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700 Families to Feed:
The Challenge of Corporate Citizenship

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ABSTRACT

When Howard Lutnick, CEO of Cantor Fitzgerald, was first interviewed after September 11, 2001, a tragedy that devastated his firm and stole the life of his brother, Lutnick stated that he now had "700 families to feed." The view that he expressed was that his firm was responsible to the families of the wage earners lost in the tragedy, even though the firm was not responsible for the events that had occurred. Such assumed corporate responsibility, consistent with a stakeholder-based approach to management, is often considered to conflict with the law. The purpose of this Article is to demonstrate that stakeholder management does not inherently conflict with the law. In fact, principles of stakeholder thinking coincide with our moral intuitions, reflect many demonstrated best business practices, and promote profit-generation as envisioned and advocated by the law. This Article explores the nature of stakeholder relationships and their impact on business enterprises. The interconnected experiences of individuals and organizations in the wake of the events of September 11, while exemplary and perhaps more pronounced, are not isolated. The purpose of this Article is to draw upon such experiences in order to move beyond the traditional hub-and-spoke model of the firm, and to integrate past and present examples in a more dynamic, stakeholder-based model of corporate citizenship that bridges the gap between stakeholder thinking and the law and is both descriptive and normative.

Keywords: World Trade Center, Peace, Stakeholder thinking, Stakeholder theory, Citizenship, Corporate citizenship, Fiduciary law, Milton Friedman, Corporate social responsibilities, Social responsibilities, Stockholder theory, Stockholders, Stakeholders, Constituency statutes

INTRODUCTION: CORPORATE CITIZENSHIP AND SUSTAINABLE PEACE

When Howard Lutnick, CEO of Cantor Fitzgerald, was first interviewed after September 11, 2001, a tragedy that devastated his firm and stole the life of his brother, Lutnick stated thathe now had "700 families to feed." The view that he expressed was that his firm was responsible to the families of the wage earners lost in the tragedy, even though the firm was not responsible for the events that had occurred. Such assumed corporate responsibility, consistent with a stakeholder-based approach to management, is often considered to conflict with the law. The purpose of this Article is to demonstrate that stakeholder management does not inherently conflict with the law. In fact, principles of stakeholder thinking coincide with our moral intuitions, reflect many demonstrated best business practices, and promote profit-generation as envisioned and advocated by the law. This Article explores the nature of stakeholder relationships and their impact on business enterprises. The interconnected experiences of individuals and organizations in the wake of the events of September 11, while exemplary and perhaps more pronounced, are not isolated. The purpose of this Article is to draw upon such experiences in order to move beyond the traditional hub-and-spoke model of the firm, and to integrate past and present examples in a more dynamic, stakeholder-based model of corporate citizenship that bridges the gap between stakeholder thinking and the law and is both descriptive and normative.

As global politics and business have become increasingly intertwined, as evidenced by the virtually unprecedented, politically motivated assault on capitalism that took place on September 11, questions relating to sustainable peace are being discussed in new contexts such as business.[1] Business enterprises are no longer isolated or immune to global politics. Although business scholarship has not traditionally tackled questions of sustainable peace in any depth, "This does not mean, of course," as Jeffrey Nesteruk has noted, "that such an inquiry is an inappropriate one. Posing new questions is one of the central roles of legal theory. Even when the outcome of such inquiries is uncertain, asking novel questions can be fruitful, sometimes in unforeseen ways."[2] One question that immediately comes to mind is, if business is linked to sustainable peace, as is perhaps demonstrated by the attack on the World Trade Center, how does this influence our understanding of business?

In the wake of September 11, dialogue regarding the relationship between business enterprises and sustainable peace has become a springboard topic for us to consider how our business models and legal principles can be integrated into stronger descriptive models with both normative and instrumental implications.[3] Stakeholder thinking provides a useful lens through which to view business enterprises, particularly in terms of engagement, development, and recovery.[4] In exploring the role of business

[1] E. W. Orts, War and the Business Corporation, 35 Vand. J. Transnat'l L. 389 (2002). "[T]he topic of war … is not ordinarily considered germane to academic studies of corporate law." *Id*. at 550.
[2] "While there is a rich literature exploring corporate social responsibility, the role of the corporation in promoting peace has not been the focus of scholarly inquiry." J. Nesteruk, Conceptions of the Corporation and the Prospects of Sustainable Peace, 35 Vand. J. Transnat'l L. 437 (2002).
[3] As stakeholder thinking has developed, its nature (*i.e*., descriptive, normative, and/or instrumental) has been widely discussed and debate. See T. Donaldson and L. E. Preston, The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications, 21 Acad. Mgmt. Rev. 65 (1995). For development of particular dimensions, see, for example, T. M. Jones, Instrumental Stakeholder Theory: A Synthesis of Ethics and Economics, 20 Acad. Mgmt. Rev. 404 ; K. Gibson, The Moral Basis of Stakeholder Theory, 26 J. Bus. Ethics 245 (2000); R. E. Freeman, The Politics of Stakeholder Theory: Some Future Directions, 4 Bus. Ethics Q. 409 (1994).
[4] It can be argued that capitalism has a moral component. A number of scholars have explored the connection between capitalism and morality. See, for example, N. E. Bowie, A Kantian Theory of Capitalism, Special Issue #1 Bus. Ethics Q., Ruffin Series 37 (1994); T. L. Fort and C. A. Schipani, Corporate Governance in a Global Environment: The Search for the Best of All Worlds, 33 Vand. J. Transnat'l L. 829 (2000).

enterprises in contributing to sustainable peace, this Article offers a stakeholder-based approach as a viable metaphor for business.[5]

Although stakeholder thinking has frequently been construed to be in conflict with the legal principle of shareholder primacy,[6] there are indications that stakeholder thinking does not inherently conflict with the law.[7] The purpose of corporate law is to protect the investment of shareholders and to guard their potential profits. Stakeholder thinking does not inherently challenge the rights of shareholders as residual claimants.[8] On the contrary, arguments in favor of stakeholder management hold that stakeholders in general, including shareholders, benefit from such an approach.

This first section of this Article deals with stakeholder theory and the law. It begins by confronting and resolving perceived conflicts between stakeholder thinking and the law. In Part I, this Article explores the role of law with regard to business enterprises such as corporations. The Article outlines the legal context and environment in which business enterprises operate and traces the rise of shareholder primacy. Part II then presents an overview of the development of thinking during the past 20 years, beginning with the 1984 publication of R. Edward Freeman's *Strategic Management: A Stakeholder Approach*.[9] This is followed by Part III, which endeavors to bridge the gap

[5] There are several alternative metaphors for business. T. L. Fort and J. J. Noone, Banded Contracts, Mediating Institutions, and Corporate Governance: A Naturalist Analysis of Contractual Theories of the Firm, 62 Law & Contemp. Prob. 163 (1999).
[6] See, *e.g.*, K. B. Davis, Discretion of Corporate Management to Do Good at the Expense of Shareholder Gain—A Survey of, and Commentary on, the U.S. Corporate Law, 13 Can.-U.S. L. J. (1988). According to Davis, "The bedrock principle of U.S. corporate law remains that maximization of shareholder value is the polestar of managerial decisionmaking." *Id*. at 8.
[7] D. G. Smith, The Shareholder Primacy Norm, 23 Iowa J. Corp. L. 277 (1998).
[8] For a discussion about residual claimants, see L. A. Stout, Bad and Not-So-Bad Arguments for Shareholder Primacy, 75 Cal. L. Rev. 1189 (2002).
[9] R. E. Freeman, Strategic Management: A Stakeholder Approach (1984).

between stakeholder thinking and the law and reveal that stakeholder thinking is consistent with and supportive of legal principles.

The second section of this Article endeavors to illustrate how stakeholder thinking leads to principles of corporate citizenship, and how corporate citizenship reveals roles for business enterprises and their stakeholders in contributing to sustainable peace. The story of the September 11 devastation of the World Trade Center in New York is then retold in Part IV.[10] Business ethics relies on storytelling to create connections between people and to provide models for behavior.[11] In this instance, the story is not of a single business enterprise, but of a community of business enterprises and stakeholders. Essential to this story are the roles of networks of stakeholder relationships in contributing to the recovery and rebuilding of downtown New York. In Part V, the Article connects lessons from September 11 to a broader model of corporate citizenship. Emphasis is placed on the movement toward a relational model, as opposed to the traditional hub-and-spoke model originally proposed by Freeman. Current approaches to stakeholder thinking have shifted the focus from the individual stakeholders to the interconnected stakeholder relationships that underlie and influence business enterprises. Finally, in Part VI, the Article concludes by linking corporate citizenship to sustainable peace. Business enterprises play an integral role in sustainable peace through their participation in the stakeholder networks that underlie their organizations and society in general.

[10] The purpose of this Article is not to ignore the other tragedies of September 11, including the plane crashes in Washington, D.C., and Pittsburgh, Pennsylvania, or to suggest in any way that they were not similarly horrific. Since this Article is not about terrorism in general, though, it focuses primarily on the impact of the events of September 11 on business enterprises in New York and their stakeholders.

[11] There is considerable support within business ethics scholarship for the development of storytelling and metaphors as teaching and learning tools. See, for example, A. C. Wicks, D. R. Gilbert and R. E. Freeman, A Feminist Reinterpretation of the Stakeholder Concept, 4 Bus. Ethics Q. 475 (1994).

PART I: LEGAL TREATMENT OF BUSINESS ENTERPRISES

In order to determine both the contribution and controversy of stakeholder thinking, it is important to view it within the context of the legal environment for business enterprises. In many ways, the treatment of business enterprises by the law has stemmed from their artificiality. Business entities are inherently "fictitious." State codes structure their incorporation and existence.[12] These codes provide for the issuance of stock to shareholders, who are considered the owners of the entities.[13] Managers are then designated to control operations in their interests. The relationship between managers and shareholders is considered fiduciary in nature. This has given rise to the notion of shareholder primacy—that managers are expected to pursue profit maximization. Economic thinking has also become increasingly popular within legal scholarship and jurisprudence.

While this is not necessarily true in other countries, where the legal infrastructure supports attention to a variety of stakeholders,[14] the tradition in the United States has been to assume that non-shareholder stakeholders are without rights. In fact, this is not entirely true. While non-shareholder stakeholders are given general protection, there is abundant legislation that specifies situations where stakeholder concerns actually trump

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[12] For a discussion of state control over corporations, see A. F. Conard, Corporations in Perspective (1976). According to Conard, it is a natural consequence of federalism. "[T]he effect of [the Constitution's] saying nothing," Conard asserted, "was to permit the states to continue granting corporate status under the doctrine of reserved powers." *Id*. at 6. Gregory A. Mark has argued that Conrad's account is overly simplistic. Mechanically, it is true that the doctrine of reserved powers legitimizes state control. There was, though, more going on "behind the scenes," so to speak. According to Mark, the system we have ended up with is not the natural result of federalism, but, in actuality, nothing more than an "accident" resulting from a web of contradictory and complementary "phenomena." G. A. Mark, The Court and the Corporation: Jurisprudence, Localism, and Federalism, 1997 Sup. Ct. Rev. 403 (1997), 406.

[13] For a general discussion that traces the development of corporate law and governance in the United States, see J. W. Hurst, The Legitimacy of the Business Corporation in the Law of the United States: 1780-1970 (1970). See also J. S. Davis, Essays in the Earlier History of American Corporations (1917).

[14] C. A. Schipani and J. Liu, Corporate Governance in China: Then and Now, 2002 Colum. Bus. L. Rev. 1 (2002).

shareholder concerns.[15] In addition, fiduciary law does not preclude managerial responsibilities to other stakeholders as well. In fact, convincing arguments can be and have been made that attention to multiple stakeholders can actually enhance overall profitability in the long term if not the short term as well.[16]

Legal treatment of shareholders and other stakeholders is influenced by a number of factors. The state codes that structure corporate organizations play a foundational role, as does our understanding and interpretation of fiduciary law. State and federal legislation and common law also serve to protect fundamental rights of general stakeholders. In addition, legal treatment of stakeholders is also heavily influenced by basic understandings of the role of the corporation, as explored, for example, through alternative theories of the firm. Economic interpretations of the firm have tended to myopically endorse shareholder primacy without regard for other stakeholders. Broader interpretations of the firm, which incorporate both its historical development and its increasingly expansive role in society, tend to allow for attention to the concerns of shareholders and other stakeholders.

