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## Corporate Governance in the Cause of Peace: An Environmental Perspective

Donald O. Mayer

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# Corporate Governance in the Cause of Peace: An Environmental Perspective

Donald O. Mayer\*

## ABSTRACT

*This Article examines the role of multinational corporations in creating global peace. Part I discusses the role of multinational corporations in the global economy, emphasizing the relationship between multinational corporations, governments, and the environment. Part II explores whether corporations have a moral duty to oppose ill-conceived laws and policy proposals and to support well-conceived laws that encourage efficiency and sustainability, but may hinder short-term profitability. Part III expands and further explores the argument set forth in Part II by examining the continuing dependency of the United States and other industrialized democracies on oil from the Middle East. Part IV concludes the Article by noting that multinational corporations have both the power and responsibility to create products and services that materially enhance human well-being by preserving the natural environment.*

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\* Professor of Management, Oakland University, Rochester, Michigan. The Author wishes to thank The William Davidson Institute at the University of Michigan for its interest in this topic. This Article is dedicated to the Kennoway Cycling Club as well as to Mary Miller Stair and the Dances of Peace.

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Peace is an uncommon subject for a law review article on corporate governance. An article on corporate governance from an environmental perspective also differs from the usual concerns about making management more accountable to shareholders.<sup>1</sup> Combining concepts of peace, corporate governance, and environment into one article will require both the author and reader to think more holistically about how corporations are governed, both internally and

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1. See, e.g., *A Survey of Global Equity Markets*, ECONOMIST, May 5, 2001, at 30 (referencing the "vast economic literature" on "the difficulty of ensuring that company managers will act in the interests of the shareholder owners for whom they are, in theory, supposed to be mere agents"); see also Daniel P. Hann, *Emerging Issues in U.S. Corporate Governance: Are the Recent Reforms Working?*, 68 DEF. COUNS. J. 191 (2001) (discussing different origins and conceptions of "corporate governance," including the need to improve performance by publicly owned companies, increased government regulation and rulemaking to force disclosure of executive compensation, improved information flows to shareholders, and the intervention of large institutional shareholders such as TIAA-CREF or CalPERS into corporate managers' performance); Matthew Boyle, *The Dirty Half-Dozen: America's Worst Boards*, FORTUNE, May 14, 2001, at 249-52 (referring to corporate governance in terms of tracking "bad corporate governance").

externally, and how corporations may help to co-create the conditions of peace and environmentally sustainable economies.

The idea that corporations may “co-create” the conditions of peace is contrary to the more customary view that in matters of creating or maintaining peace “the role of government completely dominates.”<sup>2</sup> Yet, while many corporations may have an insignificant role in co-creating peace—or in disturbing it—larger companies do seem to have an impact. This Article contends that many large corporations have an important role to play in establishing and revising the rules of the global economic game. Moreover, corporations should support those rules providing structural efficiencies<sup>3</sup> that promote full-cost pricing, phase out perverse subsidies, and provide more meaningful information to investors and consumers. In so doing, corporations, consumers, and governments can create more peaceful, sustainable societies even while allowing maximum freedom of movement of people, goods, and services across international borders.<sup>4</sup>

Implicit in this view of corporations as “co-creators of peace” is that corporations are properly viewed as created by society<sup>5</sup> to serve

2. B. Joseph White, Remarks at the Conference on Corporate Governance, Stakeholder Accountability, and Sustainable Peace, The University of Michigan Business School (Nov. 2, 2001).

3. See THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* 135 (1999) [hereinafter *TIES THAT BIND*]. Donaldson and Dunfee note that “[t]he historical business insensitivity to environmental concerns . . . is characterized by faith in technology and the presumption that an irresolvable conflict exists between ecology and economic growth.” *Id.* (citing Paul Steidlmeier’s concept of “public policy ecology” rather than “pre-ecological economism”). Donaldson and Dunfee go on to say that:

Pre-ecological economism presumes what the hypernorm formally rejects—namely, that efficiency is to be measured only by the height of the gross domestic product. The efficiency hypernorm implies, rather, that until we factor into the broad economic equation the value of scarce natural resources, we have an inadequate measure of social efficiency.

*Id.* Readers familiar with Donaldson and Dunfee’s work on integrative social contracts theory will recognize that their proposed efficiency hypernorm is meant to transcend particular economies, laws, and customs.

4. Preserving environmental values through economic efficiencies may have seemed contradictory some years ago, but a substantial body of research and thinking does not view “free market environmentalism” as an oxymoron. See generally TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* (2001); PAUL HAWKEN, AMORY LOVINS, & L. HUNTER LOVINS, *NATURAL CAPITALISM: CREATING THE NEXT INDUSTRIAL REVOLUTION* (2000) [hereinafter *NATURAL CAPITALISM*] (emphasizing the waste in resources associated with neo-classical economic theory, where infinite resources and sinks are erroneously assumed, and the radically benign effects of full-cost pricing and positive subsidies).

5. See, e.g., Jonathan Rowe, *Reinventing the Corporation*, WASH. MONTHLY, Apr. 1996, at 16. Rowe recounts the history of state-authorized incorporations in the United States, and finds that while early incorporations had to serve a public purpose, New Jersey and Delaware led the way in granting corporate charters to for-profit

public as well as private interests,<sup>6</sup> and that they are more than a “nexus of contracts.”<sup>7</sup> Accordingly, well-traveled ideas on corporate governance from Milton Friedman<sup>8</sup> and his adherents deserve respect, but fail to place corporations in their wider social and political context.

Part I will discuss the role of multinational corporations (MNCs) in the global economy, with emphasis on the relationship between MNCs, governments, and the environment. Special attention will be paid to the oil industry, which provides numerous examples of corporate power vis a vis developing nations’ governments. Often, collaborations between corporations and these governments do not adequately respect human rights, extant communities, or the natural environment. Instead of co-creating conditions of peace, these companies have instead contributed to environmental degradation, poverty, and social unrest.

Part II seeks to sort out the legal and ethical implications of Part I by asking whether corporations have a duty not just to obey the law, but also to support laws that may hinder their short-term

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corporations pursuing any legal purpose. *Id.* Corporate governance has thus come to mean accountability to shareholders rather than accountability to the public. *Id.*

6. Robert Reich has pointed out that, even as late as the mid-twentieth century, for-profit corporations were often identified with the economies and well-being of particular nations, and that the interests of major U.S. corporations were believed to be entirely consistent with the interests of the United States as host country. ROBERT B. REICH, *THE WORK OF NATIONS: PREPARING OURSELVES FOR 21ST-CENTURY CAPITALISM* (1991). Reich wrote that historically,

[b]ecause of their size and central role in the economy, America's core corporations came to identify themselves, and be identified by Americans and others around the world, with the American economy as a whole. They were the champions of the national economy; their successes were its successes. They *were* the American economy.

*Id.* at 47.

7. Jeffrey Nesteruk's Article in this volume refers to the “nexus of contracts” theory as a dominant form of discourse among corporate governance scholars, citing—among others—Daniel Fischel's view, which rejects the notion that corporations are capable of having social or moral obligations. Jeffrey Nesteruk, *Conceptions of the Corporation and the Prospects of Sustainable Peace*, 35 *VAND. J. TRANSNAT'L L.* 437 (2002). See also JOHN DOBSON, *THE ART OF MANAGEMENT AND THE AESTHETIC MANAGER: THE COMING WAY OF BUSINESS* 113 (1999).

The prevailing descriptive view of the firm in finance is that supplied by agency theory: The firm is a complex web of principal-agent relations. Any prescriptive statement that implies some unified firm objective is clearly inconsistent with this view. It is the individual agents who have objectives, and even those individuals may have more than one conflicting objective. Indeed, the whole essence of agency theory is that the firm is a cauldron of aspirational conflict, not a unified decision node.

*Id.*

8. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, *N.Y. TIMES*, Sept. 13, 1970, § 6 (Magazine), at 32.

profitability. The basic contention is that where corporations can make a difference, they are morally obliged to oppose ill-conceived laws and policy proposals and to support well-conceived laws that encourage efficiency and sustainability. It is not socially responsible for a large corporation to use its influence just to oppose those laws and proposals that threaten its short-term economic interests. The reader may well question this proposition; even more problematic will be the task of distinguishing laws and proposals that deserve support from those that require concerted opposition.

One of the major hurdles in believing that a corporation might have a duty to support a law or legislative proposal that would impair earnings in any way is the prevailing belief that corporations are relatively powerless to do so. One aspect of this prevailing belief comes from the conviction that the sole and ultimate purpose of a corporation is to maximize profits. The other aspect is a well-entrenched notion that corporations play a game in which government laws and market mandates—from consumers—largely dictate available strategies.<sup>9</sup> Consistent with this belief, Norman Bowie has said that governments set the rules and consumers command the market: accordingly, corporations have no special responsibility to the environment beyond what is required by law or demanded by consumers.<sup>10</sup>

The Bowie view, however, is at odds with the power of MNCs relative to governments in developing nations. It is also at odds with the role that corporations play in developed economies, where companies exercise free speech to inform consumers and suppliers in the market and also work to establish or reform certain governmental rules and regulations. Corporations have a role to play in co-creating peace by proactively collaborating with NGOs, governments, international institutions, consumers, and the public to create rules of the international trading game that globalize not just trade in goods, but make more available basic human needs, recognize fundamental human rights, and preserve critical habitat and natural resources for future generations. In so doing, these corporations can help to establish the pre-conditions for peaceful economic and human relationships. In theory, of course, business people everywhere should want such stable conditions, but under present arrangements they are systematically driven by short-term economic considerations

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9. See, e.g., Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857 (1984).

10. Norman Bowie, *Morality, Money, and Motor Cars*, in *BUSINESS, ETHICS, AND THE ENVIRONMENT* 89, 89-98 (W. M. Hoffman et al. eds., 1990).

to maximize current revenue<sup>11</sup> and ignore the natural environment that is the very basis for our economies.<sup>12</sup>

Part III continues this argument by looking at the continuing dependency of the United States and other industrialized democracies on oil from the Middle East. Readers whose primary concerns about peace relate to the attacks of September 11, 2001 and the resulting "War on Terrorism"<sup>13</sup> may wish to look first to this part. Its basic thesis is that, despite the shock of sharply increased oil prices in the 1970s, the United States has failed to diversify the energy basis for its economy and is paying a high military, diplomatic, and economic price for continued dependence on Persian Gulf oil. U.S. national and corporate policies have been closely aligned<sup>14</sup> and must change together to reduce dependence on fossil fuels, both for reasons of national security and, ultimately, for the sake of sustainable economies in many developing nations.

Part IV concludes by noting that MNCs have both the power and the responsibility to create products and services that materially enhance human well-being by preserving the natural environment that sustains life on Earth. This responsibility is more than the prudent pursuit of profit that makes companies strive to be—or seem—"environmentally friendly." It also includes an obligation to attend to the structural inadequacies of the economic and legal system. The rules governing that system—the "rules of the game"—are not only shaped by voting citizens and politicians, but by increasingly powerful corporations that have claimed a voice in public

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11. RALPH ESTES, TYRANNY OF THE BOTTOM LINE: WHY CORPORATIONS MAKE GOOD PEOPLE DO BAD THINGS 28-30 (1996).

12. See Herman E. Daly, *Steady-State Economics*, in *ECOLOGY: KEY CONCEPTS IN CRITICAL THEORY*, 96, 96-106 (Carolyn Merchant ed., 1994).

13. The phrase "war on terrorism" is generally understood to be the U.S. military response to the September 11 attacks, and clearly includes diplomatic and military isolation of the Taliban in Afghanistan with the goal of finding Osama bin Laden and his chief aides "dead or alive"—to use President Bush's words. But the "war on terrorism" also extends to the freezing of U.S.-based financial assets that may assist bin Laden's network, and may eventually extend to other regimes that support deliberate violent action against non-military targets.

On terrorism generally, see JESSICA STERN, *THE ULTIMATE TERRORISTS* (1999) (detailing the history of terrorism and the recent emergence of terrorists who have the capacity to use weapons of mass destruction). Stern's definition of terrorism is "an act or threat of violence against noncombatants with the objective of exacting revenge, intimidating, or otherwise influencing an audience." *Id.* at 11. She also notes that nation-states—including the United States—have sometimes used terrorism as an instrument of national policy. *Id.* at 14.

14. Parts I and II argue that U.S.-based automobile and oil companies have in the past been part of the problem by not supporting structural efficiencies in the domestic and global economies. More specifically, they have generally opposed energy diversification and conservation. As short-term strategies, such opposition may have been warranted in the name of profit maximization; as a matter for standard views on corporate governance, such opposition may appear unimpeachable. But in terms of corporate citizenship there is much to improve on. See *infra* Part II.

affairs and in the legislative arena.<sup>15</sup> In promoting or opposing national and international rules of the game, corporations should comply with and promote the kind of rules that level the global corporate playing field without leveling rainforests or degrading fisheries and other ecosystems. They should oppose rules or laws that promote unsustainable, uneconomic practices. Ideally, they should promote rules and practices that exemplify sound economics and sustainable values, rejecting “wild capitalism”<sup>16</sup> and its variants.

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15. See generally WILLIAM GREIDER, *WHO WILL TELL THE PEOPLE: THE BETRAYAL OF DEMOCRACY* (1992) (detailing the extent to which corporate lobbying and influence have made both major political parties in the United States more and more responsive to the desires of business interests).

16. Benjamin Barber has written tellingly of the conflict between modern, global capitalism—with mass production and consumption driven by the aggregate preferences of consumers worldwide—and the countervailing energies of religious sects, tribal groups, and extreme nationalists. The confrontation between global commerce and parochial ethnicity will not, in his view, produce a new and global citizenship, or engender the kinds of equality and justice that will nurture democracy and peace. BENJAMIN R. BARBER, *JIHAD VS. MCWORLD* 6-8 (1995). Barber speaks of a “wild capitalism” that promotes free markets without promoting democracy. *Id.* at 236-46.

Truly free economies in this century have always been mixed economies in which democratic governments have balanced the interests of economic utility and social justice. . . . Only the new transitional democracies have been talked by foreign advisors or bullied by international banks into thinking that a laissez-faire capitalist economics is a self-sufficient social system. Predictably, the results have been catastrophic. . . . In America, the confidence in the omnipotence of markets has been transformed into a foreign policy that assumes internationalizing markets is tantamount to democratizing them . . .

*Id.* at 238-39. Walter Lippmann, writing much earlier in the twentieth century, spoke of “naive capitalism.” WALTER LIPPMANN, *A PREFACE TO MORALS* 242-44 (1929). The book was first published in May of 1929. Lippmann’s litany of naive capitalism’s ills is eerily familiar, and describes essential tensions between business gains and social well-being that remain today.

It was discovered that if each banker was permitted to do what seemed to him immediately most profitable, the result was a succession of disastrous inflations and deflations of credit; that if natural resources in oil, coal, lumber, and the like were subjected to the competitive principle, the result was a shocking waste of irreplaceable wealth; that if the hiring and firing of labor were carried on under absolute freedom of contract, a whole chain of social evils in the form of child labor, unsuitable labor for women, sweating, unemployment, and the importation of cheap and unassimilable labor resulted; that if business men were left to their own devices the consumer of necessary goods was helpless when he was confronted with industries in which there was an element of monopoly.

*Id.* at 243-44 (emphasis added).

## I. MULTINATIONAL CORPORATIONS IN THE GLOBAL ECONOMY

Throughout history, economic progress has often led to environmental regress.<sup>17</sup> Since the end of the Cold War and the hope of a New World Order during the first Bush Administration, U.S. and European economies enjoyed a relatively prosperous decade.<sup>18</sup> New levels of affluence and well-being were reached, at least by significant numbers of people worldwide as part of global economic integration; Lee Tavis notes that “[i]n the twenty-two years between 1975 and 1997, global real per capita income increased substantially. Both developed and developing countries shared this growth, with industrialized countries gaining fifty-three percent (from a base of \$12,589 in 1985) and developing countries gaining fifty-one percent (from a base of \$600).”<sup>19</sup> MNCs were a substantial force in the global economy during that period.<sup>20</sup> At the same time, however,

17. See LESTER R. BROWN, *ECO-ECONOMY* 13-14 (2001).

18. Joan Warner, Peter Engardio, Thane Peterson, *The Atlantic Century?*, *BUS. WEEK*, Feb. 8, 1999, at 64-67.

19. Lee A. Tavis, *Corporate Governance and the Global Social Void*, 35 *VAND. J. TRANSNAT'L L.* 487, 516 (2002) (citing *Human Development Report*, U.N. Development Programme, at 154 (1999)). See also David Dollar & Aart Kraay, *Spreading the Wealth*, *FOREIGN AFF.*, Jan.-Feb. 2002, at 120, 120-33. “So far, the current wave of globalization, which started around 1980, has actually promoted economic quality and reduced poverty.” *Id.* at 120.

More dyspeptic views about progress in the developing nations can easily be found. See, e.g., TOM ATHANASIOU, *DIVIDED PLANET: THE ECOLOGY OF RICH AND POOR* (1996) (supporting the claim that nations in the “South”—transitional economies—are at a major disadvantage in the international trade and finance system). *Id.* at 163-226.

A great deal of money has flowed from South to North, and despite all rhetoric, it continues to do so. It flows as neverending debt service (Third World debt is still rising), as low commodity prices, as royalties and fees, as foreign-exchange losses, as wealth bled off by a thousand obscure mechanisms. It is a very old story, and in the face of its interminable repetition, we should feign no surprise if money and not, say, democracy or sustainable development continues to define the North-South political agenda.

*Id.* at 214.

20. ATHANASIOU, *supra* note 19, at 194. In referring to MNCs as transnational corporations, or TNCs, Athanasiou writes:

TNC activities involve a third of the world's private-sector assets, 70 percent of the products in world trade, the bulk of international financial transactions, and the major share of advanced technology. . . . The role of TNCs in global environmental destruction is just as staggering. TNC activities account for half of all oil, gas, and coal extraction, refining, and marketing. TNCs are responsible for over half the greenhouse gases emitted by industry. They produce almost all ozone-destroying compounds and dominate key minerals industries. . . . TNCs control 80 percent of the land that, globally, is given over to export agriculture, land often taken from local food production. Twenty

environmentalists were warning of increased degradation of the environment, limits to growth, and a collision between economic dreams and ecological realities.<sup>21</sup>

### A. *Thoughts on Prosperity, Peace, and Corporate Culture*

The principles and institutions of economic globalization were designed to promote global prosperity and thus end or greatly reduce armed conflict.<sup>22</sup> U.S. and European corporations were not architects of that system, but have generally supported the GATT and subsequent incorporation of GATT principles into the WTO.<sup>23</sup> Key institutions of the international economic order include the World

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TNCs account for over 90 percent of all pesticide sales and . . . have come to control a huge fraction of the world's seed stocks.

*Id.* at 194.

21. See, e.g., BILL MCKIBBEN, *THE END OF NATURE* (1989) (imagining a more barren future in which humanity is alone on Earth, with only a few plants and animals that we have chosen to save); see also PAUL HAWKEN, *THE ECOLOGY OF COMMERCE* (1993).

Given current corporate practices, not one wildlife reserve, wilderness, or indigenous culture will survive the global market economy. We know that every natural system on the planet is disintegrating. The land, water, air, and sea have been functionally transformed from life-supporting systems into repositories for waste. There is no polite way to say that business is destroying the world. . . . [A]s I prepared to write this book, I reviewed much of the new literature in the field and discovered that the more I researched the issues, the more disquieting I found the information. The rate and extent of environmental degradation is far in excess of anything I had previously imagined.

*Id.* at 3-4.

22. The national protectionism exemplified by the Smoot-Hawley tariffs in the United States was widely believed to have propelled a global economic slowdown into a worldwide depression, with dire consequences for world peace. Gerald Segal writes that during the 1930s, the international banking system "collapsed because banks and government lent far more money than they had and, when some debtors defaulted, the banks went bust. International investment then dried up, leading to unemployment and protectionism." GERALD SEGAL, *THE WORLD AFFAIRS COMPANION* 27 (rev. ed. 1996). The IMF was established to break this cycle by providing rapid financial aid and advice to governments short on hard currency reserves. *Id.*

23. For example, the Reagan and Bush administrations worked to broaden GATT's mandate to areas of investment and trade in financial services, and the Clinton administration followed suit. During the Uruguay Round of GATT negotiations, corporations sat on various trade-advisory panels and were "in constant touch with government negotiators." RICHARD J. BARNET & JOHN CAVANAGH, *GLOBAL DREAMS: IMPERIAL CORPORATIONS AND THE NEW WORLD ORDER* 352 (1994) (reporting that Public Citizen, an NGO organized by Ralph Nader, found that "of the 111 members of three key trade-advisory committees, 108 represented corporations or industry trade associations, and noted that among the corporate members were twenty-four of the fifty largest spewers of toxic pollutants in the United States"). *Id.* See also Tom Hilliard, *Trade Advisory Committee: Privileged Access for Polluters*, *PUB. CITIZEN*, Dec. 1991, at 12.

Bank, International Monetary Fund, and, more recently, the World Trade Organization, all of which have been criticized as compromising the social and environmental fabric of developing nations.<sup>24</sup> In environmental terms, Kevin Gallagher claims that many richer nations are better off

because we now import pollution-intensive goods from poorer countries. A recent World Bank study shows that pollution-intensive industry is

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24. Criticism of the World Bank includes both social and environmental aspects. See, e.g., CHERYL PAYER, *THE WORLD BANK: A CRITICAL ANALYSIS* (1982). As practiced by the World Bank, Payer sees global economic development as making "people poor by depriving them of their share of the world's natural resources and of access to political power." *Id.* at 11. Payer claims that the bank's policies and loans have: (1) opened up previously remote regions through transportation and telecommunications investment, destroying the "natural protections" those regions had enjoyed, (2) aided extractive industries such as mining, timber, and oil, without compensating harms to indigenous or local communities, (3) insisted on production for export, rather than self-sufficiency, (4) opposed minimum wage laws or trade union activities, and (5) financed projects such as dams that have denied people control over basic resources such as land, water, and forests, appropriating them instead for multinational corporations and "their collaborative local elites." *Id.* at 19-20.

Payer's book was written in 1982, but many of these criticisms persist. See, e.g., Maude Barlow, *The World Bank Must Realize Water is a Basic Human Right*, *TORONTO GLOBE AND MAIL*, May 9, 2000, at A17. Barlow discusses the World Bank's policy of water privatization and full-cost water pricing as it affects Cochabamba, Bolivia's third-largest city. The Bank required the public water system to be put in the private sector and costs passed on to consumers. "Only one bid was considered, and the utility was turned over to a subsidiary of a conglomerate led by Bechtel, the giant engineering company. . ." *Id.* The result was a doubling of water prices, which meant that, for many, water bills consumed half their monthly budget. All water, even from community wells, required permits to access, and peasant farmers were required to buy permits to gather rainwater from their property. *Id.* The parallel privatization of transportation, electric utilities, and education to foreign corporations caused "heated economic debate in Bolivia" which turned to protest as thousands took to the streets, but "police reacted to peaceful demonstrations with violence and arrests" and martial law was declared. *Id.* The protests later resulted in the withdrawal of this water privatization policy. *Id.*

On a more general level, Benjamin Barber notes that

the World Bank . . . is less concerned to create a sustainable environment or forge sustainable national economies in the debtor nations it services than to assure an open (though by no means level) playing field for international business. Its loans often bankrupt its clients. . . . The bank has also been known to impose population resettlement on peoples who have had no part in deciding on the irrigation or transportation projects being undertaken in the name of 'their' development.

