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PANEL 1: SHOULD CORPORATIONS PAY TAX?

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TAX AND CORPORATE SOCIAL RESPONSIBILITY
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MODERATOR: *Mitchell Kane*
PRESENTER: *Reuven S. Avi-Yonah*
DISCUSSANTS: *Peter A. Barnes,*
Michael L. Schler, Helen S. Scott

PROFESSOR JOSHUA D. BLANK: Good morning. Welcome. My name is Josh Blank. I'm a professor here at the law school and I'm the Faculty Director of the Graduate Tax Program. On behalf of the *NYU Journal of Law & Business* and the Graduate Tax Program in the law school, welcome to our symposium on Tax and Corporate Social Responsibility.

Since 1909 the federal government has attempted to tax businesses, specifically corporations. The corporate tax in the United States has always generated intense debate. For our students and many of the people in this room this is a topic of great interest. Just to give you a sense of the interest, last night I spent a little time taking a look at our rosters for our classes this year. We offer a number of courses in corporate tax, but we also have a basic class, a Corporate Tax I & II class, that most of our tax students take at the very beginning. This year during the academic year 256 NYU students—J.D. students, LL.M. students, executive LL.M. students—took the very basic corporate tax class, just the first class.

Many of our guests who join us today who are in the room practice in the city's major law and accounting firms. They

spend their days in the 300's Sections of the Internal Revenue Code and the Treasury Regulations and all of the guidance. And some members of our faculty who are with us have been teaching corporate tax for decades, in some cases more than thirty or even forty years.

This event, however, is a departure from our normal approach to corporate tax during the Graduate Tax Program. Our normal approach is usually to focus on the technical aspects, the practice aspects of tax in class, in addition to the underlying policy obviously. But today we're going to depart for a few hours and not focus on the technical side. Instead, we will think about the corporate tax and how it relates to our broader social values and goals.

Our two panels today will address two questions. The first question will start at the very beginning, "Should Corporations Pay Tax?" Our second panel will address the question, "Should Corporate Tax Returns Be Public?"

Before we start the event, I just have a few thank-yous and housekeeping items. I just want to thank all of you for coming to the event. We had tremendous response to this particular event. Last night we had about 115 people who RSVP'd for the event, so thank you very much for coming. I also want to thank all of our panelists and members of the tax faculty who are participating in the event. Many of you have traveled from other locations, including outside the United States, so thank you very much for coming to the event. Also, I would like to thank the Office of Student Affairs, which has funded the event and helped us a great deal in terms of planning it, and Hannah Olson in the Graduate Tax Program who worked on all of the logistical details for the event.

Finally, I'd just like to thank the *NYU Journal of Law & Business* and the editors of the *Journal* for motivating us to have this event, in particular David Holmberg, who is a 3L and one of the Managing Editors of the *Journal*.

Just to give you a sense of how this event came into being, the students on the *Journal* last year approached me and said, "We have an idea for a program. We would love to do something on tax and corporate social responsibility." David and one of his classmates, Jesse Gero, after speaking with their advisors, Helen Scott and Karen Brenner, had an idea to host this event. And we thought this would be a great opportunity,

not just to have an event for tax students, but to have an event with both the tax, and law and business students, and others, in the law school.

And so I'd like to just introduce David. I know David has a couple of words to say, and then we'll get started with the program. So David Holmberg.

MR. DAVID HOLMBERG: Good morning. I just think a couple of thanks are in order on part of the *Journal*. I guess first I want to introduce myself. Josh introduced me. I'm David Holmberg. I'm a Managing Editor at the *Journal*. I want to thank first of all, Reuven Avi-Yonah and Professor Blank for the papers and all the participants in the conference. I also wanted to thank Helen Scott and Karen Brenner for developing the idea, for supporting the event. I'd like to thank Peter Horn, Les Krusen, Hannah Olson, and David Mora for all they've done for the event. And a big thanks to Josh Blank. As he said, we came to him with the proposal last spring, but he really made the event happen. So thanks very much.

And I just wanted to say, the papers from the conference will appear in a Special Issue of the *Journal*. It will be published later this year. And if that's something you're interested in, my contact info is on the back of the program and you can email me, and I'll make sure you get a copy. So with that, I will turn it back over to Josh.

PROFESSOR BLANK: So thanks, David. And I should also mention that the papers are in draft form in the lobby. We have copies if you're interested in reading them before they are polished and beautiful after the *Journal* editors have a chance to spend time with them.

So to start the program I would like to just introduce our moderators since nobody will be on the panel who will be able to introduce them. So I will introduce our moderators and then they will introduce the panelists. Our two moderators today are Mitchell Kane and David Kamin.

Mitchell Kane is the Gerald L. Wallace Professor of Taxation at NYU. Before he joined the faculty at NYU, he was a member of the faculty at the University of Virginia School of Law. His current research focuses on tax and economic development, tax and climate change, and the intersection of international tax and corporate governance. Mitchell will moderate our first panel, "Should Corporations Pay Tax?"

Next, after our break, our second panel will be moderated by David Kamin. David is an Assistant Professor of Law here at the law school. He joined us just in 2012 as an Assistant Professor. His scholarship focuses on tax and budget policy. And before he came to the law school, he was actually at the White House where he served in President Obama's administration as Special Assistant to the President for Economic Policy in addition to other roles at the White House. So we're very happy to have both of our colleagues here today as moderators for the two panels.

Before I turn it over to Mitchell, just two quick house-keeping notes. One, there will be a ten-minute break between the two panels, so you'll have a chance hopefully to enjoy the food out in the lobby. The second thing I need to mention is that the event is being video recorded. So we will have videos of the event posted on our website and a transcript of the event will be included in the special *Journal* issue. So in terms of the panel discussion and questions of the audience just to make you aware that this will be recorded and turned into a transcript. So with that, I will turn it over to Mitchell Kane.

PROFESSOR MITCHELL KANE: Thanks, Josh. I am very pleased and happy to welcome Reuven Avi-Yonah to the law school to lead off this symposium. He is the Irwin I. Cohn Professor of Law and a Director of the International Tax LL.M. Program at the University of Michigan. Professor Avi-Yonah is truly a prolific scholar. He's producing levels of scholarship that would be the envy of many in the academy with over 150 publications to his credit. And as you can see, he's still very young, so we have much to hear from him still. He is best known probably for his work in the international area where he has written broadly and passionately about issues such as tax competition, transfer pricing, formulary apportionment. But he has also written very powerfully about the corporate tax. And here, he is a minority voice in the academy, but he is the perfect person to lead off this panel. So indeed when David also came to my office last spring and he said, "I have an idea for a symposium," I said, "Well, that sounds great. But you're going to have to find a suitable academic who's willing to write a paper on this, and that might be difficult because most academics who write about corporate tax aren't thinking about social responsibility. They're thinking about shredding the corporate tax and listing all of the things that are wrong

with it.” And so credit to David because you landed exactly the right person to come and lead this discussion. So I very much look forward to hearing what Professor Avi-Yonah has to say in his comments.

So Professor Avi-Yonah will present the paper in a little under twenty minutes. And then we have three panelists to offer comments. And they are ideally situated to give us varied perspectives from the in-house world, the academic world, and the law firm world.

