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ATTEMPTING TO DISCUSS RACE IN BUSINESS AND CORPORATE LAW COURSES AND SEMINARS

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I have taught business and corporate law courses and seminars at two New York area law schools for slightly more than a decade and have confronted several interesting challenges in the process. These challenges have varied according to the interests and personal backgrounds of my students. In some years, there was a critical mass of students anxious to dive into the discussions of corporate citizenship, social responsibility, and communitarianism that I introduced throughout the semester. At other times, the critical mass remained silent, stoically waiting for me to resume consideration of economic theory and shareholder primacy—the things that to them really mattered in Business Organizations and Corporate Governance classes.

The challenges of teaching corporate social responsibility and good corporate citizenship have shifted as political and social climates have changed in New York, the United States, and around the world.¹ I discuss some of those challenges in this

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¹ For example, I visited at St. John's University School of Law in Queens, New York, in the fall of 2001. My Business Organizations course and Corporate Governance and Accountability seminar were canceled in the days immediately following the September 11 attack on the World Trade Center and the Pentagon. When classes resumed, I crossed the Triboro Bridge from Manhattan and glanced at the place where the World Trade Center once stood. I had smelled the smoke from the site for several days at this point. I was not able to return to our discussion of the demand requirement for the filing of shareholder derivative suits. Instead, we talked about the tragedy, the human suffering, and our own pain. Eventually, our discussion encompassed corporate citizenship, social responsibility, and the role firms would play in the long aftermath of September 11.

A year later, after joining the St. John's faculty, I again taught Business Organizations and Corporate Governance and Accountability. My students readily saw the relevance of discussing corporate citizenship, ethics, and social responsibility throughout the semester as the facts unfolded of accounting fraud, insider trading, and breach of fiduciary duty at companies such as Enron,

Article. My primary focus, however, is the challenge of talking about race in business and corporate law courses and seminars.

I write about race and corporations because I see economic, business, and workplace issues as the primary elements for legal and organizational reform that attempt to move this nation closer to racial equity.² *Writing* about race, corporate law, and corporate governance has been far easier for me than *discussing* race and corporations in the classroom. Obviously, students expect to discuss race in my Law and Race seminar or in my Issues in Race, Gender and the Law seminar.³ They do not expect to talk about race in the basic corporations course or in my Corporate Governance and Accountability seminar.

In past years, I suspect that some of my students felt ambushed when I discussed race in both the basic corporations course and in the Corporate Accountability seminar. The expressions on some faces registered surprise that I raised the topic of race in corporations—a course in which I am sure they

WorldCom, Adelphia, Tyco, and ImClone.

² See generally Cheryl L. Wade, *Comparisons Between Enron and Other Types of Corporate Misconduct: Compliance with Law and Ethical Decision Making as the Best Form of Public Relations*, 1 SEATTLE J. FOR SOC. JUST. 97 (2002) (comparing the public's reaction to the Enron scandal to the public's reaction to charges of racial discrimination in the corporate work environment); Cheryl L. Wade, *Corporate Governance as Corporate Social Responsibility: Empathy and Race Discrimination*, 76 TUL. L. REV. 1461 (2002) (discussing racial discrimination in large, publicly held corporations); Cheryl L. Wade, *For-Profit Corporations That Perform Public Functions: Politics, Profit, and Poverty*, 51 RUTGERS L. REV. 323 (1999) (examining how at times companies do not adequately serve those individuals who are dependent on the companies for essential services); Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389 (2002) (analyzing the responses of corporate executives when faced with allegations of racial discrimination); Cheryl L. Wade, *The Impact of U.S. Corporate Policy on Women and People of Color*, 7 J. GENDER RACE & JUST. 213 (2003) (discussing the implications of corporate policies for people of color and for women).

³ I have used several excellent law review articles dealing with race and business issues with consistent success in my Law and Race seminar and another seminar on issues in race, gender and the law. See, e.g., Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1262–63 (2000) (examining the conduct of employees of color to determine the effectiveness of antidiscrimination law); Steven A. Ramirez, *The New Cultural Diversity and Title VII*, 6 MICH. J. RACE & L. 127, 131–41 (2000) (analyzing diversity initiatives undertaken by businesses); Susan Sturm, *Rethinking Law in the Twenty-First Century Workplace: Article & Essay: Race, Gender and the Law in the Twenty-First Century Workplace: Some Preliminary Observations*, 1 U. PA. J. LAB. & EMP. L. 639, 685 (1998) (proposing legal reform that responds to organizational and demographic changes in the workplace).

felt safe and free from “liberal” politics and discussions. Being an African American woman, I felt strangely vulnerable during these discussions.⁴ It was obvious to my students, of course, that the issues we discussed were deeply personal to me. The experience of talking about race in a corporations course with an African American woman flew in the face of what they had been told by many of their law teachers: that the study of law is an examination of objective and neutral principles.⁵

Professor Paulette M. Caldwell, an African American woman who taught law while she wore her hair in braids, gave a poignant account of the personal costs of discussing an employment discrimination case brought by an African American woman that “upheld the right of employers to prohibit categorically the wearing of braided hairstyles in the workplace.”⁶

I resented being the unwitting object of one in thousands of law school hypotheticals.

