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Corporate Ethics in a Devilish System

WHEN PARTICIPATING IN DISCUSSIONS OF CORPORATE ETHICS, I am often struck by the narrowness of the discussion. Frequently, what many consider corporate ethics is an insistence on compliance with law and a focus on various mechanisms for keeping companies within the straight and narrow of legal boundaries.¹ I believe this fixation on compliance with law is a constrained view of corporate ethics, and this Essay will set out some reasons why.

Legal compliance is important, of course. Corporations are immensely powerful economic entities, and management's respect for law is essential if companies are to be operated in a way that is consistent with social welfare.² Moreover, as artificial entities, corporations are not subject to the constraints of conscience and social norm that limit the behavior of natural persons.³ As I have written before, "it is widely believed that corporate illegality and crime are 'imperfectly regulated by social controls' because corporations cannot be incarcerated, have no conscience, are typically very complex institutions, and are not subject to the same social controls and reputational constraints as individuals."⁴

The emphasis on legal compliance is even more crucial because of the fact that a small but significant portion of the corporate law academy does not appear to deem it important as a goal in and of itself. Judge Frank Easterbrook and Professor Daniel Fishel, for example, two of the leading scholars of the "nexus of contracts" movement within corporate law, made a splash a number of years ago when they suggested that the duty to obey the law is simply a constituent part of the duty to

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1. See Cynthia A. Williams, *Corporate Compliance with the Law in the Era of Efficiency*, 76 N.C. L. REV. 1265, 1375 (1998) (noting that with regard to corporate social responsibility, prominent scholars and practitioners have emphasized the duty of corporate directors and officers to ensure legal compliance).

2. Patrick J. Ryan, *Strange Bedfellows: Corporate Fiduciaries and the General Law Compliance Obligation in Section 2.01(a) of the American Law Institute's Principles of Corporate Governance*, 66 WASH. L. REV. 413, 417, 430–31 (1991).

3. *Id.* at 428–29 (arguing that corporations are complex organizations of various individuals whose specialization and incomplete knowledge make it more likely that the organization will behave unlawfully); see also WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY* (2006).

4. Kent Greenfield, *Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality (With Notes on How Corporate Law Could Reinforce International Law Norms)*, 87 VA. L. REV. 1279, 1289–90 (2001) (quoting Ryan, *supra* note 2, at 417).

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maximize the firm's value.⁵ They argued, "if illegality will profit the company more than it will cost the company, the corporation should break the law."⁶ Additionally, they wrote that "[m]anagers have no general obligation to avoid violating regulatory laws, when violations are profitable to the firm"⁷ They also argued that when a corporation determines whether illegality is likely to be profitable, the cost that should be considered is not the actual penalty or fine; rather, it is the *expected* penalty, fine, or other costs.⁸ In essence, a corporation should consider the cost of illegality as the penalty, fine, or other costs discounted by the chance of the exposure of the corporation's illegality.⁹ The law, in other words, merely imposes a price for illegal behavior.¹⁰ If the corporation is willing to pay, then no problem with illegality exists.¹¹

Critics disapprove of this belief in the non-distinctiveness of illegal behavior, which is, thankfully, not the majority view within the academy¹² or in the courts.¹³ Without doubt, compliance with law is crucial, and those who make it their life's work to ensure that corporations comply with the law deserve congratulations and support.

But a dedication to legality standing alone is hardly a robust sense of ethics, corporate or otherwise. If I were to teach my son that being ethical means simply to obey the rules, then I would be offering impoverished and limited guidance.¹⁴ Ethics means more than obeying the law.¹⁵ If that is so, why do so many discussions of

5. See Frank H. Easterbrook & Daniel R. Fischel, *Antitrust Suits by Targets of Tender Offers*, 80 MICH. L. REV. 1155, 1177 (1982) ("Corporations are not privileges; a corporation is no more than a convenient name for a nexus of contractual relationships among people. . . . When the corporation is properly seen as a summary of a set of contractual relationships, it becomes difficult, probably impossible, to say that the agents (managers) may take it on themselves to define the responsibility of the firm.").

6. *Id.* at 1168 n.36.

7. *Id.* at 1168 n.36, 1177 n.57 ("[M]anagers not only may but also should violate the rules when it is profitable to do so.").

