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**On The Export of U.S.- Style Corporate Fiduciary Duties to Other Cultures:
Can A Transplant Take?**

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On The Export of U.S.- Style Corporate Fiduciary Duties to Other Cultures: Can A Transplant Take?

Lynn A. Stout

Introduction

The U.S. system of corporate governance is one of the most highly regarded in the world. In the typical large U.S. firm, equity ownership is separated from control of the corporate enterprise. Instead of being run by shareholders, the firm is governed by a board of directors that hires executives to manage the business on a day-to-day basis. This structure allows millions of passive investors to share in the profits that flow from large-scale enterprise, permits entrepreneurs to raise hundreds of billions of dollars in a thriving public securities market, and efficiently delegates control over trillions of dollars of corporate assets to a cadre of professional managers. The result is an engine of wealth creation that has played a central role in the development of the American economy.

How has passive, dispersed shareownership managed to evolve in the United States? This pattern stands in marked contrast to much of the rest of the world, where public securities markets are relatively undeveloped and where large corporations tend to have a core shareholder or shareholder group (e.g., a family, a bank, or the government) that owns a controlling block of shares and exercises significant influence over the firm's management. A recent series of influential articles by Raphael LaPorta, Florencio Lopez-de-Silanes, Andrei Shleifer and Robert Vishny suggest that the answer may be found in U.S. corporate law (LaPorta et al. 1997, 1998, and 1999). In particular, La Porta et al. argue that countries with legal systems rooted in the

common law, such as the U.S. and the U.K., offer minority shareholders meaningful protection from opportunistic exploitation by corporate managers and controlling shareholders. As a result, investors in common-law countries are willing to adopt passive investment roles. In contrast, corporations organized under civil codes provide minority shareholders with far less protection, leaving investors relatively distrustful and unwilling to accept noncontrolling positions in such firms. The result, they conclude, is that dispersed shareownership is less likely in civil-code nations. They support their thesis with statistical analyses that find that a large and well-developed public securities market is correlated with a common law legal system.

The possibility that the success of the American public corporation stems from the superiority of U.S. corporate law naturally raises the question whether the adoption of similar legal rules in other countries might produce similar economic benefits.¹ This issue is of special interest to transitional and developing states: it is a tempting prospect to think that, by modifying their rules to more closely approximate U.S.-style corporate law, such nations might spur the process of economic development. At the same time, there seems reason to question how easily

¹ This possibility also lies at the heart of a heated debate among modern corporate scholars over whether different nations' corporate laws can be expected to converge over time toward a single, uniform model. According to one group of prominent scholars --the "convergence school"-- dispersed share ownership and delegation to professional managers offers such efficiency advantages that, in an increasingly competitive global economy, U.S.-style corporations and corporate law eventually must triumph over other corporate forms, such as majority shareholder-dominated firms or state-run enterprises, in the Darwinian struggle for corporate survival. Perhaps the strongest contemporary statement of this thesis can be found in a recent article by Hansmann and Kraakman (2001). They argue that "as equity markets evolve in Europe and throughout the developed world ... convergence in most aspects of the law and practice of corporate governance is sure to follow" (Hansmann and Kraakman 2001: 468).

The convergence thesis has been challenged by an opposing school of scholars who argue that because corporations are institutions deeply rooted in their local political and social contexts, corporate governance is "path-dependent" -- starting from different points, different nations have evolved different corporate laws and corporate governance patterns (Bebchuk and Roe 1999; Milhaupt 1996; Licht 2001; Roe 2000).

It should be noted that the argument that corporate law is path-dependent does not necessarily imply that different nations cannot achieve good results, or even functionally similar results, through different institutions. For example, Coffee has suggested that "wholesale transplantation of common-law rules is not necessary" for dispersed shareownership to develop in other nations as other institutions, especially stock exchanges, "can potentially provide functional substitutes" (Coffee 2001a:11).

one can export the formal legal rules of one nation to another. Commentators have raised concerns about "transplant shock" -- the possibility that legal rules that work well in one nation may not work well, and ultimately may be rejected, in a nation with a different historical, political, or cultural background (Berkowitz et al. 2002; Milhaupt 2001: 2097-2102).

This essay explores the problem of transplant shock by focusing on an element of domestic context that has attracted little formal scholarly attention, but which may play an important role in determining the likely success of some types of legal transplants. This element might be labeled *local inclinations toward other-regarding behavior*. Although the meaning of this awkward phrase is explored in greater detail later, as an introductory matter it might be described as a tendency toward *cooperativeness, trustworthiness, concern for others*, or, more broadly, *altruism*.

This essay argues that altruistic behavior may play an essential, if poorly understood, role in the success of the American corporate governance system and the American public corporation.² In particular, altruistic behavior helps explain the otherwise-puzzling success of one of the most basic constructs of U.S. corporate law--the concept of fiduciary duty. Although the rules of fiduciary duty *in theory* require corporate officers, directors and controlling shareholders to refrain from using their power over the firm to benefit themselves at other corporate participants' expense, *in practice* these rules are open-ended standards that are only imperfectly and incompletely enforced by legal sanctions. Nevertheless, we observe a relatively

² The possibility of altruistic behavior is notably missing from most contemporary analyses of corporate governance, which generally assume that corporations are peopled by *homo economicus* -- purely selfish actors unburdened by moral constraints or concern for others. Nevertheless, there is reason to believe that other-regarding behavior may play a central role in successful corporate governance (Blair and Stout 2001).

high degree of compliance with fiduciary duty rules by U.S. corporate insiders.³ This compliance can be understood as a form of altruistic behavior--insiders often opt to "do the right thing," even in the absence of effective external rewards and punishments.

If this hypothesis is correct, a successful transplant of formal U.S. corporate law may depend, to a significant degree, on the extent to which we can expect the local population to exhibit a similar degree of altruistic compliance with fiduciary standards. To shed light on this complex problem, this essay explores some of the experimental evidence that has been compiled on the general phenomenon of altruistic cooperation with others. This evidence indicates that altruism is common, and that some degree of other-regarding behavior can be observed in a wide range of societies and cultures. It also suggests, however, that cultures differ significantly in their overall inclinations toward altruistic behavior.

This possibility hints at some potential obstacles that may be faced in exporting U.S.-style corporate law to different societies. Although there are likely many causes of transplant shock, cross-cultural differences in the incidence and determinants of other-regarding behavior may play an important role, especially in the case of open-ended legal rules, like fiduciary duty rules, that are difficult to enforce through external sanctions. Recognizing this reality can help us avoid some of the pitfalls to be encountered in exporting U.S.-style corporate law to other nations, and perhaps identify ways to increase the odds that a corporate law "transplant" will take.

³ See Black and Kraakman (1996: 1928-29): "Few American corporate managers doubt that they work for the shareholders" and "most managers in developed countries routinely follow laws of all kinds and think of themselves as law-abiding." See also Tyler and Blader (2002: 4), reporting results of empirical study concluding that "social motivations," including concerns for ethics and justice, were important determinants of rule-following behavior in two large U.S. financial firms.

Focusing on the phenomenon of altruistic behavior may also offer insights into the meaning and influence of the phenomenon that scholars often refer to, perhaps for lack of a more precise word, as "culture." As Licht et al. (2001:1) have recently observed, "the need to take culture into account in comparative corporate governance analysis is now widely acknowledged." But what do we mean by "culture"? And how does it influence behavior, including the behavior of corporate participants? Recent studies exploring these questions have focused on such factors as language and religion (Stulz and Williamson 2002), national crime rates and ethnic homogeneity (Coffee 2001b), or how local populations rank the importance of values like "autonomy" or "equality" in surveys (Licht 2001). Perhaps such variables are important causal factors in their own right. But they also may be proxies for a deeper phenomenon— local tendencies toward other-regarding behavior.