... I was not prepared to adopt an abstract, dispassionate, objective stance to an issue that so obviously affected me personally; nor was I prepared to suffer publicly, through intense and passionate advocacy, the pain and outrage that I experience each time a black woman is dismissed, belittled, and ignored simply because she challenges our objectification.⁷

Caldwell describes her procrastination in answering a student who inquired about the fairness of the court’s decision about braided hairstyles. “I could not think of an answer that would be certain to observe traditional boundaries in academic discourse between the personal and the professional.”⁸

⁴ See generally Deborah Waire Post, *Reflections on Identity, Diversity, and Morality*, 6 BERKELEY WOMEN’S L.J. 136 (1990–91), for an interesting account of the vulnerability, both in the classroom and among colleagues, of an African American woman who teaches law.

⁵ “Most mainstream scholars embrace universalism over particularity, abstract principles and the ‘rule of law’ over perspectivism (an approach characterized by an emphasis on concrete personal experience). . . . [U]niversal, neutral principles . . . can be more of a hindrance than a help in the search for racial justice.” CRITICAL RACE THEORY: THE CUTTING EDGE xv (Richard Delgado ed., 1995).

⁶ Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 366.

⁷ *Id.* at 368–69.

⁸ *Id.* at 369.

For some of my corporations and corporate accountability students, our brief discussions of race theory may have been their first introduction to a critical look at the law that explores some of the personal and subjective elements that critical legal scholars suggest are part of legal analysis.⁹ Some white students seemed uncomfortable with these discussions. They were reticent and exceedingly careful about participating in the conversation. I suspected that they did not want to say anything that would offend me or their colleagues of color. Worse yet was the small number of students who seemed rudely disinterested, waiting ostentatiously for me to get on with the “real” issues of corporate law.

I. WHY DISCUSS RACE IN COURSES AND SEMINARS THAT ARE NOT ABOUT RACE?

There are many reasons to discuss race in courses and seminars that are not devoted primarily to race issues.¹⁰ Professor Dorothy A. Brown has written an excellent casebook in which she examines race in the first-year curriculum.¹¹ Her casebook, with a separate chapter devoted to each first-year subject, analyzes cases from a critical race theory perspective.

I have concluded that it is important to discuss race whenever relevant because my students will practice law in a society in which racism is ubiquitous but not always apparent and recognizable. Professor Richard Delgado, in the introduction to his critical race theory anthology, explains one insight of critical race theorists “that racism is normal, not aberrant, in American society. Because racism is an ingrained feature of our landscape, it looks ordinary and natural to persons in the culture.”¹² Delgado explains that there are “business-as-usual forms of racism that people of color confront every day and that account for much misery, alienation, and despair.”¹³ Ignoring issues of race in the law school’s core courses and relegating such issues to Law and Race and Critical Race Theory seminars

⁹ “[M]any [Critical Race Theory] writers urge attention to the details of minorities’ lives as a foundation for our national civil rights strategy.” *Id.*

¹⁰ DOROTHY A. BROWN, *CRITICAL RACE THEORY: CASES, MATERIALS AND PROBLEMS* (forthcoming Oct. 2003).

¹¹ *Id.*

¹² *CRITICAL RACE THEORY*, *supra* note 5, at xiv.

¹³ *Id.*

disserves my students. Discussions of race become marginalized,¹⁴ exiled to the fringes of the law school curriculum. Only the students who enroll in “race courses” have available opportunities to discuss race and racism.

