in pricing may result in a lack of pick-up amongst SMEs or CSR or, worse, a race to the bottom in labour standards."

Confirming his own observations, the correspondent quoted "one friend who owns a factory" on several issues. First, "the 'business case' for CSR in SMEs is weak. Unfortunately CSR leads to significantly higher profits much more often in textbooks than it does in reality." At best, "there can be 'fringe' business benefits of higher staff morale, better attendance, easier recruitment, better staff retention, etc.," but "the actual contribution of these factors to the bottom line is limited in an SME context." And in a harsh comment on the CSR community that

Christian Aid mocked, the factory owner was reported to have said "I was convinced by a consultant/customer/business association of the business benefits of CSR, but it doesn't work!"

The comments by informants within small and medium-sized entities indicate the importance of large corporations in "driving" CSR through the global supply chain. Yet those responsible for CSR in large corporations are typically not management heavyweights. The people holding this portfolio whom we have interviewed vary in age and tenure with the company. Some have come from public relations, some from personnel, some from safety, some from operations, and some were hired as CSR specialists. None, however, seems to have come from a background of management participation at a strategic level. Without exception, they stress the dependency of CSR on "senior management buy-in." Some tell stories of CEOs starting a CSR program on their own initiative, whereas others talk of top executives being persuaded by others. In all cases, though, carrying through on CSR is described as a "top-down" proposition, and even those who carry the CSR banner for very large companies tend not to be very near the top. While this state of affairs may not threaten the CSR movement, it is grounds for concern about the capacity of CSR programs to survive executive turnover, especially of the involuntary sort. To be fair, the uniform response to this concern among the mid-level flag-bearers is that CSR has become an imperative that any future management will be forced to respect.

A final and related point about corporate commitment involves the nature and scale of CSR projects. Two phrases that have recurred throughout our observations and interviews are *scale-up* and *core businesses*. The former is usually heard in a discussion of a particular CSR demonstration project, such as the Greenpeace-npower wind power partnership, or a water

purification project launched in India by a British water company.[65] The obvious point is that

companies must "scale-up" their CSR efforts to have more than a token impact. This often leads

to a mention of the second point: that companies typically focus on CSR in niche activities, not

"core businesses." At the 2005 London conference, for example, a Kraft representative who

spoke about fair trade for the company's coffee suppliers was reminded by questioners from the

floor that this initiative represented only a tiny piece of Kraft's food-buying activities.[66] There

is, our evidence suggests, much skepticism in the CSR world about how much impact dialog,

embedding, and buying-in have had on large-scale corporate behavior.[67]

4. What is the Attitude of the NGOs?

There is evidence from our observations and interviews that even as NGOs develop a

more corporate style, their substantive outlook and behavior grow more corporate as well. At the

recent London conference, SustainAbility's research and advocacy director observed that the

nature of NGOs' power is changing. Traditionally, he said, NGOs sought and exercised power

"through confrontation"; now, however, they are "controlling the agenda and defining the

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[65] This project, which involved a partnership between RWE Thames Water and Care International, was the subject of a panel at the 2005 London conference.

[66] Compare the panel at the 2003 Los Angeles conference on "Addressing the Impact of Your Core Product: Kraft and Obesity."

[67] There are some widely-discussed CSR success stories, and the question of what success looks like will be a subject of our future research. British Petroleum is one frequently cited example, although a complex one given the nature of the company's business. Another is the fruit company Chiquita, where we have already conducted some interviews. The elements of "success" at Chiquita appear to include living wages and other labor advances, sound environmental practices, and control over the supply chain. A critical factor in achieving success may be the development of multiple pro-CSR power sources, including strong unions and a board that seeks and receives independent reports on the company's CSR performance. For a laudatory account of Chiquita, see J. GARY TAYLOR AND PARTICIA J. SCHARLIN, SMART ALLIANCE: HOW A GLOBAL CORPORATION AND ENVIRONMENTAL ACTIVISTS TRANSFORMED A TARNISHED BRAND (2004).

choices that are available" to companies facing CSR pressure. NGOs are "no longer just gadflies," he continued, but are "part of the system now." NGO officials acknowledge this, but at the same time worry about the effect on their "brands." As noted above, the Greenpeace UK executive director, analyzing his relationship with npower, went to great lengths to stress that his organization is still a "campaigning NGO."[68] But he recognized that once Greenpeace allows itself to be used for corporate marketing,[69] "We're at risk of selling out." Greenpeace and other environmental organizations repeatedly stress the need to avoid complicity in "greenwashing" corporate environmental malfeasance.

Another piece of evidence of the NGOs' adoption of corporate language and behaviors is a growing concern with accountability. For example, a plenary panel at the 2005 London conference was devoted to "NGO accountability…what's being done to create greater transparency?" Transparency is not just a business buzzword, of course, but has long been the pivotal concept in financial reporting. One speaker, from the educational NGO One World Trust, carried the linguistic merger so far as to say that accountability must be "embedded" *in the NGO*, *from the top down*—a statement we have heard from and about dozens of corporations. There was also general agreement that, as NGOs demand that corporations account to their broad stakeholder base, the NGOs must do the same.

But the same discussion also illuminated a number of significant differences between NGO and corporate accountability. An anonymous questioner from the floor argued that NGOs

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[68] *See supra* Part II.A.

[69] npower advertises this project as "npower Juice … clean, green electricity … developed through a partnership between npower and Greenpeace." *See* http://www.npower.com/At_home/Juice-clean_and_green/About_Juice.html (visited March 18, 2005).

must be wary of demands for accountability, since they were sometimes a pretext for efforts to defang aggressive NGOs and limit their ability to act. Another made the related point that pro-plaintiff libel laws in the U.K. already tipped the "accountability" balance too far in favor of companies, while yet another pointed out that NGOs are inherently accountable to those upon whose financial largess they depend.

All of the members of the panel appeared to accept the basic premise of accountability, but they, too, pointed to a number of distinctions between the corporate and NGO versions. The representative of One World Trust made the point that, whereas NGOs are spread out across cultures, accountability is an Anglo-Saxon word and concept: "*Accountability* doesn't translate into almost any other language." He asked what "accountability" could mean in the case of NGOs, arguing that "it's not legitimacy, not democracy, nor transparency." A panelist from Christian Aid acknowledged that "NGOs like Christian Aid are not as accountable as they should be." He pointed out, however, that a company can make money and thus succeed even if its investment is bad for the community, but an NGO fails and dooms itself to extinction by doing the same thing. He also decried NGOs that engage in "horrible company-style CSR presentations." The only corporate comment during the session—from a British American Tobacco representative—took a completely different tack, suggesting that the issue was "not accountability, but contestability," meaning that NGOs should present their positions in the form of testable and refutable scientific positions.[70]

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[70] The comments quoted in the text appear not to have been directed to financial accountability. That issue, too, has recently become front-page news. *E.g.,* Michael M. Phillips, *Big Charities Pursue Certification to Quell Fears of Funding Abuses*, WALL ST. J., Mar. 9, 2005, at A1.

