Exploitation and Antidotes: A Corporate Law-Based Approach to Overmarketing and Overpricing by Big Pharma

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ABSTRACT

This article identifies prescription drug and marketing practices as problematic. It then seeks to establish that the problems identified are the perfectly predictable consequence of corporate law functioning as usual in a context in which consumers have little to no choice. It proposes possible corporate law solutions and assesses them from the theoretical perspectives of a number of schools of legal thought. The article ultimately concludes that, although no solution is fully satisfying, the moderate steps suggested—involving director mindfulness and permitting shareholders to express themselves—are worth taking.

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[*] This article draws heavily and without indicating quotations from some of my previously published work, including Theresa A. Gabaldon, *The Story of Pinocchio: Now I'm a Real Boy*, 45 B.C. L. REV. 829 (2004); Theresa A. Gabaldon, *Like a Fish Needs a Bicycle: Public Corporations and Their Shareholders*, 65 MD. L. REV. 538 (2006); Theresa A. Gabaldon, *Joe Camel Explains It to the Board: Corporate Law, Women in the Workforce, and the Exploitation of Children*, 13 DUKE J. GENDER L. & POL'Y 203 (2006); Theresa A. Gabaldon, *Half-a-Cup Better than None: A Pragmatic Approach to Preventing the Abuse of Financial Consumers*, 81 GEO. WASH. U. L. REV. 929 (2013); Theresa A. Gabaldon, *In Loco Parentis: Directorial Duties toward Consumers*, DIRECTOR'S HANDBOOK (Alfredo Paolini, ed., Edward Elgar 2014).

INTRODUCTION

For a good part of 2015, Martin Shkreli was the "most hated man in America."[1] If you don't recall him, he is the former CEO of Turing Pharmaceuticals who raised the price of an HIV/AIDS drug from $13.50 to $750, simply because he could. The patients who relied on the drug to keep a life-threatening condition at bay had no choice but to pay the inflated price. Although Shkreli put a face on rapacious conduct by pharmaceutical manufacturers, it is important to remember that he is just that—a face for a much larger problem.

Over a five-year period during which its stock price tripled, Celgene increased the price of Revlimid, one of its flagship anti-cancer drugs, by 500%.[2] It now costs the average American patient $17,000 each month. Questor inflated the cost of a drug for multiple sclerosis from $1235 to in

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[1] Zoe Thomas & Tim Swift, *Who is Martin Shkreli?—'The Most Hated Man in America'?*, BBC NEWS (Sept. 23, 2015), http://www.bbc.com/news/word-us-canada-34331761.
[2] Arlene Weintraub, *Angry Cancer Patient Sues Celgene Over 500% Jump in Revlimid Cost*, FIERCEPHARMA (June 16, 2017, 9:03 AM), https://www.fiercepharma.com/legal/angry-cancer-patient-sues-celgene-over-500-jump-revlimid-cost.

excess of $29,000 for each vial.[3] Rodelis increased the price of a tuberculosis treatment from $20 to $320 for each pill and Valeant increased the cost of a heart medication by 525%.[4] More generally, the prices of the most popular brand-name drugs in the United States increased 127 percent between 2008 and 2014.[5] We all know that drugs are not cheap to develop—recent estimates put the cost of bringing a patented drug to market at over $2.5 billion.[6] Nonetheless, given the modest assumption that none of the drugs in question actually became dramatically more expensive to produce after being put on the market, something seems off.

A few more factoids may darken one's suspicions. For instance, Celgene's stock price increased 4,800% between 1999 and 2011 and quadrupled in the subsequent four years.[7] More generally, between 2006 and 2010, the revenue of pharmaceutical companies increased by 83%.[8] In 2015, the increase was 8.9% over the preceding year.[9] It is true that in 2016 more restraint was shown (perhaps because of the Shkreli phenomenon and other bad publicity in 2015), with sales up by only 4% for the year for the top 15 drug manufacturers.[10] In fact, in 2016 the CEO of one large drug company publicly pledged to keep annual cost increases in the single digits as a matter

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[3] Paul Barrett, *Shkreli Wasn't the First to Hike Drug Prices – And He Won't Be the Last*, BLOOMBERG BUSINESSWEEK (Dec. 23, 2015, 7:00 AM), http://www.bloomberg.com/news/articles/2015-12-23/shkreli-wasn't-the-first-to-hike-drug-prices-and-he-won't-be-the-last.

[4] *Id.*

[5] Ben Hirschler, *Exclusive-Transatlantic Divide: How U.S. Pays Three Times More for Drugs*, REUTERS (Oct. 12, 2015, 10:30 AM), http://www.reuters.com/article/us-pharmaceuticals-usa-comparison-idUSKCN0S61KU1012.

[6] Robert Weisman, *Cost of Bringing Drug to Market Tops $2.5b, Research Finds*, BOS. GLOBE (Nov. 18, 2014), https://www.bostonglobe.com/business/2014/11/18/cost-bringing-prescription-drug-market-tops-billion-tufts-research-center estimates/6mPph8maRxzcvftWjr7HUN/story.html.

[7] Keith Speights, *Celgene Stock History: The Biotech's Path to Gigantic Gains*, MOTLEY FOOL (Apr. 14, 2017, 2:43 PM), https://www.fool.com/investing/2017/04/14/celgene-stock-history-the-biotechs-path-to-giganti.aspx.

[8] Gardiner Harris, *F.D.A. Finds Short Supply of Attention Deficit Drugs*, N.Y. TIMES (Dec. 31, 2011), http:// www.nytimes.com/2012/01/01/health/policy/fda-is-finding-attention-drugs-in-short-supply.html?supply.html?pagewanted=all&_r=1&.

[9] *US Drug 2016 Sales, at $450 Billion, Moderate to Single-Digit Growth*, PHARMACEUTICAL COM. (May 4, 2017), http://pharmaceuticalcommerce.com/latest-news/us-drug-2016-sales-450-billion-moderate-single-digit-growth/.

[10] Eric Palmer, *Top 15 Pharma Companies by 2016 Revenue*, FIERCEPHARMA (May 14, 2017, 12:00 PM), http://www.fiercepharma.com/special-report/top-15-pharma-companies-by-2016-revenues.

of "social contract."[11] Still, something seems amiss.

Also seemingly amiss is the ballooning of pharmaceutical advertising with correlative increases in the prescriptions written for various mental and other ailments. Studies have demonstrated that direct to consumer advertising indeed is linked to a marked increase in the number of times patients schedule visits with their doctors,[12] as well as in the number of prescriptions written.[13] This is worrisome given the charges many have leveled that pharmaceutical advertising is deceptively incomplete. Consider the following example: "[One] advertisement promoted Jublia, a new topical drug for toenail fungus that costs thousands of dollars for a full course of treatment. Complete cure rates in studies—under 20 percent after 48 weeks of use—aren't mentioned in the advertisements."[14]

It is easy to find more examples. For instance, advertising for Belsomra, a popularly prescribed sleep aid costing $10 per pill, neglects to mention that the drug, on average, merely helps a user to fall asleep six minutes earlier than would otherwise be the case but with the added side-effect of drowsiness the next day.[15]

Beyond amiss and well into the realm of downright scary is the role played by Big Pharma in the opioid epidemic.[16] Purdue Pharma led off in the 1990s by heavily advertising OxyContin as non-addictive—a claim that clearly was untrue.[17] Other heavy-weights such as AbbVie, Johnson & Johnson, and Pfizer also conducted aggressive advertising campaigns for their proprietary opioids. These campaigns, which were directed at physicians, resulted in $11 billion from opioid sales alone in 2010.[18] Even more troubling,

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[11] *Our Social Contract with Patients*, ALLERGAN (Sept. 6, 2016), https://www.allergan.com/news/ceo-blog/september-2016/our-social-contract-with-patients.
[12] *E.g.*, Toshiaki Iizuka & Ginger Zhe Jin, *The Effect Of Prescription Drug Advertising On Doctor Visits*, 14 J. ECON. & MGMT. STRATEGY 701 (2005).
[13] Richard L. Kravitz et al., *Influence Of Patients' Requests for Direct-To-Consumer Advertised Antidepressants: A Randomized Controlled Trial*, 293 J. AM. MED. ASS'N. 1995 (2005).
[14] Elizabeth Rosen, *Ask Your Doctor if This Ad is Right for You*, N.Y. TIMES (Feb. 17, 2016), http://nyti.ms/1QOoCJc.
[15] *Here's Why You Can Skip the New Insomnia Drug, Belsomra It's Expensive, Barely Helps, and Poses Safety Concerns*, CONSUMER REPORTS, (July 12, 2015, 6:00 AM), https://www.consumerreports.org/cro/news/2015/07/skip-new-insomnia-drug-belsomra/index.htm#.
[16] *The Role of Pharmaceutical Companies in the Opioid Epidemic*, ADDICTIONS.COM, https://www.addictions.com/opioid/the-role-of-pharmaceutical-companies-in-the-opioid-epidemic/ (last visited July 30, 2018).
[17] Celine Gounder, *Who is Responsible for the Pain Pill Epidemic?*, NEW YORKER, (Nov. 8, 2013), https://www.newyorker.com/business/currency/who-is-responsible-for-the-pain-pill-epidemic.
[18] *Id.*

some of the country's largest drug companies have been sued by the U.S. Drug Enforcement Administration for participating in blatantly suspicious internet schemes for the distribution of opioids.[19]

This article could be about patents, the regulation of advertising, or the enforcement of drug laws—but it is not. Instead, the article first establishes that the problems described above are the perfectly predictable consequence of corporate law functioning as usual, in a context in which consumers have little to no choice. This lack of choice in the cases of drug addiction and overpricing life-saving drugs is so obvious that it would be comic if not so sad. Even in the case of insomniacs and toe-nail fungus sufferers, however, there is cause for concern about lack of informed decision making. To help solve this problem, the article proposes possible corporate law solutions to combat overpricing, overmarketing, and the marketing of addiction, and assesses these solutions from the theoretical perspectives of a number of schools of legal thought.

I. BACKGROUND

A. An Obvious Villain

Martin Shkreli's pricing shenanigans and insider trading conviction[20] probably make a poor impression on many readers. Would it be reasonable to generalize from that impression, perhaps concluding that the problems described in the Introduction are simply manifestations of borderline personality disorders on the part of Big Pharma's managers? The answer to the question is "Probably something else is going on," but the question itself is a trick one. This is because many legal analysts would not regard most of the described conduct as posing "problems" from the perspective of corporate law.

Oceans of ink have washed ashore on the subject of corporate purpose, sometimes alternatively cast as the question of whose interests corporate directors primarily should serve. One of the most influential schools of corporate law has established to its own satisfaction that the answer is clear: the shareholders. The method of reasoning is as follows.

The law and economics school of legal analysis describes the corporation as a "nexus of contracts" among capital providers, managers, employees, and others, all of whom conduct themselves in a manner that is rationally

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[19] Scott Higham & Lenny Bernstein, *The Drug Industry's Triumph Over the DEA*, WASH. POST (Oct. 10, 2017), https://www.washingtonpost.com/graphics/2017/investigations/dea-drug-industry-congress/?noredirect=on&utm_term=.a3963e916f89.

[20] *See* Stephanie Clifford, *Martin Shkreli Sentenced to 7 Years in Prison for Fraud*, N.Y. TIMES (Mar. 9, 2018), https://www.nytimes.com/2018/03/09/business/martin-shkreli-sentenced.html.

self-interested.[21] Adherents to this school, sometimes also known as "contractarians," characterize the "best" or "most efficient" corporate law as providing the "best" or "most efficient" set of default contract rules, thus minimizing transaction costs.[22] These are the rules that contractarians have determined the parties would negotiate for themselves most frequently (but which still may be negotiated around).[23]

The rules generally endorsed by contractarians reflect the assumption that managers act as fiduciaries for the shareholders.[24] Limiting the duties of the board of directors to serving shareholder interests is thought to be the single best method of limiting managerial opportunism and shirking, owing to the relative efficiency of monitoring by a single class of beneficiaries.[25] The board therefore is regarded as responsible for maximizing the residual value of the firm remaining after non-shareholder claimants are satisfied.[26] This easily translates to the dual assertions that the goal of the corporation is to make money for its shareholders and that the interests of shareholders are to be preferred over those of others with interests in the firm.[27] The resulting template for corporate law thus is known as the "shareholder primacy" model.