I. On Fiduciary Duties

As noted earlier, U.S.-style corporate law has been praised for offering superior protection to outside investors against insider opportunism. One of these supposed protections is the concept of fiduciary duty. It is a basic canon of American corporate law that the directors of the firm, its officers, and its controlling shareholders all owe the firm fiduciary duties of care and loyalty. The first sort of duty is said to require directors, officers and controlling shareholders to act with the care of the "reasonably prudent person." In other words, the duty of care discourages corporate insiders from behaving foolishly or negligently.⁴ The duty of loyalty supposedly provides further protection for minority investors by punishing managers and

⁴ See generally Clark (1986:123-140) for a description of the duty of care.

controlling shareholders who behave dishonestly. In particular, the duty of loyalty prohibits insiders from using their influence over the firm to line their own pockets through "looting" and other types of unfair self-dealing.⁵

At least, that is what fiduciary duties do in theory. In practice, both the duty of care and the duty of loyalty are rarely enforced through external sanctions. This is particularly obvious in the case of the duty of care, where the business judgement rule protects corporate managers from liability for breach of the duty of care for even the most foolish decisions, provided they have met the modest procedural requirement of having "informed" themselves before making a decision.⁶ In the unlikely event that the business judgement rule fails to provide complete protection from charges of negligence, U.S. corporate law permits (and corporations generally employ) a variety of other common arrangements--including D&O liability insurance, indemnification agreements, and charter amendments of the sort authorized by Delaware Code Section 102(b)(7)--to further reduce the already negligible risk that corporate directors or officers might ever actually pay damages for breach of the duty of care.⁷

The case for the toothlessness of the duty of loyalty is more subtle. When a manager or controlling shareholder steals from the firm by entering an interested transaction or taking a corporate opportunity, there is some positive probability that a court might someday hold the transgressor liable for breach of the duty of loyalty (although this probability is significantly reduced when the transaction is approved by the firm's disinterested directors, who are

⁵ See generally *ibid.* 41-157 for a description of the duty of loyalty.

⁶ See generally Stout (2002) for a discussion of the insulating effect of the business judgment rule.

⁷ Del. Code Ann., tit. 8, Sec. 102(b)(7); see Clark (1986: 664-674) for a discussion of indemnity and insurance.

themselves subject only to a duty of care analysis).⁸ What's more, the sorts of corporate arrangements commonly used to insulate corporate insiders from liability for breach of the duty of care -- indemnification agreements, exculpatory charter provisions, and so forth -- are often unavailable in loyalty cases.

Nevertheless, there remains a rather obvious problem, from a rational choice perspective, with relying on the duty of loyalty to deter insider opportunism. This problem is revealed when we consider the nature of the *remedy* imposed in loyalty cases. As a general rule the remedy for a breach of the duty of loyalty is to require the erring insider to return whatever it is of value that she has taken from the firm, either by paying a "fair price" in an unfair self-dealing transaction, or by turning over to the corporation any profits earned by stealing a corporate opportunity.⁹ In other words, the remedy for a breach of the duty of loyalty is to *make the insider return what she has stolen*. Given any realistic chance that a loyalty violation might not be detected or punished (and given the cost of monitoring, the squishiness of concepts like "fair," the vagaries of the civil justice system, and availability of offshore banking accounts, there is always such a chance), the end result is innumerable circumstances where rational and purely self-interested corporate insiders might calculate they can profit from self-dealing.

Common law rules of fiduciary duty, which on first inspection seem to protect minority shareholders from insider opportunism, look more like legal fig leaves to the informed observer. In theory, corporate insiders who shirk and steal are liable for damages. In practice, damages are rarely imposed, and are usually inadequate in amount when they are.

⁸ Del. Code Ann., tit. 8, Sec. 144(a)(1).

⁹ Clark (1986: 175, 224).

Of course, corporate officers, directors, and controlling shareholders may also sometimes be deterred from behaving opportunistically not only by legal sanctions but by what might be called "market sanctions" -- if a breach of fiduciary duty is detected, they may lose their present positions, and future business and employment opportunities as well. Similarly, legal scholars in recent years have suggested that corporate insiders may also tend to follow fiduciary duty rules out of fear of "social sanctions" that might be imposed by third parties (public expressions of disapproval, social shunning, and so forth) (Rock 1997; Skeel 2001). Perhaps when the possibility of market and social sanctions is added to the rather-dim prospect of legal sanctions, breach of fiduciary duty is punished sufficiently in the U.S. to discourage even a rational and purely selfish insider from behaving carelessly or disloyally.

This hypothesis cannot be rejected *a priori*. Yet certain realities of the business world suggest that in many situations, market sanctions and social sanctions, alone or together, may not have enough deterrence value to keep purely selfish corporate insiders from breaching their duties of loyalty and care. For example, the fear of a tarnished business reputation might well discourage a relatively-junior corporate executive in her thirties or forties from shirking, or from trying to reap a personal profit from interested transactions with her firm. However, the typical board Chair or Chief Executive Officer (CEO) is an individual in her late fifties, sixties, or even seventies. As a result, she enjoys control over millions of dollars in corporate assets in an "endgame" situation where the profits that can be reaped from opportunistic behavior may substantially outweigh the value of spending a few more years in her present position.¹⁰

¹⁰ For example, although Kenneth L. Lay was pressured to resign at age 59 from his position as Chairman and CEO of Enron in the wake of allegations of fraud and mismanagement, he made more than \$100 million from the sale of Enron shares the year before he resigned (Norris and Barboza 2002).

Similarly, before one assumes that the fear of social sanctions plays an important role in motivating corporate insiders to behave loyally and carefully, one might ask why a purely self-interested person would care about others' opinions so much they would pass up the opportunity to expropriate vast amounts of wealth.¹¹ One might also ask for evidence that social sanctions actually are applied to individuals who breach their fiduciary duties. Corporate insiders accused of actual crimes, like securities fraud, sometimes suffer notoriety. But a charge of breach of fiduciary duty through negligence or self-dealing seems far less likely to trigger social disapproval, or even much attention. And even in criminal cases, corporate wrongdoers often seem to keep their friends, families, and country club memberships.¹²

A careful analysis consequently gives rise to a suspicion that in the U.S., external sanctions alone -- including not only legal sanctions, but also market and social sanctions -- may be inadequate to explain why corporate insiders largely refrain from exploiting minority shareholders. From the perspective of the cold and calculating individual, breach of fiduciary duty often pays.¹³ If this hypothesis is correct (and I ask the reader to assume it is, if only for purpose of discussion) an interesting puzzle emerges. If the American corporate governance system encourages corporate insiders to act like careful and loyal fiduciaries, it somehow does this despite the fact that it gives those insiders rather little external incentive to behave carefully

¹¹ For a further discussion and critique of the social sanctions argument, see Blair and Stout (2001:1795-96) and Stout (2002: 682).

¹² For example, perhaps the highest-profile securities fraud case of the late twentieth century was the case against Michael Milken, who eventually served 22 months in jail. Today Michael Milken has a personal fortune of nearly one billion dollars and is a sought-after speaker, author, and philanthropist (Cohn 2000).

¹³ See Byrne et al. (2002:70), observing a sense that "no matter how serious their failure or how imperiled the corporation, those in charge seem always to walk away vastly enriched, while employees and shareholders are left to suffer the consequences of the top managers' ineptitude or malfeasance", and France (2002:33), noting that "[e]xecutives almost never go to jail for cheating shareholders ... [and they] rarely ...face financial penalties."

and loyally.

How has this system managed to work well enough that it is viewed as a paragon of protection for minority shareholders? The answer may be that U.S. corporate insiders often behave like fiduciaries not because of external constraints, but because of *internal* ones. Elsewhere, Margaret Blair and I have argued at length that in successful firms, corporate participants (including directors, officers, and controlling shareholders) tend to adopt norms of cooperation and legal compliance and follow them, to at least some extent, even when a failure to do so would be unlikely to be punished adequately (Blair and Stout 2001). In lay terms, corporate insiders act like fiduciaries not only because they fear external sanctions, but also because they have internalized a sense of obligation or responsibility toward others, including that abstract other, "the firm and its shareholders."

