



---

4-1-2017

## Corporate Governance as Moral Psychology

Alan R. Palmiter

*Wake Forest University School of Law*

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Business Organizations Law Commons](#)

---

### Recommended Citation

Alan R. Palmiter, *Corporate Governance as Moral Psychology*, 74 Wash. & Lee L. Rev. 1119 (2017).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol74/iss2/19>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact [christensena@wlu.edu](mailto:christensena@wlu.edu).

# Corporate Governance as Moral Psychology

Alan R. Palmiter\*

## *Table of Contents*

I. Introduction .....	1119
II. Moral Psychology .....	1122
III. The Moral Matrices of David Millon and Lyman Johnson .....	1128
A. Caring/Harm .....	1133
B. Fairness (Equal or Proportional)/Cheating .....	1138
C. Freedom/Coercion .....	1142
D. Loyalty/Betrayal .....	1147
E. Order and Obedience/Chaos .....	1150
F. Sacred/Sacrilege .....	1155
IV. Conclusion .....	1158

## *I. Introduction*

This Essay advances a simple thesis: Corporate governance is best seen not as a subset of economics, or even law, but instead a subset of moral psychology.

---

\* Howard L. Oleck Professor of Business Law, School of Law, Wake Forest University. I wish to thank Chris Bruner for inviting me to the Law Review's Symposium honoring Lyman Johnson and David Millon—even though I am on the periphery of “progressive corporate law scholarship.” I wish to thank Lyman and David for their friendship for so many years and for their willingness (I am confident) to be “involuntary subjects” in this inquiry into corporate moral matrices. I owe a special debt of gratitude to McNair Nichols and Jenna Lorence, who teamed up to offer many thoughtful editorial suggestions and track down citations to my sophomoric understanding of moral psychology. Finally, I owe a special debt to Austin Thompson (17) for his research help and insightful comments on this foray outside the law into human morality.

Corporate governance—that is, the decision-making and actions that arise from the dynamic relationship of investors and management in corporations—is not the product of rational economic incentives or prescriptive legal norms, but instead the product of moral values. On questions of right and wrong in the corporation, these moral values operate within the almost unbounded discretion afforded to corporate investors (primarily shareholders) and to corporate management (primarily directors and officers). The many decisions that these corporate actors make, like those of other human actors, are essentially emotive and instinctive. The justifications offered by corporate actors for their choices—whether resting on theories of shareholder primacy, team production, board primacy, or even corporate social responsibility—are after-the-fact rationalizations, not reasoned thinking.

That is, those of us who seek to understand corporate governance have largely been co-opted by the Western philosophical belief in human rationality. Beginning with Socrates and Plato, moving through Descartes and the Enlightenment, and culminating in Law and Economics, we have explained human decision-making as constructive thinking leading to rational action. But recent research in the nascent area of moral psychology suggests that we are not rational, particularly when we operate in social and political groups.<sup>1</sup> Our decisions (moral judgments) arise in our subconscious, out of rational view. This may be particularly so when we operate in the super-organism that is the corporation, where our specialized roles lead to almost unparalleled human cooperation.

While we have assumed that economic incentives and law play a determinative role in shaping culture and thus the moral matrix of our decision-making, it may be that things are the other way around. Moral decisions arise not from reasoned responses to human situations, but instead are driven by subconscious, emotive, and irrational factors. We rationalize our moral decisions—whether to feel compassion toward another who is harmed, to desire freedom in the face of coercion, or to honor

---

1. See generally, Jonathan Haidt, *The New Synthesis in Moral Psychology*, 316 SCI. 998 (2007).

those things we consider sacred—*after* we have made the decision. We layer on a veneer of rationality, to reassure ourselves of our own moral integrity and to signal our moral values to others in our group who share our moral views. And we choose our groups with great (subconscious) care.

Thus, the moral matrices—which in our political society have become molded into progressive, conservative, and libertarian camps—provide a powerful prism by which to understand decisions in the corporate context. When presented with a question of whether to move operations offshore, at the apparent expense of local workers, what moral vectors guide (if not compel) the board's decision? When presented with a proposal that the company report to shareholders on lobbying and political expenditures, so as to make corporate managers more answerable to shareholders with respect to corporate political activities, what moral vectors guide shareholder votes? When faced with a decision to leave fossil fuels in the ground or to extract their immediate value, what guides the corporation's temporal horizon?

Although both directors and shareholders—indeed, all of us—will offer a host of motivated reasoning—even a dizzying plethora of after-the-fact rationalizations—for decisions on these and other essentially moral business questions, the proffered reasons should not be understood as the drivers. They are mere echoes (sometimes distorted) of the moral forces that actually drove the decision. For all meaningful corporate decisions, which in the end are all laden with questions of right and wrong, moral psychology teaches us that there is—almost certainly—machinery that is deeper, nearly invisible, that motivates the corporate actor's decision.

My purpose in this Essay is twofold. First, I sketch the recent research in the field of moral psychology that seeks to answer the great philosophical question: When we make moral judgments, are we rational or emotional? The emerging answer is at once disturbing and liberating. We are emotional, analogical beings, and what we say about our decisions—think, legal analysis—is mostly a set of shadows on the wall. These studies reveal that we are moved—in different proportions—by a sense of compassion, fairness, freedom, loyalty, order, and sanctity. Lately, how we hold these proportions has defined our political camps, with

progressives moved by the moral vectors of caring and fairness/equality; conservatives moved by these same moral vectors, as well as those related to loyalty, order, and sanctity; and libertarians moved especially by the moral vector of freedom.

Second, in the spirit of the symposium honoring the work of David Millon and Lyman Johnson, I take a shot at applying these insights to corporate governance—that is, to how moral decisions happen in the corporation. I start by positing the story of a corporate moral decision—specifically, whether a corporate board should approve moving the company’s possibly unhealthy manufacturing offshore. I then consider how the story implicates the moral values identified by moral psychology: compassion, fairness, freedom, loyalty, order, and sanctity. To do this, I extract the moral vectors implicit in the recent writings on corporate governance by David and Lyman—writings that state (and thus reflect) how each of them approaches moral judgments in the corporation. Their various arguments for greater pluralism in the corporation, for a broader set of corporate duties, and even for the sanctity of the corporation as an instrument of social welfare reflect a set of “moral matrices.” In the end, it’s difficult to predict how David and Lyman would each resolve the tough choices facing a board of directors in a corporate offshoring decision.

## *II. Moral Psychology*

To better understand decisions within the corporation—and thus corporate governance—it is useful to turn to the relatively nascent field of moral psychology and the structures undergirding moral judgments that research in this field has identified.<sup>2</sup> Over the past couple decades, studies and experiments have revealed that our moral judgments and discourse arise from moral matrices that mix and match at least six fundamental moral

---

2. See JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION*, xii (2012) (“Politics and religion are both expressions of our underlying moral psychology, and an understanding of that psychology can help bring people together.”).

values that can be expressed as opposites, each along a separate axis:<sup>3</sup>

- 1) care / harm
- 2) fairness / cheating
- 3) liberty / oppression
- 4) loyalty / betrayal
- 5) authority / subversion
- 6) sanctity / degradation

According to these studies, we make moral judgments by weighting these values in different ways—often in ways that are closely aligned with our identification with different political groups.<sup>4</sup> In this country, political liberals are moved almost exclusively by the values of caring/compassion and fairness/equality, with adherents feeling strong (even visceral) reactions against narratives of harm and inequality.<sup>5</sup> Meanwhile, political conservatives are moved by the additional values of sanctity, authority/order, and loyalty, with adherents experiencing strong reactions against narratives involving desecration, disrespect, and disloyalty.<sup>6</sup> And political libertarians are moved primarily by the value of liberty/freedom, with strong

---

3. See Jesse Graham, Jonathan Haidt & Brian A. Nosek, *Liberals and Conservatives Rely on Different Sets of Moral Foundations*, 96 J. PERSONALITY SOC. PSYCHOL. 1029, 1029–46 (2009) (finding that conservatives tended to value five matrix values while liberals tended to prefer care and fairness over loyalty, sanctity, and authority).

4. See *id.* at 1031 (“[W]e found that liberals showed evidence of a morality based primarily on the individualizing foundations (Harm/care and Fairness/reciprocity), whereas conservatives showed a more even distribution of values, virtues, and concerns, including the two individualizing foundations and the three binding foundations (Ingroup/loyalty, Authority/respect, and Purity/sanctity).”).

5. See *id.* at 1040 (explaining that liberals are primarily moved by harm and fairness concerns); HAIDT, *supra* note 2, at 295 (“The left builds its moral matrix . . . most firmly and consistently on the Care foundation.”).

6. See Graham et al., *supra* note 3, at 1040 (explaining that conservative moral concerns are more evenly distributed across harm, fairness, loyalty, authority, and sanctity); HAIDT, *supra* note 2, at 306 (“[W]e have found that social conservatives have the broadest set of moral concerns, valuing all six foundations relatively equally . . . [with] relatively high settings on the Loyalty, Authority, and Sanctity foundations . . .”).

reactions against government (or other) restrictions on individual freedom and free markets.<sup>7</sup>

The following schematics from Haidt's *The Righteous Mind*<sup>8</sup> identify the different weights these moral values hold for American liberals, conservatives and libertarians:

Fig. 1

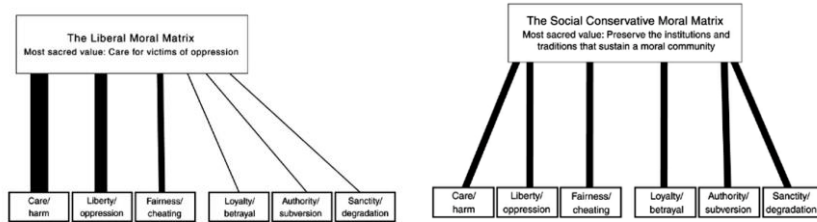


FIGURE 12.2. *The moral matrix of American liberals.*

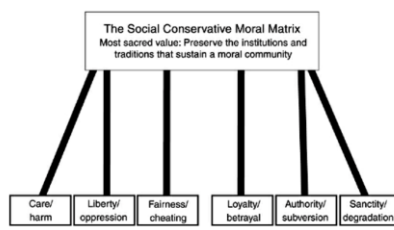


FIGURE 12.4. *The moral matrix of American social conservatives.*

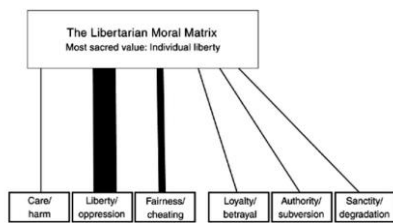


FIGURE 12.3. *The moral matrix of American libertarians.*

Further, as each group self-reinforces its own value matrix, the group's views are purified and harden as they "bind" and then become "blind" to the other.<sup>9</sup> Thus, each political camp—which for the past fifty years has become more compartmentalized and purer—is built upon a set of heuristics that constitute the camp's

7. See HAITT, *supra* note 2, at 300 ("Libertarians are the direct descendants of the eighteenth- and nineteenth-century Enlightenment reformers who fought to free people and markets from the control of kings and clergy. Libertarians love liberty; that is their sacred value.")

8. See *id.* at 297 fig.12.2, 302 fig.12.3, 306 fig.12.4 (depicting the weight of moral values that groups of Americans with differing ideologies possess).

