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# WHAT DIFFERENCE DOES IT MAKE WHETHER CORPORATE MANAGERS HAVE PUBLIC RESPONSIBILITIES?

WILLIAM H. SIMON\*

Alan Wolfe's thoughtful paper resonates with what I think we should call the Washington and Lee School of corporate jurisprudence.<sup>1</sup> It elaborates on that School's brilliant intellectual history of legal theorizing about the corporation and on its powerful critique of conservative arguments against managerial responsiveness to nonshareholder interests.

It also shares, I fear, a tendency to overestimate the practical stakes of abstract concepts of the corporation and fiduciary duties. This tendency takes three forms: first, a historical picture that portrays recent developments as a promising departure rather than business-as-usual; second, an assumption that certain abstract conceptions of the corporation (for example, public or private) differ dramatically in their relative hospitality or hostility to nonshareholder interests; and third, optimism that fiduciary norms are an important avenue through which to undertake corporate reform. I want to express reservations about each of these points.

## I. PROMISING DEPARTURE OR BUSINESS-AS-USUAL?

Wolfe and the Washington and Lee School sometimes give the impression that corporate managers were deemed beholden exclusively to shareholders until the 1980s takeover movement gave managers an incentive to invoke public responsibilities and forced everyone else to see the effects of corporate decisions on nonshareholder constituencies. I suspect, however, the opposite story would be more accurate. Throughout most of the century the idea that corporate managers have public responsibility has been a mainstream view.<sup>2</sup> The view was always subject to some controversy, but it did not receive its most politically and intellectually sustained challenge until the 1980s. On the practical level, the emergence of a new constituency of finance capitalists prompted this challenge. These capitalists were outsiders to the established managerial elite and discovered profit opportunities in corporate restructurings that damaged managerial satrapies.

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1. This designation is prompted, of course, by the prominence of David Millon and Lyman Johnson of Washington and Lee in this literature. See, e.g., Lyman Johnson & David Millon, *The Case Beyond Time*, 45 BUS. LAW. 2105 (1990); David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223 (1991); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201; Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215 (1992) (reviewing FRANK H. EASTERBROOK AND DANIEL R. FISCHL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991)).

2. See, e.g., E. Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

On the theoretical level, in the 1980s hostile takeovers and managerial conflicts of interest strained the plausibility of viewing managers as neutral fiduciaries. The pluralist proponents of public responsibility had tended to emphasize the convergence of interests of the various corporate constituencies. As conflicts of interest became harder to ignore, some felt more comfortable focusing managerial loyalty on a single group rather than charging managers with reconciling the conflicts.

That the idea of managerial public responsibility has not been deviant is clear from historical works that describe a large contingent of elite managers who have ostentatiously embraced public duties throughout this century.<sup>3</sup> Why shouldn't they? As compared to the shareholder-agent view, the public responsibility view seems more likely to confer prestige, to curry public acceptance for corporate power, and to enhance managerial discretion within the corporation.

The status of the public responsibility view has been less clear in legal doctrine only because the issue has rarely been addressed. But the paucity of authority itself suggests that the law has not been a major obstacle to managerial solicitude for nonshareholder interests. I am unaware of a single modern case in which a managerial decision has been held wrongful because it put public interests above shareholder ones.<sup>4</sup> Moreover, doctrine has long expressed general tolerance for a substantial range of public-regarding managerial decisions.<sup>5</sup>

This revised historical picture makes the repudiation of the shareholder-agent view in the *Time-Warner* case<sup>6</sup> and the constituency statutes look more like a restoration than the harbinger of revolution that the Washington and Lee School would like it to be. Managers did not make very ambitious use of their public-regarding discretion before *Time-Warner*, and that case gives little reason to think they will do so now.

## II. THE RANGE OF PUBLIC AND PRIVATE INTERESTS

My second reservation concerns the assumption Wolfe and the Washington and Lee scholars make that changing from a private to a public view of the corporation dramatically alters the range of plausible corporate

3. *E.g.*, JAMES WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918* (1968).