BARBER, *supra* note 16, at 240.

As a sister Bretton Woods institution, the International Monetary Fund (IMF) has also had its share of criticism. Joseph Stiglitz—who won the Nobel Prize for economics in October 2001—has urged the IMF to address global economic needs such as the "fight against terrorism, the fight for a better global environment, the fight for a more equal world that would reduce the disparities between the haves and the have-nots," quoted in Tim Shorrocks, *Nobel Laureate Encourages Global Justice Movement*, *GLOBALFREEPRESS*, Oct. 16, 2001, at <http://globalfreepress.com> (viewed on Jan. 19, 2002)).

steadily decreasing in wealthier countries while increasing in the developing countries. Unlike the U.S. and other industrialized countries, developing nations do not have the luxury of having poorer countries do their dirty work.<sup>25</sup>

There is little doubt that productivity, as measured by standard economic indicators, increased dramatically in the second half of the twentieth century. Some, however, have clearly been left behind.<sup>26</sup> Lee Tavis' Article discusses the "global social void" that has developed in spite of post World War II development.<sup>27</sup> Moreover, even if the rising tide of productivity has lifted all boats, or enough of them that we could confidently say that most people are better off—in terms of improved housing, life expectancy, literacy, and health care—we collectively face a natural environment that has been seriously degraded in the process.

Many economists have begun to question the basic assumptions of the economic models underlying our principle policies and institutions. Resource economists, sometimes known as ecological

25. Kevin Gallagher, *Have Faith in Free Trade—The Greatest Story Over Sold*, at [http://www.fpi.org/commentary/0106trade\\_body.html](http://www.fpi.org/commentary/0106trade_body.html) (viewed on Jan. 19, 2002).

26. See generally ATHANASIOU, *supra* note 19; see also DAVID C. KORTEN, WHEN CORPORATIONS RULE THE WORLD 18-22, 106-07 (1995). Using 1992 findings from the United National Development Programme (UNDP), Korten noted that "the 20 percent of the world's people who live in the world's wealthiest countries receive 82.7 percent of the world's income; only 1.4 percent of the world's income goes to the 20 percent who live in the world's poorest countries." *Id.* at 106. Korten also notes that in 1950, near the beginning of the global free trade era, "the average income of the 20 percent of people living in the wealthiest countries was about thirty times that of the 20 percent living in the poorest countries. By 1989, this ratio had doubled to sixty times." *Id.* at 106-07. Relatively speaking, then, Korten would find that the poorest nations are losing ground, though it must be said that if the "productivity pie" became much larger between 1950 and 1989, even the poorest nations might be better off.

Mark Weisbrot, *Another IMF Crash*, NATION, Dec. 10, 2001, at 6-8 (referring to Argentina's 2001 economic meltdown).

Over the longer term, the neoliberal program of the IMF and the World Bank—and their ability to enforce it—has contributed to a substantial decline in economic growth over the past twenty years throughout the vast majority of low- and middle-income countries. In Latin America, per capita GDP has grown a mere 6 percent over the past two decades, as compared with 75 percent in 1960-80.

*Id.* at 7-8. Louis Uchitelle, *Globalization Marches On, as U.S. Eases Up on the Reins*, N.Y. TIMES, Dec. 17, 2001, at C12 (discussing the December 2001 WTO negotiations in Doha, Qatar, at which the United States seemed to give some ground to developing nations' complaints about the WTO's free trade system). "There is also recognition in the Doha guidelines that the less-developed countries are often at a disadvantage in trading with the developed nations, and therefore need special treatment." *Id.* Uchitelle's article notes that there is now "a recognition that the global marketplace, left to itself, is not going to automatically produce wealth and prosperity in less-developed countries unless there is rule-making and new structures that reduce the potential for destructiveness." *Id.* (quoting Clyde Prestowitz, Jr.).

27. Tavis, *supra* note 19, at 487.

economists, are now achieving greater prominence.<sup>28</sup> Herman E. Daly, former senior economist at the World Bank, has been particularly influential in pointing out the deficiencies of the paradigm that has guided industrialized nations' thinking about global free trade.<sup>29</sup> Daly reminds us that economies are subsystems of the natural environment, even though economists have historically viewed the natural environment as an infinite source and an equally infinite sink.<sup>30</sup> The natural environment is neither, of course, but modern economics was born at a time when labor was scarce and natural resources were abundant;<sup>31</sup> now, human labor is plentiful—and underutilized—while natural resources are increasingly scarce.<sup>32</sup> Lester Brown, chairman of WorldWatch, has been issuing State of the World reports since 1984. He claims that as we work to maximize short-term economic benefits we are depleting Earth's natural capital.<sup>33</sup> Surveying older civilizations as well as our own, he concludes that:

As the twenty-first century begins, humanity is being squeezed between deserts expanding outward and rising seas encroaching inward. Civilization is being forced to retreat by forces it has created. Even as population continues to grow, the habitable portion of the planet is shrinking. Aside from climate change, the economic effects of environmental destruction and disruption have been mostly local—collapsing fisheries, abandoned cropland, and shrinking forests . . . . In an increasingly integrated global economy, local ecosystem collapse can have global economic consequences.<sup>34</sup>

In *A Green History of the World*, Clive Ponting describes numerous ancient civilizations in which human economic activities outran the natural resource base, resulting in decline.<sup>35</sup> Lester Brown cites Joseph Tainter's *The Collapse of Complex Civilizations* as showing how "environmental flaws" in the design of these economies led to collapse: failure to drain irrigated water to prevent accumulation of salt in soil (Sumerian), deforestation and soil erosion that

28. See, e.g., the website of the International Society for Ecological Economics, at <http://www.ecoeco.org>.

29. Daly, *supra* note 12, at 96-106.

30. *Id.* Compare Daly's views with Steidlmeier, mentioned *supra* note 3, in his critique of pre-ecological economism.

31. *Id.*

32. *Id.*

33. BROWN, *supra* note 17, at 21.

34. *Id.* at 13-14.

35. See generally CLIVE PONTING, *A GREEN HISTORY OF THE WORLD: THE ENVIRONMENT AND THE COLLAPSE OF GREAT CIVILIZATIONS* (1991). The civilizations include—among others—Mesopotamia, the Mayan, and the Easter Islanders. Overconsumption and overpopulation has doomed a number of societies, and Ponting's detailed history makes clear that our industrial capitalism has not yet solved the problem of ecological sustainability.

undermined agriculture (Mayan), and tree-cutting that exceeded sustainable yields (Easter Island).<sup>36</sup>

Our collective natural resources have been diminishing for hundreds of years, but the pace has greatly accelerated in the past fifty years.<sup>37</sup> Daily reports of shrinking forests, eroding soils, expanding deserts, dying coral reefs, rising sea levels, melting glaciers, more destructive storms, higher temperatures, more and more toxic substances, the depletion of aquifers, and decreasing access to clean, drinkable water all spell trouble for business and the well-being of humankind.<sup>38</sup> During the twentieth century, our global economic institutions have come into conflict with Earth's natural systems, a conflict that must be resolved in the twenty-first century in favor of more sustainable economic practices. Failure to do so threatens to increase the likelihood of armed conflict, especially within developing nations, in which certain groups may be marginalized or denied access to basic human needs.<sup>39</sup>

### B. *Environmental Preservation and Social Peace*

In denying certain groups of people access to land and resources, or in degrading the environment of selected groups by favoring the economic plans of MNCs, government policies and business activities may unintentionally create the conditions for violent conflict. Thomas F. Homer-Dixon has studied the conflicts engendered by environmental degradation, and has found that logging, dam construction, and factory emissions are often indirect causes of ethnic and civil strife.<sup>40</sup> Some of the key findings of the project that Homer-Dixon leads at the University of Toronto are that: (1) scarcity of renewable resources—cropland, fresh water, and forests—created intermediate social effects such as poverty and migration; (2) scarcity often encourages powerful groups to capture valuable environmental resources, leaving marginal groups to migrate to environmentally sensitive areas; (3) resource capture and ecological marginalization reinforce environmental scarcity and raise the potential for social instability; (4) adaptation to environmental scarcity in transitional economies can only be accomplished in countries with efficient markets, competent government bureaucracies, research centers, and uncorrupt legal mechanisms; and (5) in the absence of adaptation, environmental scarcity will sharpen existing distinctions among

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36. BROWN, *supra* note 17, at 14-16.

37. See, e.g., Akin L. Mabogunje, *Poverty and Environmental Degradation: Challenges within the Global Economy*, ENVIRONMENT, Jan./Feb. 2002, at 8.

38. *Id.*

39. See *infra* notes 40-48 and accompanying text.

40. See THOMAS F. HOMER-DIXON, ENVIRONMENT, SCARCITY, AND VIOLENCE (1999).

social groups and weaken state governance, which in turn can cause ethnic conflicts, insurgencies, and coups d'etat.<sup>41</sup> World Bank lending should preferably be sensitive to these factors, but some would say it has not been.<sup>42</sup>

The aggregate consequences of overconsumption<sup>43</sup> in the United States and other industrialized nations, poor inter-governmental development decisions—in the IMF and World Bank—and corporate opportunism—maximizing profit within legal limits—are ominous. Refugees from environmental disaster and degradation have created tension and sometimes violent conflict.<sup>44</sup> The degradation of Ogoni land by Royal Dutch/Shell was a significant factor in motivating the Ogoni people to demand more autonomy from the Nigerian government and more protection of the Ogoni environment. It was these demands that led to violence between the government and the Ogoni people.<sup>45</sup> Competition for scarce resources such as water can also be a potent source of violent conflict. Global warming and the melting of polar ice cover is predicted to raise ocean levels worldwide, directly impacting on island nations who plead most strongly for restraint of fossil fuel consumption by industrialized nations.<sup>46</sup> It is difficult to say how many civil wars are caused by resource capture and environmental marginalization, but since the end of World War II, more than twenty million people have died in armed conflicts, and only “three of the eighty-two armed conflicts between 1989 and 1992 were between states.”<sup>47</sup> As the next section indicates, sometimes the armed conflicts involve energy MNCs, whose presence in developing nations may serve the interests of one internal group against another.<sup>48</sup> In passing, it should also be noted that some U.S. companies are actively involved in exporting the military hardware

41. Project on Environment, Population, and Security, University of Toronto, Key Findings, at <http://www.library.utoronto.ca/pcs/eps/descrip.htm>.

42. See, e.g., Jacob D. Werksman, *Greening Bretton Woods*, in GREENING INTERNATIONAL LAW 65 (Philippe Sands ed., 1993).

The Bank and the affiliated international financial institutions known as the Bretton Woods group, have been accused of bankrolling ecological and economic disaster in the developing world, by promoting development projects that have denuded forests, depleted soils, and increased dependence on unsustainable energy sources. Gestures by the Bank to introduce greener policies in response to these criticisms have been met with deep scepticism and accusations of superficial ‘greenwashing.’

*Id.*

43. See *infra* Part II.B.3.

44. See *infra* notes 45-49 and accompanying text.

45. Steven Cayford, *The Ogoni Uprising: oil, human rights, and a democratic alternative in Nigeria*, 43 AFRICA TODAY 183, 189 (Apr.-June 1996).

46. See, e.g., Samuel Pyeatt Menefee, “Half Seas Over”: *The Impact of Sea Level Rise on International Law and Policy*, 9 UCLA J. ENVTL. L. & POL’Y 175 (1991).

47. KORTEN, *supra* note 26, at 20.

48. See *infra* Part I.C.

used in those conflicts; as of 1999, "developing nations remained the largest market for new weapons, accounting for about two-thirds of the total."<sup>49</sup>

### C. *The Role that Energy MNCs Play in Keeping or Disturbing the Peace*

Multinational energy companies are among the world's largest corporations.<sup>50</sup> These companies provide numerous cases of cooperation with governments who may terrorize and oppress their citizens. Tom Donaldson and Tom Dunfee begin their book on business ethics and social contract theory by discussing Royal Dutch/Shell's problems in Nigeria.<sup>51</sup> There appears to be growing corporate use of private military groups against any commercially disruptive elements, including unions.<sup>52</sup> In Sudan, Talisman Energy of Canada has been roundly criticized for its involvement with the government, which may have aided "a repressive government suspected of harboring and helping Al Qaeda, the terrorist network held responsible for the Sept. 11 attacks in the United States."<sup>53</sup> A U.S. federal indictment from 1998 claimed that in 1991, Osama bin Laden set up headquarters for Al Qaeda in Khartoum, Sudan's capital.<sup>54</sup> The indictment "also said Al Qaeda had forged alliances with the National Islamic Front, the ruling party in Sudan."<sup>55</sup>

Talisman's chief executive defended its role in Sudan, claiming that it was "socially responsible for a corporation to invest in certain

49. THE NEW YORK TIMES 2002 ALMANAC 500 (John W. Wright ed., 2002) [hereinafter 2002 ALMANAC] (stating that the "United States solidified its position as the largest arms dealer with more than a third of the world total. U.S. sales of \$11.8 billion, up from \$10.3 billion in 1998, were greater than those of all European nations combined.").

50. *Inside the 500*, FORTUNE, Apr. 16, 2001, at 232, available at [http://www.fortune.com/indexw.jhtml?channel=list.jhtml&list\\_frag=list\\_global500.jhtml](http://www.fortune.com/indexw.jhtml?channel=list.jhtml&list_frag=list_global500.jhtml) [hereinafter Fortune Global 500]. Fortune's Global 500 list in 2000 listed ExxonMobil as number one (with \$210 billion in revenues), Royal Dutch/Shell Group as number six (with \$149 billion in revenues), and BP (formerly British Petroleum) as number seven (with \$148 billion in revenues). *Id.* Auto companies were prominent among the top ten, with General Motors at number three, Ford Motor at number four, and Daimler Chrysler at number five. *Id.* Toyota was number ten. *Id.*

51. TIES THAT BIND, *supra* note 3, at 1-8.

52. See Eric W. Orts, *War and the Business Corporation*, 35 VAND. J. TRANSNAT'L L. 549 (2002); see also Aram Roston, *It's the Real Thing: Murder—U.S. Firms Like Coca-Cola are Implicated in Columbia's Brutality*, NATION, Sept. 3, 2001, at 34 (detailing the involvement of two U.S. corporations—Drummond and Coca-Cola—with paramilitaries that harass, kidnap, torture, and murder union activists in Colombia).

53. Bernard Simon, *Oil Company Defends Role in Sudan*, N.Y. TIMES, Oct. 17, 2001, at W1.

54. *Id.*

55. *Id.*

places that some elements of popular opinion find objectionable.”<sup>56</sup> He also noted that Talisman had worked with its partners in Sudan to adopt a code of ethics and put programs in place to address community development, human rights, and environmental concerns.<sup>57</sup> Critics, however, say that Talisman colludes with Sudan’s repressive regime to “crack down on insurgents who threaten the daily production of crude, or to clear oil areas of unwanted inhabitants” and build “roads and airstrips that allowed government forces to pursue war. . .”<sup>58</sup>

In Burma (Myanmar), Unocal has worked with a military regime that has undermined democracy and human rights.<sup>59</sup> Global Exchange, among other NGOs, has claimed that Unocal’s operations in Burma are “connected to the forced relocation of Indigenous peoples, forced labor, rape, torture, and murder.”<sup>60</sup> In June 2000, ExxonMobil was named in a U.S. lawsuit “as responsible for murder, torture, and kidnapping in Aceh, a region on the northern tip of Sumatra, Indonesia.”<sup>61</sup> The suit was filed on behalf of eleven Aceh residents and claims that Indonesian government troops hired by ExxonMobil may be responsible for numerous killings and disappearances.<sup>62</sup> ExxonMobil has denied the allegations, which include claims that the company “provided barracks where victims were tortured and heavy equipment was used to dig mass graves.”<sup>63</sup>

56. *Id.*

57. *Id.*

58. Norimitsu Onishi, *Oil Money Pulls Sudan Out of Its Isolation and Toward an Uncertain Future*, N.Y. TIMES, Oct. 17, 2001, at A12.

59. See Jeffrey Nesteruk, *Conceptions of the Corporation and the Prospects of Sustainable Peace*, 35 VAND. J. TRANSNAT’L L. 437 (2002).

60. Global Exchange, Quarterly Newsletter, Autumn 2001, at 6 (copy on file with author).

61. *ExxonMobil Sued for Atrocities*, EARTH ISLAND J., Winter 2001, at 14.

62. *Id.* For a copy of the complaint, see [www.laborrights.org](http://www.laborrights.org). The Aceh dispute is part of a wider religious conflict between Muslim and Christians. See Seth Mydans, *In Indonesia, Once Tolerant Islam Grows Rigid*, N.Y. TIMES, Dec. 29, 2001, at A3.

[A] long-running separatist war in Aceh is being fought in part in the name of Islam; Aceh is one of the most orthodox Muslim provinces. The separatist rebels in the Free Aceh Movement first rose up in the 1970’s, and are as interested in controlling the province’s rich oil and natural gas fields as they are in Islamic extremism. But the revolt is brutal—at least 1,200 people have died in Aceh this year—and religion is one way of fomenting discontent against both Indonesian authorities and the ExxonMobil affiliate that runs the gas fields.

*Id.*

63. *And Now a Word from our Sponsor*, HARPER’S MAG., Dec. 2001, at 19 (featuring portions of seven plaintiffs’ accounts). The lawsuit claims that ExxonMobil hired “Indonesian military forces, the Tentara Nasional Indonesia (TNI) . . . to protect its natural gas operations in the Aceh province, where a separatist rebellion has been ongoing for twenty-five years.” *Id.* The magazine’s preface to these accounts notes that 6,000 people, mostly civilians, have died in the fighting, and that a thousand have been

In Colombia, the Occidental Petroleum Company has been criticized for its plans to drill for oil on what the U'wa Indians consider as their ancestral lands.<sup>64</sup> In February 2000, there were demonstrations at Fidelity Investments' offices in Boston, Atlanta, New York, Chicago, San Francisco, Los Angeles, Prague, Geneva, Tel Aviv, and ten other cities to protest the mutual fund company's holdings in Occidental.<sup>65</sup> The protest was organized by Rainforest Action Network and other environmental organizations.<sup>66</sup> Fidelity responded by noting that the Colombian government was the appropriate institution to resolve the disputes between the U'wa tribe and Occidental.<sup>67</sup> An investment firm dealing primarily in "socially responsible investments," Trillium Asset Management, commented that Fidelity—with its eight percent stake in Occidental—could and should influence the petroleum company to back off the project.<sup>68</sup> The U'wa position, however, is not politically potent in Colombia, where oil shipments represent thirty percent of total export earnings.<sup>69</sup>

A pattern emerges: energy MNCs, seeking new sources of oil and natural gas—especially outside of the Middle East—are cooperating with governments who seek foreign exchange, even where those governments may be violating human rights in order to make way for corporate operations.<sup>70</sup> The Center for International Environmental Law notes that the

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killed in the last year. *Id.* In the account that follows, Unit 113 refers to the soldiers of TNI assigned by the government to the Exxon-Mobil natural gas facility near the town of Lhokseumawe. *Id.*

JOHN DOE, AGE 36: On August 11, 2000, I left my house by motorbike to go to Jungkagajah. I was stopped on the road by the Exxon brigades of the TNI. They pulled me off my motorbike and beat me so badly I couldn't see. I was handcuffed and blindfolded. They beat me some more. I was tortured almost every day for almost three months. Mainly they beat me and shocked me with electricity. They shocked my face and my genitals. Once they took me outside and threatened to shoot me and throw me in a big pit—a mass grave. They lowered me into the pit, and I could have touched a pile of bodies. They were trying to get me to confess that I was a criminal. The place where I was inside the compound of the Arun gas plant. The soldiers were from Unit 113.

*Id.*

64. See Karen Hsu, *Fidelity a Target in Oil Protest Fund; Firm Owns Stake in Company Drilling Near Indian Land*, BOSTON GLOBE, Feb. 4, 2000, at A16.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.*

69. Steven Dudley, *In Colombia, a Dispute Fueled by Oil; U'wa Indians Appear to Be Losing Battle Against Government-Backed Drilling Project*, WASH. POST, Feb. 20, 2000, at A23.

70. See generally Scott Holwick, Note & Comment, *Transnational Corporate Behavior and Its Disparate and Unjust Effects on the Indigenous Cultures and the Environment of Developing Nations: Jota v. Texaco, a Case Study*, 11 COLO. J. INT'L

link between human rights and environmental protection has become increasingly clear in recent years. Environmental damage is often worse in nations and in areas with human rights abuses. Where human rights are weak, civic groups are not able to raise environmental concerns effectively. Rights of free association, access to justice, access to information and freedom of expression are critical for the success of a country's environmental and human rights movements.<sup>71</sup>

#### D. *Breaking the Cycle of Exploitation*

The activities of some MNCs in many developing nations and their indirect support for the leading institutions of the global economy—World Bank, IMF—have sometimes contributed to environmental degradation, poverty, and social unrest. For ongoing research and discussions of the role corporate governance can play in co-creating the conditions of peace, it is important to understand whether the corporate-military-governmental collaborations described above are exceptions to the general rule of beneficial development of emerging economies through free trade or are symptoms of a global economic order that tends to exploit less powerful nations and peoples.<sup>72</sup> The truth is not necessarily somewhere in between, and if critics of the current global economic order<sup>73</sup> are correct, important changes must be undertaken to break the cycle of exploitation. Breaking the cycle will require explicit recognition among citizens, governments, and corporations of their mutually reinforcing roles. The notion that corporations merely follow the law and strive to maximize profits for shareholders does not recognize the reality that MNCs may lend support and financial credibility to the governments of transitional economies, may in fact collaborate in ways that deprive local populations of basic human needs, and may influence both national and international bodies that set the terms of global trade.

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ENVTL. L. & POL'Y 183 (2000). Holwick's article discusses a number of cases where corporations have deliberately cooperated with autocratic governments, acted in deprivation of worker's rights, and with abuse of the environment. Oil extraction, in particular, seems problematic.

71. Center for International Environmental Law, Human Rights & Environment (HRE) Program, at <http://www.ciel.org/Hre/programhre.html>.

72. ATHANASIOU, *supra* note 19, at 154.

73. Any one of various works cited herein could provide the reader with a fairly thorough critique of the current global economic order. *See, e.g.*, ATHANASIOU, *supra* note 19; KORTEN, *supra* note 26; HAWKEN, *supra* note 21; BARNET & CAVANAGH, *supra* note 23; and WILLIAM GREIDER, ONE WORLD, READY OR NOT: THE MANIC LOGIC OF GLOBAL CAPITALISM (1997). All share the perception that the current path of economic progress is undermining the environment. Most also share the belief that "globalization" is not securing equitable benefits to the developing nations and peoples of the world.

