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SHAREHOLDERS AS STAKEHOLDERS: CHANGING METAPHORS OF CORPORATE GOVERNANCE

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Metaphors are unavoidable but dangerous components of human thought. Every effort to visualize or make concrete complex concepts is selective, highlighting some ideas while eclipsing others. The resulting mental image also may evoke strong emotional and moral reactions. As Robert Jay Lifton has shown, Nazi genocide rested on an elaborate metaphor, which described the regime's racial victims as "vermin" or "bacilli," and which presented mass extermination as a program of public health.[1]

Despite the appearance of precision, treatments of corporate governance in the literature of economics, public policy, and law also have often been controlled by metaphors. Behind such specialized legal terms as "fiduciary obligations" or "the principal-agent relationship" are a series of mental pictures—metaphors—which have molded both professional and popular thinking.

Consider Milton Friedman's classic 1970 article *The Social Responsibility of Business Is to Increase Its Profits.*[2] Friedman's objective in this article was to argue against the expanded managerial obligations then being championed by defenders of "corporate social responsibility." To this end, Friedman does two things at the beginning of his discussion. First, he tells us that, because advocates of social responsibility usually focus on corporate behavior, he will concern himself with corporate executives rather than individual business proprietors. Second, he presents what he regards as an incontestable description of the relationship existing between all business owners, including shareholders, and those individuals who are paid to manage the business:

> In a free-enterprise, private-property system a corporate executive is an employe of the owners of the business. He has direct responsibility to his employers. That responsibility is to conduct the business in accordance with their desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom.[3]

Astute readers of Friedman's essay will see that they have been proffered a metaphor: a highly selective and concrete image of the role, function,

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1. ROBERT J. LIFTON, THE NAZI DOCTORS: MEDICAL KILLING AND THE PSYCHOLOGY OF GENOCIDE (1986).

2. Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 32-33, 122, 124, 126.

3. *Id.* at 33.

and responsibilities of the executives of large public corporations. Before our eyes, the image of the modern corporation has vanished, to be replaced with one drawn from Dickens. Managers of large public corporations and the millions of institutional investors who know the companies in which they invest, if they know them at all, only as lines in a quarterly report, are replaced by Bob Cratchit and Scrooge.

With his metaphor in place, Friedman's moral argument is sealed. Managers are bound by explicit and implicit promises made to shareholders they have freely agreed to serve and who have put their trust and property in the managers' hands. Of course, no one can be required to perform illegal or flagrantly unethical deeds, and this explains the qualifications Friedman places on managers' obligations to the shareholder. Nevertheless, within these modest constraints, managers owe their primary loyalty to those who agree to pay their salaries. Diversion of resources or managerial time to other "worthy causes" constitutes taxation without representation, or, more in line with Friedman's actual metaphor, embezzlement.

Friedman's defense of managers' duties to shareholders is nearly a quarter of a century old, yet its spirit lives on in the concepts—and metaphors—that continue to dominate the law of corporate governance. Within this sphere, senior managers are held to have fiduciary duties to the corporation and its shareholder "owners" that stem from special obligations managers freely incurred when they agreed to serve as "agents" for their corporate "principals." As fiduciaries, senior managers have an affirmative obligation to disclose relevant business information to other corporate decisionmakers. Senior managers must act loyally to the corporation, avoid taking personal advantage of information or opportunities that come their way; and act with the same care and diligence in corporate matters as they would in their own affairs.[4] This last obligation includes an open-ended duty to maximize shareholders' wealth. In the words of the American Law Institute's draft *Principles of Corporate Governance*, those responsible for a business corporation should have as their objective "the conduct of business activities with a view to enhancing corporate profit and shareholder gain."[5] Although managers and corporate directors are permitted, in the reasonable exercise of "business judgment," to take longer-term shareholder interests into account and sometimes to defer immediate shareholder gain, all management decisions must be oriented toward the goal of maximizing shareholder value.