4. *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919), which is often cited for the shareholder-agent view, did not enjoin the expansion that Henry Ford had rationalized with public interest rhetoric. It merely ordered the payout of retained earnings that exceeded the amount the court thought necessary for the expansion.

5. Purporting to reflect longstanding doctrine, the American Law Institute's *Principles of Corporate Governance and Structure* (Tent. draft no. 1, 1982) says,

[E]ven if corporate profit and shareholder gain are thereby enhanced, the corporation, in the conduct of its business . . . may devote resources, within reasonable limits, to public welfare, humanitarian, educational, and philanthropic purposes.

§ 2.01(c), at 17. *See id.* at 39-40, n.2 (discussion and citations).

6. *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140 (Del. 1990).

decisions. I doubt if this is true. Since productivity in a capitalist economy depends on the profitability of capital, it is usually easy to portray shareholder welfare as a means to public welfare. The remark often attributed to General Motors President Charles Wilson—"What's good for General Motors is good for the United States"—illustrates this.<sup>7</sup> Conversely, because business success depends heavily on good relations and reputation with governments, customers, suppliers, workers, and the general public, one can always describe a corporate decision that benefits nonshareholder constituencies as serving the shareholders' long run interest in good corporate relations and reputation.

Two of the most famous relevant cases suggest indifference to whether corporate decisions are motivated by public or private concerns. The plaintiffs in *Dodge v. Ford Motor*<sup>8</sup> treated Ford's claim that the River Rouge expansion was undertaken in the public interest as a devastating admission. But the court was unimpressed; while declaring the preeminence of shareholder interest, it noted that the investment seemed likely to be justifiable as well on profitability grounds.<sup>9</sup>

And in *Shlensky v. Wrigley*<sup>10</sup> the Court denied the plaintiffs an opportunity to prove that Wrigley's refusal to have night games at Wrigley field was motivated by concern for the "best interests of baseball."<sup>11</sup> Recognizing the ready availability of *potential* shareholder-focused, long-term relational justifications (for example, neighborhood goodwill), the court dismissed on the pleadings.<sup>12</sup>

The "nexus-of-contracts" approach to corporations has many problems, but an inability to accommodate the interests of nonshareholder constituencies is not among them. The legal Progressives and Realists who criticized the public-private distinction so effectively also encouraged doctrinal innovations that facilitated concern with exploitation and abuse in areas traditionally regarded as private law.<sup>13</sup>

Thus, the modern law of contract—with its doctrines of reliance, implied terms, mistake, and duress—is fully able to accommodate the claims of workers and local communities injured by plant shutdowns and takeover-induced layoffs. Note that legal scholars like Joseph Singer and Katherine Stone and economists like Laurence Summers, who have been arguing the case against the corporate freedom to layoff and discharge without concern for workers, have been doing so in *private* law terms.<sup>14</sup>

7. The remark is apparently apocryphal. DAVID HALBERSTAM, *THE FIFTIES* 118 (1993).

8. 170 N.W. 668 (Mich. 1919).

9. *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919).

10. 237 N.E.2d 776 (Ill. App. 1968).

11. *Shlensky v. Wrigley*, 237 N.E.2d 776, 780-81 (Ill. App. 1968).

12. *Id.* at 781.

13. *E.g.*, Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933).

14. Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 614 (1988) (property rhetoric); Katherine Van Wezel Stone, *Employees As Stakeholders Under State Nonshareholder Constituency Statutes*, 21 STETSON L. REV. 45 (1991) (implicit contract

I do not want to push this argument too far. Doubtless, situations exist where managers find a public interest rationale for a socially desirable decision much more plausible than a shareholder-welfare rationale. In those cases, the argument that managers can legitimately consider the public interest is important. However, the opposite situation also occurs. Richard Jackall has described a moral universe of managers in three middle-sized corporations where public-regarding rhetoric is held in macho contempt as a sign of weakness and sentimentality.<sup>15</sup> These executives feel much more comfortable with socially responsible decisions when they can be framed in the private rhetoric of relational prudence and long-term profitability.