Contractarians necessarily acknowledge the existence of externalities and other market imperfections that they believe should be regulated, if at all, by laws preserving the efficiency of the corporate form—in other words, external laws telling corporations what they must do.[28] In this view, if

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[21] Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 310–11 (1976); *see also* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 12 (1991); Henry W. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99, 99–100 (1989).
[22] *See* Jensen & Meckling, *supra* note 21, at 306–08, 310–11 (1976) (discussing the corporation as a nexus of principal-agent contracts and noting that "[s]ince the specification of rights is generally effected through contracting . . . individual behavior in organizations, including the behavior of managers, will depend upon the nature of these contracts."); *see also* Easterbrook & Fischel, s*upra* note 21, at 16–17 (discussing the variety of contracts that come together in a corporation); Henry N. Butler & Larry E. Ribstein, *The Contract Clause and the Corporation*, 55 BROOK. L. REV. 767, 770 (1989) (characterizing the corporation as a nexus of contracts).
[23] *See* Easterbrook & Fischel, *supra* note 21, at 34; Jensen & Meckling, *supra* note 21, at 311.
[24] *See* Easterbrook & Fischel, *supra* note 21, at 90–91.
[25] *See id.* at 35–38.
[26] *See id.* at 36.
[27] *See id.* at 90–93.
[28] Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAN L. REV 1259, 1271 (1982).

consumer irrationality is a problem, it should be addressed by regulation of advertising content or the like. If inability of consumers to afford their medication is an issue, government subsidies or better insurance might help. If illegal trafficking in opiates is a vexation, legalization might be the answer. In any event, the duty of the board of directors in these regards is simply to monitor corporate compliance with applicable law as it strives for maximal profit.

B. The Internal/External Distinction

The traditional distinction between internal corporate law and law external to the corporation is by no means mysterious to those inclined to accept it. The "internal affairs" doctrine is an excellent starting place and, indeed, the most consequential aspect of the distinction. It is a well-established tenet of conflicts law that the laws of a corporation's state of incorporation govern its "internal affairs."[29] These are the laws that govern the relationships between the corporation and its shareholders, officers, and directors.[30] They do not encompass the laws addressing the relationships between the corporation and its non-officer agents, including its non-officer employees, presumably because these relationships are thought to be no different than those of individuals and their employees or other agents. In a sense, then, the notion of "internal" corporate law reflects the image of the corporation as a fictional human being and is limited to addressing the matters necessary to animate it. Less colorfully, contractarians find value in permitting states to signal the "package" of governance bargains they offer, something that would not be possible without the "internal affairs" doctrine and thus some notion of what "internal affairs" are.[31]

In any event, the internal/external line does have contemporary descriptive power in resolving the question of who has the ability to enforce various legal duties. If it is the shareholders vis-à-vis the corporation, its officers, or

[29] *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 302 (AM. LAW INST. 1971).

[30] It is thought by some that the "internal affairs" doctrine also encompasses the doctrine of limited liability as a question of the "relationship of shareholders to their corporation." ROBERT W. HAMILTON, CORPORATIONS INCLUDING PARTNERSHIPS AND LIMITED LIABILITY COMPANIES 334 (7th ed. 2001).

[31] *See* Daniel R. Fischel, *The "Race to the Bottom" Revisited: Reflections on Recent Developments in Delaware's Corporation Law*, 76 NW. U.L. REV. 913, 913–14 (1982) (arguing against a federal corporate law scheme to replace the various state schemes); Marcel Kahan & Ehud Kamar, *The Myth of State Competition in Corporate Law*, 55 STAN. L. REV. 679, 682 (2002) (stating that "[w]ith market capitalization of public corporations in the United States in the range of $16 trillion, the dynamics that shape the laws states offer to govern the internal affairs of companies are of substantial importance").

its directors, it is corporate law. If it is the corporation vis-à-vis its officers or directors, it is corporate law. If it is creditors, employees, or consumers vis-à-vis the corporation it is something else, although still a matter of private law. If it is the state against any of the above, it is public law, and something else yet again.[32]

To some, however, the distinction between corporate law and other bodies of law is a perplexing one.[33] In fact, developments in corporate law are at evident cross-purposes with developments in other private law areas such as tort and contract law. This is illustrated by the enhancement of investor insulation from liability even as entity liability for some types of tortious conduct has increased.[34] These results are inherently at odds with each other. Although there may be good reasons to permit these distinctions, those reasons have not been addressed by public policymakers. Thus, the coherence of the resulting package of corporate and other laws—if it ever is perceived accurately as a single package—is suspect.

Moreover, the possibility of disconnects and conflicts between corporate/entity law and various "public" law subjects should be just as troubling. It is somewhat ironic in this day and age to reflect on the origins and original close tailoring of corporate charters to achieve very public goals.[35] It may be the case that the public/private distinction has been exacerbated by the attitudes of the law and economics school toward preserving the primacy of private bargaining.[36] In any event, environmental and labor law provide ready examples of attempts to regulate primarily, if not exclusively, corporate conduct for public purposes with no apparent recognition by policymakers that changes in entity law might also be pressed into service. Academic debate, however, has led to complementary proposals by corporate progressives (further discussed below)[37] to enhance the interests of workers by securing board representation for them, and by creating a fiduciary duty owed

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[32] *See* Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 591 (2002). Note, however, that the usual ability of a state to bring *quo warranto* proceedings has the theoretical effect of blurring these distinctions. *See id*. at 591–601 (describing corporate law as public law).
[33] Theresa Gabaldon, *Experiencing Limited Liability: On Insularity and Inbreeding in Corporate Law, in* PROGRESSIVE CORPORATE LAW 111, 111–12 (Lawrence E. Mitchell ed., 1995).
[34] *See id*. at 112–15.
[35] *See generally* EDWIN MERRICK DODD, AMERICAN BUSINESS CORPORATIONS UNTIL 1860 WITH SPECIAL REFERENCE TO MASSACHUSETTS 20 (1954) (reviewing early American corporate law); Oscar Handlin & Mary F. Handlin, *Origins of the American Business Corporation*, 5 J. ECON. HIST. 1, 2 (1945).
[36] *See, e.g.*, Fischel, *supra* note 28, at 1273–74.
[37] *See infra* at notes 161–67.

by the board of directors to workers,[38] as well as by explicit changes in labor law.[39]

II. SHAREHOLDER PRIMACY AND THE EXPLOITATION OF PHARMACEUTICAL CONSUMERS

A. An Argument

From the perspective of shareholder primacy it is, of course, clear that there is no such thing as overpricing unless it reduces consumer demand. It is equally clear that there is no such thing as overmarketing unless the dollars spent are not cost effective. Contractarians concede that fraud and non-disclosure can create market imperfections that are inefficient and may require correction, but they do not regard that correction as being one of the goals of corporate law.[40] They do not appear to have specifically considered the deliberate addiction of consumers as a form of market failure requiring correction by forces external to corporate law—although some economists have argued that there is no market failure that generally justifies banning addictive drugs[41] and many have discussed the "rational addiction" model of tobacco consumption.[42] Nonetheless, analogizing the deliberate addiction of customers to the deliberate misleading discussed by contractarians does not seem all that far-fetched.

If one actually were to accept the contractarian goal of shareholder primacy as a given, but nonetheless were concerned about consumer exploitation, a moment or two of thought might be given to the question of whether shareholder primacy indeed demands such exploitation, provided only that it is legal. The first step is to acknowledge that most jurisdictions do have statutes authorizing corporate philanthropy or statutes that provide that the board of directors may take interests of non-shareholders into account—often both. Statutes aside, the well-known common law business judgment rule limits judicial second-guessing of directorial decision-making, leaving at least a modicum of unreviewable room for considering non-shareholder interests. Exploitation of consumers, then, is in no way legally compelled. If it exists, it is for some other reason.

Indeed, there seems to be an impressive array of extralegal forces prompting corporate boards to observe the shareholder primacy norm. These

[38] Greenfield, *supra* note 32, at 643.
[39] *Id*. at 638.
[40] Fischel, *supra* note 28, at 1271.
[41] Walter Block, *Drug Prohibition: A Legal and Economic Analaysis*, 12 J. BUS. ETHICS 689, 689 (1993).
[42] *See*, *e.g.*, Gary S. Becker and Kevin Murphy, *A Theory of Rational Addiction*, 964 J. POL. ECON. 675 (1988).

include perceived susceptibility to hostile takeover, fear of relative disadvantage in raising capital, and psychological acculturation. It is psychological acculturation that this article ultimately seeks to address, arguing that it is important to adopt reforms that would seek to mitigate the pro-profit decision-making of pharmaceutical managers.

The contractarian argument against reform and thus in favor of continued psychological acculturation toward shareholder primacy manifest through profit maximization is, of course, one of normative desirability. If social utility generally is maximized when corporate profits are maximized, directors should act accordingly (and be acculturated to so act) even where not subject to legal compulsion. This means, as a policy matter, that the last possible penny of profit indeed should be extracted from the dying and consumer preferences indeed should be handily manipulated if that will contribute to the corporate bottom line. Only if public recognition of these practices were both likely and apt to lead to enough public outcry to result in boycotts, legal prohibition, or something of the sort, should manipulation be limited. This is a point that we probably are reaching in the pharmaceutical context; we thus might expect the self-moderation exhibited in 2016 to last at least as long as the spotlights still shine. Put differently, although one trotter may have been daintily withdrawn from the hog trough, we should not be at all surprised to see it plunged back in to join the other three as soon as public attention is diverted elsewhere.

Without doing the heavy lifting to establish that consumer manipulation and price gouging might be immoral, it nevertheless is worth a moment to think about just why the contractarian goal of shareholder primacy logically seems to compel acts that are, to others, morally questionable. In essence, it is a matter of definition: if an act is legal and profitable, its corporate pursuit is morally correct and, as law and economics assumes, results in a more profitable society.[43] In this view, other moral determinations should be left to external regulation, and be no part of the corporate calculus. Thus, if child pornography or assassinations for hire were the most profitable possible lines of business, and not illegal, it would be best for the board of directors to feel that their duty compels entry into those lines of business.[44] This should mean,

[43] This should not be read as suggesting that the proponents of law and economics any longer make claims that wealth maximization is a moral principle or that, without constraint, it is not normatively objectionable. *See* James Ryerson, *The Outrageous Pragmatism of Judge Richard Posner*, LINGUA FRANCA (May 2000), http://linguafranca.mirror.theinfo.org/0005/posner.html (discussing renunciation).
[44] This argument, if made, soon would founder on the shoals of practicality. First, there obviously is no way to determine what the single most profitable business is, and, second, if all corporations entered it, it would no longer be the most profitable. Human judgments must be made as to what lines of business, among a great

however, that the normative desirability of a strictly profit-centered approach to corporate decision-making depends on a critical assumption about the effectiveness of external regulations in reflecting shared moral judgments (such as those about child pornography and murder). Once it is conceded that the assumption is false, the claim of normative desirability is impaired.[45]

To illustrate this argument further, assume that a corporation manufactures men's clothing. It determines that it can sell more clothing, and be much more profitable, if the fabric weave incorporates subliminal computer-generated images, exposure to which arouses interest in sex acts with children. Assume that such imagery is not presently illegal as deceptive advertising or otherwise[46] and that the corporation does not expect any sort of meaningful consumer backlash, primarily because it believes discovery is unlikely. It foresees that illegalization eventually will occur, but believes the practice could be quickly abandoned at little out-of-pocket cost. Should it really be the perceived duty of the board of directors to order use of the weave?

This hypothetical is meant to confirm, of course, what most already recognize: legality and shared morality cannot be conflated so long as lawmakers lack omnipotence. Surely there are areas where the two differ, if for no reason other than timing, lack of discernment, or regulatory capture. Manipulation of consumer preference through over-advertising and addiction,

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variety, generally will produce profits. These judgments provide ample opportunity for the incorporation of moral taste. It may be that some lines will repel both some managers and some investors but it is somewhat unlikely that the choice not to pursue those lines will be articulated in very many cases. The same may not be true, however, once a general line of business has been selected, and the question becomes how best to achieve profitability within that line. It would seem that here choices may be more limited and thus somewhat clearer. Suppose, for instance, that the managers of a particular company learn that an inexpensive, reliable machine can replace half its work-force. Due to the economy, it is unlikely that displaced workers will find new jobs anytime soon. Is it nonetheless the duty of the directors to substitute the machine? A clear question will elicit a clear answer from some quarters. If the duty of the directors simply is profit maximization, it's out with the workers and in with the machine. The normative desirability of the economic solution might once have meant that there was no moral issue, as far as hardest-core practitioners of law and economics were concerned. Of course, the relative clarity of that response suggested to others a different conclusion.

[45] In fact, it might even be argued that the economic approach is tolerable only to the extent that external regulation succeeds in reflecting the dictates of common morality.

[46] Arguably, the standards currently in existence are broad enough to prohibit subliminal advertising of at least some products. 15 U.S.C. §§ 52(a)(1) and (2) provide "It shall be unlawful for any . . . corporation to disseminate . . . any false advertisement . . . for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices, services, or cosmetics . . . ."

as well as price gouging on life-saving drugs, may well present such cases. Concern with regulatory capture should be particularly pointed, given that "one metric that can point toward relative influence is, simply, money. And in that context, pharmaceuticals have few peers."[47] In the year before that statement was made, "pharmaceuticals raked an easy first among industries in lobbyist spending in 2012, at $234 million."[48]

B. Your Money or Your Life

A "market failure" is an inefficient allocation of resources insofar as some other allocation would make at least one actor better off and no-one worse off. As noted above, economists concede that government action may be justified where such a failure exists.[49] Is it possible to discuss the over-pricing of life-saving or life-extending drugs in those terms? While the calculus of ransoming lives seems difficult, it becomes much less so as soon as we acknowledge the relative monopoly power of drug companies over branded products. In an effort to encourage the development of new drugs, manufacturers are granted exclusive marketing rights protected by both the FDA and federal patent law.[50] This means that we *know* that the market is not setting the price of drugs, just as we *know* that foregoing consumption is not the realistic possibility it is in the case of other products of monopoly. There has been much comment on the tendency of Big Pharma to prolong legal monopolies by concealing information from would be competitors and product hopping (patenting new, only slightly if at all, improved drugs just before expiration of an older patent).[51] This is conduct that presumably is justified in the name of shareholder primacy and left to be regulated as a matter of externality. As intimated above[52] and expanded upon below,[53] where market regulators do not or cannot address market failure, it may be necessary to press corporate law solutions into service.