On this issue as well, then, the CSR movement is grappling with one of the fundamental dilemmas identified by the critics of the new governance paradigm.[71] If devolved governance is to have legitimacy, then so must the participants. This legitimacy, the critics argue, must relate both to selection and to conduct going forward. In the case of CSR, our research indicates, those whose legitimacy is at issue recognize the problem but are far from any consensus on its resolution.

5. The Role of Government

An irony of the CSR movement is that even as governments devolve power onto private actors, those same actors express great concern about the role of government. This concern focuses on two levels of government. First, NGO representatives have repeatedly told us that multinational corporations take social responsibility seriously only when pressured by their home governments–the United States, the U.K., and the EU. Many of them have emphasized the significance of the British government's activity in fostering enhanced social and environmental responsibility.[72] Again with reference to the British case, they point out that mandating particular behaviors is not always necessary; requiring disclosure and then exerting public pressure in favor of the adoption of "best practices" codes can be as or more effective.[73] Nonetheless, in our observations and interviews, there has been unanimity that the corporate

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[71] *See infra* notes __ and accompanying text.

[72] *See supra* notes __ and accompanying text.

[73] *See supra* notes __ and accompanying text.

social responsibility movement will stall without government involvement. Not surprisingly, these comments often conclude with criticism of the American government's inactivity. [74]

At the other end of the government spectrum, there is also great concern about the potential of the CSR movement to inhibit the growth of strong local government in places where corporations are "engaged" with NGOs. In some instances, circumventing a corrupt local government is the very purpose of the corporate-NGO partnership. But even where the local government (particularly at the regional or village level) is doing its honest best, the partnership's economic and political muscle may make it appear irrelevant. When this happens, a number of our informants have warned, local good government advocates may simply give up. The effects of this are particularly pernicious when the specific work of the partnership (in one example given, insuring that an influx of workers to build a plant does not disrupt local life) is done, the foreigners have largely withdrawn, and the locals are, once again, left to fend for themselves. Far from being strengthened by the activities of the corporate-NGO partnership, local institutions will have atrophied, leaving the community less prepared than ever to deal with the challenges of globalization. [75]

C. The Investor Perspective

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[74] There is a dissenting view. In an interview in 2004, one of the most prominent Dutch scholars of CSR argued to us that the United States was far ahead of Europe in promoting "green" corporate behavior. When we expressed surprise at this flouting of the conventional wisdom, she responded, "It's the lawsuits"; without the threat of litigation, European-style government cajoling was, in her view, meaningless.

[75] Perhaps tellingly, we have seen no representatives of affected local governments making presentations at any conference. The closest voice we heard was that of a Nigerian employee of Shell who, poignantly and effectively, reaffirmed the points made in the text in a comment from the floor during an environmental panel at the London conference.

We have been repeatedly told that the critical impetus toward corporate social responsibility will come from large institutional investors, particularly pension funds. Individual investors, however large their portfolios, are deemed uninterested and therefore irrelevant. CSR enthusiasts hope, however, that those who direct institutional investment will construe the promotion of CSR as part of their fiduciary duty and either limit their investing to responsible companies or take an active role in the governance of the companies they buy so as to demand socially and environmentally responsible behavior. Encouraging this kind of institutional investor activism is a critical part of the British government's CSR initiative.[76]

Our interviews have revealed, however, that the institutional investor outlook is complex. It is true that there is a growing voluntary movement in favor of socially responsible investing. Some mutual funds with strong track records are successfully selling the proposition that social and environmental responsibility is good for business, and offer portfolios limited to companies that pass their particular screens.[77] TIAA-CREF, the pension fund to which most college professors belong, has long offered participants in its defined contribution plans the option to invest their money in socially-responsible funds.[78]

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[76] *See supra* notes __ and accompanying text.

[77] For examples of such funds and descriptions of their performances, see http://www.kld.com (KLD Research & Analytics, Inc., visited March 15, 2005), and http://www.domini.com (Domini Social Investments, visited March 15, 2005).

[78] *See* http://www.tiaa-cref.org ("Social Choice" link; visited March 15, 2005). In a defined contribution plan, the participant and the employer both make regular contributions in the participant's name over the course of his or her working life. The pension that the participant actually receives is entirely dependent upon the market performance of the investments. *See* O'BARR & CONLEY, *supra* note 39, at 21.

Offering a voluntary option to beneficiaries who control their own accounts is straightforward. Defined benefit pension plans,[79] which comprise the single largest segment of the institutional investor community in both the United States and the United Kingdom,[80] present a far more difficult case. Because the plan promises to fund benefits at a particular level, beneficiaries who agitate for socially responsible investing (or any particular investment strategy) are playing with house money, not their own.[81] Our interviews suggest that the defined benefit group has divided itself into three camps. All three start from the premise that the law requires them to act solely in the "best interests" of their beneficiaries.[82] At one end of the

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[79] In a defined contribution plan, the employer promises a particular level of pension payments and then invests assets in an effort to fund the future payouts it will be obligated to make. *See id.*

[80] *See* Williams & Conley, *supra* note 6, at __.

[81] This is how the problem was described to us by an SRI specialist at a large British educational pension fund.

[82] For an introductory discussion of this legal standard, see *id.* at 19-21. In the United States, the closest thing to an authoritative statement of a fiduciary's proper approach to CSR is Department of Labor Interpretive Bulletin 94-2, which identifies the voting of proxies as a fiduciary duty and requires that, in voting proxies, "the responsible fiduciary consider those factors that may affect the value of the plans' investment and not subordinate the interests of the participants and beneficiaries in their retirement income to unrelated objectives." Interpretive Bulletin relating to written statements of investment policy, including proxy voting policy or guidelines, 29 CFR § 2509.94-2 (2004). This Interpretive Bulletin also recognizes that shareholder activism "intended to monitor or influence the management of companies in which the plan owns stock is consistent with a fiduciary's obligations under ERISA where the responsible fiduciary concludes that there is a reasonable expectation that such monitoring or communication with management . . . is likely to enhance the value of the plan's investment." *Id.; see* Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1076 (1998) (discussing the controversy over whether fund managers have the power to consider other values beyond shareholder wealth maximization, given the Interpretative Bulletin); *see also* O'BARR & CONLEY, *supra* note 39, at 229–232 (1992) (discussing the influence of fund managers in shaping the corporate governance debate over the Interpretive Bulletin). Curiously, the British commission on the CSR duties of institutional fiduciaries seems to view the weakly-worded Interpretive Bulletin as a strong endorsement of CSR activism. *See* Williams & Conley, *supra* note 6, at __.

spectrum are those who believe that those best interests include a just and environmentally sustainable world. Thus, they argue, they are not only permitted but even required to take CSR into account when making investment decisions and, most importantly, in exercising their governance authority as shareholders. The latter activities include voting proxies, occasionally filing resolutions, and "engaging" (another use of that term) with corporate management to promote CSR. One high-level executive at a British company that manages investments for many pension funds told us that she thought it is her obligation to "lead" those funds toward a socially-responsible investing philosophy.