9. See *id.* at 313 ("Morality binds and blinds. It binds us into ideological teams . . . . It blinds us to the fact that each team is composed of good people . . .").

moral matrix.<sup>10</sup> For progressives, the defining account is “oppressed versus protected,” using narratives that value compassion and fairness in a struggle against hatred and inequality.<sup>11</sup> For conservatives, the defining account is “traditional versus radical,” built on narratives that value ordered authority built on deeply-held (often religious) views.<sup>12</sup> For libertarians, the defining account is “free markets versus regulatory intervention,” using narratives of individual and collective liberty struggling against the tyranny of regulatory (public and private) intrusion and coercion.<sup>13</sup>

Using different narratives, moral psychologists have gauged the moral responses and attitudes held by adherents to each group.<sup>14</sup> Thus, members of different groups react strongly and differently to moral narratives.<sup>15</sup>

---

10. *See id.* at 318 (“We are deeply intuitive creatures whose gut feelings drive our strategic reasoning. This makes it difficult—but not impossible—to connect with those who live in other matrices, which are often built on different configurations of the available moral foundations.”).

11. *See id.* at 283–85 (describing the prototypical liberal narrative which hinges on overcoming oppression and achieving fairness and equality).

12. *See id.* at 285–86 (describing the prototypical conservative narrative which focuses on preservation of traditional values).

13. *See id.* at 300–02 (describing libertarian preference for free markets and liberty and suspicion of government intervention).

14. *See id.* at 301 (“[W]e analyzed dozens of surveys completed by 12,000 libertarians and we compared their responses to those of tens of thousands of liberals and conservatives.”).

15. Haidt has described the libertarian “moral matrix” as follows:

We found that libertarians look more like liberals than like conservatives on most measures of personality (for example, both groups score higher than conservatives on openness to experience, and lower than conservatives on disgust sensitivity and conscientiousness). On the Moral Foundations Questionnaire, libertarians join liberals in scoring very low on the Loyalty, Authority, and Sanctity foundations. Where they diverge from liberals most sharply is on two measures: the Care foundation, where they score very low (even lower than conservatives), and on some new questions we added about economic liberty, where they scored extremely high (a little higher than conservatives, a lot higher than liberals).

*Id.*



Fig. 2

Political group	Narrative	Values
Progressive	“A man walks down a sidewalk and kicks a dog sleeping on the side of the sidewalk.”	Caring, fairness
Conservative	“A woman finds an old American flag in her attic and cuts it into rags to clean the toilet.”	Loyalty, authority, sanctity
Libertarian	“A parent, whose gambling hurts their family, is jailed for being a compulsive gambler.”	Liberty

The studies on how people react to these and similar stories reveal that our moral views are mostly emotive, even instinctual.<sup>16</sup> Human decision-making appears to arise from two cognitive systems: System One is quick and intuitive, and System Two is slow and considered.<sup>17</sup> Recent studies indicate that our moral positions arise through System One and then are explained and defended by System Two, which seems to engage in “motivated reasoning” (think of a zealous, close-minded defense lawyer) rather than “constructive reasoning” (think of an objective, fair-minded judge).<sup>18</sup>

---

16. Daniel Kahneman offers a quite plausible account of how we reach decisions, moral and otherwise:

The spontaneous search for an intuitive solution sometimes fails—neither an expert solution nor a heuristic answer comes to mind. In such cases we often find ourselves switching to a slower, more deliberate and effortful form of thinking. This is the slow thinking of the title. Fast thinking includes both variants of intuitive thought—the expert and the heuristic—as well as the entirely automatic mental activities of perception and memory, the operations that enable you to know there is a lamp on your desk or retrieve the name of the capital of Russia.

DANIEL KAHNEMAN, THINKING FAST AND SLOW 13 (2012).

17. *See id.* at 20–21 (describing Systems One and Two—the dual systems by which humans make snap judgments and calculated decisions).

18. *See id.* at 21 (“The automatic operations of System 1 generate surprisingly complex patterns of ideas, but only the slower System 2 can construct thoughts in an orderly series of steps.”).

That is, our explanations (rationalizations) come only after arriving at a moral conclusion about a given moral situation. Thus, these studies address and answer the age-old question of whether we are essentially rational beings who sometimes must tame our emotions, or whether we are emotional beings who use reason to justify our actions and beliefs.<sup>19</sup> The resounding answer from the studies is that we are emotional beings who come to moral views based on a moral matrix that we are often unaware of and that we often take from the moral group to which we are aligned.<sup>20</sup> And only after coming to a moral conclusion do we then rationalize our view by resorting to the language sets provided by the group, drawing from its fundamental moral values.

The studies also suggest that value matrices tend to harden into psychological attitudes.<sup>21</sup> For example, conservatives tend to like order and predictability (both attributes of tradition and authority), while liberals tend to like variety and diversity (both attributes of tolerance and liberty).<sup>22</sup> Thus, when shown dots moving on a screen, conservatives prefer the images of dots moving in lock step, while liberals prefer random motion.<sup>23</sup>

In addition, liberals tend to be universalists who view people everywhere in the world as relevant to their moral equation, while conservatives are more focused on people in their country or their self-defined communities. Therefore, political policies aimed to improve the lives of people generally in the world resonate with liberals, while those same policies presented to conservatives have less salience and suggest disloyalty to one's own.

---

19. See *id.* at 89 (“[B]asic assessments play an important role in intuitive judgment, because they are easily substituted for more difficult questions—this is the essential idea of the heuristics and biases approach.”).

20. See *id.* at 313 (discussing the impact of a “moral matrix”).

21. See HAITT, *supra* note 2, at 368 (“Our minds contain a toolbox of psychological systems, including the six moral foundations, which can be used to meet those challenges and construct effective moral communities.”).

22. See *id.* at 300–06 (discussing liberal and conservative ideals).

23. See Jonathan Haidt: *The Psychology Behind Morality*, ON BEING WITH KRISTA TIPPETT (June 12, 2014), <https://www.onbeing.org/programs/jonathan-haidt-the-psychology-behind-morality/> (last visited Apr. 6, 2017) (describing the study in an interview) (on file with the Washington and Lee Law Review).

Likewise, the studies suggest liberals are more open to new experiences, while conservatives have trouble assimilating the unknown.<sup>24</sup> That is, liberals exhibit the trait of being willing to accept and accommodate to change, while conservatives are skeptical of change and prefer the predictability of tradition.

In short, it turns out that the abiding faith in human rationality as the basis to moral judgments—from Socrates and Plato, to Descartes and the Enlightenment, to the Rule of Law and even Law and Economics—may be wrong. The notion that we decide moral questions of right/wrong (most everything) through rational processes is mostly hogwash.

### *III. The Moral Matrices of David Millon and Lyman Johnson*

Moral psychology thus suggests that, though we each carry and make moral decisions based on our own moral matrix, our moral judgments are formed by moral values shared and refined by our tribal groups.<sup>25</sup> The natural question for those interested in corporate governance seems obvious: How does moral psychology play out in the boardroom?

If this were a law Article, I would attempt a study using the tools of moral psychology to assess how actual corporate decisions are made—a highly useful, but daunting task.<sup>26</sup> But because this

---

24. See HAIDT, *supra* note 2, at 300–06 (analyzing liberal and conservative values).

25. As Haidt points out:

We humans have a dual nature—we are selfish primates who long to be part of something larger and nobler than ourselves. We are 90 percent chimp and 10 percent bee. If you take that claim metaphorically, then the groupish and hivish things that people do will make a lot more sense. It's almost as though there's a switch in our heads that activates our hivish potential when conditions are just right.

*Id.* at 255.

26. In fact, the “paper” I presented at the Symposium on October 21, 2016, included the preliminary results of my research on boardroom attention to sustainability and other environmental, social, and governance (ESG) matters. I found a small, but perceptible, increase in corporate ESG focus—findings that are in line with studies cited by Millon and Johnson. See, e.g., Millon, *infra* note 32, at 26–28 (describing greater attention to ESG factors by “mainstream institutional shareholders”).

is an Essay for a law Symposium celebrating David Millon and Lyman Johnson, I will assume the latitude to attempt a profile of their corporate moral matrices. As self-proclaimed “progressive corporate legal scholars,”<sup>27</sup> they would seem to be appropriate subjects for this first ever speculation on how moral values might play out in corporate decisions. I do this—applying not the methods of moral psychology, but rather the methods of legal textual analysis—by attempting to reconstruct their corporate governance views along the six identified moral values of modern moral psychology.<sup>28</sup>

**A moral story.** I begin my inquiry into the moral matrices of Millon and Johnson, as reflected in their recent writings on corporate governance, by framing a moral story as an instrument to tease out the moral matrix for each of them. Here is the story:

Management of a large multinational corporation recommends to the company’s board of directors that the board approve a move of the company’s manufacturing facilities from

---

Looking at the 10-K annual reports by companies in the S&P 100, I found that, while only fifty-seven companies in 2015 mentioned sustainability or climate change as relevant to their business, this was up from forty-one companies in 2010. Corporate disclosures on average moved from “mere mention” of these matters in 2010 to “some discussion” in 2015. The picture is similar in annual SEC-filed proxy statements, where thirty-one companies in 2015 disclosed that their boards or board committees have responsibility to consider ESG matters (many with a new standing committee charged with the task), up from nineteen in 2010. A similarly small but upward trend also appears in the linkage between executive pay and ESG performance measures. While in 2010 only four of S&P 100 had this link, the number grew to eight in 2015, with sustainable, responsible, impact (SRI) performance moving in these companies from a “mere mention” to a “factor” in setting executive pay.

These ESG trends reflected in corporate disclosures and apparent boardroom attention are encouraging. Extrapolating from the 2010–2015 trends, I estimated that by 2024 all S&P 100 companies will be disclosing the relevance of ESG to their business, by 2027 all will have board committees focused on ESG, and by 2033 all will link executive pay to ESG performance. At the current pace, it will not be until 2070 that all of the S&P 100 will have adopted ESG as a core business purpose.

27. See, e.g., Lyman P.Q. Johnson & David K. Millon, *Corporate Law After Hobby Lobby*, 70 BUS. LAW. 1, 1 (2015) [hereinafter Johnson & Millon, *Hobby Lobby*] (arguing that the Court is correct in finding that business corporations should not limit themselves solely to the pursuit of profit).

28. See *infra* Parts III.A–F (examining the corporate perspectives of Lyman Johnson and David Millon on a number of topics).

the United States to Ruranesia. Management has learned of preliminary medical studies suggesting that a chemical used in the company's manufacturing process is a carcinogen. To avoid potential trouble with OSHA and liability to exposed workers, management says that the company can take advantage of the more lax workplace standards of Ruranesia. Manufacturing costs will also be lower in Ruranesia. The directors approve the move, citing corporate profits as their reason.

How would David and Lyman respond to this moral story? Of course, we do not really know what would be their instinctive, emotive response. And the interesting thing is that they would not be able to predict it either, given that our moral judgments emanate from the bowels of our unplumbed subconscious.<sup>29</sup>

But bear with me. Let me speculate what would be David's and Lyman's moral response to this story. It is, after all, a "corporate governance" story of a board of directors that chooses to have the company engage in an off-shoring, legal-arbitrage strategy. It thus pits the interests of a variety of corporate constituents, some highlighted in the story and others lurking in the shadows. As law scholars concerned about the question of the "purpose" of the corporation and "to whom" corporate fiduciaries should answer,<sup>30</sup> the story is right up their alley.

I undertake my speculation—itsself, of course, a moral judgment—by looking at three recent Articles by David and by Lyman that consider their different perspectives on corporate governance, in the process revealing a bit about the motivated reasoning each of them has employed to explain their stances on corporate governance. And, as interested as I am in how David and Lyman might respond to the story that I posit, I also use this exercise to discern my own moral matrix and how I respond to the story. In fact, maybe the value of the exercise is not really about David or Lyman—or even about me. Instead, it is a call to each of you who has plodded through to this point to think of your

---

29. See KAHNEMAN, *supra* note 16, at 4 ("The mental work that produces impressions, intuitions, and many decisions goes on in silence in our mind.").

30. See generally, e.g., Lyman P. Q. Johnson, *Rethinking Judicial Review of Director Care*, 24 DEL. J. CORP. L. 787 (1999); David K. Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223 (1991) [hereinafter Millon, *Redefining Corporate Law*].

own moral matrix—the corporate governance story providing us a shared Rorsharch test.