This tendency in law school to discuss race only in specified courses trivializes the experiences of students of color and the importance of race in American society. Ignoring race in core courses squanders precious opportunities for students who do not take “race courses” to learn to speak intelligently about the important and difficult issues of race and racism. Students will function as judges, lawyers, counselors, mediators, and negotiators in a society where few are able to speak comfortably and capably about race issues even though racism is pervasive and ubiquitous. Race and racism are complex issues that are perforated with minefields that few Americans are able to negotiate.¹⁵ “Race is a tense terrain, where we often try to hide crucial truths from ourselves. One way to bring these premises to the surface is by making them as vivid as possible.”¹⁶ It is my

¹⁴ Richard Delgado has written about the marginalization of the writing of scholars of color. See Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 561–62 (1984); Richard Delgado, “*The Imperial Scholar*” Revisited: *How to Marginalize Outsider Writing, Ten Years Later*, 140 U. PA. L. REV. 1349, 1349–51 (1992). “Even though the new voices are finding their way into the pages of the top reviews and journals, they are not being quickly and easily integrated into the conversations and dialogues of traditional legal scholarship.” *Id.* at 1368.

¹⁵ “[R]acism in America is much more complex than either the conscious conspiracy of a power elite or the simple delusion of a few ignorant bigots.” Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 330 (1987). “Decades into the experiment of integration, race still infuses our quotidian interactions, remaining a source of misunderstanding and enlightenment, alienation and togetherness.” *Talking About Race*, N.Y. TIMES, July 16, 2000, at F25. The *New York Times* examined race and racism in a series of articles that demonstrated the enormity and complexity of the racial dilemma in American society. One of the reporters who worked on the series asked, “Why is race a more sensitive subject than sex or sexual orientation or ethnicity?” Sam Roberts, *The Way We Live Now: 7-16-00: Round Table; Writing About Race (And Trying to Talk About It)*, N.Y. TIMES, July 16, 2000, at F16. Another reporter working on the same series responded:

Labels get affixed to people for saying “the wrong thing.” It may be unfair but it’s true. If a guy says something about women he can jokingly say, “Well, I’m just a chauvinist, I’m just a chauvinist pig,” and make a joke out of it. I don’t think you run across anybody who would jokingly refer to himself as a racist. It’s such a radioactive subject because these labels are so explosive. I mean, you know—bigot, Uncle Tom, sell out—you name it.

Id.

¹⁶ ANDREW HACKER, TWO NATIONS: BLACK AND WHITE, SEPARATE, HOSTILE,

hope that law schools graduate as many students as possible that will be able to take the lead in the difficult discourse about race.

II. WHY DISCUSS RACE IN BUSINESS AND CORPORATE LAW COURSES AND SEMINARS?

In 1992, Andrew Hacker wrote a book that offered his “understanding of the role and meaning of race in the contemporary United States.”¹⁷ Hacker paints a dismal picture of the disturbing economic disparities between African Americans and whites. “Since their first arrival, and continuing after they started receiving wages, black Americans have figured disproportionately among the nation’s poor.”¹⁸ In a chapter entitled “The Racial Income Gap,” he writes: “[A] greater proportion of black Americans lack regular employment than at any time since the 1930s Depression.”¹⁹ In another chapter called “Equity in Employment,” Hacker reveals that only “2.4 percent of the country’s corporations, partnerships, and sole proprietorships” are owned by African Americans.²⁰ He explains that the reason may be attributed to “the difficulty of getting start-up loans and capital from banks and investors stemming from biased attitudes about blacks’ business abilities. Nor is it easy for blacks to get experience in corporate management as a prelude to branching out on their own.”²¹ In the same chapter, Hacker explores racial bias on the part of companies that choose to open facilities in almost all-white areas and otherwise discriminate against African Americans when making hiring and promotion decisions.²²

More than a decade later, African Americans are far from achieving economic parity with white Americans. In 2001, the average household income of African Americans was 64.9% of the average household income of white Americans.²³ “Black men

UNEQUAL x (1992).

¹⁷ *Id.* at ix.

¹⁸ *Id.* at 93.

¹⁹ *Id.* at 105.

²⁰ *Id.* at 108.

²¹ *Id.*

²² *Id.* at 117–18, 133.

²³ See Roger O. Crockett & Peter Coy, *Progress Without Parity: Fewer Are Poor, but Blacks Are No Closer to Economic Equality*, BUS. WK., July 14, 2003, at 99. “[P]rogress in narrowing the economic divide between blacks and whites has

earned 73.9% of what white men earned in 2002 Black female earnings actually lost a bit of ground . . . compared with those of white women” in the last ten years.²⁴ Recent increases in unemployment have disproportionately affected both professional and blue-collar African Americans.²⁵