## II. CAN CORPORATE COMPLIANCE WITH LAW BE SUFFICIENT?

This Part of the Article considers whether a corporation can have an important voice in arranging—or re-arranging—the rules of the business game. If it can, would it have a responsibility to support environmental laws that might limit profits in the short-term? In brief, this Article contends that MNCs do have a significant voice and that they not only have a responsibility to exercise their freedom of speech to oppose ill-founded laws and regimes, but also to abide by well-considered laws and to support structurally sound proposals for modifying the legal environment of business. If abiding by such laws means reduced profits, corporate civil disobedience would not be warranted just because of such revenue losses.<sup>74</sup>

The idea that corporations may have a duty to support positive changes in the law is somewhat at odds with the prevailing paradigm of a relatively powerless publicly-held company, caught between “the market”—consumer demands, supplier problems, attention to shareholders, competitors, and creditors—and “the government”—local, state, federal, and, for MNCs, nation-states beyond the principal place of business. This paradigm is captured in the comments of auto and oil company CEOs, the outlook of Milton Friedman, the governance principles of the American Law Institute,<sup>75</sup>

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74. Yet this raises questions that might usefully be reconsidered, such as: Must corporations always follow the law, or is there a role in corporate governance for selective non-compliance? If a company located in the United States were to find that state officials were not enforcing the Clean Water Act, and that exceeding permitted discharges could save the company money, should they not do so? If the rules of the game are clear, but the officials are not enforcing them, then a savvy coach—or corporate manager—might tell the players to go with the prevailing enforcement, particularly if profit maximization were the polar star of the corporate culture. A different kind of corporate civil disobedience might also seem warranted where a host country's laws appeared contrary to international law, “natural law,” or were repugnant to the ways and thoughts of the rest of humankind.

In some ways, obedience to the law is an ambiguous, broad standard even within one country. For good reasons, corporations can—and often do—exceed the allowed minimum standards set by law. Tom Dunfee has correctly pointed out that corporate managers are well-advised to consider markets as places where moral sensibilities have significant impact on profits. See Thomas W. Dunfee, *Challenges to Corporate Governance: Corporate Governance in a Market with Morality*, 62 LAW & CONTEMP. PROBS. 129 (Summer 1999). Sensibly, U.S. law is relatively tolerant of managerial decisions—the business judgment rule comes to mind—and short-term failure to maximize shareholder returns is disciplined more in the market than in courts of law. In short, there are times when strict adherence to the law is an insufficient standard, either from a market perspective or a moral perspective. Accordingly, any guidance that following the law is per se morally sufficient should be approached with some skepticism.

75. These principles give primacy to profit-seeking within the “boundaries set by law,” while noting that corporations should take into account “ethical obligations that are reasonably regarded as appropriate to the responsible conduct of business.”

and the thoughts of business ethicist Norman Bowie.<sup>76</sup> Because this Article pays particular attention to oil companies and industrial democracies' dependence on fossil fuels,<sup>77</sup> Bowie's claims about the ethical obligations of auto companies deserve particular attention.

In *Markets, Morality, and Motor Cars*, Bowie states that business "does not have an obligation to protect the environment over and above what is required by law; however it does have a moral obligation to avoid intervening in the political arena in order to defeat or weaken environmental legislation."<sup>78</sup> The implication of this is that (1) business is relatively powerless relative to the government, and (2) environmental legislation that might be defeated or weakened by business intervention is, on the whole, socially and environmentally desirable. Neither (1) nor (2), however, is invariably true. Much environmental legislation may be misguided or in need of amendment. Also, many MNCs do seem to have significant influence or power relative to governments of developing nations.<sup>79</sup> Even in developed economies, companies often exercise free speech to inform consumers in the market and to make governmental rules and regulations more to their liking.<sup>80</sup> One may reasonably ask, if corporations are powerless to influence public opinion and public policy, why so many spend money on advertising, public relations, and lobbying? Assuming that these expenditures of corporate time and money are meant to enhance shareholder earnings, it is difficult to accept the notion that large corporations possess no power to influence governments and consumers.

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AMERICAN LAW INSTITUTE, PRINCIPLE OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS §§ 2.01(b)(1)-(b)(2) (1994).

76. Bowie, *supra* note 10, at 440.

77. *But see* the discussion on oil companies in developing nations, *supra* notes 51-70 and accompanying text. *See also infra* notes 144-50 and accompanying text (Part III of this Article, in which U.S. dependence on oil from the Middle East is claimed to be a partial cause of discord and conflict.)

78. Bowie, *supra* note 10, at 440.

79. It is beyond the scope of this Article to definitively and empirically defend this claim. Some energy MNCs would undoubtedly claim that, although they are economically powerful, the oil or gas is in the ground owned and controlled by a government or politically entrenched group that can choose among many corporate suitors, and that MNCs are actually in a weak position to dictate terms of direct investment. This is both an issue for business ethicists to consider—whether an MNC is acting unethically by getting involved in a profitable but untidy relationship because other MNCs with fewer scruples would do so in any case—and for empirical research—by examining particular direct investment arrangements, are MNCs in fact able to negotiate with governments in ways that promote positive standards for human rights, labor, and the local environment? *See also infra* notes 348-52 and accompanying text (discussing "constructive engagement").

80. Some of the information that corporations provide may in fact be misinformation. Allegations of "greenwashing" have become fairly common. *See, e.g.*, CorpWatch, USA: *Top 10 Greenwashing Companies of 1999*, at <http://www.corpwatch.org/bulletins/PBD.jsp?articleid=331>.

Moreover, the implication that all environmental laws are worth abiding by does not stand up to reason or experience, nor does the notion of business non-intervention with poorly-considered proposals "for the environment." For the sake of argument, suppose that Bowie means not only existing legislation, but also environmental bills in the legislative hopper, or even proposed regulatory standards. If he is correct, then all corporate efforts from oil and auto companies to defeat ratification of the Kyoto Protocol, however flawed, would be morally impermissible, as would all efforts from oil companies to defeat additional fossil fuel energy taxes, as would all efforts from auto companies to defeat more stringent fuel efficiency standards. But this cannot be. Oil and auto companies routinely engage in free speech activities, lobby hard to weaken certain environmental legislation and regulation, show no signs of slacking off, and generally have shareholder—and sometimes union—support. Moreover, some lobbying may result in positive changes. In short, there is nothing about corporate lobbying per se that is morally suspect. Bowie, however, leads us to something important, and this Article hopes to present a slightly more nuanced set of guidelines for corporate obedience and opposition to environmental law.

#### A. *Government Rules, Market Forces, and Corporate Responses*

Before revisiting Bowie's thoughts, it may be helpful to look at existing government policies and market forces that affect oil and auto companies. Neither the public nor U.S. politicians give explicit recognition to the interplay between government policies and market forces. The rhetoric of both left and right contributes to this confusion. From the left, the notion is that government can capably control the decisions of many market participants. From the right, the notion is that if left to its own devices, the market can allocate resources perfectly well. The words "market failure" seldom issue from the lips of the most ardent advocates of this view, but economists are well aware that government must sometimes act to create and maintain properly functioning, competitive markets. Cass Sunstein—and others—have by now made it clear that by enacting laws, government does set the parameters for the market, and that markets require law;<sup>81</sup> stable laws regarding contract, property, and tort are minimal conditions for assuring that promises are kept, that people are able to utilize land and other property in ways that enrich human life, yet do so without causing uncompensated harm to others.

Governments—and related institutions—have, however, often done more than provide such minimal services to establish markets and continue to do so. For the oil industry, the U.S. government

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81. See, e.g., CASS R. SUNSTEIN, *FREE MARKETS AND SOCIAL JUSTICE* (1997).

provides subsidies of at least five billion dollars annually, largely in the form of depreciation allowances, accelerated depreciation, and other tax incentives for fossil fuel industries.<sup>82</sup> The OECD has found that U.S. consumption patterns are based on "low density housing, extensive use of motor vehicles, and a high generation of waste,"<sup>83</sup> all largely supported by subsidies such as road construction and free parking provided by employers—whose expense is tax deductible<sup>84</sup>—and failure to include the full social and environmental costs in the price of gas.<sup>85</sup> While the United States has imposed some energy taxes, their salutary effect has been "nullified" by energy production tax incentives.<sup>86</sup> The oil industry pays an effective income tax rate of eleven percent compared to the non-oil industry average of eighteen percent.<sup>87</sup> Without such a differential rate, the oil industry would have paid an additional two billion dollars in 1991.<sup>88</sup> Moreover, state and local governments tax gasoline at about half the rate they tax other goods—roughly three percent versus six percent.<sup>89</sup>

The subsidizing of non-renewable energy, however, is just part of the global picture. A 1997 study by the Earth Council entitled "Subsidizing Unsustainable Development" found at least \$700 billion of taxpayer money annually to

encourage the use of water, the burning of fossil fuels, the use of pesticides, fishing and driving. The report documented countless

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82. James Kennedy, *Invest in Alternative Energy Technologies, Abolish Fossil Fuel "Subsidies," Group Says*, Int'l Env't Daily (BNA) (Dec. 12, 1997). The oil industry is hardly alone in receiving subsidies that are environmentally questionable. In arguing that "market economics would work to benefit the environment," Martin Lewis noted in 1992 that:

In the Tongass National Forest of southeast Alaska, the clear-cutting of ancient forests is profitable only because loggers are given massive government subsidies. In fact, in the majority of America's national forests, logging is an economically unsound activity that would wither away without continual federal handouts. Most of the environmentally destructive water projects in the American West are similarly sustained by public funds, as is that massive overgrazing that occurs on almost all the federal government's rangelands . . . [i]n these cases, avid proponents of capitalism ought to be just as incensed as the radical Greens: taxpayer money is being wasted.

Martin Lewis, *The Green Threat to Nature*, HARPER'S MAG., Nov. 1992, at 26, 30.

83. Cheryl Hogue, *OECD Says U.S. Should Scrutinize Consumption, Cut Unsound Subsidies*, Int'l Env't Rep. (BNA) 961, 961 (1995).

84. *Id.*

85. See NATURAL CAPITALISM, *supra* note 4, at 22-24, 41-42.

86. *Effect of Energy Taxes Nullified by Production Incentives, U.S. Agency Says*, Int'l Env't Daily (BNA) (Feb. 8, 1991).

87. Roland Hwang, *Money Down the Pipeline: The Hidden Subsidies to the Oil Industry*, Union of Concerned Scientists Website, at <http://www.ucsusa.org/transportation/pipeline.html>.

88. *Id.*

89. *Id.* (citing J.W. LOPER, STATE AND LOCAL TAXATION: ENERGY POLICY BY ACCIDENT (1994)).

examples of taxpayers subsidizing the use of water in countries where water tables are falling. . . . Additional billions are being spent to expand the world fishing fleet when its capacity is already nearly double the sustainable catch.<sup>90</sup>

Subsidies are anathema to economists, who understand that subsidies, like negative externalities, represent forms of market failure by undermining efficient resource allocation.<sup>91</sup>

For the auto industry, state and federal governments have combined to provide highway construction, bridges, tunnels, traffic signs and signals, policing, traffic courts, civil courts to hear auto accident claims, and a variety of other services that are only partially funded by license taxes, tolls, and gasoline taxes. Oil companies benefit from these government services as well because crude oil is refined into gasoline, which is the primary fuel for U.S. motor vehicles.<sup>92</sup> Both oil and auto companies benefit from substantial and costly U.S. military commitments in the Middle East. The cost of gasoline does not reflect its full social or environmental costs, either; Norman Myers has estimated that internalizing all direct environmental and social costs of gasoline would lead to a two dollars per gallon tax and that if Americans internalized "all costs of their car culture" they could be paying at least ten dollars per gallon.<sup>93</sup>

Sensible laws, following sound economic theory, would seek to make markets work better by eliminating the distortions of subsidies that encourage unsustainable behaviors and would seek to make markets work better by letting prices reflect their full social and environmental costs. The strategy is unexceptional, in economic terms,<sup>94</sup> but in political terms, subsidies are sometimes sacrosanct,

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90. BROWN, *supra* note 17, at 240.

91. Readers unfamiliar with the terms "subsidies" and "externalities" may consult a number of standard economic texts. In addition, a concise account of negative externalities—and why they are difficult to remedy—can be found in MANUEL VELASQUEZ, *BUSINESS ETHICS, CONCEPTS AND CASES* 276-81 (4th ed. 1998).

92. The transportation sector used 12.99 million barrels of petroleum per day in 2000, and .75 million barrels per day of natural gas. See 2002 ALMANAC, *supra* note 49, at 364.

93. Norman Myers, Consumption in Relation to Population, Environment, and Development, Paper for Proceedings of the U.S. National Academy of Sciences (delivered to the Durable Use Group, School of Natural Resources and Environment, University of Michigan, U.S.A.), July 1996, at 9 (copy on file with author). The immediate externalities include air pollution and its human health consequences. See also J. J. MACKENZIE, R.C. DOWER, & D.D. CHEN, *THE GOING RATE: WHAT IT REALLY COSTS TO DRIVE* (1992).

94. Myers, *supra* note 93, at 9, in which Myers joins a plea to "internalize externalities" with the need to eliminate "perverse" subsidies. Myers notes the fisheries example: "we harvest \$124 billion worth of fish each year which is then sold for \$70 billion, the difference being made up largely by government subsidies which thus stimulate over-fishing to meet short-term consumer demand." *Id.* See also NATURAL CAPITALISM, *supra* note 4, at 160 (distinguishing between useful subsidies and perverse ones).

and the hidden tax of negative externalities is more popular with voters—by default—than any direct tax.

It would be unfair to leave the impression that auto companies get only benefits from the current infrastructure and laws. The auto companies are also subject to a variety of U.S. federal and state laws that dictate engineering and design decisions and raise the cost of any vehicle sold.<sup>95</sup> Yet, some of the most significant legislative and regulatory mandates have been strongly resisted by auto companies;<sup>96</sup> moreover, the overall tendency seems to be resistance to any proposal or initiative that would decrease profits.<sup>97</sup> In the following sections, this Article will posit U.S. policy needs for addressing issues of global warming, energy dependence, and overconsumption, and will then focus on three general policy approaches: energy taxes, fuel efficiency standards, and mandated zero emission vehicles. The conclusion to this Part is that auto companies are clearly justified in opposing ZEV mandates in the law, somewhat justified in opposing fuel efficiency standards, and not justified in opposing higher taxes on fossil fuels. This follows from a broad mandate for corporations to support structural legal reforms that fit sound economic theory and promote structural efficiencies: that the price of a product or service reflects its full social and environmental costs and that barriers to free competition—including subsidies that perpetuate the use of non-renewable resources—are gradually eliminated.

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Ideally, subsidies are supposed to exert a positive outcome by helping people, industries, regions, or products that need to overcome cost, pricing, or market disadvantages. For example, education is subsidized so that parents don't have to pay the full cost of their children's schooling. Microprocessor development was heavily subsidized by the U.S. Defense Department for over a decade, and still is in specialized areas. Today, that looks like a brilliant investment.

Perverse subsidies do the opposite. They function as disinvestments, leaving the environment and the economy worse off than if the subsidy had never been granted. They inflate the costs of government, add to deficits that in turn raise taxes, and drive out scarce capital from markets where it is needed. . . . [T]hey provide incentives for inefficiency and consumption rather than productivity and conservation.

*Id.* at 16.

In terms of social costs, Hawken and the Lovinses note that, aside from pollution-induced illness, social costs include congestion, traffic delays, accidents, roadway damage, land use—urban sprawl and other side effects of driving itself. Road accidents cost about ninety billion dollars annually by killing over forty thousand Americans while injuring five million more. Globally, car accidents are the fifth—and soon will be the third—largest cause of death. *Id.* at 41.

95. See, e.g., CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA 138-72 (2001).

96. *Id.*

97. *Id.*

## B. Auto Industry Environmental Issues: A Sampling

There are many environmental issues that involve the auto industry, both in the United States and other industrialized nations: global warming, energy dependence, air pollution, and overconsumption must take their place along with toxic byproducts and discharges—such as mercury—recycling, and urban sprawl. For simplicity, the Article will posit that problems of global warming, energy dependence, and overconsumption are problems that the United States needs to address, and that the solution to these problems must come not just from government or consumers—from laws and “the market”—but from corporations as well.

### 1. Global Warming

The increase in observed temperatures worldwide began to attract serious scientific and political attention in the 1980s and 1990s. Human-based greenhouse gas (GHG) emissions had increased markedly, especially during the latter part of the twentieth century, and many scientists believed there was a causal connection between increased GHG emissions and global warming or global climate change.<sup>98</sup> The cause of this warming is still debated,<sup>99</sup> but most scientists and governments believe it to be the result of human activities, particularly those involving the use of fossil fuels.<sup>100</sup> Fossil fuels provide roughly eighty-five percent of the world's commercial energy,<sup>101</sup> and the automobile industry—the world's leading industry<sup>102</sup>—is highly dependent on the oil industry—a close global

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98. See *Climate Panel Reaffirms Major Warming Threat*, N.Y. TIMES, Jan. 23, 2001, at F8. “In the most emphatic warning yet about the danger of global warming, scientists from 99 nations meeting here issued a report today that sharply increased projected climate change blamed on air pollution and warned of drought and other disasters.” *Id.* See also *This Year Was the 2nd Hottest, Confirming a Trend, U.N. Says*, N.Y. TIMES, Dec. 19, 2001, at A5 [hereinafter *2nd Hottest*]. “The Earth's temperature in 2001 is expected to be the second highest in the 140 years that meteorologists have been keeping records, the United Nations weather agency said today.” *Id.*

99. See generally PATRICK J. MICHAELS, *SOUND AND FURY: THE SCIENCE AND POLITICS OF GLOBAL WARMING* (1992); RONALD BAILEY, *ECO-SCAM: THE FALSE PROPHETS OF ECOLOGICAL APOCALYPSE* (1993); Richard A. Kerr, *Climate Change: Greenhouse Forecasting Still Cloudy*, SCIENCE, May 16, 1997; Robert C. Balling, Jr., *Global Warming: Messy Models, Decent Data, and Pointless Policy*, in *THE TRUE STATE OF THE PLANET* (Ronald Bailey ed., 1995); William H. Calvin, *The Great Climate Flip-flop*, ATLANTIC MONTHLY, Jan. 1998.

100. The U.N. weather agency has “attributed much of the warming to the greenhouse effect from burning fossil fuels.” *2nd Hottest*, *supra* note 98, at A5.

101. *Id.*

102. For example, almost every seventh job in Germany is linked to the auto industry. *Parliamentarians Expecting Drawn-Out Fight on New Tax Scheme to Cut Exhaust Emissions*, Int'l Env't Rep. (BNA) 773 (Oct. 4, 1995). In the United States,

second to the auto industry.<sup>103</sup> Seven of the ten largest industrial corporations in the United States are either oil or auto companies.<sup>104</sup> A substantial percentage of carbon dioxide emissions come from motor vehicle exhaust.<sup>105</sup>

In 1992, the United Nations Framework Convention for Climate Change (UNFCCC)<sup>106</sup> was adopted at Earth Summit in Rio de Janeiro. The UNFCCC set voluntary guidelines for reduction of GHG emissions.<sup>107</sup> In subsequent discussions on the UNFCCC, it became clear that voluntary guidelines were not working, and in 1997, the Kyoto Protocol was adopted, committing industrialized nations to reduce six kinds of greenhouse gas, the most prominent being carbon dioxide.<sup>108</sup>

Since the Earth Summit in 1992, U.S. gasoline use has increased markedly.<sup>109</sup> In essence, the U.S. public is consuming more and more, generating more and more GHG emissions, and the transportation sector leads the way.<sup>110</sup> An Energy Department

automobiles became the leading industry by 1930. J. Yost Conner, Jr., Note, *Revisiting CAFE: Market Incentives to Greater Automobile Efficiency*, 16 VA. ENVTL. L.J. 429 n.2 (1997) (citing JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 27 (1990)). By the 1950s, one-sixth of U.S. jobs were connected to automobile production. MASHAW & HARFST, *supra*, at 28.

103. Fortune Global 500, *supra* note 50.

104. *Id.*

105. As of 1993, one estimate was that fourteen percent of global carbon dioxide emissions were contributed by motor vehicles worldwide. STEVE NADIS & JAMES J. MACKENZIE, *CAR TROUBLE* xv (1993). This percentage has grown. See *infra* notes 111 and 114 and accompanying text.

106. United Nations Conference on Environment and Development: Framework Convention on Climate Change, 31 I.L.M. 849 (1992) [hereinafter UN Conference].

107. *Id.*

108. John J. Fialka, *Global Warming Treaty is Approved*, WALL ST. J., Dec. 11, 1997, at A2.

109. *U.S. Gas Consumption Hits Record High in Summer*, DETROIT FREE PRESS, Oct. 18, 1997, at 10B. "Total miles traveled have been going up 2 percent or 3 percent a year." *Id.* Total motor fuel consumption rose from 8,849,000 barrels per day in 1990 to 9,374,000 barrels per day in 1995. INFORMATION PLEASE ALMANAC 452 (Otto Johnson ed., 1997).

110. John J. Fialka, *U.S. Expects Use of Energy to Soar, Boosting Emissions*, WALL ST. J., Nov. 13, 1997, at B6. "The energy department's prediction suggests that Americans, who use more energy per capita than any other nation, will also drive more and continue to shun more fuel-efficient cars." *Id.* See also Keith Bradsher, *License to Pollute: Light Trucks Increase Profits But Foul Air More Than Cars*, N.Y. TIMES, Nov. 30, 1997, at A1.

American emissions of global warming gases are increasing even faster than previously expected, in part because of the rise in popularity of sport utility vehicles and other gas-guzzling light trucks. These trucks will be the fastest-growing source of global warming gases in the United States over the next decade, exceeding the increase in all industrial emissions combined, according to an Environmental Protection Agency researcher.

*Id.*

report in 1997 indicated that the United States, with less than one twentieth of the world's population, accounted for almost one fourth of all greenhouse gases; U.S. emissions of carbon dioxide from transportation had grown 8.5 percent since 1990.<sup>111</sup> The number of vehicles worldwide multiplied by a factor of eight from 1950 to 1989,<sup>112</sup> and by 1999, the transportation sector globally was responsible for twenty-one percent of worldwide carbon emissions.<sup>113</sup> If current trends continue, the global automobile population could double in as little as twenty-five to fifty years.<sup>114</sup> Moreover, regulatory controls on motor vehicle emissions have focused on carbon monoxide, hydrocarbons, nitrogen oxide, and ozone, and highway emissions of carbon dioxide and other gases "remain largely unaddressed."<sup>115</sup> In both the European Community and the United States, the transportation sector was responsible for the largest increases in carbon dioxide emissions after the Rio de Janeiro Earth Summit.<sup>116</sup> Thus, if the United States and European nations are to reduce GHG emissions, doing so in the transportation sector seems mandatory.

