

12-8-2008

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Recommended Citation

Kent Greenfield. "The Disaster at Bhopal: Lessons for Corporate Law?." *New England Law Review* 42, (2008): 755-760.

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THE DISASTER AT BHOPAL: LESSONS FOR CORPORATE LAW?

KENT GREENFIELD*

One day a frog was sitting by the bank of the river enjoying the warm sun and cool breeze. It so happened that a scorpion approached him rather quickly as to inquire about crossing the river. “Frog,” said the scorpion, “I am in need of passage across the river upon your back. I am prepared to pay you with this mealworm that I have not eaten.” The frog thought about it for a moment, then replied “Scorpion, I know that if I grant you a ride across the river upon my back, you will poison me on the other side. For that alone I shall say ‘no thanks.’” “Frog,” again said the scorpion, “Please, I have no wish to harm you, I promise. I just need to go across the river to find more food. There is nothing left on this side for me to eat.”

The frog thought about it again for a moment and then agreed to help the scorpion get across the river. Half way across, the frog felt a rather sharp, stinging sensation in his back. The scorpion had stuck him with his venom. “SCORPION!” cried the frog, “You have killed me and you as well. Why have you done this?” “Because I am a scorpion . . . and that is my nature.”¹

When I mention the tragedy of Bhopal to current law students and even junior attorneys, the blank expressions reveal a lack of familiarity with the horrors that took place nearly twenty-five years ago. Even though the disaster, and Union Carbide’s hand in creating it, was the topic of world-wide attention for a few months during 1984 and 1985, it does not

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1. Ms. Garden Plum, *The Frog and the Scorpion*, <http://www.gardenplum.com/girls/gratree/frogandscorpion.html> (last visited Apr. 23, 2008).

receive much attention any longer. The editors of the *New England Law Review*, as well as Professor Eric Lustig, deserve credit for reminding us of what occurred and prompting participants in the conference (and readers of this journal) to question whether we have anything still to learn from what occurred in the early morning hours in Bhopal on December 3, 1984, and in the hours, days, and weeks that followed. This conference also prompts the even more important question of what happened in the days and months and years that *preceded* the accident that made it more likely.² Is there reason to believe, for example, that corporations have a tendency to create the context in which such disasters are more likely? Do they, like the scorpion, have natures that endanger the well-being of those around them and themselves as well?

For modern students of the corporation, perhaps Bhopal is now too distant to seem relevant. But more recent corporate behavior poses the same question, whether it pertains to environmental destruction (think of the practice of “mountaintop removal” mining, which is devastating parts of Appalachia),³ injuries to consumers (think SUV roll-overs),⁴ collusion with illegal governmental activities (think of Unocal’s partnership with the military regime in Burma, or U.S. phone companies’ assistance to the Bush Administration’s illegal wiretapping of citizens),⁵ or financial malfeasance (think Enron).⁶

To ask the question of whether these behaviors are aberrations or something systemic should not brand the questioner as a radical or gadfly. Nor should it imply that the questioner cannot appreciate the significant benefits that flow from and through the corporation. To ask these questions should rather be seen as a crucial element of the essential drive to improve on the ways in which corporations are governed and regulated.

2. For a detailed account of the tragedy and the litigation that followed, see JAMIE CASSELS, *THE UNCERTAIN PROMISE OF LAW: LESSONS FROM BHOPAL* (1993). *See also* DOMINIQUE LAPIERRE & JAVIER MORO, *FIVE PAST MIDNIGHT IN BHOPAL: THE EPIC STORY OF THE WORLD’S DEADLIEST INDUSTRIAL DISASTER* (2002).

3. *See* ERIK REECE, *LOST MOUNTAIN: A YEAR IN THE VANISHING WILDERNESS* (2006).

4. *See* Danny Hakim, *Some Popular S.U.V.’s Fare Badly in Rollover Tests*, N.Y. TIMES, June 8, 2004, available at <http://query.nytimes.com/gst/fullpage.html?res=9802E3DA1F31F93BA35755C0A9629C8B63>; *SUV Rollover Risks Kept Quiet*, CBS NEWS, Sept. 20, 2000, <http://www.cbsnews.com/stories/2000/09/20/national/main235030.shtml>.

