

1998

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Recommended Citation

48 Cath. U. L. Rev. 15 (1998)

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ARTICLES

INVESTOR EDUCATION, SECURITIES DISCLOSURE, AND THE CREATION AND ENFORCEMENT OF CORPORATE GOVERNANCE AND FIRM NORMS

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I. INTRODUCTION

All signs suggest that investor education for ordinary investors will become closely related to securities disclosure. Because many Americans now have to decide how to invest their savings for retirement, their well-being in retirement greatly depends upon their optimal saving and investment decision making.¹ Because they lack confidence in federal and state government provisions for retirement and other social benefits, they understand their need to save and invest in outside retirement plans for such goals as their children's education.² Even the nearly one-half of

* Associate Professor, Brooklyn Law School. I would like to thank Gary Minda, Eric Orts, Tony Sebok, Larry Solan, and especially, Margaret Blair, Eric Chiappinelli, John Fedders, Donald Langevoort, David Lipton, Marleen O'Connor, Beth-Ann Roth, Mark Sargent, Russell Stevenson, and other participants in the symposium on Corporate Disclosure and Corporate Morality/Efficiency at The Catholic University of America, Columbus School of Law, for their useful comments. I would also like to thank Dean Joan Wexler of Brooklyn Law School for a summer research grant that allowed me to complete this article.

1. See James A. Fanto, *We're All Capitalists Now: The Importance, Nature, Provision and Regulation of Investor Education*, 49 CASE W. RES. L. REV. (forthcoming 1998) (manuscript at 11-21, on file with the *Catholic University Law Review*) (companion paper discussing the pressures of investing and saving for retirement). To take only one example, many retirement "pension" programs are "defined contribution" plans where an employer establishes an individual account for an employee, to which the employer and employee may make contributions, and where an employee specifies how the funds are to be invested within the limited number of options provided by the plan. See *id.* at 15-18; see also EMPLOYEE BENEFIT RESEARCH INSTITUTE, FUNDAMENTALS OF EMPLOYEE BENEFIT PROGRAMS 57-59, 70-72 (5th ed. 1997) (elaborating on the aspects of a defined contribution plan); see generally Deborah M. Weiss & Marc A. Sgaraglino, *Prudent Risks for Anxious Workers*, 1996 WIS. L. REV. 1175, 1177 (describing enhanced investing responsibility placed on ordinary investors).

2. See STEVEN A. SASS, THE PROMISE OF PRIVATE PENSIONS: THE FIRST

working Americans who have no pension eligibility and little ability to save from income³ someday may have limited investment decision making in individualized Social Security accounts.⁴ Furthermore, the traditional focus of securities disclosure, which requires companies offering securities to provide information to investors, is inadequate for their needs. Therefore, ordinary people now having saving and investing responsibilities must be educated to understand disclosure so as to invest competently.⁵

Although inevitable and necessary, investor education raises many questions: What kind of education do investors need, particularly if we assume that markets are efficient?⁶ How does one educate investors to resist their own psychological limitations that can distort optimal investment decision making?⁷ What education is appropriate when people in-

HUNDRED YEARS 250 (1997) (addressing financial concerns, other than retirement, that many Americans face).

3. See GENERAL ACCOUNTING OFFICE, GAO/HEHS-97-81, RETIREMENT INCOME: IMPLICATIONS OF DEMOGRAPHIC TRENDS FOR SOCIAL SECURITY AND PENSION REFORM 43 (1997) (observing that only 45-47% of employees in the private sector are covered by pensions, a number that has remained constant since 1970).

4. See, e.g., NATIONAL COMM'N ON RETIREMENT POLICY, "THE 21ST CENTURY RETIREMENT SECURITY PLAN" 1 (1998) (recommending establishment of "a mechanism to create individual savings accounts within Social Security that minimizes administrative costs and provides individuals with control over the investment of a portion of their Federal Insurance Contribution Act (FICA) taxes, without exposing individuals to significant new risk"); Elizabeth A. White, *Kasich Bill Would Use Surpluses For Personal Retirement Accounts*, PENS. & BEN. DAILY (BNA) (Mar. 13, 1998), available in LEXIS, Labor Library, BNAPEN File (discussing legislative proposals to use budget surpluses to establish individualized retirement accounts for all Americans); GENERAL ACCOUNTING OFFICE, GAO/HEHS-98-33, SOCIAL SECURITY: DIFFERENT APPROACHES FOR ADDRESSING PROGRAM SOLVENCY 32-70 (1998) (discussing various proposals regarding Social Security, including establishing individual retirement accounts).

5. See Fanto, *supra* note 1 (manuscript at 85-90) (evaluating SEC investor education programs); see also Arthur Levitt, Remarks before the Investment Company Institute 2 (May 15, 1998) (transcript available at <<http://www.sec.gov/news/speeches/spch212.txt>>) (challenging securities industry leaders to "[a]sk [themselves] whether [they] have done enough to educate investors about how to safeguard their financial future").

6. See Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 554-57 (1984) (describing the concept of "market efficiency" and fully informed market participants).

7. See Donald C. Langevoort, *Theories, Assumptions, and Securities Regulation: Market Efficiency Revisited*, 140 U. PA. L. REV. 851, 858-61 (1992) (analyzing the psychological effects on the economic behavior of investors and rational decision-making). In addition, Professor Langevoort has studied the legal implications of psychological literature suggesting that investors act irrationally. See Donald C. Langevoort, *Selling Hope, Selling Risk: Some Lessons for Law from Behavioral Economics About Stockbrokers and Sophisticated Customers*, 84 CAL. L. REV. 627, 635-41 (1996). For a discussion of common behavioral problems affecting rational decision making, see generally Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1476-89 (1998);

vest through brokers and mutual funds? Who should conduct the education? In a companion paper, I attempt to answer some of these questions by proposing a theoretical framework for investor education that identifies three basic kinds of investor education: training on how to save (i.e., to defer consumption), how to invest well (i.e., to use basic asset-allocation strategies and life-cycle investing), and how to avoid common forms of investment fraud.⁸ I then evaluate several recent initiatives of the Securities and Exchange Commission (SEC) that both demonstrate its recognition of an investor's need for more than securities disclosure and are designed to contribute to investor education.⁹

Not surprisingly, this examination does not consider how investor education might affect corporate morality. First, the acquisition of critical basic saving and investing skills by ordinary people takes priority over any other form of investor education because an individual's very survival depends upon such training. Furthermore, Americans have the responsibility to save and to invest optimally, and thus, it is necessary to improve their saving and investing performance through education as soon as possible. Second, what I call "morality education" is different in nature from basic investor education. Morality education broadens an investor's perspective beyond the finance-based focus on an optimal individual portfolio that characterizes saving and investing education, to an understanding of the nature and purposes of firms and their governance. Basic investor education aims to change an ordinary person's behavior so that he or she will save and invest well (and avoid investment fraud). On the other hand, morality education potentially leads an investor to try to affect firm behavior in ways that might or might not contribute to his or her own finance-based goals.¹⁰

The central difficulties of morality education are: (1) identifying what it is that this "corporate morality" investor education should help establish; and (2) understanding the causation chain linking investor education, the investor, and securities disclosure to corporate morality. Part II

Cass R. Sunstein, *Behavioral Analysis of Law*, 64 U. CHI. L. REV. 1175 (1997).

8. See Fanto, *supra* note 1 (manuscript at 34-85). The companion paper also analyzes the growing number of investor education efforts by government agencies and private parties. See *id.* at 69-85.

9. See *id.* at 85-122 (discussing the SEC's Office of Investor Education and Assistance, its "plain English" initiative, and its recent efforts to simplify mutual fund disclosure).

10. The classic way of penalizing a firm in the capital markets is to sell its shares, which lowers its stock price and requires firms to pay higher costs or rates to raise capital in the future. Cf. FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 6 (1991). An investor does not have to exercise this discipline on firms for purely financial reasons.

of this Article examines corporate morality as behavioral “norms” of firms and firm management and discusses the ways in which morality education can make investors aware of these norms and the means to enforce them. It draws support from recent, extensive legal and economic literature on the creation of social “norms.”¹¹ Part II further observes that, although it is difficult to know with absolute confidence what corporate norms should be, there is agreement on certain desirable norms, including corporate governance norms of appropriate behavior for executives and directors. Finally, Part II studies how the causation chain, which connects investor education to norm creation and enforcement, functions and why educating an ordinary investor to understand securities disclosure is a key link in this chain.