C. Manipulation of Preference: Over-advertising to Consumers and Doctors

The points made in this section relate to the decisions made by consumers and doctors; some do double-duty with respect to the decisions made by

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47 Gregg Fields, *Parallel Problems: Applying Institutional Corruption Analysis of Congress to Big Pharma*, 41 J.L. MED. & ETHICS 556, 559 (2013).
48 *Id.*
49 *See supra* note 40.
50 *See generally*, *e.g.*, Mark S. Levy, *Big Pharma Monopoly: Why Consumers Keep Landing on "Park Place" and How the Game is Rigged*, 66 AM. U. L. REV. 247 (2016) (describing legal protections extended to pharmaceutical companies).
51 *Id.*
52 *See supra* note 45.
53 *See infra* notes 117 and 157.

corporate managers and will be further discussed below.[54] At this point, however, the arguments advanced seek to demonstrate that consumer choice is not a plausible method of establishing market efficiency, especially in matters of life and death.

1. Over-advertising to Consumers

Professor Gregory Mitchell[55] has introduced the term "legal decision theorists" to describe the scholars who advocate the behavioral analysis of law. These theorists have sought to apply the insights of social psychology and related fields toward the goal of developing a realistic account of how decisions are made in contexts relevant to law and law-making.[56] In evaluating the operation of financial markets and profit-making entities, they frequently have decried assumptions about the rationality of the relevant actors.[57] They have criticized the ability of many such actors to act in accordance with procedural norms of rationality (such as consistency and assimilation of new information), focusing on the predictable cognitive heuristics that permit humans to make decisions and identify their own preferences in light of limits on time, information, and cognitive ability.[58] Legal decision theorists thus have concluded that "human decision-making processes are prone to nonrational, yet systematic, tendencies," resulting in "bounds" on rationality and free will.[59]

Although decision-making may be systematically nonrational, it seems clear that lack of rationality does not occur uniformly across all populations and in all situations. There may be educational, cultural, and many other

[54] *See infra* notes 77.
[55] Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence,* 91 GEO. L.J. 67, 78–79 (2002).
[56] *See id.* at 69 n.2 (extensively cataloging scholarship in the behavioral analysis of law).
[57] Jon D. Hanson & Douglas A. Kysar, *Taking Behavioralism Seriously: The Problem of Market Manipulation*, 74 N.Y.U. L. REV. 630, 634-35 (1999) ("Ultimately, any legal concept that relies in some sense on a notion of reasonableness or that is premised on the existence of a reasonable or rational decisionmaker will need to be reassessed in light of the mounting evidence that a human is a reasoning rather than reasonable animal." (internal quotation marks omitted)).
[58] *See* Mitchell, *supra* note 55, at 69 ("[A] fundamental assumption of the new behavioral law and economics movement is that individuals systematically fall prey to a host of 'cognitive illusions' that lead to predictable nonrational behaviors both inside and outside traditional markets. Thus, whereas law and economics treats all legal actors in all situations as if they were perfectly rational, behavioral law and economics treats all legal actors in all situations as if they were equally predisposed to commit errors of judgment and choice." (footnote omitted)).
[59] Hanson & Kysar, *supra* note 57, at 633.

types of variance; there is, for instance, documented variance dependent on the decision-maker's accountability.[60] This recognition may be reassuring insofar as it does permit the possibility that responsible social planners could act rationally—or, at any rate, better than the rest of us. The prospect of intersubject variation does not, however, undercut the insight that, in some situations, many individuals make nonrational decisions in predictable ways. One of these has to do with the tendency to eschew strictly self-interested courses of action, engaging instead in some amount of altruistic decision-making (leading to identification of bounds on self-interest as a type of bounded rationality). A second has to do with willingness to respond to role assignment by engaging in conduct that is expected rather than responsive to individual taste. In this regard, studies described below have assessed and demonstrated participants' willingness to administer electric shocks to other participants and to act as abusive prison guards when they perceive it is their "job" to do so in furtherance of science.[61]

Another phenomenon identified by legal decision theorists has to do with the tendency to respond to the framing of a decision in predictable ways. It has, for instance, been fairly well established that decision-making is affected by whether an outcome is described in terms of achieving a gain or of avoiding a loss (with decision-makers generally considering the latter to be more important).[62] Similarly, there is a clearly revealed bias in favor of remaining with the status quo.[63] This means, for instance, that if a retirement plan is designed as one into which employees must opt, there will be significantly less participation than if it is a plan in which participation is the default.

Legal decision theorists also have made the claim that many individuals do not test hypotheses in logical fashion, instead preferentially soliciting confirming evidence and failing to perceive disconfirming evidence.[64] Relatedly, they have identified a confirmation bias "in accordance with which exposure to a competing position will not dislodge and may even strengthen the antecedently held position."[65] It is fairly easy to see how pharmaceutical advertisers could shape the so-called decisions of consumers by appeal to

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[60] Mitchell, *supra* note 55, at 110 (calling this the "situational variable with perhaps the most far-reaching effects on judgment and decisionmaking behavior, yet a variable often neglected in experimental studies and in legal decision theorists' analyses of legal decisionmaking").
[61] *See infra* notes 77–78.
[62] Russell Korobkin, *Libertarian Welfarism*, 97 CAL. L. REV. 1651, 1659 (2009).
[63] *Id.*
[64] Hanson & Kysar, *supra* note 57, at 650.
[65] Cass Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 155 (2000).

this particular heuristic.

There are many other examples of heuristics that are almost certainly exploited by advertisers. Professors Hanson and Kysar have done a particularly thorough job of describing them as part of their call for changes in prevailing schemes for product liability. [66] Interestingly, other researchers examining heuristic reaction to product presentations have documented the relative resistance of senior citizens to manipulation, as compared to populations of younger adults.[67]

Legal decision theory sometimes is viewed as the product of a group of scholars self-identifying as practitioners of "law and behavioral economics."[68] This group has both noted the importance of the various phenomena identified above and written broadly on various corporate law subjects; the group's possible views on the subject of exploitation of pharmaceutical consumers is discussed in more detail in a subsequent part of this article.[69] There is, however, another recent school that is making significant contributions to legal decision theory.

"Critical realists" have helpfully identified shortcomings in law and behavioral economics, and have advanced the proposition that conversation about rationality, bounded or otherwise, underestimates the importance of situational influence on behavior.[70] This systematic failure to reckon with situation is said to be part and parcel of the promotion of "dispositionist discourse" in which (faulty) intuition and so-called common sense lead us to attribute behavior to individual "disposition," or choice, and to be blind to such realities as biologic response to manipulated products and environments. They do not neglect the possibility of manipulation of "frames" and other information: critical realists even note the possibility that scientific discourse may be captured by economic actors in such a way as to create appeals to worldviews that would otherwise lack support. By way of illustrating their contentions, critical realists have made a convincing case that it is situational manipulation, rather than bad personal choices, that has led to the obesity epidemic afflicting America's children and adults.[71]

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[66] Hanson & Kysar, *supra* note 57, at 650.
[67] Katya Tentori et al., *Wisdom and Aging: Irrational Preferences in College Students but not Older Adults*, 81 COGNITION B87, B87–88 (2001).
[68] Gregory Mitchell, *Taking Behavioralism Too Seriously? The Unwarranted Pessimism of the New Behavioral Analysis of Law*, 43 WM. & MARY L. REV. 1907, 1915 n. 12 (2002).
[69] *See infra*, notes 97–102.
[70] Jon D. Hanson & David G. Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 136 (2003).
[71] Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645, 1797 (2004).

Bringing this home to bear in the context of pharmaceutical marketing, it seems quite likely that the manipulations involved in direct marketing to consumers have led to dramatic increases in the number of prescriptions of medications for various mental and other conditions. According to one commentator:

> [Before direct marketing was permitted], pharmaceutical companies were generating some $50 million in revenue annually from [Attention Deficit Disorder ("ADD")] medications. Once these companies were permitted to market to unwitting patients through television, clever advertising campaigns were highly effective at helping individuals to self-diagnose their own mental health disorders and ask a doctor for a prescription to the miracle cure. Evidence of just how effective these advertising campaigns have become is found in the volume of psychiatric medication prescriptions that are written by primary care physicians—up to 90%, depending on the type of medication. In 2010, physicians wrote more than 51 million prescriptions for ADD medications, and pharmaceutical companies made a staggering $7.42 billion in revenue—an 83% increase over 2006 levels.[72]

According to the same commentator, there were no significant discoveries that would have aided in the diagnosis of ADD during the period in question.[73]

2. Over-advertising to Doctors

Although members of the medical profession clearly have more relevant education than their patients, and undergo instruction in their ethical responsibilities to those patients, there is strong reason to believe they fail to provide adequate protection against the manipulations of the pharmaceutical industry. As one example, in 2013 Pfizer was sanctioned by a $142 million verdict for marketing an epilepsy drug through misleading continuing medical education programs, and sponsoring favorable articles in medical journals while suppressing negative information.[74] Recognition of the possibility of the exercise of the pharmaceutical industry's unhealthy influence over medical professionals in fact led to passage of the Physician Payments

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[72] Lt. Michael E. Jones, *Saving Normal: An Insider's Revolt Against Out-of-Control Psychiatric Diagnosis, DSM-5, Big Pharma, and the Medicalization of Ordinary Life*, 2014 ARMY LAW 54, 56 (2014).
[73] *Id.*at 55.
[74] *See generally In re* Neurontin Mktg. & Sales Practices Litig., 712 F.3d 21 (1st Cir. 2013).

Sunshine Act ("PPSA") as part of the Patient Protection and Affordable Act.[75] The PPSA, however, has been criticized by its own proponents as having enforcement provisions that are too lenient; those proponents acknowledge that it "may have little effect on corporate greed."[76]

And then there are the cheerleaders. According to an article in the New York Times describing the use of cheerleaders as drug representatives, "[k]nown for their athleticism, postage-stamp skirts, and persuasive enthusiasm, cheerleaders have many qualities the drug industry looks for in its sales force." [77] Although it may seem that using uncredentialled but attractive young women to market drugs to primarily male doctors is "merely" a form of seduction, it also has been speculated that it is a way of making sure that doctors are not able to elicit negative information—what the cheerleaders don't know, they can't tell.[78]

More telling than the cheerleaders themselves is the fact that the information necessary to make informed decisions about which drug to prescribe for which patient may not even exist, much less be available to doctors in an understandable form. Manufacturer-sponsored studies on drug efficacy seldom test a drug against anything other than a placebo, so someone wishing to compare drugs will have to obtain multiple studies.[79] Moreover, the studies may have been conducted under different conditions, over different lengths of time, etc., and thus be not comparable at all.[80] The notion that anyone is making fully informed decisions in the context of drug prescriptions is more than a little questionable.

D. Marketing Addiction

Once upon a time, a corporation in search of profit manufactured cigarettes. Men in charge learned that the corporation's products were addictive, which was good for the corporation. The product was made even more

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[75] 42 U.S.C. §§ 1320a–7h (2011).

[76] Steven M. Sellers, *Big Pharma Feels the Heat*, TRIAL, Sept. 2013, at 26.

[77] Stephanie Saul, *Gimme an Rx! Cheerleaders Pep Up Drug Sales*, N.Y. TIMES (Nov. 28, 2005), http://www.nytimes.com/2005/11/28/business/gimme-an-rx-cheerleaders-pep-up-drug-sales.html?_r=0.

[78] Robert A. Bohrer, Professor, Cal. W. Sch. of Law, *Direct to Consumer Ads Are Misleading: Concise Statements of Effectiveness Should Be Required*, Presented to ASLME 2017 Health Law Professors Conference (June 2017) (unpublished manuscript) (on file with author).

[79] *See, e.g.*, Robert A. Bohrer, *The Need for Publicly Funded Trials to Get Unbiased Comparative Effectiveness Data*, HEALTH AFF. BLOG, (Feb. 20, 2015), http://healthaffairs.org/blog/2015/02/20/the-need-for-publicly-funded-trials-to-get-unbiased-comparative-effectiveness-data/.

