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# TWENTY-EIGHT WORDS THAT COULD CHANGE THE WORLD

**R**obert Hinkley looks and acts just like everyone's image of a corporate lawyer. Impeccably dressed, polished in demeanor, and well-spoken, he bears all the marks of the world he inhabited for more than twenty years. But listen to him talk about revamping the corporation, and you'll discover you're in the presence of a revolutionary.

A fifty-two-year-old native of upstate New York, Hinkley has chosen to devote himself to eliminating corporate abuse of the environment, human rights, public health and safety, local communities, and employees. Unlike most who are committed to these causes, however, Hinkley is an insider. He has worked as a corporate attorney for Skadden Arps, one of the world's largest law firms, and he understands the intricacies of business culture in a way that many activists do not. "Too many activists," he says, "think that corporations pursue profit at the expense of the public interest because corporations and their executives are greedy. In my view, that's self-righteous and wrong." Hinkley says that corporations act the way they do for one simple reason: they are bound by corporate law to try to make a profit for shareholders. This, he believes, sometimes inhibits executives and corporations from being socially responsible.

"In 1886," Hinkley says, "the Supreme Court determined that corporations were entitled to the rights of citizenship under our Constitution. Since then, the corporation has developed into the worst kind of citizen: one that claims all the rights but shirks the responsibilities of citizenship."

Hinkley traces his career in business back to the paper route he began at age ten, some of whose proceeds he later invested (with his father's coaching) in the stock market. After receiving his law degree from New York City's Fordham University in 1978, Hinkley joined Wall Street powerhouse Skadden Arps. "We did things the other firms didn't do," he says, "such as handle hostile acquisitions. We had a real swagger in our step, and we were the best at that particular game." As a corporate attorney Hinkley advised companies from a wide variety of industries, including airlines, banks, telecommunications firms, and petrochemical and mining corporations. He saw firsthand what makes businesses successful and also came to understand how their pursuit of profit can damage the public interest. Unlike most corporate lawyers, Hinkley was not antigovernment. "From the time I was a teenager," Hinkley says, "I have believed that government is more than just an arena in which private interests settle their differences. I believe government exists to protect the public interest."

In 1981, Hinkley left Skadden Arps to work at a smaller firm, but he returned in 1989 after a former mentor invited him to manage the Sydney, Australia, office, which he did until 1996. Around that time, Hinkley became interested in the underlying assumptions behind corporate behavior and the idea of the corporation as citizen. He also discovered the ideas of man-



**ROBERT HINKLEY**

agement expert W. Edwards Deming and systems theorist Peter Senge. Deming taught him that "most of the time it's the system that causes the problem, not the people in the system." To change the system, Senge said, you should look to make "the smallest change possible that will generate the biggest effect."

For Hinkley, this means adding twenty-eight words to the Corporate Code, turning it into what he calls the Code for Corporate Citizenship. "As I've worked on this idea," he says, "it has occurred to me that corporations can do more for people than just pay an extra ten-cents-a-share dividend. I'd much rather see corporations stop polluting than have ten or fifteen cents on every share I own. And I think others would feel the same way." In June 2000 Hinkley decided to take some time out from his law practice so he could work on the code full time.

We spoke in September 2003 at Boston's Ritz-Carlton Hotel. Hinkley's passion for his work was obvious. He enthusiastically answered my questions for two and a half hours, giving no signs of tiring.

**Cooper:** What is the Code for Corporate Citizenship, and how did it come about?

**Hinkley:** There came a point in my practice when I realized that corporate managers aren't against the environment, human rights, and other elements of the public interest; they just don't see these things as relevant to their job. Why? Because the corporate law says that their job is simply to use their best efforts to pursue profit on behalf of the shareholders. Human rights, social justice, and the environment don't factor into that equation — at least, not directly.