Space constraints preclude a full review of that argument here. Suffice it to say that if this hypothesis is true, perhaps the American corporation can trace its success not only to American corporate law, but to the Americans themselves.

II. On Other-Regarding Behavior

More than a century ago, Alexis de Tocqueville offered the following insight into American social life:

The Americans ... are fond of explaining almost all the actions of their lives by the principle of self-interest rightly understood; they show with complacency how an enlightened regard for themselves constantly prompts them to assist one another and inclines them willingly to sacrifice a portion of their time and property to the welfare of the state. In this respect I think they frequently fail to do themselves justice...(de Tocqueville 1834: Book II, Chapter 8)

Whether or not de Tocqueville's observations were accurate in the nineteenth century,

there is much evidence that they are accurate today.¹⁴ Americans frequently behave in a cooperative, altruistic fashion toward each other, and frequently sacrifice their own interests to serve broader social goals. Although they may believe their other-regarding behavior is driven by self-interest, an external observer could conclude otherwise. Americans frequently incur costs themselves in order to help others. In the language of rational choice, Americans display *other-regarding revealed preferences*.

To the reader who has studied economics, my use of the adjective "revealed" to modify the noun "preferences" is an immediate clue that I am not discussing people's subjective motivations, desires, or yearnings. Rather, I am discussing how they actually behave. The fact that people often *act* as if they want to help others does not prove that they experience *feelings* of altruism. One can hypothesize any number of motivations that might lead a rational individual to conclude that she will feel better off, subjectively, if she sacrifices to benefit someone else. People may sacrifice for others to avoid the pangs of guilt, to experience the pleasure of feeling good about themselves, or because they hold a religious belief that they will receive a reward in the sweet hereafter. The point is that such motivations and incentives for apparent altruism are internal. From an external perspective, self-sacrifice makes the sacrificing party worse off. Hence self-sacrificing behavior "reveals a preference" for helping others, instead of a preference for helping only oneself.

Extensive empirical evidence documents that most Americans do, in fact, reveal other-

¹⁴ There is an extensive literature on altruistic behavior and its role in social organization. For some useful introductions, see Fukayama (1995) for a discussion of the role of cooperative behavior in economic development; Sober and Wilson (1998) on evolutionary and cognitive theories of altruism; Tyler (1990) on the importance of willing compliance with and internalization of legal rules; and Mansbridge (1990) on the general nature and importance of altruism.

regarding preferences, and on a regular and predictable basis. The literature on altruistic behavior is vast (see, e.g., Fukayama 1995; Sober and Wilson 1998; Tyler 1990; Mansbridge 1990), and I will not attempt a general survey here. Rather, I will focus on an especially compelling, persuasive, and useful subset of that evidence. This is the empirical evidence that can be found in over four decades of published studies on human behavior in a type of experimental game known as a "social dilemma."¹⁵

Social dilemmas are experiments intentionally designed to ensure that each experimental subject's self-interest conflicts with the interests of the other subjects. A typical example is the "Give Something Game."¹⁶ In the Give Something Game, a group of n subjects is provided with an initial monetary stake. Subjects are then told that they can choose one of two strategies for playing the game. The first strategy is simply to keep their stake for themselves. In the parlance of experimental gaming, this is called "defecting." The second strategy is to donate some or all of their stake to a common investment pool. This is called "cooperating." Subjects are instructed that any money donated into the pool will be multiplied by some factor of $(n-1)$ or less, and redistributed among the players. But--here's the catch--the money in the pool will be distributed among the players *pro rata* whether they chose to contribute or not.

As an example, consider a Give Something game with four players who are each given \$10 and told that any money donated into the common pool will be doubled and distributed *pro*

¹⁵ Much of the literature on altruism is theoretical or anecdotal in nature, or presents the results of idiosyncratic studies that have not been replicated. However, the social dilemma literature is both extremely well-developed and empirically grounded, and so I have focused on that literature here. It should be noted that the social dilemma results are consistent with the broader literature.

¹⁶ As a hint of the relevance of this type of experiment to business behavior, it is perhaps worth noting that the Give Something game is also sometimes called the "Investment Game".

rata. Consider for a moment how a purely selfish actor like *homo economicus* would play this game. The answer is obvious--a purely selfish player would always choose to defect and keep her \$10, hoping to benefit as well from any money other players might be foolish enough to donate to the common pool. If all the players do this, each leaves with only \$10. If all cooperate, each leaves with \$20. If three out of four cooperate and the fourth defects, the three cooperators leave with \$15 and the defector leaves with \$25.

A social dilemma game like the Give Something game thus creates a payoff structure similar to the familiar Prisoners' Dilemma of game theory. The best group outcome requires all the players to cooperate. Unfortunately, no matter what the other players do, each individual player always maximizes her own payoffs by choosing to defect. Thus cooperation is an altruistic act that benefits others, while simultaneously imposing a cost on the cooperating player.

What do real people do in social dilemmas? At this point, social scientists have published the results of hundreds of studies, run over a period of nearly half a century, in which U.S. subjects have been asked to play social dilemma games (Dawes 1980; Dawes and Thaler 1988; Dawes et al. 1990; Sally 1995). The behavior described in these studies is remarkably consistent. On average, *U.S. subjects contribute approximately 50 percent of their initial stake in a social dilemma game* (Dawes and Thaler 1998: 89; Sally 1995: 62).

It is important to emphasize that this result is observed even when experimenters go to great lengths to ensure that the subjects in the game understand that they will receive no extrinsic reward or recognition for cooperating. For example, many social dilemma experiments involve games played by strangers who are told that they will play only once, and who are assured that

their choice of strategy will not be revealed to either the experimenter or their fellow players. (This structure eliminates any possibility of social disapproval or vengeful "tit for tat") (Sally 1995: 65, 67). Moreover, experimenters in a number of studies have "debriefed" their subjects after play to determine whether they understood the payoff function in the game. They have found that subjects do, in fact, understand that cooperation reduces their own payoffs (i.e., cooperation is an altruistic act) (Sally 1995: 70). Again, this finding does not amount to proof of *psychological* altruism, meaning that people truly care about others' welfare. But it does provide persuasive evidence of *behavioral* altruism--whether or not people care about others, they often *behave as if they do*.

III. On Other-Regarding Revealed Preferences and Fiduciary Duties

What does this have to do with U.S. corporate law? To understand the strength of the connection between corporate governance and other-regarding behavior, let us return again to the concept of fiduciary duty, and particularly the example of the fiduciary duty of loyalty. The keystone of the duty of loyalty is the legal obligation that the fiduciary use her powers not for her own benefit but for the exclusive benefit of her beneficiary. It is highly improper-- indeed proscribed-- for a fiduciary to extract a personal benefit from her fiduciary position without her beneficiary's consent, even when she can do this without harming the beneficiary (Blair and Stout 2001: 1782-1783).

The duty of loyalty thus can be described *as a legal exhortation that a fiduciary reveal an other-regarding preference function* (ibid.: 1783). Regardless of their own subjective

motivations and desires, fiduciary law commands fiduciaries to *act as if* they want to improve their beneficiaries' welfare, and are indifferent to their own. This insight sheds light on the rhetoric courts often apply in duty of loyalty case. Consider the oft-cited chestnut from Judge Cardozo's opinion in *Meinhard v. Salmon*:

Many forms of conduct permissible in a work a day world for those acting at arms length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the marketplace. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior...*Salmon had put himself in a position in which thought of self was to renounced, however hard the abnegation.*¹⁷

From a rational choice perspective, Cardozo's claim that Salmon as a fiduciary ought to have "renounced" all "thought of self" makes no sense. *Homo economicus* cannot renounce thought of self. Self is all that interests her, all that motivates her.¹⁸ The rational choice model consequently implies that if we want someone to behave like a fiduciary, the best we can do is to try to harness her self-interest by designing compensation and liability rules (carrots and sticks) that will lead her to conclude that any decision that benefits her beneficiary necessarily benefits herself, and any decision that harms her fiduciary necessarily harms herself. Without such external incentives, there is no reason for a purely self-interested actor to behave like a loyal and careful fiduciary.