[80] *See, e.g.*, *id.*

addictive by tinkering with the mix.[81] Unfortunately for the corporation, even addicted consumers had alternate sources of cigarettes,[82] so the company sought to build brand loyalty using a cartoon camel that was, for a time, as familiar to children as Mickey Mouse.[83] The men in charge could not have overlooked the fact that the camel—let's call him Joe—drew the attention of those who one day became addicted juvenile smokers, "branded" by reason of their attraction to Joe, for what these men in charge hoped would be their entire lives.[84] Marketing cigarettes to children ultimately did attract sufficiently adverse attention to result in Joe Camel's forced retirement—too late for a generation of smokers.[85]

Before the 1990s, opioids predominantly were prescribed for acute post-injury or surgical pain or in end-of-life situations. Beginning in that decade, pharmaceutical advertising sought to persuade physicians that opioids should be considered for long-term neck and back pain, arthritis sufferers, and the like.[86] Trade contributions also founded non-profit associations promoting opioid use to improve the quality of life of those in pain. The industry subsequently has reaped exactly what it sowed—money. This money is great for shareholders but a disaster for the addicts who pay for, and overdose on, opioids.

III. THE MEMBERS OF THE BOARD: CAN MARTIN COME OUT TO PLAY?

A. The Tone at the Top

It is not a tremendous leap to think that the board of directors of a pharmaceutical manufacturer could, if so inclined, have an effect on pricing and marketing decisions. Let us consider, for a moment, the composition of the board. Perusal of the "About the Board" or equivalent page on pharmaceutical company websites reveals the Merck board to be entirely typical: of the

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[81] *See generally* Transcript of Record at 2200–369, State v. Philip Morris, Inc., No. C1-94-8565, 1998 WL 35263871 (Minn. Dist. Ct. Feb. 4, 1998).

[82] *See* J. Howard Beales, III, *Advertising to Kids and the FTC: A Regulatory Retrospective that Advises the Present*, 12 GEO. MASON L. REV. 873, 891–92 (2004) (describing competition).

[83] Paul Fischer et al., *Brand Logo Recognition by Children Aged 3 to 6 Years: Mickey Mouse and Old Joe the Camel,* 266 J. AM. MED. ASS'N 3145, 3147 (1991).

[84] *See*, *e.g.*, Mona L. Hymel, *Consumerism, Advertising, and the Role of Tax Policy*, 20 VA. TAX REV. 347, 418 (2000); Michael A. McCann, *Economic Efficiency and Consumer Choice Theory in Nutritional Labeling*, 2004 WIS. L. REV. 1161, 1182 (2004) (discussing the "branding" phenomenon generally).

[85] "Old Joe" was retired as part of the settlement in Mangini v. R.J. Reynolds Tobacco Co., 875 P.2d 73 (Cal. 1994).

[86] *See generally* Patrick Radden Keefe, *Empire of Pain*, NEW YORKER, Oct. 30, 2017, at 34, 34–49 (detailing Sackler family's involvement in the marketing of OxyContin).

thirteen members, two are males of color (not counting spray-tans) and three are women.[87] All appear to be above the age of 40. All, of course, have an impressive past and continuing accomplishments, most in scientific enterprise and others in investment. Most have existing directorships at other companies. They are persons to be reckoned with and do not appear to be people who should fear homelessness even if they were to stand up for unpopular ideals.

B. Quite Shocking

As noted above, there are studies demonstrating willingness to administer increasingly painful electric shocks as part of a "teaching" experiment.[88] Over time, the willingness to follow the directions of the experimenter, notwithstanding cries of pain from the putative subjects, appears constant at 61-66 percent.[89] Somewhat similarly, in the famous "Stanford prison experiment," randomly assigned "prison guards" rapidly became abusive, while the randomly assigned "prisoners" just as quickly became dysfunctionally depressed.[90] It may be a bit of a stretch, but not entirely far-fetched, to find an analogy here for corporate law. If the majority of individuals are willing to cause pain either in accordance with the ideal of scientific service or in accordance with the perceived demands of a role they have voluntarily assumed, might they not be just as willing to inflict economic—and ultimately real—pain in accordance with the perceived demands of the role of corporate director? And what if it were precisely the individuals who were most willing to repeatedly and consistently administer the "shocks" to non-shareholders, prompted by their roles as members of the board of directors, who were most willing to assume—and continue—in those positions?

C. The Role of Accountability

One would generally anticipate that accountability would tend to improve the quality of decision-making, insofar as the decision-maker might

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[87] *Board of Directors*, MERCK, https://www.merck.com/about/leadership/board-of-directors/home.html (last visited July 25, 2018).
[88] *See* Andrew M. Perlman, *Unethical Obedience by Subordinate Attorneys: Lessons from Social Psychology*, 36 HOFSTRA L. REV. 451, 456–59 (2007) (describing Stanley Milgram's teacher-learner electric shock experiment).
[89] *See* Jerry M. Burger, *Replicating Milgram: Would People Still Obey Today?*, 64 AM. PSYCHOLOGIST 1, 8 (2009) (recreating Milgram's experiment and finding that seventy percent of participants continued to apply a higher "voltage" and "had to be stopped by the experimenter"); Perlman, *supra* note 88, at 458 (noting that sixty-five percent of Milgram's subjects, when directed to do so, continued to administer an "electric shock" for the duration of the experiment).
[90] *See* Craig Haney, Curtis Banks & Philip Zimbardo, *Interpersonal Dynamics in a Simulated Prison*, 1 INT'L J. CRIMINOLOGY & PENOLOGY 69, 69–73, 80–81 (1973).

be expected to take more care, engage in less shirking, and eschew self-interest more thoroughly than otherwise would be the case.[91] Accountability researchers have suggested, however, that "self-critical and effortful thinking" is most likely where decision-makers feel they will be accountable to an audience with an interest in process rather than specific outcomes.[92] Where the views of the audience on outcomes are known, it may well be the case that decision-making processes will be truncated and existing biases will be amplified.[93]

This is not particularly good news in the case of corporate directors. It seems fairly obvious that, by reason of the business judgment rule[94] as well as statutes and provisions in articles of incorporation that hold directors financially harmless, there is limited legal accountability for the outcome of directorial actions—or, within reason, for the shoddiness of the procedures through which those actions are taken.[95] Instead, directors are accountable to markets, with their accountability outcome "scores" flashing on the scoreboards of financial statements and stock price. It is no surprise that they consistently conduct themselves so as to see those scores increase.

D. Do No Harm

Social scientists aptly caution legal scholars against employing tools they have not been trained to use. No doubt the neophyte's invocation of

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[91] *See* Mitchell, *supra* note 55, at 110–14 (noting that "predecisional accountability to a legitimate audience with unknown views may well cause decisionmakers to engage in self-critical thinking that often, though not always, leads to more rational behavior").

[92] Jennifer S. Lerner & Philip E. Tetlock, *Accounting for the Effects of Accountability*, 125 PSYCHOL. BULL. 255, 259 (1999).

[93] *See id.* at 256 (observing that when a decisionmaker knows his or her audience's views before making a decision, "[p]eople can simply adopt positions likely to gain the favor of those to whom they are accountable, thereby allowing them to avoid the unnecessary cognitive work of analyzing the pros and cons of alternative courses of action, interpreting complex patterns of information, and making difficult trade-offs").

[94] For an explanation of the modern business judgment rule, *see* Elizabeth S. Miller & Thomas E. Rutledge, *The Duty of Finest Loyalty and Reasonable Decisions: The Business Judgment Rule In Unincorporated Business Organizations?*, 30 DEL. J. CORP. L. 343, 345–50 (2005).

[95] *See* Lawrence A. Hamermesh, *Why I Do Not Teach Van Gorkum*, 34 GA. L. REV. 477, 479, 489–91 (2000) (discussing the advent of the modern "Raincoat" provision, shielding the Corporate Director of financial liability for a breach of the duty of care); *see, e.g.*, DEL. CODE ANN. tit. 8, § 102(b)(7) (2011) (allowing these provisions in the articles of incorporation of Delaware corporations). *See generally* James J. Hanks, Jr., *Evaluating Recent State Legislation on Director and Officer Liability Limitation and Indemnification*, 43 BUS. LAW. 1207 (1988) (exhaustively detailing the director and officer liability limiting statutes of a number of states).

studies about role identification, framing or the like will sometimes lead to overstatement, as well as oversight. It has been suggested that many legal decision theorists have not carefully distinguished experimental and survey empiricism and have failed to reckon with the latter.[96] Survey empiricism has demonstrated, for instance, that in at least the field of consumer lending, the model of law and behavioral economics has no more predictive power than a stricter law and economics model premised on classic rationality.[97] At the same time, social scientists appear to believe that it is high time for their insights to be taken seriously, and have acknowledged that at least some suggestions based on legal decision theory "risk no harm."[98]

This article takes the position that it does no harm to acknowledge the reality that Big Pharma companies at least sometimes attempt to manipulate consumer preferences and at least sometimes price crucial drugs at unnecessarily high prices. It does no harm to acknowledge that corporate decision-makers generally are encouraged to believe it is their duty to engage in such actions. It is the task of the remainder of the paper to establish that it would do no harm—and in fact would be beneficial—to dissuade those decision-makers from holding that belief.

IV. POSSIBLE SOLUTIONS

In the past, authors expressing concern for the plight of consumers have made a number of suggestions. These include regulation of advertising, criminalizing exploitation, giving shareholders a voice on exploitation, and making directors directly accountable to consumers.[99] Suggestions falling in

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[96] *See* Mitchell, *supra* note 68, at 1945–46 (criticizing empirical studies of behavioral decision theory for "neglect[ing]" or "downplay[ing]" subjects' rational responses and for promoting a "mythology of decision making as rampantly and fundamentally flawed [which] has developed through the repeated use of standard research paradigms that are designed to show biased behavior and . . . use . . . statistical methodology that stacks the decks in favor of finding biased behavior without concern for the practical importance of the behavior outside of the laboratory").

[97] *See* Joshua D. Wright, *Behavioral Law and Economics, Paternalism, and Consumer Contracts: An Empirical Perspective*, 2 N.Y.U. J.L. & LIBERTY 470, 474–75, 509–10 (2007) (concluding, after a study of consumer contracts, that "behavioral economic analysis . . . has not provided greater predictive power than its neoclassical counterpart" but acknowledging the study's limits).

[98] *See* Mitchell, *supra* note 55, at 132–35 (noting that "the legal decision theorists' emphasis on cognitive failings and their call for reforms to counter or protect against irrational behavior may still immediately serve a constructive role in the law").

[99] *See* Theresa A. Gabaldon, *Joe Camel Explains It to the Board: Corporate Law, Women in the Workforce, and the Exploitation of Children*, 13 DUKE J. GENDER L. & POL'Y 203, 230–31 (2006) (advocating for shareholder votes on matters of arguable exploitation); Samuel H. Johnson, *Who We Really Are: On the Need for the*

the last category—director accountability to consumers—have been forthcoming for decades and have taken a variety of forms, including imposing a new fiduciary duty and/or permitting consumers to vote in directorial elections.[100] These suggestions have been both extensively criticized and to no real avail.[101]

A. De-biasing Reform

The first proposal of this paper is more modest. Professor Gregory Mitchell has written of "de-biasing reforms" to be employed in behavior research.[102] His suggestions include "asking or directing experimental subjects to consider alternative or opposing arguments," and "asking experimental subjects to explain their choices."[103] This paper proposes that these reforms be employed in the case of corporate directors making decisions relevant to the exploitation of pharmaceutical consumers. It hardly seems draconian or even particularly burdensome to require directors to be specifically mindful of the subject of exploitation and to explain their choices in this regard.

Doubtless, objections could be raised. Discussed at length below are the speculated theoretical reactions of a number of schools of legal analysis. More practically, would-be critics might say, "Why just the exploitation of pharmaceutical consumers? Why not the environment? Why not global warming?"[104] They might also warn of the can of worms opened when trying

United States to Adopt the European Paradigm for Identity Fraud Protection, 15 CURRENTS: INT'L TRADE L.J. 123, 137 (2006) (arguing for protection of U.S. consumers by imposing criminal sanctions); Janis Sarra, *The Gender Implications of Corporate Governance Change*, 1 SEATTLE J. SOC. JUST. 457, 466, 470 (2002) (explaining differing rationales for holding directors liable to the community they operate in and the consumers they affect for socially irresponsible decisionmaking); *The Elephant in the Room: Evolution, Behavioralism, and Counteradvertising in the Coming War Against Obesity*, 116 HARV. L. REV. 1161, 1179–81 (2003) (advocating for advertising regulation to combat obesity).

[100] *See*, *e.g.*, David G. Yosifon, *The Consumer Interest in Corporate Law*, 43 U.C. DAVIS L. REV. 253, 295–311 (suggesting and defending both of these proposals).

[101] *See* Easterbrook & Fischel, *supra* note 21, at 38 (critiquing multifiduciary proposals in part on the basis that "a manager told to serve two masters (a little for the equity holders, a little for the community) has been freed of both and is answerable to neither"); Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197, 1213 (1984) (noting that consumers' "main protection . . . is generally the option to take their trade elsewhere").

[102] Mitchell, *supra* note 55, at 132.

[103] *Id.* at 133–34.