At the other end are those who characterize themselves as "mainstream" pension fund managers. Their perspective is almost 180 degrees opposite. An executive for another British company that also manages assets for a large number of pension funds described CSR investor activism as a fringe movement. He said that his clients express no interest in it and that it is his responsibility to make money for those clients–not to advocate for his own social or political views.

The tension between these two approaches was strikingly evident in an interview with a British consultant who practices both mainstream and socially responsible investing at the same time. One facet of his professional life involves advising "ultra-high net worth individuals" for a mainstream investment company. These people, he reports, are interested only in financial returns. But he also is a prominent member of several nonprofit CSR think tanks, including one organized by British business interests. In that capacity, he has helped to compile an "engagement index": a list of companies, half of which are located in the developing world, that provide good returns for investors and whose CSR performance will be monitored according to a set of "engagement principles." Our source's group "licenses" the list to institutional fund

managers, who then invest in some or all of the companies and also agree to pay a small portion of their returns to a group of "engagement professionals" who monitor the companies' behavior and interact with management as appropriate. Significantly, the companies are chosen because of their investment value and are not dropped on the basis of their substantive CSR performance. The source contrasted this approach with the more common practice of "filtering,"[83] which involves refusing to invest in companies that fail to pass some CSR test. He described the index approach as still in its formative stages, with three licensees thus far.

A middle ground may well be the wave of the future. In our interviews, this position was represented by an executive at a large defined benefit pension plan in the U.K. He agreed with his "mainstream" counterparts that his sole legal duty is to manage investments in the best financial interests of his beneficiaries. But, he continued, successful risk management is a critical component of corporate success. Since social or environmental irresponsibility can, in his judgment, create material financial risk for a company, it is his job to screen investments for such risks and, once invested in a company, to advocate forcefully with management to minimize such risks going forward. He acknowledged that his behavior is similar to that of the "leadership" proponent, but he was careful to point out that it is motivated by a very different theory that is entirely consistent with the traditional financial view of fiduciary responsibility.

III. Analyzing the Discourse of CSR Reporting

Similar themes can be seen in the written CSR reports that increasing numbers of global companies now publish.[84] These reports are typically glossy, elaborate documents that resemble

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[83] This source and others have associated filtering with American investment practices.

[84] *See supra* notes __ and accompanying text.

annual reports to shareholders in their professional production values. Various sorts of specialists are presumably involved in their preparation. However, they are entirely voluntary, neither their existence nor their format being dictated by governments.[85] Thus, they reflect the considered choices that companies make about how to discuss corporate social responsibility, and their style and content are especially revealing for this reason.

Sharon Livesey, a lawyer and business communication scholar, has recently initiated the critical linguistic analysis of corporate CSR reports. We have also begun work of our own in this area, and describe some of our results below.[86] Livesey has analyzed the discourse[87] employed in the 1998 CSR reports of Royal Dutch/Shell Group and Body Shop International, PLC.[88] Her method involves the identification and categorization of "salient themes, metaphors, modes of expression, and argument structures."[89] She, too, draws on Foucault's theoretical perspective, emphasizing his belief that "meaning is not fixed; rather, it must be constantly reproduced and reconstituted."[90] CSR discourse represents such a reconstitution, "the emergence of a new,

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[85] Although several European governments now require the disclosure of social and environmental risks that are financially material, *see supra* notes 6-15 and accompanying text, these wide-ranging CSR reports are voluntary. As noted above, some critics, like Christian Aid, characterize them as an effort to preempt mandatory reporting. *See supra* notes __ and accompanying text.

[86] *See infra* notes __ and accompanying text.

[87] For a description of discourse analysis, *see* CONLEY & O'BARR, *supra* note 38, at 2-19.

[88] Sharon M. Livesey, *The Discourse of The Middle Ground*, 15 MANAGEMENT COMM. QUART. 313 (2002) (hereinafter *Middle Ground*); *Transparent and Caring Corporations? A Study of Sustainability Reports by The Body Shop and Royal Dutch/Shell*, 15 ORGANIZATION & ENVIRONMENT 233 (2002) (hereinafter *Transparent and Caring*). Shell's move to CSR reporting followed a strong international reaction against its plan in 1995 to dispose of the North Sea oil platform Brent Spar, and the Nigerian government's execution that same year of nine activists who opposed Shell's oil business. Shell has also been accused of leading a campaign against the United Nations' proposed Norms on Business and Human Rights. *See* Corporate Europe Observatory, *Shell Leads International Business Campaign Against UN Human Rights Norms,* available at www.corporateeurope.org/norms.html (visited March 31, 2004).

[89] *Middle Ground* at 321; *see supra* notes __ and accompanying text.

[90] *Id.* at 319.

unstable discursive order, which joins the heterogeneous elements of the distinct domains of economics, environmentalism, and social justice."[91] From the Foucaldian perspective, power can be both a cause and an effect of control over this emergent discourse.[92]

Examining the Shell report, Livesey looks specifically at the concept of the "triple bottom line" (financial, social, and environmental performance).[93] (Shell refused to adopt the triple bottom line literally, but made a functionally equivalent commitment.[94]) She attributes the concept to the British environmental activist-turned sustainability consultant Steven Elkington, whom Shell hired as a consultant and whose writing is incorporated into the report—part of what Livesey calls the "institutionalization" of CSR discourse.[95] The use of the triple bottom line has two somewhat contradictory effects. On the one hand, it "softens" traditional business discourse by importing "values of environment and social welfare," introducing language such as "social value added," "environmental value added," and "natural and social capital." Consequently, "[w]ealth creation," the fundamental objective of the economic paradigm, is transformed into "sustainable value creation."[96] Simultaneously, however, the discourse of the triple bottom line "hardens" the inherently imprecise discourse of social and environmental justice. "[T]his metaphor and methodology constructed sustainable development as a measurable outcome to be objectively determined."[97] As a result, Shell was able to present itself as sensitive and scientific, caring without being sentimental, and equally attentive to the straightforward financial demands of shareholders and the inchoate desires of the loosely defined stakeholder class. Above all,

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[91] *Id.*

[92] *Id.; see* CONLEY & O'BARR, *supra* note 37, at 7-8; LISA LITOSSELITI & JANE SUNDERLAND, GENDER IDENTITY AND DISCOURSE ANALYSIS 18-22 (2002).

[93] *Middle Ground* at 329-330.

[94] *Id.* at 329

[95] *Transparent and Caring* at 246.

[96] *Middle Ground* at 329-30.

[97] *Id.* at 330.

Shell imposed discipline on the potentially messy CSR discourse, preserving as taken-for-granted "certain fundamental values of economic and management models, such as consumerism, growth, and efficiency."[98]

Livesey emphasizes the same contradiction in her comparative analysis of the reports from Shell and The Body Shop. On the one hand, both companies employed "the discourse of care," "bolster[ing] their claims of transparency with the assertion that they were companies who 'cared.'"[99] In response to criticisms that their CSR reporting was therefore imprecise and unscientific, "these corporate reporters asked that—for the time being—they be judged by a seemingly more generous set of criteria, those of human feeling and trust, and that they be given credit for doing reports in the first place."[100] But even as they asked for trust as a substitute for evidence, both companies made strategic use of the ostensible objectivity of adherence to "expert" standards. They recognized that in an impersonal world "standardization is key to making results transparent, and professional verification of report content and processes by outside experts replaces personal witnessing." Of particular value is quantification, "a fundamentally social technology that provides 'a way of organizing commercial and bureacratic life.'"[101] Shell and The Body Shop thus have it both ways, cloaking their "soft" and subjective appeals for trust in the "hard" rhetorical forms of the rigorous domains of accounting and science.