8. See *id.* at 1158.

9. See *id.* For an excellent discussion, see Williams, *supra* note 1, at 1279–80.

10. See Easterbrook & Fischel, *supra* note 5, at 1158.

11. See *id.*

12. For a review of the literature on point and an extensive critique of the Easterbrook & Fischel view, see Greenfield, *Ultra Vires Lives!*, *supra* note 4; Williams, *supra* note 1. For a more recent discussion of mechanisms to control corporate illegality, see Adam Sulkowski & Kent Greenfield, *A Bridle, a Prod, and a Big Stick: An Evaluation of Class Actions, Shareholder Proposals, and the Ultra Vires Doctrine as Methods for Controlling Corporate Behavior*, 79 ST. JOHN'S L. REV. 929 (2005).

13. See *Stone v. Ritter*, 911 A.2d 362, 369 (Del. 2006) (citing *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 66 (Del. 2006)) (discussing the obligation to obey the law as a component of the duty of good faith); *In re Caremark Int'l Inc. Derivative Litig.*, 698 A.2d 959, 968 (Del. Ch. 1996) (discussing the obligation of management to erect an internal reporting system to aid management in ensuring that the company is complying with applicable laws).

14. And even this guidance occasionally would be wrong because some rules should be disobeyed, as a matter of ethics. See Martin Luther King, Jr., Letter from a Birmingham Jail (Apr. 16, 1963), available at <http://www.stanford.edu/group/King/frequentdocs/birmingham.pdf> ("[O]ne has a moral responsibility to disobey unjust laws.").

15. Merriam-Webster defines "ethics" as "the discipline dealing with what is good and bad and with moral duty and obligation." Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/eth->

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corporate ethics begin and end in consideration of the law and how to ensure that corporations obey it? The reason is that it is difficult to expect businesses and the people within them to do more, given the legal framework we impose on them.

I should pause to admit an underlying assumption here: that situation more than disposition drives the behavior of most people.¹⁶ An individual's motivations occur within a framework of incentives and disincentives, and individuals are affected by their surroundings and by myriad influences.¹⁷ Despite our best intentions, and despite what many of us assume about our own behavior and by those around us, we make decisions less because of some inner compass than by the pushes and pulls of situation.

This is especially true of corporate executives (not to mention the corporations themselves). The "role morality" of executives, created by law and norm, creates for them the overarching and urgent goal of producing financial returns for shareholders, focused in the short term.¹⁸ That goal subordinates other matters.¹⁹ If executives wanted to act beyond that role in a way they thought their ethical system required, they might be able to on the edges.²⁰ For the most part, however, their obligations to their company and their shareholders, enforced by law and the market, keep them acting within narrow bounds.²¹

ics (last visited Feb. 15, 2008); see also Note, *Finding Strategic Corporate Citizenship: A New Game Theoretic View*, 117 HARV. L. REV. 1957, 1958 (2004) ("The words 'ethics' and 'responsibility' connote selflessness and altruism, internalizing a concept of charity without expectation of payback.").

16. For accessible and persuasive treatments of the dispositionalist-situationist debate, see Adam Benforado et al., *Broken Scales: Obesity and Justice in America*, 53 EMORY L.J. 1645 (2004); Jon Hanson & Kathleen Hanson, *The Blame Frame: Justifying (Racial) Injustice in America*, 41 HARV. C.R.-C.L. L. REV. 413 (2006); Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129 (2003) [hereinafter Hanson & Yosifon, *The Situation*]; Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1 (2004). Also very helpful is the blog *The Situationist*, <http://thesituationist.wordpress.com/> (last visited Mar. 10, 2008) (created by Jon Hanson and Michael McCann).

17. See Hanson & Yosifon, *The Situation*, *supra* note 16, at 136–38.

18. See Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477, 501 (1995) (discussing the role morality of corporate executives).

19. *Id.*

20. *Id.* at 522. The business judgment rule provides deference to the decisions of company directors. This deference offers flexibility to the executives to make decisions in a more ethically robust way, as long as they rationally can claim that their actions are in the long-term interests of the company. See, e.g., *Shlensky v. Wrigley*, 237 N.E.2d 776, 780 (Ill. App. Ct. 1968) (giving deference to management's decision not to install lights at the Chicago Cubs park, even though every other Major League Baseball franchise had done so, for the putative reason that neighborhood decay brought about by nighttime games would hurt the team in the long run). John Nilson and I have argued that the business judgment rule is a necessary ameliorative to the single-minded demand to maximize profit. See Kent Greenfield & John E. Nilson, *Gradgrind's Education: Using Dickens and Aristotle to Understand (and Replace?) the Business Judgment Rule*, 63 BROOK. L. REV. 799, 842 (1997).