[104] Interestingly, the Securities and Exchange Commission mandates disclosure about how global warming is expected to affect the businesses of reporting companies. *See* Kathryn Douglass, *Add One to the Arsenal: Corporate Securities Laws in the Fight to Slow Global Warming*, 13 LEWIS & CLARK L. REV. 1119, 1125–33 (2009). This might be expected to prompt internal reflection about the extent to

to identify the appropriate level of detail at which the de-biasing reforms might be triggered.

These practical criticisms are apt, but there are practical responses. First, mindfulness with respect to a variety of social issues would not be a bad thing. Although there might be a point at which the task of considering all, or even a large number of, possible social issues might become daunting, continuing to allow directors to hide from them in a black box marked "business judgment" simply means there will be little progress on any such issue. Moreover, the point of overload is, at the moment, quite distant.

The second practical objection is well taken, but not fatal. A requirement that members of the board specifically consider the exploitation of pharmaceutical consumers does not dictate how deeply the board must inquire. Must they consider every product and read every ad? Consult decision-making and other behavioral experts? Almost certainly, the members of a corporate board accustomed to doing little more than monitoring management would need some help; some sort of up-the-line contemplation and reporting on the issue of prospective exploitation would be required. Reports from those in the bowels of the corporation who themselves deal with the experts consulting on product, pricing, and advertisement design presumably would be particularly helpful.

It may be the case that Big Pharma's lobbying expenditures[105] would derail a legislative attempt to implement even a change so modest as a "mindfulness" proposal; perhaps not, however, given current attention to the industry's perceived excesses. Another alternative might rely on shareholder proposals as a delivery mechanism. This is further discussed below.[106]

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which such companies are contributing to the problem and the possibility that they might be forced to change their practices. For those concerned with global warming, this is a step in the right direction. Of a piece with this approach are the requirements of the Sarbanes-Oxley Act of 2002 that publicly traded companies disclose whether they have financial experts on their audit committees and whether they have codes of ethics. 15 U.S.C. §§ 7264–7265 (2012). These disclosures presumably have required boards of directors at least briefly to grapple with the underlying issues and have not-so-surprisingly correlated with increases both in financial experts and ethics codes. Section 1502 of the Dodd-Frank Act of 2010 added §13(p) to the Securities Exchange Act of 1934 (15 U.S.C. 78m(16)), mandating disclosure foreseeably affecting the business directly or indirectly done in conflict minerals jurisdictions. This presumably would have had an effect on board deliberations, were it ever to go into full effect. *See* Michael S. Piwowar, *Statement of Acting Chairman Piwowar on the Court of Appeals Decision on the Conflict Minerals Rule*, U.S. SEC. AND EXCH. COMM'N (Apr. 7, 2017), https://www.sec.gov/news/public-statement/piwowar-statement-court-decision-conflict-minerals-rule.

[105] *See supra* note 48.

[106] *See infra* note 120–31.

B. Conscience Committees

As a matter of traditional conceptualization, the fictional being that is the corporation has a brain, and that brain is the board of directors.[107] When we become concerned with the virtue of the corporation—either its integrity or its fairness—we turn to the board. Thus, if we are concerned with the reliability of financial statements, we see proposals focusing on board audit committees.[108] If we are concerned with whether workers get a fair shake, we may generate proposals, as corporate progressives did years ago, to create a fiduciary duty owed to workers by the board or proposals to secure board representation for workers.[109]

Charging a committee of the board with overseeing the audit of a company's financials does not magically create a "real" conscience for the fictional entity. It establishes a process that we hope will produce the same results as an integrity-seeking conscience, and it allocates to specific individuals responsibility for seeing that the process is carried out.[110] Appointing a specialized committee creates a context in which individuals may act, as well as an occasion for them to do so; moreover, it signals a public commitment that may have an acculturating effect on actual behavior. Thus, although this type of reform cannot assure its desired results, it should increase the chances that the desired results will occur.

By analogy, one can imagine the creation of board corporate conscience committees charged with such goals as assuring the fair treatment of workers, good stewardship of the environment, fair pricing for consumers, and other goals. Insofar as creation of such committees would institutionalize the process, create context and occasion, locate responsibility with individuals, and signal public commitment, it would seem that at least some progress

[107] *See* Lawrence E. Mitchell & Theresa A. Gabaldon, *If I Only Had a Heart: Or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645, 1657 (2002).
[108] *See* Theresa A. Gabaldon, *The Story of Pinocchio: Now I'm a Real Boy*, 45 B.C. L. REV. 829, 830-31 (2004) (describing new statutes and regulations governing the role of the audit committee).
[109] *See, e.g.*, Alfred F. Conard, *Reflections on Public Interest Directors*, 75 MICH. L. REV. 941, 952 (1977); Lynne L. Dallas, *Two Models of Corporate Governance: Beyond Berle and Means*, 22 MICH. J. L. REFORM 19, 73–77 (1988); Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 158–59 (1988).
[110] Consistent with the notion of fiduciary responsibilities on the part of individual agents are requirements that particular officers certify the corporation's financial statements. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 302, 116 Stat. 745, 777-78 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.A.); Order Requiring the Filing of Sworn Statements Pursuant to Section 21(a)(1) of the Securities Exchange Act of 1934, Exchange Act Order 4-460 (June 27, 2002).

toward the specified goals would be forthcoming.

In fact, AbbVie[111] and Eli Lilly,[112] two of the five largest drug companies, have "Public Policy" committees (the others do not, although "corporate citizenship" or the like sometimes is buried in the fine print of the charge to some other committee).[113] Here is an excerpt from the Eli Lilly Public Policy Committee's charter:

> The committee shall have the following duties and responsibilities:
> 1. Review policies and practices of the company and monitor compliance in areas of legal and social responsibility and when appropriate report and make recommendations to the board with respect to such policies and practices including those involving . . . sales and marketing . . . the ethical, social, and political aspects of pricing decisions . . . .[114]

It is not clear when the committee was chartered or what it may have accomplished, but it does clearly represent the type of committee this paper envisions.

The conscience committee proposal, obviously, is inspired by the traditional "corporation as fictional human" imagery–an attempt to bring Pinocchio to life with the help of Jiminy Cricket. It might, with some effort, be made palatable to contractarians in either of two ways. First, contractarian analyses of corporate functioning typically, but not inevitably, concede that corporations should comply with law,[115] and that law external to corporate functioning properly may take account of public goals.[116] If a public goal of price fairness or fair advertising is articulated and it seems possible that corporations eventually will be penalized for failure to further that goal, then implementing a conscience committee proposal could be viewed as not too bothersome.

Second, contractarians frequently characterize the "best" corporate law

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[111] *Governance*, ABBVIE, http://investors.abbvie.com/phoenix.zhtml?c=251551&p=irol-govhighlights (last visited Aug. 4, 2018).
[112] *Who We Are: Governance*, ELI LILLY, https://www.lilly.com/who-we-are/governance (last visited Aug. 4, 2018).
[113] *See*, *e.g.*, *Governance Committee Charter*, MERCK, https://www.merck.com/about/leadership/board-of-directors/Charter%20-%20Governance%20Committee%20-%20Nov2016.pdf (last visited Aug. 4, 2018).
[114] *Public Policy and Compliance Committee Charter*, ELI LILLY, https://assets.ctfassets.net/hadumfdtzsru/6EBHPnhWtqs6MSQIk-suyyS/cf84fdf7626115c67381f0f67210e96a/PPCC_Charter_12-11-17.pdf (last visited Aug. 4. 2018).
[115] Fischel, *supra* note 28, at 1271.
[116] *Id*. at 1272.

as providing the "best" set of default rules—those that the parties would negotiate for themselves most frequently (but which still may be negotiated around).[117] Surely, at least some corporate constituents would bargain willingly for the interests of pharmaceutical consumers to be considered, particularly considering the likelihood that they or someone they know is affected by addiction or high pricing. Getting these matters on the table for discussion could be preferable to conducting yet another *ex ante* thought experiment.

On the other hand, even if a conscience committee's role is one of gathering information and exposing possibilities, there are still theoretical oxen to be gored if constituents resolutely are presumed to be basically self-interested.[118] In this view, if one constituency is sure that its current position will not be improved by such considerations, at a minimum it must be assured that there is some grey area to be claimed—territory in which that constituency cannot be hurt but others can be helped (in other words, that a market failure exists to be addressed). Investors must believe that consumers' lives (including their own) can be improved without so impairing profitability as to offset the gain. This could be a bit of a tough sell, given the relationship, alluded to above, between extreme drug pricing and soaring stock price.[119]

C. Shareholder Proposals

Shareholder proposals might play a role in effecting the mindfulness and conscience committee remedies advanced above. That is, if the shareholders asked for implementation of either remedy, perhaps management would comply. In addition, shareholder proposals more generally could affect corporate acculturation. Until March 2017, shareholder proposals in fact were beginning to show promise as such a tool.

The allocation of managerial authority to directors, rather than shareholders, is a basic tenet of corporate law.[120] Thus, the shareholders of public corporations do not have the power to mandate or preclude corporate engagement in specific activities, exploitive or otherwise.[121] They do, however, have the power to adopt "advisory" resolutions informing management of their wishes. These resolutions arguably could—and obviously are intended

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[117] *See supra* note 23 and accompanying text.

[118] As indicated earlier, self-interest of the participants in business enterprise is a basic assumption of the contractarian approach. *See* sources cited *supra* note 21 and accompanying text.

[119] *See supra* at notes 2–7.

[120] *See*, *e.g.*, Gashwiler v. Willis, 33 Cal. 11 (Sup. Ct. Ca. 1867). There has, of course, been relaxation of this rule in the context of closely held corporations. *See*, *e.g.*, Model Business Corporations Act (2016) § 7.32; Galler v. Galler, 203 N.E.2d 577 (Ill. 1964).

[121] *Id.*

to—have a shaping effect on corporate conduct and have been forthcoming for decades.[122]

Of course, footing the bill for a proposal to be laid before the shareholders of a public corporation can be a daunting proposition. Rule 14a-8 of the Securities Exchange Act of 1934 has eased the way, mandating that certain shareholder proposals be included in management's proxy materials, at corporate expense.[123] Some proposals, however, are excluded. Specifically, Rule 14a-8(i)(7) excludes from the list of proposals that must be included in management's materials those proposals relating to the "ordinary business" of the corporation.[124]

At least for a time, however, the Securities and Exchange Commission's staff required shareholders' motions to be included in management's proxy materials if they related to issues of social concern, notwithstanding a relationship to the company's ordinary business. In Securities and Exchange Commission Staff Legal Bulletin No. 14H, the staff explained its "significant policy exception," saying:

> proposals focusing on a significant policy issue are not excludable under the ordinary business exception 'because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.' Thus a proposal may transcend a company's ordinary business operations even if the significant policy issue relates to the 'nitty-gritty of its core business.' (Quoting the concurrence in Trinity Wall Street v. Wal-Mart Stores, Inc. 792 F.3d 323, 353 (3d Cir. 2015).[125]

In fact, in 2015, a campaign focused on pharmaceutical pricing asked several pharmaceutical companies for reports "on the risks to [the relevant company] from rising pressure to contain U.S. specialty drug prices." The Commission's staff found those requests were not excludable under Rule 14a-8(i)(7) because they sought information on "fundamental business strategy with respect to . . . [the company's] pricing policies for pharmaceutical

[122] *See*, *e.g.*, Lovenheim v. Iroquois Brands, Inc., 618 F. Supp. 554 (D.D.C. 1985) (seeking proxy access for communication on the issue of animal cruelty).
[123] *See generally* LARRY D. SODERQUIST & THERESA A. GABALDON, SECURITIES REGULATION 376-82 (Foundation Press, 9th ed. 2018).
[124] Securities and Exchange Act of 1934, 17 C.F.R. § 240.14a-8(i)(7).
[125] Securities and Exchange Commission Staff Legal Bulletin No. 14H (CF) (Div. Corp. Fin. Oct. 22, 2015).

products."[126] The proposals were soundly defeated but attracted substantial attention.[127]

In 2017, a similar campaign was directed at a group of manufacturers including: AbbVie, Amgen, Biogen, Bristol-Myers Squibb, Eli Lilly, Gilead Sciences, Merck, Pfizer, and Vertex Pharmaceuticals.[128] The proponents sought reports "listing the rates of price increases year-to-year of the company's top ten selling branded prescription drugs between 2010 and 2016, including the rationale and criteria used for these price increases, and an assessment of the legislative, regulatory, reputational and financial risks they represent for the company."[129] Each of the companies involved sought and received no-action relief under Rule 14a-8(i)(7). Most of the companies argued that the 2015 proposals "focused on the company's fundamental business strategy with respect to its pricing policies for pharmaceutical products" whereas the 2017 version asked, "how and why the company makes specific pricing decisions" and focused "on obtaining explanation and justification for product-specific and time period-specific price increases."[130] The staff reasoned that the proposals were excludable on ordinary business grounds because they related "to the rationale and criteria for price increases of the company's top ten selling branded prescription drugs in the last six years."[131]

It thus appears that navigating the "significant policy exception" to the "ordinary business exception" will pose a challenge. One may, like the author, be inclined to suspect that the extent of the challenge may depend on political vagaries.