So first off is Peter Barnes. He’s on the cusp of the in-house world and the academic world. He has recently left GE where he was Senior Tax Counsel for International Matters. And he is now at the Duke Law School, where he has been appointed a Senior Lecturing Fellow, and he is also Senior Fellow at the Duke Center for International Development. And he continues in a practitioner role as Of Counsel to the law firm of Caplin & Drysdale.

Second up will be Michael Schler who is a partner in the Tax Department at Cravath, Swaine & Moore. He is also former Chair of the Tax Section of the New York State Bar Association. And most importantly of course, he is a graduate of the law school where he took his LL.M. in Taxation. Mr. Schler is also, I should say, a frequent participant in our Tax Policy Colloquium, where we are very lucky to have his frequent input, deep wisdom, and a sense of the practical world, which keeps us here in the law school very well grounded.

Finally, we will have our very own Helen Scott who is a Professor of Law at NYU. Professor Scott is a linchpin of the Law and Business Program at NYU. She has been absolutely instrumental both in thinking about curricular reform in teaching in the Law and Business Program. She is currently Co-Director of the Mitchell Jacobson Leadership Program in Law and Business. Her teaching portfolio in the Law and Business area includes classes that relate to professional responsibility in corporate governance, so she, too, I think is ideally situated to give us the academic view on this very important question of the corporate tax and social responsibility.

So with that, I will turn the microphone over to Professor Avi-Yonah.

PROFESSOR REUVEN S. AVI-YONAH: Thank you very much, Mitchell, for introducing me and thanks to Josh for arranging

this, and to David and the *Journal*. And I'm really happy to be here again. It's always a pleasure to talk about tax at NYU because you get such a great audience and you get people from practice and you get students and you get academics. It's really wonderful to be here again.

So the subject is: "Should Corporations Pay Tax?" That's a little misleading because to an academic at least that sounds like the long-disputed question of whether we should have a corporate tax at all. Of course, we've had it for over 100 years, but there is a large academic literature that Professor Kane alluded to about whether there should be a corporate tax. And I would say that he's right, that the majority view is that we shouldn't have a corporate tax and we should deal with the problems of legal entities in some other way, such as having an interest charge or some other mechanism—mark-to-market—to kind of tax the shareholders and not the corporations, and that's because corporations are legal entities and they don't bear the burden of the tax and the tax is shifted to somebody else, and for all of those reasons.

On the other hand, from a practical point of view, it doesn't look very likely that we're not going to have a corporate tax any time soon. Because politically, I think it's very unlikely, that every time you see a headline, "X Big Corporation Paid Zero in Corporate Tax," that seems to be worth writing about in the newspaper. And so I don't think it's very likely that we're going to see politicians abolishing the corporate tax.

So the way I interpreted the question is rather different, which is to argue that to some extent the corporate tax is a voluntary tax. And what do I mean by that? I mean that corporations can and have in fact drastically reduced their tax liability by using all kinds of aggressive tax planning strategies, including traditional corporate tax shelters, which now may be on the wane, but there was a while between the late eighties and around 2003, where it really looked like the corporate tax shelter wave was going to eliminate the corporate tax for many large corporations. And that even appeared in the macro statistics; there was a significant decline in the overall revenues from the corporate tax.

But there has also more recently been a lot of news about corporate profit shifting overseas, about inversion transac-

tions, about aggressive transfer pricing, about all kinds of ways in which large corporations can reduce their overall effective tax rate and their corporate tax bill. And this is what I mean by voluntary. That is, the question from the mantle is should corporations be doing that or is there something wrong about it?

So let's start with a hypothetical. Since I am a law professor, I like hypotheticals. And the hypothetical is this. Suppose you are a tax director of a large multinational and somebody, let's say from an accounting firm or a law firm, comes to you and presents a scheme under which you think—or they think—that you are likely to be able to reduce your corporate tax bill significantly. And this scheme is characterized by, on the one hand, the fact that it is completely tax driven. That is, there is no, as they say, economic substance there. And they know it and you know it, on the inside. On the other hand, there is a plausible element in it that is built into the scheme that may well enable you to argue that in terms of the codified economic substance doctrine, there is economic substance in the sense that formally there is sort of an objective profit potential by putting some degree of profit into it, and that you may be able to create documentation that might convince a court that you in fact subjectively also intended this to be the main purpose, or a main purpose of the scheme. And in addition, you are going to get an opinion from a reputable law firm saying that it's fifty-one percent more likely than not that this will in fact will be upheld by a court of law. So that is a good description of the corporate tax shelters that proliferated ten years ago. And I was involved in some of them, so I know what I'm talking about more or less.

And the question is should you do it? Should you engage in this? And I am trying to argue that the answer to that should be in the negative. That is, in a situation where you know that what you are doing doesn't have economic substance, you shouldn't do it, as opposed to the traditional way of doing tax. You know, when I was in full-time practice that's most of what we did was somebody came to us with a business proposition and the answer was what's the most tax efficient way of doing it, and that, I think, is perfectly legitimate for tax lawyers to do. So I'm not suggesting that the tax lawyer should have no role, but I'm suggesting that they shouldn't be engaging in transactions that have no purpose other than reducing taxes when they know that that's the case.

So the answer is no because regardless of what view we take of the nature of the corporation, I think that corporate social responsibility requires the answer to be no. And so let me explain.

So there are three traditional views of the corporation that have been taken from time to time, and they tend to revolve in cyclical fashion. And this is a good day to be talking about this because today the Supreme Court is hearing the *Hobby Lobby* case and that involves all of these views, as in, are corporations people or not for purposes of the religious freedom aspect of the First Amendment?

So the three views are: the kind of state-centered view—corporations are a creature of the state; as Chief Justice Marshall said in the *Dartmouth College* case, the corporation is a creature of the state. And if that's the case, then the answer is relatively easy because if the corporation is primarily a creature of the state, then it shouldn't really be doing things to undermine the revenue of the state that created it. And I think that's relatively easy to settle, but most people don't take that view of the corporation.

The second possible view is the so-called “real view” of the corporation, which is the Mitt Romney corporations that people do view, *i.e.*, corporations are self-standing entities; they are separate from their shareholders; they are separate from the state. They are organizations that have management. There is a whole—I cite in the paper—a whole philosophical tradition now that talks about it, corporations in this way. And there is also a sociological tradition. Most economists don't like this view, and I'll talk about that in a moment, but that's definitely a view that is out there. And if you take that view, then corporations are like people, like individuals. And if that's the case, I also would argue that they shouldn't be engaging in this kind of aggressive tax behavior.