Part III finds that current government and private investor education efforts and materials do not include morality education. Even federal financial market regulators like the SEC, who produce their own educational materials and who have a “public interest” perspective on education, have not developed morality education nor recognized the link between investor education and corporate morality. This is not surprising. Because investor education is relatively new and because many ordinary investors do not know how to save and invest, public and private educational efforts are focusing almost single-mindedly on basic saving, investing, and anti-fraud education. In the near term, the absence of morality education has not adversely affected firm behavior, because existing issue-oriented groups monitor firms, influence public opinion by calling attention to corporate misbehavior, and, thus, address egregious cases of corporate immorality. In addition, activist institutional investors and the proxy firms assisting them have transformed corporate governance norms without much help from ordinary investors. Yet, if investor education continues to focus an individual investor only on his or her saving and portfolio performance, it will undermine the potential influence of such investors in firms, and prevent them from seeing themselves

11. See Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 343-50 (1997) (citing and discussing the voluminous legal and economic literature on norms). For representative recent works on this subject, see generally David Charny, *Illusions of a Spontaneous Order: “Norms” in Contractual Relationships*, 144 U. PA. L. REV. 1841 (1996); Robert Cooter, *Normative Failure Theory of Law*, 82 CORNELL L. REV. 947 (1997); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943 (1995); Randal C. Picker, *Simple Games in a Complex World: A Generative Approach to the Adoption of Norms*, 64 U. CHI. L. REV. 1225 (1997); Eric A. Posner, *The Regulation of Groups: The Influence of Legal and Nonlegal Sanctions on Collective Action*, 63 U. CHI. L. REV. 133 (1996); Richard A. Posner, *Social Norms and the Law: An Economic Approach*, 87 AM. ECON. REV. 365 (1997); Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903 (1996).

as more than self-interested persons who focus all of their *investing* attention on financial gain.¹²

Part IV argues that investor education should, therefore, proceed eventually beyond basic finance to morality education and train ordinary investors to understand and discuss the following: the nature and purposes of business firms; the appropriate norms of firm and firm agent behavior, particularly corporate governance norms; sources of information about norm compliance; and the available means to influence firms if investors decide to try to have an impact upon corporate morality. This kind of education fulfills the basic goal of all investor education: to make people responsible investors. “Responsibility” here simply means that investors should be taught to own and manage their investment property in accordance with “generally accepted investing standards” *and* with their own preferences, which includes their individual, moral, political, and social preferences.¹³ Part IV offers several normative and pragmatic justifications for morality education. For normative support, it draws upon a political vision that politically active citizens should be similarly active in the management of their property, and upon a philosophical approach which suggests that, where possible, individuals should not be constrained into limited roles and should be trained to see many possibilities of reflection and action. The pragmatic justification contends that, since investing is now part of ordinary life and technology enhances individuals’ control of their investment assets, there may be adverse consequences for corporate morality if large numbers of investors are never instructed about firm normative issues. It also argues that institutional investors—who, after all, are trustees for individual shareholders—can profitably join forces with individual investors to promote corporate and corporate agent morality. The Part concludes by discussing briefly the possible content and providers of morality education and by observing that such education could be part of a high school economics or business

12. See Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1030 (1996). Professor Greenwood argues that

[s]hareholders are treated as if their entire identity were their shareownership, as if their sole goal in life were to maximize the risk-adjusted present value of the future income stream represented by those shares and as if they had no competing interests that might, even occasionally, warrant taking an action not designed to improve “shareholder” value.

Id. (footnote omitted).

13. “Preferences” is a term of art in the economic and psychological literature. See Sunstein, *supra* note 7, at 1176 (noting that “preferences and values are sometimes constructed rather than elicited by social situations”) (footnote omitted). I shall not deal with the issue of the production of preferences.

course.

II. INVESTOR EDUCATION AND CORPORATE MORALITY

The link between investor education and corporate morality involves several critical steps. The first and most difficult step is the identification of the corporate morality to be established or reinforced. To train investors to understand disclosure about corporate morality, educators must agree on the morality that is the subject of the disclosure and education. Selecting a morality to be taught has significant individual and social consequences. Not only does the selection establish the proper kinds of firm behavior, but the morality will be used to instruct ordinary people to view business firms from a particular perspective, which is influential if, as is often the case, they have little pre-existing understanding of appropriate firm behavior. Like any educational goal, corporate morality produces, and reproduces, a particular kind of society.

In this Article, I assume that corporate morality is social or cultural: in our culture, those operating corporations or other firms conduct their business in accordance with certain social “norms” and those owning firms expect compliance with them.¹⁴ This characterization does not simplify matters, however, for the social acceptance (one might even say dominance) of certain firm norms rather than others is itself subject to political and social struggles and debates. Some want a corporation and its agents to pursue only shareholder profit.¹⁵ Others see them as serving “other constituencies” and stakeholders as well.¹⁶ In the economic literature, the most successful norm analysis has involved identifying enduring norms in small cohesive groups (e.g., cattle ranchers, jewelers, ethnic lending groups) with clearly defined, easily specifiable purposes.¹⁷

14. See McAdams, *supra* note 11, at 351 (defining norms as “informal, decentralized obligations”); R. Posner, *supra* note 11, at 365 (“By ‘social norm’ (‘norm’ for short) I shall mean a rule that is neither promulgated by an official source, such as a court or a legislature, nor enforced by the threat of legal sanctions, yet is regularly complied with (otherwise, it wouldn’t be a rule).”) (footnote omitted).

15. See, e.g., Andrei Shleifer & Robert W. Vishny, *A Survey of Corporate Governance*, 52 J. FIN. 737, 738 (1997) (“Our perspective on corporate governance is a straightforward agency perspective, sometimes referred to as separation of ownership and control. We want to know how investors get the managers to give them back their money.”).

16. See, e.g., MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE FOR THE TWENTY-FIRST CENTURY 274 (1995) (“Far from abandoning the idea that firms should be run for all the stakeholders, contractual arrangements and governance systems should be devised to assign control rights, rewards, and responsibilities to the appropriate stakeholders—the parties that contribute specialized inputs.”).

17. See Cooter, *supra* note 11, at 950-51 (discussing norm formation in small groups);

Agreeing upon the appropriate norms to be applied to businesses, their operators, and their owners in the large and diverse society of the United States presents a significant challenge and has more far-reaching social consequences than the specification of norms in the small groups favored as subjects of study by law and economics scholars.¹⁸

This Article cannot pretend to identify, as a normative matter, which corporate and firm agent norms education should espouse.¹⁹ However, as an anecdotal empirical matter, there appears to exist in our culture some generally agreed upon norms relating to firm and firm agent behavior.²⁰ For example, business people understand that bribery of government officials is forbidden behavior, as is excessive firm interference with the political system, although the line between such interference and lobbying is not always clear.²¹ In many instances, law reinforces these norms.²² Accepted corporate norms include those dealing with corporate governance that specify proper attitudes and behavior of corporate fiduciaries and thus apply primarily to high-level managers and members of boards of directors. Corporate governance norms reflect the basic fiduciary obligations that require corporate employees not to act just for themselves when directing or operating a corporate enterprise, but for others and for specific purposes relating to the enterprise.²³ Who and what these “oth-

E. Posner, *supra* note 11, at 165-76 (discussing ethnic-based group norms); R. Posner, *supra* note 11, at 366 (making a point about the usefulness of norm analysis in small groups).

18. See Charny, *supra* note 11, at 1847 (questioning how well the “norm” approach works outside the small group setting, particularly with respect to commercial relations in mass markets).

19. I suggest in Part IV that education should instruct investors concerning the debates over corporate norms.

20. Indeed, it would be hard to imagine culture—or language, for that matter—existing without shared understandings regarding behavior. See, e.g., CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 89 (1973) (“[Culture] denotes an historically transmitted pattern of meanings embodied in symbols, a system of inherited conceptions expressed in symbolic forms by means of which men communicate, perpetuate, and develop their knowledge about and attitudes toward life.”).

21. The interrelation of business and politics is admittedly complex. Cf. FRED S. MCCHESENEY, *MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION* 41 (1997) (suggesting that politicians, in effect, solicit “bribes” or “rents” from private firms in order not to extract profits from such firms by legislation and regulation).