A. Theories of the Firm

Theories of the firm—why it exists and what its nature is—have fascinated scholars, practitioners, and jurists for the past two centuries. They have explored the philosophical, social, political, and economic dimensions of corporate theory in a way

[15] See, for example, the Foreign Corrupt Practices Act, the Family and Medical Leave Act, and the Americans with Disabilities Act.

[16] Although arguments have been made that managerial responsibilities to stakeholders are multifiduciary in nature, that is not the argument here. See, for example, R. E. Freeman, The Politics of Stakeholder Theory: Some Future Directions, 4 Bus. Ethics Q. 409 (1994).

that has proved both engaging and provocative.[17] Interestingly, no single, authoritative, comprehensive account of the corporation has emerged. Instead, multiple theories coexist. It does appear, though, that contractual views of the corporation are particularly popular within the legal community.[18]

It is important to place this within the context of the historical development of corporations. The corporate form was created by law, and then the theories developed retrospectively. Interestingly, many of the theories overlook the roots of the corporate form. While the corporation has become perceived as profit-generation tool for individuals, this is not actually how corporations were initially envisioned. Most of the early corporations were public utilities, and the corporate form was created to promote such services.

Morton J. Horwitz is credited with one of the more accepted accounts of the theories of the corporation. He contends that theory development has often actually followed case decisions. In his opinion, leading cases, such as *Santa Clara Co. v. Southen Pacific Railroad*, were not necessarily based on particular theories of the firm, but actually anticipated the theories they have been used to support.[19]

In "Santa Clara Revisited: The Development of Corporate Theory," he addressed the intellectual climate during various time periods in American history. Horwitz offered

[17] D. Millon, Theories of the Corporation, 1990 Duke L.J. 201 (1990). "While apparently metaphysical questions about 'the nature of the corporation' might strike one as vaguely continental and surely alien to our hard-headed, pragmatic legal culture, theorizing about 'what corporations are' has in fact occupied a great deal of home-grown mental energy and has played an important role in arguments about concrete questions of corporate law."

[18] Contractual theories of the firm have also emerged as significant within the field of business ethics. See, for example, T. Donaldson and T. W. Dunfee, Ties That Bind: A Social Contracts Approach to Business Ethics (1999).

[19] *Santa Clara Co.* v. *Southern Pacific Railroad*, 118 U.S. 394 (1886): "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does" (396).

his interpretation of the doctrinal origins of theories of the corporation through a step-by-step history of the evolution of the traditional theories of the corporation.[20] He tackled the puzzling and complex *Santa Clara* case, and demonstrated how it has been misinterpreted.[21] Whereas it has often been credited with the birth of the natural entity theory, Horwitz asserted that it was roughly a decade after the *Santa Clara* decision before the natural entity theory emerged, and it was only then that *Santa Clara* began to stand for the establishment of dramatically new constitutional protections for corporations as a result of their "legal personhood."[22] Numerous authors have subsequently relied upon Horwitz's account as they explored traditional theories further and delved into modern theories.[23]

While Horwitz's approach has proved useful in many ways, it suggests that the theories are temporally based, which is not entirely correct. The emergence of new theories has not caused the complete reversal of older theories. David Million has suggested that theories of the corporation can also be viewed according to the questions they confront.[24]

It can be argued that there are two general groups of theories of the corporation: the traditional theories and the modern theories. What distinguishes these theories is their

[20] M. J. Horwitz, Santa Clara Revisited: The Development of Corporate Theory, 88 W. Va. L. Rev. 173 (1985).

[21] "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does" *Santa Clara Co.*, *supra* note 49, at 396.

[22] Horwitz, *supra* note 20. "[T]he so-called 'natural entity' or 'real entity' theory of the corporation that the *Santa Clara* case is supposed to have adopted was nowhere to be found in American legal thought when the case was decided," Horwitz explains. "[T]hose who argued for the corporations as well as Supreme Court Justice Stephen Field, who decided in favor of the corporation in two elaborate circuit court opinions below, clearly had no conception of a natural entity theory of the corporation."

[23] See, for example, Millon, *supra* note 17.

[24] *Id.*

reliance on economic thought. There has always been controversy regarding the theoretical foundation for the corporation. Prior to the early 1900s, the focal points surrounded the philosophical, social, and political dimensions of the corporation. Then, in the early part of this century, a school of thought, called "law and economics," began to develop, which challenged traditional thinking. Accompanying this new school of thought were new theories of the firm. Modern economic theories of the corporation thus emerged that marked a radical departure from traditional thinking. The concerns that were most prominent in traditional theories are virtually inconsequential according to modern theories.

Traditional theories can be characterized by their focus on a certain set of interesting questions. According to these theories, it is the philosophical, social, and political dimensions of the corporation that serve to fuel the controversy: whether the corporation is natural or artificial, whether it is a separate entity or an aggregate, and whether it represents a public or private concern. One subset of the traditional theories questions the relationship between the corporation and law. Some people argue that the corporation is primarily a legal classification, whereas others contend that is rooted in private ventures unconnected to the law. Another subset aims toward defining what the corporation actually is. There is a view that the corporation develops into an entity of its own, separate from its members (such as shareholders).[25] Competing with this is the

[25] This is the "natural entity" theory of the firm. According to this view, the corporation is a natural entity, whose existence is defined by law, which exists as more than an artificial endeavor. Corporations engage in real activities with real consequences. Whereas "incorporation," the process through which a corporation is officially formed, is a legal process, the firm operating as a "corporation" establishes a presence in society and in the local community that often extends far beyond what the legal definition indicates. The argument is thus that corporations are "real" entities, which, regardless of their "fictitious" roots, develop independent identities that position them as legal "persons." Conard, *supra* note 12.

view that the corporation is merely the aggregate of its members.[26] A third subset challenges the public/private distinction. People who consider the corporation a "public" entity tend to acknowledge an array of rights and responsibilities (often dubbed "social" responsibilities) that people who consider the corporation a "private" entity tend to ignore. Whereas the first two types of theories explore the nature of the corporation, the third type attempts to determine the nature of corporate activity—what is appropriate or legitimate, and what is not.[27]

B. Law and Economics

Economic thinking has proved influential on the development of jurisprudence. The foundation of the legal approach to corporations is often traced back to the 1932 publication of *The Modern Corporation and Public Property*. In their seminal book, Adolf A. Berle and Gardiner C. Means underscore the problems that emerge as a result of the separation of ownership and control between corporate shareholder investors and corporate managers.[28] Self-dealing, for example, is an ongoing concern. In other words, since the managers are in charge of other people's money, it is important that they make decisions based on what is best for the investors, not themselves. Berle and Means have

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[26] The hallmark of this, the "aggregate entity" theory, is its refusal to admit the existence of a distinct corporate entity, except, perhaps, for that created by law. Robert Hessen, for example, contends that "[a] group or association is only a concept, a mental construct, used to classify different types of relationships between individuals." R. Hessen, In Defense of the Corporation (1979), 41. According to the "aggregate entity" theory, the corporation is merely the sum of its parts—nothing more, nothing less. Clearly, according to Michael Phillips, "If corporations are creatures of state law and nothing else, they almost certainly must be artificial, invisible, intangible, and fictional." M. J. Phillips, Reappraising the Real Entity Theory of the Corporation, 21 Fla. St. U. L. Rev. 1061 (1994), 1064.

[27] The fact that rights are attributed to the corporation as a separate entity, coupled with the growing body of corporate law, dedicated to the regulation of the corporate entity, serves to enhance the perception of the corporation as a "real entity." This is the "real entity" theory of the corporation. *Id.*

[28] A. A. Berle, Jr., and G. C. Means, The Modern Corporation and Private Property (1968).

thus opened the door to waves of literature exploring the ramifications of this separation, for shareholders, managers, and the corporation in general.[29]

At about the same time, economist Ronald Coase began an inquiry into the nature of the firm enterprise. His article, "The Nature of the Firm," published in 1937, called into question many of the assumptions of traditional economics, and suggested that the focus on external market transactions was misplaced.[30] According to Coase, it is the pricing mechanism associated with internal transactions that leads to the creation of firms. In other words, firms exist because it is more cost effective to combine efforts through a firm than to contract separately for everything.[31]

Economists since Coase have tended to lean toward one of two separate analytic traditions. Those following Coase, the "bargain model" theorists, assume the virtual absence of transaction costs in order explore the significance of different legal rules.[32] It

[29] The legal system plays an important role, according to Berle and Means, for both government and legal intervention are necessary in order to control the potential indiscretion of managers. More than 50 years after they first articulated their concerns, the legal theory that governs shareholder/manager relations, fiduciary law, is essentially the type of theory that Berle and Means call for. It emphasizes the private property interests of the shareholder investors, and asserts that the managers are obliged by law to protect those interests.

[30] R. H. Coase, The Nature of the Firm, 4 Economica 386 (1937). See also R. H. Coase, The Problem of Social Cost, 3 J. Law & Econ. 1 (1961).

[31] Coase steals from us the refuge of traditional "fairness" and causation in dealing with conflicts that arise. He instead leaves us to look for the "cheapest cost avoider." It does not matter, according to Coase, who is culpable. Instead, he focuses on how the situation can most easily be rectified. The goal is to have parties bargain between themselves. They are best situated to value their own benefits and harms and reach a compromise to at least mitigate some of the resulting harm. In many cases, the court recognizes the reciprocal nature of the problem—that both parties are in risk of harm—and, at least at times, will place the burden of liability upon the party that is in the best position to afford it, to encourage that party to bargain with the other party.

[32] See, for example See, for example, A. A. Alchian and H. Demsetz, Production, Information Costs, and Economic Organization, 62 Am. Econ. Rev. 777 (1972). Although Alchian and Demsetz follow in the tradition of Coase in their questioning of traditional assumptions about the nature of the firm, they challenge his contention that the price mechanism and competition were characteristics present in markets but not in firms. They do not see meaningful differences between intra-firm and extra-firm economic principles. They therefore paint a picture of the firm that draws parallels between what Coase sees outside the firm and what they see inside. Alchian and Demsetz argue that the firm, itself, has no separate existence. Corporations have "no power of fiat, no authority, no disciplinary action." Parties are considered rational, self-interested economic actors, who often exhibit conflicting interests, even though all

is the interplay of the rules in the initial bargaining environment that intrigues these theorists.[33] The "transaction cost" theorists, on the other hand, are concerned with the initial bargaining environment itself. It is their contention that it is not possible to allocate all possible risks at the time of contracting.[34] Their goal lies in the pursuit of

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parties are considered to be motivated by the pursuit of wealth maximization. The contracts between these parties represent instantaneous exchanges that are the result of choice and compromise, in the face of both competition and relative uncertainty. Alchian and Demsetz have thus been credited with laying the foundation upon which the notion of a managerial corporation has been built. They are considered to have originated the view of the corporation as a "nexus of contracts." See also W. W. Bratton, Jr., The New Economic Theory of the Firm: Critical Perspectives from History, 41 Stan. L. Rev. 1471 (1989); J. H. Barton, The Economic Basis of Damages for Breach of Contract, 1 J. Legal. Stud. 277 (1972); A. T. Kronman, Mistake, Disclosure, Information, and the Law of Contracts, 7 J. Legal Stud. 1 (1978); Priest, Breach and Remedy for the Tender of Nonconforming Goods Under the Uniform Commercial Code: An Economic Approach, 91 Harv. L. Rev. 960 (1978); Commentaries on Corporate Structure and Governance, in (D. E. Schwartz ed., 1979).

[33] See M. C. Jensen and W. H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ. 305 (1976). While Alchian and Demsetz model applies to private ownership, the Jensen and Demsetz identify the consequences of public ownership. In addition, whereas Alchian and Demsetz explore the nature of management, Jensen and Meckling focus on corporate governance and emphasize the financial implications of firm operations. Jensen and Meckling introduced the financial model that has provided the basis for further development of "law and economics" and the contractual theory of the corporation. They argue that the external dynamics of firm activities are similar to the firm's internal dynamics. Jensen and Meckling contend that managers serve as agents for the shareholders. They are thus responsible for making decisions that have direct consequences on the shareholders' interests. Unity of control and ownership is not necessary for efficient and effective firm performance, according to Jensen and Meckling. See also H. N. Butler, The Contractual Theory of the Firm, 11 Geo. Mason U.L. Rev. 99 (1989), 108.