The Kyoto protocol was the result of years of preparation and eleven days of grueling final negotiations.<sup>117</sup> The accord would require industrialized nations to cut greenhouse gas emissions to between six percent and eight percent below 1990 levels.<sup>118</sup> The reductions would be achieved between 2008 and 2012.<sup>119</sup> The differing percentage levels reflect different targets for the European

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111. Joby Warrick, *Greenhouse Gas Emissions Up Sharply in U.S. Last Year*, WASH. POST, Oct. 20, 1997, at A4. See also John H. Cushman, Jr., *U.S. Says Its Greenhouse Gas Emissions are at Highest Rate in Years*, N.Y. TIMES, Oct. 21, 1997, at A22. The Union of Concerned Scientists estimates that the U.S. transportation sector alone emits more carbon dioxide than all but three countries. Union of Concerned Scientists, *The Hidden Costs of Transportation*, at <http://www.ucsusa.org/transportation/hidden.html>. The transportation sector includes engines for autos, light trucks, heavy trucks, railroads, buses, and airplanes.

112. *Id.* at xvi. See also LESTER R. BROWN, NICHOLS LENSSEN, & HAL KANE, VITAL SIGNS 1995: THE TRENDS THAT ARE SHAPING OUR FUTURE 83 (1996). World automobile production has climbed from eight million in 1950 to thirty-five million in 1994. *Id.* The world automobile fleet went from roughly fifty million in 1950 to over 500 million in 1994. *Id.*

113. NATURAL CAPITALISM, *supra* note 4, at 40.

114. Union of Concerned Scientists, *The Hidden Costs of Transportation—Cars and Trucks and Global Warming*, at <http://www.ususa.org/transportation/cars.html>.

115. *OECD Report Warns Emission Control Efforts threatened by Projected Growth in Car Use*, Int'l Env't Rep. (BNA) (Mar. 8, 1995).

116. *Commission Report Finds Current Policies on CO<sub>2</sub> Emissions "Clearly Insufficient,"* Int'l Env't Rep. (BNA) (Apr. 3, 1996).

117. Sumiko Oshima, *Negotiators fought fatigue for accord*, JAPAN TIMES ONLINE, Dec. 1-10, 1997, at <http://www.japantimes.co.jp.cop3/news/12-12c.html> (Site no longer active; copy on file with author).

118. UN Conference, *supra* note 106, art. 3.

119. *Id.*

Union, the United States, and Japan.<sup>120</sup> The European Union would reduce its emissions by eight percent below 1990 levels, the United States by seven percent and Japan by six percent.<sup>121</sup> Twenty-one other industrialized countries would meet similar binding targets within the same 2008 to 2012 timeframe,<sup>122</sup> and all industrialized nations committed to cutting even deeper after that.<sup>123</sup> Together, these nations will be reducing their greenhouse-gas emissions by slightly more than five percent from 1990 levels.<sup>124</sup>

The Kyoto Protocol of 1997 was intended to set mandatory reduction targets for GHG emissions from industrialized nations.<sup>125</sup> Considerable opposition to this Protocol emerged in the United States, with “business interests” leading the charge.<sup>126</sup> The Global Climate Coalition (GCC) was created by major MNCs to battle any reduction commitments.<sup>127</sup> Its members initially included the American Petroleum Institute, Ford, GM, Chrysler, Dow Chemical, DuPont, Exxon, Mobil, the American Automobile Manufacturers Association, Chevron, Shell, Texaco, and Union Carbide.<sup>128</sup> According to CorpWatch, a non-profit organization promoting corporate environmental accountability,<sup>129</sup> the GCC used various strategies to defeat U.S. ratification of the Protocol. These strategies included: (1) raising public concerns about unemployment resulting from emissions regulations, (2) releasing reports with “dubious scientific legitimacy” that questioned whether global warming was taking place, (3) attending climate negotiation meetings “en masse,” (4) sending a letter “signed by 119 of the U.S.’s most prominent business leaders” to President Clinton, asking that all current climate proposals be rejected, and (5) insisting that developing countries commit to the same stringent reductions as industrialized nations.<sup>130</sup> At the same time, however, developing countries are lobbied “to reject any environmental obligations that might hinder their development.”<sup>131</sup>

Corporations have been joined by some unions in campaigning against the Kyoto Protocol. The Global Climate Information Project

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120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. CorpWatch, *The Weather Gods: How Industry Blocks Progress at Kyoto Climate Summit*, at <http://www.corpwatch.org/true/feature/planet/gods.html> (on file with author).

127. *Id.* See also The Global Climate Coalition website, at [www.globalclimate.org](http://www.globalclimate.org).

128. CorpWatch, *supra* note 126.

129. See CorpWatch website, at <http://www.corpwatch.org>.

130. CorpWatch, *supra* note 126.

131. *Id.*

includes trade associations like the American Petroleum Institute and trade unions such as the United Mine Workers of America and the AFL-CIO;<sup>132</sup> their advertising campaign warns of a general increase in prices that would result from a climate agreement and the unfairness of exempting the developing world from binding commitments.<sup>133</sup> Predictions of massive job losses and economic slowdowns are the stock in trade of the American Petroleum Institute, and the Western Fuels Association sponsors "expert witnesses" who contest prevailing scientific opinion and argue that climate change would be a good thing.<sup>134</sup>

Assuming CorpWatch is a credible source, it seems clear that some of these corporate-sponsored organizations will use any arguments, experts, or statistics that will defeat or weaken environmental laws that would impair jobs and profits. Many shareholders—and union members—would even applaud this strategy, particularly if it helped to maintain share prices or preserve jobs. Nor would all agree that deliberate distortions are morally suspect; the experience of advocacy within the rules of courtroom litigation provides a model in which zealous and sometimes extreme claims are made. Even so, deliberate lying is penalized as perjury, and groundless or frivolous claims can be sanctioned.<sup>135</sup> Moreover, in the context of public debate, deliberate distortions may be legal, but are neither honest nor responsible. They may, in the short term, protect profits, but in a society in which people as citizens as much as consumers need accurate information to make sound decisions, strident and distorted advocacy is irresponsible.<sup>136</sup> For auto companies, the primary means of achieving U.S. reductions in carbon dioxide emissions would be alternate fueled vehicles with greatly reduced or no carbon dioxide emissions, much higher taxes on gasoline—to discourage consumption and emissions—increased fuel efficiency mandates for internal combustion vehicles, and mandated use of technologies such as "zero emissions vehicles." Yet, for most of the 1990s, the auto industry has endorsed none of these, while visibly advocating no policy alternatives. At best, this is consistent with the idea that a corporation can be socially responsible in opposing any environmental proposal or law that might impair profits, regardless of its benefits to society.

There could be many good faith reasons for opposing the Kyoto Protocol; it is well beyond the scope of this Article to discuss all these

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132. *Id.*

133. *Id.*

134. *Id.*

135. *See, e.g.*, FED. R. CIV. P. 11.

136. The same can be said of environmental organizations that deliberately misrepresent matters so as to engender fear among people and gain contributions for the cause.

reasons. The involvement of MNCs in the political process, however, is undeniable. If the Protocol has serious flaws, companies have a right—even a duty—to oppose it with arguments based on sound science and economic projections. Preferably, alternative proposals could be offered that would support meaningful re-direction of a fossil-fuel based economy.

Currently, the confluence of corporate political contributions and official U.S. energy policy suggests that the public interest is being ill-served. An international drive to “phase out fossil fuel subsidies and increase financing for nonpolluting energy sources worldwide” is opposed by the Bush administration, which bases its opposition on a “desire to let the marketplace, rather than [the] government, decide how quickly renewable energy resources are adopted worldwide.”<sup>137</sup> Given the strong subsidies provided by the U.S. government for promotion of fossil fuel resources,<sup>138</sup> the administration’s position seems more driven by ideology—or perhaps campaign contributions<sup>139</sup>—than by practicality. The Bush-Cheney energy plan, released in May 2001,<sup>140</sup> does not mention the Kyoto Protocol, and primarily focuses on increasing energy supply using coal, oil, gas, and nuclear energy.<sup>141</sup> Recommended actions for renewable energy sources, efficiency, equity, and the environment are allegedly “minor, and place all of these issues at the margins of energy policy.”<sup>142</sup> Meanwhile, the United States sat on the sidelines in 2001 as

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137. Joseph Kahn, *U.S. Set to Oppose International Plan for Cleaner Energy*, N.Y. TIMES, July 14, 2001, at A1.

138. For example, the Institute for Policy Research and Friends of the Earth did a study that claimed that the “export promotion agencies of rich nations, like the Export-Import Bank of the United States, are the world’s largest public backers of fossil fuels,” providing \$115 billion to support such projects from 1994-1999. *Id.*

139. See NATURAL RESOURCES DEFENSE COUNCIL, THE BUSH-CHENEY ENERGY PLAN: PLAYERS, PROFITS, AND PAYBACKS, at <http://www.nrdc.org/air/energy/aplayers.asp> (discussing the number of top-level administration officials, apart from the President and Vice President, who come from the ranks of the energy industry or have close ties to the auto industry).

140. RELIABLE, AFFORDABLE, AND ENVIRONMENTALLY SOUND ENERGY FOR AMERICA’S FUTURE, at <http://www.whitehouse.gov/energy> [hereinafter Bush-Cheney Plan]. A number of commentators mentioned the secrecy leading up to the issuance of this plan. See, e.g., Vincent Morris, *Cheney Closes Door on Comparisons to Hillary*, N.Y. POST, May 21, 2001, at 6. “President Bush, who appointed Cheney to oversee a panel that drew up recommendations for a national energy policy, is taking flak for refusing to release information about the group, or even identify its members.” *Id.* See also Editorial, *Whose Energy Policy Is It?*, ROCKY MOUNTAIN NEWS, July 20, 2001, at 38A. “Cheney should release the names in the interests of preserving the integrity of the White House and because that is what compliance with the law would seem to require based on what is now known.” *Id.*

141. Bush-Cheney Plan, *supra* note 140.

142. Arjun Makhijani, *The Cheney Energy Plan: Technically Unsound and Unsustainable*, IEER, at <http://www.ieer.org/comments/energy/chny-art.html>.

delegates from 164 countries decided on the final details of the Protocol's implementation.<sup>143</sup>

## 2. Energy Dependence

Energy dependence will be discussed at length in the next Part. It is enough to note here that U.S. energy independence has been a concern since the "oil shocks" of the 1970s. Complete U.S. energy independence from OPEC is most unlikely, even with stringent conservation and increased domestic production.<sup>144</sup> Nonetheless, purposeful public strategies to wean the United States from Middle East oil supplies are needed, both to defuse Islamic extremists<sup>145</sup> and to protect the economy from another series of oil shocks.<sup>146</sup> Increased reliance on conservation and renewable energy sources could also help to reduce trade deficits.<sup>147</sup> U.S. trade for Saudi or Iraqi oil may also provide revenues used contrary to U.S. foreign policy goals. In a prescient piece published in 1996, Joseph Romm and Charles Curtis noted that

Persian Gulf nations' oil revenues are likely to almost triple, from \$90 billion a year today to \$250 billion a year in 2010—a huge geopolitical power shift of great concern, especially since some analysts predict increasing internal and regional pressure on Saudi Arabia to alter its pro-Western stance. That represents a \$1.5 trillion increase in wealth for Persian Gulf producers over the next decade and a half. That money could buy a tremendous amount of weaponry, influence, and mischief in a chronically unstable region.<sup>148</sup>

Moreover, U.S. dependence on oil and current U.S. consumption of oil provides a model of economic development that is clearly

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143. See *2nd Hottest*, *supra* note 98.

144. Nelson D. Schwartz, *Breaking OPEC's Grip*, FORTUNE, Nov. 12, 2001, at 78.

145. *Id.* Schwartz notes that

oil security isn't just a theoretical concern for think-tank types anymore. Osama bin Laden and the rising tide of Islamic fundamentalism have forced the U.S. to confront the ultimate nightmare scenario—the overthrow of the Saudi monarchy, which controls 25% of the world's proven oil reserves. . . . In his public *fatwas*, the world's most wanted terrorist even refers to the crude reserves of the Arabian peninsula as 'this Islamic wealth' and calls on followers to resist American influence on petroleum production in the region.

*Id.*

146. See Joseph J. Romm & Charles B. Curtis, *Mideast Oil Forever?*, ATLANTIC MONTHLY, April 1996, at 57, 59.

147. *Id.* at 60.

148. *Id.*

unsustainable<sup>149</sup> and has enormous economic repercussions on the U.S. economy as well.<sup>150</sup>

### 3. Overconsumption

Overconsumption is not generally recognized as an environmental problem per se, or as a national security problem. Overconsumption does not lead directly to extinction of a particular species, destruction of a specific forest ecosystem, degradation of tillable soil, or loss of fisheries, aquifers, coral reefs, or stable climate patterns. Yet, overconsumption results in these losses and will continue to do so because it is built into our notions of material progress, standard economic theory, and law.<sup>151</sup> Moreover, the mentality that promotes overconsumption can create a society that is restless, edgy, and aggressive, which is contrary to a societal and global goal of a world more at peace. Lester Brown, Paul Hawken, Amory Lovins, and others have made clear that current consumption patterns are depleting natural capital and undermining future well-being.<sup>152</sup>

William Rees has pioneered the concept of an "ecological footprint," approximating the varying average impact of humans on the environment, depending on which country they live in.<sup>153</sup> He finds that Japan has a 2.5 hectare/capita footprint, and that the Netherlands has a 3.3 hectare/capita ecological footprint, giving them "national ecological footprints about ten and twenty-one times larger than their respective domestic productive land bases. Each is running a large eco-deficit and accumulating a non-repayable debt with the rest of the world."<sup>154</sup> If you accept the viewpoint that economic progress is colliding with finite resource limits—and there are those who do not<sup>155</sup>—it is difficult to deny Rees' conclusion that

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149. BROWN, *supra* note 17, at 17 (considering the drastic environmental and economic effects of China's following the same development model as the United States).

150. Increased demand from China and other emerging economies could generate the kind of price shocks that would keep the U.S. economy in recession. See Romm & Curtis, *supra* note 146, at 60. See also Daniel Fisher & Lynn Cook, *The Prize*, FORBES, Nov. 12, 2001, at 64, 68. "Any price increase has devastating effects on the U.S. economy. Each dollar increase in the per-barrel price of oil trims airline margins by half a percentage point and cuts profits by \$450 million . . ." *Id.*

151. See Don Mayer, *Institutionalizing Overconsumption*, in THE BUSINESS OF CONSUMPTION 67-90 (Laura Westra & Patricia H. Werhane eds., 1998).

152. BROWN, *supra* note 17, at 27-73. See also NATURAL CAPITALISM, *supra* note 4, at 146-52.

153. William E. Rees, *Reducing the Ecological Footprint of Consumption*, in THE BUSINESS OF CONSUMPTION, *supra* note 151, at 113-30.

154. *Id.* at 117.

155. See, e.g., Julian L. Simon, *Scarcity or Abundance?*, in THE BUSINESS OF CONSUMPTION, *supra* note 151, at 237-46 (noting that "[a]lmost every trend that affects

“there is simply not enough natural capital on the planet to sustain present international development trends using prevailing technology.”<sup>156</sup> Rising material expectations and an increase over Earth’s present population of six billion would require “absolute reduction in material standards of living” or “massive increase in material and energy efficiency.”<sup>157</sup> Far greater efficiencies could be found,<sup>158</sup> but only if we minimize perverse subsidies and begin to tax material and energy consumption rather than labor.<sup>159</sup>

Instead, major industrialized nations continue to tax labor through income taxes and treat consumption of natural capital as an economic “freebie,” retaining perverse subsidies and avoiding consumption taxes that would help reduce negative externalities. Moreover, the current version of corporate global free trade favors the use of machinery over human labor, favors consolidation, and requires long lines of transportation that encourage fossil fuel use.<sup>160</sup> Proponents of the current system must also acknowledge alleged inequities in current consumption patterns, such as the claim that the prosperity of the “new world order” after the fall of the Soviet Union was “limited to a tiny percent of the world’s people, and to an ever smaller number of people even in the United States,”<sup>161</sup> even while sacrificing small farmers, farmlands, forests, wetlands, prairies, ecosystems, and watersheds.<sup>162</sup> The U.S. motorists’ appetite for oil poses particular problems, yet is still not clearly seen by

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human welfare points in a positive direction, as long as we consider a reasonably long period of time and hence grasp the overall trend”).

156. Rees, *supra* note 153, at 117.

157. *Id.*

158. NATURAL CAPITALISM, *supra* note 4, at 22-143.

159. Rees, *supra* note 153, at 119-20 (arguing that “[r]educing income and other taxes in proportion to resource taxes would make the latter revenue neutral, so ecological tax reform would not necessarily increase the average fiscal burden on taxpayers”).

160. Jerry Mander, *Economic Globalization and the Environment*, 16 TIKKUN 33 (2001), at 37. The concentration of economic power also makes Western societies more vulnerable. See Thomas F. Homer-Dixon, *The Rise of Complex Terrorism*, FOREIGN POL’Y, Jan./Feb. 2002, at 52-62. Homer-Dixon finds that increased vulnerability of “advanced nations” stems from “the growing complexity and interconnectedness of our modern societies” and “the increasing geographic concentration of wealth, human capital, knowledge, and communication links.” *Id.* at 55.

161. Letter from Wendell Berry, Alison Deming, William Kittredge, Richard Nelson, David W. Orr, Chet Raymo, Pattiann Rogers, and Scott Russell Sanders, Thoughts in the Presence of Fear, Oct. 2001 (on file with author). See also BARBER, *supra* note 16, at 42 (noting that “[i]f we look at energy consumption in the rich nations where again America is again the archetype we get a disturbing take on fairness. Not only is there less and less to go around, but what is left is being more and more unfairly and inefficiently allocated.”).

162. *Id.*

citizens, corporations, and government as worthy of concerted action.<sup>163</sup>

Thus, overconsumption poses a fundamental problem for global governance and corporate governance: if all nations followed the consumption patterns of the United States, Europe, and Japan, there would be ecological disaster, yet our national and international legal regimes—including the WTO—do not reflect this fundamental premise, while consumers, corporations, and governments appear needlessly locked into overconsumption of fossil fuels in a path-dependent pattern<sup>164</sup> that is resistant to fundamental changes, even changes that are market-oriented and economically sound.

These changes may be more mandatory than not. Wes Jackson, of the Land Institute in Salina, Kansas, has commented that “as long as we regard the resources of the world as ours at a minimal cost, there will be children born who, when adults, will willingly lay down their lives to bring us down in the name of social and economic justice.”<sup>165</sup> Ideally, science, public interest, and legal thought will converge on solutions that move the U.S. and other economies toward energy independence and consumption at sustainable levels.

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163. Neela Banerjee, *The High, Hidden Cost of Saudi Arabian Oil*, N.Y. TIMES, Oct. 21, 2001, Week in Review, at 3 (“Five percent of the world’s population lives in the United States, but it burns about 19 million barrels of oil a day, or 25 percent of the global daily consumption of 76 million barrels. American cars and sport-utility vehicles alone consume 10 percent of that.”).

164. Paul Krugman notes that markets establish dominant means and methods, so that subsequent innovation is linked to what has come before. As examples, he cites the QWERTYUIOP keyboard, which was originally designed to slow down typists whose speed might jam the mechanical keys. But as the keyboard became standard, and numerous people had been trained on it, the innovative efficiencies of alternative keyboard arrangements could not get established in the market. Others have noted that MS-DOS may be another example of path-dependence. In the U.S. motor vehicle market, part of consumer resistance to natural gas or electric vehicles is the lack of service infrastructure, confirming that “the market” is not neutral for all possible innovations, but is in fact highly “path dependent.” See PAUL KRUGMAN, *PEDDLING PROSPERITY* 221-24, 227-29, 243-44 (1994).

165. Letter from Wes Jackson, *From the Margin*, (Oct. 2001) (on file with author). See also <http://www.landinstitute.org>. Of course, moving toward sustainable economies will not solve all social, economic, and political problems, particularly in the Middle East, or entirely defuse terrorism toward the United States from Islamic fundamentalists. See also Fareed Zakaria, *Why They Hate Us*, NEWSWEEK, Oct. 15, 2001, at 22-40 (presenting the political disorders of Middle Eastern nations as a major contributing factor encouraging religious fundamentalism). But it will not be possible to encourage modernity and political reform in that part of the world if ‘the West’ continues to see the Middle East either as a geopolitical imperative—the Cold War—or as a place to supply the energy for its economies. Rabbi Michael Lerner tells us that “the alternatives are stark: either start caring about the fate of everyone on this planet or be prepared for a slippery slope toward violence that will eventually dominate our daily lives.” Letter from Rabbi Michael Lerner, *A World Out of Touch With Itself: Where the Violence Comes From*, (Sept. 2001) (copy on file with author).

### C. *Environmental Legislation and Auto Companies' Responses*

Ever since the OPEC-induced oil price spikes of the 1970s, U.S. auto companies have faced numerous legislative initiatives that would boost fuel economy, eliminate or reduce carbon dioxide and other emissions, and move consumers toward more energy-conscious choices.<sup>166</sup> This Article focuses on three different kinds of legislation: corporate wide fuel-efficiency standards, mandates for a certain percentage of "zero emission vehicles" (or ZEVs), and higher gasoline taxes.

#### 1. Corporate Average Fuel Economy (CAFE) Standards

Even before concerns over global warming, the U.S. Congress was greatly concerned that U.S. energy dependence on oil left the economy vulnerable to "price shocks" based on OPEC price controls or embargoes.<sup>167</sup> Because the U.S. was importing a third of its oil, the Arab oil ministers' 1973 decision to cut supplies to the United States<sup>168</sup> soon led to long lines at gasoline pumps, missed or delayed fuel deliveries, public school closures for lack of heat, and violence on the highways.<sup>169</sup> As a response, the federal government enacted the Energy Policy and Conservation Act (EPCA),<sup>170</sup> which included three measures to promote fuel conservation. In the EPCA, Congress set a national speed limit of fifty-five miles per hour,<sup>171</sup> imposed a "Gas Guzzler Tax,"<sup>172</sup> and authorized fuel efficiency standards in Title V.<sup>173</sup> The fuel efficiency standards set in Title V required that all companies selling autos in the United States must reach a sales-weighted corporate average fuel economy (CAFE) of eighteen miles per gallon by 1978, twenty-two miles per gallon by 1981, and 27.5 miles per gallon by 1985.<sup>174</sup> Miles per gallon averages would include a weighted average of

166. See, e.g., Energy Policy and Conservation Act of 1975, 49 U.S.C. § 32 (1994), §§ 901-19; 49 C.F.R. 531.

167. See DANIEL YERGIN, *THE PRIZE: THE EPIC QUEST FOR OIL, MONEY, AND POWER* 606-08 (1991).

168. *Id.*

169. Conner, *supra* note 102, at 432-33. See also YERGIN, *supra* note 167, at 617, 691-93.

170. 49 U.S.C. § 32, §§ 901-19.