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4. In addition to the need for senior manager to act loyally, avoid taking personal advantage, and use care and diligence, Robert C. Clark adds to these three attributes of corporate fiduciaries a fourth attribute of the case law in this area: its quality of "moral fervor" and "intrusive normative rhetoric" regarding fiduciaries' obligations. *See* Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55, 76-79 (John W. Pratt & Richard J. Zeckhauser eds., 1985).

5. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (Tent. Draft No. 2, 1984), *quoted in* The Committee on Corp. Laws of the Am. Bar Ass'n, *Other Constituencies Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2255 n.4 (1990).

Over the years, voices have been raised against this dominant metaphor. From E. Merrick Dodd in the early 1930s to R. Edward Freeman in the 1980s and 1990s, economists, legal theorists, and moral philosophers have tried to assert a plurality of obligations incumbent on senior managers and corporate directors.[6] In the field of business ethics, "stakeholder" and "multi-fiduciary" theories of the firm have been advanced as ways of recognizing the potentially devastating impact corporations can have on their internal and external constituencies and of empowering senior managers and directors sometimes to subordinate shareholder interests to those of employees, communities, or other groups affected by corporate activities.

Recently, the argument that corporate management should consider the interests of many constituencies appears to have attained some hearing within the world of corporate law. A handful of Delaware court decisions have modestly expanded the business judgment rule to allow corporate directors to take into account the impact of their decisionmaking on other corporate "stakeholder" groups, especially employees and local communities.[7] These decisions, however, require that measures taken on behalf of other constituencies produce "some rationally related benefit accruing to the shareholders."[8] Over the past two decades, twenty-eight states have passed "other constituency" statutes permitting, though usually not requiring, senior managers and corporate directors to consider the interests of other stakeholders.[9] Charles Hansen notes that these statutes are "remarkably consistent" with one another.[10] Generally, they permit directors, *while acting in the best interests of the corporation*, to take into account a variety of constituencies other than shareholders, including employees, communities, customers, and suppliers.[11] Because these statutes, with few excep-

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6. R. Edward Freeman & Daniel R. Gilbert, Jr., Corporate Strategy and the Search for Ethics (1988); R. Edward Freeman, Strategic Management: A Stakeholder Approach (1984); E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. 1145 (1932).

7. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986) ("A board may have regard for various constituencies in discharging its responsibilities"); Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955 (Del. 1985) (suggesting that business judgment rule allows directors to consider, among other factors, effect of takeover on "creditors, customers, employees, and perhaps even the community generally" when enacting defensive measures).

8. *Revlon*, 506 A.2d at 176. This decision imposes the further requirement that once the corporation has entered a phase of being auctioned among active bidders, the directors' only concern is securing the highest price per share. *Id.* at 182.

9. Charles Hansen, *Other Constituency Statutes: A Search for Perspective*, 46 Bus. Law. 1355, 1355 (1991).

10. *Id.*

11. The Minnesota statute is typical in this regard. It reads:

> In discharging the duties of the position of director, a director may, in considering the best interests of the corporation, consider the interests of the corporation's employees, customers, suppliers, and creditors, the economy of the state and nation, community and societal considerations, and the long-term as well as short-term interests of the corporation and its shareholders including the possibility that these

tions,[12] specify that the impact on other constituencies must have a relationship to the best interests of the corporation, understood in terms of shareholder gain,[13] they represent little more than codifications of the business judgment rule as it has recently been interpreted by the Delaware courts.[14] As a result, it seems fair to say that these legal developments do not really challenge the dominant principal-agent, fiduciary metaphor and, in some respects, they even reinforce it. Court decisions have widened the latitude of fiduciary decisionmaking, but they have not altered its ultimate priorities. In every case, the claims and welfare of other corporate stakeholders must *also* serve the long-term interests of shareholders, a strict requirement. If we consider that "other constituency" statutes often were passed in reaction to the takeover battles of the 1980s and that these statutes moderate directors' duties to shareholders only in the context of mergers or acquisitions, the claim that these statutes represent a fundamental change in corporate legal perspectives is weakened further. By and large, these statutes aim to strengthen the hand of management in its efforts to ward off "third party" hostile raiders, or upstart managers, whose conduct threatens more traditional lines of corporate control and obligation.