[34] See F. H. Easterbrook and D. R. Fischel, The Corporate Contract, 89 Colum. L. Rev. 1416 (1989); F. H. Easterbrook and D. R. Fischel, The Economic Structure of Corporate Law (1991). Easterbrook and Fischel have been lauded as the foremost architects of the contractual interpretation of the corporation. See W. W. Bratton, The Economic Structure of the Post-Contractual Corporation, 87 NW. U. L. Rev. 180 (1992). Whereas those before them introduced the "nexus of contract" idea, they are responsible for laying out the particulars of a contractual approach to contract law, first in their 1989 article, "The Corporate Contract," followed subsequently by their more comprehensive 1992 book, *The Economic Structure of Corporate Law*. Easterbrook and Fischel underscore the contract metaphor as a new way of analyzing corporations and corporate law. They argue that corporations, a subset of firms, represent a myriad of freely bargained contractual arrangements. They are careful, in using such a metaphor, though, to distinguish the corporate view of contract from other views, such as the political view. "We often speak of the corporation as a 'nexus of contracts' or a set of implicit and explicit contracts," Easterbrook and Fischel assert. "This reference, too, is shorthand for the complex arrangements of many sorts that those who associate voluntarily in the corporation will work out among themselves. The form of reference is a reminder that the corporation is a voluntary adventure, and that we must always examine the terms on which real people have agreed to participate." According to Easterbrook and Fischel, what distinguishes corporate contracts, and the contract theory as applied to corporations, is that corporate contracts are real. "The corporate venture has many real contracts," they explain. "The terms present in the articles of incorporation at the time the firm is established or issues stock are real agreements. Everything to do with the relation between the firm and the suppliers of labor (employees), goods and services (suppliers and contractors) is contractual." The contribution of Easterbrook and Fischel has thus been fundamental. They join two

ways to reduce the transaction costs in complex contraction relationships (*i.e.*, relational contracts).[35]

While these approaches are admittedly different, together they comprise the bringing together of law and economics in a way traditionally considered inappropriate. Whereas law and economics have traditionally been considered at odds, the field of "law and economics," which has gained increasing acceptance during the past few decades, has set a new course for a great deal of legal scholarship and decision-making. It has laid the foundation for a new, contractually based, economic theory of the corporation, which has, in turn, influenced both legislation and jurisprudence.

C. Fiduciary Law and Managerial Decision-Making

The separation of ownership and control in business enterprises dates back to Berle and Means and has lead to the development of fiduciary law.[36] Since managers

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previously disparate fields—law and economics—in a way that has proved influential in both legal analysis and legal construction. They do not entirely supplant corporate law, but they do redefine its scope, for, according to Easterbrook and Fischel, "The corporation is a complex set of explicit and implicit contracts, and corporate law enables the participants to select the optimal arrangement for the many different sets of risks and opportunities that are available in a large economy." Easterbrook and Fischel, The Corporate Contract, 1418.

[35] See, for example, V. P. Goldberg, Regulation and Administered Contracts, 7 Bell J. Econ. & Mgmt. Sci. 426 (1976); I. R. Macneil, Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law, 72 NW. U. L. Rev. 854 (1978); O. E. Williamson, The Economic Institutions of Capitalism: Firms, Markets, Relational Contracting (1987). See C. J. Goetz and R. E. Scott, Principles of Relational Contracts, 67 Va. L. Rev. 1089 (1981). According to the traditional model of contracts, people engage in contractual relationships in order to benefit from mutual cooperation. They make exchanges, of products or services, for example, in order for mutual benefit. Such exchanges are not without expected risks, but those risks are expected and, therefore, assumed to be incorporated into the bargaining process—either specifically by the bargaining parties or generally by legal rules or prescriptions. Goetz and Scott argue that there are some types of contractual relationships that are not covered by the traditional model. These contracts, so-called "relational" contracts, are unusual in both their duration and degree of interactivity. This translates into greater uncertainty and unpredictability with regard to the risks. Future contingencies are not easily anticipated. "Not surprisingly," Goetz and Scott point out, "parties who find it advantageous to enter into such cooperative exchange relationships seek specially adapted contractual devices." *Id*. at 1090.

[36] Berle and Means, *supra* note 28.

make decisions that affect the profitability of the stock owned by shareholders, managers are considered to have fiduciary responsibilities to those shareholders. Managers are expected to make decisions in the interest of shareholders, not for personal gain.

According to fiduciary law there are certain relationships, based on trust, which place one person, or entity, in control over the interests—usually, though not always, financial—of another person or entity.[37] These relationships are called "fiduciary" relationships.[38] While contracts, or agreements of some sort, often lay the groundwork for these sorts of relationships, there is little, if any, direct attention paid to spelling out many of the relevant rights and responsibilities. Fiduciary law operates as something "stricter than the morals of the market-place," said Judge Cardozo in *Meinhard* v. *Salmon*, because it involves "the punctilio of an honor the most sensitive."[39]

Fiduciary relationships emerge in situations where financial interests are at stake. "The term 'fiduciary' itself was adopted to apply to situations falling short of 'trusts,' but in which one person was nonetheless obliged to act like a trustee," explained Deborah A. DeMott.[40] In fiduciary relationships, owners of the interests benefit or suffer from the consequences of the decisions made by fiduciaries, but remain mere beneficiaries without any control over the specific decisions made with regard to their interests. Fiduciaries are not beneficiaries of the interests, or funds, they are charged with protection of *another's* interests. As Victor Brudney pointed out, "The essence of a fiduciary relationship is that the fiduciary agrees to act as his principal's alter ego rather than to assume the standard arm's length stance of traders in a market. Hence the fiduciary is not armed with the

[37] For a general overview of fiduciary law, see, for example, G. Hertig, Corporate Governance in the United States as Seen from Europe, 1998 Colum. Bus. L. Rev. 27 (1998).
[38] See generally, T. Frankel, Fiduciary Law, 71 Cal. L. Rev. 795 (1983).
[39] *Meinhard* v. *Salmon*, 249 N.Y. 458, 464, 164 N.E. 545 (1928) at 546.
[40] D. A. DeMott, Beyond Metaphor: An Analysis of Fiduciary Obligation, 1988 Duke L.J. 879 (1988).

usual wariness that one has in dealing with strangers; he trusts the principal to deal with him as frankly as he would deal with himself—he has bought candor."[41]

In the corporate setting, "fiduciary" is the label often given to the relationship between corporate shareowners and the corporation (*i.e.*, officers, directors, and managers).[42] People and entities invest in corporate activities through the purchase of shares. Their purchase, or investment, is accompanied by a loss of control, though. Although the motivation for such investment is generally profit, there is nothing in the purchase agreement that guarantees that the investment will earn a profit. "Treating managers and directors as fiduciaries provides an effective mechanism for imposing sanctions when management fails to exercise its responsibilities to the corporation properly," Carol B. Swanson asserted. "This is tantamount to replacing supervision with deterrence."[43]

This is where, and why, fiduciary law steps in to govern the relationship. Duties of care and loyalty emerge in the corporate setting as restraints upon managerial behavior. Corporate profits do not belong to the managers—they belong to the shareowners. These duties thus compel managers (1) to conduct business in such as way

[41] V. Brudney, Contract and Fiduciary Duty in Corporate Law, 38 B.C. L. Rev. 595 (1997).
[42] Fiduciary law affords shareholders "fair expectations." M. A. Eisenberg, The Structure of Corporation Law, 89 Colum. L. Rev. 1461 (1989). For a general discussion of fiduciary law as it operates in the corporate setting, see L. E. Mitchell, Fairness and Trust in Corporate Law, 43 Duke L.J. 425 (1993).
[43] C. B. Swanson, Corporate Governance: Sliding Seamlessly into the Twenty-First Century, 21 J. Corp. L. 417 (1996). See also J. C. Coffee, Jr., Court Has a New Idea on Directors' Duty, Court Has a New Idea on Directors' Duty, Mar. 2, 1992). The leading decision in Delaware is *Revlon, Inc.* v. *MacAndrews & Forbes Holdings Inc.*, 506 A.2d 173 (Del. 1986) (1986). See also *Simons* v. *Cogan*, 549 A.3d 300 (Del. Supr. 1968); *Hartford Fire Ins.* v. *Federated Dept. Stores*, 728 F. Supp. 976 (S.D.N.Y. 1989); *Metropolitan Life Ins. Co.* v. *RJR Nabisco Inc.*, 716 F. Supp. 1504 (S.D.N.Y. 1989). Some decisions suggest that directors normally own duties to creditors as well as shareholders. See, for example, *Armstrong Manors* v. *Burns*, 14 Cal. Rptr. 335 (1941); *Fox* v. *MGM Grand Hotels*, 187 Cal. Rptr. 141 (Cal. App. 1983). For an overview, see W. W. Bratton, Jr., The New Economic Theory of the Firm: Critical Perspectives from History, 41 Stan. L. Rev. 1471 (1989).

that contributes toward increasing these profits, and (2) not to use corporate profits to serve personal purposes, or the purposes of anyone other than shareowners.

Fiduciary law is currently confronting general challenges regarding whether it serves as an appropriate vehicle within the context of corporate law. Fiduciary law is intrinsically linked to notions of morality. Many contractarians thus argue against the continued reliance on fiduciary principles in the corporate setting. They believe that the purpose of corporate law is merely to interpret the underlying contractual relationships and enforce them. "Regarding the fiduciary duties owed by corporate managers to the corporation and its investors, it was entirely predictable that the Contractarians advocate that society should have no corporate fiduciary principles," Rutherford B. Campbell, Jr., explains. "Rather, the Contractarians argue that we are better off if society stays out of the entire matter and leaves private parties (*i.e.*, corporate managers and investors) free to contract as they see fit regarding fiduciary duties."[44] Viewing the role of corporate law in such a way renders fiduciary law virtually irrelevant with regard to corporations.

In spite of questions and criticism from numerous perspectives, fiduciary law continues to guide fundamental assumptions about appropriate managerial decision-making. It delineates the scope of managers' relationships with shareholders and assigns particular rights and responsibilities that are recognized and enforced by the legal system. Fiduciary law does not necessary preclude stakeholder thinking, though, for it can be argued that responsible managers pay attention to stakeholder concerns in order to protect shareholders. It is only narrow, myopic interpretations of the fiduciary responsibilities of

[44]R. B. Campbell, Jr., Corporate Fiduciary Principles for the Post-Contractarian Era, 23 Fla. St. U. L. Rev. 561 (1996).

managers that threaten the ability of business enterprises to fulfill their responsibilities to shareholders and other stakeholders as well.

D. Milton Friedman and Corporate Social Responsibilities

Although dialogue concerning corporate social responsibilities had existed since the earliest corporations emerged in the United States,[45] it was in 1970 that Milton Friedman, noted free-market economist, addressed the debate head on and provided on of the most often cited references for the shareholder theory of the firm.[46] Shareholder primacy is reflected in Friedman's "The Social Responsibility of Business Is to Increase Its Profits," which initially appeared in the *New York Times Magazine* on September 13, 1970, but which has subsequently been reprinted in a wide variety of sources.[47] Interestingly, while it was published in the popular press as a "news" article, it addresses, and is tenable to, both scholars and practitioners. It remains the leading encapsulation of the shareholder theory of firm management.

Friedman denounced discussions of the possible "social responsibilities" of business that had become popular by 1970. Practitioners and scholars had begun to explore the depth of managerial responsibilities. They contended that shareholders were not the only relevant parties, and that concerns were not purely financial. Friedman considered this absurd. First, shareholders, as the owners of the corporation, also own, or are entitled to, the corporation's profits. The managers of the corporation, working on

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[45] A legendary "debate" took place in an exchange of law review articles in the early 1930s. A. A. Berle, Jr., Corporate Powers as Powers in Trust, 44 Harv. L. Rev. 1049 (1931); E. M. Dodd, Jr., For Whom Are Corporate Managers Trustees?, 45 Harv. L. Rev. 1145 (1932); A. A. Berle, Jr., For Whom Corporate Managers are Trustees: A Note, 45 Harv. L. Rev. 1365.
[46] M. Friedman, The Social Responsibility of Business Is to Increase Its Profits, N.Y. Times Mag., Sept. 13, 1970, 1970).
[47] *Id*.

their behalf, as agents, are morally obliged to protect and pursue the interests of the owner-shareholders. According to Friedman, the interests of the shareholders are financial, so the obligation of managers must involve profit maximization. Second, Friedman argued that voluntary contractual relationships between productive constituents, such as employees, managers, customers, suppliers, and the local government, underlie corporate affairs. Each constituent is rewarded (paid) according to terms freely agreed upon. It is therefore implicit in this network of contractual arrangements that the profits are to be to supplied to the shareholders, just as products and services are supplied to customers, paychecks are supplied to employees, and so on.