22. See E. Posner, *supra* note 11, at 165-93 (discussing positive and negative effects of laws upon norms); R. Posner, *supra* note 11, at 367-68 (discussing interaction between law and norms).

23. See JAMES D. COX ET AL., *CORPORATIONS* 179-217 (1997) (describing basic legal obligations of management); HENRY HANSMANN, *THE OWNERSHIP OF ENTERPRISE* 60 (1996) (observing that informal norms may ensure that managers act on behalf of shareholders); WILLIAM A. KLEIN & JOHN C. COFFEE, JR., *BUSINESS ORGANIZATION AND FINANCE: LEGAL AND ECONOMIC PRINCIPLES* 149 (6th ed. 1996) (describing the duty of

ers” and “purposes” are opens the debate about the content of the norms, although such content may be less of an issue in the reality of firm life where managers generally try to make money for their shareholders while also serving other constituencies.²⁴

The next link in the chain between corporate morality and investor education is securities disclosure; disclosure should reveal whether corporations and corporate agents are complying with accepted “norms.” Under U.S. securities regulations, a corporation assisted by independent professionals, such as bankers, accountants, and lawyers, whose legal and reputational concerns help ensure the accuracy of the disclosure,²⁵ in effect conducts self-disclosure primarily about its business operations and financial results, which may also reveal its compliance (or lack of compliance) with norms.²⁶

However, the capacity of mandatory disclosure under securities regulations to identify norm compliance, or even to deal at all with corporate morality, should not be exaggerated. This disclosure does not cover what many would identify as normative issues. This is so because information pertaining to a company’s compliance with a norm might not be disclosed if it is not required by a line item or if it does not trigger the materiality threshold in such an item.²⁷ For example, a company has no obli-

care as an “aspirational statement”).

24. See MICHAEL USEEM, *INVESTOR CAPITALISM: HOW MONEY MANAGERS ARE CHANGING THE FACE OF CORPORATE AMERICA* 36-37 (1996) (observing that institutional investors have changed shareholder-management relations so that managers must remain in constant contact with their shareholders); Margaret M. Blair & Lynn A. Stout, *A Theory of Corporation Law as a Response to Contracting Problems in Team Production*, 84 VA. L. REV. (forthcoming May 1999) (observing situations where, in law and reality, corporate management serves multiple constituencies).

25. See John C. Coffee, Jr., *Brave New World?: The Impact(s) of the Internet on Modern Securities Regulation*, 52 BUS. LAW. 1195, 1210-13, 1232-33 (1997) (discussing the “gatekeeper” role of lawyers and investment bankers in securities offerings, that is, to ensure the reliability of the company whose securities are being sold).

26. See JAMES D. COX ET AL., *SECURITIES REGULATION: CASES AND MATERIALS* 240-45 (1997) (presenting overview of this self-disclosure under the securities laws).

27. As a brief summary, in any registered securities offering a company selling its securities must file a registration statement, on which the offering document or prospectus is based. A company filing a registration statement must provide detailed disclosure in accordance with a list of items in forms keyed to certain kinds of offerings and companies. See 17 C.F.R. §§ 229.101-.802 (1997) (providing a description of these items commonly referred to as Regulation S-K). Similarly, if a company is a reporting company (i.e., it has listed its securities on an exchange or has a large number of U.S. shareholders), it must file annual and quarterly reports in accordance with SEC form requirements. See 15 U.S.C. § 78m (1994). An item becomes subject to mandatory disclosure only through a political process that may or may not reflect general social acceptance of its importance. Cf. ANNE M. KHADEMIAN, *THE SEC AND CAPITAL MARKET REGULATION: THE POLITICS OF EXPERTISE* 83-118 (1992) (presenting an overview of the “politics” of SEC rule making).

gation to discuss its treatment of employees or their working conditions; disclosure about employees is generally limited to the number employed and collective bargaining agreements in force.²⁸ Still, disclosure may touch on normative matters, particularly in corporate governance. For instance, standard disclosure items require discussion of management's background, compensation, and its transactions and business relationships with the firm, all of which could reveal a lack of compliance with accepted norms of management behavior.²⁹ Shareholders, moreover, can encourage companies to disclose information about their compliance with certain norms, even if mandatory disclosure would not otherwise require them to address the subject.³⁰

If one assumes that mandatory disclosure identifies norm compliance or violation, it can lead to norm creation or enforcement and, in effect, "morality creation," in a manner different from, but not exclusive of, law enforcement. Admittedly, this is just a "norm" recharacterization of the traditional justification for SEC mandatory disclosure, which states that disclosure discourages company misbehavior by bringing it to the "light of day."³¹ Norm creation and enforcement is generally understood to emerge through the collective enforcement of individuals who share the norms in question—that is, members of the "norm community." The collective action often takes the form of "soft" sanctions that still carry considerable force; norm followers "shun" or "shame" norm violators, with the ultimate sanction being a collective refusal to deal with the violator. As norm theorists explain, a central problem of norm creation and

28. See 17 C.F.R. § 229.101(c)(xiii) (requiring disclosure of "[t]he number of persons employed by the registrant"); see also Faith Stevelman Kahn, *Pandora's Box: Managerial Discretion and the Problem of Corporate Philanthropy*, 44 UCLA L. REV. 579, 581-82 (1997) (pointing out that corporations do not have to disclose charitable contributions they have made).

29. See 17 C.F.R. §§ 229.401-.404.

30. See Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29,106 (1998) (amending 17 C.F.R. § 240.14a-8 (1997)) (establishing a rule pursuant to which shareholders can put a proposal on a company's annual proxy statement); Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-39093, 62 Fed. Reg. 50,682 (1997) (proposed Sept. 26, 1997) (proposing changes to such rule). In fact, some of the most controversial Rule 14a-8 proposals have involved efforts by shareholders to place on a company's proxy statement proposals attempting to effect "norm" changes in companies. See *id.* at 50,683 ("Social policy issues, such as environmental matters or the manufacture of tobacco products, and other issues, such as extraordinary business transactions, are also the focus of a significant number of proposals each year.").

31. See LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY, AND HOW THE BANKERS USE IT* 92 (1914). Louis D. Brandeis, who provided this traditional justification for mandatory disclosure, was a source of inspiration for much New Deal legislation.

enforcement in large groups is publicity; dispersed individuals may have difficulty even realizing that they share norms or that a particular person has violated them.³²

In the large social world of American business and investment, mandatory disclosure of norms and their violations can provide the necessary publicity to help create and enforce business norms. Disclosure not only alerts individuals that others consider the norms to be important—that there is, in fact, a norm community larger than they thought³³—but, more importantly, it also notifies them about “rogue” corporations and/or corporate actors. Investors can thus “sanction” a company appropriately: by discounting its shares, by voting directors out of office, or by “shunning” the firm through other action, such as product boycotts. The publication of norm violations in a company may even make employees not implicated in the violations ashamed of working for that company and may encourage them to look elsewhere for employment.³⁴

For example, if it becomes “socially” unacceptable for a company to do business in a certain country, disclosure can enforce this norm by revealing the identity of a company conducting business there, which can result in consequent adverse publicity for the company and boycotts of company products. Disclosure about the background and structure of board members, management compensation, share holdings, trading by officers and large stockholders, and dividend policy³⁵ may reveal compliance, or noncompliance, with corporate governance norms;³⁶ and such

32. See McAdams, *supra* note 11, at 362-64 (discussing the importance of publicity in establishing a norm consensus as well as in detecting norm violations). Individuals sharing norms suffer from collective action problems. See *id.* at 362-63. Because they really do not benefit individually from policing compliance with norms, individual investors will spend little effort on norm enforcement. Accordingly, for norm enforcement to work, individuals must collectively enforce norms. Publicity helps create this collective action by simultaneously identifying the violator and the complying members of the community. See *id.* at 363; *cf. id.* at 366-72 (presuming society-wide knowledge of the consensus, such that “esteem” will drive individuals to conform to the consensus). Publicity is not difficult in a small, cohesive group where the members constantly interact with, and thus monitor, one another, which is why norms work best there.