Yet as we have already seen, there is reason to suspect that U.S. corporate law does not (and perhaps cannot) provide the fine-tuned incentives that would motivate purely selfish corporate insiders to do a good job of serving the interests of the firm and its outside

¹⁷ 163 N.E. 545, 546-48 (N.Y. 1928) (Emphasis added).

¹⁸ In theory, one can modify rational choice theory to take account of the possibility that people have altruistic preferences (get pleasure from helping others). In practice, most rational choice analysis and most corporate governance discussions implicitly assume that corporate insiders and other individuals care only about their own welfare, narrowly defined.

shareholders.¹⁹ Market sanctions and social sanctions may only begin to fill the gap. Despite this worrisome possibility, we nevertheless expect corporate officers, directors and controlling shareholders to behave like other-regarding fiduciaries. What's more, corporate insiders for the most part seem to behave this way, or at least often enough that U.S. corporate law is regarded as providing superior minority shareholder protection. Somehow, insiders have managed -- at least to some extent -- to internalize "norms" of cooperation and trustworthiness that prompt them to behave in an other-regarding fashion (that is, to confer benefits on or refrain from imposing costs on others, even when this requires some degree of self-sacrifice). This is not to say that corporate insiders in the U.S. never shirk or steal. The point is that they do not seem to shirk or steal nearly as much as they might.

This kind of cooperative effort and self-restraint can be described as a form of altruistic behavior. Corporate insiders who work harder than they must, and refrain from stealing when they might, are behaving in an other-regarding fashion, even though the "other" in this case may be an abstract group like "the shareholders," or even an abstract ideal like "do the right thing." The result of such seemingly-irrational self-restraint and cooperation is a thriving corporate

¹⁹ In addition to using fiduciary duty rules to threaten corporate insiders with legal punishments, one can use contract rules to try to design compensation systems that offer rewards. However, it turns out to be almost as difficult to design good "carrots" as effective "sticks." Although corporate directors and officers are often paid handsomely, there is at best only an indirect connection between their pay and how well they actually perform their roles. As an example, consider the case where the connection between pay and performance is probably tightest--the CEO. In the U.S., CEOs receive the lion's share of their compensation in the form of stock and stock options. Yet the value of such packages depends on a host of variables outside the CEO's control (most obviously, general stock market trends, as determined by interest rates and the larger economy). Moreover, there are ways a CEO can manipulate stock prices to benefit herself while simultaneously harming the firm and its shareholders -- in the extreme, by cooking the books.

The connection between pay and performance is weaker still for lower-level executives and directors, who can free-ride on their peers' efforts. And while majority shareholders might benefit from a rise in stock price (which also benefits minority shareholders), they can also benefit from simply appropriating the firm's wealth (which hurts other stockholders). Thus, in the complex and uncertain world of business, it is impossible to draft complete contracts that perfectly "bond" corporate insiders' interests to those of the firm and its minority shareholders.

sector that generates wealth for directors, officers, and shareholders alike. In other words, American business life may resemble a social dilemma experiment, and the behavior we observe in business may often resemble the behavior we observe in social dilemmas. At the level of the individual, altruism is irrational. At the level of the group, it is highly advantageous.

If this thesis is true, it immediately raises the question of whether the patterns of self-sacrificing, cooperative behavior observed in American public corporations (and American social dilemma games) can be expected to be found outside our borders. A recently published study hints at some interesting possible answers.

IV. On Other-Regarding Behavior Abroad

As noted above, an extensive body of literature documents how subjects behave in social dilemma games. One of the limitations of this literature, however, is that it is almost entirely comprised of studies of U.S. subjects, usually university students. As a result it remains something of an open question whether the other-regarding behavior observed in U.S. social dilemma experiments is representative of human behavior generally, or whether it departs significantly from what we would find elsewhere. Would cross-cultural study find significant differences in other-regarding behavior?

Until recently, very little direct evidence could be brought to bear on this question. In May of 2001, however, a study was published in the *American Economic Review* by a collaboration of prominent business, economics, and anthropology scholars (Henrich et al., 2001). These researchers conducted a cross-cultural study in which they arranged for subjects from fifteen small societies scattered across the globe to participate in a variety of experimental

games. The cultures tested ranged from foraging groups, to nomadic herders, to agricultural communities.²⁰ Most experiments were structured so that the subjects played anonymously, for stakes that approximated a day or two's wages in the local economy. Experienced field researchers recruited the subjects, tested them to ensure that they understood the nature of the game they were playing, and eliminated players who did not appear to grasp the game (Henrich et al. 2001:74).

Social dilemma games were among the games studied. In particular, Henrich et al. arranged for social dilemma games to be played by subjects drawn from seven of the fifteen cultures studied. They reported two very interesting general results.

First, altruism appears to be a widespread, and indeed possibly universal, behavioral phenomenon. In each of the seven societies in which social dilemma games were administered, cooperation rates were significantly above the null hypothesis of zero. The researchers also administered another game designed to test for other-regarding behavior, known as the "ultimatum game," in each of the fifteen societies studied, and observed other-regarding behavior in each. In their own words, the authors concluded that "the canonical model (of self interested behavior) is not supported in any society studied" (Henrich et al. 2001:73).

A second important general finding of the study, however, was that while none of the cultures conformed to the neoclassical model of rational selfishness, they nonetheless showed

²⁰ It can be argued that such societies differ far more from U.S. culture than the cultures of developed nations do. Interestingly, a cross-cultural study of behavior in ultimatum games played by university students in Israel, Japan, the U.S., and the former Yugoslavia provides some support for this hypothesis, because it found evidence of cross-cultural differences in other-regarding behavior in ultimatum games, but on a smaller scale than was found by Henrich and his colleagues (Roth 1992; see also Henrich et al. 2001: 74-75). Transplant shock due to differences in the incidence and determinants of other-regarding behavior accordingly may be more of a concern in the case of developing nations such as Korea or Brazil, than in the developed world.

significant differences in the incidence of altruistic behavior. For example, cooperation rates in social dilemma games ranged from a low of 22 percent among the Machiguenga of the Peruvian rainforest, to a high of 58 percent among the cattle-herding Orma of Kenya (Henrich et al. 2001:75, 76). In ultimatum games, the researchers observed similar and parallel differences between cultures in the incidence of other-regarding behavior.²¹

It is of course risky to reach conclusions about cross cultural differences based on a single study, no matter how carefully done. It is to be hoped that social scientists will undertake more studies of this sort that will provide further information. In the meantime, however, these results strongly suggest (1) that other-regarding behavior can be observed in other cultures, and (2) that the incidence of such behavior varies from culture to culture.

Such findings undermine the prospect that we can transplant U.S. corporate law rules to other nations and, without more, produce the relatively cooperative and other-regarding behavior we see among corporate participants in the U.S. This is not to say that a low incidence of cooperation in social dilemma games among a particular population necessarily implies a low incidence of compliance with fiduciary duty rules. Perhaps the Machiguenga, who are relatively ruthless in social dilemma and ultimatum games, would behave like model citizens in the corporate context. Similarly, if the Orma of Kenya were installed in corporate headquarters, they might act in such a shamelessly self-interested fashion as to make Gordon Gekko blush. But evidence of cross-cultural differences in altruistic behavior in experimental games suggests just that--cross cultural differences do exist.

Which leads to the question, what is their source? Why do some populations tend to

²¹ For example, the Machiguenga of Peru on average offered to share only 26 percent of their stakes with their partner in an ultimatum game, while the average Orma shared 44 percent (Henrich et al. 2001:74).

cooperate more in social dilemma games, while other populations cooperate less? It would be extremely useful to know the answer, for at least two reasons. First, if we can understand why some populations cooperate more than others in social dilemma games, we may be able to gain a better understanding of the sorts of societies in which corporate participants might comply voluntarily with open-ended fiduciary duty rules even when these cannot be well enforced. Put differently, we may be able to better distinguish cultures which are likely to accept a transplant of U.S. corporate law, from cultures which are likely to reject it. This might allow would-be reformers to avoid some costly mistakes.