This suggests that there is still need for basic rethinking of the metaphors that underlie our views of corporate governance. Beyond the details of corporate law, the owner-employee, principal-agent fiduciary metaphor continues to shape society. The hold of the metaphor is undeniable, but how valid is it? To what extent does the image of owners who entrust their wealth to hired managers accurately portray the underlying human and moral realities of the modern corporation?

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interests may be best served by the continued independence of the corporation.

MINN. STAT. ANN. § 302A.251(5) (West Supp. 1993), *cited in* Hansen, *supra* note 9, at 1355 n.3.

12. Hansen singles out the statutes of Connecticut, Iowa, Indiana, and Pennsylvania (especially the latter's 1990 amendments) as the only ones among the 28 that permit or require directors to place other constituencies on a footing with stockholders. Hansen, *supra* note 9, at 1370, 1375. The Committee on Corporate Laws of the American Bar Association places Georgia's statute in this category. The Committee on Corp. Laws of the Am. Bar Ass'n, *supra* note 5, at 2262-63.

13. The Committee on Corp. Laws of the Am. Bar Ass'n, *supra* note 5, at 2265.

14. There is considerable debate about the significance of other constituency statutes and their potential for imposing weightier duties on directors and senior managers than are currently imposed by the business judgment rule. Among those arguing that these statutes may be interpreted as having significant impact are Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 631-35 (1992) and David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 245-46, 251-60 (1991). Both authors urge interpretations that, among other things, would view these statutes as granting nonshareholder groups enforceable rights and standing to sue. At the opposite extreme, the Committee on Corp. Laws of the Am. Bar Ass'n, *supra* note 5, argues for subsuming these statutes to the business judgment rule. Intermediate positions that see these statutes as potentially broadening the meaning of the traditional "duty of care" are offered by Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14, 40-44, 84-92 (1992) and Stephen M. Bainbridge, *Interpreting Nonshareholder Constituency Statutes*, 19 PEPP. L. REV. 971, 1019-23 (1992).

As powerful as the fiduciary and principal-agent metaphors have been, it is not hard to see that in many ways, they misrepresent the realities of the shareholder-management relationship. In a recent paper, the philosopher John Boatright signaled several incongruities in the vision of employee-managers and corporate directors bound as trustees for corporate owners.[15] One problem, long acknowledged in corporate law, is that ownership of a corporation is significantly different from the ownership of personal possessions. By and large, shareholders have no right to control the use of corporate assets. Control is vested in a fictitious person, the corporation, under the supervision of the board of directors. Senior managers and directors are fiduciaries not to the "shareholder-owners" of the firm, but to the corporation. Berle and Means discussed this separation of ownership from control more than half a century ago[16] and it has been revisited more recently in the context of takeover activity in the work of Michael Jensen and Richard Ruback.[17] This separation complicates the simple and morally compelling picture of owners exercising their will through agents whom they have expressly hired for that purpose and who correspondingly owe them duties of loyalty and service. In fact, in exchange for a good return on their investment, shareholders of public corporations have, by everyone's admission, already relinquished most of what we normally think of as the powers of ownership.[18]

The image of shareholders as owners-principals who enter into solemn agreements with either senior managers or directors breaks down further if we seek to identify any of the promises, covenants, or contracts, which this vision presumes. At what point do shareholders and managers ever freely enter into a relationship in which one party promises to perform specified services in return for payment or other consideration? Most shareholders purchase stock on the open market from other shareholders. They have no face-to-face dealings with senior corporate managers or directors. As Boatright observes,

> the idea of a contract is most at home in situations in which two parties are able to negotiate a set of mutual obligations which

15. *See* John R. Boatright, *The Shareholder-Management Relation and the Stakeholder Paradox* (paper presented at the Annual Meeting of the Society for Business Ethics, Atlanta, Ga., Aug. 6-7, 1993).