D. Closing the Money Pit

A fourth suggestion, made elsewhere and hereby renewed, is that we should recognize that shareholder primacy is as unnecessary as are shareholders themselves. As an initial matter, we can easily note that public shareholders (unlike at least some shareholders of closely held firms) emphatically are not managers; neither are they inventors of useful goods and

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[126] Carly J. Goeman, *The Price Isn't Right: Shareholder Proposals as Opportunities for Institutional Investors to Restore Firm Value and Reduce Pharmaceutical Prices*, 2017 COLUM. BUS. L REV. 748, 782 (2017).
[127] *See id.*
[128] Ronald O. Muller & Elizabeth Ising, *Shareholder Proposal Developments During the 2017 Proxy Season*, HARV. L. SCH. F. ON CORP. GOVERNANCE & FIN. REG. (July 12, 2017), https://corpgov.law.harvard.edu/2017/07/12/shareholder-proposal-developments-during-the-2017-proxy-season/.
[129] *Id.*
[130] *Id.*
[131] *Id.*

services.[132] Their only formal role is (of course) that of capital provider.

Various concomitant but subsidiary roles from time to time have been ascribed to public shareholders. These subsidiary roles generally are related to the monitoring function described by contractarians.[133] As monitors, they could be seen as the repository of the corporation's ultimate governing authority, owing to (1) their ability to deny capital to the corporation in the first place, (2) their ability to elect the board of directors, (3) their ability to sell their shares to someone else who is interested in electing the board of directors,[134] and/or (4) their ability to enforce the fiduciary duties of corporate managers by bringing derivative causes of action on behalf of the corporation.[135]

From a practical standpoint, these subsidiary roles may be rather quickly dismissed. First, pricing bubbles show just how limited the perspicacity of both individual and institutional investors can be in discerning the worth of capital-seeking companies.[136] Second, shareholders of public corporations are infamous for electing the slate of directors that management suggests.[137] Third, there is empirical evidence that shareholders of public corporations who "vote with their feet" by selling in large numbers to someone who wishes to install new (presumably superior) management are not necessarily disposing of systematically mismanaged firms.[138] Fourth, the ability to bring

[132] Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1191 (2002).
[133] *See* Easterbrook & Fischel*, supra* note 21, at 35–38.
[134] Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 249, 310 (1999); Robert B. Thompson, *Preemption and Federalism in Corporate Governance: Protecting Shareholder Rights to Vote, Sell, and Sue*, 62 L. & CONTEMP. PROBS. 215, 216–18 (1999).
[135] Blair & Stout, *supra* note 134, at 292–93.
[136] *See generally* Theresa A. Gabaldon, *John Law, with a Tulip, in the South Seas: Gambling and the Regulation of Euphoric Market Transactions*, 26 J. CORP. L. 225 (2001) (discussing the market in the late 1990s).
[137] *See* Arthur R. Pinto, *Corporate Governance: Monitoring the Board of Directors in American Corporations*, 46 AM. J. COMP. L. 317, 325-26 (1998) (suggesting that management's control over corporate information and proxy solicitation at the corporation's expense—as well as stockholders' general passivity—allow them to influence a shareholder's voting decision).
[138] *See* Anup Agrawal & Jeffrey F. Jaffe, *Do Takeover Targets Underperform? Evidence from Operating and Stock Returns*, 38 J. FIN. & QUANTITATIVE ANALYSIS 721, 742–44 (2003) (concluding takeover targets are no less profitable than other companies); *see also* DAVID J. RAVENSCRAFT & F.M. SCHERER, MERGERS, SELL-OFFS, AND ECONOMIC EFFICIENCY 68–70, 101–03, 122 (1987) (concluding from a study of manufacturing firm acquisitions that (1) before acquisition, acquired companies generally had above average profitability for their industries, although those companies acquired by tender offer had profits slightly below the industry average,

derivative causes of action has been so severely restricted[139] and the liability of officers and directors so limited[140] as to diminish the right to relative triviality.[141]

A somewhat more descriptively accurate role also has been assigned to the shareholders of public corporations. Shareholders widely are described as the "residual claimants" vis-à-vis the corporation.[142] Accordingly, when "profits increase, the shareholders benefit from this bounty; if profits decline, shareholders feel the loss."[143] The role, then, translates to the acceptance of the risk of corporate loss in exchange for the possibility of theoretically unlimited gain.

In considering the importance of the role of residual claimants, however, it is important to note that, given the existence of limited liability, shareholders actually cannot feel the loss of anything beyond their initial capital input.[144] This is exactly the kind of risk that a creditor accepts; the only difference has to do with the size of the risk. Risk differentials are, of course, most usually dealt with by adjusting rates of return. Logically, this means that highly compensated, long-term creditors would do just as well as shareholders when it comes to the task of bearing risk.

This analysis questions the notion that shareholders must receive the prospect of unlimited returns in order to induce them to accept the limited risk of loss of their capital. All that shareholders logically should require is an adequate return to make foregoing alternate investments worthwhile. The real role of shareholders of public corporations, then, is to permit some amount of capital-raising in which the terms of repayment and return are relatively unspecified. This may be convenient for the corporation, but is not obviously necessary for entities with any sort of proven track record, any more than open-ended repayment terms are necessary for borrowers of loans

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and (2) profitability tended to decline after acquisition, except in those companies acquired by tender offer, where profitability neither declined nor improved).

139 Pinto, *supra* note 137, at 342.

140 Tim Oliver Brandi, *The Strike Suit: A Common Problem of the Derivative Suit and the Shareholder Class Action*, 98 DICK. L. REV. 355, 387 (1994).

141 The right also is one regularly only exercised at the instigation of self-interested attorneys. *See* Theresa A. Gabaldon, *Free Riders and the Greedy Gadfly: Examining Aspects of Shareholder Litigation as an Exercise in Integrating Ethical Regulation and Laws of General Applicability*, 73 MINN. L. REV. 425, 439–40 (1988) (highlighting the ethical problems that arise by lawyer solicitations of various corporate derivative suits).

142 *See* Stout, *supra* note 132, at 1192 (explaining contractarian arguments for shareholder primacy).

143 Gabaldon, *supra* note 108, at 851.

144 Frank H. Easterbrook & Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89, 89–90 (1985); Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 81 n.1 (1991).

to buy homes.[145] Even its convenience for the corporation is not a foregone conclusion, given the fact that the corporate debt market often is the source of much more capital than the stock market.[146]

Ironically, although shareholders are not necessary to be residual risk bearers (and in fact are not truly residual risk bearers, given limited liability), they, or someone like them, are necessary to "absorb" a corporation's generation of profits in excess of its costs, including its cost of capital. After all, were there no deemed motive to benefit shareholders, what would the corporation's purpose be? Might publicly held corporations then be managed primarily for the purpose of creating goods (such as life-saving drugs), providing services, offering employment and the like? One thinks not. Most importantly, modeling all public corporations essentially along nonprofit lines would be a complete political nonstarter: we regard ourselves as a capitalist nation and prize our putatively open markets. Quite arguably, then, the primary–and only truly indispensable–role of the shareholder of a public corporation is to symbolize commitment to these theoretical ideals.

Still, one can imagine compromise solutions. Suppose, for instance, that a condition for exclusive rights to market a new drug were a fair-price transfer of those rights to an entity funded exclusively by market-rate debt to be repaid at the time the exclusion is to terminate. It seems that such a solution would provide incentive for the development of new drugs but mitigate the inclination to drive up their prices for purposes of subsequent profit-taking. This might be a solution imposed from "without" corporate law, functioning as an add-on to the Food and Drug Administration and patent regimes, but it would be one that would rely on amelioration of corporate law's tendency to

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[145] It does, however, permit unsophisticated capital providers to take respectable gambles.

[146] *See* LAWRENCE E. MITCHELL ET AL., CORPORATE FINANCE AND GOVERNANCE 456 (2d ed. 1996) (noting the increased capacity of debt securities to yield high returns); John Floegel, *Equity Financing for Public Corporations: Reasons and Methods to Encourage It*, 138 U. PA. L. REV. 1411, 1419 (1990) (explaining that in 1990, equity financings represented "a negligible percentage of total corporate financing"); Lynn A. Stout, *The Unimportance of Being Efficient: An Economic Analysis of Stock Market Pricing and Securities Regulation*, 87 MICH. L. REV. 613, 645 (1988) (stating that "[f]irms rarely use equity issues to raise capital."); *see also Canadian Oil Industry Financings Hit 10-Year High*, OIL & GAS J., Mar. 10, 2003, at 38, 38 (finding that the Canadian oil and natural gas industry's debt comprised 7.02 billion Canadian dollars of the 9.98 billion total oil financing in 2002). Moreover, even if nonspecific terms of repayment and return are highly desirable for at least some corporations, there is no reason that classes of debt with these terms could not exist. This highlights, of course, the fact that "debt" and "equity" are just matters of definition and borrows from corporate finance's willingness to hybridize the two. The question then merely becomes what enforcement and monitoring rights would be required before creditors would sign on to the deal.

shareholder primacy excess. In effect, it would be something like halfway to a regulated public utility approach,[147] but would rely on market priced debt rather than the decree of a regulatory commission with respect to the permissible rate of return on equity.

V. BACK TO SCHOOL

Contractarian views have focused discussion to this point. Those views are not, of course, the only ones that matter in the field of corporate law. There follow some apologetically brief descriptions of other schools and their possible reaction to some of the proposals made above.

A. Behavioral Economics

As noted above, the contractarian approach is the product of strict law and economics analysis.[148] One of its more vigorous recent challengers is a close relative known as behavioral economics (a branch of the legal decision theory described above).149 Behavioral economics accepts the insights of social science and utilizes empirical studies of human behavior in order to reassess some of the assumptions of the traditional law and economics movement.[150] Its proponents have established to their own satisfaction that not all economic actors act in their own self-interest—in some instances because of altruism, in some because of predictable cognitive heuristics, and in some because of plain old stupidity.[151]

In accepting that shareholders' self-interest is bounded to the extent that

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[147] *See generally* SCOTT HEMPLING, ABA, REGULATING PUBLIC UTILITY PERFORMANCE: THE LAW OF MARKET STRUCTURE, PRICING AND JURISDICTION (2015) (describing the regulation of public utilities).
[148] C. AMATUCCI ET AL., RESEARCH HANDBOOK ON DIRECTORS' DUTIES 226 (Adolfo Paolini ed., 2014).
[149] *Id.*
[150] *See, e.g.*, Greenfield, *supra* note 32, at 583 (2002) ("While adopting some of the conventional premises of law and economics, such as the belief that legal rules affect behavior, [behavioral law and economics] distances itself from many of the traditional assumptions of law and economics, such as a dependence on individual economic 'rationality' as the determinant of behavior."); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1473–76 (1998) (arguing for an analytical approach that "allows us to model and predict behavior relevant to law with the tools of traditional economic analysis, but with more accurate assumptions about human behavior"); *see also* Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 73–77 (applying behavioral economic analysis to the design of corporate compliance systems).
[151] *See* Jolls, Sunstein & Thaler, *supra* note 150, at 1476–79 (laying out the three "bounds"—"bounded rationality," "bounded willpower," and "bounded self-interest"—that underlie behavioral law and economics analysis).

their views of normative desirability can contemplate altruistic benefits to others,[152] behavioral economics might be used to formulate a different iteration of shareholder primacy. In this version, shareholder welfare might be examined in terms of what shareholders affirmatively desire other than profit maximization. One might take the attempted shareholder proposals discussed above as some evidence of these alternative desires (although refraining from price-gouging also could be seen as in a company's long-term best interest).[153] Taking this a bit further, one might even reason that individual shareholders are consumers of prescription drugs and so would prefer less manipulation and over-pricing, even if it led to less profitability.

This possibility, however, presents at least three difficulties. The first is that a number of shareholders are not individuals but institutions. This problem may be awkwardly assumed away, perhaps, by positing that after all institutional stacking, or "nesting," is considered, individual shareholders will be revealed. The second is the perceived problem of the commons. If the shareholders of Corporation A understand that Corporation A will limit manipulation and price-gouging but believe that Corporation B will continue the practice, they are apt to regard their sacrifice as pointless. This argument is undercut, however, to the extent that a number of important drugs do not have ready substitutes. The third is that not all shareholders require prescription medication (although some 70% of Americans do) and not all shareholders would believe that manipulation is possible or that overpricing is in any way a problem.[154]

Nonetheless, in considering both predictable cognitive heuristics and the possibility that sometimes people are stupid, behavioral economics provides additional fodder for the analysis of consumer exploitation. It has given rise to at least two interesting approaches intended to address problems created by the "bounding" of rationality and free will. These are libertarian paternalism and asymmetric paternalism. These are particularly relevant to the over-advertising issue and less so to overpricing.