171. 23 U.S.C. § 154 (1994) (repealed 1995).

172. 26 U.S.C. § 4064 (1994). Under this program, the federal government imposes a tax on the manufacturer of any automobile that does not achieve a pre-determined fuel efficiency rating. As a practical matter, the tax is passed along to purchasers. See Conner, *supra* note 102, at 436 n.47.

173. 49 U.S.C. §§ 32901-19 (1994).

174. Title V provided monetary penalties for corporate non-compliance; for failure to meet the 1987 or 1988 standard by just one mile per gallon, General Motors could have been subject to penalties of \$200 million or more. The CAFE standards arguably impelled significant improvements in fuel efficiency for most kinds of autos. Some would contest

city and highway EPA mileage ratings.<sup>175</sup> The Department of Transportation (DOT) was responsible for setting the precise levels for the 1981-85 model years and for 1986 and beyond.<sup>176</sup> The current standard of 27.5 miles per gallon has not been exceeded since 1990.<sup>177</sup>

When the CAFE standards were set, Congress allowed an exception for "light trucks" and entirely exempted very large trucks.<sup>178</sup> The basic idea was to make some allowances for farmers and ranchers to have pickup trucks with more horsepower and, necessarily, lower fuel efficiency.<sup>179</sup> In the 1980s, Detroit automakers were able to capture a significant market share by producing minivans and light trucks for urban and suburban motorists.<sup>180</sup> For various reasons, throughout the 1980s and 1990s—including lower gasoline prices (adjusted for inflation), an aging "baby boomer" market that increased demand for larger cars, and the increasing use of light trucks for passenger rather than commercial use,—fuel efficiency began to decline.<sup>181</sup> Under pressure from U.S. automakers, and using the discretionary authority provided it by the EPCA, the Department of Transportation rolled back the 27.5 standard to twenty-six for the 1986 model year and held it there for two years.<sup>182</sup> The standard rose to 26.5 miles per gallon for the 1989 model year.<sup>183</sup> Early during the first Bush administration, however,

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this, however, and credit market forces—the high price of gasoline in the late 1970s and early 1980s—as the primary cause for consumer demand for more fuel efficient vehicles. Whatever the stimulus, general gains in fuel efficiency from 1974 to 1988 were impressive: new car efficiency as measured by EPA doubled between 1974 and 1988, increasing to about twenty-eight miles per gallon.

175. Jean Agras & Duane Chapman, *The Kyoto Protocol, CAFE Standards, and Gasoline Taxes*, 17 CONTEMP. ECON. POL'Y 296 (1999).

176. Robert W. Crandall & John D. Graham, *The Effect of Fuel Economy Standards on Automobile Safety*, 32 J. L. & ECON. 97, 98 (1989).

177. Agras & Chapman, *supra* note 175, at 296.

178. *Id.* at 296-97.

179. When the standard for light trucks began in 1979, it applied only to trucks with a gross vehicle weight (GVW) of less than six thousand pounds. This expanded in 1980 to include light trucks up to 8,500 GVW. So-called light trucks greater than 8,500 GVW are not regulated for fuel efficiency or emission standards; this would include Lincoln Navigators, Dodge Rams, Ford Econolines, Ford F series pickups, GM Suburbans, and GMC Sierra pickups. Agras & Chapman, *supra* note 175, at 296.

180. This trend continued into 1990s, as the popularity of minivans—classified for CAFE purposes as light trucks—waned in favor of Sport Utility Vehicles, or SUVs—also classified for CAFE purposes as light trucks. See Warrant Brown, *Minivans, Trucks Lead U.S. Auto Sales Surge*, WASH. POST, July 7, 1992, at D1. See also Steve Bates, *Driven by Ambition, Not Road Conditions; Baby Boomers Turn to 'Sport Utes' For Image, Rather than Adventure*, WASH. POST, Dec. 31, 1994, at B1.

181. See Rudy Abramson, *Fuel Efficiency of Cars Fell in '90, Group Says*, L.A. TIMES, Apr. 3, 1991, at A7.

182. Conner, *supra* note 102, at 438 ("As the real cost of gasoline continued to decline, Ford and GM successfully petitioned to have the standard lowered for the 1986 through 1989 model years . . .").

183. *1989 Auto Fuel Standards Set at 26.5 MPG*, L.A. TIMES, Oct. 4, 1988, at Business, Part 4, at 2.

the standards were returned to 27.5 miles per gallon.<sup>184</sup> There were some proposals in the early 1990s to increase CAFE standards to an average of forty miles per gallon,<sup>185</sup> partly in response to the threat of global warming.<sup>186</sup> These proposals, however, were defeated in Congress;<sup>187</sup> during the Clinton presidency, Republicans attached riders to a number of bills that insured a freezing of CAFE standards.<sup>188</sup>

The attacks of September 11, 2001 may provide new impetus for motor vehicle fuel efficiency. Initially, there was not much interest in Congress in exploring conservation and alternative energy sources.<sup>189</sup>

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184. See Warren Brown, *Gas Mileage Standard Toughened; Administration Sets 27.5 mpg Minimum*, WASH. POST, May 18, 1989, at E1.

185. In January of 1991, S. 279 (The Motor Vehicle Fuel Efficiency Act) was proposed by Senator Bryan (D-NV). The bill proposed to increase the federally mandated CAFE standards from a 1988 baseline by twenty percent for 1996 and forty percent by 2001 on the assumption that both were technologically feasible. S. 279 was essentially the same as bill that Senator Bryan had introduced in the 101st Congress. In addition, several other bills directed at global warming and comprehensive energy programs contained mandatory fuel efficiency standards.

186. See Jonathan Marshall, *How Fuel Efficiency May Backfire*, S.F. CHRON., July 23, 1991 at A1. "Leading environmental groups have staked out this issue as one of the most important on their agenda. Although acknowledging that the legislation is not a complete solution, the Sierra Club has called it 'the biggest single action Congress can take right now to curb global warming.'" *Id.* See also Michael Weisskopf, *Higher Mileage Standards Run Out of Gas in Senate; Lobbying Blitz by Bush Administration, Auto Industry Leaves Cloture Move 3 Votes Short*, WASH. POST, Sept. 26, 1990, at A31.

The measure, which would have required automakers to boost fuel efficiency 20 percent by 1995 and 40 percent by 2001, was originally packaged in the clean air bill passed by a Senate committee last year. It was sole as a way to decrease tailpipe emissions of carbon dioxide, which causes global warming.

*Id.*

187. Richard L. Berke, *Bill to Raise Cars' Fuel Efficiency Dies With Senate Vote on Debate*, N.Y. TIMES, Sept. 25, 1990, at A12. In addition to concerns over global warming, the lead sponsor, Senator Bryan of Nevada, was concerned over U.S. dependence on Middle Eastern oil. The opponents, he stated, need to ask themselves "What is their answer to every parent in America whose son or daughter is in the Middle East because of our oil dependence? What are they proposing to make us less vulnerable on foreign oil and vulnerable to the potential instability in the Middle East?" *Id.*

188. The fiscal year 1996 Department of Transportation Authorization prohibited use of funds to promulgate any CAFE rules, and a similar House rider was attached to DOT appropriations in FY1997 and was considered for FY1998 appropriations as well. In the 105th Congress, legislation was introduced that would freeze CAFE standards at current levels unless Congress specifically directed otherwise.

189. Carolyn Lochhead, *Push for New Fuel Sources has Lost its Political Energy; Improved Market Conditions have Stalled Reform Bids*, S.F. CHRON., Dec. 9, 2001, at A11 (referring to drilling in the Arctic National Wildlife Refuge, increasing fuel efficiency standards for SUVs, and providing tax breaks for wind, solar, and other "green" sources of energy, Lochhead notes that "[f]alling prices have removed much of the political momentum for such controversial changes." She quotes Robert Ebel, director of energy and national security at the Center for Strategic and International

There was a continuing push from House Republicans to encourage oil exploration in the Arctic National Wildlife Refuge (ANWR) matched by an alternate energy bill sponsored by Senate Democrats that avoided ANWR exploration.<sup>190</sup> By early 2002, however, legislation was introduced in the Senate that would raise average fuel efficiency standards to 36 mpg by 2015, a standard that would classify minivans and SUVs as passenger vehicles rather than light trucks.<sup>191</sup> Senate debate on a comprehensive energy package began in March of 2002.<sup>192</sup> The prospect of tightened fuel efficiency standards has resulted in renewed lobbying of legislation and the public by the U.S. auto industry.<sup>193</sup>

There are some strong arguments against mandated fuel efficiency standards. There is also some strident rhetoric that stretches the notion of a "right."<sup>194</sup> Auto company lobbying on this

Studies: "I don't see any pressure to expand supply or do something to give the American consumer an incentive to make better use of the energy he or she does consume. When energy prices come down as they have, the development of alternative and renewable forms of energy is forgotten.")

190. *Id.* The proposed—Democratic—Senate energy bill of December 2001 "avoided setting strict SUV efficiency standards" but did "call for a major shift to efficiency and renewable fuels, requiring that 10 percent of the nation's electricity come from solar, wind, geothermal and other green sources by 2020, up from 2 percent now." *Id.*

191. John Lancaster, *Debate on Fuel Economy Turns Emotional*, WASH. POST, Mar. 10, 2002, at A12. See also Danny Hakin, *To Detroit's Dismay, McCain Proposes Rise in Fuel Standards*, N.Y. TIMES, Feb. 9, 2002, at C3.

192. Karen Masterson, *Senate takes up energy measures; Democrats, GOP differ widely on some key issues*, HOUSTON CHRON., Mar. 6, 2002, at A2.

The Energy Policy Act of 2002 seeks to change many aspects of the energy industry. It has Enron-inspired provisions to strengthen the Federal Energy Regulatory Commission's authority over energy mergers . . . . By far, the most contentious issues will be over federally imposed fuel efficiency standards on passenger vehicles and oil exploration in the Alaskan Arctic National Wildlife Refuge. . . . Both parties say they want to wean the nation from its dependency on Mideast oil.

*Id.*

193. Lancaster, *supra* note 191. "The Coalition for Vehicle Choice, which is backed by three major auto manufacturers, is running print ads in New Hampshire urging their voters to contact their senators on behalf of 'the endangered SUV and pickup.'" The Coalition for Vehicle Choice has been active for many years in lobbying against stricter fuel economy standards. See *infra* note 194.

194. For example, the Coalition for Vehicle Choice argues against CAFE standards on the grounds that they "cheat" consumers of "the right to choose vehicles that meet their needs and lifestyles." See Website of the Coalition for Vehicle Choice, at <http://www.vehiclechoice.org/main.html>. The "right" comes close to a "right to life;" see Cal Thomas, *Don't Mess with our SUVs*, DETROIT FREE PRESS, Feb. 13, 1998, at 7A (because his wife needed an SUV to feel protected against eighteen-wheelers, he fears that government will "regulate her into a less safe vehicle"); see also C. Van Tune, *In Praise of Gas Guzzlers*, MOTOR TREND, Nov. 1995, at 5. Tune is less concerned about life than a certain quality of life.

issue has been remarkably effective, at least partly because many of the arguments make practical and economic sense. The principal arguments against fuel economy standards are as follows: (1) lighter vehicles are not as safe;<sup>195</sup> (2) a doubling of fuel-economy in the United States will not appreciably alter GHG emission levels, because moving from twenty-seven miles per gallon to forty miles per gallon would not appreciably reduce GHG emissions if motorists simply drove more;<sup>196</sup> (3) even if vehicle miles traveled did not increase, forty miles per gallon is only half as fuel efficient, making emission reductions almost insignificant;<sup>197</sup> (4) global warming is not a problem, and even if it were, U.S. carbon dioxide emission reductions would be pointless against increased vehicle emissions from developing nations, where large increases in vehicle fleets are predicted;<sup>198</sup> (5) consumers want choice, and do not want to be forced by government regulations into smaller, less safe vehicles;<sup>199</sup> (6) existing CAFE regulations are an inefficient means of enforcing conservation because a bureaucracy must measure miles per gallon for each vehicle the corporation sells and then levy fines;<sup>200</sup> (7) an increase in gasoline taxes would be far more efficient, and tax incentives for purchase of fuel efficient vehicles or alternate fueled vehicles would preserve consumer choice;<sup>201</sup> and (8) market forces will regulate far better, anyway, because when consumers want fuel-efficient cars, they will buy them.<sup>202</sup>

The vigorous efforts to defeat more stringent CAFE standards are partly motivated by reason, and partly motivated by money. U.S. automakers' profitability in the late 1980s and 1990s was due in no small part to the market success of larger vehicles, which produce a

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Stuck behind a rust-whacked '74 Mercury Montego with a dragging muffler and cheeseburger wrappers for taillight lenses? Get around him, friend. Spin the tach needle up to redline in two or three gears and feel the leeches of humanity being blown off your psyche. *Aah*, you're out in front again; life is as it should be.

*Id.* Randall J. Gillary of Troy, Michigan, comes firmly down on the side of his right to be safe when he writes, "I will not cram my family into a Yugo in order to please the environmental lobby." Letter to the Editor, DETROIT NEWS, March 20, 1998, at A18.

195. See generally Website of the Coalition for Vehicle Choice, *supra* note 194.

196. *Id.* See also Michael K. Berkowitz, Nancy T. Galliani, Eric J. Miller, & Robert A. Wolfe, *Forecasting Vehicle Holdings and Usage with a Disaggregate Choice Model*, 6 J. FORECASTING 240 (Oct./Dec. 1987). "The model consistently indicates that households will exploit such fuel efficiency improvements to maximize their own utilities by traveling more, hence ultimately consuming about the same amount of fuel as they previously did when they drove in less fuel efficient vehicles." *Id.* at 265.

197. See Website of the Coalition for Vehicle Choice, *supra* note 194.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

far better profit margin than smaller ones.<sup>203</sup> This partly explains why the United Auto Workers would join with automakers to oppose stricter CAFE standards.<sup>204</sup>

Some of the arguments automakers make against CAFE standards are better than others; some of the arguments seemingly lack good faith. For example, the argument that smaller vehicles are not as safe is certainly true in one respect: SUVs as manufactured in the 1990s were unsafe, primarily for small car owners that collided with them.<sup>205</sup> The argument that consumers had a right to choose larger, safer, more comfortable vehicles—SUVs—is a potent one—why should government dictate how comfortable and safe you can be?—but is undercut by the automakers' failure to adequately inform SUV owners of rollover tendencies that drivers would not and did not expect.<sup>206</sup> Moreover, if consumers' right to choose safer vehicles is vitally important, then full disclosure by automakers of safety and crash data would also be important. The industry record in this regard, however, has not been impressive.<sup>207</sup>

203. Bradley Stertz, *Waging War on the Big Trucks*, DETROIT NEWS, Feb. 22, 1998, at 1C, 3C. See also Bradsher, *supra* note 110, at A1. "And Chrysler, which barely breaks even on ordinary passenger cars, began pocketing \$8,000 in profit for every Durango sold." *Id.* See also Repps Hudson, *GM Official Lobbies Against Raising Fuel-Mileage Levels; Automaker Supports Tax Incentives for Buyers of Alternative-Power Vehicles*, ST. LOUIS POST-DISPATCH, July 26, 2001, at C1. Dennis Minano, General Motors' vice-president for environment and energy, said that "bills pending in Congress to broaden the application of the CAFE standards 'have the ability to threaten our core business.'" *Id.*

204. Keith Bradsher has pointed out that when President Clinton campaigned in 1992, he called for the auto industry to produce more fuel efficient cars. Pressure from the United Auto Workers, the auto industry, and politicians in auto manufacturing states caused the Clinton-Gore team to "back off." Bradsher, *supra* note 110, at A42.

205. See, e.g., Keith Bradsher, *A Deadly Highway Mismatch Ignored*, N.Y. TIMES, Sept. 27, 1997, at A1.

Crashes with light trucks, particularly pickups and sport utility vehicles, are especially deadly for people riding in the small, fuel-efficient cars that have been produced over the last quarter-century in an attempt to reduce gasoline consumption and pollution. . . . Germany's equivalent of the American Automobile Association performed a crash test in 1993 that involved a nearly head-on collision at 31 miles per hour between a 2,400-pound Volkswagen Golf and a 4,800-pound Nissan sport utility vehicle. The Nissan rode up over the Volkswagen's hood nearly to the base of the Golf's windshield; the crash dummy in the Golf suffered head injuries that measured 3,177 on a scale for which readings above 1,000 are considered fatal. Partly in response to that test, Mercedes-Benz has designed its new sport utility vehicle to reduce the damage to cars.

*Id.*

206. See *SUV Rollover Risks Kept Quiet*, CBS NEWS, Sept. 20, 2001, at <http://www.cbsnews.com/now/story/0,1597,235030-412,00.shtml>.

207. See RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* 70-73 (1996) (describing corporate secrecy in the Ford Pinto case, the GM side-mounted gas tank cases, and Chrysler crash test

There is also some merit to the “market forces” argument: U.S. drivers willingly buy larger, less fuel-efficient vehicles.<sup>208</sup> Seemingly, many drivers also buy for image rather than safety.<sup>209</sup> In polls, the public seems concerned about global warming and favors fuel efficiency standards; in showrooms, they choose size and power.<sup>210</sup> Auto analyst Maryann Keller points out that consumers’ car purchases are “dictated by their desires for performance, comfort, and safety, not by any ecological standard.”<sup>211</sup>

The consumer’s choice, however, does not take place on a blank slate. As we have seen, the context of consumer choice for personal transportation takes place in a context of subsidies to oil companies and the market’s failure to fully price gasoline.<sup>212</sup> In addition, insurance companies tend to provide a flat rate insurance that charges drivers the same whether they drive a lot or a little.<sup>213</sup> Bradsher has also shown how current laws favor SUVs and light trucks,<sup>214</sup> and the phenomenon of path-dependence<sup>215</sup> effectively limits consumer choice to different brands of vehicles with internal combustion engines.<sup>216</sup> Generic appeals to “the market,” in short, are a lot less straightforward than they seem. Appeals to “the market”—as a self-regulating mechanism always and automatically preferable to government regulation—lack the good faith articulation of structurally efficient principles that this Article recommends as a foundation for responsible corporate advocacy.

The denial of global warming or global climate change as a serious policy problem was part of U.S. automakers’ approach to

data); see also BOGUS, *supra* note 95, at 212-13. Regarding ignition defects, Ford officials considered a recall, but “rejected the idea because it would cost more than \$429 million. . . . Ford repeatedly assured NHTSA it knew of no defect, even as it was conducting extensive studies showing exactly what caused the stalling.” *Id.* at 213.

208. See ROBERT A. LUTZ, *GUTS: THE SEVEN LAWS OF BUSINESS THAT MADE CHRYSLER THE WORLD’S HOTTEST CAR COMPANY* 67 (1998).

209. BOGUS, *supra* note 95, at 165.

210. Robert Lutz, a former president at Chrysler, complains that the same consumer who checks off the “ecologically sound” option in a survey will get to the showroom where his “right brain” pounds out the message, “Buy the V-10! Buy the V-10!” LUTZ, *supra* note 208, at 67.

211. Stephan Wilkinson, *The Automobile and the Environment: Our Next Car?*, AUDUBON, May/June 1993, at 59.

212. See *supra* notes 82-94 (regarding subsidies and lack of full pricing).

213. Author’s conversation with State Farm Mutual office, Rochester, Michigan; March 2002. Motorists can get a low mileage discount—under 7,500 miles driven per year—but a premium would be the same whether a motorist drove twenty thousand or fifty thousand miles per year. See also NADIS & MACKENZIE, *supra* note 105, at 148-49 (suggesting a pay-at-the-pump approach as economical, efficient, and fair).

214. Bradsher, *supra* note 110.

215. KRUGMAN, *supra* note 164.

216. *Id.*

corporate advocacy well into the 1990s.<sup>217</sup> Detroit automakers reacted to the Kyoto Protocol in 1997 by denying that global climate change was a problem that needed to be addressed.<sup>218</sup> Other arguments against CAFE have merit, but are also open to debate. It is true that doubling fuel efficiency for all vehicles—including light trucks—would not necessarily conserve gasoline if people drove twice as much. The majority of driving, however, is done by commuters; presumably, commuters would not drive to work twice as often, but they might live further from work. Still, commuting times may already be approaching their maximums in a number of U.S. metropolitan areas.<sup>219</sup> The safety of smaller cars can be enhanced by decreasing numbers of very large vehicles, and technologies exist to make smaller cars even safer than they are today.<sup>220</sup> In claiming that developing nations' emissions will far outweigh any savings that may be generated in the United States, there is both a denial for past European and North American contributions to carbon emissions and an assumption that the automobile future in nations like China must be similar to the U.S. past. Major automakers will play a part in the kinds of vehicles sold in China, however, and those need not be based on the internal combustion of gasoline unless there are truly no good economic alternatives. That, in turn, depends on what is meant by "economic" if alternate fuels have a viable infrastructure, if the full costs of gasoline are factored into its price, and if subsidies to oil could be phased out, other kinds of vehicles could very well be economical.<sup>221</sup>

The best arguments against CAFE address the relative inefficiency of these mandates compared to more economic-minded alternatives: "feebates" for those who choose smaller vehicles<sup>222</sup> or other incentives to help automakers sell alternate fueled vehicles. Occasionally, an auto company executive will say that higher fuel taxes are the most sensible economic policy solution, but it is not said

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217. John M. Broder, *Auto Makers See Nothing but Trouble in a Warmer World*, N.Y. TIMES, Oct. 16, 1997, at G19.

218. *Id.*

219. JANE HOLTZ KAY, ASPHALT NATION: HOW THE AUTOMOBILE TOOK OVER AMERICA, AND HOW WE CAN TAKE IT BACK 13-16 (1997).

220. NATURAL CAPITALISM, *supra* note 4, at 29-30. "Crash tests have proven that innovative ultralight designs are at least as safe as standard cars, even in high-speed collisions with bridge abutments or with heavy steel vehicles." *Id.* at 29.

221. See KRUGMAN, *supra* note 164 (regarding path-dependence); see also *supra* notes 82-94 (regarding subsidies and lack of full pricing).

222. A "feebate" would tax buyers of inefficient new cars and provide rebates to buyers of fuel efficient ones. See NADIS & MACKENZIE, *supra* note 105, at 149. Referring to SUVs and large trucks for personal use, Eric Orts offers the following: "Citizens who want to purchase such vehicles should have the freedom to do so, but they should pay for the risks they impose on others. Proceeds could be used to pay for programs to improve road safety and air cleanliness." Eric W. Orts, Letter to the Editor, N.Y. TIMES, June 16, 1997, at A14.

too often, or too emphatically.<sup>223</sup> In sum, opposition to CAFE standards has not been linked to advocacy for structurally efficient reforms.<sup>224</sup> The CAFE legislation does have flaws, and even the basic idea is somewhat flawed. It assumes that doubling gas mileage will cut fuel use in half, even though such doubling may just encourage more driving. Moreover, it allows drivers to put the onus on auto companies: people polled about global warming greatly prefer solutions that do not cost them anything and require the auto companies to come up with some new technology that solves the problem.<sup>225</sup> With such flaws, we should certainly expect corporate advocacy directed toward consumers and government; corporate compliance, without strenuous argument, would be disappointing not only to shareholders, but to the driving public. Yet, the real hope is neither silence nor specious or self-serving argument, but instead, the kind of advocacy that provokes searching and honest conversations among corporations, consumers, and the government.