33. See Sunstein, *supra* note 11, at 929-30 (discussing “norm bandwagons,” whereby new norms are established through individual and group action). See also McAdams, *supra* note 11, at 400-07 (discussing how law can be used to signal, and thus to establish, a consensus around certain norms).

34. Norm enforcement may intersect with law enforcement; securities law disclosure may reveal behavior that is actionable under state corporate law. *Cf.* 17 C.F.R. § 240.13e-4(d) (1997) (providing for mandatory disclosure on an issuer self-tender, which requires a kind of disclosure that shareholders could use to show that a corporation treated them unfairly in the transaction).

35. See 17 C.F.R. §§ 229.201, 229.401-405 (1997).

36. See, e.g., BLAIR, *supra* note 16, at 116-21 (summarizing some corporate govern-

disclosure, as opposed to materially misleading disclosure, does not necessarily trigger any law enforcement.³⁷ For instance, if a sign of a board's independence from management (e.g., a lead outside director) signals compliance with these norms, disclosure showing its presence or absence could further extend, as well as enforce, the norms. Indeed, these examples suggest why parties actively contest whether a particular subject should become part of mandatory disclosure; those parties realize that disclosure has much to do with norm creation and enforcement.³⁸

Norm creation and enforcement thus cannot work, unless disclosure of pertinent norm information reaches members of the potential norm community who understand and act upon it. In securities disclosure, owners of firms have to comprehend the significance of disclosure pertaining to corporate norms and the importance of acting upon this disclosure. Here, the significance of investor education in the chain leading to the enforcement of corporate morality becomes apparent, for without education, investors may well not understand the norm information provided to them. Education must train ordinary investors that disclosure documents and other sources (e.g., market information services, newspapers, stock prices) provide information about corporate and corporate agent behavior. More importantly, it must lead investors to understand the importance of business and corporate governance norms and to identify their violation by firms and corporate agents. Investors then need instruction on the available possibilities of collective action to establish and enforce such norms.

While some norms and their enforcement do not involve much education for the ordinary investor (e.g., people would readily understand and condemn a corporation's excessive interference with the political process), a typical small investor may not understand corporate governance

ance codes of conduct designed by institutional investors); THE BUSINESS ROUNDTABLE, STATEMENT ON CORPORATE GOVERNANCE (1997), available at <<http://www.brtable.org/document.cfm/11>> (on file with *The Catholic University Law Review*) (offering the organization's guidelines on various corporate governance issues); THE CALIFORNIA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, CORPORATE GOVERNANCE CORE PRINCIPLES & GUIDELINES (Apr. 13, 1998) available at <<http://www.calpers.ca.gov>> (on file with *The Catholic University Law Review*) (establishing guidelines for the nation's largest public institutional investor).

37. In an extreme, but unlikely, scenario, the disclosure might reveal a breach of a fiduciary duty of care or loyalty by officers or directors.

38. Interested parties, of course, also debate with regulators about disclosure requirements because they fear the enhanced costs of compliance, as well as other potential adverse effects, such as liability risks and/or loss of confidentiality. See generally Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 BROOK. L. REV. 763, 840-74 (1995) (addressing reasons for the limited scope of disclosure requirements under current laws).

norms, their importance in business, or the prevalent means of collective action to enforce them. For example, a corporation may pay its chief executive a high salary in relation to his performance which does not necessarily violate any corporate law, but which arguably runs against current governance norms.³⁹ Disclosure helps an investor identify the mismatch between pay and performance.⁴⁰ However, an ordinary investor needs to be educated not only on how to understand the disclosure, but also on how to appreciate its significance; that is, that the board may be inactive and under the chief executive's control, and that it has not adopted the right incentive structure for the executive.⁴¹ Such education may train an investor on where to find sources to interpret this disclosure, such as shareholder activists. Education would also have to teach the investor about appropriate responses by the governance norm community,⁴² which could include lending support to a shareholder resolution dealing with management compensation, sending a letter or e-mail to management, or selling one's shares in the company.

Later, I shall return to a brief consideration of the substance of morality education and related issues, such as whether this education is worth its costs and whether educated investors could contribute to norm enforcement. It is useful now to examine whether such education currently exists and the immediate consequences of the current state of investor educational affairs.

III. EXISTING CORPORATE MORALITY AND GOVERNANCE EDUCATION

There has been little investor morality education, which is due partly to the concentration of educational resources and attention on saving and investing education. This state of affairs arguably has not adversely affected corporate morality, because during the new era of "investor capitalism" in recent years, institutional investors and other "norm en-

39. See BLAIR, *supra* note 16, at 88-92 (summarizing the executive compensation debate).

40. See 17 C.F.R. § 229.402(a)(2) (providing requirements of detailed disclosure of executive compensation).

41. In this example, an investor may base his or her understanding of an executive's misbehavior on general social norms dealing with "fair" pay and "fair" employee behavior, provided that the investor can decipher the executive compensation disclosure, or have someone explain it.

42. The acceptable enforcement strategies of corporate governance enforcement can be understood as social "institutions" (i.e., socially-accepted ways of behaving). See Jack Knight & Douglass North, *Explaining Economic Change: The Interplay Between Cognition and Institutions*, 3 LEGAL THEORY 211, 214 (1997) (explaining that "[i]nstitutions consist of formal rules (constitutions, statute and common law, regulations), informal rules (conventions and social norms), and enforcement mechanisms").

trepreneurs”⁴³ have developed and enforced corporate governance and other kinds of corporate norms.⁴⁴ As a pragmatic matter, there has thus been little immediate need to educate ordinary investors about corporate norms.

A review of investor education materials⁴⁵ shows that they deal rarely with any norm creation and enforcement, and do not even educate investors about corporate governance norms. Rather, they focus on the three basic kinds of investor education: saving, investing, and avoiding investment fraud.⁴⁶ The educational materials do not provide any instruction about appropriate behavior for corporate agents—that is, managers and directors—or about available procedures enabling investors to affect norms. For example, an investor should understand the governance structure of a firm and the possibility of investor “voice” through voting rights, albeit on a limited number of issues.⁴⁷ Yet even well-designed investor education materials do little more than note in passing that some kinds of investments (e.g., common stock) carry voting rights.⁴⁸ In teach-

43. See McAdams, *supra* note 11, at 394-97 (referring to “norm entrepreneurs” as those who “aim to shape norms”).

44. See USEEM, *supra* note 24, at 15-37 (discussing “new rules” of “investor capitalism” in which management autonomy has declined as investors take a more active role in governance).

45. See Fanto, *supra* note 1 (manuscript at 63-65 nn.147-52) (surveying investor education materials available from numerous sources, including profit, not-for-profit, and government agencies).

46. See *id.* (manuscript at 37-51) (studying the areas of investor education). They are thus designed to bring ordinary investors into the saving and investing world or “culture.” The materials teach investors how to defer consumption; they instruct individuals about life-cycle investing and asset-allocation strategies, as well as about financial markets and financial professionals; and they attempt to alert investors as to the forms of investment fraud used against consumers. The materials come at different levels of sophistication—comic books for students versus beta portfolio evaluations for experienced investors—and in diverse formats, including both written and electronic media. See, e.g., *id.* (manuscript at 53 n.119) (discussing Merrill Lynch’s comic book for children, THE FURTHER ADVENTURES OF SAVIN’ DAVE AND THE COMPOUNDERS (1997)); *id.* (manuscript at 67-68 n.161) (recognizing <<http://www.riskview.com>>, a web site that permits an investor to calculate the risk of his portfolio).

47. See ROBERT CHARLES CLARK, CORPORATE LAW 94 (1986) (enumerating limited number of subjects on which shareholders have a vote). Indeed, courts often assume that, if an individual purchases a security, he or she is conversant with the rights and limitations that accompany this kind of property. See, e.g., *Hariton v. Arco Elecs., Inc.*, 182 A.2d 22, 26 (Del. Ch. 1962), *aff’d*, 188 A.2d 123 (Del. 1963) (presuming shareholders know the possibility under corporate law that a corporation may reorganize in a way that hurts their economic interest).