Because you have to ask yourself what would be the state of the income tax if all individual taxpayers minimized their taxes to the maximum extent possible. That is, engage in every conceivable trick that they can possibly legally justify. And the answer is the system will collapse. I mean, we have, as we all know, a pretty good tax enforcement mechanism as far as wage withholding and information reporting, at least domestically. The percentages are very high because the IRS has very

good computers and the whole Tax ID Number system. And so if you get wages, you get withheld on. If you get other income, you typically have information reporting and then everything that's reported to the IRS, and by and large the computer will spot you if you under-report. But of course, there's lots of types of income where there is no wage withholding and no information reported. And what's interesting is that all the economic studies that I am familiar with show that even there the compliance rate is well north of fifty percent, which economists really find too difficult to understand because given the audit rates, the chances that you will be caught if you under-report this stuff are very, very low. And so why it is that small business owners that get paid in cash or in checks, and why is it that people who receive tapes, and why is it that all kinds of people who are not covered by the information reporting system nevertheless pay their taxes? The answer is that they feel that it is their obligation to do that, and that's the law and they're supposed to be doing that. And I really do think that if the IRS had to try to catch everybody like that, and everybody was trying to minimize to the extent possible, we will never be able to collect, and our system depends on the personal income tax to the extent that other countries don't because they have the VAT. But we don't, so we really need voluntary compliance and I think that's a very important part. And this is what worries me about stories in which ordinary people that use that, some people can get away legally with not paying their taxes, and then the question is why is it that I am paying my taxes.

So that's as far as individuals are concerned. So if corporations are like people, they shouldn't be doing it either. That is, again, if every corporation engaged in all aggressive tax behavior as much as possible, then it's very hard for the system to cope with it. And this is, in fact, what happened during the height of the corporate tax shelter wave—that the system was beginning to wobble, and luckily we've kind of straightened it. But as long as the attitude is we should be as aggressive as possible, I'm worried that the next wave is just around the corner.

But then the interesting part of the paper, I think, is when you deal with the questions of whether corporations are somehow different, so that corporate managers, in fact, should be doing everything they can to reduce their corporate tax as long as it's arguably legal. And this is the familiar argument

that most of my academic colleagues and certainly most economists would take, which is that corporations are a pure nexus-of-contracts, that is, that they don't really exist; it's just a question of their relationship and the most important relationship is between the management and the shareholders. And the managements are the agents of the shareholders and they should be doing everything to enhance shareholder value. And if you hear people from corporations talking about their own conception of their own role, those are the—that's the terms in which they conceive of their own role. That is, they are agents of the shareholders; they should enhance shareholder value to the ultimate extent. The paper that I circulated begins with a quote from the famous Milton Friedman *New York Times* article—"The Social Responsibility of Business Is to Increase its Profits"—in which he definitely took this view. That is, he viewed corporate social responsibility as completely illegitimate because corporations should be about enhancing shareholder values because they are agents of the shareholders. Okay.

So what are the consequences for tax if you take that view? Well, the obvious argument is that reducing taxes also enhances shareholder value, and in some cases you can show that that's happened. So, for example, the inversion transactions at least initially resulted in a jump in the value of the shares because the effective tax rate went down and the share value went up. And so you could certainly argue that there are instances in which aggressive tax behavior that reduces the effective corporate tax rate is something that enhances shareholder value. And if it is the responsibility of the corporate management to enhance shareholder value, shouldn't they be doing whatever they can? And therefore the answer to the hypothetical should be yes. When you are presented with such a scheme, even though you know that it's wrong, because you have an opinion that you're fifty-one percent likely to get away with it, you should do it because that's the thing that enhances shareholder value. And I'm going to try to argue against that.

So the argument is basically this. If you take that view, that means that CSR (corporate shareholder responsibility) is completely illegitimate. Corporations cannot engage in any activity that is not directly to the benefit of their shareholders. This means that the entire responsibility for dealing with all social problems essentially revolves on the state. Now, in this country,

of course, there is also the NGO sector that deals with some of that, but I'm thinking more about other countries in which the NGO sector is weak. And even here the state has to deal with some problems. There are some things that the NGO sector just can't deal with. But in developing countries, it's basically one or the other. And if you think that CSR is not legitimate, that means that the state has the responsibility with dealing with all social problems.

But then, I think you come up against something that I think is a logical contradiction within Friedman's argument, which is if you take the argument of enhancing shareholder value to this extreme—that is, all corporations should try to reduce their taxes as much as possible—the result is no corporate revenues, no tax revenues. And if that means that the state has no revenues in order to support its functions, and under that view the state has all the responsibility, so it needs to have the revenue.

Now, of course, people will immediately say, okay, but the corporate tax is not that important—it's only ten percent of total revenues, and therefore the state can deal and we can, for example, increase individual taxes. But I think that's a little glib. First of all, it's not so easy to increase individual taxes, at least in this country. And in other countries, individuals already pay as much as they can possibly bear. Second of all, there are lots of places in the world where the corporate tax is much more important than here. Like developing countries, for example, where it's more like twenty-five percent, and you can really see—in developing countries, you can see the effect of aggressive tax behavior because it's been going down dramatically recently because of transfer pricing and stuff like that, and tax competition. It's really been reduced dramatically. And the problems that they face that the government is supposed to deal with are tougher than the problems here. And so I really do think that from that perspective it's a problem if we tell corporations that it's okay for them to reduce taxes as much as possible, and at the same time we'd say that the government has to deal with all problems and it needs the resources to do it, but the corporations don't pay their tax. So good luck to that. Nobody is left to deal with the problems and I don't think that's an acceptable attitude even from a Friedmanesque perspective.

So to sum up, I don't think there's any good argument for saying yes in this situation. Remember the hypothetical is that you know very well that what you are doing has no economic substance at all, that it's purely tax motivated, but you think you may be able to get away with it. And I think the answer under those circumstances, under any conceivable theory of the corporation is just say no. Thank you.

MR. PETER A. BARNES: I'm delighted to be here. I like to pretend I'm an academic. I had three wonderful semesters here at NYU as an adjunct. I even see one student in the audience. But I'm not fooling myself. I know I'm here as the corporate representative. I might dream otherwise, but I recognize why I was invited and I'm glad to be here. Thanks, Reuven.

I have two points to make and the second is actually much more important than the first. But the first is that corporate social responsibility and the moral issues around tax compliance are very, very serious issues and they deserve serious analysis. And I'm worried that the background discussion in the paper—and that's different from really the way Reuven described it a few moments ago—that the background in the paper doesn't frame the issues in a way that's fair. I hope that maybe some of the disconnect between what you just said and what you previously wrote gets ironed out before final publication.

PROFESSOR AVI-YONAH: [Interposing] That's the point of a panel like that, right?

MR. BARNES: I like that. I think some of the written language is not only harsh, but inaccurate. Reuven has in his statement posited a case where there's no economic substance: you know it, the outside advisor brought in the proposal, you bought it. But the paper—and I use the paper not to try to trap Reuven, but because it's characteristic of a lot of the writing about corporate tax planning—the paper says in fact corporations have significant leeway about whether they should pay the tax imposed them. That's a silly statement. They don't have leeway on whether they pay the tax. They pay the tax. The question is what's the right tax to be paid.