21. Mitchell, *supra* note 18, at 522. For an analysis of the limitations of the business judgment rule in offering freedom to corporate executives, see Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1 (2008) [hereinafter Greenfield, *Gilded Age*].

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In this view, failures of corporate ethics are not matters of bad people acting within and through business. Rather they are failures of the system itself. Let me explain.

There are many views of what constitutes the substance of ethical or moral behavior.²² Whether one takes guidance from religious norms or from Rawls, Kant, Aristotle or other philosophical thinkers, there are significant areas of agreement as to what amounts to ethical behavior. If my son asked me what ethics really means (and I try to tell him these things even when he does not ask), I would encourage him to think about the obligations of acting with due care for others, of taking responsibility for the effect of one's actions, of being honest, of considering broadly one's impacts, and of taking a long-term view, especially with regard to resource use.

Corporate law and financial markets operate to make these ethical obligations difficult to satisfy in a business setting. Limited liability, for example, the very cornerstone of corporate law,²³ is inconsistent with the ethical norm of taking responsibility for one's own actions since it shields people from liability that arises from their wrongful conduct.²⁴ Limited liability is fundamental and indeed is a principal reason that businesses choose to incorporate.²⁵ Moreover, corporations create subsidiaries through which they can perform risky operations, in part because the parent can shield assets from any potential liability.²⁶ There may be strong reasons to support limited liability in order to incentivize business creation and capital formation. Certainly, however, this has ethical implications and should be subject to an ethical critique, especially if it allows companies to shield themselves from taking financial responsibility for harms they cause.²⁷

22. For a sampling of the many views on the substance of ethical or moral behavior, consult religious writings such as the Bible, the Qu'ran, the Talmud, and the Veda. See also ARISTOTLE, *THE NICOMACHEAN ETHICS OF ARISTOTLE* (Sir David Ross trans., Oxford Univ. Press 1975) (1925) (focusing on the development of a balanced moral character and one's affirmative choice to engage in consistent virtuous conduct); IMMANUEL KANT, *GROUNDWORK FOR THE METAPHYSICS OF MORALS* (Allen W. Wood ed. and trans., Yale Univ. Press 2002) (reasoning that moral behavior is such only if it is motivated exclusively by good will); JOHN RAWLS, *A THEORY OF JUSTICE* (1971) (invoking social contract theory to argue that moral behavior on the societal level is achieved through a recognition of inviolable basic liberties and equality of opportunity).

23. Nina A. Mendelson, *A Controller-Based Approach to Shareholder Liability for Corporate Torts*, 102 COLUM. L. REV. 1203, 1208–09 (2002).

24. See *id.* at 1204.

25. *Id.* at 1208–09.

26. Lynn M. LoPucki, *Virtual Judgment Proofing: A Rejoinder*, 107 YALE L.J. 1413, 1427 (1998) (“Limiting liability is widely understood to be the principal reason for the separate incorporation of subsidiaries.”).

27. The scholarship on limited liability and its implications is extensive. For a taste, see LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* (2001) (describing the moral hazards arising from limited liability); Theresa Gabaldon, *Experiencing Limited Liability: On Insularity and Inbreeding on Corporate Law*, in *PROGRESSIVE CORPORATE LAW* 111–37 (Lawrence E. Mitchell ed., 1995); Mendelson, *supra* note 23. But see Steven Bainbridge, *Abolishing Veil Piercing*, 26 J. CORP. L. 479 (2001) (providing an argument to justify limited liability regimes while suggesting that corporate veil piercing should be constrained); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991).

The expectations for corporate executives also contradict the ethical obligation of honesty. To be sure, there is a massive legal framework built up to protect shareholders from fraud, and consumer and creditor protections also exist.²⁸ But employees are not protected by anti-fraud law on the federal or state level.²⁹ If the CEO goes to a shareholder meeting and lies about financial projections, it can be a federal crime.³⁰ If she then appears in the employee lunchroom and utters the same lie, not only is it *not* a violation of law, it may in fact be consistent with (or required by) her fiduciary duty to maximize shareholder value.³¹