One of the heuristic phenomena noted by behavioral economics has to do with the importance of how a decision is framed. This recognition has prompted some of the school's adherents to propose the approach known as "libertarian paternalism," pursuant to which policy makers would determine

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[152] *See* Neel P. Parekh, Note, *When Nice Guys Finish First: The Evolution of Co-operation, the Study of Law, and the Ordering of Legal Regimes*, 37 U. MICH. J.L. REFORM 909, 918, 935, 940 (2004).
[153] *See* Goeman, *supra* note 126, at 796.
[154] Presumably, it is this type of diversity of viewpoints that explains why main-stream corporate America does not, by and large, attempt to accommodate the possible non-monetary preferences of shareholders as to a number of matters in addition to consumer manipulation.

which resolution of an issue generally is preferable, and frame decision-making contexts accordingly.[155] Although individuals thus are psychologically encouraged to make decisions in the manner selected by the policy makers, deviation—or "opting out"—is permitted. A simple example involves placing fruit before sugary desserts in school cafeteria lines.[156] Hopefully, children then find themselves with apples on their plates and less room for other desserts, but those who are "rational" enough to see through the ploy also are free to bypass the fruit and make a beeline for the cookies. Given this example, the model does seem a bit odd, since it essentially calls on actors to self-prove rationality by opting away from the choice urged by presumably well-informed social planners. In fact, this observation tends to suggest that although elements of choice may be preserved in a scheme for reasons of political philosophy, that preservation actually has little to do with a purported dichotomy between rational and irrational.

Libertarian paternalism has been criticized for failing to grapple with the situational constraints on individuals' ability to opt away from a prompted decision—in other words, the "libertarian" part of the claim becomes meaningless.[157] It also has been noted that libertarian paternalism simply does not deal with the many instances in which those who frame issues are market rather than government actors.[158] In fact, Professors Cass Sunstein and Richard Thaler, the fathers of libertarian paternalism, do not attempt to extend their approach to entities the goal of which is profit-maximization, perhaps in the belief that free market competition ultimately will reveal collective "real" preference.[159] This overlooks, of course, the very real possibility of market failure based on manipulation and monopoly.

Behavioral economic analysis has spurred the growth of another approach recognizing that humans do not always act in the ways that conventional law and economics would predict. The "asymmetric paternalism"

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[155] *See generally* Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003) (making the case for "libertarian paternalism," by which decisions are framed in such a way as to "steer" individuals towards the welfare-enhancing choice while maintaining their ultimate freedom to choose).

[156] *See id.* at 1164–66.

[157] Mitchell, *supra* note 68, at 1254.

[158] Yosifon, *supra* note 100, at 307–08.

[159] Similarly, but more obviously, mandating—or even strongly recommending—frames for corporate actors to use in their own decisions about products and promotion is not apt to be a proposal that Professors Sunstein and Thaler would be prepared to endorse. Most notably, libertarian paternalism is an attempt to respond to perceived lack of rationality. Hijacking the theory to counter a motive of profit-maximization would identify that motive as something other than rational—a position that Professors Sunstein and Thaler clearly have not taken.

school calls for paternalistic action where the benefits to irrational individuals significantly outweigh the cost to rational individuals of losing the right of choice.[160] This easily would go so far as to permit the government to directly dictate the frames pursuant to which particular products are marketed, either to consumers or medical providers, thus protecting the irrational while still leaving the rational—capable of avoiding the framing effect—freedom to choose. It also clearly would permit governmental placement of at least some limits on product lines, including opioids.

Asymmetric paternalism appears to assume that individuals can be neatly sorted by rationality, whereas it is unlikely that there are very many individuals who are wholly rational or irrational at all times, even in a focused context such as making consumption choices. The possibility of mixed rationality does not seem to be a fatal flaw—as is the case with libertarian paternalism, people may (perversely) self-prove rationality with respect to any particular decision by opting away from the prompted choice. More tellingly, asymmetric paternalism also has been subjected to the criticism that the ability to choose is always situationally constrained by elements that even high-minded social planners may not, for any number of reasons, be able to predict or accommodate.

In any event, separate from direct limits on production or marketing is the question of whether asymmetric paternalism might provide a justification for either mandating or encouraging framing in corporate decision-making about marketing and pricing. If one does accept—as adherents of asymmetric paternalism do—that less than completely rational consumers can be affected by framing and other cognitive biases, a problem clearly exists. It is not obvious that addressing that problem by trying to rewire the decisions of corporate directors is sufficiently protective, but it would seem to do no harm. Similarly, taking the studies and conclusions of behavioral economics and its offshoots at face value, it would seem there should be no objection to the creation of a conscience committee as another way to insert a conscience "step" into corporate process.

B. The Progressive Approach

During the 1990s, a group of vaguely-to-expressly self-identifying communitarian corporate law scholars also self-identified as "progressive"[161] and

[160] *See* Colin Camerer et al., *Regulation for Conservatives: Behavioral Economics and the Case for "Asymmetric Paternalism,"* 151 U. PA. L. REV. 1211, 1212 (2003).
[161] David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, *in* PROGRESSIVE CORPORATE LAW 16, 19 (Lawrence E. Mitchell ed., 1995); *see also* Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82

proceeded to joyously express their rejection of shareholder primacy.[162] Corporate progressives generally endorse an expansion of the goals of the corporation and the duties of management to include responsibility to other constituents,[163] frequently arguing for the recognition of enforceable fiduciary duties running from directors to groups such as creditors and employees.[164] As an alternative or supplemental approach, progressives also have proposed methods of increasing the board's discretion to recognize nonshareholder interests.[165] These methods include extending the terms for which members of the board are elected and adopting statutory safe harbors for consideration of the interests of nonshareholder constituencies.[166] It has also been suggested that board members be given additional fiduciary duties owed to, and enforceable by, other stakeholders.[167] Although corporate progressives have not devoted much attention to the issue of consumer exploitation, their general concern with corporate social responsibility and the interests of nonshareholders suggests that the consumer protection initiatives described in this paper (perhaps short of dispensing with shareholders) would receive strong support.

CORNELL L. REV. 856, 857 n.1 (1997) (reviewing PROGRESSIVE CORPORATE LAW (Lawrence E. Mitchell ed., 1995) and criticizing the use of the term).

[162] *See* Millon, *supra* note 161, at 16–22.

[163] *See, e.g.*, Millon, *supra* note 161, at 1 ("Those scholars who have challenged the shareholder primacy principle may be referred to as communitarians, because . . . their work focuses on the sociological and moral phenomenon of the corporation as community, in contrast to the individualistic, self-reliant, contractarian stance . . . ."); Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime That Recognizes Non-Shareholder Interests*, 30 COLUM. J.L. & SOC. PROBS. 587, 589 (1997) (arguing that the model of shareholder primacy should be replaced with a regime under which "[b]oards must consider equally the interests of non-shareholding stakeholders and shareholders when making decisions that can affect both groups").

[164] *See* Lawrence E. Mitchell, *The Fairness Rights of Corporate Bondholders*, 65 N.Y.U. L. REV. 1165, 1178 (1990) (arguing that fiduciary rights should be extended to corporate bondholders); Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers*, 69 N.C.L. REV. 1189, 1194–96 (1991) (arguing that fiduciary duties should extend to displaced workers).

[165] *See* Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 582–86 (1992).

[166] *See* LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT 112–18 (2001) (advocating for self-perpetuating boards); Mitchell, *supra* note 165, at 635–40 (explaining a method of enforcing constituency statutes that accounts for and protects multiple interests).

[167] *See, e.g.*, O'Connor, *supra* note 164, at 1196 (arguing "that the corporation's nexus of contracts should be restructured to recognize that directors have fiduciary duties to mitigate the effects of layoffs and plant closings upon displaced workers").

C. The Team Production Model

The "team production" approach speaks the language of neoclassical economics, but makes somewhat different starting assumptions.[168] The consequence is a set of conclusions that often resonate with corporate progressives.[169] Team production scholars characterize the board of directors as an independent "hierarch" mediating among all those with "team specific" inputs to the corporation.[170] In this view, the proper function of the board is to employ the inputs of financiers, workers, communities, and others in order to maximize the value of the firm. Not incidentally, this requires the board to allocate corporate profits among all inputting groups in a manner all participants will tolerate.[171] Although the proponents of the model have not characterized consumers as having team-specific inputs, they have acknowledged the board of directors' ability to engage in corporate philanthropy[172] and presumably would find aversion to exploitation an acceptable motivation for directorial decisionmaking. In fact, the writing of Professor Einer Elhuage[173] generally endows the team production model with sufficient latitude to permit the board to engage in at least limited moral decisionmaking—extensive enough, at any rate, to roughly emulate the non-self-interested conduct of individual entrepreneurs.

In addition, it surely is worth noting that consumers of drugs with no substitutes—or, for that matter, consumers with opioid addictions—really should be considered to have team-specific inputs. As it is, they essentially are "bonded" to the provision of funds to a particular enterprise. Unlike other team members, they have no choice with respect to tolerating different balances in the allocation of profits, so perhaps the team production model eventually would relegate consideration of their interests to the realm of philanthropy, but that is not clearly the case. In any event, it seems that adherents

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[168] *See* Blair & Stout, *supra* note 134, at 249 (questioning whether principal-agent problems are unique to corporations as compared to other business firms and suggesting the team production approach to the corporation).
[169] Note, however, that the adherents of this model specifically disavow identification as progressives. *See id.* at 253–54.
[170] *See id.* at 250–51.
[171] *See id.* at 251 ("Within the corporation, control over those assets [belonging to team members] is exercised by an internal hierarchy whose job is to coordinate the activities of the team members, allocate the resulting production, and mediate disputes among team members over that allocation.").
[172] *See generally* Margaret M. Blair, *A Contractarian Defense of Corporate Philanthropy*, 28 STETSON L. REV. 27 (1998) (invoking the team production model in defense of corporate charity).
[173] *See generally* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733 (2005) (arguing that the law allows corporate managers to at least somewhat forego profits to the public interest).

of the team production model should raise few objections to either a mindfulness process or a conscience committee proposal. If the interests of all those with team-specific inputs are to be considered by the board, establishing that either the entire board or a committee thereof do so explicitly would seem to be desirable.

D. Feminism

The multiple concerns of feminists share a common overlay of focus on the position of women in a patriarchal society, and a common goal of expunging the perceived inequalities of that position.[174] As part of the feminist undertaking, the experience of women is examined, the values of women are explored, and existing legal and social structures are assessed in terms of their arguable congruence with that experience and those values. This type of analysis does not necessarily presuppose that the experiences and values of all or most women are different from those of all or most men, but the possibility that a difference exists dictates the approach. The probability that values and experience may vary woman to woman is an analytic challenge with which feminists constantly grapple.[175] Nonetheless, if the values of even some women identifiably and predictably diverge from those underlying a legal regime, it is a matter with which to be reckoned.

As an integral part of their analytical process, feminist scholars make use of the concept of "gender," which is defined as the socially constructed (as opposed to biological) differences between being male and female.[176] The

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[174] *See* SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM 244 (1986) ("It would be historically premature and delusionary for feminism to arrive at a 'master theory,' at a 'normal science' paradigm with conceptual and methodological assumptions that we all think we accept . . . . [W]e need to learn how to see our goal for the present moment as a kind of illuminating 'riffing' between and over the beats of the various patriarchal theories and our own transformations of them . . . ."); Elaine Marks, *Introduction* to NEW FRENCH FEMINISMS: AN ANTHOLOGY x–xiii (Elaine Marks & Isabelle de Courtivron eds., 1980) ("[American feminists'] style of reasoning, with few exceptions, follows the Anglo-American empirical, inductive, anti-speculative tradition. They are often suspicious of theories and theorizing."); Christine A. Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 41 STAN. L. REV. 751, 753 n.11 (1989) (book review) ("If . . . the need for diversity within feminism . . . is answered simply with uncritical pluralism, nothing has been gained . . . . [T]o the extent that any articulation of feminism is white, it is not only incomplete but also inadequately centered in women's experience, and therefore inadequately feminist.").

[175] *See, e.g.*, Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Marlee Kline, *Race, Racism, and Feminist Legal Theory*, 12 HARV. WOMEN'S L.J. 115 (1989).

[176] For discussion of "gendering," *see generally* Mary Anne C. Case, *Disaggregating Gender from Sex and Sexual Orientation: The Effeminate Man in the Law and Feminist Jurisprudence*, 105 YALE L.J. 1 (1995) (treating "gender" and "sex"

term "gendered" sometimes is used to describe structures, analyses, etc., that are the outcome of gender. It may, for example, be said that corporate law is gendered because it predominantly is the product of men, constructed in (perhaps unknowing) reliance on their own experience of being male in society. As the discussion above inherently reveals, the landscape of mainstream corporate law analysis indeed has been characterized by such socially-ascribed male features as competitiveness, formal rationality, and paternalism.

By contrast, feminist analysis willingly exposes corporate law's formal, but flawed, underlying assumptions about rationality in the marketplace.

As a practical matter, it is easy to say that drug pricing and drug advertising are gendered. Not only are approximately two-thirds of Big Pharma boards male,[177] it would be somewhat difficult to believe that the value systems of the women on those boards has been left untouched by male-shaped drug and capital markets and, for that matter, centuries of male-dominated society. While this line of argument may leave one in a post-existentialist state of crisis, it also should leave one ready to question the status quo and willing to experiment with models not premised on strict rationality and shareholder primacy.