**My sampled Articles.** Here are the Articles that I consider:

David Millon's Articles:

- *Radical Shareholder Primacy* (2013)<sup>31</sup>
- *Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law* (2012)<sup>32</sup>
- *Two Models of Corporate Social Responsibility* (2011)<sup>33</sup>

Lyman Johnson's Articles:

- *Law and the History of Corporate Responsibility: Corporate Governance* (2013)<sup>34</sup>
- *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose* (2013)<sup>35</sup>
- *Delaware's Non-Waivable Duties* (2011)<sup>36</sup>

In re-reading these writings, I am struck by the many differences (sometimes obvious and sometimes subtle) between David's and Lyman's moral approaches.

To me, David has the heart of a true progressive; his writings reveal great care and concern for fair treatment of those affected by the modern corporation.<sup>37</sup> At the same time, his moral matrix also seems to lead him to consider whether some of these

---

31. David K. Millon, *Radical Shareholder Primacy*, 10 U. ST. THOMAS L.J. 1013 (2013) [hereinafter Millon, *Shareholder Primacy*].

32. David K. Millon, *Enlightened Shareholder Value, Social Responsibility, and the Redefinition of Corporate Purpose Without Law*, in CORPORATE GOVERNANCE AFTER THE FINANCIAL CRISIS (P.M. Vasudev & Susan Watson eds., 2012) [hereinafter Millon, *Enlightened Shareholder*].

33. David K. Millon, *Two Models of Corporate Social Responsibility*, 46 WAKE FOREST L. REV. 523 (2011) [hereinafter Millon, *Two Models of CSR*].

34. Lyman P.Q. Johnson, *Law and the History of Corporate Responsibility: Corporate Governance*, 10 U. ST. THOMAS L.J. 974 (2013) [hereinafter Johnson, *Law and Corporate Responsibility*].

35. Lyman P.Q. Johnson, *Unsettledness in Delaware Corporate Law: Business Judgment Rule, Corporate Purpose*, 38 DEL. J. CORP. L. 405 (2013) [hereinafter Johnson, *Unsettledness*].

36. Lyman P. Q. Johnson, *Delaware's Non-Waivable Duties*, 91 B.U. L. REV. 701 (2011) [hereinafter Johnson, *Non-Waivable Duties*].

37. See generally Millon, *Shareholder Primacy*, *supra* note 31; Millon, *Enlightened Shareholder*, *supra* note 32; Millon, *Two Models of CSR*, *supra* note 33.

progressive goals might not be accomplished through an enlightened corporate freedom in which managers respond to market and reputational pressures, thus “to pay attention to human rights and environmental norms of good behavior.”<sup>38</sup> But he has doubts that market-driven freedom—given informational limitations, the tendencies of corporate management to cheat, and the corporation’s profit-driven motivations—will be sufficient to move corporations to “go as [corporate social responsibility (CSR)] advocates might they think should.”<sup>39</sup> That is, he questions the loyalty that corporate managers feel toward the financial bottom line, rejects their obedience to a narrowly-defined profit imperative, and especially disdains their sense that the profit motive and our capitalism are sacred.<sup>40</sup> Thus, in the name of caring and fairness, David disavows fundamental libertarian/conservative tenets.<sup>41</sup> He may well define the corporate progressive!

Lyman, on the other hand, comes across to me to be more multi-dimensional. Although he has joined David on joint projects seeking to minimize the oppressive power of corporate managers,<sup>42</sup> Lyman seems to have a clearer vision of the corporation as a moral institution.<sup>43</sup> He attaches importance to (enforceable) loyalty, built on deep, unstated assumptions of trust by those who give their lives and souls (and perhaps money) to the corporate enterprise.<sup>44</sup> He imagines fiduciary duties, it seems,

---

38. Millon, *Enlightened Shareholder*, *supra* note 32, at 45.

39. *Id.* at 46.

40. *See id.* (“Ultimately, corporate management is and will continue to be driven by cost-benefit concerns, which means that certain problems will not be addressed or prevented if it is not cost-effective to do so.”).

41. *See id.* (arguing that there is a responsibility gap in the way corporate management adheres to cost-benefit concerns in dealing with certain problems).

42. *See, e.g.,* Johnson & Millon, *Hobby Lobby*, *supra* note 27, at 14 (arguing that “constituency statutes” empower corporate management to consider non-shareholder interests in directing the corporation’s business).

43. *See infra* notes 44–46 and accompanying text (discussing Lyman Johnson’s vision of the corporation).

44. *See* Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 975 (“Recently, corporate law’s long and unsustainable neglect of corporate responsibility concerns has led to the emergence of a new type of business corporation, the benefit corporation.” (internal citations omitted)).

as a sort of credo for our life in modern business.<sup>45</sup> He grounds many of his arguments in historic analysis and constitutional frameworks, thus revealing the importance he attaches to structure and tradition. He also is much clearer in seeing sanctity in the human ties that bind us together in the super-organism that is the corporation, just as bees assiduously work in various ways to make their hive succeed.<sup>46</sup> That is, while David may sense the sacred in our natural environment, Lyman seems to sense it in the corporation, a paradigmatic collaborative human enterprise. In the end, Lyman may well be a model corporate conservative!

Next I consider how David and Lyman reflect, in different ways and to different extents, the moral values (and opposites) identified by moral psychology as relevant to our moral decision-making.

#### *A. Caring/Harm*

Both David Millon and Lyman Johnson—reflecting perhaps the defining trait of progressive corporate law scholars—would have corporate decision makers “care” more about how their decisions affect non-shareholders.<sup>47</sup> They both proclaim their goal of advancing the cause of corporate pluralism—the caring by corporate decision makers about a broad spectrum of corporate stakeholders.<sup>48</sup> They both decry others whose views on corporate governance focus on short-term shareholder profits without explicit consideration of (caring for) non-investor constituencies.<sup>49</sup>

---

45. See Johnson, *Non-Waivable Duties*, *supra* note 36, at 702 (noting that he believes “wholesale waiver of fiduciary duties is objectionable and bad policy”).

46. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 982 (showing disdain that the federal incursion into corporate governance focuses almost exclusively on stockholder interests).

47. See *infra* notes 48–49 and accompanying text (discussing David Millon’s and Lyman Johnson’s views of the corporation).

48. See generally Johnson, *Law and Corporate Responsibility*, *supra* note 34; Millon, *Enlightened Shareholder*, *supra* note 33.

49. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 989 (denouncing Professor Lucian Bebchuk for arguing for investor activism without



David questions the “radical” version of shareholder primacy, in which the only objective of the corporation is shareholder wealth maximization—with corporate managers serving as agents for a homogeneous body of profit-seeking equity investors.<sup>50</sup> Instead, David calls for “enlightened shareholder value” in which shareholder wealth is understood as “a long-run orientation that seeks sustainable growth and profits based on responsible attention to the full range of relevant stakeholder interests.”<sup>51</sup> David’s accounts are inevitably sprinkled with “caring” stories of how non-shareholders have suffered at the hands of heartless, profit-oriented managers—such as the 1984 Bhopal disaster, Shell Oil’s activities in the Niger delta, or Nike’s use of child labor.<sup>52</sup>

Lyman, while espousing what he refers to as “institutional pluralism,” as distinguished from the “undesirable monism” of shareholder wealth maximization,<sup>53</sup> engages much more in the language of responsibility.<sup>54</sup> In fact, his writings do not focus on the specific people for whom corporate governance should be concerned.<sup>55</sup> For example, the three Articles that I sampled make

---

considering “the effects on noninvestor constituencies”); Millon, *Enlightened Shareholder*, *supra* note 33, at 1 (criticizing short-term focus on current share price without considering immediate or longer-term negative effects on non-shareholders).

50. See Millon, *Shareholder Primacy*, *supra* note 31, at 1014 (“[P]roponents of radical shareholder primacy . . . all accept the agency characterization and the shareholder wealth maximization injunction.”).

51. Millon, *Enlightened Shareholder*, *supra* note 32, at 1.

52. See *id.* at 22–23, 28 (discussing the Bhopal disaster of 1984, Royal Dutch Shell PLC’s and its Nigerian subsidiary’s involvement in torture and execution, and Nike’s 1992 adoption of a code of conduct that “mandates observance of basic labor, health, and safety standards”); see also Millon, *Two Models of CSR*, *supra* note 33, at 531 (describing Nestle’s entry into milk production in the Moga district of India).

53. See Johnson, *Unsettledness*, *supra* note 35, at 409–10 (arguing that “[w]ithout a statutory ‘fix,’ or timely clarification by the Delaware Supreme Court, Delaware law might be interpreted as imposing an undesirable monism of corporate purpose at a time when, in corporate law elsewhere, institutional pluralism should be encouraged”).

54. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 975 (decrying neglect of “corporate responsibility concerns”).

55. See generally *id.*; Johnson, *Unsettledness*, *supra* note 35; Johnson, *Non-Waivable Duties*, *supra* note 36.

no specific mention of workers, employees, or communities—even as he urges that the corporation’s purpose be more pluralistic and responsible.<sup>56</sup> Perhaps a bit like Charlie Brown’s Linus, Lyman may have stronger feelings for mankind than he does for individual people.<sup>57</sup> But this may also be a sign of his being a true conservative—that is, one who recognizes that empathy (identifying *with* another person, as opposed to feeling compassion *for* that person) may lead our emotions astray and become a misguided basis for making good policy.<sup>58</sup> To Lyman, institutions would seem to be more important than individuals.

So how would David and Lyman respond to my offshoring story, at least as it suggests possible harm to workers both in the United States and in Ruranesia? David would no doubt call for this harm to be factored into the board’s decision, because of the potential costs to the company, but also because of pluralistic caring that should be woven into all corporate decision-making.<sup>59</sup> Lyman might be less moved by the plight of the workers, possibly noticing that it is unclear whether the U.S. workers would prefer to keep their jobs in the face of the potential health risks, and whether the Ruranesia workers might be delighted to accept the risks in exchange for the new employment.<sup>60</sup>

Perhaps not surprisingly, absent from David’s and Lyman’s thinking on the pluralistic corporation is any sense of compassion for the shareholders whose financial destinies are in the hands of corporate managers.<sup>61</sup> David reduces these shareholders to

---

56. See Johnson, *Law and Corporate Responsibility*, *supra* note 13, at 978 (mentioning workers only once in quoted passage describing Germany’s dual board system).

57. See Charles Schulz, *Peanuts*, GOCOMICS, <http://www.gocomics.com/peanuts/1959/11/12/> (last visited Apr. 18, 2017) (depicting Charlie Brown’s love for mankind) (on file with the Washington and Lee Law Review).

58. See Paul Bloom, *Perils of Empathy*, WALL STREET J. (Dec. 2, 2016, 9:38 AM), [www.wsj.com/articles/the-perils-of-empathy-1480689513](http://www.wsj.com/articles/the-perils-of-empathy-1480689513) (last visited Apr. 18, 2017) (arguing that “when it comes to guiding our decisions, empathy is a moral train wreck” and effectively “makes the world worse”) (on file with the Washington and Lee Law Review).