48. See, e.g., AMERICAN SAVINGS EDUCATION COUNCIL (visited Aug. 25, 1998) <<http://www.asec.org>> (providing no information on this subject); NEW YORK STOCK EXCHANGE, YOU AND THE INVESTMENT WORLD 4 (1997), <<http://www.nyse.com/public/educate/6a/6a1/6a1b/6a1b.htm>> (visited Aug. 26, 1998)

ing materials of the National Institute for Consumer Education and the National Association of Securities Dealers, called "The Basics of Investing," the normative discussion aims only to create and reinforce norms of ethical investing behavior in students by helping them to understand how investment fraud harms investment markets and society through loss of consumer confidence in the securities markets.⁴⁹

Although the SEC has been active in investor education,⁵⁰ it, too, concentrates on the three basic forms of investor education. In its educational materials, the SEC does not portray a "responsible" investor as one who, in addition to investing optimally, also enforces general business or corporate governance norms through his or her saving and investing practices. This lack of attention to norms is most striking in mutual fund regulation, where the SEC recently has devoted substantial effort to revising and simplifying fund disclosure, primarily by developing a "profile" or abbreviated prospectus that fund companies can use to sell funds to investors.⁵¹ The disclosure has an educational purpose since it is designed to help focus ordinary investors, with little time and investing background, on the most important information regarding a fund investment.⁵² Yet the profile all but ignores corporate governance. A profile prospectus would disclose the identity of the investment advisor and the investment policies of the fund, together with its performance history, but not information about board members or governance of the company.⁵³

(noting simply that common stock gives voting rights on certain matters).

49. See National Association of Securities Dealers, Inc. & National Institute for Consumer Education, *Ethics and Fraud*, in THE BASICS OF INVESTING: A GUIDE FOR EDUCATORS Unit 6 (1997), available at <<http://www.investor.NASD.com/nisection6.html>> (visited Aug. 25, 1998).

50. See Fanto, *supra* note 9 (manuscript at 85-111) (discussing the SEC's Office of Investor Education and Assistance, its "plain English" initiative, and its recent efforts to simplify mutual fund disclosure).

51. See New Disclosure Option for Open-End Management Investment Companies, Securities Act Release No. 33-7513, 63 Fed. Reg. 13,968 (1998) (to be codified at 17 C.F.R. pts. 230 & 270) (final rule on profile prospectus); Proposed New Disclosure Option for Open-End Management Investment Companies, Securities Act Release No. 33-7399, 62 Fed. Reg. 10,943 (1997) (to be codified at 17 C.F.R. pt. 230) (proposed Mar. 10, 1997) (proposal on profile prospectus).

52. See Fanto, *supra* note 1 (manuscript at 111-22).

53. See New Disclosure Option for Open-End Management Investment Companies, 63 Fed. Reg. at 13,969 (limiting disclosure to fund goals, strategies, risks, fees, information on the fund's advisor, purchasing and selling fund shares, fund distributions, and taxation); Proposed New Disclosure Option for Open-End Management Investment Companies, 62 Fed. Reg. at 10,945-50 (describing, in greater detail than the final rule, each disclosure item in the profile). The only recent educational SEC initiative related to norm enforcement is its requirement that companies, fund companies, or others present their proxy

Although, as discussed below, the absence of morality education is not acceptable and ordinary investors should do more than specialize in risk diversification,⁵⁴ the current state of investor education may be the best short-run solution. For primarily cultural reasons, education will be important in helping ordinary Americans deal with their saving and investing responsibilities.⁵⁵ It is difficult to educate ordinary people to save more, to invest optimally in line with the teachings of finance, and to stay away from the common forms of investment fraud. However, a well-designed government and private party educational partnership may further these educational goals.⁵⁶ More Americans are becoming educated about saving and investing as these activities become a part of everyday life. Education about firm and governance norms should wait until the major kinds of investor education take hold.

Additionally, the absence of investor “morality” education may not have hindered the creation and enforcement of corporate norms so far, particularly those relating to corporate governance. Ordinary Americans, whether investors or not, do not need much education to understand corporate violations of well-accepted social norms, so long as

statements, which solicit votes from shareholders, in “plain English” and in an easily comprehensible format. See Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018, 63 Fed. Reg. 29,106, 29,106-07 (1998) (requiring that the shareholder proposal rules be written in a “plain English” question and answer format); Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-39093, 62 Fed. Reg. 50,682 (proposing that the shareholder proposal rules be revised into a Question & Answer, “plain English” format, resulting in rules that are easier to follow). As requested by the House Committee on Commerce, the SEC also is investigating the normative issue of corporate charitable giving, that is, whether companies need to disclose information regarding their charitable contributions. See Securities & Exchange Comm’n, *Revised Invitation for Comments: Charitable Giving by Public Companies*, (last modified Nov. 24, 1997) <<http://www.sec.gov/rules/other/chgive.htm>> (requesting public commentary on corporate charitable giving).

54. See, e.g., HANSMANN, *supra* note 23, at 44-45, 57 (observing that shareholders are well-suited to bear the risks of management opportunism because they can diversify their investments).

55. See Fanto, *supra* note 1 (manuscript at 21-34) (arguing that cultural constraints will make education a preferred United States solution to problems of individual saving and investing).

56. In the educational partnership, federal and state agencies encourage individual saving and investing behavior by publicizing its importance, by supporting investor education in schools, and by facilitating the provision of investor education by private parties, such as, financial firms, not-for-profit consumer groups, and self-regulatory organizations. Federal law mandates the partnership. See Savings Are Vital to Everyone’s Retirement Act of 1997, 29 U.S.C.A §§ 1146-47 (West Supp. 1998) (amending ERISA and mandating that the Department of Labor promote retirement savings by the public). It is certainly an open question whether education can produce basic, successful investment performance by most Americans and thus help avoid the enormous disparities in wealth due simply to investment choices. I owe this observation to Professor Daniel Greenwood.

someone brings the violations to their attention and suggests appropriate action. In fact, on many critical social issues (e.g., environmental and racial issues) the “norm entrepreneurs” fulfill this role.⁵⁷ As is well-known, many shareholder proposals for company proxy statements traditionally come from such issue activists.⁵⁸

In corporate governance, certain institutional investors, such as the public pension funds and firms giving guidance on proxy voting,⁵⁹ have developed and enforced corporate governance norms among company management for all the reasons that have been discussed ably in the governance literature. They are the informed “consumers” whose activism and monitoring may well benefit all investors with a free ride on their efforts.⁶⁰ In the past decade these investors clearly have transformed large public corporations, bringing heightened scrutiny to, and developing best practices for, executive and board behavior. Although debates continue as to whether corporate governance activism has improved corporate performance, which is another way of asking whether corporate governance really matters to firm success,⁶¹ there is no question in the world of American, and even international, big business, as well as in the academic literature,⁶² that corporate governance has become the domain of institutional investors and their specialized assistants.

Amid all of this norm creation and enforcement, the small investor has been ignored. Norm entrepreneurs of large social issues simply aim to

57. The SEC acknowledges that a norm has been accepted widely in this country when it compels companies to include proposals in their proxies dealing with that norm. Cf. WILLIAM L. CARY & MELVIN ARON EISENBERG, *CASES AND MATERIALS ON CORPORATIONS* 363-65 (7th ed. 1995) (noting SEC no-action letters advising against using the ordinary business operations exception to proxy disclosure on controversial issues).

58. See Amendments to Rules on Shareholder Proposals, 62 Fed. Reg. at 50,683; see also Stewart J. Schwab & Randall S. Thomas, *Realigning Corporate Governance: Shareholder Activism by Labor Unions*, 96 MICH. L. REV. 1018, 1044 (1998) (describing the shareholder activist phenomenon and citing relevant articles on it).

59. Such organizations include Institutional Shareholder Services, Inc. and the Investor Responsibility Research Center.

60. See Edward B. Rock, *The Logic and (Uncertain) Significance of Institutional Shareholder Activism*, 79 GEO. L.J. 445, 466-72 (1991) (discussing the ability of small shareholders to rely on institutional investor activity); see generally Bernard S. Black, *Agents Watching Agents: The Promise of Institutional Investor Voice*, 39 UCLA L. REV. 811 (1992) (addressing the benefits of active institutional investors).

61. See Bernard S. Black, *Shareholder Activism and Corporate Governance in the United States*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 459, 463 (Peter Newman ed., 1998) (“The overall level of shareholder activism is quite low. A few institutions spend a trivial amount of money on overt activism.”).