It says in the immediate next sentence that corporate tax revenues have fallen from a quarter of all revenues in '65 to less than ten percent today. There's no mention of pass-throughs. Any honest discussion of corporate tax revenues

needs to raise the issue of pass-throughs. And then the very next sentence says the major reason in recent years for this decline is the growth of a corporate tax shelter industry. I think that's an inaccurate statement, and Reuven has said in his oral remarks ten years ago we had a problem. If you look at the financial statements that corporations file—and I encourage you to do so—and you read the tax footnotes, the idea that corporate tax shelters as described either in the paper or orally are the reason for corporate tax revenues to fall is simply not correct. Corporate tax shelters are bad, pure bad, if you'd say no economic substance, you created them out of whole cloth just to reduce your taxes. They're the economic equivalent of American citizens putting assets overseas and not reporting the income on their return. We can all agree that that's bad.

That's not the reason that corporate tax revenues are too low by whatever standard that we say they're too low. It's income earned overseas, and growth overseas is dramatically faster than growth in the U.S. And it's income that's deferred overseas. This matters because we're talking about important issues and framing the issues accurately is key, and I'm worried that the language in the paper as opposed to the description Reuven gave us orally isn't very helpful.

My second point is much more important. This paper and critics of corporate tax compliance generally in my view have a moral blind spot. They criticize corporate planning and suggest that legality is not the test—there's some moral standard. The legal rule is here, there's some moral standard over here, and the companies should all be over to the side past where that moral cutoff is. But there's no recognition, absolutely zero recognition, that individuals in their daily lives, me, you, even Reuven, engages in economically equivalent behavior in our own personal private tax planning. I'm not saying—and this is critical—I'm not saying that everybody does it, so bad behavior by corporations is okay. That's not what I'm saying.

What I am saying is that tax planning by individuals is absolutely routine and is encouraged. And the behaviors that we engage in as individuals and the fundamental core behaviors engaged in by corporate tax planners are economically equivalent, and I would say morally equivalent.

There's a wonderful *New Yorker* cartoon from a few years ago. Two game show participants are standing at the podium and the announcer says, "Mr. Smith, you pick first." And one of the two participants says, "I choose moral superiority." It seems to me that the critics of tax planning have chosen moral superiority and then rushed ahead. It seems to me the key here is that the critics have to do one of two things. They either have to explain why the moral standard for tax compliance by corporations is different and is higher than the moral standard for tax planning and compliance by individuals. Or we have to be willing to raise our voices equally and loudly to behavior by individuals that today is viewed as fully appropriate, pure vanilla.

I want to offer a few examples, and I hope these hit close to home. We've got an awful lot of younger people in the audience, and your tax planning may be pretty simple: zero, zero, zero, zero. But these issues may ring for your parents and for you in years to come.

Let me start with retirement savings. There are plenty of people in this audience who are partners at big law firms or well-paid academics who fully fund their tax deferred retirement accounts. They defer that income in New York at ten-plus percent. They take that income when they are in Florida at zero percent state tax. Or, even if they're in Connecticut, they take it at five percent. Where's the corporate social responsibility voice that says, hey, your million-dollar, over a million-dollar retirement account, gosh, the New York state tax on that where you earned the income, would pay for an awful lot of pre-K students to have school year round as we all agree corporate responsibility suggests is important.

A second example: Subchapter S corporations where one of the owners is an employee. By God, these people engage in transfer pricing. Can you imagine that? They are trying to decide what portion of the income is salary and what portion is not. That's transfer pricing. How often have you heard an advisor say, well, we can certainly support that the salary component is \$100,000. But corporate social responsibility tells me that you ought to report \$200,000 as your salary. The egregious cases—and we know them, John Edwards, Newt Gingrich—those hit the papers. But I don't hear any voice out there saying, hold on, when your Subchapter S corporation has essentially no capital investment, when you're the only em-

ployee or the primary employee, let's face it, ninety-nine percent of the earnings ought to be salary.

A third example of individual tax planning: home equity loans. We all know home equity loans are taken out and then the funds are used to pay for a car or a vacation or our schools. There are very tight rules under the Code. Car loan interest is not deductible. Vacation loan interest is not deductible. But we borrow against our home, home equity line. Perfectly legal. Perfectly legal. And buy the car. But if we're going to have a moral test, how do we feel about that?

Here's one that really bothers me. For Roth IRAs there is an income limit in order to enjoy a Roth IRA. But every single issue of *Money Magazine*, every issue of *Kiplinger's* says don't worry about those income limits. You make a nondeductible, traditional IRA investment and then you convert. Those pesky income limits, they only apply apparently to little people. I find that equally concerning from a corporate social responsibility and a moral perspective.

A fifth example: New York State and New York City have a controversial test for whether you're subject to tax on all your income if you have a residence here. You claim that you're domiciled in Connecticut or Long Island or New Jersey, but if you have an apartment in the City and you're here 183 days then you're subject to full tax in New York City. There was a case a month ago—it's a little unclear how this is all going. We all know people who have a diary to track the number of days they're in New York. They telecommute on Friday because I know I have to be in the City on Saturday and I don't want to be in the City on Friday as well. How often have you been on a conference call when the guy from the office next door phoned in on a Friday? And you said, you know, Joe, this is the fifth time we've talked today from your home in Connecticut. Morally, your heart and your mind are in New York today. So when you keep your diary be sure to put down today as a New York City day because you've spent the entire day telecommuting to New York City.

And one other example. You lived in Scarsdale because the schools were great. Sure, you paid an awful lot of tax, high property taxes. But your last child, the fourth child, is now a senior in high school. Going to sell the house and move someplace cheaper. Has anyone ever looked at them and said, hold

on, other people paid the taxes for your four kids to go through the schools. Here you're getting ready to graduate your last child and you're leaving, and under corporate social responsibility considerations, you're leaving somebody else to pick up the tab for the school system.

There are many, many more of these examples. And what I want to emphasize is this is absolutely pure vanilla tax planning with no moral stigma attached to it. Indeed, people almost look at you like you're a sucker if you don't do it. And as I said, Suze Orman, *Money Magazine*, *The New York Times* Saturday section describes these techniques without the slightest hint that there's anything amiss. But these techniques of tax planning parallel exactly what corporations do.

Corporations don't use tax shelters with no economic substance very often, any more than most citizens stash money overseas and fail to report it. Corporations use simple techniques. They use home equity loans. They borrow where the interest will be tax deductible and most efficient. They telecommute. Corporations telecommute in order to minimize tax nexus in the jurisdictions and where they'll be subject to tax. They defer, corporations defer income in a retirement account or a CFC. And then they use it later for investment or take it out in a way where the tax burden on it will be less.

I am keenly interested in Lee Sheppard's article that she'll write in the course of the next year, in which she has one column for individual income-tax planning and the moral equivalent on the corporate side.

MS. LEE A. SHEPPARD, *Tax Notes*: [Inaudible]

MR. BARNES: Thank you, Lee. And they match up amazingly. And companies—this is a point Josh raises in his very good paper we'll discuss in a minute—companies do this against a backdrop of continuous audit. More than 800 companies have agents who wake up every morning, take a shower, get dressed, get in their car, and drive to the company's premises. These tax planning techniques are pure vanilla. If companies have an obligation, moral obligation, to pay more tax than an individual, then I think we need to say so and we need to explain why. I would point out that in fact in some cases corporations do pay more than they are obligated. This primarily arises with respect to property taxes in towns and cities where a company is a major, major presence. And you will

often find that the company does not aggressively seek to lower the property valuations because they recognize that sharp changes in valuation and in property taxes affect the community.