59. See *supra* notes 50–52 (deriving David Millon’s take on corporate governance from his works).

60. See *supra* notes 53–58 (extracting Lyman Johnson’s thoughts on corporate governance from his works).

61. See generally, e.g., Millon, *Shareholder Primacy*, *supra* note 31; Millon,

“short-term institutional investors” that pressure managers in untoward ways to exploit non-shareholders for their short-term purposes.<sup>62</sup> Lyman is not as derisive and recognizes that investors have been harmed by corporate misconduct, but he also seems to view shareholders as somehow less deserving of our compassion compared to non-shareholder constituencies.<sup>63</sup>

This reduction of shareholders to money-grubbing capitalists is natural in moral framing.<sup>64</sup> Thus, neither David nor Lyman, in commenting on the modern corporate structure, gives attention to the individual retirees and savers looking for financial returns for their under-funded pensions, their poor-performing individual retirement accounts, or their skimpy college savings plans.<sup>65</sup> Thus, the moral forces pitted against each other in the offshoring decision would not seem to include—in David’s moral weighting and only slightly in Lyman’s—the investors whose savings constitute the holdings of institutional intermediaries against whom they aim their moral indignation or skepticism. These savers, who it would seem David and Lyman seem to disentitle as owners, must share the corporate enterprise with other non-owners.

---

*Enlightened Shareholder*, *supra* note 32; Millon, *Two Models of CSR*, *supra* note 33; Johnson, *Law and Corporate Responsibility*, *supra* note 34; Johnson, *Unsettledness*, *supra* note 35; Johnson, *Non-Waivable Duties*, *supra* note 36.

62. See Millon, *Enlightened Shareholder*, *supra* note 32, at 4 (“Shareholder pressures for short-term results and compensation packages that reward management for delivering them will presumably continue to encourage a myopic outlook.”).

63. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 982–86 (describing pro-shareholder activism as favoring shareholders, not other corporate constituents, though recognizing that the financial scandals of the early 2000s “greatly harmed investors”).

64. See Sanjay Sanghoo, *Why Shareholder Value Should Not Be the Only Goal of Public Companies*, TIME, Feb. 4, 2014, <http://time.com/4121/why-shareholder-value-should-not-be-the-only-goal-of-public-companies/> (last visited Apr. 18, 2017) (noting that “[i]t is widely accepted that companies should have only one goal, which is to maximize returns for investors”) (on file with the Washington and Lee Law Review).

65. See generally, e.g., Millon, *Shareholder Primacy*, *supra* note 31; Millon, *Enlightened Shareholder*, *supra* note 32; Millon, *Two Models of CSR*, *supra* note 33; Johnson, *Law and Corporate Responsibility*, *supra* note 34; Johnson, *Unsettledness*, *supra* note 35; Johnson, *Non-Waivable Duties*, *supra* note 36.

That is, neither David nor Lyman would seem to be moved by the subtext of my offshoring story that *shareholders* (who do not appear explicitly in the story) would be better off if the company sought to cut its costs and liability risks by moving its manufacturing offshore. Nor would it seem relevant that there might be a confluence of interests: Shareholders are happy that the offshoring decision will reduce the company's costs and risks; the workers in the United States (and perhaps even more their families) are happy not to be exposed to a (possible) carcinogen; and the Ruranesia workers (though perhaps less their families) are happy for the new employment, whatever the health risks.

Perhaps Lyman might have been more circumspect, given his view that the pluralistic corporation is measured by a process where "public interest" directors consider the interests of the various stakeholders.<sup>66</sup> But who are the stakeholders here, and what are their interests? Are they the U.S. workers left jobless, but saved from exposure to a possible carcinogen, or are they the Ruranesia workers now employed, but at risk of poor health and an earlier death? Or, perhaps more broadly, are the stakeholders the U.S. communities, now with higher unemployment though perhaps fewer health costs, or are they the Ruranesia communities, now with higher employment but with higher (or lower) health costs?<sup>67</sup>

In short, we may not know the strength or direction of the "caring" moral vector that both David and Lyman, in different

---

66. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 977–79 (summarizing proposals to install "public interest directors" on corporate boards to advance the welfare of non-shareholder stakeholders, such as employees, consumers, and communities).

67. There is also the possibility that communities are served by certain virulent cancers, particularly if they strike workers near their retirement age. Perhaps a virulent, fast-acting cancer resulting in lower healthcare costs reduces protracted elder-care costs. How should directors weigh such a scenario? How would workers in Ruranesia, where life might generally be "poor, nasty, brutish, and short," view the scenario? See THOMAS HOBBS, *LEVIATHAN* 89 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) ("And the life of man, solitary, poore, brutish, and short.") (describing the consequences of living without security, akin to wartime). Ruranesia may also be one of those countries with pluterperfect happiness and the value of life should be weighed more highly than life in the United States, particularly before America was made great again.

ways, seem to embrace. Even if we identify that corporate governance should ask decision-makers to care about a broader set of concerns than financial returns for shareholders, a CSR-infused corporate governance does not answer the question: For whom should the enlightened corporate managers act? David's references to stories from outside the United States would suggest his instincts might side with the Ruranesia workers,<sup>68</sup> while Lyman's seeming attention to those who act and live "within the corporation," though not fully recognized by law, would suggest his instincts would be for the United States workers.<sup>69</sup> But we do not know.

### *B. Fairness (Equal or Proportional)/Cheating*

David and Lyman differ in their views on the question of the appropriate place of non-shareholder constituents in the corporation.<sup>70</sup> David seems to accept, at least in advancing his thesis of "enlightened shareholder value," that shareholders have some sort of "priority" in the corporate hierarchy.<sup>71</sup> He does not urge, at least in making this argument, a pluralistic model in which shareholders and other stakeholders have comparable claims on corporate outcomes. Lyman, however, writes in terms of a pluralism of interests, in which non-shareholder constituents should have claims comparable to those of shareholders.<sup>72</sup> Thus, for Lyman fairness is about equality, while David seems to accept

---

68. See, e.g., Millon, *Two Models of CSR*, *supra* note 33, at 531 (discussing Norwegian company Yara International's ASA sponsorship of partnerships to "develop storage, transportation, and port facilities that will serve African regions").

69. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 974–75 (tracing the history of corporate responsibility).

70. See *infra* notes 72–84 (discussing David Millon's and Lyman Johnson's views on non-shareholder constituents).

71. See Millon, *Enlightened Shareholder*, *supra* note 32, at 1 ("ESV still recognizes the priority of shareholder interests and therefore differs from a pluralist management model based on balancing of all stakeholder interests.").

72. See Johnson, *Unsettledness*, *supra* note 35, at 410 (arguing that institutional pluralism should be encouraged).

the possibility that fairness may be proportional to some entitlement, including based on capital contributions.<sup>73</sup>

In presenting his thesis of enlightened shareholder value, David seems to understand fairness in the corporation as arising when corporate managers take into account non-shareholder interests, but only to the extent they are weighted with respect to long-term shareholder interests.<sup>74</sup> In this way, David hews more closely to traditional doctrine and practice that assumes a corporate pecking order.<sup>75</sup> Lyman, however, seems to understand fairness in the corporation as arising when non-shareholder interests are given equal weighting with shareholder interests.<sup>76</sup> Lyman is much more a communitarian, urging the recognition of non-shareholder claims that go well beyond traditional doctrine and practice.

In addition, David and Lyman see the motives for consideration of non-shareholder interests as emanating from different sources. For David, a broader management perspective in both a “longitudinal” (temporal) dimension and a “latitudinal” (range of interests) dimension may arise from growing shareholder and other market pressures to consider interests beyond short-term shareholder financial results.<sup>77</sup> For Lyman, a more ecumenical management perspective may not be supported by current judicial doctrine and thus would require a legislative

---

73. See Millon, *Enlightened Shareholder*, *supra* note 32, at 3 (explaining that the ESV approach is an alternative to both a shareholder primacy approach and a pluralist approach).

74. See *id.* at 7 (“[M]anagement must attend to the full range of considerations that determine its well-being.”).

75. See *id.* at 2 (arguing that U.S. corporate law provides “ample space for express recognition of nonshareholder interests and long-run approach to management”).

76. See Johnson, *Unsettledness*, *supra* note 35, at 445 (embracing the idea that pursuit of common-good is achieved when considered at the institutional and individual level).

77. See Millon, *Two Models of CSR*, *supra* note 33, at 536 (identifying a “sustainable model of CSR” as recognition that corporation’s long-run prosperity depends on the well-being of various stakeholders); see also Millon, *Enlightened Shareholder*, *supra* note 32, at 3–4 (identifying emerging attitudes of institutional shareholders toward socially-responsible investing and pressures from public opinion, moved by non-governmental organizations and the media, to consider longer-term labor and environmental impacts).

solution, one beyond that offered by the fledgling “benefit corporation.”<sup>78</sup>

Lyman disparages the argument that shareholders have a legal entitlement or deserve a priority in the corporate hierarchy.<sup>79</sup> He heaps scorn on the Law and Economics movement, decrying its “steely focus on investor well-being via hostile takeovers” and its disaggregation of “the corporate institution into a mere ‘nexus’ of various contracting parties in which investor interests were paramount.”<sup>80</sup> David joins in, criticizing the nexus-of-contracts theory for its conceiving of the corporation as a “legal fiction” and thus discounting the “possibility that management might owe duties to the corporate entity rather than simply to shareholders.”<sup>81</sup> But David seems less willing to abandon the corporation’s capitalist underpinnings and to take up a communitarian vision of the corporation. Shareholders, in David’s view, are entitled to get something for their investment.<sup>82</sup>

Lyman, however, rejects the libertarian justification for shareholder primacy—that shareholders, unlike other constituents, have paid for their vaunted status. Lyman celebrates the Delaware Supreme Court’s decision in the *Time-Warner*<sup>83</sup> case that “emphasized that corporate directors were legally responsible for directing the ‘corporation’s’ best interests and that such company interests were not necessarily the same as those of investors seeking a near-term premium for

---

78. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 990 (calling for revision of corporate statutes to reflect both the discretion and duty of directors to consider non-shareholder constituents). Nonetheless, David accepts that law might be necessary to bring managers to take a longer-term perspective, even as they take into account non-shareholder interests. See generally Millon, *Enlightened Shareholder*, *supra* note 32 (discussing the room for law in socially-oriented corporate responsibility).

79. See Millon, *Enlightened Shareholder*, *supra* note 32, at 2 (“The law does not mandate shareholder primacy.”).

80. Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 984.

81. Millon, *Shareholder Primacy*, *supra* note 31, at 1034.

82. See *id.* at 1018 (“[M]anagement’s duty is to maximize the shareholders’ return on their investments in the corporation.”).

83. *Paramount Commc’ns, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1989).

their stock.”<sup>84</sup> That is, Lyman decidedly sides with the “entity conception” of the corporation in which all corporate constituents have a claim to fair treatment and against the “aggregate theory” of the corporation in which only shareholders deserve this treatment.<sup>85</sup>

How does my offshoring story play out for our two corporate moralists—at least with respect to the fairness vector? David would seem to be focused on whether and how the interests of non-shareholders (principally workers) would impact the long-term financial interests of shareholders.<sup>86</sup> That is, David would seem to consider and gauge the interests of the workers in my story, both domestic and foreign, according to their impact on enlightened shareholders. Or, maybe not. David’s thoughts on how corporate managers might be pressured to consider non-shareholder interests could well simply reflect a *real politik* stance that, because re-jiggering the legal corporate governance landscape is unlikely, the next best hope is that managers will respond to “enlightened” shareholder and market pressures.<sup>87</sup> That is, David admits that optimal “socially responsible behavior” in the corporation may have to be legally coerced.<sup>88</sup>

Lyman, on the other hand, would not seem to weigh shareholder interests in his moral deliberations.<sup>89</sup> Whether the company keeps its manufacturing processes in the United States or moves them abroad, shareholders would seem to be the least of Lyman’s concerns. What is unclear, though, is how Lyman would resolve inter-constituency conflicts. His writings pit shareholders

---

84. Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 984–85 (citing *Time, Inc.*, 571 A.2d at 1150, 1154).

85. *Id.* at 985

86. See Millon, *Enlightened Shareholder*, *supra* note 32, at 3 (discussing how ESV is a long-term approach and that it “rejects a sole focus on shareholder interests and instead embraces a broader approach that includes the corporation’s other stakeholders as well”).