62. See, e.g., COMPARATIVE CORPORATE GOVERNANCE: ESSAYS AND MATERIALS M-1 to M-139 (Klaus J. Hopt & Eddy Wymeersch eds., 1997) (providing appendices listing codes of best practice of corporate governance in numerous countries).

galvanize this small investor along with other Americans to effect a desired action, such as a product boycott. Specialists in corporate governance dismiss the small investor as irrelevant, explaining that he or she has no time to spend on governance matters, and thus makes a rational decision to ignore such issues, and generally support management in an unthinking way.⁶³ It is time, however, to consider moving beyond this treatment of ordinary investors so that they may learn to care about and to participate in the creation and enforcement of governance and other norms.

IV. THE FUTURE OF INVESTOR EDUCATION: CORPORATE GOVERNANCE EDUCATION?

While, in the best of circumstances, it may take time to convey successfully basic saving, investing, and anti-fraud education to the many ordinary Americans in need of it, investor education should not stop with this essential mission. Rather, it should be designed to train ordinary investors about corporate norms, make them consider their own views regarding these norms, and then instruct them in the possibilities of affecting corporate behavior. The following discussion offers a few normative and pragmatic arguments in support of this contention. It does not intend to exaggerate the likelihood that this education will produce an immediate impact on investor or corporate behavior nor does it intend to ignore the existing impediments to small shareholder activism. Even ordinary investors educated to understand and judge the implications of corporate behavior may still decide that the preferred, and perhaps only practical, strategy is to build a well-diversified portfolio, adjusted for their own risk-preferences, and, when dissatisfied with a given investment, to take the traditional "Wall Street" walk.⁶⁴ They should not, however, be taught that the *only* possibility available to them is to be a relatively passive consumer of financial products and that investing *must* be limited to purely financial considerations.

That investor education has a self-reflective, normative, and *formative* side is apparent, even in the basic saving and investing education. This

63. See USEEM, *supra* note 24, at 18 (portraying the small shareholder in the takeover situation: "Both sides calculated that most of the company's many small shareholders were likely to remain loyal to management."); *id.* at 30 ("Smaller investors and firms have neither the inclination nor the capacity to move in these directions [i.e., more contacts with company management].").

64. See BLAIR, *supra* note 16, at 35 ("This ability to sell out at any time is sometimes called the 'Wall Street Walk' and, as noted above, is one way that shareholders can signal their dissatisfaction with the way a company is being run.").

education should bring an individual into the saving and investing “culture,” which means that he or she should reflect on the financial goals, both social (e.g., retirement) and personal (e.g., saving for specific purposes), important to him or her, or to significant others, and should come to understand his or her responsibility for meeting them. It should then train the individual in the optimal ways that have emerged out of social experience and social reflection, particularly in the disciplines of finance and psychology, for achieving these goals through saving and investing. Like every kind of education, investor education will be at once constraining and empowering: it constrains individuals by guiding them to think about, and to do, saving and investing in particular ways, for particular purposes; it empowers them insofar as they benefit from the collective social learning on performing well the important responsibilities that *this* society has now placed on all individuals.⁶⁵

The ultimate goal of investor education is to make an investor a responsible manager and owner of his or her property; investing educators constantly remind people to remember that they are dealing with their own assets.⁶⁶ Responsible ownership in investing means more than the role of a consumer concentrating on the important, but narrow, goal of designing an optimal portfolio for his or her purposes.⁶⁷ While an ownership perspective does not suggest that the investor cease to consider the benefits that the investment brings specifically to him or her, it enlarges the investor’s vision to consider the purposes of firms, the organization

65. This observation is true of every social activity, as Stanley Fish (often) has observed. See STANLEY FISH, *PROFESSIONAL CORRECTNESS: LITERARY STUDIES AND POLITICAL CHANGE* 82 (1995) (“Each effort only makes sense in relation to the traditions, goals, obligatory routines, and normative procedures that comprise its history and are the content of its distinctiveness; as tasks geared to different purposes, they call on entirely different skills and set in motion different orders of attention.”); see also MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 138 (Alan Sheridan trans., Pantheon Books 1977) (“Thus discipline produces subjected and practised bodies, ‘docile’ bodies. Discipline increases the forces of the body (in economic terms of utility) and diminishes these same forces (in political terms of obedience).”).

66. See Securities & Exchange Comm’n, *Invest Wisely: Advice From Your Securities Industry Regulators* (last modified Dec. 19, 1997) <<http://www.sec.gov/consumer/inws.htm>> (“Do not rush. Do the necessary background investigation on both the firm and the sales representative.”); Remarks of Chairman Arthur Levitt at the National Roundtable on Saving and Investing (March 30, 1998) (available at <<http://www.sec.gov/news/speeches/spch209.txt>>) (“It’s your money—Financial security starts when you take personal responsibility for your financial well-being.”).

67. See Don Phillips, *Owner or Consumer? Open Letter to the SEC* (visited May 2, 1997) <<http://text.morningstar.net/cgi-bin/GetNery=MsOpEd/lettertosec1.html>> (no longer available at website, on file with *The Catholic University Law Review*) (letter by the president of a mutual fund rating organization arguing against regulatory actions that accept and promote the view of ordinary investors as consumers).

and governance structures for achieving these purposes, and the means whereby the investor himself or herself can influence them. Since a large organization, such as a public corporation—the final, although often mediated, investment of much of investors' funds—clearly does not exist to serve the purposes of a single ordinary investor, the ownership perspective encourages the investor to understand the social issues implicated by firms and their activities and the effects of these firms on many lives.

This view of responsible ownership of investment assets draws support from a political vision, or at least accepts a relation between political views and behavior concerning firm ownership. This relation should not be surprising, because in the investment world, the idea of shareholder democracy, with its own political resonance, has been used and espoused at various times over the years.⁶⁸ Scholars observe that firm governance is closely related to a country's political traditions⁶⁹ and that firm governing bodies in reality act in ways similar to political organizations in their effort to balance competing firm interests and claimants.⁷⁰ A political argument for an expanded "ownership" education for investors would contend that a politically active citizenry needs to be actively involved in managing investment property, particularly because the firms that receive investments are so critical to providing the substructure for the political activity in the first place.⁷¹ Just as responsible investing should reinforce the political component, a limited view of it could promote political passivity.⁷² Without dramatizing the issue, there are politi-

68. See generally Daniel E. Lazaroff, *Promoting Corporate Democracy and Social Responsibility: The Need to Reform the Federal Proxy Rules on Shareholder Proposals*, 50 RUTGERS L. REV. 33, 79 (1997) ("As the 'owners' of the corporate enterprise, the shareholders deserve a meaningful role in the corporate decision-making process.") (footnote omitted) (citing *Medical Comm. for Human Rights v. SEC*, 432 F.2d 659, 680-81 (D.C. Cir. 1970), *vacated on other grounds*, 404 U.S. 403 (1972)).

69. See MARK J. ROE, *STRONG MANAGERS, WEAK OWNERS: THE POLITICAL ROOTS OF AMERICAN CORPORATE FINANCE* 19-49 (1994) (discussing the political paradigm of corporate ownership).

70. See Blair & Stout, *supra* note 24 ("[O]ur theory [the "team production model"] points to the fundamentally political nature of the corporation.") (footnote omitted).

71. See Lazaroff, *supra* note 68, at 81 (arguing that corporate activity may generate more social and economic reform than government action). This statement does not mean to suggest that culture is determined by the "more essential" economic activities in society. See FREDRIC JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* 32, 35-36 (1981) (identifying the economic infrastructure as a part of an "entire system of *relationships*" among various bases of "superstructures," that is, culture, ideology, the legal system, and the state).

72. See Greenwood, *supra* note 12, at 1098-1104 (arguing that a limited view results in shareholders that value only those actions that increase stock price, even when they conflict with traditional societal norms); *cf.* AMY GUTMANN, *DEMOCRATIC EDUCATION* 44 (1987) ("[A] democratic state must aid children in developing the capacity to understand

cal and ideological implications in failing to instruct people about the consequences of their ownership of property and in encouraging them to view such ownership in a limited way.⁷³

The normative justification should have an individual, as well as a social or "political" component, although the political and individual components are closely interrelated. This justification would propose that, where feasible, an individual should not be limited to a specific role, particularly a passive one, in a given activity, but should be made aware of all of the possibilities of expression, influence, and ability to contribute that are available in the activity. This potential is a positive human good and should be facilitated and promoted.⁷⁴ Investor education about saving and investing is individually empowering because it helps individuals understand and undertake the diverse forms of human expression and control that these activities make possible.⁷⁵ Yet limiting investor education to these subjects would harmfully cut off the possibilities of other kinds of individual activity and expression in investing. Such limitations would reify individuals in roles by causing them to think of themselves as limited to certain activities (e.g., selecting the optimal portfolio) and by significantly discouraging them from engaging in others.⁷⁶

and to evaluate competing conceptions of the good life and the good society.").