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[98] *Id.*

[99] *Transparent and Caring* at 251.

[100] *Id.* Livesey's use of "the discourse of care" is strongly evocative of Carol Gilligan's now-classic liberal feminist formulation of "the ethic of care." CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 62-63 (1982).

[101] *Transparent and Caring* at 249 (citation omitted).

We have also begun our own program of analyzing the discourse of CSR reports. Our first two subjects have been the 2003 reports issued by ExxonMobil and British American Tobacco p.l.c.[102] We chose ExxonMobil to provide a sector comparison to Livesey's Shell analysis, and because ExxonMobil entered the CSR era as perhaps the world's greatest environmental villain following the *Exxon Valdez* oil spill in 1989 We selected BAT to complement our previous analysis of the public discourse strategies employed by its CSR team,[103] and because of the particular difficulties faced by a tobacco company seeking to be socially responsible.[104] Our analyses are consistent with Livesey's findings, and reveal some additional themes.

From the very beginning, the short, succinct, and glossy ExxonMobil report blends the social and the economic, the 'soft' and the 'hard', the rhetoric of care and the rhetoric of analysis. The single-page introductory letter from Chairman and CEO Lee R. Raymond states as the company's the goal the creation of "sustainable shareholder value."[105] This simple yet powerful phrasing merges the traditional, narrowly economic vision of corporate fiduciary responsibility with the loosely-defined notion of sustainability, with all of its connotations of broader social and environmental responsibility.[106] But the next two paragraphs disclaim the

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[102] ExxonMobil Corporate Citizenship Report (May 2003) (hereinafter ExxonMobil), available at www.exxonmobil.com/corporate/files/corporate/CorporateCitizenship2002.pdf; British American Tobacco p.l.c. Social Report 2002/03 (hereinafter BAT), available at www.bat.com/socialreport.

[103] *See supra* notes __ and accompanying text.

[104] BAT's dilemma was reflected in a recent interview with a representative of a British scientific research institute that is advising BAT on managing its land around the world. He said, "We wish BAT didn't exist. But it does, and it's a steward of the land. So we help them."

[105] ExxonMobil at 1.

[106] As Livesey points out, "[s]ustainable development is a complex notion that seeks to reconcile the goals of economic development and ecological wellbeing"; she further characterizes it as "a contested terrain" and "a source of confusion." *Middle Ground* at 315-16.

ability to exert substantial influence in the non-economic sphere, and redefine social responsibility in primarily economic terms:

> However, we cannot be all things to all people . . . our primary responsibility to society is to do our job well–providing the world with abundant, affordable energy in a safe, reliable and environmentally responsible manner.

> Many other forces–cultural, political and environmental–have an impact on society that is greater than ours.[107]

The chairman then reiterates this Adam Smith-like conception of social good ("our activities and those of others in private industry deliver economic benefits and help advance worthwhile societal goals") and backs up the assertion by citing the "value to consumers" of the company's products, the billions it invests in research, the billions more it pays in taxes and royalties, the still more billions it spends on goods and services, the dividends it pays to its shareholders, and the employment opportunities it offers.[108] Only then does the letter allow for the possibility of "other" forms of social contributions, and that in a backhanded way: "Although these economic contributions form the core of the social benefits that ExxonMobil delivers, there are many other ways we contribute."[109] Finally, the chairman states that even ExxonMobil's "wider involvement in society" will be governed by 'hard' analysis, the "rigorously applied management systems" that mark its core endeavors: "Our approach to

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[107] ExxonMobil at 1.
[108] *Id.*
[109] *Id.*

corporate citizenship reflects our scale and the disciplined approach we take to all aspects of our business."[110]

The remainder of the 41-report is a detailed playing-out of these themes. The illustrations (which are found on every page) are a striking combination of colorful graphs and charts and photographs of children, tigers, and ExxonMobil employees of every race and many nationalities. In the text, disciplined management and analysis are repeatedly described as the keys to ExxonMobil's social accountability. The Operations Management Integrity System is the critical "framework for meeting [ExxonMobil's] commitments to the highest operational standards of safety, health and environmental protection"; under this system, "[a] broad range of factors is analyzed, including economic, environmental and social."[111] In the environmental sphere, OIMS is augmented by "Environmental Business Planning,"[112] which helps the company "to prevent incidents."[113] Quantitative "performance indicators" are used to track environmental progress.[114] ExxonMobil brings a new and literal salience to the notion of micro-management, employing "'molecule management' to yield high-value products while improving energy efficiency and lowering emissions."[115] Even the air is systematized, with emissions being "most effectively managed at the point of discharge."[116]

The section headed "Engagement with Communities" begins with a restatement of the chairman's assertions about the financial contributions ExxonMobil makes through taxes, wages,

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[110] *Id.*
[111] *Id.* at 3; *see also id.* at 17.
[112] *Id.* at 12.
[113] *Id.* at 13.
[114] *Id.*
[115] *Id.* at 14.
[116] *Id.* at 16.

the purchase of goods and services, and other forms of distributions.[117] Here, too, systematic

management is emphasized. Each major project is said to begin with an "Environmental and

Social Impact Assessment," which identifies risks, specifies mitigation plans, and "forms the

basis for ongoing monitoring of the environmental and social performance of the project."[118]

So also with security, which is the subject of "Integrated Security Management,"[119] and

"workforce development and diversity," which "requires leadership, action plans, accountability,

stewardship and constancy of purpose over the long term."[120]

 Greenhouse gases and climate change are the subject of a more complex and ambiguous

rhetoric. The discussion begins with a qualified acknowledgment of the problem: "We

recognize that the risk of climate change and its potential impacts on society and ecosystems

may prove to be significant."[121] The essence of the response is consistent with the rest of the

report: "to take sensible, economic actions now to improve efficiency and reduce future global

emissions."[122] But the application of the management-based logic seen elsewhere is complicated

by the absence of appropriate discourse structures, there being "currently no commonly accepted

methodology for accounting for greenhouse gas emissions."[123] One of the few appeals to hard

fact in these sections of the report is the statement that it is really someone else's problem:

"developing countries represent only 25 percent of the global economy and yet produce almost

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[117] *Id.* at 24.
[118] *Id.* at 25.
[119] *Id.* at 28-29.
[120] *Id.* at 32.
[121] *Id.* at 9.
[122] *Id.*
[123] *Id.* at 15.