No one to my knowledge has ever said why corporations are different than individuals. If corporations aren't different, then I think we have to accept that tax planning is moral, and it's not even a question of saying, oh, it's legal, but it's just not right. We can change moral parameters. We've done it in the past. We've done it in small ways. We don't spit on the sidewalks. We rarely smoke. We certainly don't smoke in a room like this. We've changed moral parameters with respect to the role of women and minorities. We can change moral parameters, but it's hard work. And if we're going to do it, and say with respect to taxes, legal is not the standard, but there's some moral standard, then we need to criticize *Money Magazine*. We need to criticize *Kiplinger's* and AARP. We need to criticize your neighbor. We need to criticize your friend. We need to criticize you and me. I don't hear those conversations going on. I simply hear the cries of people who have assumed moral superiority. They got to choose first. They chose moral superiority and they say it may be legal, but it's not right. I find that to be whining more than insight. Thank you.

PROFESSOR KANE: We're a few minutes ahead, so, Reuven, I don't know if you want to take two or three minutes to respond to that?

PROFESSOR AVI-YONAH: Well, I don't know. Let me say a couple of things. First of all, on corporate tax shelters the fact of the matter is that for a period of over ten years every large corporation in America, including General Electric, engaged in corporate tax shelters. You won't deny that, I assume. They were—

MR. BARNES: [Interposing] Actually I would, but we'll have that debate separately.

PROFESSOR AVI-YONAH: Okay. All right.

MR. BARNES: Since two district courts affirmed the taxpayers' positions.

PROFESSOR AVI-YONAH: Okay, whatever. Every large corporation in America engaged in corporate tax shelters—I think that is fair to say. And most of them were eventually struck down. So, and this is still continuing and we read about more

cases every day, and so it's not as if—and I do think that there was a significant change in the moral position of in-house corporate tax people around the late eighties. Before that they wouldn't do it because no serious Fortune 500 corporation would do it. And then after that the slogan of enhancing shareholder value overtook everything else, and corporations do things that they wouldn't have done before. That's my perspective.

The second thing, on individuals, I would denounce every single one of the techniques that you mentioned. I don't think [crosstalk] personally—

MR. BARNES: [Interposing] Have you ever written an article—

PROFESSOR AVI-YONAH: [Interposing] I do not write about individual taxes. I have written extensively recently saying that the ordinary income rate should be set the same as the dividends and capital gains rate precisely because otherwise you can play some of these games. And I've written articles about the fact that we should deal with migration. I have a conference on migration, including migration for retirement, and the—and the various other things I've written, a lot of stuff. I've written primarily on corporate international, so this is my main focus. But I'm perfectly willing to say that every single one of these techniques that you mentioned is wrong and I'm perfectly willing to denounce *Money Magazine* or *Kiplinger's* or Suze Orman, and anybody else that you want me to denounce. Thank you very much.

PROFESSOR KANE: Thank you. Michael?

MR. MICHAEL L. SCHLER: This is a lot to follow, but I thought Reuven's paper is really very interesting and very thoughtful. I agree with Reuven's presentation. I don't agree with most of what's in the paper for reasons I will get to.

I agree with Peter Barnes that individuals, the issue for individuals trying to save taxes is the same as the issue for corporations trying to save taxes. But I disagree with Peter that what corporations do that we're talking about has anything to do with the examples—with most of the examples that individuals do that Peter was talking about, most of which I think are perfectly okay, contrary to Reuven. So you can see everybody disagrees with everybody here on things.

PROFESSOR HELEN S. SCOTT: [Interposing] I haven't spoken yet.

MR. SCHLER: Well, we'll get to you. But going back to Reuven's paper, the paper makes it seem like what the right of corporations to save taxes depends on is which view you take of corporations. I don't think that is true at all. And I think regardless of the view you take of corporations the issue for all corporations is the same as the issue for all individuals. So with that, I totally agree with Peter. They all have the same Internal Revenue Code. Congress has decided that everybody should pay taxes under the Code. We live in a democracy—that's the choice of the people. And so the issues, as it seems to me, are exactly the same. The issue is also the same because anybody who avoids tax, properly or improperly, is really shifting the tax burden onto other people to the same extent regardless whether they are individuals or corporations, and regardless of what theory you take of corporations. So it seems to me the issues are the same. The one difference with corporations is they have a fiduciary duty to the shareholders, but it's not clear to me why that should make a difference for any of this.

But Reuven divides the theory of corporations into three theories, which I have trouble keeping in mind which is which. But I would divide the tax issues we're talking about into four, which will illustrate some of the differences, I think, particularly between maybe at least me and Peter, maybe Reuven, also. Like I said, there are really four categories of transactions, which we can look at separately to decide whether we think you should be able to do them or shouldn't be able to do them, whatever "should" means—whether it's legal or moral or whatever.

The first is transactions that clearly don't work under current law—and we can argue about what that is—but let's say we all agree they don't work, and I think that's sort of the case Reuven is talking about. Nobody will say anybody should be able to do that. You have to sign a tax return saying it's a correct statement of your legal liability. So I think everybody will agree—if everybody agrees it doesn't work, nobody should be able to do it.

The next case is cases: there are two easy cases and two hard cases. The next easy case is cases that aren't clearly allowed under current law and—and, this is important—and

that reach results that are clearly intended by Congress when they passed the law. That's also an easy case. An example that's in the paper a lot is corporations, they're claiming all these deductions because they gave stock options to their employees and the employees are getting rich by reporting the income and the company has got a corresponding deduction. Congress clearly intended that to be allowed—perfectly okay. If you're one of Peter's individuals who make sure they stay out of New York State for 183 days in the year, it's a bright-line rule. If you meet the rule, you're fine. I don't think anybody would object if a corporation either owned seventy-nine percent or eighty percent of a sub in order to consolidate or not consolidate. It's a bright-line rule. Nobody's claiming that's a tax shelter. Anybody is allowed to do it. It's legal; it's moral. Everything is okay. So those are the two easy cases.

Then you get to the harder cases. And my first harder case is where it's clearly allowed under current law even after you apply doctrines like economic substance, but it's a result that clearly is not intended by Congress. Call it a legal tax loophole.

Now, just like what—now that's a case, just like, if it clearly doesn't work it's shifting costs onto other people, onto other taxpayers, but technically it works, but the economic effect is just as bad as if it didn't work.

Now this is where I think you get into the question of whether it's moral or immoral or patriotic or unpatriotic. You can quote Learned Hand all you want. And I don't think there is any particular right answer to that. Everybody can come up to their own conclusion, and anybody—I have no particular expertise on that any more than anybody in the audience or anybody on the street for that matter. But before you reach a conclusion on that whether—you know, again, cases that legally clearly work—if it went to court you'd win, but it's clearly not intended. We call that a legal tax loophole.