The imperative that corporate managers take a narrow and short-term view of their obligations is also ethically problematic. Those executives who think broadly about their obligations or want to offer fair and proportionate “returns” to stakeholders other than equity investors are routinely punished by the market—they suffer criticism by Wall Street, sometimes suits by the plaintiffs bar, and sometimes takeover.³² An executive that causes the company to act in the long term, to take into consideration the interests of stakeholders other than shareholders, or willingly to accept lower profit in order to avoid imposing costly externalities on society at large will appear, from the viewpoint of shareholders and their Wall Street protectors, to be under-performing.³³ To the extent that ethics imposes costs or lengthens the time horizon—something that ethics by its own terms is bound to do—it is unsustainable unless we change the system in which we ask corporate

28. See generally Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified as amended in scattered sections of 11, 15, 18, 28, and 29 U.S.C.) The purpose of the Sarbanes-Oxley Act is to protect shareholders by improving corporate disclosure regulations. For a more substantive discussion of the Sarbanes-Oxley Act’s protective provisions, see J. Brent Wilkins, *The Sarbanes-Oxley Act of 2002: The Ripple Effects of Restoring Shareholder Confidence*, 29 S. ILL. U. L.J. 339 (2005).

29. See generally KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS & PROGRESSIVE POSSIBILITIES* (2006) [hereinafter GREENFIELD, *FAILURE*] (arguing for federal fraud protection for employees); Kent Greenfield, *The Unjustified Absence of Federal Fraud Protection in the Labor Market*, 107 YALE L.J. 715 (1997) (suggesting a potential federal statutory scheme to protect the labor market in the same way that federal anti-fraud regulation protects the capital markets).

30. Various cases have been brought against corporate directors alleging violations of federal securities laws when the corporation lies or conceals financial projections to shareholders. See, e.g., *Grossman v. Novell, Inc.*, 120 F.3d 1112 (10th Cir. 1997); *Provenz v. Miller*, 102 F.3d 1478, 1487 (9th Cir. 1996) (“A [financial] projection is a ‘factual’ misstatement [actionable under securities law] ‘if (1) the statement is not actually believed, (2) there is no reasonable basis for the belief, or (3) the speaker is aware of undisclosed facts tending seriously to undermine the statement’s accuracy.’”); *Plaine v. McCabe*, 797 F.2d 713, 723 (9th Cir. 1986) (noting that allegations of misrepresentation or failure to disclose specific items, including financial projections, from tender offer documents sufficiently stated a claim for violations of federal law).

31. See Robert C. Clark, *Major Changes Lead Us Back to Basics (A Response to the Symposium on My Treatise)*, 31 J. CORP. L. 591, 596–97 (2006) (explaining the fiduciary duty to maximize shareholder value).

32. See *Shimko v. E. States Corp.*, 146 A.2d 891, 892 (Md. 1958) (addressing suit by shareholders to compel the corporation to pay dividends when there was a two million dollar surplus, and the corporation claimed it would use as part of a long-term recapitalization plan). See generally *Dodge v. Ford Motor Co.*, 170 N.W. 668, 685 (Mich. 1919) (awarding payment of dividends to shareholders on the grounds that withholding payment to increase the welfare of the general public was not in the best interests of the corporation and shareholders).

33. See *Dodge*, 170 N.W. at 679, 683, 685 (explaining how Ford Motor Co.’s non-payment policy was viewed to be under-performing).

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executives to work. We would need to adjust the obligations of their roles to include, at least, the possibility and, more appropriately, the obligation to act in an ethically robust way.

I recognize that short-termism is an evil that many have started to speak out against, including representatives of corporate management such as the Chamber of Commerce and the Business Roundtable.³⁴ Sarbanes-Oxley plays into this opposition, in fact, since it is now more difficult for managers to use accounting manipulation to hide efforts on their part to manage for the long term.³⁵ In other words, to satisfy short-term Wall Street expectations, managers were formerly able to manipulate more easily the financial disclosures from quarter to quarter without actually managing for the short term.³⁶ It is a very real possibility that one of the unintended consequences of Sarbanes-Oxley's stricter reporting standards is that now in order to *appear* to manage in the short term, one must *actually* manage for the short term.

Many have argued that the responsibilities of Sarbanes-Oxley should be relaxed.³⁷ There may be some merit to this argument with regard to specific provisions, but a general trend toward fewer responsibilities is not one that I would applaud. On the contrary, I believe we ought to impose more rather than fewer responsibilities on management and use the law to make our ethical norms real and impactful. If the corporations, as institutions, are indeed without consciences—the prototypical Holmesian “Bad Man”³⁸—and corporate managers are limited by their role morality, then the way to make corporate ethics more than a public relations gimmick is to embody them in law.