In his article, Friedman questioned how "business," an inanimate object, can have responsibilities at all.[48] Further, since managers are employed by the shareholder-owners of businesses, their responsibilities must be to the owners. And since shareholder-owners invest in business to earn profits, the managers' responsibilities must translate into the maximization of those profits. The responsibility of managers, as agents appointed by business owners is, according to Friedman, "to conduct business in accordance with their [shareholders'] desires, which generally will be to make as much money as possible while conforming to the basic rules of the society, both those embodied in law and those embodied in ethical custom."[49]

Friedman acknowledged the temptation to attend to other concerns, "social responsibilities," but contended that such courses of action inevitably end up eroding corporate profits and therefore impinge upon the managers' primary responsibility to

[48] Friedman is clearly not alone is this thinking. An entire body of literature within business ethics addresses this very point in the discussion surrounding the moral status of the corporation.
[49] Friedman, *supra* note 46.

shareholders. In addition, Friedman argued that managers motivated by social responsibility end up spending other people's money toward inappropriate ends. For example, to refrain from increasing the price of a product in order to help keep down inflation translates into lower profits for shareholders. While keeping inflation down is arguably a noble goal, it does not make it the place of managers to take steps that might contribute toward such a goal at the expense of shareholder profits.

Interestingly, Friedman suggested that "social responsibility" is sometimes merely a "cloak" offered for legitimate business decisions. For example, a manager's decision to invest in a community (such as to offer education for potential employees) in order to provide for the long-term success of the business is easily justified, according to Friedman, on grounds other than actual "social responsibility." He suggested that references to "social responsibility," with regard to such decisions, translate into mere "window-dressing."[50] In no way do they suggest that there is a place for managers to be motivated by "social responsibilities."

Friedman concluded by underscoring the major thrust of his argument, regarding shareholder primacy—that managers are, first and foremost, responsible for generating corporate profits. "[T]here is one and only one social responsibility of business," he asserts, "to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game, which is to say, engages in open and free competition without deception or fraud."[51]

Although Friedman articulated a strong argument regarding the importance of attending to shareholder concerns, he nevertheless failed to stifle efforts in support of

[50] *Id.*
[51] *Id.*

corporate social responsibilities in scholarship or in practice. Part of the reason for this is that he did not account for the interconnected stakeholder relationships that underlie business enterprises and must be recognized and managed for sustainable success.

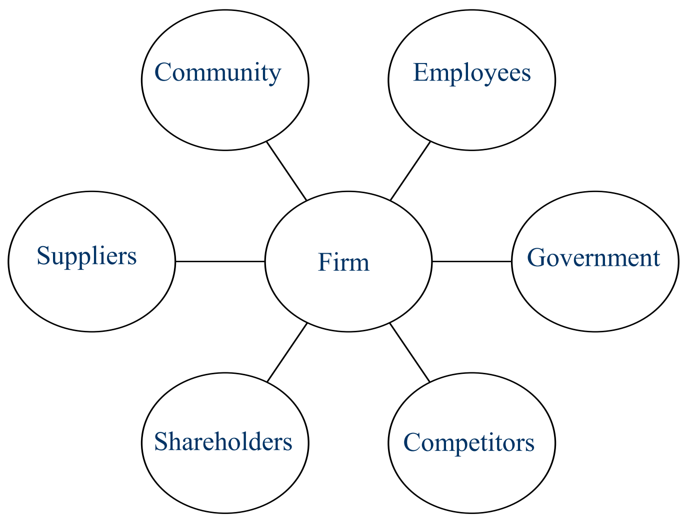
PART II: STAKEHOLDER THINKING

In spite of Friedman's argument, the role of the manager and the place of the corporation in its larger social and communal context continues to be questioned. Stakeholder thinking provides one vehicle through which social responsibilities are recognized and shareholder primacy as a guiding principle is challenged.

Stakeholder thinking was initially recognized by the business ethicists in the mid-1980s; it has since become a model upon which many businesspeople rely. It signifies the recognition that the corporation has responsibilities to people or entities in addition to shareholders. Although there are different types of stakeholder "theories" within the general stakeholder thinking "genre," the basic shared premise is that there are numerous people or entities that have "stakes" in the affairs of the firm—*that affect or are affected by firm decisions*—and that they, therefore, have some sort of rights and responsibilities vis-à-vis their stakeholder relationships with firms and each other. Stakeholder theories thus identify these people or entities (*e.g.*, the firm, managers, employees, customers, suppliers, communities) and explore the normative relationships between them.

A. Traditional Stakeholder Thinking

In 1984, in *Strategic Management: A Stakeholder Approach*, Freeman challenged traditional principles of management by suggesting that shareholder interests should not be treated as supreme, but should instead be considered as part of a broader web of stakeholder interests. According to Freeman, firms have equivalent moral responsibilities to stakeholders in general (individuals or entities who affect or are affected by firm operations). Although Freeman was neither the first person to coin the term "stakeholder" nor the only opponent of shareholder primacy, he served as a catalyst for increased and ongoing dialogue and debate regarding managerial responsibilities.



The stakeholder concept did not emerge in a vacuum. Even before the word "stakeholder" began to appear in the popular press or scholarly literature, there was considerable conversation about and support for the idea that a corporation has obligations beyond its traditionally-accepted fiduciary obligations to shareholders.[52] Once the term gained popularity, scholars began applying the stakeholder model to a wide range of situations. Indeed, it has become the primary model for corporate social responsibility and its potential is still being explored.

[52] The fiduciary obligation of managers to shareholders reflects traditional understanding of business. In American law it is contained in the legally protected and enforced "duty of care."

The original stakeholder model proposed was a hub-and-spoke model, which placed the firm in the center of a set of bilateral relationships. In this way, the firm was transformed from an entity on paper into a multidimensional enterprise whose activities had tangible consequences.

Stakeholder thinking generally aims to dispel a few common misunderstandings. The first common misunderstanding that stakeholder thinking attacks is that shareholder*s* are the only legitimate claimholders, or stakeholders. This fallacy encompasses the traditional assumption that a financial investment (*e.g.*, through stock ownership) is necessary to ground a claim on the firm. On the contrary, evidence suggests that individuals and entities other than shareholders have legitimate claims on the firm. Employees, customers, suppliers, the community, and so on, all have legitimate claims as a result of their relationship with the firm. Employees, for example, invest in firms through labor, commitment, and loyalty. Stakeholder thinking thus establishes the presence of multiple legitimate stakeholders.

Stakeholder thinking also dispels the common misunderstanding that shareholders and their interests are primary. Traditional fiduciary law and corporate law identify shareholder interests. It is true that managers are barred from behaving in fiscally irresponsible manners, so as to interfere wrongfully with firm profitability and shareholder returns, but this is not to say that these are the manager's only concerns. Managers have overriding responsibilities to other stakeholders, many of which are codified in federal and state legislation, which define and assert a number of non-shareholder stakeholder concerns, and protect them from managers willing to pursue pure profit maximization at the expense of non-shareholder stakeholders. For example, consumer protection laws, labor and safety laws, and environmental laws offer protection to a host of stakeholders. Indeed, extensive legislation actually prioritizes the interests of *non*-shareholder-stakeholders and demonstrates that shareholder interests are *not* inherently primary. Shareholder-stakeholder and non-shareholder-stakeholder concerns are both treated as significant, with neither given inherent preference.

Finally, stakeholder thinking is now moving toward recognition of the complexity of the stakeholder network. While early versions of the stakeholder model depict bilateral relationships, it is important to recognize that stakeholder relationships are not *only* bilateral. In actuality, stakeholder relationships are networked and interrelated. Stakeholders have relationships with one another, as well as with the firm, and these relationships affect one another. Firms, for example, have bilateral relationships with suppliers, employees, communities, and so on. As it turns out, while it is useful initially to view the core bilateral relationships, they do not tell the whole story, because of the interconnectedness of the multiple, overlapping stakeholder relationships.

B. Stakeholder Relationships

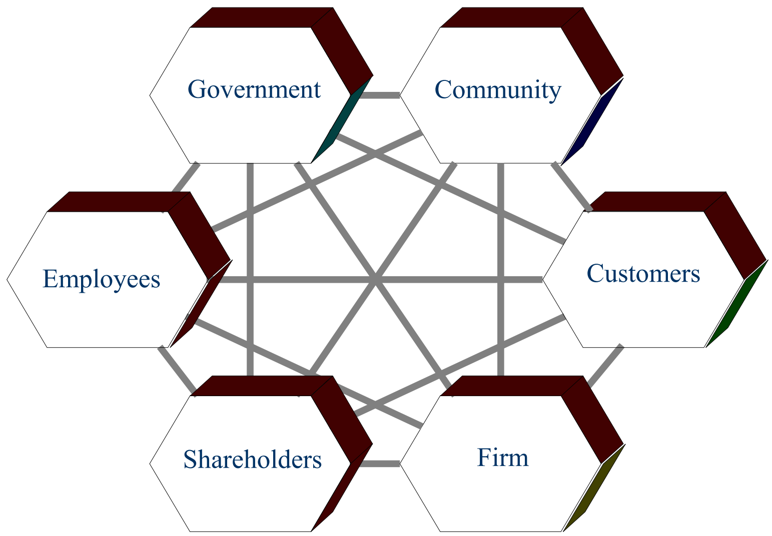
Stakeholder thinking underscores the lack of integration of business and law, for, while it addresses business operations, it does so with little attention being paid to the role of law.[53] Underlying legal principles and legislation are assumed, but their consequences—particularly regarding stakeholder relationships—are rarely explored.[54]

[53] For instance, see Donaldson and Preston, *supra* note 3. Although Donaldson and Preston do not explore the ramifications of legislation on stakeholder thinking in detail, they do take note of relevant changes in the legal landscape.

[54] Although stakeholder relationships have been mentioned previously, there has been insufficient development of their importance with regard to the development of stakeholder management. C. L.

In spite of the occasional vague references, such as to "requirements of law,"[55] there have been few efforts aimed at exploring in depth the relationship between stakeholder thinking and its legal context, particularly with regard to how the law *supports* attention to stakeholders.[56]

The lens of the stakeholder model offers a useful vehicle for viewing firms in order to understand better the range of responsibilities firms have to others.



Bendheim, S. A. Waddock and S. B. Graves, Determining Best Practices in Corporate-Stakeholder Relations Using Data Envelopment Analysis: An Industry-Level Study, 37 Bus. & Soc'y 305 (1998).

[55] See, for example, A. B. Carroll and J. Nasi, Understanding Stakeholder Thinking: Themes from a Finnish Conference, 6 Bus. Ethics: Eur. Rev. 46 (1997). "This interest or stake might be manifested as a legal or moral claim on the organization. Legal stakes are established by the accepted legal system extant in a country" (72). See also A. B. Carroll, Business and Society: Ethics and Stakeholder Management (1993). "This right might be a legal right to certain treatment rather than a legal claim of ownership such as that of a shareholder. Legal rights might include the right of due process (to get an impartial hearing) or the right to privacy (not to have his or her privacy invaded or abridged). The right might be thought of as a moral right, such as that expressed by an employee" (60). In addition, see M. B. E. Clarkson, A Stakeholder Framework for Analysing and Evaluating Corporate Social Performance, 20 Acad. Mgmt. Rev. 92 (1995). "When there is no such legislation or regulation, an issue may be a *stakeholder* issue, but it is not necessarily a *social* issue. A test of whether an issue has become a *social* issue is the presence or absence of legislation or regulation" (103).