50 percent of the world's carbon dioxide (or carbon) emissions," and are likely to account for 80 percent of the carbon increase in the next 20 years.[124]

The BAT document is very different in appearance. It is a dense, sprawling report, with 158 pages of compact text and few illustrations. Its content is entirely consistent with what we heard from BAT's CSR team,[125] and exhibits both similarities to and differences from the approach taken by Exxon Mobil. In his single-page introduction, BAT chairman Martin Broughton stresses (in a highlighted sidebar that accompanies his photograph), as ExxonMobil does, the primacy of economics as a motivation for CSR: "Corporate social responsibility is integral to our approach to the management of our business globally and to building long term shareholder value."[126]

Elsewhere on the same page, however, the discourse of traditional financial management yields to the alternative 'soft' discourses of communication and feelings. For example, whereas the sentence just quoted is the only reference to shareholders in the chairman's letter, there are eight mentions of the open-ended, contested category of "stakeholders."[127] There is repeated emphasis on the goal of "dialogue" with these undefined stakeholders—"stimulating discussions, as stakeholders share their views, concerns, criticisms and indeed some praise." This communicative process can evoke emotional responses, as when the chairman acknowledges that "[i]t is disappointing that we still encounter reluctance amongst the tobacco control and public health communities to engage in dialogue." Nonetheless, BAT's "doors remain open" to

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[124] *Id.*

[125] *See supra* Parts II.B.1-2.

[126] BAT at 3.

[127] *See supra* Part II.B.1. For a discussion of the legal difficulties inherent in defining the stakeholder category, see Orts, *supra* note 47.

"stakeholders in these groups" as BAT strives to show by action "that we mean it." Presumably, any representative of these interests who chooses to join the dialog thereby becomes a stakeholder, which further highlights the indeterminacy of that category.

Significantly, the chairman's letter devotes two full paragraphs to what Livesey terms the "institutionalization" of CSR discourse.[128] The first describes the commendations that the company has received from major CSR reporting players such as the Dow Jones Sustainability Index and the U.K. Business in the Environment Index. Then, after "sincerely" thanking the stakeholders for their contributions, the chairman goes on to thank the Institute of Business Ethics and MORI (Market & Opnion Research International) for "facilitating" much of the dialogue, and Bureau Veritas for "verification and assurance" of BAT's compliance with the AA1000 Assurance Standard.[129] The message is clear that BAT endeavors to talk to everyone, and also talks about this talk to the most widely recognized monitors of CSR discourse.

A major objective of all this talk is "embedding CSR principles," a concept that BAT's CSR team mentioned repeatedly in their public presentation. Despite its significance to the BAT report, it—like "stakeholder"—is nowhere defined in the report. It was clear in the public presentation that it refers to making CSR a norm that is taken for granted by everyone in the

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[128] *Transparent and Caring* at 246.
[129] The named organizations are among the most prominent independent groups that conduct CSR dialogs, monitor CSR activities, and audit CSR reports. The AA1000 Assurance Standard, promulgated by the British NGO AccountAbility, are a set of "guiding principles" for auditing ("assuring") CSR reports—a CSR version of Generally Accepted Accounting Principles. *See* *http://www.accountability.org.uk/aa1000/?pageid=52* (visited March 19, 2005). The report elsewhere makes repeated references to the Global Reporting Initiative, another set of sustainability reporting standards. *See* *http://www.globalreporting.org/* (visited March 19, 2005).

company. Embedding has become such a prominent feature of CSR discourse that its meaning is apparently now taken for granted as well.

The concluding paragraph of the chairman's letter is significant in two respects. First, it emphasizes that the process of communication is at the core of BAT's view of CSR: "I believe that our reporting and our Statement of Business Principles demonstrate that we continue to address difficult issues facing our business, including those around our products." Note the absence of any reference in this peroration to substantive achievements; instead, the chairman's concluding claim is that by *reporting* and making a *statement* BAT *demonstrates* that it is *addressing* difficult issues. Process rules; the message is the message. Second, the chairman makes a striking concession to the power of stakeholders by stating that BAT's performance "is for our stakeholders to judge." It would be extraordinary if the chairman were delegating to a largely self-appointed constituency the power to judge the substance of the company's performance. But in fact all that is being put up for judgment is BAT's performance as a communicator, all of which prompts the suspicion that the objective of the whole exercise is simply to keep everyone talking in a forum that BAT controls.

The body of the report pursues the chairman's themes at great length. It begins with a 12-page description of BAT's CSR process, including a description of its independent standards compliance assurance and a "stakeholder global issues map."[130] There follows a statement of BAT's three "business principles"—mutual benefit, responsible product stewardship, and good corporate conduct—each of which is then broken down into several "core beliefs."[131] Next comes an 11-page explication of the "Framework for Corporate Social Responsibility," which is

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[130] BAT at 5-16.
[131] *Id.* at 17-20.

itself an elaboration of the three business principles and the core beliefs.[132] The three

determinations that frame the framework are "where we should take the lead," "where we should

work together with others," and "where others should take the lead."[133] This section is followed

by a 22-page report on the past year's U.K. stakeholder dialog, "which focused on the

development of the Framework for Corporate Social Responsibility, based on the Statement of

Business Principles . . . facilitated by Stewart Lewis, a Director of MORI and assisted by the

Director of the Institute of Business Ethics . . . [and] monitored and evaluated by Bureau

Veritas."[134] This section quotes numerous statements by participating stakeholders. True to the

chairman's letter, there is a mixture of praise (*e.g.,* "it's good to see your use of AA1000"),

concern (*e.g.,* "If they do everything they say, they're not going to sell tobacco.") and criticism

(*e.g.,* "This is about the appearance of virtue, rather than actual virtue.").[135]

The final 60% of the report deals with such specific areas of performance as supplier

responsibility (making sure that BAT's suppliers live up to its standards),[136] environmental

management,[137] labor practices,[138] and human rights.[139] Whereas everything up to this point has

consisted of talk about talk, these sections blend the discourses of talk and action. While

considerable attention is devoted to communications, participation in dialog-based programs, and

awards bestowed by various CSR institutions,[140] there are also references to things that BAT has

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[132] *Id.* at 21-31.

[133] *Id.* at 21.

[134] *Id.* at 32.

[135] *Id.* at 36.

[136] *Id.* at 87.

[137] *Id.* at 95.

[138] *Id.* at 109.

[139] *Id.* at 121.

[140] To take but one example, two pages on biodiversity and conservation mention a "Biodiversity Week [at a BAT factory] to raise awareness," "discussing forming a Business and Biodiversity Forum," a "presentation at the IUCN Centre," and an "exhibition" that was

done. A section on "Occupational health and safety"[141] illustrates the point. It discusses a survey, as well as such communicative acts as "encourag[ing]" affiliated companies to take various steps. But the company also reports "providing condoms," "trac[ing] and test[ing]" the contacts of TB patients, "offer[ing] a cheap method for disinfecting water," and "issu[ing] nets impregnated with insecticide."