5. *See* Leslie Cauley, *NSA Has Massive Database of Americans’ Phone Calls*, USA TODAY, May 11, 2006, available at http://www.usatoday.com/news/washington/2006-05-10-nsa_x.htm; Zoe Chafe, *Unocal Settles in Burma Human Rights Case*, WORLD WATCH, May/June 2005, at 38, available at 2005 WLNR 7207060.

6. *See generally* ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

This is why the articles of this Symposium, particularly those by Adam Sulkowski et al. and Marjorie Kelly and Allen White, related to the panel on corporate governance, are particularly important.⁷ We find ourselves in a time of increasing economic instability,⁸ accelerating globalization,⁹ widening inequality between the rich and poor,¹⁰ and growing unease about corporate power.¹¹ It is certainly possible that corporations are part of the cause of some of the problems our nation faces, but it is also possible that corporations, and corporate law, could be part of the solution.¹² These prominent thinkers are important contributors to this discussion.

It is important to emphasize in this discussion that a skepticism of corporate power does not necessarily correlate with a belief that individual corporate executives or managers are anything less than upstanding, moral individuals. One need not believe that individual Union Carbide managers were criminally or civilly culpable for the Bhopal accident to believe that the accident was made more likely by a corporate law framework that incentivized a drive toward profit by externalizing costs and risks.¹³ Corporations are chartered for the purpose of making money and they tend

7. Marjorie Kelly & Allen White, *Corporate Design: The Missing Organizational and Public Policy Issue of Our Time*, 42 NEW ENG. L. REV. 761 (2008); Adam Sulkowski et al., *Corporate Responsibility Reporting in China, India, Japan and the West: One Mantra Does Not Fit All*, 42 NEW ENG. L. REV. 775 (2008).

8. See, e.g., Edmund L. Andrews, *Sharp Drop in Jobs Adds to Grim Economic Picture*, N.Y. TIMES, Mar. 8, 2008, at A1, available at <http://www.nytimes.com/2008/03/08/business/08econ.html>; Peter S. Goodman, *Slump Moves from Wall St. to Main St.*, N.Y. TIMES, Mar. 21, 2008, at A1, available at <http://www.nytimes.com/2008/03/21/business/21econ.html>.

9. See generally JOSEPH E. STIGLITZ, *MAKING GLOBALIZATION WORK* (2006); JAGDISH BHAGWATI, *IN DEFENSE OF GLOBALIZATION* (2004).

10. See Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1, 2-5 (2008).

11. According to a recent Pew Research Study, 65% of the public agrees with the statement that corporate profits are too high (up from 59% in 2003), with 30% in complete agreement. The survey also finds that only 38% of the public thinks that businesses strike a fair balance between profits and the public interest. See THE PEW RESEARCH CENTER FOR THE PEOPLE AND THE PRESS, *TRENDS IN POLITICAL VALUES AND CORE ATTITUDES: 1987-2007*, 52-53 (2007), available at <http://people-press.org/reports/pdf/312.pdf>.

12. See generally KENT GREENFIELD, *THE FAILURE OF CORPORATE LAW: FUNDAMENTAL FLAWS AND PROGRESSIVE POSSIBILITIES* (2006) (describing ways in which corporate law is flawed and identifying opportunities for progressive policies and principles in corporate law).

13. For another provocative example, see Kent Greenfield, *September 11th and the End of History for Corporate Law*, 76 TUL. L. REV. 1409 (2002) (suggesting that the corporate ideology of shareholder primacy helped to create the context in which September 11th could occur by influencing airlines to minimize security concerns that did not affect stock prices).

to do that well. But within the current design of corporations, there is nothing intrinsic to the corporate form to limit that financial drive to moral, socially beneficial, or even legal avenues.¹⁴ Constraints on the financial drive must come from some external source, usually law of some kind. When law is incomplete, inefficient, or unevenly applied, it is not surprising when the profit norm wins out. As I have said elsewhere,

[W]ithout constraints, [the corporation] can be too single-minded in the pursuit of profit. As an artificial entity, it has no conscience of its own. And with the separation between the company and its investors, the consciences of those investors are not easily brought to bear. The company has every incentive to externalize costs onto those whose interests are not included in the firm's financial calculus—and the firm can do this by polluting the environment, selling shoddy products to one-time purchasers, raiding its employees' pension funds, or producing its goods in sweatshops.¹⁵