87. See *id.* at 39 (noting this version of ESV is market-driven).

88. See *id.* at 6 (“[C]ritics of transnational corporations should not expect that a commitment to shareholder value—even if enlightened—will necessarily generate the measure of socially responsible behavior that they believe to be appropriate.”).

89. See Johnson, *Unsettledness*, *supra* note 35, at 422 (“The issue of the best interests of the corporation is a matter of concern only for directors.”).



against non-shareholder constituencies, but do not recognize that when shareholders are removed from the moral calculus, the conflicts among non-shareholders can be just as real. Corporate moral discourse is a messy affair, and it is understandable that those who engage in it have not specified precisely how multi-dimensional decision-making works.

### *C. Freedom/Coercion*

Lyman and David push back against the motivated reasoning of the Law and Economics movement that celebrates the freedom afforded corporate management under the business judgment rule (BJR).<sup>90</sup> But they do so for different reasons.

David would leave intact the BJR, but have its capacious boundaries include decisions that “sacrifice short-term shareholder profits for the sake of nonshareholder considerations . . . by reference to the corporation’s long-run well-being.”<sup>91</sup> David seems to recognize the lack of normative limits on the discretion exercised by directors, accepting a view that “director primacy” may accurately describe the operation of corporate decision-making.<sup>92</sup> As he points out, “managerial discretion, broadly if not entirely shielded from shareholder oversight, is arguably the foundation of Delaware corporate law.”<sup>93</sup>

Lyman, on the other hand, has argued for a rethinking of judicial oversight of corporate decisions, urging a shift from the current perspective of directorial discretion under the BJR (a nearly quintessential “freedom” moral vector) to one that begins

---

90. See Millon, *Enlightened Shareholder*, *supra* note 32, at 8 (noting that under the BJR, “the judiciary will not second-guess strategic and operational decisions as long as they are based on sufficient information, not subject to conflict of interest, and made in good faith”).

91. *Id.* at 8.

92. See Millon, *Shareholder Primacy*, *supra* note 31, at 1017 (“In today’s corporate law discourse, the ‘shareholder protection’ version of shareholder primacy resonates with Professor Stephen Bainbridge’s ‘director primacy’ theory of corporate law.”).

93. *Id.* at 1023.

with questions of duty (a decidedly “loyalty” moral vector).<sup>94</sup> As Lyman has said, “fiduciary duties should be made more prominent and the BJR should be dramatically deemphasized.”<sup>95</sup> Lyman asserts that the reluctance to find directors have breached duties, as preached by the BJR, should be limited to boardroom decisions and not extended to decisions or actions by officers and controlling shareholders.<sup>96</sup> He points out, “the business judgment rule is well established as a mainstay doctrine in Delaware only with respect to corporate directors, not with respect to officers or controlling shareholders.”<sup>97</sup>

David recaps the history of the “law and economics” love affair with “shareholder primacy.” It is curious, though, that a moral tribe (the Chicago School) that so celebrates freedom would seek to enslave corporate managers to shareholder masters. Why the yoke of “shareholder primacy”? Although David does not explicitly answer the question, the answer may well be that the rhetoric of shareholder primacy is itself a smoke screen. Knowing that neither law nor practice (nor political realities) would make corporate managers subservient to shareholders, the Chicago School advances a secret agenda of managerial empowerment by arguing for the appearances of managerial agency.<sup>98</sup>

As told by David, there was no great rising up against managerial overreaching, no march on Dover or D.C. to unshackle shareholders from their managerialist masters, no protest movement when the takeover tools of the 1980s were essentially dulled and de-fanged by a variety of legal and extra-legal forces that left managers as powerful as ever. In David’s words, “corporate law has not evolved in ways that empower shareholders to exercise direct control over those on whom they are dependent for their financial returns.”<sup>99</sup> Shareholders are left

---

94. See Johnson, *Unsettledness*, *supra* note 35, at 424–25 (asserting that Delaware’s “pride of place” for BJR should be replaced by showcasing fiduciary duties).

95. *Id.* at 405.

96. *Id.* at 410.

97. *Id.*

98. See generally Millon, *Enlightened Shareholder*, *supra* note 32.

99. Millon, *Shareholder Primacy*, *supra* note 31, at 1034.

with an activism that operates at the fringes of the enormous repository of discretion left to corporate managers.

David also explores whether international norms might compel a corporate board to choose a non-shareholder approach to protect human rights. While he concludes that hard international law (treaties and customary norms) do not specify human rights and environmental obligations applicable to transnational corporations, he does find an emerging soft law governing activities of transnational companies.<sup>100</sup> He points to the United Nations Global Compact, which specifies ten principles of “corporate citizenship in the world economy” in the areas of human rights, labor, the environment, and anticorruption.<sup>101</sup> Although participation is voluntary, some 5,200 companies in 130 countries have signed on and are obligated to prepare and provide annual reports.<sup>102</sup>

That is, David sees soft norms as beginning to create coercive pressures on corporate managers to consider basic human rights in their decision-making—particularly in transnational companies that aspire to “corporate global citizenship.”<sup>103</sup> That is, the tribal boundaries for transnational corporate managers are being re-defined through the tribe’s own processes of metamorphosis. It is a hopeful story that recognizes the limited range of law and the much wider (and more powerful) range in which moral values operate.

In addition, David imagines a “strategic” CSR in which the claims for various stakeholders work in tandem with the profit motives of shareholders, thus countering the “law and economics” view of CSR as imposing losses on shareholders in a zero-sum game.<sup>104</sup>

---

100. See Millon, *Enlightened Shareholder*, *supra* note 32, at 84–85 (pointing to United Nations Universal Declaration of Human Rights, which specifically calls on private groups, thus corporations, to protect basic human rights).

101. *Id.* at 13.

102. *Id.*

103. See *id.* at 13–14 (noting how such norms may be incorporated in companies’ voluntary codes of conduct).

104. See Millon, *Two Models of CSR*, *supra* note 33, at 533–35 (describing “strategic” versus “philanthropic” CSR).

Lyman, unlike David, is more concerned with hard norms and the rhetorical power of the BJR to soften judicial resolve to oversee the exercise of managerial discretion on behalf of the “corporation.” For example, in discussing the waivability of fiduciary duties, Lyman is unbending and inveterate in defending the force of duties in business organizations.<sup>105</sup> In fact, it is remarkable how Justice Cardozo’s words resonate and continue their life in Lyman’s views on corporate duties:

A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty . . . .<sup>106</sup>

In discussing the ability of participants in a business to waive the sanctity of their relationship in the name of contractual freedom, Lyman articulates the arguments for waivers. Arguably, he points out, they would create “greater certainty and determinacy in intra-firm relations” and allow investors to bear the “greater risk from broad waivers for other perceived benefits”—safeguarded against “egregious misconduct” by managers’ desire to protect their reputations and their need to access capital markets.<sup>107</sup> But these are the arguments of those who celebrate the freedom granted directors under the BJR, and Lyman is skeptical. There are “well-recognized shortcomings with much *ex ante* bargaining” and courts “should continue to worry about the abuse of managerial discretion.”<sup>108</sup> Moreover, waivers (freedom) may not be for investors alone to give: The business entity (the corporation) is pluralistic.<sup>109</sup>

---

105. See Johnson, *Non-Waivable Duties*, *supra* note 36, at 721 (stating that waiver statutes are necessary to waive contractual duties, but not sufficient to establish appropriateness of the waiver).

106. *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928).

107. Johnson, *Non-Waivable Duties*, *supra* note 36, at 721.

108. *Id.* at 722.

109. See Johnson, *Unsettledness*, *supra* note 35, at 438 (“[L]aw rightly adopts an enabling and pluralistic approach to corporate purpose . . .”).

Lyman elevates corporate duties to a central role in corporate law and corporate governance, with the focus of corporate law not on managerial “freedom” but on managerial “duties.”<sup>110</sup> Lyman proposes a fundamental rethinking of the BJR and its analytical preeminence, arguing for making fiduciary duties “more prominent” and the BJR “dramatically deemphasized.”<sup>111</sup>

So how would my story resonate to David and Lyman—under the influence of the “freedom” vector? David would make clear that the board has the freedom to choose “employment policies that seem costly in the short term” if they could be justified over a longer term.<sup>112</sup> That is, the board would not be bound to choose to move the company’s manufacturing offshore. David intimates that the directors, moved by new soft norms, might decide to have the company stay in the United States and perhaps undertake costly worker-protection measures or to move only after an alternative manufacturing process were identified. Perhaps, David would suggest, the board would be moved to enhance goodwill among consumers or perhaps feel compelled to respond to pressure from sustainable, responsible, impact (SRI) shareholders. In the end, while David goes to lengths to assert the board is *not compelled* to pursue short-term shareholder interests, he does not give a full account of the soft norms that might *compel* the moral decisions faced by directors.

Lyman paints a darker portrait of the management soul. He disdains the judicial attitude that corporate managers have an inherent freedom to choose the corporation’s trajectory.<sup>113</sup>

---

110. See *id.* at 405 (“[I]t is suggested that fiduciary duties should be made more prominent and the business judgment rule should be dramatically deemphasized.”).

111. *Id.*; see also Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 977 n.12 (arguing that corporate managers do not only owe a duty to their stockholders to make a profit but should advance a range of broader “corporate” interests (citing E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932))).

112. David Millon, *Human Rights and Delaware Corporate Law*, 25 PAC. MCGEORGE GLOBAL BUS. & DEV. L.J. 173, 179 (2012).

113. See Johnson, *Unsettledness*, *supra* note 35, at 405 (“For directors, those [policy] rationales do not apply in the loyalty setting, and in the care setting, can be achieved by recalling simply that there is no substance to judicial review in that context.”).

Instead, he argues for a fundamental rethinking of the BJR and its soporific incantations that dissolve the sense of duty that he sees as central to the pluralism that defines the corporation and its purpose.<sup>114</sup> Thus, Lyman would address the offshoring question by reference to the corporate purpose, a purpose to which the corporate directors are duty-bound to advance. In the end, the offshoring story lacks important details, and Lyman's approach might well be one of process. The corporate directors would be compelled to dig more deeply into the questions of effects on the American (and the Ruronesia) workers, their families and communities. Lyman points out that "American society" has become "somewhat disenchanted with the corporate sector," and "societal expectations of the private sector are shifting."<sup>115</sup> Perhaps, the corporate board would also be compelled to consider the effects of the offshoring decision on the business's overall carbon footprint. After all, Lyman is decidedly non-libertarian.

#### *D. Loyalty/Betrayal*

David and Lyman have a nuanced difference in their views on the question to whom corporate managers owe their allegiance. David accepts, at least for the sake of argument, that shareholders have "priority" and thus does not urge a pluralistic model in which shareholders and other stakeholders have comparable claims on corporate outcomes. Lyman, however, advocates for a pluralism of interests, in which corporate directors owe their loyalty to the "corporation" and must put aside their own personal views for the collective good.

Thus, David seeks to broaden the dimensions that corporate managers should consider, but within the framework of long-term shareholder interests. He asserts that corporate managers are not required by state corporate law (particularly the law of Delaware) to accept shareholder primacy. Instead, corporate

---

114. *See id.* at 438 (asserting that "the deference of the business judgment rule becomes a key mechanism for creating the necessary slack between law's agnosticism about corporate purpose and actual governance conduct").

115. *Id.*

managers should see themselves as bound to consider impacts on the “corporation.”<sup>116</sup> Likewise, but even more, Lyman questions whether directors should hold shareholders in sacred worship, decrying that “boards of public companies . . . seem far more receptive to shareholder concerns than was true for much of the twentieth century.”<sup>117</sup> For Lyman, the implication is that this fawning over shareholders is somehow disloyal, that directors should have other objects of their loyalty (putting other interests ahead of their own).