[56] But see E. W. Orts, A North American Legal Perspective on Stakeholder Management Theory, in Perspectives on Company Law (E. W. Orts ed., ed. 1997). See also R. Marens and A. Wicks, Getting Real: Stakeholder Theory, Managerial Practice, and the General Irrelevance of Fiduciary Duties Owed to Shareholders, 9 Bus. Ethics Q. 273 (1999). Orts, among a handful others, has addressed the relationships between stakeholder thinking and the law. More recently, Marens and Wicks have argued that standing legal principles, case precedent, and legislation do not inherently preempt stakeholder thinking. They also *suggest* that support for stakeholder thinking can be found in the law.

The reality is that the firm is not in the center of all pertinent relationships, and that relationships are not merely bilateral. In fact, the relationships that emerge out of firm operations are more accurately described as an interconnected web of relationships. A network model is thus more useful as a model, particularly when advancing principles of corporate citizenship. In such a model, the firm is itself a stakeholder of firm operations, and the firm stands opposite its stakeholders in relationships, just as they are in relationships with one another. It is the intermingling of all of these overlapping relationships that constitutes the operations of the firm.

C. Stakeholder Thinking vs. the Law

Until recently, stakeholder thinking has developed with only nominal reference to the legal environment in which businesses operate.[57] This is largely the result of traditional interpretations of fiduciary law and shareholder primacy, which ostensibly preclude attention to non-shareholder stakeholder concerns. This is starting to change, though. Although the structuring of corporate relationships, specifically with regard to shareholders and managers, has not officially been altered, managers, through skillful decision-making, have demonstrated that they can simultaneously attend to the concerns of both shareholders and other stakeholders. This is important, because managers are human beings, and, as such, they have natural moral inclinations. While the corporate entity is arguably fictitious, its effects on stakeholders are real. Although laws do not always coincide with our moral principles, they should leave room for us to adhere to our moral principles within the context of the law.

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[57] T. J. Radin, Stakeholder Theory and the Law, Dissertation, Darden, August 1999.

An interesting phenomenon occurred during the 1980s as we witnessed a subtle shift in legal thinking. Within a short period of time, more than half the states in the United States adopted so-called "constituency statutes."[58] These statutes—drafted in virtually identical language—expressly permit managers to consider the interests of certain "constituents" (stakeholders) during certain situations. Numerous scholars, both business and legal, have speculated about the influence of constituency statutes. Foremost among the legal scholars to recognize the relevance of this phenomenon was Eric Orts. He traced the stockholder/stakeholder controversy back to the Berle/Dodd debate of the early 1900s, which was only temporarily reconciled.[59] A number of scholars initially viewed constituency statutes as holding the potential for change in corporate practices.[60] While this may be true, such expectations have yet to be realized. In fact, the existence of such statutes has proved extremely controversial.[61]

Constituency statutes are arguably less important than what they represent, that is, a shift in legal thinking toward recognition that managerial decision-making governed solely by shareholder concerns is overly myopic. For example, if managers make

[58] M. Kelly, Laws Require Directors to Take Wider View on Takeover Offers, Star Tribune, Nov. 27, 1995). See E. W. Orts, Beyond Shareholders: Interpreting Corporate Constituency Statutes, 61 Geo. Wash. L. Rev. 14 (1992); T. L. Fort, Corporate Constituency Statutes: A Dialectical Interpretation, 15 J.L. & Com. 257 (1995); J. Biancalana, Defining the Proper Corporate Constituency: Asking the Wrong Question, 59 U. Cin. L. Rev. 425 (1990); J. J. Hanks, Jr., Playing with Fire: Nonshareholder Constituency Statutes in the 1990s, 21 Stetson L. Rev. 97 (1991); K. V. W. Stone, Employees as Stakeholders Under State Nonshareholder Constituency Statutes, 21 Stetson L. Rev. 45 .
[59] Berle, *supra* note 45; Dodd, *supra* note 45.
[60] See R. M. Hart and C. M. Degener, Non-Stockholder Constituency Statutes, N.Y.L.J., April 12, 1990). But see M. P. Dooley, Two Models of Corporate Governance, 47 Bus. Law. 461 (1992); L. E. Mitchell, A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes, 70 Tex. L. Rev. 579 (1992); R. S. Karmel, Implications of the Stakeholder Model, 61 Geo. Wash. L. Rev. 1156-1176 (1993).
[61] See, for example, L. J. Oswald, Shareholders v. Stakeholders: Evaluating Corporate Constituency Statutes Under the Takings Clause, 24 Iowa J. Corp. L. 1 (1998); S. M. Bainbridge, Interpreting Nonshareholder Constituency Statutes, 19 Pepp. L. Rev. 971 (1992); W. W. Bratton, Confronting the Ethical Case Against the Ethical Case for Constituency Rights, 50 Wash. & Lee L. Rev. 1449 (1993); G. v. Stange, Corporate Social Responsibility Through Constituency Statutes: Legend or Lie?, 11 Hofstra Lab. L.J. 461 (1994); C. Hansen, Other Constituency Statutes: A Search for Perspective, 46 Bus. Law. 1355 (1991).

promises to employees regarding long term employment, it is arguably morally wrong to break those promises in the interests of shareholders by allowing mass layoffs or a takeover that causes layoffs. In some states, this would actually constitute actionable harm to the employees. In fact, courts in many states are increasingly recognizing rights of employees linked to their reliance on workplace guarantees.[62]

The emergence of constituency statutes has provoked questioning of the disparity between how laws regulate business and how businesses actually operate.[63] While corporate laws do not protect non-shareholder stakeholders in general, the fact of the matter is that businesspeople generally do. It tends to be assumed that good managers consider stakeholder relationships in their short- and long-term decision-making, even though corporate law does not demand that they do so.

In addition, it is important to keep in mind the conscious steps taken to protect stakeholders through the passing of specific legislation (*e.g.*, environmental protection laws, consumer protection laws, employment laws, security laws, and so on). Such legislation plays an integral role in shaping the environment in which stakeholder relationships exist. Legislation often serves to bolster stakeholder claims, and it serves to trump shareholder primacy as a guiding principle in the situations where it operates. Indeed, various pieces of state and federal legislation actually create, sustain, and maintain many vital business-related operations and stakeholder relationships.

Further, it is essential to keep in mind the global nature of business. While each country is governed by its own laws, there are perceivable trends and countries often

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[62] [Werhane, 2003 [forthcoming] #143]. See Chapters 2 and 3 regarding exceptions to employment at will. See also T. J. Radin and P. H. Werhane, The Public/Private Distinction and the Political Status of Employment, 34 Am. Bus. L.J. 245 (1996).

[63] D. G. Smith, The Shareholder Primacy Norm, 23 Iowa J. Corp. L. 277 (1998). See also Donaldson and Preston, *supra*, note 3.

model legislation after one another. The Foreign Corrupt Practices Act, for example, long considered an anomaly, is now serving as a model for international legislation also directed toward the fight against corruption. It is also important to recognize that the American model is not necessarily the dominant model overseas, particularly in Europe and Asia, where non-shareholder stakeholders are specifically recognized.[64]

Corporate law is merely one legal vehicle through which corporations and stakeholders are regulated. Examination of other bodies of law, such as federal and state legislation, as well as the Constitution as it has been found to relate to corporations, reveals that shareholder interests and fiduciary responsibilities are not the only concerns that managers are required to consider. While corporate law might appear to show preference to shareholders, American law as a whole is consistent in many ways with stakeholder thinking.

PART III: STAKEHOLDER THINKING AND LAW: BRIDGING THE GAP

Shareholder primacy is no longer either a satisfying answer or an insurmountable obstacle to the challenges of managerial decision-making. The reality is that not all managerial decisions are about bottom line profitability. In addition, managerial decisions and determinations are not clear-cut, in either the short or long term. Indeed, many decisions involve investments in relationships that pay off only over time.

Corporations clearly serve societal roles beyond pure shareholder wealth-maximization, with the tempered support of both legislators and jurists. State and federal

[64] But see, regarding alternative approaches abroad, A. F. Conrad, Corporate Constituencies in Western Europe, 21 Stetson L. Rev. 73 (1991). See also A. A. Sommer, Jr., Defining the Corporate Constituency: Corporate Governance in the Nineties: Managers vs. Institutions, 59 U. Cin. L. Rev. 357 (1995).

legislation identifies and affords protection for competing concerns, and judges often sanction unconventional corporate activities, as long as they cannot be construed as causing direct interference with shareholder profits, by deferring to managerial discretion. The legal environment of business enterprises is not as unfriendly to stakeholder thinking as is frequently assumed.

A. History Revisited

In many ways it is somewhat ironic that traditional interpretations of the corporation treat it as an individual-based profit-making enterprise, for the corporate form was originally created as a contributor to the community. The purpose of most of the early corporations (at least through the middle of the 19th century) reinforced the image of the corporation as "artificial."[65] Few of the early firms were incorporated for purely private business objectives. On the contrary, early corporations tended to serve public roles. Many were charitable and municipal enterprises, others were privately-owned banking, insurance, and public utility entities.[66] In other words, like the legal system, early corporations tended to promote the general public welfare. The pursuit of incorporation for private, profit-making, purposes was initially viewed with suspicion. During the mid-1800s, there was fear that the presence of corporations threatened the economic balance of power.[67] Such concerns thus contributed to the passing of general incorporation statutes, which, in term, made incorporation more accessible and made them seem less discriminatory.

[65] D. Millon, Theories of the Corporation, 1990 Duke L.J. 201 (1990).
[66] Hurst, *supra* note 13.
[67] See Millon, *supra* note 65.

The gradual emergence of corporations as for profit enterprises caused the courts to determine what constitutes fair business practices. As the courts wrestled with what constitutes fair business practices, the court in 1909 confronted a situation where someone went into business in order to put someone else out of business.[68] The court held that this does not constitute a proper business purpose:

> Men cannot always, in civilized society, be allowed to use their own property as their interests or desires may dictate without reference to the fact that they have neighbors whose rights are as sacred as their own. The existence and well-being of society require that each and every person shall conduct himself consistently with the fact that he is a social and reasonable person. The purpose for which a man is using his own property may thus sometimes determine his rights.[69]

In other words, there is the expectation that business enterprises will reflect profit-generation as a goal. At the same time, the court also recognized the connectedness of business enterprises to other stakeholders, such as the community, and held that it was wrong for the community to be left without a service being provided as a result of unfair competition. While stakeholders are not given general rights within business enterprises, jurisprudence nevertheless reflects an implicit understanding that their concerns will not be completely ignored.

[68] *Tuttle* v. *Buck*, 107 Minn. 145 (1909).
[69] *Id.*

B. Rethinking Fiduciary Law

Current scholarship indicates that fiduciary law is not necessarily the "linchpin" of corporate law.[70] At the very least, it has been misinterpreted and applied more broadly than is warranted. According to Richard Marens and Andrew Wicks, fiduciary law does not inherently exclude attention to stakeholders other than shareholders. As Marens and Wicks accurately pointed out, the roots of the term go back to times when managerial indiscretion was feared. It is rooted, therefore, in an attempt to prevent managers from self-dealing, more than in an effort to distinguish between stakeholders and preclude attention to non-shareholder stakeholder considerations.

In addition, as Marens and Wicks explained, fiduciary duty is no longer only between managers and shareholders. In 1996, the Supreme Court in *Varity* v. *Howe* held that a corporation had breached its fiduciary duty to employees as a result of a fiscally irresponsible reorganization.[71] While, to date, this remains a somewhat isolated instance, it reflects changing attitudes. There is growing recognition that firms and their managers have a broader range of obligations than anticipated by fiduciary law as applied to shareholders.

The presence of fiduciary relationships does not preclude the existence of other stakeholder relationships. Focusing on shareholders, at the expense of other stakeholders, ignores the potential financial consequences of those relationships. It can be argued that, in order to fulfill fiduciary obligations in the interests of shareholder profitability, stakeholder relationships must be taken into account.

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[70] H. N. Butler and L. E. Ribstein, Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians, 65 Wash. L. Rev. 1 (1990).
[71] *Varity Corp.* v. *Howe*, 1016 Sup. Ct. 1065 (1996).

C. Corporate Personhood

"The 'corporation,' itself is born, lives and dies all by and upon paper," asserted Dean Edwin R. Latty. "What is wanted, then, is a statutory chart-blueprint to tell the decision-makers what they can do and how to do it—anything from a stock option to a merger."[72] While state corporate codes continue to treat corporations as fictitious entities, other areas of the law (particularly federal law) recognize corporations as legal persons with protected legal rights. Legal "personhood" has emerged, for the most part, during this century. Courts have gradually carved out specific rights and responsibilities to be attributed to and enforced for the corporation as a separate entity.