## 2. Gasoline Tax Increases

If questioned as to how Detroit could help reduce CO<sub>2</sub> emissions, a Big Three CEO or other high-ranking officer might say that only far higher fuel prices would shift consumer demand away from larger vehicles.<sup>226</sup> This can be said, however, without risking the status quo: while several studies have demonstrated that only a steep increase in gasoline taxes will shift gasoline consumption downward, U.S. politicians are not about to risk the public's well-known antipathy toward energy taxes of any kind.<sup>227</sup> They have learned to

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223. It has been reported, however, that auto executives have called "repeatedly" for Congress to repeal the CAFE rules "and replace them with higher gasoline taxes, but there has been no enthusiasm in Washington for such a move." Keith Bradsher, *With Loophole, Carmakers Post Mileage Gain*, N.Y. TIMES, June 2, 2000, at C1. The lack of enthusiasm is not surprising, given that motorists and taxpayers—like everyone else—prefer to have someone else pay the bill. Customers will say in surveys that they want more environmentally responsible products, but are unwilling to pay for them or to sacrifice features on their SUVs. See LUTZ, *supra* note 208, at 67.

224. See *supra* notes 196-222 and accompanying text.

225. "Americans tend not to see their personal consumption as an important factor in global warming. Instead they shift the blame to business and industry. Americans favor taxes on business, as opposed to personal income taxes, to solve the warming problem." Dylan Golden, Comment, *The Politics of Carbon Dioxide Emissions Reduction: The Role of Pluralism in Shaping the Climate Technology Initiative*, 17 UCLA J. ENVTL. L. & POL'Y 171, 192 (1998/99).

226. Richard Feast, *Sour Talk in Big Apple*, AUTOWEEK, Apr. 10, 1989, at 28.

227. The public is joined in this by U.S. industry, and not without reason. If one country legislates a carbon tax, that country's industry may be at a competitive disadvantage in global trade. "Ideally, carbon taxes should be imposed internationally to eliminate adverse competitive effects . . ." Richard L. Ottinger & Mindy Jayne, *Global Climate Change Kyoto Protocol Implementation: Legal Frameworks for Implementing Clean Energy Solutions*, 18 PACE ENVTL. L. REV. 19, 44 (2000). Note,

avoid suggesting even modest increases in gasoline taxes, much less proposing them or voting for them, because U.S. drivers believe—erroneously—that they already pay enough for gasoline.<sup>228</sup>

U.S. drivers' preferences for cheaper gas and larger vehicles, however, reflect a number of unusual market distortions. Norman Myers has pointed out that the total social costs of gasoline use are barely reckoned into the market price,<sup>229</sup> leading to what economists call "negative externalities."<sup>230</sup> In addition, many employers offer free parking as a non-taxable benefit to employees, the oil industry benefits from subsidies under U.S. tax laws, and larger vehicles are now favored by the law in numerous ways.<sup>231</sup> Finally, both the driving public and the auto industry benefit enormously from having a system of roads and highways built and paid for with public funds, and the costs of maintaining that system—including traffic enforcement—are only partly covered by licensing or registration fees and gasoline taxes.<sup>232</sup>

Restructuring the market so that external costs are taken into account is more easily said than done.<sup>233</sup> Eric W. Orts points out at least four "conventional economic approaches" to market-oriented environmental laws: energy taxes or pollution charges, extending rights of ownership in the natural environment, tradeable pollution rights, and providing truthful information about products and their environmental effects.<sup>234</sup> Energy taxes are problematic because government must set a fee based on estimates of potential harm, and reasonable people are bound to disagree; there are also ongoing tasks of oversight to adjust taxes, raising taxes when there are too many emissions and lowering them when there are too few emissions.<sup>235</sup> In the United States, proposals to significantly increase federal gasoline

however, that this argument does not apply to gasoline taxes because the tax would not apply to articles for export from the United States.

228. See Neela Banerjee, *Made in America, and Never Mind the Gas Mileage*, N.Y. TIMES, Nov. 23, 2001, at C5.

229. Myers, *supra* note 93, at 9.

230. VELASQUEZ, *supra* note 91.

231. See *supra* notes 82-94 and accompanying text; see also Bradsher, *supra* note 110.

232. See KAY, *supra* note 219, at 121.

For all the heated arguments about the gas tax (at its lowest in seventy-five years), it covers only 60 percent of our road costs. Other sources go unweighed. Though we dispense over \$16-plus billion a year to the Federal Highway Trust Fund from our gas taxes and other user fees, it isn't enough. Not nearly enough. The rest comes from general taxes, with money from property, sales and sometimes gas taxes used to fund local roads.

*Id.*

233. Eric W. Orts, *Reflexive Environmental Law*, 89 NW. U. L. REV. 1227, 1243 (1995).

234. *Id.* at 1242-47.

235. *Id.* at 1242-43.

taxes would have to be accompanied by reductions in federal income tax in a process of tax shifting that might prove politically confounding. If enacted, the tax shift could result in underfunding of government in some years, and a surplus in other years.

### 3. Zero Emission Vehicles

Another strategy for reducing fossil fuel emissions from vehicles is to shift to alternate fueled vehicles. Various choices include electric, natural gas, methane, and fuel cell vehicles. The federal government has provided some limited support for the development of alternate fueled vehicles,<sup>236</sup> while California has mandated that companies selling vehicles there market a certain percentage of zero emission vehicles, or ZEVs.<sup>237</sup>

Auto companies have worked hard to defeat and delay this requirement.<sup>238</sup> Indeed, there are good reasons for such opposition; the existing technological means of achieving zero emissions are electric vehicles (EVs).<sup>239</sup> Hybrid cars such as Honda's Insight or the Toyota Prius, while more fuel efficient, still have carbon dioxide and other emissions.<sup>240</sup> While there have been advances in fuel cell research, the marketing of significant numbers of fuel cell powered vehicles is still several years away.<sup>241</sup> As for EVs, the sources of

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236. See *U.S. Agencies Sued on Alternative Fuel Rule*, S.F. CHRON., Jan. 3, 2002, at A3. "Federal agencies have flouted a Gulf War-era law requiring most of their newly purchased vehicles to run on alternative fuels, environmental organizations charge in a lawsuit lodged yesterday." *Id.*

237. See *California's Anti-Pollution Police Fear Electric Vehicle Project May Fall Flat: The State's Dream of Forcing Carmakers to Sell 100,000 Zero-Emission Vehicles a Year has Evaporated*, FIN. TIMES, Dec. 19, 2000, at The Americas 4. As implied by the article's title, California has not entirely prevailed against "the forces of the car industry and the facts of life." *Id.*

238. Leslie H. Reed, Jr., *California Low-Emission Vehicle Program: Forcing Technology and Dealing Effectively with the Uncertainties*, 24 B.C. ENVTL. AFF. L. REV. 695, 726 (1997).

239. John O'Dell, *GM Sues to Overturn State's Zero Emission Vehicle Mandate; Courts: The auto maker says the requirements would impose an unfair financial burden and its has no other legal options*, L.A. TIMES, Feb. 24, 2001, at C1. "To date, the only type of vehicle that meets the strict zero emission standard is the battery-powered electric vehicle." *Id.*

240. See David Chao, *Hybrids: The Greening of North America*, TORONTO SUN, Oct. 20, 1999, at D14. "Compared to a conventional gasoline-powered vehicle, the Prius emits only half the carbon dioxide and one-tenth of the carbon monoxide, hydrocarbon, and nitrogen oxide." *Id.*

241. Fuel cell systems—widely hailed as the most promising solution to the zero emissions quest—require hydrogen fuel, but there is no service infrastructure for hydrogen. In January 2002 the Bush administration announced a new program which would supplant an eight-year partnership with the U.S. vehicle industry "aimed at boosting fuel efficiency," the primary aim of the new program is "the development of hydrogen-based fuel-cell technology." Nancy Dunne & Nikki Tait, *U.S. Plans Fuel Cell Venture*, FIN. TIMES, Jan. 10, 2002, at 28. But Jack Smith, GM's chairman, "pointed

electricity for EVs are mostly coal-fired or nuclear powered electric utilities; coal-fired plants add carbon dioxide emissions to the atmosphere, and nuclear power raises other environmental concerns.<sup>242</sup> Consumers reject vehicles that cannot be conveniently refueled on the road, and drivers cannot find facilities away from home to quickly recharge an electric vehicle.

Vehicles powered by natural gas burn clean with no harmful emissions, but drivers do not want the inconvenience of seeking out the few natural gas pumps that could refuel their vehicles; such pumps are hard enough to find in metropolitan areas, and in rural areas are rare indeed.<sup>243</sup> And this is not likely to change: service stations will not put in natural gas pumps until there is enough demand—natural gas-powered cars—and drivers will not buy cars powered by natural gas until there are plenty of pumps to make refueling convenient. The phenomenon of “path dependence” continues to provide a seeming mandate for gasoline powered internal combustion engines that steers both manufacturers and consumers along the path of least resistance.<sup>244</sup>

#### D. Motor Cars and Morality Revisited

Norm Bowie has written that automakers have no special responsibility toward the environment beyond what is required by

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again yesterday to the need for a nationwide hydrogen refueling infrastructure.” *Id.* The “path dependence” problem that Krugman points to means that the hydrogen fuel partnership may develop remarkable technologies that cannot sell because motorists have no place to buy hydrogen; a superior product, in short, will not necessarily penetrate “the market,” laden as it is with existing infrastructure and politically entrenched subsidies and hidden externalities. See KRUGMAN, *supra* note 164 and accompanying text.

Warren Brown, who covers automotive issues for the Washington Post, had some useful insights on infrastructure as this partnership was made public.

Here, ‘infrastructure’ means more than the equivalent of hydrogen gas pumps. It means an informed and prepared public, including police, fire departments, auto safety officials, automotive technicians and dealerships, and federal energy policy mavens.

Second, “infrastructure” means vehicle development, design and manufacture, with special attention being paid to onboard hydrogen storage and delivery modules.

All this is going to take time—at least another decade by the most optimistic estimates. It will also require lots of money, patience and political will.

Warren Brown, *Bush Plans Development of Fuel Efficient Cars*, WASH. POST, Jan. 11, 2002, available at <http://www.washingtonpost.com/wp-dyn/articles/A31669-2002Jan11.html>.

242. See NADIS & MACKENZIE, *supra* note 105, at 170.

243. Bowie, *supra* note 10, at 440.

244. See KRUGMAN, *supra* note 164.

law.<sup>245</sup> Yet, many MNCs operate in countries where “law”—as understood in the United States—is so poorly developed that obedience to the law may be ethically empty. For example, Shell Nigeria’s actions in Ogoniland did not violate Nigerian law or international law, but were socially and environmentally irresponsible nonetheless.<sup>246</sup> Shell has even acknowledged as much.<sup>247</sup> An oil company or an auto company operating in a nation where environmental laws and regulations are relatively weak or unenforced cannot claim the moral high ground. Bowie also cautions that a business should avoid “intervening in the political arena in order to defeat or weaken environmental legislation.”<sup>248</sup> This cannot be entirely correct, either; under Bowie’s injunction, auto company campaigns against higher CAFE standards, ratification of the Kyoto Protocol, and zero emission vehicles are all equally suspect. Yet, the previous sections in this Part were meant to show how corporate opposition to poorly conceived lawmaking could be consistent with good corporate governance.<sup>249</sup> This opposition, however, should combine the mandate of profit maximization with advocacy for sound, market-oriented reforms, and avoiding advocacy for the sole sake of short term profitability.

If California proposes that each automaker must insure that at least fifteen percent of the vehicles it offers for sale in California have zero emissions by 2003, a strong case for opposition emerges, and not only in terms of maximizing shareholder wealth. If a company knows that the law will mandate the production of vehicles that (a) are not likely to be purchased by consumers, (b) will not advance environmental integrity, (c) will significantly reduce profits to the company, and (d) will shift resources away from better, long-term solutions, it surely has a duty to oppose the law. The argument here is that corporate responsibility to oppose unwise or ill-conceived legislation or regulation can be founded on self-interest—short term profit maximization—but is also grounded in a civic responsibility to ensure that the market is governed by structurally efficient rules.<sup>250</sup> In either case, opposition should be tendered to politicians and the public in good faith, meaning that specious, hypocritical, or solely self-serving arguments are morally suspect.

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245. Bowie, *supra* note 10, at 440.

246. See Cayford, *supra* note 45.

247. TIES THAT BIND, *supra* note 3, at 1-8.

248. Bowie, *supra* note 10, at 443.

249. See *supra* Part II.A-B.

250. TIES THAT BIND, *supra* note 3, at 135. Donaldson and Dunfee note that the market “does not always succeed in transforming the self-interest of the butcher, the brewer, or the baker. Market participants must shoulder systemic responsibilities or else the market suffers.” *Id.*

The argument can be tested in light of the industry's consistent opposition to the CAFE standards. As noted earlier, there are some good faith reasons to oppose government mandates on fuel efficiency. Several of the automakers' arguments against CAFE, however, lack consistency with other aspects of their corporate conduct.<sup>251</sup> Advocacy for increases in energy taxes, or for tax incentives for consumers to buy alternate fueled vehicles, are more appropriate and responsible arguments. Those arguments, in fact, seem to be made with greater frequency.<sup>252</sup>

One of Bowie's arguments fits very well with the paradigm of corporations being squeezed between government regulators and consumer demands. This is the paradigm in which corporations are relatively powerless, warranting Bowie's prescription to obey environmental laws, oppose no environmental laws, and wait on the demands of individuals as citizens and consumers to make needed changes. Business, says Bowie, will "respond to the market."<sup>253</sup> It is the consuming public that has the obligation to make the trade-off between cost and environmental integrity.<sup>254</sup> It is true that if the consuming public demanded zero emission cars, then auto companies would have to make them or go out of business; but, again, the consumer's choice does not take place on a blank slate. The context of consumer choice for motor vehicles is one of subsidized oil, subsidized roads and highways, cheap gas, insurance rates that are the same no matter how much people drive, laws that favor large vehicles, and an understandable consumer preference to drive a vehicle that will not be overpowered by a larger one. It is, therefore, doubtful that "the market" as presently configured could do much of anything to reduce U.S. carbon dioxide emissions from motor vehicles or end U.S. over-dependency on Persian Gulf oil. Markets are not perfectly competitive; they are path dependent, imperfect—externalities and subsidies—and highly politicized—rewarding campaign contributions with "access" or a seat at the table.

A more nuanced version of Bowie's recommendations for ethical corporate governance in auto companies is selective environmental compliance and defiance. Auto companies—and, arguably, all companies—should obey democratically-created laws and regulations, but oppose—in court, in administrative hearings, and in public pronouncements—any law that is contrary to sound economics, and advocate laws that are consistent with making the market more structurally sound. Attention to what Eric Orts has called "reflexive environmental law" will be useful here, as some market-oriented

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251. See *supra* notes 206-08 and accompanying text.

252. See Hudson, *supra* note 203.

253. Bowie, *supra* note 10, at 443.

254. *Id.*

policies will serve particular problems better than others;<sup>255</sup> an emissions-trading system for U.S. motor vehicle owners, for example, is probably unworkable, whereas some form of energy taxes or “feebates” seems more sensible.<sup>256</sup> Thus, there will be room for argument and advocacy in any law or proposal. This Article’s recommendation for responsible corporate governance is a good faith articulation of the benefits and pitfalls of any particular proposal and the advancement of alternative proposals, rather than the more “traditional” opposition of a company to any environmental law or proposal that may adversely affect profits.<sup>257</sup>

Telling the truth consistently requires that automakers should be willing to not only criticize government laws and regulations that have misguided aims and ineffective means, but to support laws that foster efficient markets and sound policy goals. If auto and energy companies deny that fossil fuel dependence is a national security problem, or deny that carbon dioxide emissions may be a global climate problem, or plan for a world in which all nations consume gasoline, land, and other resources in order to drive personal vehicles, both efficiency and truth are poorly served.

Auto companies have taken some positive steps. In 2000, the Ford Motor Company acknowledged that its SUVs created more safety and environmental problems than its cars.<sup>258</sup> In December 1999, Ford withdrew its support for the Global Climate Change coalition, an industry-sponsored public relations and lobbying effort that routinely dismissed global warming as a serious problem.<sup>259</sup> In January 2000, DaimlerChrysler also quit the coalition, noting that it had become an impediment to pursuing environmental initiatives in a credible way; while continuing to oppose the Kyoto protocol, GM left the coalition two months later, acknowledging that carbon dioxide buildup could be changing the world’s climate.<sup>260</sup>

Detroit automakers have also been working on new, more environmentally friendly technologies. Since 1993, the U.S. government and Detroit automakers have spent \$1.6 billion to develop an eighty mile per gallon family car through the Partnership

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255. Orts, *supra* note 233, at 1241-52.

256. *Id.* at 1245.

257. “During the past 2 1/2 decades, the auto industry has fought every attempt to regulate it, no matter how worthwhile the rules may have been for consumers—benefits such as cleaner air, greater safety and more economical transportation.” David C. Smith, *Detroit’s breather is over: the regulatory era makes a comeback—with a flourish*, WARD’S AUTO WORLD, June 1989, at 5.

258. Keith Bradsher, *Ford is Conceding S.U.V. Drawbacks*, N.Y. TIMES, May 12, 2000, at A1.

259. David Goodman, *Big Three Dump Greenhouse Lobby*, TORONTO STAR, Mar. 18, 2000.

260. *Id.*

for a New Generation of Vehicles (PNGV).<sup>261</sup> Alliances with companies working on fuel cell technologies may have begun the process of making the internal combustion engine obsolete.<sup>262</sup> DaimlerChrysler expects to market a fuel-cell Mercedes in 2005.<sup>263</sup> These are responses not only to the market and to anticipated rises in gasoline price as supplies diminish, but also to anticipated regulation.

Responsible corporate advocacy requires not only honesty, but also a commitment to addressing legal and regulatory concerns proactively. For example, if there are infrastructure barriers to fuel cell technologies, automakers have the responsibility to address those publicly. If gas prices relative to other markets are encouraging over-consumption and negative externalities, auto companies should say so. If reasonable market-oriented changes in law can encourage reduced fossil fuel consumption, auto companies should say so. If government needs to provide greater incentives to the private sector for exploring new forms of energy, auto companies should say so.

Educating the public and espousing the creation of public goods is a legitimate, even necessary function for large public corporations. Bowie's inclination is to accept a fairly clear separation between public and private spheres, but such a separation seems less and less realistic. Regulators make career moves to private industry through the "revolving door," and formerly public functions are privatized or de-regulated; companies and trade associations contribute heavily to politicians and parties, lobby extensively for statutory and regulatory changes, and work assiduously at cultivating public opinion. In the context of U.S. law and policy, automakers must acknowledge their influence and use it positively. Because of the U.S. position as a major power, U.S. law and policy will also impact the development of international law and may contribute to—or detract from—the hope of a more peaceful world.

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261. *U.S. to promote more fuel-efficient trucks*, REUTERS, Mar. 30, 2000. The PNGV program is being phased out in favor of the Freedom CAR program to develop hydrogen as an energy source for cars and trucks. See Terril Yuejones, *Federal Push on Fuel Cells Faces Hurdles: The Development of a New Distribution System for Hydrogen Would Likely Cost Hundreds of Billions of Dollars to Implement*, L.A. TIMES, Jan. 10, 2002, Business part 3, at 1.

262. See generally Gregg Easterbrook, *Opportunity Cost*, NEW REPUBLIC, May 15, 2000, at 21 (describing corporate alliances created to develop alternative energy technology).

263. *Id.* at 25. This estimate may be over-optimistic, however. See BROWN, *supra* note 17 (estimating that the general availability of fuel cell vehicles is apt to be no sooner than 2012).

### III. OIL, THE ENVIRONMENT, AND PEACE

Over the past fifty years, Arab leaders have come to realize that oil is the economic Achilles heel of the industrialized democracies, and have proposed to use oil as a “weapon.” Daniel Yergin’s monumental book, *The Prize*, notes that Egypt’s Gamal Abdel Nasser was one of the first to realize the potentially disruptive power of Arab oil:

Nasser, too, wished to carve out a great empire, and in his book, he emphasized that the Arab world should use the power that came with the control over petroleum—“the vital nerve of civilization”—in its struggle against “imperialism.” Without petroleum, Nasser proclaimed, all the machines and tools of the industrial world are “mere pieces of iron, rusty, motionless, and lifeless.”<sup>264</sup>

This section of the Article therefore asks whether the industrialized democracies’ continuing dependence on Persian Gulf or Middle East oil<sup>265</sup> is an active cause of conflict between Islamic peoples and “the West,” particularly the United States. By implication, it also asks whether decreased dependence on oil generally—or Persian Gulf oil specifically—might effectively disarm the Arab “oil weapon” and decrease the likelihood of aggressive interactions between Islamic groups and industrialized democracies. Giving a tentative “yes” to both then requires us to ask whether corporations could—or should—have a role in reducing that dependence.

#### A. A Faustian Bargain?

There is little doubt that the Persian Gulf war and the United States “war on terrorism” after the attacks of September 11, 2001 represent major, armed encounters between very different-minded groups, and may well represent what Samuel Huntington has called the “clash of civilizations.”<sup>266</sup> As such, relations between the United States and Middle Eastern nations and sub-groups—such as Osama bin Laden’s Al Qaeda network—are likely to remain tense and hostile

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264 YERGIN, *supra* note 167, at 487.

265. The Persian Gulf states include Saudi Arabia, Bahrain, Kuwait, Oman, Egypt, and the United Arab Emirates. The Middle East is a larger region, and by some is reckoned to extend on an East-West axis from Libya to Pakistan and as far south as Somalia and the Sudan.

266. See generally SAMUEL P. HUNTINGTON, *THE CLASH OF CIVILIZATIONS AND THE REMAKING OF WORLD ORDER* (1996) (positing a post-Cold War multipolar world in which seven or eight civilizations vie for economic, military, and cultural influence. Those civilizations include Western—U.S. and European—, Latin American, African, Islamic, Sinic, Hindu, Japanese, Orthodox—Russia, Greece, Eastern Europe—, and Buddhist. In Huntington’s civilizations, religion is clearly a defining factor).

for some time.<sup>267</sup> Nonetheless, the U.S. private sector's dependence on oil provides a continuing motive for U.S. military intervention in the region, and a stimulus to further terrorist responses.<sup>268</sup> To the extent that consumers, corporations, and the U.S. government could, over time, reduce their collective reliance on Middle Eastern oil—or reduce their reliance on oil generally—the prospects of peace may well be enhanced.