Second, if we can identify the determinants of altruistic behavior, these may prove to be variables policymakers can influence or change. This raises the hopeful prospect that a society that otherwise might be prone to reject a transplant of other-regarding fiduciary duty rules, might be transformed into a society in which cooperative compliance with such rules becomes more likely.

V. On Some Causes of Other-Regarding Behavior

Thus there is much to be gained from identifying the causes of other-regarding behavior. The balance of this essay is devoted to considering this question, as well as some of the policy implications that flow from different theories of causation. My remarks are necessarily speculative and preliminary, as no predominant theory of the cause of altruism has emerged in the literature, and one is unlikely to emerge until after much further study. Nevertheless, the limited evidence available suggests at least three possible sources of the behavioral variations experimenters observe in social dilemma experiments: (1) genetic differences (“nature”); (2) past

environment (“nurture”); and (3) present social environment (or, perhaps, “culture”).

A. Nature

Let us first consider the possibility that cross cultural differences in altruistic behavior have a biological basis. In particular, let us consider the possibility that cooperative behavior has its origins in an important subcategory of biological causes--genetics.²²

A significant body of evidence supports the claim that altruism is “genetic” in the sense that evolutionary pressures have caused *homo sapiens*, like many other social species, to develop a capacity for behavior that decreases evolutionary fitness at the individual level while increasing the evolutionary fitness of the group.²³ The more interesting question, however, is whether this capacity for altruism is uniform in the population (almost everyone has a genetic capacity for other-regarding behavior, just as almost everyone has two legs), or whether we can expect to see significant differences among individuals in genetic predisposition to cooperate (some people are predisposed to cooperate while others are predisposed to defect, just as some people have light eyes and others have dark eyes).

As an empirical matter, it should be noted that there is considerable formal (not to mention informal) evidence to suggest that individuals vary considerably in their predispositions to cooperate. As an example, consider the finding that U.S. subjects who play social dilemma games with strangers contribute, on average, about half their initial stake. This average turns out

²² Differences in behavior can have a biological cause without being genetic in origin. For example, someone may become aphasic (unable to speak) as a result of head trauma even though he has the genetic potential for speech and could speak prior to the injury.

²³ For a comprehensive review, see Sober and Wilson (1998).

to be a blend of two modes of behavior: many subjects contribute their entire stakes, while many others contribute nothing.²⁴ Thus U.S. subjects tend to divide into two camps, those who contribute everything and those who freeride on the contributor's efforts.

Could such choices have a genetic origin? One can easily imagine a “cooperator” gene that causes individuals who carry the gene to be predisposed to altruistic cooperation, while individuals who lack this gene are predisposed to selfishly defect. Although this hypothetical example of genetic influence is so grossly oversimplified it would make a geneticist wince,²⁵ I nevertheless offer it (with due apologies to the field of genetics) to illustrate a simple point: some of the differences we observe in other-regarding behavior among individuals may be inherited.

What are the implications of this hypothesis for comparative corporate law? Pessimistic, one can argue, because it raises the possibility that the cross-cultural behavioral differences in altruistic behavior reflect differences in gene pools (e.g., the proportion of genetic “cooperators” found in the local population).²⁶ If this is true, and if the success of the U.S. corporate governance system depends on altruistic compliance with underenforced rules, it seems plausible that U.S. law will not work well in societies where the population has little or no genetic

²⁴ “Typical distributions of public goods games contributions with students have a U-shape, with the mode at contributing nothing, a secondary mode at full cooperation, and mean contribution between 40 and 60 percent.” Henrich et al. (2001: 75).

²⁵ For a friendly introduction to the complexities of genetics and heritability and how these interact with environmental influences, see Dennett (1995).

²⁶ To return to the oversimplified example offered earlier, the idea here is that if the cooperator gene is present in different proportions in different populations, populations with a large proportion of genetic “cooperators” would display more altruism in social dilemma games (and possibly in firms) than populations with a higher proportion of genetic “defectors.”

predisposition toward altruism.²⁷ Moreover, because population genetics change slowly over periods of generations, this is likely to remain true for the foreseeable future.

B. Nurture

Given the pessimistic implications of a genetic explanation for other-regarding behavior, it is perhaps good news that, while a genetic cause cannot be excluded, considerable empirical evidence suggests that nature is not the only or even the most significant factor in determining the incidence of altruistic behavior. To the contrary, nurture may matter more.

Consider an interesting result that has been frequently observed in social dilemma games played among university students in the U.S.: economic majors cooperate, on average, far less than non-majors (Sally 1995: 62-63). A famous example can be found in an early study by Marwell and Ames (1981: 306-07) which reported the results of a series of social dilemma games in which cooperation rates averaged between 40 and 60 percent. There was, however, a notable exception to this pattern. In a series of games played by economics graduate students, the cooperation rate averaged only 20 percent. Put differently, economics graduate students seem even less cooperative than the Machiguenga.

Why do economics majors cooperate so much less than other students? At least two explanations come to mind. First, something about the study of economics may attract individuals who are predisposed to behave self-interestedly. (One can see how the study of *homo economicus* might especially appeal to *homo economicus* himself). Thus the low rates of

²⁷ Conversely, populations with a greater genetic predisposition toward altruism may do even better with the U.S. corporate law than U.S. citizens do; perhaps we should install the Orma in corporate headquarters, after all.

cooperation observed among economics majors playing social dilemmas stems from selection bias: defectors are more likely to study economics than cooperators.

The second possibility is that economics majors begin their studies just as cooperative as the next person. However, something about process of studying economics changes their behavior compared to their peers', decreasing their relative willingness to behave altruistically. Put differently, economics courses somehow turn cooperators into defectors.²⁸ Although there are a number of mechanisms by which environment can influence behavior, in the case of an intelligent and speaking species like *homo sapiens*, one of the more significant influences may be one's own past experiences and the experiences described by others. In lay terms, cooperation and defection may be learned behavior.

A decade after Marwell and Ames published their results, Frank et al. (1993) set out to shed further light on the question of why economics majors cooperate less than nonmajors. They administered a series of social dilemma games to university students at varying stages in their educational careers. They found that while both economics majors and nonmajors began their undergraduate studies equally willing to cooperate, over time economics majors' cooperation rates stayed stable. Meanwhile, the cooperation rates of other students *increased*. This result suggests both that cooperation may be learned (undergraduates become more altruistic with each year of study), and that studying economics somehow interferes with this learning process.²⁹ The bottom line, Frank et al. concluded, was that the differences in

²⁸ This possibility has implications for those who value the altruistic qualities of their friends and companions: the slogan "friends don't let friends study economics" comes to mind.

²⁹ Ultimatum game studies also suggest that other-regarding behavior increases with age. A example can be found in an experiment reported by Camerer and Thaler (1995). In this experiment, kindergarten students were asked to play an ultimatum game with M&Ms. They behaved much more like *homo economicus* than adult subjects do, leading Camerer and Thaler to speculate that "the tendency [to behave in an other-regarding fashion] is

cooperativeness they observed between economics majors and nonmajors “are caused in part by training in economics” (Ibid.: 170).

If a predisposition to cooperate with strangers is indeed caused largely by environmental factors, and particularly if it is a learned behavior, it will be acquired only under favorable conditions. Those conditions may include explicit lessons about the value of altruistic cooperation that are taught by authorities such as parents, teachers, and religious leaders. (Conversely, behavior may also be influenced by explicit lessons concerning the virtues of self-interest. Almost every introductory economics course at some point recites Adam’s Smith’s parable of the invisible hand, and one wonders if economic students are taking such sermons too much to heart.) They may also include the implicit lessons of one's own experience in past social interactions. As the social dilemma game illustrates, “irrational” cooperation often produces a better outcome for a group and its members than “rational” defection does. Individuals who frequently participate in cooperative group activities may learn habits of cooperation that make them more likely to cooperate with strangers in novel situations as well.