I have asked my students in Corporate Governance and Accountability to make the connection for themselves between economic disparities among racial groups in the United States and the social irresponsibility of corporate citizens that discriminate. The underlying theme of these discussions is that the way corporations are governed is relevant to many of the racial inequities that persist in the United States. Corporate governance reform and organizational change may begin to close the economic gap between whites and minorities in America. Specifically, if companies monitor their employees’ compliance with anti-discrimination law, they may begin to mitigate some of the economic effects of employment discrimination. These conclusions are implicit in the statistical evidence of workplace discrimination in hiring, promotion, and pay that I give my students. For example, I tell my students that “[b]lack managers and executives are . . . paid less than whites in similar jobs,” and that “black male executives and managers earn 23% less than white ones.”²⁶

I see race discrimination as a corporate governance issue because directorial failure to monitor compliance with antidiscrimination laws reduces rather than maximizes shareholder wealth.²⁷ Companies that discriminate often pay large amounts to settle class actions brought by employees or consumers of color alleging that boards breached duties of care in failing to avoid the losses incurred when settling

stalled” Roger O. Crockett, *How to Narrow the Great Divide*, BUS. WK., July 14, 2003, at 104.

²⁴ Crockett & Coy, *supra* note 23, at 99.

²⁵ See *id.*; see also Louis Uchitelle, *Blacks Lose Better Jobs Faster as Middle-Class Work Drops*, N.Y. TIMES, July 12, 2003, at A1 (discussing the unemployment rate and its disproportionate affect on African Americans across the country, despite their persistence in staying in the workforce).

²⁶ Crockett & Coy, *supra* note 23, at 102.

²⁷ See Cheryl L. Wade, *Racial Discrimination and the Relationship Between the Directorial Duty of Care and Corporate Disclosure*, 63 U. PITT. L. REV. 389, 389–90 (2002) (stating that these breaches seriously harm the economic interests of shareholders in the short term and may also affect the long term profitability of the corporation and shareholders).

discrimination suits.²⁸ It is also appropriate to discuss these issues in Corporate Governance and Accountability because corporate governance refers to how decisions are made within publicly-traded companies.²⁹ My hope is that the decisions made by my former students who become corporate lawyers, managers, or directors will not adversely affect constituencies of color on whom corporate activity has a significant impact. My goal is for those concerned about the way companies discriminate to understand the ways to hold such firms accountable.

Several alarming events have eclipsed national discourse on race and racism in American society. In the immediate aftermath of the September 11 attacks on the United States, few American citizens thought about any of the pressing issues that were so important on September 10, 2001 and before. In the months that followed, the nation became preoccupied with terrorism, homeland security, and other global matters such as issues relating to Iraq, North Korea, and Liberia. In the aftermath of accounting scandals that bankrupted companies such as Enron and WorldCom, almost all political, legal, and social discussion of corporate activity, corporate law, and corporate governance relates to financial disclosure and accounting matters. Few are focused in a substantial way on the impact of racism within public companies and its effect on employees, consumers, suppliers, and communities of color. Even though we find it difficult to talk about, racism persists. It has changed form to some extent, but its effect remains unmitigated. For these reasons, I aspire to break the nation's silence on race matters by discussing them in class.

III. CHANGING SCHOOLS; CHANGING TIMES

I began my teaching career at Hofstra University where most students felt compelled to take the basic corporations course even though it was not a prerequisite for graduation. Of course, they were absolutely right in doing so. This general consensus, however, that one must study basic corporate law,

²⁸ See *id.* at 389 (discussing recent cases where large settlements were paid to minority employees alleging racial discrimination and the fiduciary duties to shareholders breached because of these settlements).

²⁹ See DAVID SCIULLI, CORPORATE POWER IN CIVIL SOCIETY 10 (2001) (defining "corporate governance").

resulted in huge corporations classes where many students learned for the first time about the ways men and women do business and the law that applies to them. One year, I stood before approximately 170 students. If I had to measure the interest of each of my students in corporate law by the look on his or her face on the first day of class, I would say that slightly more than half of my students were not interested. The challenge in teaching this course was to inspire in my students a level of interest in business law that extended beyond copious note taking in order to get a decent grade in a class that was worth four credits. To do this, I had to understand some of the reasons why large numbers of students were not interested, much less enthusiastic, about corporate law. My conversations with many of these students have induced me to devote several hours of the semester to discussions of corporate social responsibility, fairness, justice, and communitarianism.