"Personhood," in American law, is not restricted to humans. While it is not officially limited by factors such as race, religion, or gender, personhood, at least according to American law, is limited by age. Minors (people under 18 years of age) are not considered responsible for their actions, in most instances—their parents (or guardians) are considered accountable for their behavior. This is generally the case, though there are exceptions. For example, some older minors are sentenced and punished as adults for serious criminal offenses. Minors, for example, are not bound by promises they make (*i.e.*, purchases). In addition, personhood is also limited by mental capacity. The American legal system provides a criminal defense for insanity. In theory, at least, mentally handicapped people are not able to conduct adequate moral reasoning, and, therefore, they cannot be punished as if they were. This is not to suggest that the American legal system necessarily handles diminished capacity properly, but that is

[72] E. R. Latty, Why Are Business Corporation Laws Largely "Enabling"? Cornell L.Q. 601 (1965).

another issue. What is relevant here is that American law does at least acknowledge the relationship between mental capacity and moral culpability.

While the legal and moral spheres intersect at places, they are not the same. Numerous legal regulations concern activities that, while they might not be socially productive or constructive, are not inherently immoral. According or protecting *legal* rights and responsibilities is, therefore, not necessarily linked to *moral* rights and responsibilities (though there is often some sort of relationship). The law is, arguably, a pragmatic guide or tool, while morality is about “right” or “good” behavior. The law does not necessarily aim at (traditionally understood) fairness, but at predictability and practicality. Contractual disputes, for example, are often not adjudicated according to who *deserves* the penalty or additional cost, but according to who can bear it more easily.[73]

It is the American legal system that identifies the corporation as a “legal” person, though admittedly “fictitious.” Treating corporations as legal “persons” thus allows the legal system to enforce rights and responsibilities for the corporation. In other words, the “corporation,” as a legal “person,” has become a “stakeholder,” in and of itself.

The duplicity of the corporation, as a stakeholder with its own concerns and as the intersection of multiple relationships between stakeholders with their own separate concerns, is underscored by the treatment of corporations by jurists. In deciding the cases that come before them, courts first determine whether a corporation is acting as legal person or is serving as mere umbrella for other stakeholders’ behavior.

[73] See, for example, Coase, *supra* note 30.

Basically, a legal person is someone (or something) subject to legal provisions. What is interesting is that a corporation can be considered a legal person with regard to some provisions, and not with regard to others. Although legal personhood is distinct from moral personhood, the considerations that go into determining whether a corporation is a moral person are relevant with regard to the determination of whether a corporation is a legal person.[74]

PROVISION	NATURE	RESULT
Art. I, @ 10, cl. 1	Impairment of Contracts	Corporations are protected. *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1810).
Art. III, @ 2, cl. 1	Diversity of Citizenship Jurisdiction	Even though the corporation is an "artificial" person, it is considered a citizen of the state where it is incorporated or presumed to have citizenship. *Marshall* v. *Baltimore & O. R.R.*, 57 U.S. (16 How.) 314 (1853); *Louisville, C. & C. R.R.* v. *Letson*, 43 U.S. (2 How.) 497, 557-58 (1844).
Art. IV, @ 2	Privileges and Immunities	Corporations are not protected. *Bank of Augusta* v. *Earle*, 38 U.S. (13 Pet.) 517 (1839).
1st Amendment	Freedom of Speech	Corporate *speech* is protected, although the corporation as *speaker* is not. *First Nat'l Bank* v. *Bellotti*, 435 U.S. 765 (1968).
4th Amendment	Unreasonable Searches and Seizures	Corporations are protected. *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186, 208 (1946); *Hale* v. *Henkel*, 201 U.S. 43 (1906).
5th Amendment	self-incrimination	Corporations are not protected. *Bellis* v. *United States*, 417 U.S. 85 (1974); *United States* v. *Kordel*, 397 U.S. 1 (1970); *Hale* v. *Henkel*, 201 U.S. 43 (1906).
5th Amendment	Double Jeopardy	Corporations are not protected. *United States* v. *Martin Linen Supply Co*., 430 U.S. 564 (1977).
5th and 14th Amendments	Due Process	Corporations are protected. *Grosjean* v. *American Press Co*., 297 U.S. 233, 244 (1936); *Minneapolis & St. Louis Ry*. v. *Beckwith*, 129 U.S. 26 (1889).
5th and 14th Amendments	Equal Protection of the Laws	Corporations are protected. Pembina Consol. Silver Mining & Milling Co. v. Pennsylvania, 125 U.S. 181 (1888); Santa Clara County v. Southern Pac. R.R., 118 U.S. 394 (1986).
14th Amendment	Privileges and Immunities	Corporations are not protected. *States* v. *Hague*, 307 U.S. 496, 514 (1939); *Western Turf Ass'n* v. *Greenberg*, 204 U.S. 359, 363 (1907).

[74] Identifying the corporation as a legal person does not indicate that it merits moral personhood as well. In fact, this is a topic that has been debated extensively. P. A. French, The Corporation as a Moral Person, 16 Am. Phil. Q. 207 (1979); M. G. Velasquez, Why Corporations Are Not Morally Responsible for Anything They Do, 2 Bus. & Prof. Ethics J. 1 (1983). Among the more persuasive arguments is that proposed by Patricia H. Werhane, that corporations are not moral persons, but are "secondary moral agents." P. H. Werhane, Persons, Rights, and Corporations (1985).

Jurists have confronted numerous questions regarding the applicability of constitutional provisions to corporations. In many instances, the courts have found that corporations *are* included among the legal persons intended to be protected (the court has already confronted a host of questions concerning the Constitutional status of the corporation). Rights and responsibilities attributed to corporations tend to correspond to the constitutional protections afforded to human persons. Corporations are not guaranteed protection *as* human persons, but they are afforded protection *similar to* human persons.

For example, courts have extended protection to corporations for behavior encompassed by the 1^{st}, 4^{th}, 5^{th}, and 14^{th} Amendments. The due process rights of corporations have been protected, as have been their rights to freedom from illegal searches and seizures. In addition, courts have determined that corporations have citizenship, even though they are not biological individuals. Where courts have refused to recognize the rights of corporations, it is regarding provisions such as double jeopardy and self-incrimination, where it would serve injustice, not justice, to treat corporations as legal persons. As persons, corporations are more than profit-making enterprises.

D. Allowances in the Law for Corporate Responsibilities

Most of the dialogue surrounding stakeholders and the law refers to the rights of stakeholders—*i.e.*, protecting them from harm. On the other side, there is also the perspective of the corporation's ability to make contributions for their benefit. Such contributions often take the form of corporate giving, also known as corporate philanthropy. Interestingly, a legal justification for corporate donations has been developed, which dates back to the 1930s. The institution of financial incentives (such as tax breaks) have provided a business-related purpose, and the First Amendment has been interpreted as empowering corporations to make corporate gifts.[75]

The purpose here is not to argue against corporate giving, which is the subject of much debate,[76] but to suggest that there are broader ramifications. If managers are allowed to funnel corporate funds into causes they deem appropriate, then it should also be appropriate for them to make similar decisions regarding other stakeholders—not just the recipients of gifts. It only makes sense that, within the context of permissible corporate giving, that managers not only be allowed but be expected to consider the array of stakeholders interests that affect and are affected by the operations of business enterprises.

Further, it is essential to keep in mind that stakeholders both affect and are affected by business enterprises. It can be argued that corporate giving enables firms to invest in stakeholders to provide for future returns. Corporate giving to causes such as arts and education programs, for example, help to enrich the community in which firms operate. This can lead to a stronger potential workforce from which to draw. This is only one example. The broader message is that corporate philanthropy, as a legally allowable choice for managers, indicates that the law is not antithetical to stakeholder thinking.

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[75] For an overview, see H. W. Smith, If Not Corporate Philanthropy, Then What?, 41 N.Y.L. Sch. L. Rev. 757 (1997).

[76] See, for example, V. Brudney and A. Ferrell, Corporate Speech and Citizenship: Corporate Charitable Giving, 69 U. Chi. L. Rev. 1191 (2002); J. L. Himmelstein, Looking Good and Doing Good: Corporate Philanthropy and Corporate Power (1997); J. E. Fisch, Questioning Philanthropy from a Corporate Governance Perspective, 41 N.Y.L. Sch. L. Rev. 1091 (1997); M. A. Eisenberg, Legal Conduct, Ethical Conduct, The Penumbra Effect, Reciprocity, the Prisoner's Dilemma, Sheep's Clothing, Social Conduct, and Disclosure, 28 Stetson L. Rev. 1 (1998)

E. Stakeholder Thinking and the Law

The reality is that stakeholder thinking does not conflict with the law as much as it can appear at first blush. First, there are short and long term consequences of decision-making.[77] Ignoring stakeholder concerns might not affect short-term performance, but it can have a serious negative impact on long-term performance. If we have not learned anything else from the experiences of such companies as Enron, Arthur Andersen, and, more recently, WorldCom, we should have learned that life catches up to you.[78] This is true for individuals, organizations, and society at large.

Second, life is complex.[79] This is what has often been overlooked during much of the traditional debate, which has focused on shareholders and other stakeholders as individuals or groups of individuals with regard for combined effects of their interaction. Complicated networks of stakeholder relationships underlie business enterprises and influence their performance. In addition, contrary to Freeman's original hub-and-spoke model, the firm is not in the center of all of those relationships.[80] Perhaps if the firm were, then shareholder primacy might make sense, but the reality is that numerous

[77] L. T. Hosmer, Moral Leadership in Business (1994).

[78] For a discussion of the impact of the Enron situation, see J. N. Gordon, What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections, 69 U. Chi. L. Rev. 1233 (2002). According to Gordon, "The Enron matter will prove to be a very important event in the history of American shareholder capitalism. Many of the important institutions were subjected to a stress test at a particular firm and the outcome was poor…. But Enron also reminds us that there is a problem that cannot be solved, but can only be contained, in the tension between imperfectly fashioned incentives and self-restraint." *Id*. at 1249-50. See also K. Y. Testy, Linking Progressive Corporate Law with Progressive Social Movements, 76 Tul. L. Rev. 1227 (2002); L. P. Q. Johnson, The Social Responsibility of Corporate Law Professors, 76 Tul. L. Rev. 1483 (2002); R. Ashford, Binary Economics, Fiduciary Duties, and Corporate Social Responsibility: Comprehending Corporate Wealth Maximization and Distribution for Stockholders, Stakeholders, and Society, 76 Tul. L. Rev. 1531 (2002); F. S. Kahn, Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud, and September 11, 2001, 76 Tul. L. Rev. 1579 (2002).

[79] A growing number of business scholars have started drawing upon scientific thinking, in domains such as physics (chaos theory), in order to emphasize the inherently complexity in life and business so as to train business practitioners to manage this complexity in order to use it to their advantage. See, for example, M. J. Wheatley, Leadership and the New Science (1992).

[80] Radin, *supra* note 57.

stakeholder relationships exist that affect operations over which the firm does not have control. Stakeholder thinking therefore enables business enterprises to remain dynamic. Paying attention only to shareholders limits the ability of managers to counter relationships that threaten its performance, and to recognize and develop relationships that can protect the firm over the long term.

Third, the law keeps itself in check. Corporate law is not the only legal constraint on managerial behavior. The presence of other checks and balances—such as the Constitution, judicial decisions, and state and federal legislation—indicates that managers' fiduciary responsibilities encompass protecting shareholder interests within the context of the broader legal environment.

Fourth, the law is dynamic. Changes take place, both through legislation and judicial interpretation, within our legal environment. While the foundational principles tend to remain constant, the interpretation and application of the law is an ongoing process, particularly as unanticipated events occurred. Take, for example, whistleblowing. The doctrine of employment-at-will does not anticipate the problems an employee will confront when he or she reports illegal activities taking place in the workplace. Judges and legislatures have thus intervened in order to provide protection for whistleblowers so that they do place their employment in jeopardy by participating in the enforcement of the law. In some instances, the law has to catch with morality. This is what is happening with regard to a number of stakeholders.