This hypothesis was indirectly tested by Henrich et al. (2001: 75-76) in their comparative study of cooperative behavior in fifteen small societies. To help identify the determinants of other-regarding behavior, the authors regressed the cooperation rates they observed in experimental games on a variety of individual subject characteristics, including age, sex, and relative wealth. But they also regressed their findings on two group variables. The first group variable was a rank-order measure of the importance of cooperation to daily economic production in the society studied. For example, Lamelara whale-hunters rank high on this

learned...” (ibid.: 217).

scale,³⁰ while the Machiguenga, who are economically independent at the family level, rank low. The second group variable was a rank order of market integration, meaning how frequently people participated in market exchanges with strangers. The more frequently subjects participated in markets, the higher the ranking.

The results of the regression revealed that these two group variables predicted *nearly 70 percent* of the variance observed in the subjects' cooperative behavior. In contrast, the individual variables of age, sex, and relative wealth were not statistically significant (ibid.:76). This finding indicates that altruistic cooperation in experimental games is highly correlated with past social patterns. People who have often cooperated with others in their daily economic lives are more likely to cooperate with strangers in an experimental game as well.

What are the implications for comparative corporate governance? They are at least a bit more optimistic than the implications of a genetic explanation for differences in altruism. How much more optimistic depends, in large part, on how easily and how quickly a predisposition for cooperation or defection can be acquired. If the learning process is quick, it seems possible that a society in which altruistic cooperation with strangers is uncommon might be shifted relatively easily toward cooperation (the emphasis here is on “relatively”) simply by exposing the populace to new situations in which cooperation proves beneficial.³¹ If, on the other hand, the learning process is slow and incremental— if cooperation and defection are habits that tend to last a lifetime— we again are likely to be faced with situations where a transplant of open-ended fiduciary duty rules to a society where other-regarding behavior towards strangers is uncommon

³⁰ Just try hunting a whale by yourself.

³¹ This observation conjures up the image of development agencies funding an army of field researchers to recruit entire populations to play social dilemma games.

is unlikely to significantly change behavior. The best we can hope for is to avoid such mistakes.

C. Culture

So far, the discussion has been cast in terms of a tension between nature (genetics) and nurture (learning) as potential explanations for differences in cooperative behavior among individuals and societies. This is well-known terrain, and many intellectual battles have been fought over it, including battles over the source of differences in intelligence, criminality, and so forth.³² But to understand the causes of altruistic behavior we may need to explore less-familiar territory as well. In addition to nature and nurture, there is a third and more subtle possible source of differences in altruistic behavior that merits consideration. This third source might be described generally as *present environment* (to distinguish it from past environment, which influences learning). More particularly, it might be called *present social context*. As will be seen, this concept may come as close as any to capturing what most people mean when they refer to “culture.”

To understand how present social context (as opposed to basic personality, whether innate or acquired) may influence cooperative behavior, let us return to the finding that U.S. subjects exhibit an average 40 percent to 60 percent cooperation rate in social dilemma games. This average obscures the fact that subjects' behavior in social dilemmas can easily be changed. In particular, experimenters can increase or decrease cooperation rates dramatically by manipulating certain variables. This effect is so strong that studies have reported cooperation rates among U.S. subjects as low as 5 percent and as high as 95 percent (Sally 1995: 62, 71). It

³² For a recent example, see Dickens and Flynn (2001).

is important to bear in mind that in *all* of these studies, payoffs were structured so that a rationally selfish player would choose to defect. Nevertheless, in some cases virtually all the subjects chose cooperation, while in others almost all defected.

Such results cut against the notion that individuals tend, whether by nature or nurture, to divide into permanently fixed personality types (e.g., “cooperators” and “defectors”). True, different individuals seem more or less predisposed to cooperate in a social dilemma situation.³³ But at least in the U.S., almost everyone—even economics majors!—seems capable of other-regarding behavior, in the right circumstances. Similarly, almost everyone seems capable of behaving selfishly, in the right circumstances.

What are “the right circumstances”? Why would the same person cooperate in one social dilemma game, and defect in another? At this point, the evidence strongly indicates that cooperation rates in social dilemmas are largely determined by *social context*.³⁴ Put differently, cooperation rates are largely determined by experimental subjects' perceptions of *other people*, including such matters as: the subjects' beliefs about what other people expect; the subjects' beliefs about what other people want; the subjects' beliefs about what other people's payoffs will be; and the subjects' beliefs about how other people are likely to behave.³⁵ *Homo economicus*

³³ As noted earlier, even when faced with the same social context, some U.S. subjects cooperate more than others. Thus, by selecting “cooperative” personalities, researchers can get higher cooperation rates (Alcock and Mansell 1977).

³⁴ A statistical analysis of over 100 reported studies found that while cooperation rates in social dilemmas were somewhat negatively correlated with the magnitude of the subjects' personal benefits from defecting, “all the other variables that should affect a selfish decider are either not meaningful or have the opposite sign,” and a variety of social variables that should be irrelevant to selfish subjects were quite important (Sally 1995: 77).

³⁵ Although social context is highly important in determining cooperation rates among U.S. subjects, it should be noted that cooperation rates can be changed by manipulating two other factors as well. The first is the subjects' predispositions or “personalities” (see note 33). The second factor or variable is the personal cost of cooperation to the player. Studies have found that as the personal cost associated with adopting a cooperating strategy in a social dilemma increases, cooperation rates decline (Sally 1995: 75-76). Put differently, people seem

would be utterly indifferent to such matters unless they changed his own payoffs. *Homo sapiens* seems keenly interested in them.

As an example, let us consider a social variable that has proven highly significant, in a statistical sense, in determining cooperation rates. This variable is the experimenter's requests. Put simply, subjects in social dilemma games tend to do what an experimenter asks them to do. If the experimenter asks them to cooperate, they cooperate; if the experimenter suggests they defect, they defect (Sally 1995: 78). A purely selfish person would ignore such requests, because they do not change the fact that defecting offers superior payoffs. Nevertheless, we see large changes in behavior in response to mere intimations about the experimenter's desires. In one experiment, for example, researchers presented subjects with a social dilemma game they called the "Community Game," and observed a cooperation rate of approximately 70 percent. They then presented similar subjects with the same game, but called it the "Wall Street" game. The cooperation rate dropped to 33 percent (Ross and Ward 1996: 106-107).

A variety of other social variables have proven similarly important in determining cooperation rates among U.S. subjects in social dilemmas. Examples include a subject's perception of how much her cooperation will benefit others (the greater the benefit to others, the greater the likelihood of altruistic cooperation) (Sally 1995: 79); whether the subject feels a sense of common social identity with the other players (subjects randomly divided into subgroups cooperate more with members of their own "in-group" than with members of their

more inclined toward other-regarding, "nice" behavior when it doesn't cost them too much.

What does this tell us about the circumstances under which we might expect U.S. style fiduciary duties to work? Most obviously, there is value to legal enforcement of fiduciary duties, especially the duty of loyalty. If corporate directors and shareholders are free to steal from the firm without fear of sanction, then the opportunity cost of other-regarding behavior increases, and the incidence of other-regarding behavior will likely decrease.

“out-group”) (ibid.: 78-79); and whether a subject expects her fellow players to cooperate or defect (if a player believes her fellow players will "play nice," she is far more likely to "play nice" herself) (Dawes 1980:187). Again, none of these matters would interest a purely selfish person. Nevertheless, each significantly influences the incidence of cooperative behavior.

Such findings paint something of a Jekyll-and-Hyde portrait of human nature. Most people appear to have at least two distinct personalities. One is cooperative and other-regarding; the other purely selfish. Which personality emerges in a particular situation is heavily influenced not only by predisposition (whether a product of nature or nurture) but also by social context— our perceptions of the needs, expectations, identities, and likely behavior of those around us.

V. On Fiduciary Duties, Again

These observations offer some useful lessons about how we might best go about exporting the notion of fiduciary duty to other nations. One of these lessons is that, even in a society where other-regarding behavior is common, corporate insiders will be unlikely to behave like fiduciaries if the local social context does not support such altruistic behavior.