Some students have told me that they prefer courses in family law or criminal law rather than corporate law courses because they prefer to deal with people. These students become more interested in corporate law when I emphasize the fact that corporate law *is* about people and the rules and principles that govern their relationships when they do business in the corporate form. This leads to a discussion of the theories of what a corporation is.³⁰ While many students are comfortable and familiar with the notion of a corporation as an artificial entity with a legal identity that is separate from its owners and managers, I stress for those who find this notion difficult to understand the fact that corporate law primarily deals with the people who own and manage the corporation. I let them know on

³⁰ Generally, I lecture on the topic of what a corporation is, pulling from a variety of sources. See, e.g., Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 99 (1989) (discussing the view of "the firm as a 'nexus of contracts' among participants"); Frank H. Easterbrook & Daniel R. Fischel, *Corporate Control Transactions*, 91 YALE L.J. 698, 700 (1982) (describing the corporation as a "web of agency relationships"); Jonathan R. Macey, *Corporate Law and Corporate Governance: A Contractual Perspective*, 18 J. CORP. L. 185, 185 (1993) (discussing the value of "[a]pplying basic economic analysis to the corporate form"); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 262 (discussing how theories of the corporation have developed and changed over the last century); Alan Wolfe, *The Modern Corporation: Private Agent or Public Actor?*, 50 WASH. & LEE L. REV. 1673, 1696 (1993) (discussing the proper mixture of a corporation's public and private responsibilities).

the first day of class that corporate law *is* about human relationships.³¹

A negative public perception of corporations and corporate lawyers is the source of another kind of challenge for those who teach large basic corporations courses.³² Some of my students share this negative perception, concluding that notions of social, civic, and ethical responsibility, fairness, and justice play no part in the study of corporate law. It is for this reason that I spend some class time explaining that corporate law *is* about responsibility to and fairness and justice for directors, officers, shareholders, and even potential investors. It is during this explanation that I introduce the duties of care and loyalty owing from directors to shareholders as an example of responsibility to shareholders. An introduction to the disclosure rules found in the Securities Act of 1933³³ and the Securities Exchange Act of 1934³⁴ illustrates fairness principles that benefit the investing public through mandatory disclosure for their protection. I introduce the business judgment rule to demonstrate that courts defer to their business decisions, if made diligently and in good faith, as a matter of fairness to corporate directors and officers.³⁵ In attempting to keep the discussion balanced, I also discuss the business judgment rule as a practice of judicial deference for the economic benefit of shareholders. Courts do not second-guess the decisions of corporate officers and directors because they want to encourage risk-taking—as long as it is not grossly negligent—that will enhance shareholder wealth.³⁶

This discussion about duty, deference, and disclosure, however, is not enough for many students whose ideas about

³¹ It is important to introduce this perspective to students who will become corporate litigators. One commentator advised defense lawyers representing corporate clients that “putting a human face on a client may gain some mileage” with jurors. John Gibeaut, *Softening up Client ‘Appeal’*, A.B.A. J., July 2003, at 28.

³² See generally RALPH NADER & WESLEY J. SMITH, *NO CONTEST: CORPORATE LAWYERS AND THE PERVERSION OF JUSTICE IN AMERICA* (1996); Arthur W. Samansky, *TV Commercials: The SOB in the Gray-Flannel Suit*, WALL ST. J., Nov. 15, 1988, at A22 (stating that “[e]xecutive-bashing has been a film maker’s staple almost from the day the camera was invented”).

³³ 15 U.S.C. §§ 77a–77aa (2000).

³⁴ *Id.* § 78. The purpose of this statute was to protect investors’ interests by making disclosure of certain information mandatory. See *id.* § 78(8).

³⁵ See, e.g., *Joy v. North*, 692 F.2d 880, 887 (2d Cir. 1982) (applying the business judgment rule).

³⁶ *Id.* at 885–86 (stating that sometimes the better choice may involve the risky option because it will most likely lead to a balance between gains and losses).

responsibility, justice, and fairness extend beyond what is equitable among the parties who look to the corporate form as a way to do business and make money. What about the rest of the world, they ask. They, of course, are concerned about the groups of people who are not shareholders, officers, or directors, but who are affected by corporate activity in significant and sometimes profound ways. These students are sometimes enticed by the consideration of nonshareholder constituencies and our deliberation about corporate responsibility that extends to employees, suppliers, and the communities in which companies do business. I let my students know that there is something for everyone. Feminists,³⁷ environmentalists,³⁸ and civil and human rights activists³⁹ can find fulfillment in the study of corporate law.

A good number of students find an irresolvable level of incongruity in the notion of using corporate law as a tool for social justice. A discussion of the corporate lawyer's role in making sure that senior officers and directors do what they must in order to ensure corporate compliance with the law helps to resolve the contradiction that some students find inherent in the idea of using corporate law to ensure justice. To some extent, this is a discussion about corporate social responsibility, but there is more to it. This discussion is also about diligently ensuring compliance with law as a matter of justice.