What would such an ethical system of corporate law look like? If ethics is taking responsibility for one's actions, considering broadly one's actions, being honest, and taking the long-term view, then we could change corporate law in realistic and

34. See Lee Drutman, *The Long-Term Value Moment*, AM. PROSPECT, July 9, 2007, http://www.prospect.org/cs/articles?article=the_longterm_value_moment (cataloging various studies pointing out the pathologies of short-termism in the business strategy).

35. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 101–09, 116 Stat. 745, 750–71 (codified as amended at 15 U.S.C. §§ 7201–19 (Supp. V 2006)).

36. See Drutman, *supra* note 34.

37. See Peter K.M. Chan, *Breaking the Market's Dependence on Independence: An Alternative to the “Independent” Outside Auditor*, 9 FORDHAM J. CORP. & FIN. L. 347, 349 (2004) (arguing that the auditing restrictions in Sarbanes-Oxley should be relaxed); Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521, 1602 (2005) (arguing that because of the haste under which Sarbanes-Oxley was enacted, the Act does not appropriately serve the corporate world's needs and should be relaxed); Stephen Labaton, *Investors' Suits Face Higher Bar, Justices Rule*, N.Y. TIMES, June 22, 2007, at A1 (reporting that industry groups and allies in academia have urged the Bush Administration and Congress to make it more difficult for investors to bring lawsuits against corporations and to relax some of the provisions of the Sarbanes-Oxley Act of 2002).

38. Oliver W. Holmes, Jr., Justice, Supreme Judicial Court of Mass., *The Path of the Law*, Remarks at the Dedication of the new hall of the Boston University School of Law (Jan. 8, 1897), in 10 HARV. L. REV. 457, 459 (1897) (“If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences.”).

meaningful ways to make those norms more realizable in the corporate context. We could change corporate governance to give those contributors to the firm who do not own stock—employees, communities, other stakeholders—some ability to have their views heard and considered within the governance of the firm. Bringing the views of non-shareholder stakeholders into the governance of the firm would not only make it more likely that the corporation will consider broadly the impacts of its decisions, it also will—because shareholders tend to have a very short time horizon³⁹—necessarily cause the firm to take a longer-term view of its decisions and strategies. Such inclusion will also cause corporations to internalize more of the costs of their decisions. In addition, the law should require corporations to tell the truth not only to shareholders and consumers, but to employees as well.

The market, by itself, will not cause companies to act this way. Of course, some companies do try to take into account the long-term interests of a broader group of stakeholders, to beneficial effect.⁴⁰ But most do not for several reasons. The long-term benefits are either not recognized, not deemed important, or not internalized into the decision-making of the firm.⁴¹ Shareholders elect boards, and the law makes shareholders supreme.⁴² Few directors or managers have the incentive to push their firms to take what must seem a huge short-term risk—reallocating more decision-making power to non-equity investors—for gains that seem abstract or beyond the time horizon for shareholders.⁴³ The law must overcome this “stickiness” of the status quo.

39. The average stock turnover for Fortune 500 companies is over 100% a year, and is even greater for smaller companies. LAWRENCE E. MITCHELL, *THE SPECULATION ECONOMY: HOW FINANCE TRIUMPHED OVER INDUSTRY* 277–78 (2007).

40. See generally RAJENDRA S. SISODIA ET AL., *FIRMS OF ENDEARMENT: HOW WORLD CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE* (2007) (arguing that stakeholder management results in market successes).

41. But see Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1, 46–48 (2004) (discussing the “shareholder primacy” theory of the corporation where if one takes a long-term view of shareholders’ interests, advancing the concerns of other corporate constituents may serve to enhance shareholder value); David Locasio, Comment, *The Dilemma of the Double Derivative Suit*, 83 NW. U. L. REV. 729, 758 (1989) (explaining that, under Delaware law, the business judgment rule affords corporate directors broad discretion in their decision-making that enables them to consider the long-term interests of shareholders (citing *Auerbach v. Bennett*, 393 N.E.2d 994, 1000 (N.Y. 1979))).

42. See *Unocal Corp. v. Mesa Petroleum Co.*, 493 A.2d 946, 959 (Del. 1985) (discussing the benefits of a corporate model where the shareholders elect the members of the board: “If the stockholders are displeased with the action of their elected representatives, the powers of corporate democracy are at their disposal to turn the board out.”).