16. ADOLF A. BERLE, JR. & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

17. *See, e.g.*, Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5 (1983).

18. Clark observes that shareholders' rights are "extremely limited." Clark, *supra* note 4, at 57. Foremost among them are the right to vote for or against candidates for directorships and the right to vote for or against so-called "organic corporate changes" such as mergers, charter amendments or the dissolution of the corporation. *Id.* But the board must first approve such changes and put them before the stockholders for approval. Clark notes that "even a 100 percent vote of the stockholders cannot initiate or force through such a change" if the board resists. *Id.*

governs specific interactions. In the case of shareholders and management, however, there is virtually no opportunity for the two parties to negotiate the terms of their relation.[19]

There is also little need for such negotiation. Within the traditional principal-agent, fiduciary view of the firm, it is obviously important that owners make clear what they expect managers to do on their behalf. Owners have tied up their capital in the enterprise and, like patients who have given control of their bodies to a physician or clients who have put their fate in an attorney's hands, they are thereafter hostage to their fiduciary's decisionmaking. Even when owners and managers have not entered into formal agreements, implicit contracts governing such relationships might be supposed since it is reasonable to assume that all parties to such an arrangement *would have agreed* that managers should act as trustees for the vital resources owners give them. But shareholders of a modern corporation hardly are as dependent as most people who rely on the conduct of fiduciaries. In most cases today, they commit only a small portion of their wealth to any one firm. With diversified portfolios, their overall risk in investing in a firm is relatively low. Indeed, some shareholders may even profit elsewhere in their portfolio as a result of reverses suffered by one of the firms whose stock they own.[20] Furthermore, if they do not like the policies or directions taken by a firm in which they have invested, they are free at any time to sell their stock in a very active public market. In these respects, shareholders today have little commitment to the firms in which they invest: they are neither committed to a firm, in the moral sense of *caring* about its prospects, nor are they committed in the practical sense of having joined their fate to the company's. This essential lack of commitment by shareholders creates a moral reality very different from that presumed in the owner-agent model or in any form of fiduciary relationship.

One other feature of the corporate form, limited liability, contributes to this lack of shareholder commitment. Traditionally, ownership of property has implied privileges: the right to enjoy one's possessions and to exploit the freedoms and opportunities they represent. Ownership also has always implied responsibility for the harms that one's property can inflict on others, but, by and large, this has been a minor consideration in most people's thinking. Those who flagrantly abused or neglected their property might, at worst, lose it. In the late twentieth century, however, as a result of unprecedented growth in our technological capabilities and the scope of business activities, we have entered another realm. As any banker can attest, in a world of Superfund toxic clean-up legislation, property can be a dangerous and expensive liability. In a host of industries, including pharmaceuticals, chemicals, energy, and transport, the misuse of corporate

19. *See* Boatright, *supra* note 15, at 3 (quoted by permission).

20. This point is made by Michael P. Dooley in a defense of enhanced managerial authority vis-à-vis shareholders. *See* Michael P. Dooley, *Two Models of Corporate Governance*, 47 BUS. LAW. 461, 526-27 (1992).

property and technologies can kill or maim hundreds or thousands of people and cause damages in the tens of billions of dollars. The record of the past two decades is littered with disasters of this magnitude: A.H. Robins and the Dalkon Shield; Union Carbide and Bhopal; Johns-Manville and asbestos; Exxon and the Valdez oil spill; and, most recently, Dow-Corning and silicone breast implants.

What does this burgeoning tendency of corporations to become potential sources of massive harm mean for our traditional principal-agent, fiduciary metaphor? The very idea of fiduciary relationships was developed to protect principals from the serious harms that their agent might cause them. But what happens when the conduct of the principal and the agent *together* becomes a source of serious harm to others? Naively, we might think that such a prospect is easily assimilated to the principal-agent model. To the extent that a principal and agent act jointly, they should bear the costs of the harms their behavior creates. If I deliberately instruct or knowingly permit someone to use my property in a way that injures others, we are both responsible to those we have harmed. But in the world of corporate law and corporate fiduciary relationships, this expected moral logic does not apply. Thanks to limited liability, shareholders can fund the activities of large corporations, receive dividends and capital gains on their investments, and yet remain immune to some of the costs of misconduct or misjudgment by their corporate agents.