73. For a related argument, see Gregory S. Alexander, *Pensions and Passivity*, 56 LAW & CONTEMP. PROBS. 111, 112-13 (1993) (arguing that the passivity encouraged by the modern pension system "diminishes the degree of personal responsibility that classical liberal ownership required all individual owners to take. At the same time, despite its group-like character, the corporate pension system, unlike classical socialism, contains no features that allow, let alone guarantee, democratic participation by the group.") (footnote omitted).

74. Cf. ROBERTO MANGABEIRA UNGER, *PASSION: AN ESSAY ON PERSONALITY* 35 (1984)

Its [the doctrine of modernism] specific social expression is the belief that no institutional order and no imaginative vision of the varieties of possible and desirable human association can fully exhaust the types of practical or passionate human connection that we may have good reason to desire and a good chance to establish.

Id.

75. As an aside, the empirical evidence on investor education suggests that ordinary investors prefer to control their property and investment decision making. See Arthur B. Kennickell et al., *Saving and Financial Planning: Some Findings From a Focus Group*, 8 FIN. COUNSELING & PLAN. 1, 4 (1997) (noting that the focus group emphasizes "self-control" in saving and financial planning).

76. Cf. JAMESON, *supra* note 71, at 63. Jameson explains that reification is a complex [dynamic] in which the traditional or "natural" . . . unities, social forms, human relations, cultural events, even religious systems, are systematically broken up in order to be reconstructed more efficiently, in the form of new post-natural processes or mechanisms; but in which, at the same time, these now isolated broken bits and pieces of the older unities acquire a certain autonomy of their own, a semi-autonomous coherence.

Pragmatic concerns about improving corporate behavior add support to these normative justifications for additional and broader investor education that focus more on benefits to the individual investor. It is important to remember that, despite the current focus on institutional investors, ordinary investors have not disappeared even from the direct investment world; institutional investors own only approximately 47% of the equity in this country, and these investors generally are acting for smaller investors.⁷⁷ In other words, behind all the institutional investor activity stands the ordinary person who increasingly puts funds in a mutual fund, pension fund, or insurance annuity. While it is commonplace to mention securities market transformations due to the enormous changes in computer technology,⁷⁸ one important consequence is that the technology may promote more direct, as opposed to intermediated, investing by individual investors, who together would have significant voting power in many corporations.⁷⁹

A large, untrained group of owners eventually may have a negative

Id. Reification certainly is not due just to mental constraints. People often do not make efforts to engage in activities because the activities either expressly are prohibited to them or the access to them is so restricted as to make general involvement impossible. Yet such prohibitions and restrictions are at least partly kept in force by ideological views that encourage some people to think that they are not “worthy” or competent to participate in a particular activity. See generally PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, *LA REPRODUCTION: ÉLÉMENTS POUR UNE THÉORIE DU SYSTÈME D’ENSEIGNEMENT* (1970).

77. See THE CONFERENCE BOARD, *1 INSTITUTIONAL INVESTMENT REPORT: PATTERNS OF INSTITUTIONAL INVESTMENT AND CONTROL IN THE UNITED STATES: FINANCIAL ASSETS AND EQUITY HOLDINGS 7* (1997) (stating that recent growth in institutional investors’ share of equity holdings has remained stable after rapid growth during the 1980s).

78. See Coffee, *supra* note 25, at 1195 (arguing that the Internet will revolutionize securities regulation).

79. See *id.* at 1197 & n.9 (observing that “[o]n the longer-term horizon, there is even the visionary possibility that the Internet can be used to pass through voting rights in securities held by pension and mutual funds to the fund’s own owners or beneficiaries—a possibility that carries with it profoundly destabilizing implications for institutional investors”) (footnotes omitted); Howard M. Friedman, *Proxy Solicitations and the Cyberspace Revolution*, *INSIGHTS*, Dec. 1997, at 9, 11-12 (observing that “[s]ome companies have begun to experiment with holding their annual meetings [on-line],” and noting that, “[t]he Internet may overtake structural reform as the tool of corporate democratization in the 21st century”); John C. Wilcox, *Electronic Communication and Proxy Voting: The Governance Implications of Shareholders in Cyberspace*, *INSIGHTS*, Mar. 1997, at 8, 11 (discussing company communications with investors through new electronic media and wondering whether “pass-through voting” for investors in pension funds and mutual funds will develop). Indeed, “pass-through” voting has developed within both defined contribution and defined benefit pension plans. See generally Donald J. Myers & Michael B. Richman, *Pass-Through of Proxy and Tender Decisions—New Guidance from the Nationsbank Case*, *PENS. & BEN. DAILY (BNA)* (Apr. 1, 1998), available in LEXIS, Labor Library, BNAPEN File (describing developments in pass-through voting in retirement plans).

impact on corporate behavior. If ordinary investors figure, even more importantly than they do now, directly in the capital of public corporations and if they are not trained in corporate morality, there ultimately could be adverse consequences for the enforcement of corporate, and particularly corporate governance, norms. The accepted wisdom is that individual investors generally follow, and will continue to follow, investment managers,⁸⁰ which makes sense *if they have no morality education*. They have little time available even for the financial aspects of their investments and have never been encouraged to consider a possible corporate governance role. Accordingly, it is reasonable for them to support management, with whom they are familiar, over outside challengers on nearly every issue. Indeed, the potential negative impact from investor passivity applies especially to behavior of financial intermediaries, such as mutual funds, through which many ordinary people invest.⁸¹

As a pragmatic matter it makes sense for the norm entrepreneurs, who have been sometimes successful in policing corporate behavior, to recognize the benefits from the presence of other educated, but ordinary, investors. There need be, in fact, no stark division between institutional and retail investors on normative issues, even if obvious differences exist in investing abilities and professional occupations. In helping to monitor corporate and corporate agent behavior, whether on corporate governance or other matters, activist institutions may be more successful in norm enforcement if they can draw support from ordinary investors who are direct investors or the beneficiaries of institutional funds. That is, their complaints about corporate misbehavior will have more force, whether through the corporate ballot box or through outside public pressure, if their views reach beyond other institutional investors to touch the large group of traditionally passive individual investors. Having ordinary investors on their side may also help institutional investors deflect criticisms from company management or from politicians that they are the new elites wielding too much financial power without accountability.

This leads to the scope of morality education and its providers. Because this topic is potentially a large one, I offer here only a few observations. As a preliminary solution, morality education could come from the very norm entrepreneurs who have been successful in enforcing corporate norms, particularly in corporate governance. Concerned parties such as norm entrepreneurs, will always mobilize to convey their mes-

80. See Wilcox, *supra* note 79, at 12.

81. See INVESTMENT COMPANY INSTITUTE, 1998 MUTUAL FUND FACT BOOK 1 (38th ed. 1998) (observing that the total assets in mutual funds grew from \$1.07 trillion in 1990 to \$4.5 trillion in 1997).

sage to the public when startling examples of corporate abuse appear in their domain. Because corporate governance services for institutional investors have prepared and standardized information about corporate governance norms, they could design presentations and formats for ordinary investors without much trouble.⁸² Computer technology lowers the costs of preparing and communicating this education, as it does for basic investor education.⁸³ Since information on governance norms and their violations thus can be communicated easily to ordinary investors, as it is now among institutional investors,⁸⁴ individual investors need only a conceptual framework on governance norms so that they can make sense of, and act on, the disclosed information.