Well, let's talk about, let me refer to some other legal loopholes. Let's say a company, a manufacturer comes up with a legal pollution loophole where they—there are environmental laws and they come up with a totally legal way, it meets every regulation, but it allows them to pollute vastly more than the regulation was intended to allow. And you can go on with that forever. You know, a bank that comes up with a loophole from the capital requirements that lets them use much less

capital so it puts the risk of a bailout on the government because they found a way around the rules. There was an article in the *Times* a few days ago that—I'll call it the legal bonus loophole. So the headline of the article was that a European bank "To Sidestep European Union Bonus Cap as It Cuts Costs." There was some EU rule on limiting bonuses and they came up with a way to avoid that. So there are legal loopholes all over. And one question is should tax be—is there anything different about tax than any of these other loopholes, whether it's other financial loopholes or pollution loopholes or whatever. And so one question is—and I don't have the answer to that—is tax different for some reason?

But regardless whether you think that tax is different or not, the government still has to raise money. And the question is, well, people are going to do these legal loopholes whether they're corporations or individuals. And I really don't think there's much difference for these cases if they are not clearly intended by Congress. But I think most of Peter's examples were intended by Congress, so that's why I don't feel that they are in this category.

So what can Congress do if it wants to go after these legal tax loopholes? They can wait till they find each one and enact legislation, and that has never worked since I've been practicing tax law. They can enact disclosure rules so that corporations have to disclose what kind of tax they pay and then rely on the public pressure, but that's the subject of the next panel so we won't get into that. Or another possibility is a broad general anti-abuse rule, so that whatever you do if it's not intended by Congress, the IRS has the power to say it doesn't work, sort of like a super economic substance doctrine. Personally, I think that would be a good idea, but it would be very controversial.

But let's move on to the fourth hard case, which I think is a lot of what is really what people are talking about. The fourth case, which is again a hard case—suppose it's not clear if something works under current law, either because the statute is ambiguous or because the application of the economic substance doctrine is unclear, which is a lot of what we're talking about.

Now, again, none of this depends on whether you're an individual or a corporation or which theory of corporations

you're talking about. And as a practical matter corporations, maybe because of their fiduciary obligations to the shareholders, maybe because they have to come up with financial statements every quarter, they will do whatever they can to do these transactions if they can get away with it. I mean, everybody, I think even Peter will agree with that. There's no black and white. Most transactions are in the gray area, and the question is if Congress wants to limit those transactions, what can it do? It can require disclosure, and there's been some of that. They can increase penalties, and there's been some of that.

But a lot of the big issues these days, as I said, is the transaction that—there's a normal business transaction, but it's done in a really funny way to give some totally unexpected tax result that Congress pretty clearly did not intend. And that's really the big issue in the courts these days, is the scope of the economic substance doctrine. I think the classic example of that is the *Gregory v. Helvering* case, which—I don't know how familiar people are with, how many people are really tax lawyers here—but the underlying transaction was the normal sale of a business for cash. And the company came up with a real gimmick to avoid paying tax on the gain by doing a distribution of the stock and a spin-off and then a sale by the shareholder. And then the Supreme Court in the *Gregory v. Helvering* case said, no, that's just not what the statute intended—we're just not going to let you do that. And many people, including me, think the economic substance doctrine is sort of like that, where the underlying transaction is a real transaction, everybody would agree it's a normal transaction, but you do it in a really gimmicky kind of way to save a lot of tax. And every time—the cases for the most part, though not every one, have come out saying, well, you just can't do that. And when Congress codified the economic substance doctrine a few years ago they specifically said that courts could bifurcate transactions into the part that really has economic substance and the part that doesn't. Many courts have done that, a few courts have not, and that may get to the Supreme Court eventually. But I think the fact that Congress, when they codified the doctrine to sort of authorize bifurcation, will support that. These cases are all pre-codification, so that authority for bifurcation didn't exist yet.

But every time a case comes down saying that the court will bifurcate a doctrine and disallow the tax benefits, there is

this big uproar. I guarantee you within three weeks there'll be an article on tax codes saying, oh, the world is ending. There was an article just last month in the *Journal of Taxation*; the title of the article is "Tax Shelters and the Decline of the Rule of Law." The decline of the rule of law wasn't because people were getting away with tax shelters. It was because people were losing cases because the courts weren't applying the literal language of the law. They were applying doctrines instead. So I think that's where most of the issues that we're really talking about are, is these business transactions done in really peculiar ways, and whether that does or doesn't work under current law and whether it should or shouldn't work under current law. And I think that's what the future issues will mostly be.

PROFESSOR KANE: Reuven, do you want to take a minute or two?

PROFESSOR AVI-YONAH: No, I mean, on the issue of whether Congress intended things or not, I mean, I think this is fundamentally the problem that, actually, starting with *Gregory* we've been asking—the Supreme Court version of *Gregory*—we've been asking what was the taxpayer's purpose rather than what was Congress' intent. And the issue applied as to what was Congress' intent test, then I tend to agree that some of the individual cases that Peter mentions pass muster and I would then argue that we should probably change the law because some of them strike me as wrong as a policy matter. But nevertheless, I don't have a particular problem in that case in engaging them.

But these other cases, like for example, the business with the Roth IRA limit, I think that's a loophole that Congress did not intend. And so that's—I would agree that that's the right question. The problem is that the way economic substance existed even before codification and after codification, that's not the question that is asked. The question is did the taxpayer have a subjective business purpose and was there an objective profit potential? And those are the wrong questions to ask in my opinion.

MR. SCHLER: I have to say I agree that the economic substance doctrine is sort of helpful in a way that it does require a business purpose. But I think anti—but it's really restrictive because if you have a business purpose you automatically win even though it's clearly contrary to what Congress intended.

And maybe the Roth IRA is an example. You really have a business purpose for what you're doing—you're moving money around. But maybe Congress did and maybe Congress didn't intend that, but that's why Congress can never go after all these little things one by one. That's why I think you need an anti-abuse rule and it would be much more effective than the economic substance doctrine.

PROFESSOR KANE: Helen?

PROFESSOR SCOTT: Okay. Well, I want to thank the *Journal* and the organizers for inviting me to speak, particularly because I am not a corporate tax person. I'm not any kind of tax person. I know almost nothing about tax, and I'm fine with that. I do not intend to take the moral high ground that was alluded to by Peter. But I intend to situate my comments within the context of the developing events and literature of both corporate governance and corporate social responsibility, which is where I come from. My conclusions are along the same lines as Reuven's, but I take a very different view of how to frame the question, and so I get there by a very different route. I'm speaking as a tax outsider, not as a tax insider, so I hope you will grant me the benefit of the doubt on that basis.

As someone who reads and teaches extensively in corporate governance, in business and legal ethics, and corporate crisis management, what strikes me as odd is that this question should still be asked in the way it is. To reveal my bottom line right away, the question that puzzles me is why is tax any different? This was a question that was raised earlier. Why is tax any different from any other civic, moral, social activity that is or has become, or—and this is really my message—*will become* seen as central to the corporations' public person, public activity, and public actions?

The old view was that corporate social responsibility consisted of good deeds that were essentially unrelated to a firm's central mission and belonged more in the marketing department than anywhere else. But that view is already quite outdated. In the old days, this separation of the values or mission of the corporation from the operations of the corporation was what gave rise to debates on whether corporations could make charitable contributions, whether they could engage in philanthropic acts, and then the question of whose right it was, the CEO, the Board, whoever, to make those decisions.