In the past, this consequence of limited liability may not have been apparent. Corporate failures largely meant insolvency, and the burden of insolvency usually was distributed either among shareholders, who saw the value of their stock wiped out, or creditors, who knowingly put their money at risk. But in today's world, limited liability represents a potentially massive benefit to shareholders. Because of it, they are immune to pursuit, beyond their equity stake, by individuals or groups the corporation has injured. In economic terms, we can think of limited liability today as a "social subsidy" in the form of an unpaid insurance policy awarded investors that protects them against the bottomless liability which corporate misconduct can entail.[21] As Christopher Stone has put it, thanks to limited liability, "[w]e have arranged things so that the people who call the shots do not have to bear the full responsibility."[22]

In fact, shareholders do not "call the shots" (although senior managers and directors, who also are protected by "limited liability," often do). The

21. The economic and tax implications of limited liability are explored by Kose John, Lemma W. Senbet, and Anant K. Sundaram in an unpublished working paper. Kose John et al., *Limited Liability and Corporate Taxation* (1989) (unpublished paper available through Dartmouth College). John, Senbet, and Sundaram argue that the double taxation of corporate income is partly justified as compensation to society for the protection that limited liability accords the owners of firms engaged in risky activities. Kose, Senbet, and Sundaram develop the implications of limited liability for multinational business in a second article. Kose John et al., *Cross-Border Liability of Multinational Enterprises, Border Taxes, and Capital Structure*, FIN. MGMT., Winter 1991, at 54.

22. CHRISTOPHER STONE, WHERE THE LAW ENDS 46 (1973).

point is that shareholders are not property owners, nor principals to their agents, nor individuals dependent on fiduciaries in any of the normal ways that these concepts and images bring to mind. Shareholders neither control corporate property nor bear the consequences of its abuse in any of the ways that the traditional owner-employee metaphor suggests. Why, then, should we insist that *moral* relations between shareholders and senior managers or shareholders and directors, relations emphasizing strict fiduciary obligations, pertain, when these relations belong to a moral world that does not exist?

One answer is that we simply have been misled by our metaphors or bewitched, as Wittgenstein put it, by our language. To some extent, I think this is true. As a teacher of Masters of Business Administration students, I repeatedly have witnessed the force of the principal-agent metaphor. Students with little knowledge of corporate law, but a few years of work in business environments, seem naturally to assume that for both moral and prudential reasons they must primarily be committed to maximizing shareholder wealth.

Even sophisticated theorists seem to fall under the spell of this metaphor. In a recent article, business ethicist Kenneth Goodpaster presents what he terms the "stakeholder paradox." According to Goodpaster, orienting corporate decisions by values that go beyond the long-term maximization of shareholder gain "seems essential, yet in some ways illegitimate."[23] Goodpaster is willing to accept what he calls a "strategic stakeholder" position, although he questions its worth as a moral commitment. His strategic stakeholder position permits management to take into account the impact of its decisions on other stakeholders to the extent that the impact on other stakeholders has consequences for long-term shareholder wealth. For such a view, shareholders remain the pole star of managerial decisionmaking. But Goodpaster is less comfortable with what he terms a "multi-fiduciary" view that would insist on giving senior managers or directors equal obligations to a plurality of corporate stakeholders. Why so? Why is Goodpaster unwilling to relinquish the moral primacy of the shareholder-management relationship? Part of the answer, it seems, is that he cannot get the owner-employee, principal-agent metaphor out of his mind:

> It can be argued that multi-fiduciary stakeholder analysis is simply incompatible with widely-held moral convictions about the special fiduciary obligations owed by management to stockholders. At the center of the objection is the belief that the obligations of agents to principals are stronger or different in kind from those of agents to third parties.[24]

Goodpaster's solution to the "stakeholder paradox" is to retain the primacy of management's fiduciary obligations to shareholders but to acknowledge

23. Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, Bus. Ethics Q., Jan. 1991, at 53, 63.