Fifth, human beings are moral beings. It can be argued that corporate law does not demand that managers ignore their moral intuitions. While managers are specifically forbidden from prioritizing their personal interests, it only makes sense that it is to be expected that managers will exercise their moral reasoning as part of their decision-making. Managers are hired because of their decision-making abilities—because of their skills and abilities and who they are as individuals.[81] To place upon them an intractable mandate of a sole guiding principle (shareholder primacy) simply does not make sense. If shareholder returns were the only consideration, then there would be a management algorithm, not a human manager, at the helm. The reality is that shareholder concerns are a subset of the broader category of concerns that managers must confront, and managers distinguish themselves according to their adeptness at balancing these competing concerns.

Sixth, shareholder primacy no longer provides a useful imperative for managers.[82] General expectations today are such that businesses will consider the concerns of an array of stakeholders—such as through fair employment practices, corporate giving to communities, and joint ventures among competitors. Such initiatives tend to address stakeholder concerns—they enhance the values of shares as well.

Bridging the gap between stakeholder thinking and the law is therefore not as complicated or imposing an endeavor as it might seem. On the contrary, through inspection of the law as a whole (beyond state-dictated corporate law), respect for history, and recognition of ongoing developments within the law, stakeholder thinking and the law are in many ways consistent and supportive of one another.

[81] With regard to people as individuals, or "particularized others," see S. Benhabib, The Generalized and the Concrete Other, in Women and Moral Theory (S. Benhabib ed., ed. 1989); S. Benhabib, Situating the Self: Gender, Community, and Postmodernism in Contemporary Ethics (1992).
[82] D. G. Smith, The Shareholder Primacy Norm, 23 Iowa J. Corp. L. 277 (1998).

PART IV: SEPTEMBER 11, 2001

The ripple effect of the devastation caused by the tragedy of September 11 has extended beyond the perimeter of downtown New York and has affected the lives of a wide constellation of stakeholders—not only shareholders and victims. The events of September 11 have also had an impact on employees, competitors, business partners (suppliers, distributors, and so on), the environment, and the community in general. As many downtown New York firms endured severe physical and psychological distress, the concerted and combined effort of multiple stakeholders vastly aided recovery process progressed.

A. That Day

The collapse of the towers took with them both lives and businesses. Global investment firm Morgan Stanley occupied roughly a fourth of the floors in the two towers. The towers were also home to such firms as international legal conglomerate Sidley Austin Brown and Wood, broker-dealer Cantor Fitzgerald, and Chicago-based futures and options trading firm, Carr Futures. Not all of the firms were American, though. Some 20 Japanese firms had offices in the Twin Towers of the World Trade Center. In addition, the concourses and lobbies of the buildings were lined with shops—everything from florists and gift shops to Ben and Jerry's. As the buildings crumbled, so disappeared the livelihoods, hopes, and dreams of thousands of businesspeople, along with all of the physical evidence and records that business transactions and negotiations had ever taken place there.

Even businesses not directly hit by the attack forced to remain closed for days and weeks even. Another building in the World Trade Center, #7, which housed the investment bank Salomon Smith Barney, collapsed within the day and innumerable other offices suffered serious structural damage. The entire downtown New York landscape was permanently altered.

The tragedy at the World Trade Center was of a unique nature. It was not the first time the towers had been targeted and harmed. The problem was that, after the first bombing, the residents of the World Trade Center had developed a false sense of security, in that they were confident that harm could not be brought in through the front door—and it was not. Virtually no one anticipated an attack from outside.

In building the World Trade Center chief architect, Minoru Yamasaki, led a team of 14 architects who designed the buildings to be defensible against being hit by a plane. Because of their height, an accident was foreseeable to them. The buildings were thus designed like pipes, so that, were a plane to hit, it would travel through the building without bring the building down. The buildings were built roughly 30 years ago, though, when the Boeing 707 was the airplane with which to reckon—nothing of the size and impact of the Boeing 757s that tore into the World Trade Centers this September had been envisioned. In addition, no one foresaw the malicious intentionality of such a collision with two planes full of fuel. So, while in theory, the buildings were resistant to air attacks, in fact, they were quite vulnerable. In addition, as the fuel leaked to the cores of the buildings, they appeared to implode, and, as they did so, it shook the very foundation of buildings within neighboring blocks. In fact, as a result of the horrific catastrophe, including the physical damage as well as the gas leaks and power outages, New York south of 14^{th} Street, including the New York Stock Exchange, was, in an unprecedented event, closed for days.

The picture painted here is one that endeavors to depict some of the incredible, almost inconceivable, losses endured by the businesses that had populated lower Manhattan, primarily those in the financial district. It is, though, barely the tip of the iceberg. It was several days before the smoke over downtown New York even began to lift. While businesses are now operating again—many from satellite offices or new locations—things are not the same.

It is important to understand, or at least attempt to determine, the gravity of what happened to the people and their lives in order to begin to appreciate the importance of understanding the roles of the firms from that day onward. Records are gone, and people are missing, injured, and dead, but the firms still exist—even those without the support of home or branch locations. In fact, the presence and importance of these firms are arguably even greater in the wake of the tragedy, for it is now that their citizenship needs to be felt by the array of stakeholders who depend upon them.

In the months following the disaster, we continued to feel the effects of September 11. The American economy is recovering, but people, businesses, communities, and countries are still feeling the consequences. Many people, not just in New York, are out of work, and new jobs are not easy to find. Others are choosing to change their jobs. The firms formerly located in or around the World Trade Center not only lost valuable human assets as a result of the bombings, but they are losing additional employees who were prompted by the disaster to reconsider their employment choices, with regard to location, environment, and firm. Around the world firms are creating new policies and procedures, and they are forging new sorts of relationships to carry them forward.

B. Stakeholder Concerns

Although the notion of businesses as citizens is not new, it has gained momentum during the past several years and it is increasingly being viewed as a useful new paradigm for business. The view is that firms, like people, have responsibilities to the people and groups of people with whom they are involved. People have responsibilities based on their citizenship, which makes them subject to American laws. Although business firms do not acquire official citizenship, they are subject to American and international laws for a number of reasons, such as the process of incorporation. American and international individuals thus share with American and international business firms similar rights and responsibilities.

While there is an innumerable list of affected parties, the primary stakeholders are the firms themselves (and the airlines).[83] These firms wear a number of hats, so to speak, in that, while they are firms in and of themselves, they are also inter-networked in relationships that position them as neighbors in the World Trade Center, sometime competitors partners upon occasion, and peers.[84] Landlords in downtown New York are having trouble filling space.[85] Employers provided psychological counseling for people having trouble dealing with what happened. In addition, it is important to keep in mind

[83] K. L. Alexander and F. Swoboda, Boeing to Cut Up to 30,000 Jobs: Airlines, Hill Leaders Near Agreement on $17.5 Billion in Aid, Wash. Post, Sept. 19, 2001.
[84] A. Baldwin, Record Loss Leaves Wall Street Reeling: Dow Jones Drops Record 1,370.04 in Week, St. Louis Dispatch, Sept. 22, 2001.
[85] P. Grant, Landlords Let Compassion Trump Profits When Offering Space to Displaced Firms, Wall St. J., Sept. 19, 2001.

the clients/customers, employees, and families/friends of employees. All of these people are directly affected by what has happened.

With regard to employees, they can be divided into multiple groups. First, there is a line that can be drawn between the employees who were in the building and the employees who were not. Beyond that, there are the employees based in the affected office (*i.e.*, World Trade Center) and those that are not (for those businesses with multiple offices/branch locations). In addition, there are former employees, present employees, and future employees. Former employees often own stock or share in the pension plan. They, particularly those who have retired, and not just moved on to competitors or the like, also tend to hold an emotional attachment to the firm's reputation. Just as alumnae of schools often feel pride associated with their alma maters, retirees, as "alumnae" of firms, often feel similar emotions with regard to the firms where they worked.

The government is clearly another important stakeholder. If not for the rescue personnel dispatched by the government, the number of lost lives might be even greater. Regardless, these people risked, and many lost, their lives in order to try to get others to safety. Even though they were not able to prevent the collapse of the buildings, they helped get people to safety quickly and expeditiously. The government is also a stakeholder as a target of the incident, as a participant in recovery and restoration efforts, and as the moderator of public safety. Foreign governments are also significant stakeholders. Not only because of the foreign firms and people involved in the tragedy, but also because of the shared threat of terrorism.

Other firms, such as neighbors, competitors, and partners (*i.e.,* collaborators, distributors, and suppliers), were also stakeholders. They were all affected by what happened, and what was to happen, as a result of the tremendous losses felt by the business community—particularly the small mom-and-pop stores. The New York Stock Exchange, for example, while not directly hit, was nevertheless forced to close for days.[86] This created formidable economic challenges, both nationally and globally. Indeed, the widespread closings and the tremendous impact on people and lifestyle choices, such as travel and tourism, had serious, long-term economic ramifications on all businesses.

In addition, other charities also suffered in the consequences of September 11.[87] With no disrespect intended toward the tremendous losses felt, there are other important causes, and, as many contributions were redirected toward victims of September 11, other charities suffered.

What about the children?[88] An ongoing concern involves how to answer the questions of children. What do we want to teach them regarding what has happened, and how do we help them recover from the nightmare?

Finally, the community as a stakeholder cannot be ignored.[89] The global, national, local, and Internet communities were all affected by this tragedy. In the hours that followed the incident, websites emerged and web conversations developed that endeavored to reconnect friends and families. This was an event that touch people around the world—it was not isolated its reach.

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[86] C. V. Dusen, Financial World Tied to Trade Center, Atlanta Constitution, Sept. 12, 2001.
[87] L. Gubernick and A. M. Chaker, Charities Not Linked to Attack Victims Worry About a Decrease in Donations, Wall. St. J., Sept. 20, 2001.
[88] K. W. Arenson, Schools Offer Free Tuition To Children of the Victims, N.Y. Times, Sept. 22, 2001.
[89] J. E. Hilsenrath, Grief Commutes From 'Ground Zero' to Manhasset, Wall St. J., Sept. 17, 2001.

The complete array of stakeholder obviously encompasses a wider range than those listed here. The tourism industry, and the economy, are also stakeholders, as are the Palestinians, both in the Middle East and here. And, as painful as it is to remember, there were pockets of people in the United States, primarily from other countries, who took joy in the harm that came to the businesses and people in the World Trade Center. While theirs might not be a stake we wish to protect, it is, nevertheless, a stake to acknowledge, particularly if attempting to complete a full picture.

C. Role of Relationships

In 1984, Freeman identified terrorists as possible stakeholders of organizations, and for this he has received considerable criticism. It is possible to argue that the events of September 11 resulted from the reluctance to recognize the impact of business enterprises on terrorists. This is not to suggest that business practices should be compromised for the sake of vocal opposition, or that anyone should necessarily give in to threats and fear. Recognizing the effects of decisions on stakeholders empowers managers to anticipate and prepare for consequences. In this instance, recognizing the threat of terrorism might have prompted enhanced security measures or broader policy recommendations.

The importance of stakeholder relationships has emerged as a dominant theme, particularly in the wake of September 11. Multiple stakeholder relationship have been affected and built upon in order to provide for the recovery of downtown New York and the environs. Relationships between the community (volunteers) and the government, for example, have been integral to the rebuilding effort. These relationships include relationships that involve affected firms as well as relationships among their stakeholders, in which they are not directly involved. It is also mportant to note that many of the people involved in these relationships remained anonymous. People and organizations made contributions—often without identifying themselves. The volunteers in the brigade to look for survivors and remains received plentiful food and water, though they were rarely told from whom the gifts came.

A number of firms from all over the world have participated in the relief effort. Wall Street firms have collectively organized efforts, even though many are actually industry competitors.[90] Morgan, Lewis & Bockius, for example, a Philadelphia law firm, provided web support and collected donations for Cantor Fitzgerald, a client.[91] Many firms have contributed money to charities who have then redistributed the funds among victims.[92] Others offered office space, personnel, and supplies.

New York still suffers, and the affected, as well as the contributors to the recovery effort, continue to outnumber the direct victims. Michael Bloomberg, the Mayor of New York, has recently announced a plan to spread the tax burden among non-residents who work in Manhattan.