We can't solve the problem of corporate irresponsibility by imposing volumes of laws and regulations that try to restrain the system, because the system is designed not to be restrained. I believe the solution lies in redesigning the corporation itself to build in some self-restraint. So I am suggesting that the

## **ROBERT HINKLEY'S PLAN TO TAME CORPORATE POWER**

*an interview by* **ARNIE COOPER**

## I DON'T LIKE TO CRITICIZE ACTIVISTS, BECAUSE THEY DO A LOT OF GOOD, HARD WORK, BUT THEY WON'T SOLVE THE PROBLEM OF CORPORATE ABUSE OF THE PUBLIC INTEREST FIGHTING ONE GARBAGE DUMP AT A TIME.

corporate law be changed to say: "The duty of directors henceforth shall be to make money for shareholders *but not at the expense of the environment, human rights, public health and safety, dignity of employees, and the welfare of the communities in which the company operates.*" Those final twenty-eight words are what I call the "Code for Corporate Citizenship."

Once that change has been made, everything in the corporation will change. Today, when people go to work, they know that their only job is to help the company make money. It's not their job to be concerned with the public interest. Under the new code, though, their job will also be to pay attention to the public interest and to speak up on its behalf. Right now, most feel it's their job to keep quiet.

**Cooper:** What steps need to be taken to put your idea into practice?

**Hinkley:** It's simple: Corporations wouldn't exist if we didn't have laws that let them exist and specify how they are to operate. These laws are just statutes, like speed limits, and the way you change a statute is by going to the state legislature and getting a bill passed in both houses and signed by the governor.

All we have to do is get these twenty-eight words and their enforcement provisions added to the corporate law. It must be done on a state-by-state basis, but the change is the same in every state.

**Cooper:** Where do we start?

**Hinkley:** Well, you can't really start with the state legislature; you have to start with the people and make them aware of the problem. And we've begun doing that. Groups have already formed around this issue in Minnesota, California, and Maine.

Marjorie Kelly, who wrote *The Divine Right of Capital*, also advocates starting with the people to change the situation. This is because only they can fix it. She calls for a second "(r)evolution" — with parentheses around the *r* to suggest that it's also an evolution. In the first American Revolution, she points out, the colonists used pranks to grab people's attention — most famously, the Boston Tea Party.

Now, I don't like pranks. When I hear the word *prank*, it raises the hair on my corporate-lawyer neck.

**Cooper:** But that didn't stop you from carrying out one of your own.

**Hinkley:** That's right. In May 2003, we formed a corporation in Richmond, Virginia, called "Licensed to Kill, Inc." We chose Virginia because it's the home of tobacco giant Phillip Morris.

When you set up a corporation, you have to obtain a charter from state government in which you specify the name of the company, how many shares it's going to issue, the company's purpose, the names of its directors, and how long the company will be around.

In its charter, Licensed to Kill, Inc., states: "The purpose of Licensed to Kill, Inc., is to engage in any business permitted under the laws of the Commonwealth of Virginia, including the marketing and manufacture of tobacco products in a way that kills four hundred thousand Americans and 4.5 million other people each year."

When word got out about our company, the media demanded of the Virginia State Corporations Commission, "How could you let them do this?" The commission replied, "There was nothing we could do about it." And that's exactly the point of this exercise: We think there should be something state government can do. It should not be required to stand by and allow companies to be formed under its auspices that are going to damage the public interest. State corporate law is meant to serve the people, not be used as a tool to hurt them.

Yes, it was a prank. But it captured people's imaginations and made them think. Public awareness has to be created — in this way and others — before legislators will act.

**Cooper:** What about the argument that consumers are driving the demand for harmful — and even deadly — products such as cigarettes?

**Hinkley:** Corporations often try to shift the blame for their abuse of the public interest onto their customers. The tobacco industry is a prime example. Cigarette manufacturers argue that they are simply providing a product their customers want: it's not their fault that smokers are killing themselves. The implementation of the code will prove the speciousness of this argument, which intentionally ignores the billions of dollars those companies spend every year on advertising and distribution in order to entice more people to become smokers, and to make their deadly and addictive products more available. They are doing more than just serving a market: they are creating and expanding it.

The code will not prohibit the sale of tobacco. It should, however, cause tobacco companies to get out of the tobacco business and into other businesses that do not harm the public interest. Some are already doing this. How many fewer premature deaths from smoking would there be in the world if there were no longer any mass-marketing or widespread distribution of tobacco?