24. *Id.*

that, as moral agents, senior managers and directors also have general moral obligations to other constituencies and groups. Just as I cannot ask my attorney to commit wrongs or totally ignore her conscience on my behalf, so shareholders cannot expect managers to put their consciences aside as they pursue the goal of shareholder wealth. In Goodpaster's view, this way of configuring responsibilities helps explain the force of various stakeholder perspectives without surrendering our moral intuitions about the nature of the owner-manager relationship. The problem with this approach is that we normally believe fiduciary obligations are special. They can lead doctors and lawyers to downplay or even suspend important moral obligations to third parties as they try to protect the interests of their patient or client. Applied to corporations, placing primacy on managers' and directors' fiduciary obligations to shareholders can mean that corporate officers might be allowed to inflict serious harms on other stakeholders while fulfilling their special moral mission. The question remains why, apart from the tug of a metaphor, we want to authorize corporate managers to act in this way.

In fairness to Goodpaster and others, we should note that more than emotionally and morally tinged images lie behind this privileging of obligations to shareholders. Good reasons have been put forth for refusing to place shareholders on a moral plane of equality with other corporate stakeholders. Oliver Williamson, for example, points out that, apart from the assumption of special duties owed to them by management, shareholders are among the least protected of corporate constituencies. Unlike workers, suppliers, or creditors, they are unprotected by explicit covenants or contracts and are unable periodically to renegotiate the terms of their relationship.[25]

Others fear the loss of control or managerial arrogation of power that might ensue if any kind of multi-fiduciary model replaced current lines of responsibility. Managers responsible to everyone are responsible to no one. In a world in which management has to evaluate every major corporate decision in terms of its impact on a variety of often conflicting constituency interests, corporate decisionmaking might be paralyzed and the private enterprise system as we know it, with its virtues of efficiency and productivity, might vanish. In the words of the American Bar Association's Committee on Corporate Laws, "[w]hen directors must not only decide what their duty of loyalty mandates, but also to whom their duty of loyalty runs (and in what proportions), poorer decisions can be expected."[26] Alternatively, some fear that if managers are empowered to set constituency against constituency, in the end all power will fall into management's hands. The "control problem" that has bothered corporate theorists for decades would go from being technically difficult to conceptually unsolvable. A half century ago, responding to Dodd's multi-fiduciary stakeholder position, Adolf Berle expressed this concern when he warned that Dodd's view of

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25. OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM 304-05 (1985).
26. The Committee on Corp. Laws of the Am. Bar Ass'n, *supra* note 5, at 2269.

corporate managers as trustees for various constituencies could well lead to a "social-economic absolutism of corporate administrators."[27]

All these are serious concerns. Nevertheless, one has the impression in reading these and other arguments that the whole that is being defended—the vision of traditional owner-manager relations—seems larger and more compelling than the sum of its parts. However, taken individually and collectively, these arguments do not constitute a very convincing justification of the principal-agent, fiduciary model. Despite Williamson's contentions, for example, it is hard to believe that shareholders are somehow more vulnerable than other corporate stakeholders. We have seen how much latitude the transferability of corporate equities gives this group. Contrast this with the bulk of employees today, who serve "at-will" and are unprotected in their basic livelihood by contracts or law. Can it really be said that employees (or local communities or dependent suppliers) are really better able to "negotiate" the terms of their relationship to the corporation than are shareholders?