43. There are many factors that have led companies to focus on equity-driven investors and short-term gains instead of allocating decisions based on long-term growth and giving power to non-equity investors. See, e.g., Martin Lipton & Steven A. Rosenblum, *A New System of Corporate Governance: The Quinquennial Election of Directors*, 58 U. CHI. L. REV. 187, 205–13 (1991) (discussing how competition among institutional investors can lead corporations to focus on short-term gains which can threaten the long-term health of a company). Because of this, the long-term interests of the shareholders might actually be weakened. Thomas Lee Hazen, *The Short-Term/Long-Term Dichotomy and Investment Theory: Implications for Securities Market Regulation and for Corporate Law*, 70 N.C. L. REV. 137, 179 (1991) (“Although not all observers agree, many have suggested that corporate managers’ obsession with short-term shareholder wealth maximization has, in many cases, diverted their attention away from the efficient operation of their companies.”).

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One concern often expressed is that a more robust system of stakeholder governance will impose large and unsustainable costs on the United States economy, especially in an increasingly globalized world economy.⁴⁴ The answer to this concern begins with the notion that employee (and stakeholder) involvement in management is compatible with business success. As I have discussed at length elsewhere, as employees feel more “ownership” in their firm, they will work harder, contribute more ideas, improve their productivity, malingering less, and obey company rules more.⁴⁵ This will tend to improve company profitability over time. The more difficult competitiveness critique to answer is not that individual firms will fail if they take into account the interests of stakeholders, but that capital (i.e., shareholders) will flee U.S. markets if a stakeholder governance framework is established.⁴⁶ It is true that recognizing a stakeholder framework might bring about a reallocation of the corporate surplus away from shareholders and toward other stakeholders. That is part of the objective of such a framework. But as the stakeholder model creates gains for the corporation as a whole, then the slice of the pie going to shareholders may grow in an absolute sense, even if it is not as large in a comparative sense.

The judgment of capital is always a relative one—“will I make more if I invest here or elsewhere?”—so a stakeholder corporate governance regime will only cause capital to flee if it can find a better risk/return mix elsewhere. Given the power and stability of U.S. markets, there are very few places likely to offer a better risk/return ratio. Europe’s current corporate governance framework is more protective of stakeholders than any regime the U.S. is likely to enact, making it unlikely that capital will flee to Europe.⁴⁷ Indeed, the fact that Europe has such a robust system of stakeholder protection while maintaining healthy and competitive capital markets is an indication that there is little reason to worry that capital will abandon ship if the U.S. adopts a similar model.⁴⁸

All of this is to say that if we, collectively, desire corporations and their management to behave more ethically in any genuine sense, we have the tools at our disposal to bring that about. Those tools are *legal* tools, changing the nature of the

44. See Ethan S. Burger, *Who Is the Corporation’s Lawyer?*, 107 W. VA. L. REV. 711, 741–42 (2005) (explaining the two common theories of stakeholder governance and noting that the stakeholder model results in difficulty in sustaining competitiveness because of the increasing globalization of the economy).

45. See GREENFIELD, FAILURE, *supra* note 29. For a broad overview of the debate on the effectiveness of employee ownership, see generally Henry Hansmann, *When Does Worker Ownership Work? ESOPS, Law Firms, Codetermination, and Economic Dependency*, 99 YALE L.J. 1749 (1990) (describing employee ownership in various employment contexts and its benefits and costs).

46. See John C. Coffee, Jr., *The Future As History: The Prospects for Global Convergence in Corporate Governance and its Implications*, 93 Nw. U. L. REV. 641 (1999) (examining the various types of stakeholder governance both in the United States and abroad, and discussing the implications of each, the reasons for the disparity between countries in governance standards, and how adopting various forms of stakeholder governance specifically could impact the United States).

47. See Luca Enriques, *Bad Apples, Bad Oranges: A Comment From Old Europe on Post-Enron Corporate Governance Reforms*, 38 WAKE FOREST L. REV. 911 (2003) (discussing European corporate governance and stakeholder protection in the context of the Enron collapse).

48. For a more extensive answer to this critique, see Greenfield, *Gilded Age*, *supra* note 21.

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obligations of the firm and of its management. The current corporate governance framework constrains management to act in ways that we would deem unethical if conducted in other areas of life. We cannot expect people to act as Saints in a devilish system.