Some of the disclosure rules under the Securities Exchange Act of 1934 provide an opportunity to discuss corporate law as a means to achieving social justice. A contextualized discussion of these rules also makes the consideration of introductory securities regulation less abstract and more manageable for students. I have asked my students to read Item 103 of Regulation S-K of the Exchange Act.⁴⁰ We discuss the mandatory disclosure of legal proceedings that arise under

³⁷ We consider Title VII of the Civil Rights Act of 1964, which prohibits sex discrimination in employment. Section 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (2000).

³⁸ We discuss the Securities and Exchange Commission's environmental disclosure rules under its integrated disclosure system. *See, e.g.*, Adoption of Integrated Disclosure System, 47 Fed. Reg. 11,380, 11,381 (Mar. 16, 1982).

³⁹ For this discussion, we read some of the cases analyzing the social issue proposals submitted by shareholders who are concerned about corporate infringement upon civil and human rights. *See, e.g.*, Amalgamated Clothing and Textile Workers Union v. Wal-Mart Stores, Inc., 821 F. Supp. 877 (S.D.N.Y. 1993).

⁴⁰ Fed. Sec. L. Rep. (CCH) ¶ 71,001 et seq.

environmental law and the fact that under Item 103 only proceedings that are economically significant need be disclosed. After considering the concept of materiality, we go on to discuss the goals of these mandatory disclosure requirements—the achievement of environmental justice by making transparent corporate activity that has potentially deleterious environmental consequences.⁴¹ After considering the concept of materiality, we next discuss the goal of these mandatory disclosure requirements: The achievement of environmental justice by making transparent the corporate activity that has potentially deleterious environmental consequences. We also look at Item 303 of Regulation S-K and its requirement that companies disclose potential environmental liability.⁴² We discuss the fact that only material potential expenditures need to be disclosed and also ask whether the materiality requirement undermines the accomplishment of true environmental justice. This leads to a discussion of the time and cost burdens that would be placed on issuers if the materiality factor was dropped.

I emphasize that while this is a discussion focused on corporate social responsibility, it is responsibility that is mandated by law. I make the point by comparing mandatory environmental disclosure rules to voluntary corporate codes of conduct that relate to the environment, such as the Valdez Principles. “The Valdez Principles asked corporations to go beyond mere compliance with the minimum environmental standards set by federal, state, and local governments and aggressively protect the environment.”⁴³ This enables students to understand that while compliance with the law ensures social justice and responsibility, there is another kind of corporate social responsibility, which asks businesses to go beyond that which is required under the law to ensure the benefit of certain constituencies.

After discussing environmental disclosure rules as a way of encouraging compliance with the law, I ask students to consider the mandatory disclosure of material proceedings that relate to civil rights matters. I ask students why there is no civil rights analogue to the requirement that potential environmental

⁴¹ [2003] Fed. Sec. L. Rep. (CCH) ¶ 71,001.

⁴² *Id.* ¶ 71,033.

⁴³ Elizabeth Glass Geltman & Andrew E. Skroback, *Environmental Activism and the Ethical Investor*, 22 J. CORP. L. 465, 498–99 (1997).

expenditures be disclosed under Item 303. In other words, why doesn't the SEC require the disclosure of potential civil rights expenditures? This leads to an interesting discussion about the differences between social commitment to improving the environment and its commitment to helping in the enforcement of the civil rights of women, minorities, and the disabled.

Another part of my discussion of legally mandated corporate social responsibility includes the directorial duty of care.⁴⁴ For this discussion, I spend some time focusing on the duty-to-monitor component of the duty of care. My students read an excerpt of *Graham v. Allis-Chalmers Manufacturing Co.*,⁴⁵ in which the company incurred large financial losses as a result of having violated antitrust laws.⁴⁶ Because the directors were not on notice that some employees were part of a price-fixing conspiracy, the Delaware Supreme Court held that they owed no duty to investigate or monitor employee behavior in this regard.⁴⁷

Three decades later, the Delaware Chancery Court defended the result in *Allis-Chalmers*, narrowly interpreting the case "as standing for the proposition that, absent grounds to suspect deception, neither corporate boards nor senior officers can be charged with wrongdoing simply for assuming the integrity of employees and the honesty of their dealings on the company's behalf."⁴⁸ I ask my students to think about the nature of a director's duty. I explain to them that outside directors have their own jobs. How can they be expected to monitor the decisions made by officers and employees that they may never meet? I then call their attention to the fact that employee decision making that does not comply with the law may cause significant financial losses. I direct my students' attention to the cases enumerated by Chancellor Allen in *Caremark* where the decisions of officers and employees deep "in the interior of the

⁴⁴ This discussion occurs after focusing on the duty-of-care cases that explore directors' responsibility to make business decisions only after careful consideration and due deliberation. See, e.g., *Joy v. North*, 692 F.2d 880, 885-86 (2d Cir. 1982); *Smith v. Van Gorkom*, 488 A.2d 858, 872-73 (Del. 1985); *Kamin v. Am. Express Co.*, 86 Misc. 2d 809, 812-14, 383 N.Y.S.2d 807, 810-11 (Sup. Ct. N.Y. County 1976).