As an example, let us return to the finding that U.S. subjects are highly responsive to experimenters' requests in social dilemma games. This finding suggests that, if we want to encourage individuals to follow imperfectly-enforced corporate law fiduciary duty rules, it might be extremely useful to find some person or organization that enjoys the sort of authority enjoyed by the experimenter in a social dilemma game, both to "instruct" them that they ought to behave

in an other-regarding fashion, and to explain exactly which "other" they ought to be serving.³⁶ Interestingly, a number of corporate theorists have suggested that this is the role played by the Delaware Chancery and Delaware Supreme Court, whose judicial opinions encourage corporate insiders to serve the interests of the firm and its shareholders not primarily by threatening them with the prospect of personal liability, but by offering "sermons" on the proper department of corporate officers, directors, and controlling shareholders.³⁷ Similarly, a legal transplant of U.S.-style fiduciary duty rules to another culture may be more likely to "take" if we can enlist the help of a respected local authority—which might, or might not, be a court—to perform a similar sermonizing function.

The possibility that social context is an important determinant of altruistic behavior also sheds a more optimistic light on the question of whether one can successfully transplant open-ended fiduciary duty rules to cultures in which altruistic behavior is relatively rare and uncommon. This is because, so long as other-regarding behavior is not completely lacking in a particular society (and even the Machiguenga have a positive cooperation rate in social dilemmas), we can hold out hope that altruistic compliance with fiduciary duty rules can be encouraged by identifying and providing the right sorts of social signals. If we can identify the social conditions that trigger cooperative behavior in a particular culture -- even a culture where cooperation is rare -- and replicate those conditions in the corporate arena, we may be able to

³⁶ The idea that corporate insiders ought to behave in an other-regarding fashion does not address the issue of exactly which "others" they ought to serve. In the United States, courts generally describe insiders' fiduciary duties as running to "the firm and its shareholders," see *Mills Acquisition Co. v. Macmillan, Inc.*, 559 A.2d 1261, 1280 (Del. 1988). The meaning of this phrase is debatable, as it remains unclear whether the interests of the firm include only the interests of the shareholders, or might be read to include other groups as well (Allen 1992). However, at a minimum it implies that insiders ought not to direct their altruism toward, for example, an incompetent manager, or a controlling shareholder involved in a self-dealing transaction.

³⁷ See Blair and Stout 2001; Eisenberg 1999; Rock 1997; and Skeel 2001.

increase the odds of a successful transplant.

Henrich et al. offered a similar speculation:

A plausible interpretation of our subjects' behaviors is that, when faced with a novel situation (the experiment), they look for analogues in their daily experience, asking "What familiar situation is this game like?" and then act in a way appropriate for the analogous situation...

The Machiguenga show the lowest cooperation rates in public-good games, reflecting ethnographic descriptions of Machiguenga life, which report little cooperation, exchange, or sharing beyond the family unit. By contrast, Orma experimental subjects quickly dubbed the public-goods experiment a *harambee* game, referring to the widespread institution of village-level voluntary contributions for public-goods projects such as schools or roads. Not surprisingly, they contributed generously (58 percent of the stake), somewhat higher than most U.S. subjects contribute in similar experiments. (Henrich et al. 2001: 76).

It should be noted, however, that this analysis suggests there are at least two components to what we call "culture." The first is the objective signals that the members of a particular society receive about what others expect, how others are likely to benefit, and how others are likely to behave in a particular situation. The second component is how members of a particular society *subjectively interpret* those signals in light of their past experience. Henrich et al. followed identical protocols with their experimental subjects. Nevertheless, the Machiguenga, accustomed to competing with strangers, viewed the social dilemma game as a competitive game, while the Orma interpreted an identical situation as a cooperative *harambee* game. Nurture enters the picture again, not a source of differences in basic personality (we all have at least two, a cooperative personality and a competitive personality), but as a source of differences in whether a particular social situation is perceived as calling for our altruistic personality.³⁸

³⁸ This possibility offers hope to the poor, disdained economics graduate student. Perhaps he cooperates less in social dilemmas not because he is more selfish, but simply because his training leads him to recognize a social dilemma as just that, and to mentally categorize it as a competitive rather than cooperative situation. Indirect evidence of this can be found in an experiment that found that students in economic classes were more likely than students in other classes to seal and mail a "lost" letter enclosing currency apparently intended to repay a personal

This hypothesis -- that social context can trigger cooperative behavior, and that perceptions of social context are influenced both by the objective signals we receive and the way in which we subjectively interpret those signals -- carries both positive and negative implications for our ability to successfully to transplant open-ended, U.S.-style fiduciary duty rules to other cultures. The good news is that, in theory, it may be possible in a very broad range of societies to structure local social context in a way that supports altruistic behavior, including altruistic compliance with underenforced fiduciary duty rules. The key is to find the local equivalent of the *harambee* game, and to persuade the populace that corporate relationships are analogous.

The bad news is that, in practice, it often may be extremely difficult to figure out exactly how to go about this. As Henrich et al. suggest, in some societies there may be only a very few cooperative social institutions we can analogize to, none of which looks much like a modern corporation. What's more, it may be very difficult for an outside observer to recognize truly cooperative institutions.³⁹ Thus one of the most important lessons to be learned from social dilemma studies may be that the answer to the question whether a legal transplant will "take" is something that must often lie beyond the provenance of the armchair theorist. This category includes, sadly, the armchair legal theorist, the armchair rational choice theorist, and the armchair development theorist.⁴⁰ Lawyers, economists, and World Bank analysts, whether working alone or working together, may rarely be able to determine reliably whether and under

loan (Yezer et al. 1996), suggesting that while economics students may cooperate less in formal social dilemma games, they may be more willing to cooperate in "real world" situations.

³⁹ For example, cooperative behavior in a particular culture that appears altruistic on first inspection may in fact be driven by non-legal "social" sanctions that are not readily apparent to someone outside the society. For a discussion of social sanctions, see text accompanying notes 11-12.

⁴⁰ The author concedes immediately that she falls into the first category.

what circumstances a transplant of U.S. legal rules to another culture is likely to be rejected. If we want to gauge the odds of a successful transplant – or better yet, increase those odds -- we must enlist the aid of anthropologists, sociologists, historians, and political scientists, as well.

Conclusion

The success of the U.S. business firm has sparked great interest in the question of whether and to what extent we can transplant U.S.-style corporate law to other nations. This essay argues that to understand the difficulties involved, we must first understand that a key component of U.S. corporate law--the concept of fiduciary duty--is an open-ended standard of behavior that cannot be perfectly enforced or even well enforced. Nevertheless, U.S. corporate law seems to mostly work in the United States. The essay posits that one of the reasons this is true is that American corporate insiders tend to “internalize” fiduciary duty rules, and altruistically comply with them even when noncompliance would produce greater extrinsic rewards.

If this hypothesis is true, it suggests that an export of formal U.S. legal rules beyond our shores is unlikely to succeed unless the citizens of the importing nation adopt a similar pattern of altruistic compliance. Unfortunately, the available evidence suggests that there may be significant cross-cultural differences in the incidence of such altruistic behavior. Although we do not yet fully understand the sources of such differences, some of the more obvious possibilities include nature, nurture, and social context (culture). Which source is most significant matters, because depending of the source and determinants of altruism, the task of successfully exporting U.S. corporate law may range from merely difficult, to impossible.

Much work remains to be done before we will know which adjective applies. In the meantime, however, there is much we can take of value from the preliminary evidence available. Perhaps the most basic lesson is that the adoption of formal rules of law that resemble U.S. corporate law may not, alone, be sufficient to produce results similar to those observed in U.S. corporations.⁴¹ Human behavior can, of course, be influenced by government-imposed sanctions: most of us are willing to slow down to avoid a speeding ticket. Thus the fact that U.S. courts do sometimes impose liability on corporate insiders for breach of fiduciary duty may play an important role in explaining the relative success of the U.S. corporate governance system. But law is not the only means of regulating behavior. Behavior is also influenced market prices, by technological developments that make new things possible, and, as argued here, by social conditions that promote cooperative vis-a-vis self-regarding patterns of behavior. Thus corporate insiders may refrain from exploiting minority shareholders because they fear they will be held liable in a derivative suit, but they may also act to ward off a hostile tender offer, because improved accounting standards make their exploitation too observable, or because they simply feel "it would be wrong." To understand why good corporate governance systems work and why bad ones fail, each of these mechanisms must be taken into account.