### III. WHAT IS THE PUBLIC INTEREST?

The Washington and Lee School has yet to give a very definite notion of what a vigorous regime of corporate social responsibility would look like. If corporate social responsibility is a response to systemic problems in the economic climate, then it requires considerably more theoretical elaboration. It is not enough simply to encourage courts to enjoin action that "unnecessarily" injures "legitimate" interests of nonshareholders<sup>16</sup> without some guidance as to what "necessity" and "legitimacy" mean here. To mention just one of many problems, what about injuries that take the form of "negative pecuniary externalities" such as extinction of trade or employment relations? Mainstream economics theory teaches that trade and employment expansion in other areas will compensate for such externalities.

I am not suggesting that the ideal of public interest is too indeterminate or subjective for systematic elaboration. On the contrary, I think the idea could provide as coherent and plausible a basis for normative judgments as the general norms, say, of the common law of tort and contract. However, any effort to implement such norms as enforceable fiduciary duties will necessarily involve the courts in reviewing business judgments of the kind they have traditionally been reluctant to handle. Consider, for example, the claim by Michael Piore and Charles Sabel that in many situations traditional manufacturing corporations have two plausible responses to competitive pressures: they try to cut wages and sweat labor, or they can train workers and reorganize production so that labor becomes more efficient.<sup>17</sup> It may be that each strategy is equally profitable to the shareholders, but the latter is surely better for workers. Thus, in principle, a management team that chose the first approach would be a prime candidate for a Mitchell-type

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rhetoric); Laurence Summers & Andrei Schleifer, *Breach of Trust in Hostile Takeovers, in* CORPORATE TAKEOVERS: CAUSES AND CONSEQUENCES (Alan Auerbach ed., 1988) (implicit contract rhetoric).

15. ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* (1988).

16. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 635-36 (1992).

17. MICHAEL J. PIORES, *THE SECOND INDUSTRIAL DIVIDE: POSSIBILITIES FOR PROSPERITY* (1985).

remedy. But I have no confidence that the courts could identify such situations, and given the business judgment rule, they seem unlikely to try.

Moreover, there is some risk that, when the Washington and Lee School finally does elaborate its conception of the public interest, the idea of corporate public responsibility will seem superfluous, ineffectual, or marginal. It will seem superfluous to the extent that the relevant interests can be protected through the elaboration of private law doctrine. It will seem ineffectual to the extent that the reform of fiduciary doctrine is not accompanied by reform of the surrounding structures of corporate organization. And it will seem marginal to the extent that fiduciary reform is accompanied by reform of the surrounding structures.

I see three general tendencies in current efforts to support the notion of public responsibility as an enforceable duty. The first tendency and, to my mind, most successful is the reliance-focused approach of Joseph Singer, Katherine Stone, and the economists in the "implicit contracts" literature.<sup>18</sup> The idea here is that, in recent circumstances of economic restructuring, some managers have been tempted to betray implicit promises of job and compensation security on which workers have relied. These promises are concededly unenforceable under strict contract and property law, but the policies that underpin a variety of reliance-protective doctrines in these fields seem applicable. These policies thus support doctrinal innovation to protect these newly-appreciated forms of reliance, and one route would be to interpret corporate fiduciary duties to preclude betrayal of promises of this sort.

In the present context, however, two qualifications are in order. First, note that this analysis has been worked out by both lawyers and economists in *private law* terms of contract and property; it is not clear that we need fiduciary duties to achieve the goal here, and we certainly do not need a conception of the corporation as a public entity to do so. Second, under a reliance approach, managers can satisfy their responsibilities simply by discouraging reliance. For example, in the employment context, consistent disclaimers of any intention to provide job and compensation security should do the trick. It may be costly for management to take this approach, but many companies now seem willing to incur these costs, and to the extent they do, the effect of the public responsibility doctrine would be less dramatic than many proponents would like to see.