Another good example of this it's-the-customers'-fault argument is the automobile industry's insistence that consumers are not willing to pay more for cars that pollute less.



But this ignores the fact that polluting vehicles cost less only because, over the past hundred years, hundreds of billions of dollars have been spent on finding ways to make them cheaper. In comparison, almost nothing has been spent on the development of affordable pollution-free vehicles. The problem is not consumers. The problem is that manufacturers aren't really giving consumers a choice. Currently, the only choice is between an affordable polluting automobile and an unaffordable nonpolluting one. That's no choice.

Under existing corporate law, companies have no incentive to risk investing in research and development that will eliminate pollution. Indeed, existing law encourages them not to take this risk. The code will change this, because the code will place the cost of pollution — a cost the automobile industry currently foists on the public — back onto the automobile companies. When this happens, companies will find ways to bring down the cost of pollution-free cars.

**Cooper:** How will this affect international trade? You can't enact the code just in the U.S. and expect it to work, can you?

**Hinkley:** Actually, I think you can. If U.S. businesses change, then I think businesses in Europe, Japan, China, and Southeast Asia will see that they have to change, as well, because they have to be competitive in the U.S. market. Also, once the technology becomes available, companies around

the world will want to take advantage of it.

I should point out, too, that the Europeans and the Japanese are already ahead of us on this. We're the ones dragging our feet on the Kyoto Protocol.

Finally, the corporate law is essentially the same overseas as it is in the United States. The code can be implemented there and will work just as well as it will here.

**Cooper:** Will implementation of the code have any effect on the third of the earth's people who are living on less than two dollars a day?

**Hinkley:** Yes, in many ways. For one thing, it will eliminate the pollution that's now endangering their health and lives. For another, it will guarantee that they get paid a living wage and are treated with dignity while working in the factories run by American companies. I believe it's a step toward providing a higher standard of living for everybody.

**Cooper:** You've compared the contemporary corporation to Hal, the computer in *2001: A Space Odyssey*.

**Hinkley:** Dave Bowman, the astronaut in that story, has a problem similar to the one now faced by humankind. Hal, the HAL 9000 computer that is the brain and nervous system of Dave's spaceship, has been unintentionally programmed to put its own survival ahead of that of Dave and his fellow crew members. When Dave begins to suspect that something's wrong, the computer does everything it can to keep him from

pulling its plug.

Corporations are programmed by the corporate law. That law tells them to pursue their own interests. Sometimes this comes at the expense of the public — under whose laws corporations were created. And, like Hal, corporations don't like it when human beings try to curb their behavior.

In 2001, the computer kills Dave's crew and nearly kills him before he manages to disable it. Today's corporations kill people and make them sick. In addition, they violate human rights and the dignity of their employees, pollute our environment, and destroy local communities. When challenged, they threaten workers and communities with loss of jobs. They also try to convince our elected representatives that the public interest is best served by granting companies the power to destroy even more of it. They have practically convinced us that their interest is the only interest that matters.

We might not need to pull the plug on corporations, but it's certainly time to change their programming. I take heart from a September 2000 *Business Week*/Harris poll that asked Americans which of the following two propositions they agreed with more strongly:

Corporations should have only one purpose — to make the most profit for their shareholders — and pursuit of that goal will be best for America in the long run.

Or,

Corporations should have more than one purpose. They also owe something to their workers and the communities in which they operate, and they should sometimes sacrifice some profit for the sake of making things better for their workers and communities.

An overwhelming 95 percent of Americans chose the second proposition. They would prefer that corporations practice something they are not designed for: self-sacrifice for the benefit of the public interest.

One of my heroes is the late Buckminster Fuller, who solved problems by what he called "anticipatory design." He reasoned that he could change human behavior by designing new tools for people to use, which would, coincidentally, cause them to abandon their previous problem-producing behaviors and devices. Although Fuller did not advocate the elimination of corporations, he was sure that they would not provide the solution to what he called "the world's great problems": pollution, war, and the lack of a high quality of life for all human beings. To him, corporations were not the obstacle to finding the solutions; the obstacle was that the human race looked to corporations to solve its problems.