The energy-intensive economies of Europe, the United States, and Japan are largely dependent upon imported oil, and much of that oil is from the Persian Gulf states.<sup>269</sup> U.S. oil dependence on Persian Gulf oil has grown since the oil price shocks of the 1970s.<sup>270</sup> Overall oil imports to the United States, the European Union, and Japan are predicted to increase between 2002 and 2020.<sup>271</sup> As of early 2002, Congress has no proposals pending that would significantly reverse

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267. *Id.* at 109–21.

Meanwhile Muslim population growth will be a destabilizing force for both Muslim societies and their neighbors. The large numbers of young people with secondary educations will continue to power the Islamic Resurgence and promote Muslim militancy, militarism, and migration. As a result, the early years of the twenty-first century are likely to see an ongoing resurgence of non-Western power and culture and the clash of the peoples of non-Western civilizations with the West and with each other.

*Id.* at 121.

Even as the United States routs the Taliban and Al Qaeda from Afghanistan, further military options in the Middle East are being weighed. See Lawrence F. Kaplan, *Phase Two: Why the Bush administration will go after Iraq*, NEW REPUBLIC, Dec. 10, 2001, at 21. By January 2002, the United States was also considering not only military action against Iraq, but also in Somalia and Yemen. See Henry Kissinger, *Phase II and Iraq*, WASH. POST, Jan. 13, 2002, at B7.

268. See Paul Krugman, *Not a Fuels Errand*, N.Y. TIMES, Sept. 26, 2001, at A19.

269. See Gawdat Bahgat, *Oil Diplomacy: American Policy in the Persian Gulf*, 24.2 FLETCHER F. WORLD AFF. J. 144 (2000); see also Benjamin Schwarz & Christopher Layne, *A New Grand Strategy*, ATLANTIC MONTHLY, Jan. 2002, at 36-42. "About 25 percent of U.S. petroleum imports come from the Persian Gulf. If the United States adopted a national energy strategy, it could free itself from dependence on Persian Gulf oil." *Id.* at 37.

270. *Id.* at 147. For a somewhat different view, see Schwartz, *supra* note 144, at 80. "Although OPEC still helps set global prices and Saudi Arabia remains the world's leading crude producer, the U.S. gets a smaller percentage of its imported oil from the cartel now than it did 25 years ago." *Id.*

271. Liz Skinner, *Measure Aims to Reduce U.S. Energy Dependence*, HOUSTON CHRON., May 17, 2000. A measure introduced in May of 2000 by Senate Republicans sought to decrease "American dependency on foreign oil to less than 50 percent by 2010. The United States now imports about 56 percent of the oil it consumes and the U.S. Energy Department predicts that by 2020 that figure will rise to 65 percent." *Id.* See also Schwartz, *supra* note 144, at 80 (stating that "[t]he U.S. consumes nearly 20 million barrels of oil a day, up 18% in the past ten years. The bulk of that oil is turned into fuel—for cars, trucks, and planes. Machines that run on alternative fuels are on their way, but won't be available in large numbers for years.").

that dependence for the United States.<sup>272</sup> Unless that dependence is reversed or at least significantly reduced, the United States—with or without assistance from Japan or the European Union—must commit military, political, and diplomatic resources to maintaining some semblance of “stability” in the Middle East.<sup>273</sup> The cost of that

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272. Increased domestic exploration was a principal part of the Bush administration's energy plan as passed by the Republican-dominated House of Representatives. See *Senate Democrats Push U.S. Energy Conservation*, N.Y. TIMES, Dec. 5, 2001. “The Republican-led House approved a broad energy package in August that would allow drilling in the Alaskan refuge and provide some \$33 billion in tax breaks for oil, natural gas, coal, and refining companies.” *Id.*

Environmentalists complained that the bill paid inadequate attention to alternative energy, and that drilling in Alaska National Wildlife Refuge would do little to decrease oil dependence. Krugman, *supra* note 268, at A19.

Drilling in Alaska would make no difference worth mentioning. Right now the United States produces less than half the petroleum it consumes, making us highly vulnerable to disruptions in world oil markets. At its peak, the wildlife refuge would supply only about 5 percent of our consumption. So with it we would depend on imports for 45 percent of our needs instead of 50 percent.

*Id.* See also Amory B. Lovins & L. Hunter Lovins, *Fool's Gold in Alaska*, FOREIGN AFF., July/August 2001, at 73 (stating that “the refuge is unlikely to hold economically recoverable oil. And even if it did, exploitation would only briefly reduce U.S. dependence on imported oil by just a few percentage points, starting in about a decade.”).

Even the notion of U.S. oil independence is an illusion:

America is never going to be able to satisfy its hunger for oil through domestic production, whether we drill in the Arctic National Wildlife Refuge, in the Rockies, or anywhere else in the U.S. . . . America will always rely on imported oil. Overseas is where the oil is. It's that simple.

Schwartz, *supra* note 144, at 78.

273. See Bahgat, *supra* note 269, at 144-45. Bahgat reviews U.S. military involvement in the Middle East as follows:

In the late 1970s and early 1980s the Soviet Union invaded Afghanistan, closely approaching oil resources in the Gulf. President Carter did not hesitate to respond in what came to be known as the Carter Doctrine which stated that any attempt by an outside force to gain control of the Persian Gulf region would be regarded as an assault on the vital interests of the United States. Similarly, in 1987-88 the United States navy escorted reflagged Kuwaiti oil tankers to protect them from any hostile attack, at the urging of the Kuwaiti government. The Gulf War (1990-91) confirmed the American role in protecting oil resources in the region. This growing American involvement in the Gulf region reflects a consensus in the United States and other countries that the prosperity of the global economy depends on the availability of Gulf oil in reliable volume and at reasonable prices.

*Id.* Some commentators suggest that covert military involvement may have begun even earlier. See Mark Hertsgaard, *The Real Price of Oil*, MOTHER JONES, Oct. 5, 2001, available at [http://www.motherjones.com/web\\_exclusives/commentary/opinion/oil\\_price.html](http://www.motherjones.com/web_exclusives/commentary/opinion/oil_price.html). “Presidents and Congresses of both US political parties have for decades affirmed military and diplomatic policies aimed at guaranteeing American access to overseas oil; the CIA-assisted overthrow in 1953 of Iran's prime minister Mohammed Mossadegh—who had advocated nationalizing the country's oil supplies—

commitment is considerable, yet not easily calculated, and is not included in the price of oil—or gas at the pump. U.S. military presence in the Gulf, especially in Saudi Arabia, is a significant motivating factor behind the Al Qaeda network's attacks on U.S. embassies in Africa, the World Trade Center towers, and the Pentagon.<sup>274</sup>

Moreover, the U.S. alliance with King Fahd's fragile government in Saudi Arabia is, at best, an inherently unstable one.<sup>275</sup> The U.S.-Saudi relationship has been variously described as "cold blooded"<sup>276</sup> or as a "Faustian bargain."<sup>277</sup> In exchange for U.S. military support, Saudi Arabia provides bases for U.S. forces, attempts to stabilize world oil prices, and gives preferential prices to U.S. importers.<sup>278</sup> Yet, the Fahd regime also has maintained "tangible connections to

is but one example." *Id.* Others note that fears of a "gas famine" in the 1920s led the United States, France, Britain, and the Netherlands to "slicing up parts of the Middle East into national oil concessions, thus ensuring their supply of petroleum." Charles C. Mann, *Getting Over Oil*, *TECH. REV.*, Jan/Feb 2002, at 33.

274. See Schwartz, *supra* note 144, at 81. "In his public *fatwas*, the world's most wanted terrorist even refers to the crude reserves of the Arabian peninsula as 'this Islamic wealth' and calls on followers to resist American influence on petroleum production in the region." *Id.*

275. Editorial, *Reconsidering Saudi Arabia*, *N.Y. TIMES*, Oct. 14, 2001, at A12 [hereinafter *Reconsidering*].

276. *Id.*

277. Jim Hoagland, *The True Cost of Oil*, *WASH. POST*, Nov. 5, 2001, at B7.

The extensive participation by Saudi nationals in the Sept. 11 plan puts a spotlight on the failure of the Faustian bargain between Riyadh and Washington. While Saudi Arabia's control on oil prices and supplies has enabled Americans to continue to be energy addicts, America's military presence in the Persian Gulf has given the Saudi royal family a false sense of security.

*Id.* See also Jim Hoagland, Editorial, *Status Quo in the Persian Gulf*, *WASH. POST*, Sept. 9, 2001, at B7.

To protect the U.S. oil lifeline in the Gulf, every president from Franklin D. Roosevelt to George W. Bush has overlooked the dilemmas in this implicit Faustian bargain. U.S. support for democracy and human rights in Saudi Arabia, Qatar and even in Iraq has ranged from nonexistent to tepid. But access to the oil, and to the kings, emirs and other leaders who control it, has not produced great insight into the politics of a region that has constantly surprised Washington.

*Id.*

278. Banerjee, *supra* note 163.

Saudi Arabia has all along made certain it was the largest supplier of oil to the United States, oil traders, diplomats, and economists said. Saudi Arabia could make more money selling oil to east Asia, but has preferred to sell oil to the United States at lower prices in order to retain its coveted role.

*Id.*

Islamic fundamentalist terrorism"<sup>279</sup> and Saudi citizens have been implicated in numerous attacks on U.S. interests during the 1990s,<sup>280</sup> including attacks on U.S. embassies in Kenya and Tanzania, and the attack on the U.S.S. Cole in 2000.<sup>281</sup>

It is grimly ironic, therefore, that U.S. dollars for Saudi Arabian oil have been converted into direct aid for Al Qaeda, and that Osama bin Laden's network is likely to have trained and financed the actions of fifteen Saudi citizens in the attacks of September 11, 2001.<sup>282</sup> It is also troubling that Saudi cooperation after September 11 was somewhat halting.<sup>283</sup> With or without Saudi cooperation, the U.S. public expected its government to "root out" the wrongdoers and either kill them or bring them to justice; yet there was no reason to

279. *Reconsidering, supra* note 275. See also Seymour M. Hersh, *King's Ransom*, NEW YORKER, Oct. 22, 2001, at 35 ("... by 1996 Saudi money was supporting Osama bin Laden's Al Qaeda and other extremist groups in Afghanistan, Lebanon, Yemen, and Central Asia, and throughout the Persian Gulf region"). Hersh's article makes clear just how little domestic support there is for the Saudi Arabian royal family. National Security Agency intercepts "depict a regime increasingly corrupt, alienated from the country's religious rank and file, and so weakened and frightened that it has brokered its future by channeling hundreds of millions of dollars in what amounts to protection money to fundamentalist groups that wish to overthrow it." *Id.*

280. See Douglas Jehl, *Holy War Lured Saudis as Rulers Looked Away*, N.Y. TIMES, Dec. 27, 2001, at A1 (noting the Riyadh bombing by bin Laden-inspired extremists that killed five Americans and wounded thirty-seven, and the bombing of an airbase in Al Khobar that "killed 19 American airmen and wounded hundreds more").

281. *Id.* The 1998 embassy attacks in Nairobi, Kenya and Dar es Salaam, Tanzania killed 224 people, including twelve Americans, and injured more than five thousand. Judith Miller, *Many Say U.S. Planned for Terror but Failed to Take Action*, N.Y. TIMES, Dec. 30, 2001, at A1. "It is also believed that bin Laden's associates had a role in training the Somalis who killed 18 American servicemen in Mogadishu, Somalia in 1993." *Id.*

282. See Banerjee, *supra* note 163. Banerjee notes that

in 1999 and extending at least into mid-2000, Saudi Arabia exported 150,000 barrels of oil a day, *gratis*, to Pakistan and Afghanistan as foreign aid, according to Petroleum Intelligence Weekly, a trade publication. Among oil traders, it is widely believed that the shipments exceeded war-ravaged Afghanistan's needs, and that oil may have been resold to arm the Taliban.

*Id.*

283. The Saudis have seemingly shunted criticisms that they failed to cooperate fully with U.S. investigations, inquiries, and initiatives; instead, the Saudis have allegedly put increased pressure on the Bush administration over Israeli-Palestine relations. Lawrence F. Kaplan, *Arabian Fights: How the Saudis Lobby Bush*, NEW REPUBLIC, Dec. 24, 2001, at 15.

This week the Saudi foreign minister met with Bush again, ostensibly to be reminded what steps his country must take to crack down on terror. Instead he ended up reminding the president what steps must be taken to crack down on Israel. Nor have administration officials tempered their public—and phony—exultations about 'across the board' Saudi cooperation in the war against terror.

*Id.* at 17.

think that extirpating bin Laden or his chief aides—or Saddam Hussein, for that matter—would bring an era of peace in the Middle East. Other matters must also be addressed.

### B. *Consumptive Capitalism and Islamic Culture*

U.S. military action against Islamic terrorists may provide retribution and at least temporary respite from further attacks, but peace will be served only when the roots of unrest are examined. How does the United States—its corporations, consumers, and government—evoke so much unrest and resentment in other parts of the world?<sup>284</sup> Part of the answer is U.S. inward focus, its inability to see itself as others do.<sup>285</sup> For example, U.S. motorists seem largely unaware that their high levels of gas consumption have helped to fund bin Laden's network.<sup>286</sup> Not coincidentally, the U.S. public seems unaware that its relatively high levels of fossil fuel consumption do any harm to the environment, that the price of gasoline is actually far less than its social and environmental costs, or that the United States may be "the least generous nation on the planet."<sup>287</sup>

284. See Keith B. Richburg, *Divergent Views of U.S. Role in World; "Elite" Abroad Tie Sept. 11 to Policies*, WASH. POST, Dec. 20, 2001, at A34. The survey data comes from the Pew Research Center, Princeton Survey Research Associates, and the International Herald Tribune, and

provides further evidence of the gap between how Americans view themselves and how others in the world do. . . . American opinion makers, by 52 percent, said they thought the U.S. was admired because it does 'a lot of good around the world.' By contrast, majorities elsewhere disagreed, saying that was at most a minor reason.

*Id.* See also Stanley Hoffmann, *Why Don't They Like Us?*, AMERICAN PROSPECT, Nov. 19, 2001, at 18-21.

285. See Richburg, *supra* note 284.

286. Banerjee, *supra* note 228, at C5.

Sue Smith had already heard the theories, and she dismissed them entirely. "I don't think it's unpatriotic to use so much gas," Ms. Smith said, loading her silver Chevy Tahoe with groceries. "It's very patriotic. It's our way of life. We're an affluent society. Should I hate my neighbor because she has a better house, a better car, more money?" For Ms. Smith and many others here, the answer to that vulnerability is not reducing demand or developing alternative fuels, but drilling at home. "We should go on living the way we're living," Ms. Smith said. "And we should think about the wacko environmental groups that are forcing us to get oil someplace else."

*Id.*

287. Paul Krugman, *The Scrooge Syndrome*, N.Y. TIMES, Dec. 25, 2001, at A19. Krugman discusses the World Health Organization's proposal that advanced countries provide resources to raise up the level of essential health services available to the world's poorest people and nations; the price would be about "0.1 percent of advanced countries' income. The payoff would be at least eight million lives each year." *Id.*

If more and more members of the U.S. motoring public were to voluntarily use less gasoline, and if as citizens they supported higher gasoline taxes, stricter fuel economy standards, and the phase out of subsidies for oil and its related industries, the United States would be less dependent on oil generally, and Persian Gulf oil in particular. Yet, consumers must be better informed, and cannot act alone; corporate and national policies must be in accord. Granted, adopting these more economically-minded policies would not by themselves guarantee peace in the Middle East or bring about stable, democratic regimes there.<sup>288</sup> A continuing strategy of political and military action to insure "stable" oil supplies from the Middle East, however, is a sure invitation to further conflict.<sup>289</sup> Instead, the United States and oil MNCs could seek oil elsewhere, or could seek to develop other energy sources.<sup>290</sup>

Finding new oil fields outside the Middle East is one answer to unwanted dependence on that region, but oil seems to exacerbate local conflicts wherever it is sought.<sup>291</sup> The pursuit of other energy sources, moreover, has not heretofore been a high priority for the United States or its principal corporations.<sup>292</sup> Despite the OPEC

Krugman notes that this commitment would make the world a "richer and safer place," but that U.S. voters are grossly misinformed about the percentage of tax dollars going to foreign aid.

When asked how much of the federal budget should be devoted to foreign aid, Americans typically come up with a number around 10 percent—about 20 times what we currently spend. Voters are, however, misinformed: they think that the share of foreign aid in federal spending should be *cut* to 10 percent.

*Id.* The W.H.O. report shows that among advanced countries, the U.S. share of G.N.P. given in foreign aid ranks "dead last, well behind far poorer countries such as Portugal and Greece." *Id.*

288. The relative scarcity of democratic regimes in the Middle East has been noted. See Barbara Crossette, *As Democracies Spread, Islamic World Hesitates*, N.Y. TIMES, Dec. 23, 2001. Crossette quotes from a survey published in December 2001 by Freedom House: "Since the early 1970's, when the third major historical wave of democratization began, the Islamic world, and, in particular, its Arab core, have seen little evidence of improvements in political openness, respect for human rights, and transparency. . . ." *Id.*

289. HUNTINGTON, *supra* note 266. Noting that the Gulf War was largely seen in the Middle East as a war of U.S. imperialism to secure oil supplies, and thus tended to unify Islamic nations against the United States, Huntington writes:

The Gulf War was the first post-Cold War resource war between civilizations. At stake was whether the bulk of the world's largest oil reserves would be controlled by Saudi and emirate governments dependent on Western military power for their security or by independent anti-Western regimes which would be able and might be willing to use the oil weapon against the West.

*Id.* at 252.

290. See Mark L. Hymel, *The Population Crisis: The Stork, The Plow, and the DRS*, 27 N.C. L. REV. 15, 122 (1998).

291. See *supra* notes 54-72 and accompanying text.

292. See Mann, *supra* note 273, at 34.

induced oil-price shocks of the 1970s, no sustained strategies for alternative energy have been pursued since the Carter administration.<sup>293</sup> The explanation for this lies largely in the continuing abundance and low price of oil and the existence of an elaborate service infrastructure for oil and gasoline.<sup>294</sup>

The relative lack of U.S. energy policy to encourage alternatives to a fossil-fuel economy, however, is helped considerably by a self-imposed shortsightedness that refuses to count the ecological and political costs of continued dependence on oil. The ecological costs may include global warming and the global effects of overconsumption;<sup>295</sup> the political costs could be ignored as part of the long-standing U.S. bargain with the Saudis.<sup>296</sup> Even after September 11, the dominant message from Capitol Hill was not energy conservation or renewable energy, but more exploratory drilling for oil in the Arctic National Wildlife Refuge, one of the last remaining pristine wilderness areas in the United States.<sup>297</sup>

Would reducing dependence on Middle Eastern oil at least partially defuse Islamic fundamentalists and enhance the opportunities for peace in that region and in the world? The question cannot be answered with complete confidence, but well-educated guesses remain. Even if U.S. and EU consumption of Middle East oil is not the primary cause for the animosity that led to the September 11 attacks on the Pentagon and World Trade Center, the U.S. military presence to insure that supply may well be.<sup>298</sup> The existence of Israel, a Western-style democracy and functioning economy in the midst of the Arab world, may be a more significant issue, but even if a permanent peace could be brokered between Israel and its neighbors, particularly Palestine, and even if Western economies did not need Middle Eastern oil, it must be conceded that peace in and from the Middle East seems unlikely. Ethnic and religious tensions abound, some nations in the Middle East have or will have weapons

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293. Karl R. Rabago, *Building a better future: Why public support for renewable energy makes sense*, SPECTRUM, Spring 1998, at 22. "Cumulative energy subsidies for fossil fuels, nuclear power and large hydroelectric facilities dwarf the commitment we have made to nonhydro renewable energy." *Id.*

294. Mann, *supra* note 273, at 36. "And with oil prices falling to \$17 a barrel last fall—and billions of dollars already invested in the nation's petroleum-based infrastructure—there are few economic motivations for adopting new technologies." *Id.*

295. See *supra* notes 151-65 and accompanying text.

296. See *supra* notes 275-83 and accompanying text.

297. Eric Pianin, *War Effort Pushes "Green" Issues Aside: Environmental Groups Rethink Agenda as Nation Focuses on Anti-Terror Fight*, WASH. POST, Oct. 21, 2001, at A5 ("But many agree that environmentalists will have much more difficulty blocking oil and gas exploration in environmentally sensitive areas, including ANWR, as Bush stresses the dangers of continued U.S. dependence on foreign oil.")

298. Lamin Sanneh, *Faith and the Secular State*, N.Y. TIMES, Sept. 23, 2001, at D17.

of mass destruction, and many Islamic fundamentalists seek to extend their influence beyond the Middle East.<sup>299</sup>

### C. *The Clash of Civilizations and the Corporate Response*

If the power to resolve conflicts lies with nations, not corporations, and conflicts are inevitable, it is tempting to say that MNCs have very little say or sway in the course of future conflicts.<sup>300</sup> At a time when the power of nation-states and traditional notions of sovereignty have been eroded, however, non-state actors—including MNCs—cannot be relieved of all responsibility quite so quickly. Samuel Huntington predicted serious and endemic conflict between “the West” and Islamic fundamentalists in his 1996 book, *The Clash of Civilizations and the Remaking of World Order*.<sup>301</sup> His principal thesis is that the end of the Cold War unmasked a multipolar global order based on culture and civilization rather than ideology.<sup>302</sup> He provides convincing evidence that many of the post-colonial armed conflicts involve warring ethnic and religious groups—including armed conflicts in Yugoslavia, Lebanon, Cyprus, East Timor, Sri Lanka, Kashmir, and the Israeli-Palestinian conflict—rather than conflicts motivated by ideology.<sup>303</sup> By contrast, armed conflict among the industrialized democracies, which have comparable cultures and value systems, is relatively rare.<sup>304</sup>

Relevant to the conflict between Islam and the West, Huntington notes a number of apparent realities that escape many in the United States, but which are prominent in the minds of many people in the Middle East.<sup>305</sup> These include the subjugation of the world by Western powers through violence,<sup>306</sup> the inherent tensions between “Western values” and Islamic culture,<sup>307</sup> the reality of U.S.

299. STERN, *supra* note 13, at 110.

300. See *supra* notes 72-73 and accompanying text.

301. HUNTINGTON, *supra* note 266.

302. *Id.* at 28.

303. *Id.* at 252-54.

304. *Id.* at 34. “States with similar cultures and institutions will see common interest. Democratic states have commonalities with other democratic states and hence do not fight each other. Canada does not have to ally with another power to deter invasion by the United States.” *Id.*

305. *Id.* at 211-18.

306. *Id.* at 51.