It is not our purpose in this analysis to challenge ExxonMobil or BAT's good faith or performance, or the accuracy of any of their assertions. We agree with Livesey that CSR data "allow stakeholders to call corporate actors to account" and that the new discourse of social responsibility has coincided with an "emerging practice of sustainability."[142] Our point, rather, is that, by preempting the CSR reporting issue, corporations have gained a significant form of power: the power to define and frame. ExxonMobil has exercised this power to define social responsibility in economic terms, and to frame the appropriate response in terms of management, discipline, and control. Significantly, while ExxonMobil emphasizes "engagement with communities" in assessing the environmental and social impact of its projects,[143] its report makes no mention of open-ended, all-inclusive conversations. In particular, there is no invitation to interested constituencies to define themselves as stakeholders and join the dialog. This is a discourse of action, not talk. Those who would contest the company's approach must do so on its terms or risk being dismissed as irrelevant.

In sharp contrast, BAT's report frames CSR in terms of a communication process. Any self-identified stakeholder can apparently claim a seat at the table, and no comment is a priori

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"featured in the World Conservation Union Stand" at the 2002 "Summit on Sustainable Development." *Id.* at 106-07.

[141] *Id.* at 117-121.

[142] *Middle Ground* at 341.

[143] ExxonMobil at 24-25.

irrelevant. Indeed, BAT grants to stakeholders the right to pass judgment on its CSR performance. BAT thus appears to cede to stakeholders the very control that is the hallmark of ExxonMobil's discourse. But perhaps BAT exerts a subtler yet more effective form of control. Whereas ExxonMobil purports to control the content and substance of CSR, BAT effectively defines CSR as being without substance. If a company's responsibility to society is defined in terms of communication, then what better form of control than to manage the forum in which that communication takes place–to own the table, as it were? By choosing a 'hard' discourse of economics, management, and science, ExxonMobil rules out many forms of criticism, but still sets itself up for fact-based attack. BAT, however, can plausibly reply to any charge of failure of communication with more communication. While its open-ended discourse invites criticism in any form and from any source, it binds the company to nothing more than listening.

IV.   The CSR Movement as an Experiment in the New Governance

The corporate social responsibility movement can also be interpreted as an ongoing experiment in what has been called "new governance" or "the new governing paradigm."[144] New governance theory is complex, its terminology and taxonomies contested, and its theoretical framework still inchoate.[145] A core element in virtually all formulations, however, is the idea of the "post-regulatory state." According to Colin Scott, the prior concept of the "regulatory state" was developed "to contrast a distinctive and emergent form of governance from the practices and institutions of the welfare state."[146] Whereas the welfare state is characterized by reliance on

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[144] *See* Colin Scott, *Regulation in the Age of Governance: The Rise of the Post-Regulatory State*, National Europe Centre Paper No. 100, Australian National University, June 6, 2003, at 5, available at www.anu.edu.au/NEC/publications.php.

[145] For a cogent summary of the emerging theoretical themes, *see id.*

[146] *Id.* at 4.

"instruments of public ownership, direct state provision of benefits and services, [and] integration of policy making and operational functions," the regulatory state involves "the separation of operational from regulatory activities in some policy areas (sometimes linked to privatization), a trend towards separating purchasers and providers of public services (through policies of contracting out and market testing) and towards separation of operational from policy tasks within government departments and the creation of executive agencies."[147] The hallmarks of the post-regulatory state include the possibility of "regulatory governance functioning in a manner not dependent on state law or in which state law is not central," and "a loosening of the sharp distinction between states and markets and between the public and the private."[148] The welfare state, in other words, is characterized by direct state intervention. The regulatory state still exerts top-down "command and control" authority,[149] but exercises its power in more diffuse ways. The essence of the post-regulatory state, captured in the linguistic shift from *government* to *governance*, is the further diffusion of regulatory power among networks of state and non-state actors that transcend national boundaries.[150]

Anne-Marie Slaughter has emphasized the prominence of networks in the post-regulatory "pluralist mix of global governance mechanisms."[151] These include many forms of "transgovernmental" networks, defined as interactions among sub-units of governments that are not closely controlled by their respective legislatures or executives.[152] They may arise as a matter of conscious planning or spontaneously, when an agency "would reach out on its own

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[147] *Id.* at 4.
[148] *Id.* at 2-3.
[149] Anne-Marie Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, 24 MICH. J. INT'L L. 1041, 1059 (2003).
[150] *See id.*
[151] *Id.* at 1044.
[152] *Id.* at 1045.

account to its foreign counterparts" in an effort to address a common problem.[153] Importantly, "transgovernmental networks can be folded into larger 'mixed networks' of governmental and private actors."[154] In one view, these networks become mere "talking shops" where information is collected and disseminated but no real power is exercised.[155] Slaughter argues, however, that this view is "short-sighted," missing "a key dimension of the exercise of power in the Information Age."[156] Her general point is that information can be power: by virtue of their ability to "generate compilations of best practices, codes of conduct, and templates for everything," the networks' "dissemination of information has played a far greater role in triggering policy convergence in various issues than more deliberate and coercive attempts."[157]

The corporate social responsibility movement can be usefully seen as nascent governance by just such a global information network. A variety of actors have come together to disseminate information and to use that process to influence conduct. Just as Slaughter describes, these actors "generate compilations of best practices, codes of conduct, and templates for everything." In the case of the U.K. and some other EU countries, governmental actors have participated, with the precise effect of "triggering policy convergence." The fact that CSR has yet to become part of American regulatory policy may be a reflection less of differing ideologies than of the fact that network governance is far better developed within the EU than in this country. In fact, it has been widely argued that such governance–sometimes labeled "comitology"–is the very essence of the EU.[158]

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[153] *Id.* at 1056.
[154] *Id.* at 1057.
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *See id.* at 1058-62 (reviewing comitology scholarship).

The new governance has its strident critics. The most pervasive critique concerns democratic accountability. Simply put, the argument is that as the nodes of decision making become more numerous, less well defined, and harder to locate, they stray dangerously far away from the people and institutions that are under direct electoral control. Network governance proponents argue that the process ultimately enhances democracy. Some applaud the "depoliticization" of decision-making[159] that ensues when the traditional linear, law-centered system of control is displaced by a pluralistic, "decentered" deliberative process.[160] The result, it is argued, will be "much better outcomes for the society as a whole, reflecting the supposed choices of a hypothetical median voter."[161] A different kind of support for the new governance comes from what Slaughter terms the theory of "horizontal democracy."[162] Its starting point is "the empirical fact of mushrooming 'private governance regimes' in which individuals, groups, and corporate entities in domestic and transnational society generate the rules, norms, and principles they are prepared to live by." Correlatively, the function of the state is viewed as "not to regulate directly, but rather to manage these processes by facilitating problem solving and information pooling."[163] Thus, the argument goes, even as it appears to cede political power to unelected governmental and private actors, the post-regulatory state actually promotes democracy by domesticating this irresistible tide of self-help.

The critical response to these arguments goes well beyond the basic point of attenuated electoral control. Some contend that "disaggregated democracy" is "fatally flawed by the

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[159] *Id.* at 1068.

[160] *See* Scott, *supra* note 144, at 7-10 (discussing theories of "autopoeisis" and "governmentality"); Slaughter, *supra* note 149, at 1068-69 (reviewing "vertical democracy" argument).

[161] *Id.* at 1068.

[162] *Id.* at 1072.