A number of individuals, firms, communities, and countries are contributing to the recovery effort—not all of whom are directly involved. Interestingly, a lot of decisions made were done so purely out of respect. *Newsday*, for example, a Long Island-based daily newspaper, voluntarily chose to refuse ads from funeral parlors in the

[90] E. Copulsky, Helping Hands: Wall St. Chips in to Care for its Own, N.Y. Post, September 15, 2001.
[91] J. Blumenthal, Phila. Firms Helping With Relief Efforts: Economy a Looming Concern, Phila. Firms Helping With Relief Efforts: Economy a Looming Concern, September 19, 2001.
[92] A. Kannapell, Keepers (and Disbursers) of the Country's Sudden Generosity, N.Y. Times, Nov. 12, 2001.

days following September 11, out of respect for the victims—*Newsday* did not want to take advantage of the tremendous losses.

In addition, September 11 was an international event, to say the least. Even so, it will still be months and years before downtown New York even starts to show signs of recovery. It is amazing to note the high levels of voluntary contributions, by individuals and groups, toward this effort. Separate relationships among a variety of stakeholders are what has enabled recovery to progress, and these relationships provide the link to sustainable peace.

PART V: BUSINESS ENTERPRISES, STAKEHOLDERS, AND CORPORATE CITIZENSHIP

The past several years have witnessed a trend in stakeholder thinking toward emphasizing the stakeholder relationships that influence businesses and communities, not only on a local or national level, but also on a truly global scale. The events surrounding the World Trade Center—those that led up to its destruction, as well as everything that has occurred since—emphasize the significance of relationships. In light of the increasing globalization of business, it is now incumbent upon managers to consider the international possibilities and effects of their activities.

It is important during this time to keep in mind that, while the magnitude of what has happened is arguably much larger than anything we have previously experienced, we do have models that can assist us in our thinking about business moving forward.

Numerous businesses, such as Malden Mills, for example, have gone through tragedies.[93] It is, therefore, important that we build relationships, not just between the stakeholders of the World Trade Center, but between what we are experiencing now and what has happened before. An underlying goal of this paper is thus to link our developing notion of international business citizenship with past and future business practices, so that we can appeal not just to scholarly ideals but to actual business decisions and business role models in the development of a theoretical model.

A. Malden Mills[94]

On December 11, 1995, a fire occurred at Malden Mills, a textile manufacturing plant in Lawrence, Massachusetts. The losses were tremendous. Three buildings were destroyed, 36 workers were injured, and the jobs of 3,000 employees were put in jeopardy in a small town that would not easily be able to absorb such a consequence.

CEO Aaron Feuerstein had a strong prior reputation in the community. Feuerstein had endeavored to support and save local businesses, had contributed toward the education of community members, and had generally improved life in the community. He had even extended lines of credit to local businesspeople. In the workplace, the employer-employee relationships were characterized by respect and dignity—employees felt valued. When the tables turned and Feuerstein confronted disaster, he had already invested in strong relationships with multiple stakeholders

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[93] R. R. Ulmer, Effective Crisis Management Through Established Stakeholder Relationships, 14 Mgmt. Comm. Q. 590 (2001).
[94] *Id*.

When Feurestein responded, he did so through the relationships he had developed. He worked with the media to identify his accountability, even though the situation was accidentally, and to create transparency—to communicate what had happened to the wide array of stakeholders. He continued to pay workers, even though they did not have facilities in which to work.

At the same time, the stakeholder relationships proved significant. The Chamber of Commerce developed a relationship with employees and other stakeholder through a hotline. In addition, community members united to set up an independent relief fund. Customers stood by loyally, and competitors also reportedly offered assistance. Feuerstein's prior investment in stakeholder relationships were instrumental in getting Malden Mills through this difficult time.

B. Other Business Practices

While the Malden Mills example is one of the more pronounced examples, it is not alone. In times of crises, and in day-to-day affairs, it is not uncommon for business enterprises to reach out to stakeholders. Miller Brewing, for example, has on several occasions provided bottled water to communities in need. Citibank, like many other companies, provides volunteer incentives and matching programs for a variety of causes. In Indonesia, General Motors employees even helped build houses for flood victims in July 2002.

What this illustrates is that the responses to such occurrences as the fire at Malden Mills and the events of September 11 are not out-of-the-ordinary, but actually correspond with the moral inclinations of stakeholders in any number of situations. The reality is that members of business enterprises recognize their connectedness to one another and other stakeholders, and they make regular contributions as they develop various relationships.

C. Contributions to Corporate Citizenship

The situation that has resulted in the wake of the bombing of the World Trade Center underscores the interconnectedness of business stakeholders around the world. The injured did not have faces to their attackers; they were targets only because they were, or were associated with, capitalistic business citizens. The dead and injured participated in the American and international marketplace, and, for that, they were punished.

As terrible as this event has been, it would seem that it also provides us with an excellent opportunity to explore, discuss, and determine the essence of corporate responsibilities, in crisis and day-to-day situations. Perhaps we can begin with an analysis of the depth of responsibilities in this time of crisis, and use it in order to determine responsibilities day-to-day.

The situation in September 2001 underscores the need for firms to recognize their citizenship and their responsibilities to their stakeholders. These firms were targets because they were business citizens. They participated in the American marketplace, and for that they were punished. But it is not just the firms who were hurt—stakeholders were harmed as well. It is now for the firms, who have created the relationships and allowed their stakeholders to become reliant upon them, to take responsibility for piecing things back together.

Citizenship provides the vehicle for translating stakeholder responsibilities for managers.[95] As a citizen, an individual receives benefits and acquires certain responsibilities. Business enterprises, as citizens receive benefits such as tax breaks Constitutionally-protected freedoms. In addition, they receive protection from harm, as individuals do, through local fire and police protection agencies. In return, business enterprises have the same sorts of responsibilities that individuals do, such as with regard to treating others with respect and to acting responsively. What the notion of citizenship offers stakeholder thinking is a community-based conception of reciprocity. In other words, while stakeholder thinking suggests that firms should pay attention to stakeholders because they affect or are affected by the firm's operations, citizenship more broadly indicates that, even if the effects are not clear, responsibilities to stakeholders also exist as a result of the membership of the firm in a community in which others are also citizens (with similar benefits and responsibilities).[96]

D. Lessons for Managers

Stakeholder thinking and notions of corporate citizenship play a vital role in broadening managerial vision. There are vital lessons from situations such as September 11. In the wake of the catastrophe, we witnessed the best that we can be, as individuals and business enterprises. People wanted to go back to work—not for the salary, necessarily, but because they felt natural connections to their peers at work. After

[95] B. A. Altman and D. Vidaver-Cohen, A Framework for Understanding Corporate Citizenship, 105 Bus. & Soc'y Rev. 1 (2000).
[96] With regard to corporate citizenship, see also H.Van Buren, Jr., Corporate Citizenship and Obligations of Fairness, J. Corp. Citizenship 55 (2001); D. J. Wood and J. M. Logsdon, Business Citizenship: From Individuals to Organizations, Special Issue #3 Bus. Ethics Q., Ruffin Series (2002); S. Waddock and N. Smith, Relationships: The Real Challenge of Corporate Global Citizenship, 105 Bus. & Soc'y Rev. 47 (2000).

September 11, people held their loved ones close, but the grieved alongside their co-workers. In New York, and perhaps elsewhere, people started meeting each other's eyes more often. It was capitalism that was attacked, but it was human beings who were part of the capitalist endeavors.

Some of the most important lessons involve stakeholder relationships:

1) Business enterprises cannot exist without stakeholders. This creates an inherent interconnectedness.
2) Stakeholders affect and are affected by business enterprises. It is important to consider stakeholders who are affected by business enterprises because the effects can cause them to engage in activities that will then affect business enterprises.
3) The reliance of stakeholders on business enterprises can create the basis for responsibilities. Many employers have assisted families of lost wage earners for this reason.
4) The business enterprise is not involved in all significant relationships. For example, in the wake of September 11, many employees sought psychiatric counseling that enhanced their work performance. More broadly, many donors contributed to organizations who then distributed funds to victims. In addition, it is essential for business enterprises to remain cognizant because they can be affected by relationships in which they are not directly involved. Competitors lobbying Congress, for example, can have an effect on the operations.
5) Shareholders are stakeholders. Many shareholders are also employees, members of the community, and so on. Addressing stakeholder concerns encompasses some shareholder concerns as well.
6) Competitors are stakeholders. Competition does not have to be viewed as competition against one another. In the situation involving Malden Mills, for example, competitors contributed to the recovery of Malden Mills because the industry is made better off by the presence of stronger competition—of competitors competing together.
7) Life is long. Investments in relationships can pay off in the short term, but they hold tremendous potential for the future.

8) Life is uncertain. Because we do not know what will happen tomorrow, in terms of either world events or business occurrences, the stronger the underlying relationships, the better positioned business enterprises are to respond to what does happen.

It is therefore important, from a business sense, to recognize, manage, and develop stakeholder relationships—not only because they are essential in times of crisis, but because they are integral to day-to-day operations, whether it is obvious or not.

Stakeholder thinking does not offer a formula for management. It does not inherently identify which stakeholders or stakeholder relationships should be prioritized or which should be reconciled when they conflict. The purpose of stakeholder thinking is not to provide such a formula, but to expand managerial thinking in order to encompass a wider array of concerns. Managers are hired because of who they are as moral persons. Stakeholder thinking emphasizes that managers should be empowered to exercise their moral thinking in the workplace. It therefore helps to reconcile business behavior with the natural moral intutions of most people.

Stakeholder thinking does not inherently conflict with the enterprise goal of profit generation. In fact, stakeholder thinking supports profit generation (which benefits shareholders) since it generally benefits multiple stakeholders. Stakeholder thinking does not suggest that profits should be ignored in favor of stakeholder interests. On the contrary, stakeholder thinking merely promotes profit generation through greater attention to stakeholder concerns. Greater long term profitability can often be achieved by addressing stakeholder concerns up front.

CONCLUSION: CORPORATE CITIZENSHIP AND SUSTAINABLE PEACE

Citizenship does not replace individual responsibility. This Article contributes to an ongoing conversation regarding the roles of stakeholders in organizations. Since the word "stakeholder" first became common in business conversations, debate has existed surrounding the existence of moral responsibilities to stakeholders. My argument is that we are individuals first, before we are members of business enterprises, and it is our personal responsibilities that can, do, and should shape our consideration of stakeholder interests with regard to the business enterprise. In the wake of September 11, as downtown New York was physically and psychologically crippled, it was almost as if businesspeople forgot that they were businesspeople, and they reacted as people. What we witnessed during that time, and somewhat since, is the vitality of stakeholder relationships. This is consistent with contemporary thinking regarding best business practices. Business enterprises are increasingly being viewed as systems of relationships that are maintained and nurtured in order to enhance organizational success.[97]

Connecting this to sustainable peace, as stakeholder relationships contribute to the sustainability of organizations, they can similarly contribute to the sustainability of a peaceful society. Conflict erupts following discontent, and people are discontent when they feel disconnected. The fortification of stakeholder relationship thus translates into a step toward sustainable peace. This allows problems to be addressed on the local level, so that they can be prevented from escalating into situations that jeopardize peace. In addition, corporate citizenship emphasizes increased vigilance. It is not just for governments to monitor peace, but for business enterprises to self-police as well. As

[97] P. Senge, The Fifth Discipline (1990); J. Pfeffer, The Competitive Advantage Through People (1994).

members of society, which is how the notion corporate citizenship positions them, they have a stake in peace.

Capitalism has often been painted as immoral, or at least amoral. On the contrary, there are strong arguments that suggest that capitalism can be viewed as having a strong moral component.[98] Though ironic, in the wake of September 11, it seems that we witnessed the beauty of capitalism, for, when disaster struck, stakeholders, already interconnected, developed additional relationships in order to participate in the recovery process. If, instead of abandoning those relationships we build upon them, that is the first step toward sustainable peace. On September 11, capitalism was our Achilles heel—the two unprotected towers on the tip of the island. We can, though, turn capitalism into our armor. By increasing and enhancing our connectedness through stakeholder relationships, we can both prevent future attacks and arm ourselves if they do occur.

[98] Bowie, *supra*, note 4; W. M. Evan and R. E. Freeman, A Stakeholder Theory of the Modern Corporation: Kantian Capitalism, in Ethical Theory and Business (W. M. Evan and R. E. Freeman ed., ed. 1988).