307. *Id.* at 78. This includes the Judeo-Christian principles that are indelibly part of Western culture. The relationship between Islam and Christianity has often been antagonistic. “Each has been the other’s Other. The twentieth century conflict between liberal democracy and Marxist-Leninism is only a fleeting and superficial historical phenomenon compared to the continuing and deeply conflictual relation between Islam and Christianity.” *Id.* at 209.

imperialism over the past hundred years,<sup>308</sup> the link between “Western values” and “modernity,”<sup>309</sup> and the resurgence of Islam as a reaction to modernity.<sup>310</sup> In short, the post-Cold War sense of a New World Order based on U.S.-dominated free markets is apt to be short-lived.<sup>311</sup> Moreover, Huntington sees a link between U.S.-style consumer-driven capitalism and a “decadence” that Asian and Islamic peoples oppose.<sup>312</sup>

Yet, what possible difference can MNCs make? Two potential contributions may be noted: First, as argued in the previous Part, MNCs can—and morally, should—use their increasingly potent political speech and influence to advocate domestic and global legal systems that are fair, transparent, ecologically sensible, and allow competition in accord with the best economic and ecological thinking available. To some extent, this is already taking place; corporate advocacy for generalized rules against bribery, or collaboration in transnational systems such as ISO 14000, set standards and practices that are not merely local.<sup>313</sup> Second, U.S. and EU-based MNCs can realize that they share, relative to much of the world, a common culture and civilization; they may strive to be borderless, but are not valueless.<sup>314</sup> Given that MNCs will invariably transmit ideas, values, and ways of life that are alien to many cultures, they must own up to their values and hold them consistently.

Democratic values may very well be part of that mix.<sup>315</sup> One tentative hypothesis about peace is that democratic nations tend to

308. *Id.* at 83. Note also that the Gulf War was viewed as imperialism in Middle East. *Id.* at 251.

309. *Id.* at 97, 110, 116.

310. *Id.* at 97.

311. *Id.* at 21-29.

312. *Id.* at 98, 108. “More broadly, the religious resurgence throughout the world is a reaction against secularism, moral relativism, and self-indulgence, and a reaffirmation of the values of order, discipline, work, mutual help, and human solidarity.” *Id.* at 98.

In the early 1990s Asian triumphalism was articulated anew in what can only be described as the ‘Singaporean cultural offensive.’ From Lee Kuan Yew on down, Singaporean leaders trumpeted the rise of Asia in relation to the West and contrasted the virtues of Asian, basically Confucian, culture responsible for this success—order, discipline, family responsibility, hard work, collectivism, abstemiousness—to the self-indulgence, sloth, individualism, crime, inferior education, disrespect for authority, and ‘mental ossification’ responsible for the decline of the West.

*Id.* at 108.

313. Paula C. Murray, *Inching Toward Environmental Regulatory Reform—ISO 14000: Much Ado About Nothing or a Renovation Tool?*, 37 AM. BUS. L.J. 35, 40 (1999).

314. See Tim Chen, *Pax Mercatoria: Globalization is a Second Chance at “Peace For Our Time”*, 24 FORDHAM INT’L L.J. 217, 240 (2000).

315. HUNTINGTON, *supra* note 266, at 34.

be more at peace with one another.<sup>316</sup> If so, then do corporations have any stake in promoting democracy or democratic values? This question is particularly salient with respect to corporations chartered in the United States. As William Greider has asked: "Where does loyalty reside for those American corporations that have rebranded themselves as 'global firms'?"<sup>317</sup> Does the national interest truly lie in "making the world safe for globalizing commerce and capital?"<sup>318</sup> According to one view, the concept of "borderless companies" promoted by General Electric—much admired as a model of good corporate governance<sup>319</sup>—would elevate maximizing shareholder return over any allegiance to the corporation's charter country or its principal place of business.<sup>320</sup> Pledging such allegiance can undermine a MNC's short-term profits: Citibank, for example, has "lobbied to weaken the new regulatory rules required to halt the flows of terrorist money in the global financial system."<sup>321</sup>

Under a very different view, one espoused in this Article, we can refuse to accept that economic survival overwhelms any ability of corporations to use their influence to promote values of honesty, openness, transparency, and accountability. We can refuse to accept that anything legal and profitable is corporately correct, an acceptance that allows corporations to gain advantage by unfairly forcing costs on others—negative externalities, by using political

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316. *Id.*

317. William Greider, *Pro Patria, Pro Mundus*, NATION, Nov. 12, 2001, at 22 [hereinafter Greider, *Pro Patria*].

318. *Id.*

319. On General Electric CEO Jack Welch's retirement, Jeffrey Garten—Dean of the Yale School of Management—paid tribute to Welch in a commentary on National Public Radio's "Marketplace." He noted that if you had invested ten thousand dollars in GE when Welch took over, you would own stock worth \$677,000 in September of 2001—even higher if you had sold when the market was at its peak. Among other tributes, Garten said that Welch "wrote the book on how to run a global company." Marketplace, PUBLIC RADIO INT'L, Sept. 6, 2001.

320. Greider, *Pro Patria*, *supra* note 317, at 22.

321. *Id.* at 24.

Now, crisis requires leading governments, especially that of the United States, to do an abrupt about-face and begin to employ their neglected sovereign powers, that is, to intrude purposefully in the marketplace and impose some rules in behalf of society. The most compelling example is the need for new regulatory controls on capital flows in the global financial system in order to smash the terrorists' critical support base—the secretive, cross-border access to money. The global bankers, led by Citigroup, resisted, claiming it's too complicated to trace movements of illicit money. . . . Citigroup and other major banks want weak enforcement not because they are soft on terrorism but because they recognize that policing terrorist money can lead to tougher enforcement aimed at their own activities—their profitable role serving wealthy clients in money laundering and the massive tax evasion that occurs through offshore banking.

*Id.*

influence to favor themselves over others, by accepting perverse subsidies, or by avoiding accountability—in the unrestricted and unexamined movement of capital in secret offshore bank accounts. Rather, under the view advocated here, corporate free speech and political action should be used not only to advance the company's interests but to promote conditions under which many ideas, products, and services can compete and collaborate to bring about dynamic, sustainable societies. It is, ultimately, toward the “telos of peace”<sup>322</sup> and sustainability that corporations and nations should strive.<sup>323</sup> Yet, according to the usual “maximizing profits” view, corporations have no such responsibilities, and it is not realistic to expect them to be responsible to anyone or anything beyond their own bottom lines.<sup>324</sup>

#### D. Corporations, War, and Sustainable Economies

War is bad for the environment and other living things.<sup>325</sup> During the past twelve years, U.S. arms have been repeatedly striking targets in the Middle East, with promise of more to come.<sup>326</sup> That the motivation for doing so could in any way be linked to U.S., EU, and Japanese thirst for oil from that region should be disconcerting at the very least.<sup>327</sup> Still, very few U.S. voices, particularly corporate ones, have been raised in objection to the larger implications of U.S. presence in that region.<sup>328</sup> Yet those voices should be raised, because U.S. over-dependence on inexpensive oil from the Middle East can compromise its ability to consistently invoke the rule of law, to be viewed as an objective broker for peace in the region, or to model principles of conservation, restraint, and

322. Timothy L. Fort, *Corporate Makahiki: The Governing Telos of Peace*, 38 AM. BUS. L.J. 301 (2001).

323. *Id.*

I propose the telos of sustainable peace as an aim to which business should orient their actions both for reasons of the good of avoiding the activities that contribute to or make more likely the spilling of blood as well as for the good of sustainable economic enterprises, which are fostered by stable, peaceful relationships.

*Id.* at 306.

324. See Greider, *Pro Patria*, *supra* note 317, at 22.

325. Recent wars in the Persian Gulf, Kosovo, and Afghanistan have created major ecological damage. As to Kosovo, see A.C. Thompson, *War Without End*, NATION (Special Report dated Dec. 2, 2001), available at <http://www.thenation.com/doc/mhtml?I=special&s=thompson20011202>. See also PLANET MANAGEMENT 174-75 (Michael Williams ed., 1993) (“Environmental Terrorism—The Gulf War”).

326. Kissinger, *supra* note 267.

327. Bahgat, *supra* note 269, at 144.

328. Linda A. Mabry, *Multinational Corporations and U.S. Technology Policy: Rethinking the Concept of Corporate Nationality*, 87 GEO. L.J. 563, 588-89 (1999).

fairness to people in that region. Corporations, no less than citizens, politicians, and the media, contribute to the ongoing discussions and debates that shape U.S. foreign policy.<sup>329</sup>

Setting forth the oil dependence problem as a national security issue for the United States is not new.<sup>330</sup> The "oil weapon" has been used against the United States before.<sup>331</sup> Gradually removing this "weapon" will not in itself bring peace, but may nonetheless help.<sup>332</sup> It seems fair to say that de-funding terrorist groups like Al Qaeda would likely reduce conflict, as would de-militarizing U.S. presence in the Middle East,<sup>333</sup> as would greater generosity toward less fortunate societies, as would a demonstration of sincere self-discipline relative to free markets and the principles espoused by the United States and the European Union. If MNCs do have political clout, and if a more stable, peaceful world were an explicit corporate goal, then MNCs would not politically support U.S. military intervention for securing oil supplies,<sup>334</sup> would generally support free trade and development policies that better secured the sufficiency and prosperity of developing nations, and would support aid to developing nations that did not necessarily bring benefit to global corporate profits. Moreover, such MNCs would refuse bailouts, perverse subsidies, and ongoing policies that encouraged negative externalities from oil and

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329. Thomas M. Murray, *The U.S.-French Dispute over GATT Treatment of Audiovisual Products and the Limits of Public Choice Theory*, 21 MD. J. INT'L L. & TRADE 203, 214 (1997).

330. For security, not just for the United States but for industrialized democracies, Schwarz and Layne advocate an "international Manhattan Project to obviate the need for oil—thus dramatically reducing the revenue streams to the regimes in Iran, Iraq, and Saudi Arabia." Schwarz & Layne, *supra* note 269, at 42.

331. *Id.*

332. *Id.*

333. Huntington points out that going to war for oil strengthens the resistance and animosity of Arab governments. HUNTINGTON, *supra* note 266, at 248-49. Schwarz and Layne believe that if the United States remains in the region, it will have to prop up unpopular or failing regimes at considerable economic and political costs. Schwarz & Layne, *supra* note 269, at 41. The alliances between the United States and the governments of Saudi Arabia and Pakistan face "doubtful prospects precisely because their close connection to Washington intensifies radical nationalist and Islamic fundamentalist opposition within those countries." *Id.* Schwarz and Layne cite a figure of \$106 billion annually being spend on defense of the Persian Gulf region. *Id.* at 42.

334. Hersh points out that several prominent MNCs are recipients of lucrative contracts in Saudi Arabia. Working through Prince Bandar, the Saudis

have contributed hundreds of millions of dollars to charities and educational programs here. American construction and oil companies do billions of dollars' worth of business with Saudi Arabia, which is the world's largest oil producer. At the end of last year, Halliburton, the Texas-based oil-supply business formerly headed by Vice-President Dick Cheney, was operating a number of subsidiaries in Saudi Arabia.

Hersh, *supra* note 279, at 37.

gasoline use. The apparent inability of citizens and corporations to do so manifests the ideology of self-interest—that we can all do what we want to do and that it will all work out for the greatest good. Even Adam Smith would not have made such a claim.<sup>335</sup> A thorough rethinking of underlying assumptions and models is probably overdue; such self-criticism is a considerable strength of liberal democracies, and is not just a luxury for scholars but is also imperative for good governance.<sup>336</sup>

The age of sovereignty may be vanishing before our eyes.<sup>337</sup> With non-government actors—Al Qaeda, for example—and corporations assuming greater relative power, a period of relative anarchy may be at hand, with all that entails for increases in violent conflicts.<sup>338</sup> The collective action problem for corporations is to find ways to contribute to the rule of law and the ascendancy of market arrangements that help to secure sustainable, peaceful societies. If, on the other hand, corporations feel obliged to pursue short-term financial interests at all costs, then the ultimate costs could be considerable.

#### IV. WITH POWER COMES RESPONSIBILITY: ADVOCATING STRUCTURAL MARKET REFORM IN THE CAUSE OF STABILITY AND PEACE

What should be the agenda for corporate governance and the pursuit of peace? One threshold question is whether corporations should even care about peace. There are those companies that find war profitable, even if not entirely desirable.<sup>339</sup> U.S. companies lead the world in arms exports.<sup>340</sup> MNCs that have extensive contracts for the U.S. Department of Defense may find maximum profits in times of war, cold or otherwise.<sup>341</sup> From an environmental perspective, however, world war would be a disaster.<sup>342</sup> The localized fault-line

335. See James E. Alvey, *Adam Smith's Higher Vision of Capitalism*, J. ECON. ISSUES 441 (1998).

336. *Id.*

337. Benjamin Barber, *Beyond Jihad Vs. McWorld*, NATION, Jan. 21, 2002, at 11. In discussing the end of an age in global politics where sovereign states pursued self-interests "in a setting of shifting alliances," Barber writes that we now need "to understand how September 11 put a period once and for all at the end of the old story of American independence. . . . By the end of the twentieth century, irresistible interdependence was a leitmotif of every ecological, technological and economic event." *Id.*

338. *Id.*

339. See *supra* text accompanying notes 49 & 52.

340. *Id.*

341. See *supra* Part I.C.

342. Consider, for example, the possibility of nuclear winter on both human and nonhuman life on Earth. The nuclear winter theory holds that smoke and dust produced by a large nuclear war would result in a prolonged period of cold on the earth.

wars such as Huntington describes—Kosovo, Cyprus, Armenia, Indonesia, and Kashmir—tend to degrade the forest, water, and soil resources that sustainable local societies require, leading to resource conflicts.<sup>343</sup> Middle East conflict since 1990 has also been hard on natural environments in Kuwait, Iraq, and Afghanistan.<sup>344</sup>

Assuming that this threshold question has been crossed, and that most companies generally care to find opportunity in lands and economies where peace and relative abundance prevail, an important inquiry is whether corporations have any significant sway in establishing or maintaining stable, peaceful economies. This Article has tried to convince the reader that many corporations do have the power to influence the rules of the game, both within their country of origin and beyond. If the reader is not convinced, that inquiry remains the most pertinent: do MNCs have significant power to affect changes in the way business is done globally? For readers that are convinced, there are several further inquiries that may usefully be addressed.

First, within well-developed regulatory regimes, do MNCs have any particular obligations to promote sustainable, environmentally-friendly economic activities beyond what is required by law? Is there an obligation to advocate legal rules and mandates that are systematic and rational? This Article has argued in the affirmative to both, with a corollary command that corporations should avoid the solely self-interested gambits and strategies motivated by the goal of short-term profit maximization for one firm or one industry.<sup>345</sup> Standard corporate governance theory would hold just the opposite, sometimes with the caveat that long-term strategies may require promoting a corporation's environmental bona fides, or that paying attention to environmental issues is helpful in increasing profits or in avoiding losses caused by poor public relations.<sup>346</sup>

Second, with regard to transitional economies, do MNCs have any particular obligation to engage governments in the role of "diplomat" or political player, advocating human rights, environmental protections, and equitable distribution of joint ventures with host country governments? Framed somewhat differently, do MNCs have any particular obligation to avoid benefiting from war economies, to avoid using private militias that

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Early versions of this theory were put forth in the early 1980s by Richard P. Turco, Owen B. Toon, Thomas P. Ackerman, James B. Pollack, and Carl Sagan. They believed that low temperatures and prolonged periods of darkness would characterize a post-holocaust event and obliterate plant life. This, in turn, would threaten human existence.

343. See *supra* notes 44-47 and accompanying text.

344. See *supra* note 325 and accompanying text.

345. See *supra* Part II.

346. *Id.*

may kill in defense of property and business operations, or to disengage from corrupt or repressive regimes? Part II of this Article pointed to ongoing issues of this sort, especially where MNCs were engaged in natural resource extraction—timber, oil, and natural gas. It is with regard to these governments and peoples that MNC power is greatest, and where the contrast or contest between people and profits is clearest.

This Article has argued that only the narrowest view of corporate governance requires a company—such as Talisman Energy<sup>347</sup>—to stay in Sudan, to maximize profits in Sudan, and to exercise the right to remain silent regardless of any atrocities that Sudan's government may undertake.<sup>348</sup> A somewhat more expansive view of corporate governance would hold that Talisman should pay close attention to moral attitudes in the market and guard against a more global public opinion that might jeopardize profits.<sup>349</sup> An even more expansive view of good governance for MNCs would ask Talisman to exemplify "constructive engagement" in the best possible sense, using best-known environmental practices—even though not required—, advocating for fair distribution of government profits, and employing and training host country workers at a fair relative wage. The perils and possibilities of constructive engagement, however, are not completely documented or widely understood,<sup>350</sup> and further studies on constructive engagement are much needed.<sup>351</sup>

Third, with regard to U.S. military policy, what influence—if any—do MNCs have? Part III made explicit the connection between U.S. foreign policy in the Middle East—a flashpoint for violent

347. See *supra* notes 53-58 and accompanying text.

348. *Id.*

349. *Id.*

350. There are, as noted in Part II, a growing number of lawsuits alleging human rights abuses, but less clear is the path that a responsible MNC can take in dealing with difficult or corrupt regimes. In the search for non-Islamic sources of oil, are governments and corporations condoning human rights violations? The best practices of MNCs are starting to be documented and publicized, but must be accurate and subject to objective verification. Any legal obstacles to global industry-wide standards and mutual support for best practices should be cleared away. See *supra* Part II.

351. Some of the studies may be philosophical or conceptual. For example, what about corporate power relative to sovereign power? In the presence of a hegemon, some nations will feel powerless; if a particular company feels powerless relative to a powerful nation-state we should not be surprised. But again, this sense of powerlessness is relative. As a research agenda item, people need to consider how to break the seeming lock of powerlessness in a global economy where competition seems to push companies into debatable morality, whether it is alleged exploitation of human labor or—in collaboration with host country regimes or international institutions—exploitation of the natural environment. Shell reportedly felt that if it was not in Ogoniland, someone else would be; Talisman energy made the same point about Sudan, saying that if they were not there, someone even less scrupulous would be.

conflict—and U.S. and European oil consumption.<sup>352</sup> It is deliberate that U.S. military force is engaged for economic reasons as well as political or strategic ones, but could MNCs discourage ongoing military engagement in the Middle East? They could, this Article has argued, by actively supporting alternative energy policies;<sup>353</sup> oil is not going to be replaced, but systematic reductions in its use can greatly reduce its potential as a weapon for militant factions and “rogue nations” in the Middle East.<sup>354</sup>

Fourth, with regard to sovereignty, national power, and globalization, where do MNCs stand? In the twenty-first century, are corporations going to remain “stateless,” indifferent to the fates of their home nations—typically, the United States, the European Union, or Japan? Huntington’s work suggests not so much that nations trading with one another tend not to go to war, but that nations with similar, democratic institutions are more likely to be at peace with one another.<sup>355</sup> If so, the basic values of the societies from whence these companies grew are values that need defending.<sup>356</sup> If MNCs leave that task to individuals, or to government, that defense will be far less robust. Moreover, as William Greider points out, MNCs do the United States a disservice by proclaiming their borderless, stateless natures in peaceful times then professing great patriotism in accepting government largesse in times of war.<sup>357</sup>

Fifth, and on a more general level, globalization, free trade, and development must become more directed toward long-term, sustainable development in transitional economies. For example, it does very little good for the *maquiladoras* of Mexico to thrive for twenty or so years, then lose factories and jobs to China or nations in Southeast Asia paying lower wages. “Development” that is only temporary brings renewed human misery and often leaves environmental damage in its wake. To the extent that MNCs confuse economic activity and growth with development, or support trade policies that selectively garner the benefits of free trade for

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352. PAUL KENNEDY, *THE RISE AND FALL OF THE GREAT POWERS: ECONOMIC CHANGE AND MILITARY CONFLICT FROM 1500 TO 2000* xxii (1987). Kennedy makes clear that economic strength is critical to military success, and vice versa, and that there is a direct connection between military might and market share. U.S. patterns of foreign policy to support corporate interests—oil, energy, Persian Gulf war—fits this pattern, but Part III of this Article has argued that this pattern must be broken. Economic strength comes from innovation, technological change, and adherence to basic market principles. Corporate and national cooperation toward alternative energy does not offend free market principles that are already *in extremis* from extensive subsidies and negative externalities. See *supra* Part III.

353. See *supra* Part III.

354. *Id.*

355. HUNTINGTON, *supra* note 266, at 34.

356. *Id.*

357. See Greider, *supra* note 317 and accompanying text.

industrialized economies, "the West" will have a continuing reputation for exploitation.

Thus, the agenda of peace and corporate governance has need of balanced, objective assessments of whether global prosperity offers the best chance for world peace, and whether free trade as it is presently constituted is pointing us all toward greater prosperity. The heart of the argument throughout this Article is that by failing to address negative externalities and perverse subsidies, the world's largest MNCs do not participate in a system of global free trade that is sustainable. For reasons of stability, clarity, and sustainability, they should want such a system, but doubtless feel impelled by short-term exigencies to make the best of a system that seems fairly ungovernable.

Globalization, the general availability of sophisticated weapons and weapons of mass destruction, and the violent clash of different cultures and values should tell us that open markets and open borders are likely to bring more conflict rather than less.<sup>358</sup> In a fully connected world of trade among all nations, there is no guarantee of peace unless people have the resources and economies to stay and thrive in their ancestral lands.<sup>359</sup> Therefore, globalization must mean more than just opening new markets for MNCs.

MNCs have gained from the freer movement of people and goods across national borders, and they have both the power and the responsibility to do business in ways that materially enhance human well-being by preserving the natural environment that sustains life on Earth. Ecology cannot be separated from domestic and international politics; the new century requires that the United States consider and prioritize environmental threats to more traditional notions about national security.<sup>360</sup> The rules of the game—to borrow Friedman's phrase—are not only shaped by voting citizens and politicians, but by increasingly powerful corporations that have claimed a voice in public affairs and in the legislative arena.<sup>361</sup> In promoting or opposing national and international "rules of the game," corporations should seek to institute the kinds of structural efficiencies that promote sustainable economies.<sup>362</sup> This ethical duty is also eminently practical.

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358. See *supra* Part III.C.

359. Rabbi Michael Lerner tells us that "the alternatives are stark: either start caring about the fate of everyone on this planet or be prepared for a slippery slope toward violence that will eventually dominate our daily lives." Letter from Rabbi Michael Lerner, *A World Out of Touch With Itself: Where the Violence Comes From*, Sept. 2001 (on file with author).

360. See Seth Dunn, *Unnatural History*, *WORLDWATCH*, Jan/Feb 2002, at 36.

361. See GREIDER, *supra* note 15.

362. See *supra* Part II.

In dealing with the law, many corporations, their lawyers, and their government relations staffs may feel like they are playing defense, litigating opportunistic product liability claims, and heading off disastrous, wrong-headed regulations. They also have an ethical duty, however, to support meaningful market reform at national and international institutions. Business people, like vacationers, are very risk averse. The best collective risk reduction strategy for business in the twenty-first century is to take seriously the cumulative effects of economic activity on the natural environment and the fabric of local communities, and to support national and international legal reforms that restore functioning ecosystems and vibrant communities.

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