[163] *Id.* at 1072-73; *see* Scott, *supra* note 144, at 9 ("modest role of law in steering or proceduralizing those activities over which control is sought").

inevitably elitist identity of the participants in these networks, their corresponding biases in making vitally important public decisions and their unawareness of these biases, and the impossibility of creating equal access to these networks without destroying the very conditions that make them work as deliberative bodies."[164] Another worry is that capture of the regulatory process by the regulated becomes an even greater danger when the state backs away from its traditional role of intervening to balance inequalities.[165] If it is "*economic* power which ground[s] the capacity of non-state actors to govern or coerce,"[166] there is no reason to believe that those actors' motive or opportunity would diminish in a post-regulatory environment. Moreover, those in the Foucauldian tradition argue that power has always been exercised by "disparate practices and technologies" that do not derive explicitly from law and the state.[167] Consequently, one might conclude, new governance is likely to become a particularly effective servant of old power relations.

Once again, the CSR movement may be a revealing test of these theories in action. The sociologist Ronen Shamir has characterized "the field of CSR as one conceptual space where various regulatory/disciplinary regimes are pursued and negotiated among a host of players."[168] In the United States, the government directly regulates some of the specific corporate behaviors (particularly in the environmental and safety areas) that comprise the category "social

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[164] Slaughter, *supra* note 149, at 1070.

[165] *See* Scott, *supra* note 144, at 10.

[166] *Id.* (emphasis in original).

[167] *See id.* (applying Foucault's analysis of power to theory of "governmentality").

[168]Shamir, *supra* note 1, at 659. Consistent with new governance theory, Shamir concludes that the contemporary "notion of corporate governance signifies a decisive move in the direction of abandoning traditional 'command and control' state regulatory schemes in favor of 'responsive regulation', which is supposed to facilitate—yet not enforce and dictate—self-regulation programs and "compliance-oriented" regulation, which is to be carried out through corporate consent and voluntary organizational processes of reflexive learning." *Id.* at 660.

responsibility,"[169] but it has thus far left the larger field entirely to emerging networks of private actors. Even in the U.K., where the national government has taken an overt, top-down regulatory role, what is regulated is disclosure, not behavior; behavior will be determined through a private discourse in which markets will presumably have the ultimate say.[170] In the above-quoted language of the new governance, the British government is "facilitating problem solving and information gathering."[171]

Most of the elements that the new governance critics fear are also at least latent in the CSR movement. Elites are everywhere. Participating global corporations are the apotheosis of economic elitism, while some stakeholder actors can be seen as representing various cultural and information elites. No one has been elected, of course; with the exception of such obvious participants as employees and residents of company towns, the class of private stakeholders is self-appointed and limited only by an aspirant's ability to get heard. Capture seems to be a clear and present danger, with the target corporations both managing the stakeholder dialog and using its very existence to deflect demands for old-style government intervention. And finally, as we

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[169] *See, e.g.*, Robert A. Kagan, Neil Gunningham & Dorothy Thornton, *Explaining Corporate Environmental Performance: How Does Regulation Matter?* 37 L. & Soc'y Rev. 51 (2003) (demonstrating interaction of government regulation and pressures from private actors in determining corporate environmental behavior); Peter J. May, *Compliance Motivations: Affirmative and Negative Bases*, 38 L. & Soc'y Rev. 41 (2004) (analyzing complex motivations of homebuilders to comply with codes); *cf.* Cary Conglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 L. & Soc'y Rev. 691 (2003)(arguing for shift to regulatory regime that "directs regulated organizations to engage in a planning process that aims toward the achievement of public goals, offering firms a flexibility in how they achieve public goals).

[170] This is, of course, exactly how traditional capital market regulation works, suggesting that the new governance may not be so new after all.

[171] *See supra* note __ and accompanying text.

have argued above,[172] Foucault himself could not have conjured a better example of the exercise of power through subtle and distributed disciplinary practices.

The practical significance of the theoretical disputes surrounding the new governance is reflected vividly in a report issued earlier this year by SustainAbility, a British consultancy that is one of the most prominent and respected players in the CSR movement.[173] The report came about when the UN Global Compact, a voluntary CSR standards initiative, "asked SustainAbility to evaluate the extent to which CSR initiatives are helping drive the transition to more sustainable forms of development."[174] SustainAbility then interviewed CSR leaders from business, government, and civil society; conducted a public opinion poll; reviewed corporate best practices; and conducted several case studies.[175]

SustainAbility situates the report squarely within the discourse of the new governance by defining "'governance' to refer to mechanisms, processes and institutions which set the 'rules of the game' for societies at the domestic or global level." The report expressly acknowledges the reality of the post-regulatory state: "Governments are a fundamental component of governance, but increasingly non-state actors from business and civil society are seen to play key roles."[176] As with the new governance generally, the specific phenomenon of CSR has come about "as a pragmatic response where governance has failed or been weak."[177] The report finds in the evolution of CSR almost all of the pros and cons that have been put forward in the new

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[172] *See supra* note __ and accompanying text.

[173] SustainAbility, *Gearing Up: From Corporate Responsibility to Good Governance and Scalable Solutions* (2004)(hereinafter *Gearing Up*), available at http://www.sustainability.com/publications/gearing-up.asp.
    [174] *Id.* at 2.
    [175] *Id.*
    [176] *Id.* at 4.
    [177] *Id.* at 17.

governance literature. On the plus side, for example, is the "good news" that "many CR [SustainAbility's idiosyncratic variant of CSR] initiatives are evolving in the right direction, with a growing variety of companies acknowledging a wider range of stakeholders and acting on an increasing number of key issues."[178] These positive developments are the product of a "type of governance shift" that might not have been possible "20, ten or even five years ago."[179] This governance shift is seen in turn as enabled by "a maturation in the types of relationships that are feasible."[180] This process of maturation has many elements, all of which are recognizable as key pieces of the new governance paradigm:

> Internationally, we are seeing a growing focus on "ethical" or "responsible" globalization. . . Citizens in many developing countries are achieving greater rights and recognizing greater responsibilities. Although trust in both business and government often remains low, the potential for collaboration clearly exists. Internationally, NGOs . . . are actively increasing their capacity to work with business in forging solutions to key sustainable development challenges. This does not suggest that dissent has ceased to exist–which is neither likely nor desirable. However, collaborative relationships . . . are increasingly becoming an alternative and complementary model. . . . [T]hey demonstrate shifting relationships between government, business and civil society and an opportunity for more constructive joint working.[181]

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[178] *Id.* at 2.
[179] *Id.* at 18.
[180] *Id.*
[181] *Id.*