But today companies operate in a very different world. Corporate social responsibility as we talk about it now has taken on both broader and deeper dimensions. Issues once considered well outside the core functions considered in business decisions are now embedded both in missions and in business models. PepsiCo talks about water stewardship and how central it is to the long-term viability of the core business of the company. Walmart talks about environmental sustainability and works to lessen its carbon footprints.

But to return to the beginning in a kind of a way, I do agree with Reuven that we start with our concept of the corporation. The concepts that I look at to determine its role, its function, and its mission in modern society grow out of a seminal piece by Bill Allen, Professor William Allen, that is cited in Reuven's piece, called "Our Schizophrenic Conception of the Business Corporation." In that piece, he describes how society and legal analysis has moved back and forth between the property- or shareholder-centric model, and the social entity or constituency-centered model, never really settling for more than a very brief moment on one to the exclusion of the other. And I think that's the world that business finds itself in today. The shareholder-centric model certainly remains important, but the social entity model has taken on vastly increased prominence.

The activities of global companies today touch such a wide variety of constituencies in addition to shareholders. Employees, communities, suppliers, customers, creditors, governments are all touched by the activities of these corporations in a way, I have to say, that individual activities do not. And given the scope of the activities and the economic centrality of global business, it really doesn't make sense to talk about these firms as if they are not social actors, if they do not have particular cultures and values. They can span multiple jurisdictions, and yet they strive to retain a single unitary corporate vision. And part of that vision increasingly addresses the role that firms play in the societies and the communities in which they are present.

Several factors make this trend likely only to accelerate. The biggest is transparency. The ubiquity of the Internet, the power of social media, make any and all actions that firms take or omit to take immediately visible. The failures of other institutions—including some of the legal regimes and some of the

jurisdictions in the developing world in particular—the failure of those institutions in solving intractable social problems make the power, the resources, and the expertise of global business an increasing focus of action. One of my colleagues at the business school talks about how businesses are increasingly confronted with challenges whether in managing global manufacturing supply chains, addressing privacy issues in the information technology industry, security issues in the extractive industries, or confronting child and forced labor in agriculture.

Finally, the power of law as the determinant should not be overstated. Companies don't necessarily wait for the enactment of laws to set policies and to try to promote their values within the corporation and within all the communities in which they operate. Where the integrity of the corporation is at stake, it's not about compliance with the law, certainly not technical compliance with the law. It's about the credibility of the business. And drivers of value in these companies depend on that credibility. Nor is compliance with the law enough either to address or to anticipate the questions that global companies now face. One of my other colleagues calls it the moving goal posts. What is permissible today is a static concept, but business is dynamic. Political, social, and yes, legal responses change. Legal responses, slowly—other responses more rapidly.

So now we ask questions about whether companies are entitled to arbitrage human rights laws or environmental laws or discrimination laws in deciding how they are going to conduct their business. Increasingly we see firms obliged to face the question of what their own internationally applicable standards are in these areas regardless of what the legal rules are in the various jurisdictions.

So my question then again is why is tax different? Why should we think about tax in any different ways? I've heard a few suggested answers. One is, it's only money. Tax is only money. It's a cost of doing business. One is, it's not about people; it's about relationships to the government. Another is, it's too complex, it's technical, it's very precise and technically driven. So tax is only about money. Tax is a cost of doing business.

Social psychologists understand this view. One of the most prominent ways—I'm quoting from a book called *Willful Blind-*

ness, which is an interesting study of social and organizational psychology—one of the most prominent ways in which people justify their harmful practices is by using arguments about money to obscure moral and social issues. Monetizing things, objectifying them, allows you to take out all the other factors. Quantification is a very comforting thing to be able to do, but many of these cannot be priced so precisely.

All business-related choices are to some extent about money. The decision to hire child labor where it's permitted by law, to discharge pollutants to the level permitted by local law is also about money. Complying with a higher standard than is required is a self-imposed cost of doing business.

Firms make lots of decisions that are not solely about money even if they have a, quote, "business justification." A couple of times on this panel the concept of enhancing shareholder value has already been mentioned. That concept is a very comforting concept to lawyers and it's very comforting to business law students, but as soon as you start to examine it, it starts to lose its meaning, starts to lose its content. Businesses are driven to create long-term sustainable value, not simply to appease whatever shareholders happen to be in the market in any given moment, especially in a market where even institutions consider a long-term holding to be three months. A company can't plan on that basis. Once we start talking about long-term sustainable value, there are a lot more factors that go into the decision. Even ordinary decisions we're familiar with like living up to a contract, which has become unprofitable and against which the corporation has a defense, that's a costly decision to make. But the social good of being a reliable partner, the desire to do business with that firm or in that industry in the future is worth it to the company. Trust, like credibility, has enormous value. The decision to incur the cost of inspecting the plants of your subcontractors, we've just seen that in the news a lot. Not required by law nor is the willingness to fund those efforts. Yet we see global businesses taking on these responsibilities, the corporate social responsibilities, to do things like that.

Tax is not about people and human rights. It has no moral content. It's about government and funding social policies. Of course, all statutes and regulations are expressions of social policies. Using the tax law is only one of the tools that governments have for funding and furthering social policies.

But it's also about civic obligations. Do corporations have civic obligations? Firms certainly depend on a lot of the benefits of being a member of a community or a polity. The security provided by the government, the judicial system whereby contracts are made enforceable, the roads, the electrical and other infrastructure, the labor pool, the education, all of that stuff that is provided are important to firms doing business in that polity. And yet firms cannot serve in the military; they can't sit on juries. So how do they shoulder their share of the costs?

Companies are not only increasingly being viewed as citizens, but they are also increasingly seeking the rights of citizens, to free speech and in the case already mentioned, *Hobby Lobby*, being argued today before the Supreme Court, the right to the free exercise of religion. Well, obviously the rights of citizens come with the responsibilities of citizens, so it's no surprise that attention has turned increasingly to the fair participation in the tax system.

Most of all, it's about, however, the brand. The main driver of value, the name, the brand, the focus of the company, is something a firm fights fiercely to protect. Its reputation is key. In the business communication literature, another quote: "Key elements to a typical consumer's image of a corporation are name recognition and the corporation's involvement in social issues."

Psychologists studying attitude formation find that people generally form attitudes along two central dimensions, potency and goodness. Global firms are potent. Now they are increasingly facing the question of how—what it means—to be good. The idea that firms can engage in strategic tax avoidance behavior unrelated to other business objectives—we've already kind of dealt with that. People are more or less agreed that that's not an acceptable behavior. But firms now, I think, are going to be faced with developing a principled basis for their tax postures. We have seen the beginnings of that. Exhibit 1, Starbucks, I'm sure most of you are familiar with the uproar over Starbucks paying corporate tax in the U.K. And as reported by the BBC, Starbucks has only reported taxable profit once in fifteen years and announced that it would pay more corporate tax after a public outcry. "We've listened to our customers and we've decided to forego certain deductions, which would make us liable to pay 10 million pounds in

corporation tax this year,” and so forth. The G8 in June of last year announced a deal to, quote, “clamp down”—again from the BBC—on corporate tax avoiders. And just a few weeks ago news articles reported on how Apple had shifted \$9 billion in, quote, “untaxed profits” out of Australia.