**Cooper:** What about street protests and other traditional means of changing society?

**Hinkley:** In 2002 I attended a conference in New York titled "Challenging Corporate Power: Demanding Accountability." A woman got up and gave a great presentation about

how local activists had kicked a waste dump out of East Austin, Texas. Everyone was very inspired. But then someone raised his hand and asked what had happened to the dump. Well, it is now forty miles down the road.

I don't like to criticize activists, because they do a lot of good, hard work, but they won't solve the problem of corporate abuse of the public interest fighting one garbage dump at a time. As long as corporations see regulations as a cost, they will naturally look for ways to reduce them. This includes jurisdiction shopping — moving plants to places where regulations are more lax — and lobbying elected officials to reduce the regulatory burden. Sometimes they threaten to move in order to obtain more favorable legislation at home. They also tend to do only as much as the law requires. Corporate lawyers run into this all the time. Companies want lawyers to advise them on how close they can get to the line. Very real damage occurs in the space between what the letter of the law requires and what would best protect the public interest. Most of the pollution, human-rights violations, and other forms of corporate abuse of the public interest are perfectly legal.

Activists haven't found what systems theorist Peter Senge would call the "point of highest leverage." They need to become less "not in my backyard" and more "not on our planet." They also have to recognize that, be they environmentalists, human-rights activists, consumer advocates, or labor activists, they are all fighting the same thing: the desire of the corporation to maximize profits. If they joined forces, they could take advantage of this point of highest leverage and all win. The Code for Corporate Citizenship is a means of challenging the corporation at the most fundamental level. It is a systemic, holistic solution, rather than a local solution. Instead of treating the symptoms, it eradicates the disease.

**Cooper:** You talk about activists in the third person. Aren't you an activist?

**Hinkley:** I prefer to think of myself as a citizen. It's unfortunate, but the word *activist* gets confused in many people's minds with the term "special interest."

The word *citizen*, on the other hand, does not imply having a special interest. A good citizen is concerned for the common good, not just what is good for him- or herself. And sometimes good citizenship requires sacrificing one's own interest in favor of the public interest. Most activists are really citizens looking out for the public interest.

**Cooper:** How did corporations come into existence?

**Hinkley:** To begin with, a corporation is nothing more than a way to do business that is authorized by the state. It's hard to pinpoint exactly when the first corporations came into existence, but some trace them back to big shipping companies that were setting up colonies around the world for England in the seventeenth century. At that time, the investor who built the ship was responsible to the owner of the goods being shipped for the value of any goods that were lost. This made investment risky and posed a great impediment to the shipping industry. So a group of wealthy entrepreneurs came up with the idea of the corporation, which provided that if the ship sank, the owners of the goods wouldn't be able to sue the

investors who'd built the ship; rather, they could sue only the company that owned the ship. The law recognized this corporation as a "person," a separate entity. This scheme encouraged investment in shipbuilding, because now you didn't have to worry about losing more than your initial investment if the ship went down.

To form a corporation, the shippers had to go to the monarch and get a charter, a piece of paper that said, in effect: "These are the terms and conditions under which I am allowing this company to exist and operate" — the most important being that investors would be immune from any liability that arose from the operations of the ship.

This setup worked pretty well — so well, in fact, that a number of the American colonies were actually founded by corporations. Our foe in the American Revolution wasn't only King George; it was King George's corporations. After the revolution, those corporations were no longer a factor. In fact, there were very few corporations in the United States at the turn of the nineteenth century. Those that did exist tended to have a public or quasi-public purpose.

In those days, in order to form a corporation, you had to go to the state legislature and get a charter issued on an ad hoc basis. Remembering the abuse of King George's corporations, American legislatures held their own corporations on a short leash. They placed limits on the amount of capital that the corporation could raise, what businesses it could engage in, and how long it could exist. Moreover, the state had the ability to revoke their charter at any time. These restrictions ensured that there was very little corporate abuse of the public interest in this country from the American Revolution to around the time of the Civil War.