The argument about loss of corporate control merely assumes that it is impossible legally or ethically to impose on managers and directors a multiplicity of significant but potentially competing obligations and to hold them accountable for fulfilling them. In fact, fiduciaries of various sorts commonly find themselves pulled between compelling duties. In complex negotiations or when they serve groups of clients, attorneys frequently are asked to represent multiple parties whose interests do not coincide. So long as they act with everyone's permission and fully disclose what they are doing, this mode of conduct is regarded as both possible and permissible. Some years ago, Justice Brandeis coined a term for those who act in situations of this sort when he called them "lawyers for the situation."[28] It is also now an established principle of legal ethics that lawyers have obligations to the court for the administration of justice[29]—for example, the obligation to prevent perjury and to avoid complicity in it[30]—that are as compelling as their fiduciary duties to the client. These competing duties approximate a multi-fiduciary view of lawyers' responsibilities. Although such conflicts are less common in medicine, they can be expected to proliferate as physicians and nurses work in increasingly complex organizational and professional environments. Already, in areas like genetic counseling, practitioners find themselves serving multiple individuals within families whose interests often compete. In all these instances, professionals are expected to do the best they can both by developing and working within a framework of reasonable and defensible priorities. Why cannot corporate directors and senior managers be asked to do the same?

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27. Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1372 (1932).

28. *See* GEOFFREY C. HAZARD, JR., ETHICS IN THE PRACTICE OF LAW 58-68 (1978).

29. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 1 (1983). "A lawyer should assist in maintaining the integrity and competence of the legal profession." *Id.*

30. MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 (1993).

I do not intend here to develop the outlines of a multi-fiduciary view of managerial responsibilities.[31] Such a view, I suspect, will be the outcome of years of painstaking legal reasoning. If the relatively new "other constituency" statutes are not interpretively subsumed by the older "business judgment" and "managers as fiduciaries for the shareholder" framework, or if the few exceptional statutes that now permit directors sometimes to privilege other constituencies over shareholders become more representative of law in this area, this direction of legal innovation may represent the beginning of a multi-fiduciary approach. Eventually, we would expect the elaboration of a body of law establishing a slate of varied priorities for corporate management. Within this framework, shareholders would be one stakeholder group among others. Normally they would be regarded as *primus inter pares* in the sense that they have priority in day-to-day fiscal decision-making. But their interests might be explicitly subordinated in cases in which certain kinds of serious inconveniences or harms threaten other stakeholders.

Of more immediate concern is the question of why it is important to move beyond the hold of the "manager as fiduciary" or the "principal-agent" metaphor. Since a multi-fiduciary stakeholder perspective normally will require attention to shareholder gain, and since a modified shareholder view permits consideration of other constituencies' interests when these are reasonably related to corporate business interests, what really is the difference between these two approaches? Do we have a case here of going east or west around the globe, but ending up in essentially the same spot?

I do not think so. In practice it can make a significant difference under which metaphor and which specific model of governance corporate management operates. The difference will become apparent whenever corporate decisions arise in which acting on moral, as opposed to legal, responsibilities to other constituencies *cannot readily be justified in terms of long-term shareholder gain*. The traditional model, we have seen, requires managers to obey the law, even if this means subordinating shareholder gain. And the model permits them to act on moral obligations to stakeholders when these can reasonably be related to increasing shareholder wealth. What this model does not permit is for managers to respect even their strongly felt moral obligations when acting on them clearly fails to augment the value of shareholders' holdings, or may reasonably be construed as tending to damage shareholders' long-term positions.

It may seem that situations like this are not very likely to occur, but, in fact, as a result of the scope and magnitude of modern corporate activities, they have become quite common. The Bhopal disaster provides a good example.[32] Senior managers at Union Carbide and at Union Carbide's

31. Suggestions as to the possible course of these developments are made by Orts, *supra* note 14, at 98-100 and Mitchell, *supra* note 14, at 635-36. For an ethical as opposed to legal effort in this direction, see ABBASS F. ALKHAFAJI, A STAKEHOLDER APPROACH TO CORPORATE GOVERNANCE 103-18 (1989).