The second tendency is to see public responsibility as a duty to forego short-run payoffs in favor of larger long-run payoffs.<sup>19</sup> Enforcing this duty would also require difficult judicial business judgments. Moreover, the more plausible analyses of this subject suggest that the pressures for short-term gain at the expense of long-term performance are broad and systemic.<sup>20</sup>

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18. See *supra* note 14.

19. Millon, *Redefining Corporate Law*, *supra* note 1, at 266.

20. See MICHAEL E. PORTER, *CAPITAL CHOICES: CHANGING THE WAY AMERICA INVESTS IN INDUSTRY* (1992).

They arise from such circumstances as the dispersion and fragmentation of shareholdings among outside owners with limited incentives and ability to exercise control and develop information, the assessment of institutional shareholders on the basis of short term performance indicators, the bias of accounting and capital budgeting practices against investments in intangibles with remote payoffs, compensation practices that link executive pay to short term stock prices, a governance structure that generates directors with little personal stake in the corporation, and a variety of tax incentives that discourage or fail to reward long term holding.

A fiduciary norm of long-term performance would fit nicely into an ambitious scheme of structural reform designed to neutralize or reverse pressures of the short term. But as long as the structural pressures remain in place, reformulating fiduciary norms alone seems unlikely to make dramatic headway.

Finally, the third tendency is to interpret fiduciary duties in terms of some ideal of community—a set of relations broader and denser than that of the managerial elite and a mass constituency of dispersed faceless shareholders.<sup>21</sup> Again, I find this proposal attractive in principle but unlikely to be effective in the absence of much more broad-ranging institutional reform. As long as risky businesses are financed with capital drawn from outside the community in which they produce, responsibilities to that community will have to compromise significantly with responsibilities to outside capital suppliers. As many economic communitarians have recognized, ambitious conceptions of economic community require a high degree of local, internal finance, with attendant increased risks from loss of diversification. Despite the increased risks, I think that many economically plausible opportunities exist for worker or community ownership of this sort. But without community ownership, an ambitious conception of community responsibility seems unworkable; and with community ownership, it might seem trivial.

The demand for theories and criteria might seem unfair if we conceived of corporate social responsibility merely as interstitial norms that operated only in extraordinary situations not provided for in more explicit forms of social regulation. But even in this modest view, we would still need some paradigmatic examples to illustrate the type of decisionmaking being urged. This is a customary function of case law.

Unfortunately, however, the two caselaw landmarks in the field—*Dodge* and *Time-Warner* are not much help. *Dodge*, despite Henry Ford's pompous rhetoric, does not seem about social responsibility at all; today the case would be treated as involving an attempted freezeout of minority shareholders in a close corporation, and on that view, the Court seems to have been right to the extent it ruled against Ford.<sup>22</sup>

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21. I read Alan Wolfe's paper as sympathetic to this idea. So am I. See William H. Simon, *Social-Republican Property*, 38 UCLA L. REV. 1335 (1991).

22. For an account that suggests that Ford's refusal to pay dividends was an attempt to

*Time-Warner's* language about a valuable corporate "culture" does invoke public interest concerns,<sup>23</sup> but neither the Court nor the approving commentators have offered any serious analysis of what public interest there might be in *Time's* corporate culture—as an occasional reader of the magazine over the past thirty years, I am skeptical—and why it would have been threatened by Paramount. Of course, for the Delaware court, public interest is just one more incantation that triggers judicial indulgence toward managers. But the Washington and Lee commentators, who see it as a standard for enforceable duties, owe us more.

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freeze out the Dodge brothers, see ROBERT LACEY, *FORD: THE MEN AND THE MACHINE* 166-77 (1988). For the leading contemporary approaches to close corporation oppression issues, see *Wilkes v. Springside Nursing Home*, 370 Mass. 842 (1976); *Matter of Kemp & Beatley, Inc.*, 473 N.E.2d 1173 (N.Y. 1984).

23. *Paramount Communications, Inc. v. Time Inc.*, 571 A.2d 1140, 1143 n.4 (Del. 1990).