Investors need more systematic and extensive morality education than what these norm entrepreneurs can offer. This education would intersect with general economic education. Its goal would be to take a "larger" view of business activity and to see, realistically, the possibilities of individual and collective action therein. Investors should learn about the role of firms in the economy, the advantages that come from complex business organizational structures, and the accepted purposes and goals of corporate and other business activity.⁸⁵ The education would include discussion and debate about these purposes and about the interaction between business goals and other social ends, such as human welfare issues. Investors would have to receive instruction about the power and decision

82. One thinks, for example, of Institutional Shareholder Service, Inc.'s (ISS) information and instructions on proxy voting throughout the world, a service that is available in computerized form. See Institutional Shareholder Services, Inc., *Proxy Record* (visited Aug. 25, 1998) <<http://www.cda.com/iss/prxyrcrd.html>> (describing the ISS's proxy software). The obvious question is whether ISS would find it profitable to provide a similar kind of service for small investors. An organization like the American Association of Individual Investors might also design appropriate materials.

83. Institutional investors could reach retail investors through Web-sites. In fact, an enterprising small investor can learn much about corporate governance norms through existing Web-sites of institutional investors and other groups. See, e.g., *Corporate Governance* (visited Aug. 26, 1998) <<http://www.CORPGOV.NET>> (independent net site with many corporate governance links); *Counsel of Institutional Investors* (visited Aug. 25, 1998) <<http://www.ciicentral.com>> (site of the Council of Institutional Investors); *LENS The Active Investment Alternative* (visited Aug. 25, 1998) <<http://www.lens-inc.com>> (site of fund run by noted activists Robert Monks and Nell Minow); *Welcome to CalPERS Online* (visited Aug. 25, 1998) <<http://www.calpers.ca.gov>> (site of the California Public Employees' Retirement System).

84. See Wilcox, *supra* note 79, at 11 (referring to the issue of mobilization that is occurring among institutional investors through Web-sites).

85. As noted above, current investor education materials have little such information. See, e.g., NEW YORK STOCK EXCHANGE, *supra* note 48, at 28-29, available at <<http://www.nyse.com/public/educate/6a/6a5/6a5.htm>> (visited Aug. 25, 1998) (focusing on macro-economic and financial education).

making structure within a corporation to understand who manages it and why, what is the function of corporate officers and board members, and what are the prevalent views about their appropriate behavior. The education naturally would lead to an explanation of how ordinary investors can affect corporate decision making and enforce behavior. Although, as Adolf Berle and Gardiner Means pointed out long ago, securities are a special kind of property without the control rights traditionally associated with ownership,⁸⁶ investors should still be instructed on available means of control, even if the means are not extensive and their exercise does not often succeed.

Families and schools have an important role in conveying basic education about saving and investing.⁸⁷ Although families will develop more expertise on saving and investing because these activities are a part of everyday life, they may have a more difficult time conducting the morality education described above, other than by fulfilling their important role of inculcating in the young the foundations of morality.⁸⁸ By contrast, high schools are better positioned to provide this general economic and business education and an introduction to the social debates associated with them.⁸⁹ Financial regulators must also conduct this education. Just as they have come to recognize the importance of investor educa-

86. See ADOLF A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 3-10 (1991).

87. See Fanto, *supra* note 1, (manuscript at 51-58) (discussing the actions families and schools can take in savings and investing education).

88. See Richard H. Thaler & Hersh M. Shefrin, *An Economic Theory of Self-Control*, in RICHARD H. THALER, *QUASI-RATIONAL ECONOMICS* 77, 85 (1991) ("The best predictors of which individuals will fall into which groups [better versus worse savers] are probably related to family background, since the family is the most likely place for the individual to learn (or not learn) the rules and norms necessary to overcome the self-control problems.") (footnote omitted).

89. Professor Langevoort suggested during the symposium that, because schools do not now function well in conveying basic knowledge to students, it is inappropriate to impose on them another educational task. This criticism applies equally to placing any kind of investor education responsibility on the schools. Yet the question whether schools are now functioning properly is at least partly distinct from the question whether they are well situated (because they reach individuals early in life) to conduct morality education. Cf., GUTMANN *supra* note 72, at 70 (observing that the present problem with schools is not an adequate argument against the importance of schools in morality education). In fact, the available empirical evidence suggests that high school investor education has positively affected students' later saving and investing behavior. See B. DOUGLAS BERNHEIM ET AL., *EDUCATION AND SAVING: THE LONG-TERM EFFECTS OF HIGH SCHOOL FINANCIAL CURRICULUM MANDATES* 3 (National Bureau of Econ. Research, Working Paper No. 6085, July 1997). If education can have this effect in present circumstances, why should such school training not enjoy similar success with morality education?

tion,⁹⁰ they have to move beyond its financial focus, which serves to keep investors from thinking about anything other than their own personal portfolio. Once the regulators have adequately addressed basic saving and investing education—that is, by making individuals recognize the importance of having an optimal personal portfolio—they must remind investors of the larger moral and social issues that come with business operation and ownership.⁹¹

V. CONCLUSION

Investor education will receive much worldwide attention and activity in the coming decades⁹² as more individuals are given responsibility for their saving and investing. Because of this responsibility, individual investors need an optimal investment return to meet their financial goals, particularly in retirement. While the main focus of educational efforts will, and should be, on saving, investing, and preventing investment fraud, and while the education must be done so that investors do not forget this focus,⁹³ it must eventually extend to instruction on “larger” firm issues. If individuals are to be responsible stewards of their investment property, they should understand the purposes of business firms, their governance, and the norms that are appropriate for firms and firm agents, as well as the need for changes in normative behavior to ensure that firms function better in accordance with these purposes. Furthermore, this instruction should enable ordinary investors to read disclosures to understand the norms a firm or its agents are following (and/or

90. See Fanto, *supra* note 1, (manuscript at 71-79) (referring to the educational efforts of the Pension and Welfare Benefits Administration and federal bank regulators).

91. Just as there may be difficulties in having financial regulators espouse any given investment strategy, such regulators must reflect before advocating any given business for firms, other than shareholder value. Yet there is no reason why regulators could not identify competing purposes and urge investors to be active, as time permits, in supporting the ones they favor. I do not mean to suggest that basic saving and investing education is not an ongoing process for most ordinary investors and a target of oversight for financial regulators. Once, however, the regulators have generally promoted this basic education, they should then encourage the development of morality education.

92. See, e.g., *Securities & Exchange Comm'n, First-Ever Hemisphere-Wide Investor Education Campaign Planned; Campaign will promote financial literacy, economic growth* (Dec. 15, 1997) available at <<http://www.sec.gov/news/press/97-111.txt>> (discussing investor education campaigns throughout Latin America and Canada).

93. Some participants in the symposium were concerned that morality education would distract investors from the basics of investing. Similarly, some did not want financial regulators, like the SEC, to focus on corporate morality, because it would distract the regulators from overseeing securities markets. While these are valid concerns, it seems to me ultimately harmful, for the reasons stated above, to restrict retail investing to purely financial concerns.

the advice provided by norm entrepreneurs) and to take action to enforce, or at least promote, the behavior that they personally support.

This education will counteract the representation that the individual investor is simply a provider of capital, active insofar as he or she attempts to maximize his or her own investment return, but passive regarding anything that does not touch on this exclusive focus, a rationale that is used to explain his or her indifference to corporate governance and a representation that actually contributes to such passivity and impedes other kinds of investor action. If firms are understood as more than mere instruments of shareholder profit and as complex, quasi-political organizations serving multiple contending and contentious constituencies, the retail investor, who provides, directly or indirectly, much firm capital, must be brought back into the picture, particularly regarding the creation and enforcement of corporate governance and other norms. It is important that these investors learn to express their voice or voices, and investor morality education is necessary to this expression.

Again, I emphasize that this education may lead neither to more shareholder democracy nor to a radical transformation in investor or corporate behavior. Despite their understanding of norms of corporate behavior, ordinary investors may decide to spend the little time that they have available on maximizing their portfolio value to satisfy their own personal financial preferences. The familiar “structural” problems of shareholder action—the difficulty of acting collectively and the little value of any one shareholder voice in a large organization—remain. Yet if people are encouraged to understand investing in a broader context that, despite its social framework, has direct relevance to their *own* lives, they may well take an interest and participate in norm enforcement, even if only in the limited way that their time and efforts permit.⁹⁴ It is inappropriate, both for normative and pragmatic reasons, to keep individual investing within a restricted sphere, now that it is part of everyday life.

94. After all, individuals do vote in political elections, even though similar collective action problems exist in that context. See MCCHESENEY, *supra* note 21, at 136.