David sees misplaced loyalty in the corporation, with stock-based compensation and a corporate culture of “shareholder loyalty,” inexorably pushing managers to focus on short-term shareholder value.<sup>118</sup> He decries the “radical shareholder primacy” thesis that enforces, legally and in practice, a view that managers owe undivided loyalty to shareholders and the maximization of their financial wealth.<sup>119</sup> Further, David points out that pressures from institutional shareholders (now collectivized by Institutional Shareholder Services) have led corporate boards to dismantle poison pills and staggered boards, giving shareholders and their demands for short-term results even more salience in the boardroom.<sup>120</sup>

Lyman carries forward his views on the centrality of “duty” in the corporation (particularly selfless loyalty to the corporation) in his views of waiver of fiduciary duties. Although writing mostly about waivers in non-corporate settings, Lyman is quick

---

116. See Millon, *Enlightened Shareholder*, *supra* note 32, at 72 (stating that fiduciary duties run to corporation and identifying relevant consideration to include impact on non-shareholder constituencies including “creditors, customers, employees, and perhaps even the community generally”).

117. Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 986.

118. See Millon, *Enlightened Shareholder*, *supra* note 32, at 77–79 (concluding that equity-based pay rewards short-term results rather than longer-term performance and management culture assume that primary loyalty should be to shareholders).

119. See Millon, *Radical Shareholder Primacy*, *supra* note 31, at 1018–19 (“[M]anagement’s job is to act on behalf of shareholders, using its managerial authority to advance their interests . . . [And the] primary role of corporate law is to enhance management’s accountability to the shareholders.”).

120. See Millon, *Enlightened Shareholder*, *supra* note 32, at 78 (describing events as of 2010, before the congressional mandate of say-on-pay, which predictably would further exacerbate shareholder pressures).

to state he finds such waivers “objectionable.”<sup>121</sup> He further argues that the Delaware constitution prohibits corporate statutes that would permit Delaware judges to uphold private waiver of fiduciary duties.<sup>122</sup> The basis for this constitutional objection is key to understanding the vaunted place that duty holds for Lyman in corporate law. As he explains, the business bar and judiciary “forget that equity originates outside law and does not readily yield to law’s strictures.”<sup>123</sup> That is, duty is inherent in the business (especially, the corporate) form whose legal being rests on the foundation of equity jurisdiction.

If fiduciary duty and equity are inseparable, as they are for Lyman, the question becomes toward what end. According to Aristotle, equity “must correct the possible injustice resulting from the categorical.”<sup>124</sup> The injustices that Lyman imagines are steeped in moral discourse: the disloyalty of directors who advance a shareholders’ meeting date to frustrate a voting insurgency; the directors who, after accepting a position of trust, are grossly negligent in failing to supervise corporate affairs.<sup>125</sup> Ultimately the validity of contractual waivers depends on a judicial (equitable) assessment of “the degree of moral and commercial repugnance of the [challenged] managerial behavior” where “the overall state of business morality [is] an important and legitimate social concern.”<sup>126</sup>

So how does the moral value of loyalty play out in the resolution of the offshoring decision in my story? For David, there is less of a sense of the importance of the loyalty that managers owe to long-term corporate interests. This is not surprising. The

---

121. Johnson, *Non-Waivable Duties*, *supra* note 36, at 702 (“[T]he author believes that permitting wholesale waiver of fiduciary duties is objectionable and bad policy.”).

122. *See id.* (“[T]here is substantial doubt as to whether fiduciary duties in unincorporated business associations formed under Delaware law can, by private agreement, be waived at all.”).

123. *Id.* at 708.

124. ARISTOTLE, *NICOMACHEAN ETHICS* bk. V, at 141 (Martin Ostwald trans., Bobbs-Merrill Co., Inc. 1962).

125. Johnson, *Non-Waivable Duties*, *supra* note 36, at 710–13 (citing *Schnell v. Chris-Craft Industries, Inc.*, 285 A.2d 437 (Del. 1971) and *Charitable Corp. v. Sutton*, 2 Atk. 400, 26 Eng. Rep. 642 (Ch. 1742)).

126. *Id.* at 719–20.



soul of a progressive is less concerned about loyalty (with its overtones of order and sanctity) than about compassion and fairness. David does not seem to experience the visceral betrayal when managers look out for their own short-term interests, compared to feelings that Lyman has when managers are disloyal to the corporate purpose. Lyman, true to his conservative matrix, calls on a return to deep-seated (traditional) notions from equity that call on directors to be selfless. How this selflessness should be expressed in an offshoring decision is, again, hard to say. For David, it might well be that the subtexts of human rights in the workplace and environmental harm (such as runoffs from the toxic chemicals used in the manufacturing process) guide his judgment. For Lyman, loyalty to the corporation might well be perceived as loyalty to the existing order—that is, the American workers and society for which the corporation operates.

#### *E. Order and Obedience/Chaos*

David and Lyman have markedly different views of the way in which corporate order exists and might evolve. For David, management culture plays an important (if not critical) role in molding the moral decisions of corporate decision makers—perhaps even more important than law.<sup>127</sup> While recognizing a place for law, David seems to see corporate evolution as happening from internal, extra-legal forces.<sup>128</sup> For Lyman, on the other hand, the framing construct for his propounded moral matrices is corporate law. Lyman shows an abiding faith in the “rule of law” (or perhaps “rule of equity”) and its analytical purity: If we can just make persuasive arguments, the law will

---

127. See Millon, *Enlightened Shareholder*, *supra* note 32, at 78–80 (speculating how sustainability values being adopted by transnational companies might infuse US corporate culture).

128. See *id.* at 79–80 (pointing to Section 172 of the U.K. Companies Act of 2006, which requires directors to promote interests of the corporation for the benefit of shareholders, but with regard for long-term consequences, employee interests, relations with suppliers and customers, and impacts on the community and environment).

follow.<sup>129</sup> For Lyman, better logic equals—or, at least, eventually will equal—better law and better outcomes.

David perceives that a move from the shareholder-centric corporation to one that pays “heightened attention to human rights and environmental considerations” will happen because of the potential costs to the corporation of disregarding these non-shareholder factors.<sup>130</sup> That is, just as the corporation seeks to gauge and control the financial, litigation, and reputational risks to shareholder value, David imagines that similar cost-benefit exigencies will lead to a more pluralistic corporation.<sup>131</sup> This, perhaps in a leap of hope for David, will be because enlightened shareholders demand such a result.

In fact, David sees an emerging “new corporate order” that arises from a redefined relationship between institutional shareholders and corporate management in which such shareholders bind together to “incorporate [environmental, social, and governance] ESG issues into investment analysis and decision-making processes . . . [and to] be active owners and incorporate ESG issues into ownership policies and practices.”<sup>132</sup> Since Millon predicted this new order, there has been (as described before) a perceptible change in the avowed ESG focus of many U.S. public companies.<sup>133</sup> Whether this is indeed a move toward a new and accountable order is still unclear. After all,

---

129. For example, Lyman observes as an article of faith: “Ultimately, judges must express the resolution of fundamental issues in doctrinal terms, their *lingua franca*.” Johnson, *Unsettledness*, *supra* note 35, at 408. He cites to viewpoints of various legal scholars, but does not explain why judges must explain how their decisions arise from doctrine. *Id.* Perhaps resorting to doctrine is an accepted modality of the legal culture that judges inhabit. They are bound by accepted norms, including a common language. A decision by a highest court that simply stated, “We affirm [or] reverse [or] remand, because we just feel that way,” would face academic finger-wagging and snickering. But others might view such a pithy judicial opinion as a breath of honesty.

130. Millon, *Enlightened Shareholder*, *supra* note 32, at 80.

131. *See id.* at 81–84 (discussing the importance of corporate sensitivity to liability and reputational risk).

132. *See id.* at 84–85 (describing United Nations Principles for Responsible Investment, a set of six core principles agreed to by twenty institutional shareholders from twelve countries through the coordination of the U.N. Secretary-General).

133. *Id.*

predictions of a new “CSR corporation” have been afoot for nearly two decades.<sup>134</sup> And real corporate engagement has been spotty. For example, an SEC guidance in 2010 urging greater corporate disclosure of the various regulatory, market, and operational risks of climate change fell mostly on deaf ears.<sup>135</sup> But, if a new CSR is beginning to coalesce, it could transform corporate culture.

Lyman, on the other hand, sees a new corporate order arising from law. Just as Louis Brandeis grieved the dissolution of regulatory order in the late Nineteenth Century<sup>136</sup>—in a spiraling race of laxity that erased the limits on amount of capital, specifications of duration of the corporation, prohibitions on holding of stock in other corporations, and shareholder veto powers,<sup>137</sup> Lyman imagines a return to “the good old days.” He sees some of this coming from managerial “professional introspection” and engagement within the larger corporate community, but especially from the heretofore-BJR-enamored “Delaware bench” who he urges to “rethink and possibly remold prior rulings, in the light of experience.”<sup>138</sup>

In this vein, Lyman also imagines not only a diminishment of the BJR, but also a new order of duties within the corporation.

---

134. See Millon, *Enlightened Shareholder*, *supra* note 32, at 85 (citing Claire Moore Dickerson, *Human Rights: The Emerging Norm of Corporate Social Responsibility*, 76 TUL. L. REV. 1431, 1439–40 (2002)).

135. See Alan R. Palmiter, *Climate Change Disclosure: A Failed SEC Mandate*, SSRN (Aug. 3, 2015), <http://ssrn.com/abstract=2639181> (last visited Apr. 18, 2017) (“In 2010 the SEC issued an interpretive guidance calling on public companies to take seriously their disclosure responsibilities with respect to climate risk . . . Then it all unraveled.”) (on file with the Washington and Lee Law Review).

136. See TONY FREYER, *REGULATING BIG BUSINESS: ANTITRUST IN GREAT BRITAIN AND AMERICA 1880–1990* 191–95 (describing Brandeis’ dissents in post-war deregulation cases); see also, e.g., *Fed. Trade Comm’n v. Gratz*, 253 U.S. 421, 429 (1920) (Brandeis, J., dissenting) (discussing concerns about the Court departing from established practice in dismissing regulation cases).

137. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 975 (“[C]orporate law itself developed in such a way as to loosen, not tighten, most constraints on those who govern public corporations.”).

138. See Johnson, *Unsettledness*, *supra* note 35, at 408–09 (admonishing “judges, as a lawmaking mechanism, to stand between the categorical edicts of a legislative/regulatory state and pure, unconstrained, private ordering”).

Specifically, he seeks to revive the idea of “public directors” who—in addition to being selected by non-shareholder constituencies—would owe duties to the corporation.<sup>139</sup> Thus, these directors (even though having the ostensible purpose to represent non-shareholder interests and viewpoints) would be duty-bound to consider the “corporation” as a totality.

Lyman, in this sense, is anti-order. He would do away with the monism of shareholder profit maximization. He states his worry that “Delaware law might be interpreted as imposing an undesirable monism of corporate purpose at a time when, in corporate law as elsewhere, institutional pluralism should be encouraged.”<sup>140</sup> Monism is well-structured; its elegance commands respect; it is conservative. If a board chooses to erect an antitakeover barrier that dilutes shareholder value and primacy—as happened in *eBay Domestic Holdings, Inc. v. Newmark*,<sup>141</sup> where the directors sought to preserve the control structure thus to preserve the company’s purpose to create a “community” of those using the firm’s services—monism offers a clear answer.<sup>142</sup> In the case, directors sought to undo the monistic purpose of the corporation.

Consistent with his view that law should (or does) recognize a pluralistic corporate purpose, Lyman asserts that the legal corporate order resolves the question whether corporate rights and duties are waivable. The notion of waiver of corporate duties, first unleashed by the “law and economics” movement that reimagined the corporation as contract, is at odds with Lyman’s view of the law-bound order of the corporation.<sup>143</sup> Not only finding such waivers to be “bad sportsmanship,” Lyman lays out a well-researched argument that whatever waiver authorizations

---

139. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 977–78 (describing proposals for revamped composition of boards of directors).