E. Critical Race Theory

"A central claim of [critical race theory] is that antiracist politics and legal theory should be informed by the voices of people 'on the bottom' of discrimination."[178] In part, this is because, on issues of race,[179] voices on the bottom simply are seen as more credible than the voices of those on the top.[180] Eliciting those voices thus promises improvement in substantive

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separately and the applicability of that distinction to employment discrimination and other areas of law). As an example, for a time between the Industrial Revolution and the advent of the women's liberation movement, the popularly ascribed gender role of women was to remain at home, raising children (although, most certainly, some women—either as a matter of aspiration or necessity—did deviate).

[177] *See supra* at note 87.

[178] Devon W. Carbado, *Race to the Bottom*, 49 UCLA L. REV. 1283, 1284 (2002).

[179] It should be noted that—as race has come to be regarded as a matter of social construct rather than genetic immutability—the inclusion of other social categories of inequity in critical race theorization has become quite natural. *See* Darren Lenard Hutchinson, *Progressive Race Blindness?: Individual Identity, Group Politics, and Reform*, 49 UCLA L. REV. 1455, 1459 (2002) ("Advocates of progressive race blindness embrace the persuasive contemporary social theories that dispel traditional accounts of race (and other identity categories) as products of biology.").

[180] Carbado, *supra* note 178, at 1304 ("The argument is based on that notion that Whites are the beneficiaries and perpetrators of racism (therefore, their perspectives cannot be trusted), and Asian Americans are the victims of racism (therefore, their voices should be listened to).").

results[181] and inviting speech from the formerly silent has benefits of its own.[182] This spare description of a rich literature presents two central questions. First, how broadly is the concept of "antiracist politics and legal theory" to be defined? Second, how is one to identify those "on the bottom" with respect to any particular issue?

For purposes of a corporate law analysis, the second question is far simpler than the first, for it is easy to identify both a "bottom" and a "top." Economically privileged white males have shaped corporations, corporate law, and corporate law commentary;[183] eliciting the voices of those "outsiders" not sharing all three of those characteristics would, from a critical race perspective, have intrinsic value in addressing relevant issues. This suggests a fairly clear answer to the first question as well. In any situation in which "top" and "bottom" are so easily discerned in terms of race, gender and economic class, issues within the realm of critical race analysis clearly are implicated.

Outsiders have, of course, increased their participation in financial markets; stock market participation in particular has been said to be democratizing.[184] Still, racial minorities are less likely than whites to participate in equity markets.[185] Moreover, the experience of racial minorities as consumers can be radically different than those of white males. It is well known, for instance, that lending practices have been known to discriminate on the basis of race[186] and that minorities and women pay higher car prices than do white

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[181] *See* Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 569 (1984) (arguing that increasing minority representation in work and school has three main justifications: reparations, social utility, and distributive justice); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R. C.L.L. REV. 323, 362 (1987) ("suggest[ing] a new, reconstructed legalism that attempts" to develop "new norms and new law that will achieve and maintain the utopian vision" of critical legal studies).

[182] *See* Carbado, *supra* note 178, at 1299 ("The reason to look to the bottom is not to generate a particular substantive outcome, but to get an authentic voice.").

[183] *See* Theresa A. Gabaldon, *Corporate Conscience and the White Man's Burden*, 70 GEO. WASH.
L. REV. 944, 945–46 (2002) (noting that "the cultural bias and world view of corporate authors manifests itself in the proposal of solutions that work for people 'like us'").

[184] *See* Gabaldon, *supra* note 136, at 229, 233–34.

[185] *See* Dorothy A. Brown, *Pensions, Risk, and Race,* 61 WASH. & LEE L. REV. 1501, 1537 (2004) (noting that "Blacks and Hispanics are less likely to invest their money in the stock market than are Whites").

[186] *See, e.g.*, FRANKLIN J. JAMES, BETTY L. MCCUMMINGS & EILEEN A. TYNAN, MINORITIES IN THE SUNBELT 121 (1984) (finding that although the data concerning rental discrimination were inconclusive, in the Denver market to purchase real

males.[187] It might well be the case that minorities have inferior insurance and pay higher drug prices than do whites. It also might be the case that inability to pay even the same prices as whites carries its own consequences. Positing the exact content of the views of those "on the bottom" of corporate America may be somewhat risky, but it is unlikely that a chorus in favor of shareholder primacy and correlative exploitation of drug consumers would be heard. Although asking directors—a group of predominantly white males and white male wannabes—to overtly consider the welfare of the consumers of prescription medications may seem to be less than inspiring and not likely to bring about much real change, it might well fall into the category of "do no harm" reform.[188] Considering the proposals of the somewhat more diverse group of shareholders might also represent an improvement.

F. Contractarian Rejoinders

Contractarians generally do not bother to rebut feminist or critical race theorists, but have produced responses to other schools.[189] Some portion of these responses have comprised a reiteration of some of law and economics' basic assumptions in the context of an examination of the precise claims of the newer schools, generating statements along the lines of the following (specifically in response to the team production model): "By vesting shareholders with an exclusive right to a corporation's residual, then, the principal-agent model facilitates adoption of the sort of mechanisms that can reduce the risk of opportunism and thus minimize the transaction costs associated with inducing team-specific investment."[190] This is no more than a reassertion of the norm of shareholder primacy in a slightly louder voice for those who weren't listening the first time, probably indicating that the debate is as much cultural as it is logical. If this is the case, it is unlikely that consensus ever will be achieved if exchanges continue along previous lines. As discussed immediately below, sufficiently divergent world views are unlikely to prevail on one another by means of public reason.

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estate "less assistance was offered to Hispanics and blacks in financing home purchases").

[187] *See* Ian Ayres, *Fair Driving: Gender and Race Discrimination in Retail Car Negotiations*, 104 HARV. L. REV. 817, 828 (1991) (finding that "[b]lack female testers were asked to pay over three times the markup of white male testers, and black male testers were asked to pay over twice the white male markup").

[188] There is, however, the possibility of criticism that the appearance of progress sometimes can distract from its genuine achievement.

[189] *See, e.g.*, Bainbridge, *supra* note 161; Alan J. Meese, *The Team Production Theory of Corporate Law: A Critical Assessment*, 43 WM. & MARY L. REV. 1629, 1634 (2002) (offering a contractarian response to the team production approach).

[190] Meese, *supra* note 189, at 1671.

G. Cultural Cognition

Libertarian and asymmetric paternalism might be praised by some for their theoretic ability to slip the paternalistic (or interventionist) camel's nose under the libertarian (or free market) tent on matters including, but not limited to, the framing of various issues. Neither approach is likely to be satisfying, however, to those who would rename the camel "communitarian," "feminist" or "critical" and escort it into the living room through the front door. This same lack of satisfaction might also be directed at the theory of cultural cognition—which nonetheless may be quite compelling from a practical standpoint.

Cultural cognition theory recognizes the priority of culture in an individual's assessment of such matters as the validity of facts and the perception of risk.[191] Pursuant to the theory, "culture" or "world view" may be usefully classified by "group" and "grid."[192] "Group" is a question of whether one is oriented toward individualism or communitarianism.[193] "Grid" refers to whether one is inclined toward hierarchical or egalitarian values.[194] The theory rejects public reasoning as a method of resolving intensely polarizing issues,[195] instead suggesting a process of "expressive overdeterminism" to minimize social discord.[196] Expressive overdeterminism calls for the crafting of solutions that permit validation of divergent world views.[197] Its proponents suggest, for instance, a resolution of the gun control debate pursuant to which gun owners registering their guns are paid bounties for doing so, thus validating both the safety concerns of those who would prefer gun control and the autonomy of those who fear loss of the "right" to bear arms of their choosing.[198]

That said, cultural cognition does seem to teach that without cultural agreement, some problems simply will not be resolved;[199] in fact, there may

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[191] *See* Dan M. Kahan & Donald Braman, *Cultural Cognition and Public Policy*, 24 YALE L. & POL'Y REV. 149, 150–57 (2006) (defining "cultural cognition" as "the psychological disposition of persons to conform their factual beliefs about the instrumental efficacy (or perversity) of law to their cultural evaluations of the activities subject to regulation").

[192] *Id.* at 153.

[193] *Id.*

[194] *Id.*

[195] *Id.* at 151.

[196] *Id.* at 168.

[197] *Id.* ("Policymakers can harness this identity-affirmation effect by designing policies that are sufficiently rich in their social meanings to affirm the values of persons of diverse cultural worldviews simultaneously.").

[198] *Id.* at 170.

[199] Kahan and Braman suggest solutions that try to join conflicting cultural values together, because

not even be a consensus that they exist. It might be that exploitation of pharmaceutical consumers falls in this latter category. Attitudes toward the operation of free market play a critical role in establishing whether one is individualistic or communitarian: "a hardcore methodological individualist . . . insists that all human institutions and states of affairs be linked to the decisions of self-interested individuals . . . ."[200] Presumably, then, individualists generally will resist market interference and would, if disposed to think about corporate law, ascribe to contractarian views.

Accordingly, those who do see problems with the conduct of pharmaceutical companies must be realistically circumscribed in their attempts to resolve them. As to this, cultural cognition nonetheless has a lesson to convey. For instance, it probably is helpful to characterize remedial proposals as simple attempts to redress market malfunction. In this guise, attempts to manipulate consumer preference might be portrayed as a close relative to fraud and thus a specific type of market failure. The problem of overpricing might be portrayed as the predictable result of the patent regime, itself a form of tampering with free market forces (although one would need to be careful about the implied insult to social elites that might offend those with highly hierarchical world views). It also might be worthwhile to describe efforts to improve the corporate decision making process to specifically address what critics see as rapacious conduct as simply a way for pharmaceutical companies to benefit themselves in the long run.

In any event, in light of the composition of Big Pharma boards, and the board-centric nature of the recommendations of this article, cultural cognition's insights with respect to what is known as "the white male effect" surely are noteworthy. According to an important article co-authored by several of the founders of the school, it has long been recognized that white men fear various risks less than women and minorities.[201] The explanation posited by Professor Dan Kahan *et al* is that "individuals selectively credit and dismiss asserted dangers in a manner supportive of their preferred form of social organization."[202] The "white male effect" thus "reflects the risk skepticism that hierarchical and individualistic white males display when activities

"[i]t's only when [citizens] perceive that a policy bears a social meaning congenial to their cultural values that citizens become receptive to sound empirical evidence about what consequences that policy will have. It's therefore essential to devise policies that can bear acceptable social meanings to citizens of diverse cultural persuasions simultaneously." *Id.* at 171.

[200] *Id.* at 154.

[201] Dan M. Kahan et al., *Culture and Identity-Protective Cognition: Explaining the White Male Effect in Risk Perception*, 4 J. EMPIRICAL LEGAL STUD. 465, 465 (2007).

[202] *Id.*

integral to their cultural identities are challenged as harmful."[203] It is easy to see how this skepticism affects arguments about the risk of gun violence.[204] It also extends to views about risks to the environment: insofar as "assertions of environmental risk are perceived as symbolizing a challenge to the prerogatives and competence of social and governmental elites . . . , it is hierarchical men—and particularly white ones, insofar as minorities are more likely to be disproportionately egalitarian in their outlooks—whose identities are the most threatened, and who are thus most likely to form an extremely dismissive posture toward asserted risks."[205] Although cultural cognition does not seem to have examined attitudes toward the overmarketing and overpricing of drugs, it would not be surprising to find that white males weigh the risks of those activities quite differently than women and minorities.

CONCLUSION

It is the contention of this paper that anyone who believes that pharmaceutical consumers rationally dictate the allocation and pricing of social resources is delusional. The shareholder primacy model that might be invoked to justify consumer exploitation is neither legally compelled nor, from the standpoint of many commentators, normatively desirable. These points have relatively little to do with the way in which Big Pharma (or corporate America more generally) actually functions. Although, as cultural cognition suggests, strongly held but divergent world views will prevent either of the sides on this matter from prevailing as a matter of reason, progress may be made on the basis of multiple appeals. Expressions of intent to correct market failure may be helpful.

As it happens, these expressions of intent are not merely instrumental. Markets have failed our least healthy citizens. The mechanism for at least some of these developments has been a type of corporate-launched psychological warfare. It seems not inappropriate to return fire with some of the same weapons. This article thus proposes a requirement that corporate directors be more mindful of at least some of the problems they cause. This requirement could take the form of a list of questions that directors would individually and collectively address before certain actions were taken. It also could take the form of a conscience committee, as well as bombardment with shareholder resolutions. Alternatively, if implausibly, removing shareholders at least partially from the board's equation might be of help.

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203 *Id.*
204 *Id.* at 475.
205 *Id.* at 474.

The recommendations made in this article undeniably are board-centric. From the standpoint of both feminist and critical race analysis, this seems uninspired, given the composition of Big Pharma boards. The concerns of those schools could only be amplified by the discernments of cultural cognition. Nonetheless, the status quo is undesirable, the matter is pressing, and corporate law is not going to completely reinvent itself anytime soon. Partial measures are better than none.