As the Industrial Revolution started to gain traction, however, business owners complained about having to go to the state legislature to get a charter. New York and other states passed the general corporation laws, which said that investors could set up a corporation simply by filing certain papers with the secretary of state and paying certain fees. All the other states followed suit, fearing that companies would flock to the states with such laws to get incorporated. Thus began what's been referred to as the "rush to the bottom," as states raced to lessen the restrictions that still remained on corporations in an attempt to attract business.

By the beginning of the twentieth century, all restrictions had been dropped. No longer did corporations have any obligation not to harm the public interest. Just like people, they were free to make money in any way that was legal. What legislatures didn't realize at the time was that corporations behave differently from people. Being dedicated to one purpose, the pursuit of profit, they have none of the self-regulatory traits — conscience, morals, a sense of right and wrong — that people do. Moreover, because corporations consist of hundreds of people acting together, backed by millions of dollars of capital, they are able to do a great deal more damage than individual people, and regulating them like people doesn't work.

**Cooper:** You've said that corporate citizenship is the next logical step for capitalism. Why?

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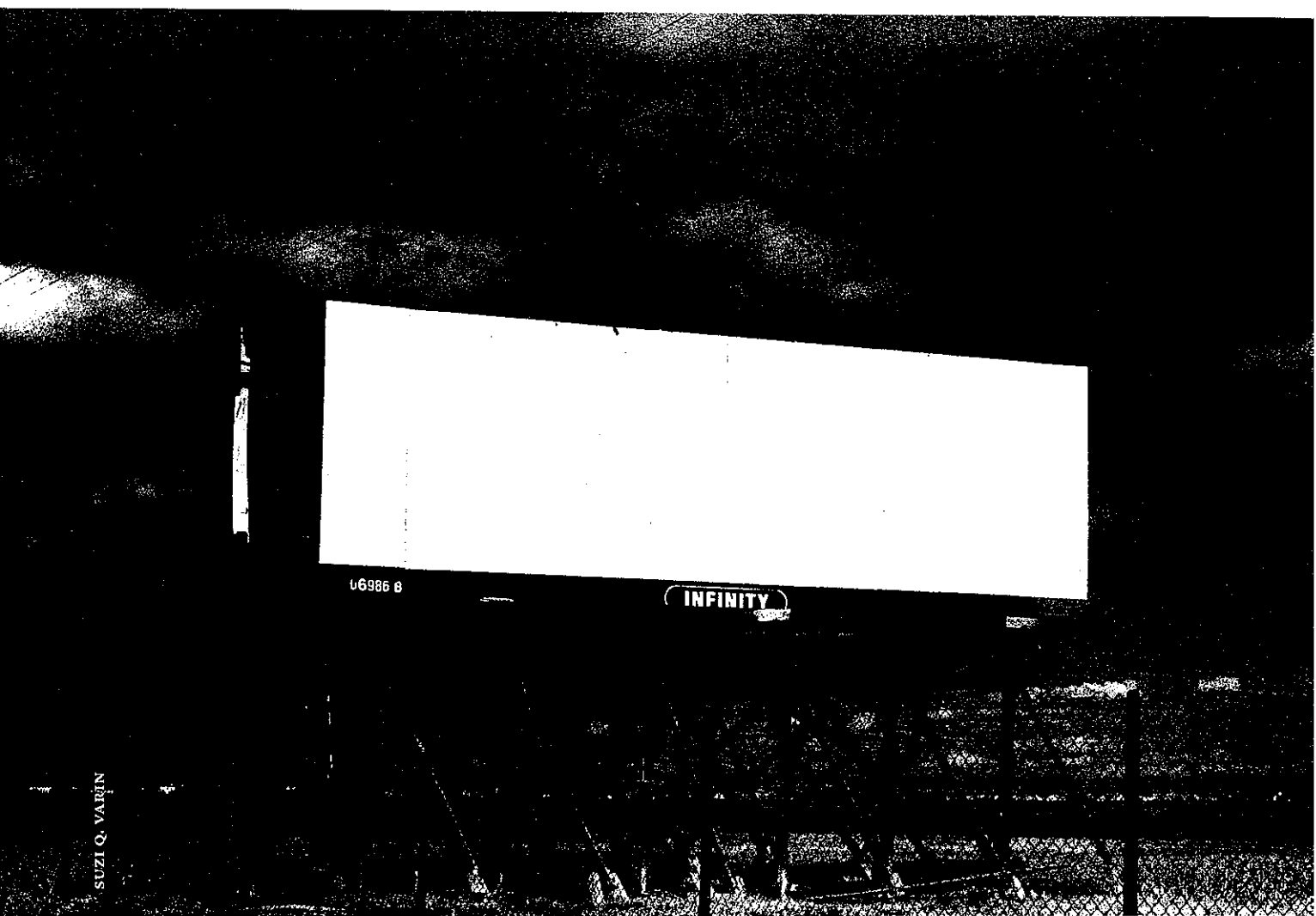
**Hinkley:** For more than a hundred years, corporations have enjoyed the rights of citizenship. And all companies want to be known as good citizens. It's good public relations. Unfortunately, existing law makes it difficult for them to be good citizens. The Code for Corporate Citizenship will finally balance the rights of citizenship with the appropriate obligations of citizenship.