140. Johnson, *Unsettledness*, *supra* note 35, at 409–10.

141. 16 A.3d 1 (Del. Ch. 2010).

142. See Johnson, *Unsettledness*, *supra* note 35, at 439 (explaining that Craigslist “operates its business as a community service”).

143. See Larry E. Ribstein, *Writing About and Teaching Corporate Law: Reflections on Corporate Law and Economic Analysis*, 40 EMORY L.J. 509, 523 (1991) (discussing essays on the proposition of the corporation as a contract and that the corporation “is a set of contractual relationships”).

the state's legislature might have enacted are unenforceable in Delaware courts as a matter of Delaware constitutional law.<sup>144</sup> Although he makes this point primarily in the context of non-corporate forms, where Delaware judges and courts have exhibited a broad willingness to accept contractual waivers of fiduciary duties,<sup>145</sup> the essential point that Lyman makes is that corporate fiduciary duties cannot be “curtailed or negated.”<sup>146</sup>

So how would the moral orders imagined by David and Lyman help resolve the story of the offshoring corporation? David would begin by denying the answer propounded by “radical shareholder primacy”—that the offshoring decision should be based on a short-term, cost-benefit analysis focused on shareholder profits.<sup>147</sup> But David is left floundering about how to measure longer-term effects and on whom. As argued by some, a corporation whose purpose is to advance the interests of multiple constituents is a corporation whose order comes to turn on the caprice of managers.<sup>148</sup> But perhaps this is the new corporate order, and it will have to sort out what a pluralistic corporation means.<sup>149</sup> Lyman, even more than David, instinctively sees the

---

144. See Johnson, *Non-Waivable Duties*, *supra* note 36, at 701–05 (analogizing corporate rules to the rules of golf, which the players are not permitted to waive).

145. See *id.* at 720 (comparing corporate and non-corporate law in Delaware).

146. See *id.* at 705 (explaining that Delaware's exculpation statute only permits reduction or elimination of monetary damages for breaches of the duty of care, but not alteration of the duty itself).

147. See Millon, *Shareholder Primacy*, *supra* note 31, at 1013–14 (describing “radical shareholder primacy” as the version of shareholder primacy theory whose key corporate law focus is to “minimize agency costs so as to maximize shareholder wealth”).

148. See Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 24, 31–36 (1991) (criticizing non-shareholder constituency statutes for requiring “corporate agents to serve so many masters—employees, communities, bondholders, customers, suppliers—that the costs of dual fiduciary duties in terms of confusion and misunderstanding by courts and litigants vastly outweigh any potential benefits”).

149. See *id.* at 42–43 (referencing a pluralist understanding of governmental process such that local communities mobilize to politically oppose corporate harms, but without describing a pluralistic corporation).

corporation as pluralistic.<sup>150</sup> But why this is so is unclear. Lyman would see the directors as compelled to consider the interests of workers, presumably at home and abroad.<sup>151</sup> And their communities would also have some weight on the scales. Perhaps by bringing new directors to the board, the corporate culture would shift as it sought to incorporate a wider set of moral matrices beyond the order imposed by shareholder wealth maximization.<sup>152</sup>

### *F. Sacred/Sacrilege*

David and Lyman have different views on the ultimate purpose of the corporation—that is, what corporate governance would hold as sacred. David’s view seems much more instrumental, perhaps borrowing from the instrumental (and thus amoral) constructs prevalent in the corporate governance literature.<sup>153</sup> Lyman, on the other hand, sees the corporation as infused by its nature with a public, social, and thus sacred purpose.<sup>154</sup>

David, while urging a more other-thinking corporation, places such a corporation in a corporate culture in which he recognizes that financial self-interest drives all action.<sup>155</sup> David’s

---

150. See Johnson, *Unsettledness*, *supra* note 35, at 438 (favoring the law’s “enabling and pluralistic approach to corporate purpose” because of the need to hold directors and managers “accountable for their conduct”).

151. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 978 (noting that a reform effort focused on worker representation on the board has failed to take root in the United States).

152. See Johnson, *Non-Waivable Duties*, *supra* note 36, at 719–20 (reminding scholars that the “overall state of business morality” is an “important and legitimate societal concern”).

153. See Millon, *Enlightened Shareholder*, *supra* note 32, at 96–97 (concluding that bottom line financial concerns do and will continue to drive corporate management and corporate social responsibility).

154. See Johnson, *Unsettledness*, *supra* note 35, at 451 (concluding that the money-maximizing purpose neglects “broader social expectations of business conduct in the modern world”).

155. See *supra* note 153 and accompanying text (accepting the general primacy of profit maximization efforts in corporate management in the current and prospective corporate legal landscape).

vision of a corporation guided by enlightened shareholders is ultimately “driven” by financial self-interest, which because of market and reputational pressures acts as a force to expand attention to human rights, environmental, and other CSR values.<sup>156</sup> For David, at least in his description of the means and the end of the corporation, money remains the corporation’s sacred purpose.<sup>157</sup>

Lyman, however, seems to be animated by a vision of the modern corporation espoused by Adolf Berle.<sup>158</sup> Pointing to the analysis of Professors Bratton and Wachter, Lyman identifies that Berle did not advocate shareholder empowerment as an end, but rather as a means.<sup>159</sup> “His belief [was] that a public corporation should broadly serve societal goals, since powerful institutional investors simply represent one set of oligarchs replacing another—corporate managers.”<sup>160</sup> For Lyman, the proper end is a re-purposed corporation, not one that merely chooses to pursue its wealth-maximizing purpose in a more inclusive, full-hearted way.<sup>161</sup>

Lyman decries that the modern corporation’s purposes have been usurped and defiled:

Today, in the second decade of the twenty-first century, unfolding developments in the law of corporate governance—state and federal—still take no direct heed of broad corporate responsibility concerns in regular business corporations

---

156. See Millon, *Enlightened Shareholder*, *supra* note 32, at 39–40 (discussing the reputational harm that would result from inattention to these considerations).

157. See *id.* at 46 (noting the reputational cost concerns that play a role in the ultimate cost-benefit considerations of corporate management).

158. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 974 (citing ADOLF BERLE & GARDINER MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 68 (1932) (referencing the grip Berle’s contributions have had on corporate law)).

159. See *id.* at 987 (noting that “shareholder empowerment was not one of the political outcomes envisioned” by Berle).

160. *Id.* at 987.

161. See *id.* at 989 (finding that the “historical corporate responsibility approach of focusing solely on director-manager volunteerism or external legal regulation of the corporation needs rethinking”).

because corporate governance remains a closed system of just three groups—investors, directors, and managers.<sup>162</sup>

Lyman, instead, admires the earlier voices that imagined corporate structures that included a broader set of concerns.<sup>163</sup>

Further, Lyman decries that Delaware has strayed from a pluralistic vision of the corporation, which he sees as its animating purpose.<sup>164</sup> As to corporate purpose, Lyman calls on “Delaware law [to] permit a pluralistic approach in the for-profit corporate sector” and away from “a strict shareholder primacy focus in the 2010 *eBay* decision.”<sup>165</sup> Thus, Lyman seeks a new corporate order—statutory, to be sure—that empowers the modern corporation to pursue purposes other than shareholder-centric monistic purposes.<sup>166</sup>

How would David’s and Lyman’s views on the animating purpose of the corporation—its sacred nature—guide them in resolving my offshoring story? David would seem to believe the corporation’s decision should be decided by financial self-interest, informed by “social responsibility” factors that seep into the financial cost-benefit calculus by virtue of non-corporate legal risks, consumer pressures, and public shaming.<sup>167</sup> That is, corporate decision makers might do good, but only to the extent they feel compelled to do well. Capitalism’s worship of profits, which David seems to adopt for the sake of argument, may occupy a sacred place in the corporation.<sup>168</sup>

Lyman, however, sees a corporation—and thus its decision-making culture—as more defined by legal constraints

162. *Id.* at 988.

163. *See id.* at 977 (describing a 1959 essay by Abram Chayes calling on non-investor groups as having a greater say in corporate decisions as “truly innovative, fairly vague”).

164. *See* Johnson, *Unsettledness*, *supra* note 35, at 405 (introducing his argument that Delaware law should permit a pluralistic approach in the for-profit corporate sector).

165. *Id.* at 405.

166. *See id.* at 409, 448–49 (proposing various legislative solutions).

167. *See* Millon, *Enlightened Shareholder*, *supra* note 32, at 93 (discussing the extra-legal pressures imposed upon corporations by private actors that “reshape management attitudes and behavior”).

168. *See id.* at 95 (reiterating the fact that “[a]ll businesses must earn profits in order to survive and prosper”).



and compulsion.<sup>169</sup> He sees the corporation as being wayward. The typical publicly-traded corporation no longer holds sacred values of selfless commitment to the well-being of others.<sup>170</sup> Instead, Lyman concludes that a commitment to others is today expressed in extra-corporate norms, such as environmental law or workplace safety regulation.<sup>171</sup> Within the corporation he does not perceive selflessness or even mechanisms that might lead to this. In short, Lyman might well react to the offshoring story by decrying the absence of legal rules against offshoring jobs in the United States or the failure of legal norms to protect Ruranesia workers.

#### IV. Conclusion

The pluralistic corporation—like sustainability—is multi-faceted.<sup>172</sup> Move one part and another moves, often in unexpected ways. In the end, the law of corporate governance gives corporate decision makers capacious room to balance (consciously and unconsciously) the moving parts of nearly every business decision.<sup>173</sup> The interesting questions of corporate governance are how business decisions happen, and perhaps even more interesting how decision-making might be made to evolve.

Attempts at legal reform would seem bound to fail. For example, Lyman points out that “other constituency” statutes—which call on corporate directors to take into account the interests of constituencies beyond those of short-term

---

169. See *supra* note 144, at 702 (disputing the ability to contractually waive fiduciary duties under Delaware law).

170. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 975 (noting the corporation’s “rise in commercial significance” and the now “unsustainable neglect of corporate responsibility”).

171. See *id.* at 976 (determining that corporate law regulation’s decline has led to external regulations designed to protect “vulnerable constituencies such as consumers, employees, and the natural environment”).

172. See Johnson, *Unsettledness*, *supra* note 35, at 436 (describing the pluralistic approach whereby purposes are pursued by “combining financial pursuits with ‘socially responsible’ objectives”).

173. See Millon, *Two Models of CSR*, *supra* note 33, at 524 (remarking on the “main challenge” to balance “potentially conflicting interests implicated by business decisions”).

shareholders—have been a resounding failure.<sup>174</sup> In Lyman’s words, “these laws [adopted in nearly thirty jurisdictions] appear to have had little visible and enduring impact on corporate governance.”<sup>175</sup>

Instead, like our political constitutional structure, the most powerful force moving the body politic of the modern corporation is “soft law,” that body of norms that are nearly unperceived, but that guide attitudes, behavior and decisions as surely as gravity.<sup>176</sup> The legal “bite” of positive law—what most corporate law academics seem to mean when referring to corporate governance—may be far less affective than the “evolving normative expectations as to what responsible corporate conduct should look like in the twenty-first century.”<sup>177</sup> That is, corporate governance is really a set of moral matrices embedded in the process of corporate decision-making.<sup>178</sup>

So if corporate governance reform is to embrace a larger social consciousness, it will not happen with the flourish of a legislative pen or the incantations made in a judicial opinion (even by a court of equity), but rather from a shift in moral perspective. This is a great lesson of moral psychology.<sup>179</sup> We are

---

174. For the description of statutes as expressly authorizing board of directors to consider non-shareholder interests, including employees, customers, suppliers, creditors, and local communities see Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 979 (listing these statutes); Millon, *Enlightened Shareholder*, *supra* note 32, at 73–74 (same).

175. Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 980; see also Millon, *Enlightened Shareholder*, *supra* note 32, at 9 (counting forty-one jurisdictions with a constituency or stakeholder statute). See generally Millon, *Redefining Corporate Law*, *supra* note 30; Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992).

176. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 981 (describing “soft law” as non-binding initiatives lacking the legal ‘bite’ of positive law); see also Millon, *Enlightened Shareholder*, *supra* note 32, at 75 (finding that “soft law” developments illustrate movement towards a “set of substantive standards governing the activities of transnational companies”).

177. Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 981.

178. See Johnson, *Unsettledness*, *supra* note 35, at 429 (referencing “moral discourse” and the possibility of “ex ante moral admonition” leading to more honest managerial conduct).

179. See *id.* at 429 (noting the contributions of behavioral psychology to these moral concepts).

not persuaded to change our moral decision making by others' arguments (or motivated reasoning). Instead, moral evolution happens when we sense that our "tribal culture" is moving toward a new paradigm.<sup>180</sup> And we are bound to move with it.

The term "thought leaders" captures this idea.<sup>181</sup> That is, thought leaders are those persons embedded within our tribal culture who are capable of seeing beyond the boundaries that define and protect us.<sup>182</sup> They can be the ones (perhaps the only ones) to provide new feedback loops. We don't perceive the change; just as individual fish move in a school that itself moves like a single organism responding to currents, food sources, and threats, we move with the flow of our culture. In Haidt's words, we first bind ourselves to a moral matrix and then become blind to others' moral matrices.<sup>183</sup>

It is no surprise, according to Lyman, that "genuine reform of the deep decision-making architecture of corporate governance" has received "little innovative thinking"—or that it has gone "nowhere."<sup>184</sup> Observers of corporate governance have been chasing up the wrong tree. Understanding the nature of corporate decision-making—and thus ways it might evolve or be reformed—depends not on formulating well-constructed arguments for corporate decision-makers to use as a new roadmap to more inclusiveness or even to impose new legal norms that seek to

---

180. See generally JOSHUA GREENE, *MORAL TRIBES: EMOTION, REASON, AND THE GAP BETWEEN US AND THEM* (2014) (discussing evolution, culture, and personal experience as a launching pad for progressive, forward-thinking).

181. See Britton Manasco, *If You're Not a Thought Leader You Won't Survive*, 10-3 COMPENSATION & BENEFITS FOR L. OFF. 7 (2010) (identifying thought leaders as those with great potential for becoming "trusted authorities").

182. See *id.* (describing three factors that make thought leadership important to lawyers and professional business firms in particular).

183. See generally HAIDT, *supra* note 2; Jonathan Haidt & Jesse Graham, *When Morality Opposes Justice: Conservatives Have Moral Intuitions that Liberals May Not Recognize*, 20 SOC. JUST. RES. 98 (2007) ("Morality binds and blinds. It binds us into ideological teams that fight each other as though the fate of the world depended on our side winning each battle. It blinds us to the fact that each team is composed of good people who have something important to say.").

184. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 976 (discussing the innovation vacuum in this area).

discombobulate existing modalities. It depends on reshaping the moral matrix in the boardroom—a major paradigm shift.

A shift in paradigm is no small matter. As Lyman points out, even though “many managers” may disagree with the narrow focus on investor well-being, they find it “futile (and against self-interest) to resist a share-maximizing strategy pushed by a determined group of activists.”<sup>185</sup> But times are changing. For example, the hedge-fund-led shareholder activism that has dominated the academic and policy discourse for the last couple decades is beginning to wane.<sup>186</sup> Hedge funds are out of favor, as their collective promise to beat the market has proved hollow.<sup>187</sup> And there is a rise in socially-responsible investing—a broad and amorphous concept—that seems to be placing remarkable new pressures on corporate managers to show an “environmental, social, governance” (ESG) consciousness.<sup>188</sup>

---

185. *Id.* at 986.

186. See WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS, 163–81 (5th ed. 2016) (discussing the rise of institutional investor power in the publicly-held business sector and, in particular, the proliferation and empowerment of hedge funds).

187. See Jen Wieczner, *Why Big Investors Are Finally Pulling Their Money Out of Hedge Funds*, FORTUNE, (Mar. 2 2016), <http://fortune.com/2016/03/02/hedge-fund-investors-withdraw-returns/> (last visited Apr. 18, 2017) (noting the generally lackluster returns for hedge fund investors) (on file with the Washington and Lee Law Review); see also JEFF C. HOOKE & JOHN WALTERS, THE MD. PUB. POLICY INST., MARYLAND POLICY REPORT: WALL STREET FEES AND INVESTMENT RETURNS FOR 33 STATE PENSION FUNDS 1–2 (2015) [https://www.mdpolicy.org/docLib/20150804\\_MarylandPolicyReport201505.pdf](https://www.mdpolicy.org/docLib/20150804_MarylandPolicyReport201505.pdf) (finding that state pension-fund investments in private equity funds and hedge funds under performed relevant benchmark returns).

188. Two recent reports by the Forum for Sustainable and Responsible Investing found that “sustainable, responsible, impact” (SRI) investing grew by 76% from 2012 to 2014 and another 33% from 2014 to 2016, with a fourfold increase in assets under management that takes into account environmental, social and governance (ESG) issues. FORUM FOR SUSTAINABLE & RESPONSIBLE INV., REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS (11th ed. 2016), [http://www.ussif.org/files/SIF\\_Trends\\_16\\_Executive\\_Summary\(1\).pdf](http://www.ussif.org/files/SIF_Trends_16_Executive_Summary(1).pdf) [hereinafter 2016 REPORT]; FORUM FOR SUSTAINABLE & RESPONSIBLE INV., REPORT ON US SUSTAINABLE, RESPONSIBLE AND IMPACT INVESTING TRENDS (10th ed. 2014) [http://www.ussif.org/Files/Publications/SIF\\_Trends\\_14.F.ES.pdf](http://www.ussif.org/Files/Publications/SIF_Trends_14.F.ES.pdf) [hereinafter 2014 REPORT]. From 1995 to 2014, SRI assets in the United States grew tenfold from \$0.6 trillion to \$6.2 trillion, 2014 REPORT, and then to \$8.7 trillion in 2016, representing today about 20% of all U.S. financial assets under professional management, 2016 REPORT.

Thus, Lyman's concern that "calls for broadly responsible conduct" would resonate more with private companies rather than companies with publicly traded securities may have reversed its polarity in the last few years.<sup>189</sup> The pressures on managers of public companies to show ESG performance may now be greater than the pressures on managers of private companies to follow their conscience.<sup>190</sup> In fact, companies owned by private equity firms would seem to have even more pressures to maximize share returns.

We in the legal academy—and the corporate legal academy—have become less relevant to those who make corporate law. And corporate law has become less relevant to those who make corporate decisions. Consider, as does Lyman, the story of Rule 14a-8.<sup>191</sup> It was originally promulgated by the SEC to specify a mechanism for shareholders in public companies to vote on proposals by fellow shareholders on matters of mutual interest.<sup>192</sup> An early case confirmed the rule's purpose to give shareholders a voice in matters of shareholder-centric corporate governance—in the case, to require a shareholder vote on the company's auditing firm and procedures to amend the company's bylaws.<sup>193</sup> But then, in the 1970s, the rule came to be used as a tool to put matters of corporate social responsibility before shareholders and management.<sup>194</sup> But none of these CSR proposals garnered

---

189. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 989 (arguing that this is so because private companies are not "subject to capital market or shareholder voting pressures").

190. See *id.* at 989 ("Perhaps, too, the corporate responsibility focus in the public corporation will migrate (or broaden) to include calls for more fully exploring—culturally and legally—the 'social responsibility' aspects of share ownership.").

191. See *id.* at 982–83 (referencing activism through a proposal to shareholders at Dow Chemical invoking Rule 14a-8).

192. See Note, *Proxy Rule 14a-8: Omission of Shareholder Proposals*, 84 HARV. L. REV. 700, 700–01 (1971) ("Rule 14a-8 grants to a shareholder the right to have a proposal which he intends to present at a stockholders' meeting included by management in the corporate proxy materials.").

193. See *SEC v. Transamerica Corp.*, 163 F.2d 511, 513 (3d Cir. 1947) (identifying the specific proposals desired for presentation to the shareholders for action).

194. See Johnson, *Law and Corporate Responsibility*, *supra* note 34, at 982–83 (describing the anti-Vietnam activism against Dow Chemical's manufacture

shareholder support, and they were seen by management and most shareholders as an irritation.<sup>195</sup> Then, in the 1990s, the rule shifted back to being a corporate governance tool, with proposals calling on director stock ownership, de-staggering of corporate boards, and majority voting by shareholders regularly gaining majority support.<sup>196</sup>

How we view the corporation and its purposes is a moral question that we each resolve outside of our conscious attention—and well beyond rational argumentation. The analysis, formulations, and clever insights that we all engage in—and much on display at the Symposium honoring David and Lyman—are just ways for our tribe to bind together. If we are to change others' moral matrices and perhaps our own,<sup>197</sup> it will be by listening, sympathizing, reassuring, being exemplary, explaining—best done over dinner and drinks. This was David Hume's great insight and approach to life.<sup>198</sup> We are analogic, instinctive, emotional beings. And we're very fast at it.<sup>199</sup>

We leave the Holocene, the ten thousand years of stable climate and abundant resources that gave humankind farming, commerce, and modernity.<sup>200</sup> And we enter the Anthropocene,

---

of napalm).

195. See *id.* at 983 (noting that the resolutions received “less than 3 percent of the” stockholder votes).

196. See *id.* at 985 (citing Marcel Kahan & Edward Rock, *Embattled CEOs*, 88 TEX. L. REV. 987, 998–1005 (2010) (describing the decline in staggered boards and the rise in majority voting for directors)).

197. See generally HAITT, *supra* note 2, at 219–366 (discussing the idea that “[m]orality binds and blinds”).

198. See The School of Life, *PHILOSOPHY—David Hume*, YOUTUBE (Oct. 10, 2016) (last visited Apr. 6, 2017), [https://www.youtube.com/watch?v=HS52H\\_CqZLE](https://www.youtube.com/watch?v=HS52H_CqZLE) (last visited Apr. 18, 2017) (illustrating Hume's philosophy on human nature) (on file with the Washington and Lee Law Review).

199. See generally FRANK PARTNOY, *WAIT: THE ART AND SCIENCE OF DELAY* (2013) (describing how we make decisions, consciously and subconsciously, often in milliseconds).

200. See *Holocene Epoch*, BBC NATURE, [http://www.bbc.co.uk/nature/history\\_of\\_the\\_earth/Holocene](http://www.bbc.co.uk/nature/history_of_the_earth/Holocene) (last visited Apr. 6, 2017) (“The Holocene (or Recent) is the current geological epoch which started some 11,500 years ago when the glaciers began to retreat.”) (on file with The Washington and Lee Law Review).

with a destabilized climate, growing resource limits, and the prospect of unprecedented adaptation.<sup>201</sup> How we become sustainable—that is, how we become more pluralistic in our decision-making—is the great question of our time.<sup>202</sup> My Essay is a fumbling attempt to explain a possible path toward greater pluralism and sustainability thinking in corporate governance.

---

201. See Simon L. Lewis & Mark A. Maslin, *Defining the Anthropocene*, NATURE, Mar. 12, 2015, 171, at 171–78 (describing the Anthropocene as a potentially new geological epoch dominated by humans).

202. See generally DAVID W. ORR, DANGEROUS YEARS: CLIMATE CHANGE, THE LONG EMERGENCY, AND THE WAY FORWARD (2016) (asserting that our present problems result from how we make decisions and take action together after surveying our current climate crisis).