⁴⁵ 188 A.2d 125 (Del. 1963).

⁴⁶ See *id.* at 127-28.

⁴⁷ See *id.* at 128-29, 131.

⁴⁸ *In re Caremark Int'l Inc.*, 698 A.2d 959, 969 (Del. Ch. 1996).

organization . . . vitally affect the welfare of the corporation."⁴⁹ In *Caremark*, Chancellor Allen recalled debacles at Salomon, Inc., Kidder, Peabody, and Prudential Insurance, where corporate losses resulted from the illegal conduct of employees that arguably should have been monitored more closely.⁵⁰ A question for my students is the question posed by Chancellor Allen: "[W]hat is the board's responsibility with respect to the organization and monitoring of the enterprise to assure that the corporation functions within the law to achieve its purposes?"⁵¹

After discussing the *Caremark* decision, which held that directors owe a duty to make a good faith attempt to install an adequate monitoring system to ensure corporate compliance with the law, I inform my students that in recent years corporate law compliance has become a significant undertaking for managers in light of general legal obligations which are far more numerous than those in place when *Allis-Chalmers* was decided.⁵² At this point, I remind my students of the racial discrimination class action that was settled by Texaco in 1996.⁵³ I highlight the social responsibility and justice issues that are inherent in a consideration of whether directors have breached their duty of care when they fail to monitor their employees' compliance with anti-discrimination law.⁵⁴ I ask the students to consider whether the Texaco directors breached their duty of care when they failed to adequately monitor alleged racial discrimination, which resulted in over \$175 million paid to settle the race discrimination class action.⁵⁵

By the time I have this discussion of race discrimination at large public companies such as Texaco, my students are less surprised by our consideration of race matters in a corporations course. The discussion of race has been prefaced with earlier discussions of the notion that fairness and justice are underlying

⁴⁹ *Id.* at 968.

⁵⁰ *See id.* at 968–69.

⁵¹ *See id.*

⁵² I now include discussions concerning the changing obligations of corporate lawyers, boards, and senior officers under the Sarbanes-Oxley Act, which was enacted in 2002 in reaction to fraudulent financial disclosures at companies such as Enron and WorldCom. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745.

⁵³ *See* Jack E. White, *Texaco's High Octane Racism Problems: Piles of Cash and Substantial Reforms Fail to Reverse the Call for Boycott*, TIME, Nov. 25, 1996, at 33.

⁵⁴ *See* Wade, *supra* note 27, at 391–92.

⁵⁵ *See* White, *supra* note 52, at 33.

themes of, and justifications for, disclosure rules to protect investors and the business judgment rule for the protection of directors. We have already discussed corporate social responsibility and environmental justice. Race and racism within large public companies is simply a continuation of the theme with which we started at the beginning of the semester.

The Texaco case comes up again later in the semester when we talk about disclosure under the federal securities laws. I ask students to consider whether things would have worked out differently for Texaco if Regulation S-K called for disclosure of potential material liability under civil rights laws as is required for potential environmental liability. Shouldn't investors know about this kind of conduct that could lead to huge financial loss? Would such disclosure, or the possibility of having to make such disclosure, have inspired corporate managers to do something about the alleged race discrimination? I distinguish corporate responsibility that is mandated by law from the typical discussion of corporate social responsibility that asks businesses to achieve social good even when it is not required by law. Cases on charitable contributions and corporate entities behaving as good citizens lead nicely into a discussion of the corporate social responsibility goals that require more than compliance with the law and the tension between shareholder wealth-maximization and achieving social good.