When you think about it, it's a strange notion that states should allow for the formation of powerful institutions that then go forth and abuse the public interest. I think the time has come for us to recognize this mistake and correct it. Profits and protection of the public interest need not be mutually exclusive. Capitalism will continue to exist — in fact, I think it will be reinvigorated.

Under the code, making money will still be the object. The code will just put conditions on how the money can be made. But meeting those conditions will require a whole new set of technologies. Right now, we've got a lot of automobiles and power plants that pollute. A lot of our management systems are set up to treat people like numbers. And we have a lot of products that, although they might have certain benefits, also make people sick and/or kill them. To deal with these problems, we're going to need innovative technology and new systems. This will require research and development, which will require funds, which are provided through investment in new ideas. These funds will be provided by people who are looking for a return on their money. That's capitalism.

**Cooper:** You've suggested that, to allow for this transition to new technology, the code should not become fully enforceable for a period of fifteen years. But isn't fifteen years too long to wait?

**Hinkley:** There has to be some grace period before corporations can be held legally accountable to the new standard required by the code. The new technologies that will be required cannot be developed overnight. I have suggested fifteen years as an appropriate time, but that time period should be subject to debate. The real question is "When should corporate abuse of the public interest cease?" If you assume "Never" is not the



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right answer, then the time has come to ask, "When?"

Just because the code might not be legally enforceable for fifteen years doesn't mean that corporations will not change their ways before then. Passing the code now will create a "contingent liability" on the books of every company that is currently damaging the public interest in the ways the code protects. Almost immediately, Wall Street and lenders will want to know what steps companies are taking to eliminate these potential liabilities. If the answer is "None," then these companies will soon find their access to capital drying up. To avoid this, they will quickly determine just where their operations violate the code and start working on ways to bring them into compliance.

In addition, whole new industries will spring up to service corporations making the transition. Good ideas that so far have been shelved because they were "uneconomical" will now become feasible as corporations look for ways to reduce their liabilities. These new ideas will attract venture capital. Because of all these factors, we'll see improvements in corporate behavior well before the end of the fifteen-year transition period.

**Cooper:** How will the code be enforced?

**Hinkley:** That's a good question. I think that, by balancing the directive to make money with obligations to the public interest, corporate managers will finally have the power to do

the right thing, and most will seize the opportunity. If they do not, I have suggested that the code be amended to include enforcement provisions very similar to those that already exist under the U.S. securities laws. Instead of shareholders or defrauded investors doing the enforcing, members of the public who are harmed by a corporation's behavior will have the right to bring suit to recover damages against both the corporation and its directors.

**Cooper:** What are the limitations of your idea? What can it not do?

**Hinkley:** The code won't get corporations out of politics. Nor will it get corporations out of our schools. That's not to say these things couldn't be included later. But the five elements I've chosen are things I believe we can all readily agree on.