But the dangers seen by new governance critics are equally real. The self-interested presence of business is both essential and problematic. Since global corporations are economic enterprises backed by vast economic power, there is both incentive and opportunity to manipulate CSR. The core problem is that "the business case for getting in front of the core pack remains weak."[182] SustainAbility characterizes the problem as a species of "prisoners' dilemma": "Collectively, society would benefit from solutions, but there is little or no incentive for any single actor to take the first move and risk bearing all the costs alone. Indeed the individual incentive is to do nothing and hope to 'free ride', benefiting from the actions of others."[183] Instead of leading, many companies use their power to structure and dominate a CSR discourse that devolves into little more than a public relations exercise–a post-regulatory version of "regulatory capture."[184] SustainAbility sees evidence of precisely this problem in the current state of affairs, in that "most [CSR] initiatives still sit at a distance from the company's core business activities, disengaged from long-term strategy."[185] The future will provide a test of the strength of the new governance paradigm, in particular whether CSR stakeholders will be able "to ensure that voluntary initiatives do not serve as camouflage or alibis for participants."[186]

Finally, SustainAbility cautions against being too quick to dispense with the traditional role of government. The report argues that "stronger government policies in these areas are necessary and perhaps inevitable."[187] It acknowledges that government intervention gives rise to two sets of concerns: too much government control over business, and too much corporate influence over government. Ultimately, the report concludes, "the challenge is not to get

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[182] *Id.* at 3.
[183] *Id.* at 13.
[184] *Id.* at 19.
[185] *Id.* at 2.
[186] *Id.* at 3.
[187] *Id.*

companies to take on the responsibilities of business but to help to insure that governments fulfill their own responsibilities."[188]   Although the report does not mention the recent legal developments in the U.K, they would seem to be an apt illustration of what SustainAbility has in mind.

From theory to practice, then, the new governance paradigm provides an excellent account of the CSR movement. The inadequacy of traditional regulation at the national level has provided the stimulus for the collection of actions that comprise the movement. As the model would predict, the result to date has been a template that blurs traditional public/private and state/market boundaries and introduces new categories of actors into the regulatory process. On the ground, our ethnographic findings and SustainAbility's observations confirm that the strengths and weaknesses attributed to new governance are all present in abundance, with ultimate success or failure still in the balance.

Conclusion

Our ethnographic and linguistic research has amply confirmed the existence, vitality, and relative coherence of the corporate social responsibility movement. Governments, corporations, and their stakeholder critics take it seriously at the rhetorical level. At the level of action, governments outside the United States increasingly promote its primary objectives: the identification, planning, and disclosure of corporate responses to social and environmental problems. Companies themselves have begun to go well beyond the modest legal requirements that have so far been imposed. Disclosure is now a widespread practice, as is "engagement" with a wide range of stakeholders. This includes everything from talk to the implementation of specific environmental and social projects to the solicitation of independent CSR audits. Among

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[188] *Id.*

NGOs, observing, critiquing, and sometimes participating in these engagement activities has become a core activity. Some investors, especially publicly funded institutions, are also taking notice, either by subjecting their share purchases to CSR filters or by requiring their trustees and managers to engage (that ubiquitous word again) the management of portfolio companies on CSR issues. And all of this activity has generated a new industry of CSR support, featuring consultants, facilitators, auditors, and communications specialists.

One view of these developments is that the "progressives" are winning. Even if governments are not mandating that corporations clean up their behavior, both literally and figuratively, at least they are forcing disclosure of the instances when they do not. As is assumed in the financial world, transparency will presumably beget substantive changes for the better. Moreover, according to the optimistic view, companies are hiring people with CSR sensibilities and taking them seriously as they "embed" social and environmental principles in their respective corporate cultures. At the same time, corporations are cooperating with NGOs and other stakeholders rather than treating them as nuisances to be ignored or silenced.

Our empirical research is casting doubt both on the conclusion that the CSR movement is actually succeeding and on the ultimate desirability of that success. With respect to the first question, there is reason to be skeptical of corporate motives. We have heard many expressions of concern that companies' CSR activities rarely encompass their "core" activities, as well about the need to "scale-up" social and environmental activities from the demonstration project level. Moreover, our linguistic analyses suggest that companies are treating both stakeholder dialog and CSR reporting as opportunities to shape and control the debate over their conduct—and bringing sophisticated communication strategies to bear in doing so. Rather than redressing the

power imbalance between corporations and civil society, these processes may be reinforcing it in subtle but effective ways.

Even if the optimistic view is correct and CSR is indeed carrying the day, there are attendant costs, both actual and potential. One obvious problem, acknowledged by the protagonists, is the effect on NGOs as they evolve from gadflies into corporate partners. NGOs are already beginning to talk like corporations, with their discussions of "branding" and "accountability." As their representatives readily admit, these habits of language may presage adverse changes at the level of thought and action as well. They worry constantly about capture and cooptation, about becoming accomplices to "greenwashing." They find it hard to resist the logic when corporations demand the same kind of accountability that NGOs demand of them. But the NGOs realize that their social utility lies in being independent, aggressive, and sometimes hyperbolic—in other words, in not always being accountable. They see the very real possibility that the demand for accountability, so eminently reasonable on the surface, may be a Trojan horse, disguising an effort to domesticate, bureaucratize, and ultimately neuter the most stridently effective among them.

Finally, if the CSR movement is indeed ascendant, then we are in the midst of an experiment in the new governance whose consequences are difficult to gauge. As new governance theorists have suggested, CSR shifts the emphasis from traditional government regulation of corporate conduct to the promotion of disclosure by corporations and their engagement with civil society. The world of CSR is, precisely as predicted by new governance theory, a complex communication network among public and private actors. Critically, the latter—NGOs, for example—bear much more responsibility for shaping outcomes that in the old regulatory state.

Equally evident, however, are the risks predicted by new governance critics. Who chose the private actors that are central to the process? Some, such as employees and local residents, are consensus candidates. But others—the "partnering" NGOs, or those who are recognized as tribunes of various interests—seem to have chosen themselves. As befits a communication network, they have leveraged themselves into a place at the table by their ability to communicate, with the public as well as their corporate targets. This is not to say that they are inappropriate or ineffective tribunes, but merely that they have come by their positions by a process that has none of the hallmarks of liberal democracy. Above all, the CSR world is a profoundly paternalistic one. Powerless people are occasionally seen in the dialog process, but at the sufferance of corporations. Otherwise, they must be spoken for by their unelected representatives.

The discussion of selection brings us inevitably back to accountability. Representatives who are not chosen by their constituents cannot be removed by them, either. One manifestation of this problem is the widely-expressed concern that corporate/NGO partnerships may be preempting the development of strong local governments. The essence of this concern is that the entities that have appointed themselves to speak for local interests have displaced the very institutions that would be most likely to call them to account. We have heard the response that corporations and NGOs are subject to discipline by their respective customers and contributors. But we have repeatedly been told that customers will not pay for CSR, and in any event both customers and contributors are far removed from the locales where accountability issues are most salient.

So CSR remains a work in progress. At its best, it promises a corporate decision-making process in which managers think and talk openly about social and environmental issues and then

tell the world what they did and why. At its worst, it is nothing more than an elaborate public relations charade in which companies perform certain prescribed rituals but continue to do business as usual. But it may be even worse than business as usual, as the effect of the rituals may be to co-opt critics, mislead consumers, and preempt regulation. Only ongoing empirical scrutiny of the CSR movement will tell. At this relatively early point in that process, our research leaves us still hopeful but increasingly skeptical.