⁴¹ It also may not be necessary. There is reason to suspect that business institutions within a particular society are likely to evolve toward the most efficient form possible, given local conditions and constraints. Thus nations with different legal regimes may be able to evolve corporate governance patterns that resemble those observed in the U.S. (including well developed securities markets and dispersed shareownership) through the development of institutions that look different from ours, but perform similar functions. See note 1, above.

BIBLIOGRAPHY

- Alcock, James E. & Diana Mansell, 1977. Predisposition and Behavior in a Collective Dilemma, *Journal of Conflict Resolution* 21:443-56.
- Allen, William T., 1992. Our Schizophrenic Conception of the Business Corporation, 14 *Cardozo Law Review* 14:261-281.
- Bebchuk, Lucian Arye & Mark J. Roe, 1999. A Theory of Path Dependence in Corporate Ownership and Governance, *Stanford Law Review* 52:127-70.
- Berkowitz, Daniel, et al., forthcoming 2002. Economic Development, Legality, and the Transplant Effect, *European Economic Review*.
- Black, Bernard & Reinier Kraakman, 1996. A Self-Enforcing Model of Corporate Law, *Harvard Law Review* 109:1911-82.
- Blair, Margaret M. and Lynn A. Stout, 2001. Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law, *University of Pennsylvania Law Review* 149:1735-1810.
- Byrne, John A., et al., 2002. How To Fix Corporate Governance, *Business Week* 69-78 (May 6, 2002).
- Camerer, Colin & Richard H. Thaler, 1995. Anomalies: Ultimatums, Dictators, and Manners, *Journal of Economic Perspectives* 9:209-19.
- Clark, Robert C., 1986. *Corporate Law*. Boston: Little, Brown & Co.
- Coffee, John C., Jr., 2001a. The Rise of Dispersed Ownership: The Roles of Law and the State in the Separation of Ownership and Control, *Yale Law Journal* 111:1-82.
- Coffee, John C., Jr., 2001b. Do Norms Matter? A Cross-Country Evaluation, *University of Pennsylvania Law Review* 149:2151-77.
- Cohn, Edward, 2000. The Resurrection of Michael Milken. *The American Prospect* 27 (March 13, 2000)
- Dawes, Robyn M., 1980. Social Dilemmas, *Annual Review of Psychology* 31:163-93.
- Dawes, Robyn M. & Richard H. Thaler, 1988. Cooperation, *Journal of Economic Perspectives* 2:187-97.
- Dawes, Robyn M. et al., Cooperation for the Benefit of Us— Not Me, or My Conscience, in Jane

- J. Mansbridge (ed.), 1990. *Beyond Self-Interest* 97-110.
- Dennett, Daniel C., 1995. *Darwin's Dangerous Idea: Evolution and the Meanings of Life*. New York: Simon & Schuster.
- De Tocqueville, Alexis 1834. *Democracy in America*.
- Dickens, William T. & James R. Flynn, 2001. Heritability Estimates Versus Large Environmental Effects: The IQ Paradox Resolved, *Psychological Review* 108:346-69.
- Eisenberg, Melvin Aron, 1999. Corporate Law and Social Norms, *Columbia Law Review* 99:1253-1292.
- France, Mike, 2002. Punishment for Corporate Fraud? How Radical. *Business Week* 33 (March 11, 2002).
- Frank, Robert H., et al., 1993. Does Studying Economics Inhibit Cooperation? *Journal of Economic Perspectives* 7:159-71.
- Fukayama, Frances, 1995. *Trust: The Social Virtues and the Creation of Prosperity*. New York: Free Press.
- Hansmann, Henry and Reinier Kraakman, 2001. The End of History for Corporate Law, *Georgetown Law Journal* 89:439-68.
- Henrich, Joseph et al., 2001. In Search of Homo Economicus: Behavioral Experiments in 15 Small-Scale Societies, *American Economic Review* 91:73-78.
- La Porta, Rafael, et al., 1997. Legal Determinants of External Finance, *Journal of Finance* 52:1131-1155.
- La Porta, Rafael, et al., 1998. Law and Finance, *Journal of Political Economy* 106:1113-1150.
- La Porta, Rafael, et al., 1999. Corporate Ownership Around the World, *Journal of Finance* 54:471-517.
- Licht, Amir N., 2001. The Mother of All Path Dependencies: Toward a Cross-Cultural Theory of Corporate Governance Systems, *Delaware Journal of Corporate Law* 26:147-205.
- Licht, Amir N., et al., 2001. Culture, Law, and Finance: Cultural Dimensions of Corporate Governance Laws, downloadable at http://papers.ssrn.com/sol3/papers.cmf?abstract_id=267190.
- Mansbridge, Jane J. (ed.), 1990. *Beyond Self-Interest*. Chicago: University of Chicago Press.

- Marwell, Gerald & Ruth E. Ames, 1981. Economists Free Ride, Does Anyone Else? *Journal of Public Economics* 15: 295-310.
- Milhaupt, Curtis J., 1996. A Relational Theory of Japanese Corporate Governance: Contract, Culture, and the Rule of Law, *37 Harvard International Law Journal* J. 37:3-64.
- Milhaupt, Curtis J., 2001. Creative Norm Destruction: The Evolution of Nonlegal Rules in Japanese Corporate Governance, *University of Pennsylvania Law Review* 149:2083-2129.
- Norris, Floyd & David Barboza, 2002. Enron's Many Strands: Ex-Chairman's Finances, Law sold Shares for \$100 Million. *New York Times*, Sec. A, P. 1, Col. 1 (February 16, 2002).
- Rock, Edward, 1997. Saints and Sinners: How Does Delaware Corporate Law Work? *University of California at Los Angeles Law Review* 44:1004-1107.
- Roe, Mark J., 2000. Political Preconditions to Separating Ownership from Control, *Stanford Law Review* 53:539-606.
- Ross, Lee & Andrew Ward, 1996. Naive Realism in Everyday Life: Implications for Social Conflict and Misunderstanding, in Edward S. Reed et al. (eds.), 1996. *Values and Knowledge* 103-109. Mahwah, N.J.: L. Erlbaum Associates.
- Roth, Alvin E., et al., 1992. Bargaining and Market Behavior in Jerusalem, Ljubljana, Pittsburgh, and Tokyo: An Experimental Study, *American Economic Review* 81:1068-95.
- Sally, David, 1995. Conversation and Cooperation in Social Dilemmas: A Meta-Analysis of Experiments from 1958 to 1992, *7 Rationality and Society* 7:58-92.
- Skeel, David A., Jr., 2001. Shaming in Corporate Law, *University of Pennsylvania Law Review* 149:1811-68.
- Sober, Elliott & David Sloan Wilson, 1998. *Unto Others: The Evolution and Psychology of Unselfish Behavior*. Cambridge: Harvard University Press.
- Stout, Lynn A., 2002. In Praise of Procedure: An Economic and Behavioral Defense of Smith v. Van Gorkom and the Business Judgment Rule, *Northwestern Law Review* 96:675-93.
- Stulz, Rene & Robin Williamson, 2002. Culture, Openness, and Finance (manuscript on file with the author).
- Tyler, Tom R., 1990. *Why People Obey The Law*. New Haven: Yale University Press.
- Tyler, Tom R. & Steven L. Blader, 2002. The Psychology of the Corporate Actor: Ethical Values, Procedural justice, and Rule Following in Work Organizations (manuscript on file with

author).

Yezer, Anthony M., et al., 1996. Does Studying Economics Inhibit Cooperation? Watch What We Do, Not What We Say, 10 *Journal of Economic Perspectives* 10:177-186.