I discuss with my students a context in which the tension between social responsibility and shareholder wealth-maximization is exacerbated. We consider the assumption by private, for-profit corporations of certain public functions, such as educating children, imprisoning those accused of crime, and distributing social services benefits. These companies are atypical because they engage in businesses where human beings are the source of shareholder profit. When private companies manage prisons, public schools, and distribute welfare benefits, the inmates, students, and welfare recipients they purport to serve become human commodities who are more like the widgets manufactured by more typical corporations than they are like the constituencies of traditional companies.⁵⁶ A discussion of these companies vividly illustrates the inherent conflict between

⁵⁶ See Cheryl L. Wade, *For-Profit Corporations That Perform Public Functions: Politics, Profit, and Poverty*, 51 RUTGERS L. REV. 323, 325 (1999).

shareholder wealth-maximization goals and the interests of the people who rely on these companies. These companies engage in businesses that have a profound effect, not only on the students, prisoners, and indigents they serve, but also on society in general. The entire nation relies on the adequate provision of the services these companies render.⁵⁷ When these companies educate, incarcerate, and distribute social service benefits, they establish social policy.

A discussion of for-profit companies that assume functions traditionally performed by the government enables me to clarify the nature of the relationships between the various nonshareholder constituencies with the corporate entity. I do so by comparing the students and prisoners in the schools and prisons run by for-profit companies, the overwhelming majority of whom are people of color, to traditional nonshareholder constituencies. They are unlike the consumers, creditors, suppliers, and employees associated with the average corporation. I call them corporate dependents. They lack the bargaining power that most corporate constituents have.⁵⁸ They are unable to choose alternatives when they are dissatisfied. The relationship between corporate dependents and the companies on which they rely is custodial in nature.⁵⁹ These companies control the very lives of corporate dependents. The power of for-profit companies over corporate dependents is especially evident in the context of prison privatization where the state's authority to control and intercede in individuals' lives is handed over to private companies.⁶⁰

CONCLUSION

It is important for me to convey to my students that the work of a corporate lawyer need not be antithetical to a life's

⁵⁷ Cf. William H. Rentschler, "Lock 'Em Up and Throw Away the Key": A Policy That Won't Work, USA TODAY, Nov. 1997, at 24. Rentschler writes that when many prisoners are released they are "bereft of all hope[] and trained only to continue along the path of crime. Their aim is to get out and get even. Society bears the burden." *Id.*

⁵⁸ See Wade, *supra* note 55, at 325-26.

⁵⁹ See *id.* at 342.

⁶⁰ For-profit companies have traditionally provided specific services to inmates. The provision of food, health care, and education are examples of for-profit involvement that should be distinguished from prison privatization, which involves the transfer of ownership and control of entire facilities.

work devoted to social responsibility and racial justice. Corporate lawyers can practice corporate law and achieve social good. Corporate lawyers can move their clients closer to achieving racial equity for the various constituencies that are affected by corporate activity. In this Article, I suggest that we teach corporate law and governance in a way that is consistent with enhancing corporate social responsibility and racial justice. In the classroom, however, at least when it comes to race matters, I am not always able to do so.

Many law teachers of color have described the importance, rewards, and difficulties of talking about race in the classroom.⁶¹ For some, efforts to undertake such discussions have yielded impressively positive outcomes. Professor Paulette Caldwell wrote of her success in discussing a case about a black woman plaintiff with braided hair in a style similar to the one worn by Caldwell at the time after initially having been hesitant to have the discussion in her Employment Discrimination course:

Our silence broken, the class moved beyond hierarchy to a place of honest collaboration. Turning to [the case], we explored the question of our ability to comprehend through the medium of experience the way in which a black woman's hair is related to the perpetuation of social, political, and economic domination of subordinated racial and gender groups; we asked why issues of experience, culture, and identity are not the subject of explicit legal reasoning.⁶²

I have had some success in discussing race in corporations courses and seminars. I have had some spectacular failures, however, that were followed by a year or two in which I could not bring myself to discuss race in my corporations courses and seminars.⁶³

⁶¹ See Frances Lee Ansley, *Race and the Core Curriculum in Legal Education*, 79 CAL. L. REV. 1511, 1512–13 (1991); Taunya Lovell Banks, *Teaching Laws with Flaws: Adopting a Pluralistic Approach to Torts*, 57 MO. L. REV. 443, 445–47 (1992); Okianer Christian Dark, *Incorporating Issues of Race, Gender, Class, Sexual Orientation, and Disability into Law School Teaching*, 32 WILLAMETTE L. REV. 541, 542 (1996); Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 314–15 (1994).

⁶² See Caldwell, *supra* note 6, at 366.

⁶³ For example, one year my questions about corporate compliance with anti-discrimination law that prohibits race discrimination were met with a stony silence. Not one of my eighty or so students that year raised a hand. The following year, I

approached the same discussion about compliance with law focusing on sex discrimination and harassment rather than race discrimination and harassment. I had much better results. Students were eager to discuss the same corporate compliance issues as they related to women.