**Cooper:** Why isn't getting corporations out of politics one of your goals?

**Hinkley:** For two reasons: First, because I did not want to raise a constitutional issue with the code. The Supreme Court has held that corporate political contributions are protected by the constitutional right to free speech. Changing the U.S. Constitution has been done only twenty-five times in our history, and the Bill of Rights accounts for ten of those. It's very difficult to do. By contrast, changing state law, which is all the code will do, happens every day.

The second reason is that I am not all that concerned about the role of corporations in politics. I think it was Voltaire who said, "I may not agree with what you have to say, but I will defend to the death your right to say it." I think that we have to get more people involved in politics instead of trying to get corporations out. If we are going to require corporations to become better citizens, we are going to have to become better citizens ourselves.

**Cooper:** One element of the code that I find rather baffling is the implicit idea that companies can produce products without polluting the environment. After all, even a zero-emissions vehicle creates pollution in the manufacturing phase.

**Hinkley:** I don't have the technological answers for how it can be done, but neither did President John F. Kennedy when he announced a national goal to land a man on the moon by the end of the 1960s. The point is that, to eliminate pollution, we first have to make it our goal. Once we've done that, we will devote the resources necessary to make it happen. We will develop technologies that we never thought possible. But if we don't make it our goal, then we will never devote the resources, never develop the technology, and never solve the problem.

**Cooper:** Of course, all this research and development will cost consumers.

**Hinkley:** Absent everything else, yes, companies will charge more for their products in order to defray costs. But one of the beauties of capitalism is that corporations compete by trying to bring down their costs. Competition brings costs down over time, as businesses find ways to deliver products more and more cheaply.

The code will place back on the corporation the costs that companies now create but leave for the public to deal with.

As companies find ways to reduce these costs, prices will decrease.

This was proven by W. Edwards Deming, who helped rebuild Japanese industry after World War II. U.S. car manufacturers said consumers wouldn't pay extra for quality, so they dragged their feet on improving their products. Under Deming's tutelage, Japanese manufacturers built quality products and were able to grab a big slice of the U.S. car market. Quality and profit were not mutually exclusive. Neither are profit and protection of the public interest.

**Cooper:** Would you agree with many commentators that, right now, corporations control the government?

**Hinkley:** Yes, more or less. Right now, the public interest is suffering because too many people think that their opinions on issues don't matter. Without their input, government must decide among competing special interests. Eventually, the strongest special interest prevails, and the public's chance to have its say disappears.

"The economy," a euphemism for corporate profits, has become our federal government's principal measuring stick for the well-being of the public interest. It is now almost a foregone conclusion that government should sacrifice the environment and other elements of the real public interest in order to become more "business-friendly." But is this truly what the public wants?

Only a few corporations, however — the very largest — control the government. In fact, the vast majority of companies are small, family-owned, local businesses. They already operate more or less without violating the public interest. If they're not good citizens, they'll get a bad reputation and will soon be out of business. So they run their businesses in ways that are sustainable and generally don't pollute, and they treat people and their communities with respect. The people who run these companies will support the code.

We shouldn't forget that corporations don't vote. Take the state of Delaware, which is home to more than 60 percent of Fortune 500 companies. Not one corporation votes in Delaware. If you can convince the nearly one million people who do vote in that state to support the code, then they'll make the state legislature change the corporate law to include it.

**Cooper:** I still think that corporations will do everything in their considerable power to squash your idea. You say we need to begin with the people, but how do you win them over when their view of the world is shaped by the consumerist mantra brought to them constantly through the corporate media?

**Hinkley:** Really I do not have to win anybody over. People already know in their hearts that polluting, violating human rights, making people sick, treating people like machines, and bullying your neighbors are wrong; they just don't know what can be done about these things. The code gives them hope that there is a solution.

I keep in mind the words of Mahatma Gandhi: "First they ignore you. Then they laugh at you. Then they fight you. Then you win." It doesn't matter whether they ignore the code, laugh at it, or fight it; it is an idea that is not going away. ■