So to those who believe that tax is different from other social costs, remember that law is a lagging indicator. Law is very slow to change. It moves in the glacial pace. News reports like this, in my view, are the canaries in the coal mine. This is very much like the way other issues have developed that are now considered normal focuses of corporate attention. Environmental standards, working conditions. Saying it’s legal is not a durable answer.

The next panel—I feel like I’m a bridge between this panel and the next panel—the next panel on the disclosure of corporate tax returns, as a student of corporate social responsibility and corporate governance, it’s the obvious next step in these issues. This is how these issues develop. First people demand a disclosure from corporations on their environmental activities and their environmental impacts. That’s step one. That starts to create an environment in which people expect, increasingly, a response from business that isn’t about simply compliance with the law, but how their business models are going to incorporate these issues, which have such a significant impact on society.

So I feel like I’m transitioning. Without taking the moral high ground, it is really, in my view, about the way corporations have to do business in modern society. And maybe tax is the next big issue. It certainly wouldn’t surprise me one bit. Thank you.

PROFESSOR KANE: I’d just like to thank all of our panelists. Those are really a wonderful set of comments. In a symposium on “Tax and Corporate Social Responsibility,” I think you’ve leveled some serious challenges because we have heard both a series of comments about what is special about corporations and what is special about tax. So the two things we need to be unique to make this topic run have come under scrutiny.

I was going to exercise a moderator’s privilege and just ask one question to kick things off. And so I guess this goes to Reuven, but hopefully implicates everything that has been said this morning. I’m left wondering, after having the benefit of

the commentators, Reuven, what you think the best causal story is about what you viewed as an uptick in aggressive corporate tax planning, say, from the eighties to maybe ten years ago and still in existence now. So the paper, to my reading, seemed a bit of two minds about this. So in one place it's very much grounded in the evolution of the view of the corporation. You're trained as a historian; you have this wonderful view over the millennia of how we viewed the corporation. And in some sense the causal story seems to be that the nexus-of-contracts view became dominant and this, temporally, roughly aligns with the uptick in aggressive corporate tax planning.

At other places, though, the paper discusses issues, which I think have nothing to do with that, so it talks about a causal story, which is grounded in upticks in executive compensation. That it is about options and consolidation in the accounting firms, and those would hold true regardless of what one's view of the evolution of the corporation was over the years. Now I think the commentators seem exactly split on this, depending on whether they come from the tax or the corporate world. So I just heard Helen give a very passionate explanation of what's happening outside of tax, and the view there that this is *all* about how we view the corporation, and we're a bit retrograde here in the tax world and we need to catch up with the people who more socially minded. And that would give a certain causal story that talks about the nature of the corporation. Whereas our two commentators grounded more in the tax world, I heard them say, well, what does this have to do with the view of the corporation? Individuals are the same as corporations, so it's not about how we think about the purpose of the corporation. And Mike said basically just look at the tax code. And we've got the same tax code, for the most part, for individuals and corporations.

And so it seems to me until you nail down the causal story, if your view is we have experienced an uptick in aggressive corporate tax planning and you think there's too much, without an understanding of the causal story, we don't really know what the remedy is because the remedy will look very different. If we think it's about the nature of the corporation, we might fish around for issues about corporate governance and how we view fiduciary duty to the shareholders. If it's not about that, then it seems to me to push very strongly towards remedies,

maybe a GAR, maybe thinking about incentives or how much option compensation we have and the like.

I don't want to take too much time. We have fifteen minutes left for general audience questions. Feel free to respond to that, or maybe that anyone on the panel maybe tees it up for others.

MR. BARNES: Yeah, just very briefly, Helen's incredibly insightful and important comments, I think it's important to say tax is not behind these other areas. We're already there. And Helen spells out the importance.

PROFESSOR SCOTT: Thank you.

MR. BARNES: Corporations typically—large corporations—typically have very close relationships with foreign tax authorities numbering in the dozens and dozens. Those are no different than the environmental relationships, no different than the prudential relationships regarding proper capitalization, no different than worker rights issues. We may have further developments in that regard, but I don't want to leave the impression that somehow tax is different or is behind. Because I would assert that corporations are just as mindful of their civic responsibilities with respect to the tax authorities—U.S., local, state, and foreign—as they are in all other areas. We are repeat players. We're there every day. We're there every year. We're there every filing. And so I don't want to leave the impression that somehow tax is lagging. I don't think it is.

MR. SCHLER: Well, let me just say, when you look at the cases coming up through the system though, I'm not saying anything about GE, but just in general, the cases that come up through the system are pretty aggressive cases. And maybe they're there every day talking to the tax authorities, but a lot of corporations are still being very aggressive in the kind of transactions they are doing day in and day out.

MR. BARNES: I think you're drawing a conclusion that bad behavior is rampant in the same way you could draw the conclusion that nobody reports their individual income tax properly because 40,000 people have stashed cash overseas. Are there cases of abuse? The answer is absolutely yes. I don't think you extrapolate from a few problematic cases to conclude that bad behavior is rampant.

PROFESSOR AVI-YONAH: I would think that the Luxembourg example with Starbucks, which Helen brought up is re-

ally interesting because nobody disputed that this was legal. I mean, it's exactly the same technique that all the American corporations are using. They just put the brand name in Luxembourg and they deducted royalties. There was no dispute and yet they felt that they needed to do something because the idea that they are all over the UK and they are deriving all of these profits and they are not paying a penny of tax just struck people as wrong. And if that's the attitude that you take, then the notion that we have \$2 trillion of untaxed profits of American multinationals sitting overseas just strikes some people, including myself, as somehow wrong and something should be done about that.

So fundamentally, to come back to Mitchell's very insightful question, I think it is really important that we all agree that the right view of corporations is that they're like individuals. Because that's the view that I also take. That's the so-called "real view" of corporations. I think that's right. That's the view that underlies the notion that corporations do have CSR and so on. What worries me is that that's relatively new, and sometimes you hear people, including recently, including in Congressional hearings, take the opposite view, which is to say we are just agents of the shareholders. Corporations are not like people. We have to—we are different because we are corporations. Because we are corporate agents we have to enhance shareholder value, et cetera, et cetera.

That's the thing that—and to answer your questions, I don't think that's the causal mechanism. I don't think any of these theories are really causal in the same way that John Dewey wrote in the twenties that they are just cycling in as kind of cover-up. I think what's happened to cause corporate tax shelters and aggressive tax planning are these other changes, but then people use those theories, this theory in particular, to give themselves ideological cover. And what worries me is that to the extent that if it genuinely makes them feel good about what they are doing, then this may last for longer than it should. And I'm trying to make them feel bad about what they are doing.

PROFESSOR KANE: All right. I think we have time for a handful of questions.

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Editor's Note: The additional Q&A session with the audience members is not reflected in this transcript, and is available on the *NYU Journal of Law & Business* website.