32. I discuss this episode at length in the first chapter of my book, RONALD M. GREEN,

Indian affiliate, Union Carbide India Limited, were apprised of the poor maintenance conditions and general disrepair of the company's Bhopal facility. It may well be that failure to correct these problems resulted only from miscommunication and the kinds of confusion that can occur in a large international organization. But Union Carbide's failure to invest heavily in the Bhopal plant can also be seen as the outcome of a chain of business reasoning predicated on the shareholder model. To begin with, the chances of an accident were relatively slight and these had to be weighed against the major outlays needed to bring the Indian facility up to United States' standards. Because the Bhopal plant had been losing money for several years and had no prospects of turning around, it would have been hard for any senior manager concerned with quarterly results to justify such costs. Of course, it might be argued that even the slight risk of massive injury attendant upon an accident, and the consequent liability costs, could justify such expenditures under some application of the business judgment rule. But a series of specific considerations undermine this line of reasoning. For one thing, there was substantial likelihood from Union Carbide's perspective that liability could be confined to its Indian affiliate. Sheltered behind international legal boundaries and the rule of limited liability, Union Carbide's American and Indian shareholders might well be financially better off if managers gambled against safety. Furthermore, even if the almost unimaginable worst case scenario became reality—the two thousand deaths and thousands of injuries that actually occurred—the very low economic value of Indian lives made reduced attention to safety a reasonable gamble from Union Carbide's perspective. I do not wish to argue that senior managers at Union Carbide could not have made a case, within the framework of the business judgment rule, for investing in plant safety as a way of protecting the long-term interests of the corporation, especially if they had hindsight knowledge of what actually happened. My point is that they would have had a hard time making such a case. Within the traditional model of fiduciary responsibilities these managers would be in the difficult position of arguing that slight risks to human life and health justify incurring relatively high and unreasonable costs.

Union Carbide's situation is not unique. Modern corporations frequently find themselves in circumstances in which reducing the risk of serious harm to stakeholders is both expensive and not legally required. The law may be mute because, as in the case of the Dalkon Shield, relevant legal enactments may not have been developed yet, or, as in the case of Union Carbide, a multinational corporation may be acting between jurisdictions and without clear legal direction. When situations of this sort arise, only managers'

THE ETHICAL MANAGER (1994). For other discussions of the Bhopal disaster, see Arthur Sharplin, *Union Carbide of India, Ltd.: The Bhopal Tragedy*, CASE RES. J., 1985, at 229, and Thomas N. Gladwin, *A Case Study of the Bhopal Tragedy*, *in* MULTINATIONAL CORPORATIONS, ENVIRONMENT, AND THE THIRD WORLD: BUSINESS MATTERS (Charles S. Pearson ed., 1987).

personal moral convictions may stand between the risk of massive harm to others and the dominant legal-ethical imperative of maximizing shareholder value. Sometimes, as the recent experience of Johns-Manville shows, a moral commitment to other stakeholders may require a willingness to exhaust the resources of the company, something that the shareholder fiduciary model will not allow, at least until the law intervenes and compels it. That these situations arise more and more frequently, as a result of the power and risks of modern corporate activities, tells us that the weaknesses in the traditional model are not just theoretical. They evidence themselves in actual corporate decisionmaking and in this way can potentially contribute to the infliction of serious harm on stakeholders.

Some might argue that these risks and dangers of the shareholder model, though substantial, are more than offset by other risks created once corporate management is freed from its primary duty to increase shareholder wealth. I respect these arguments and do not intend to show here that they are wrong. But it is important to note that this discussion takes place on the plane of public policy. The question concerns which model of corporate governance makes most sense and best serves all of our needs in a modern business environment.[33] We will have to answer this question by looking at the specific strengths and weaknesses of different models.

We will not be helped in this debate, however, if our emotions and thinking are constantly distorted by a faulty metaphor of "risk-taking owners" and the "loyal managers" they employ. That metaphor, I have argued, has no relevance to contemporary corporate reality. It is time to cast it off and let it lie with the Ghost of Christmas Past.

33. This is the same conclusion reached by Boatright when he insists that the debate over fiduciary obligations rests not on contract or agency but on considerations of public policy. *See* Boatright, *supra* note 15, at 5-8.