Because of this tendency for corporations to externalize costs and risks, we have long chosen to regulate the corporation in various ways to reduce its propensity to make money via mechanisms that are socially harmful. We impose fiduciary duties on managers to look after the concerns of shareholders and we have built a byzantine regulatory system for the capital markets to protect shareholder interests. We impose on corporations certain requirements to protect employees, including OSHA regulations and anti-discrimination laws. We also have erected a system of labor laws to protect unions and union members. Tort law protects consumers and others. Environmental law constrains some corporate activities in order to protect communities and future generations. These various regulatory mechanisms are put in place in order to constrain corporations and corporate power.¹⁶

I have argued at length elsewhere that social welfare would be increased if we sought to internalize some of these constraints into the corporate form itself.¹⁷ I say this because traditional, “external” regulation

14. For an analysis of the imperviousness of corporations to legal constraints, see WILLIAM S. LAUFER, *CORPORATE BODIES AND GUILTY MINDS: THE FAILURE OF CORPORATE CRIMINAL LIABILITY* (2006).

15. See Kent Greenfield & Gordon Smith, *Debate: Saving the World with Corporate Law?*, 58 EMORY L.J. (forthcoming 2008).

16. For a chart of various regulatory protections of corporate stakeholders, see Greenfield, *supra* note 10, at 22.

17. See GREENFIELD, *supra* note 12; Greenfield, *supra* note 10; Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as a Regulatory Tool*, 35 U.C. DAVIS L. REV. 581 (2002).

is narrow in scope, limited by jurisdiction, and often captured by corporate interests. It is also often inefficient, haphazardly enforced, and reactive rather than proactive. I will not rehash those arguments here. But it is worth noting that my argument, that “external” regulation of the corporation is insufficient and inefficient as a matter of domestic law, is likely even stronger with regard to corporations on a global scale. Corporations often operate in a multitude of jurisdictions, from Bhopal to Bolivia, and the strength of protections for stakeholders vary considerably. The regulation of corporate governance, if we could figure out how to use it, is broad in scope, interwoven throughout the firm, integrated with the company’s entire activities, and not limited by jurisdiction.¹⁸

All this is to say that corporations are often sufficiently powerful and influential and that the regulatory efforts of specific jurisdictions will be ill-suited to affect the cost-benefit calculus of corporate decisions, much less the structure of corporate decision making itself. As water will flow through the path of least resistance, corporations will tend to find the jurisdiction whose legal framework will allow them to operate with the best mix of risk and reward. And of course the risk and reward that matter will not be the risk and reward from society’s point of view—it will be the risk and reward from the standpoint of the company’s financial bottom line. Absent extraordinary leadership, a company will not voluntarily internalize the social costs of its behavior into its decision making calculus. If, for example, a company is to produce a highly dangerous chemical, the release of which will cause disaster, a company will tend to locate that production where any resulting financial liability will be minimized. The minimalization can come as a result of the likelihood of the legal jurisdiction to fail to impose liability or through a calculation that any loss will be reduced because of the low earning power of those affected, reducing the level of potential tort damages. I cannot say that such a crass calculation was in fact made by those who made the decision to locate Union Carbide’s pesticide plant in Bhopal. But I notice that Union Carbide did not have any factories in Chestnut Hill.

It is worth emphasizing that corporate managers and executives making such decisions are not doing anything illegal or even immoral. They are doing what we ask them to do, which is to look after the interests of the bottom line. We ask them to be single minded in their role and to leave to others the worries about the externalities their companies cause. I believe we should ask more of corporate managers and of the corporations

18. See 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, 1369-78 (2001) (discussing the extension of the ultra vires doctrine to regulate corporations operating outside the jurisdiction of the United States).

themselves. I believe that we should adjust corporate governance to fold into the very decision making of the firm the interests of all those who contribute to its success.¹⁹ I believe that such adjustment would allow corporations to build wealth for all concerned and not merely to transfer it from one party to another. But absent such change or other meaningful regulatory limitation, we should not be surprised when corporations fail to accurately balance the social harm that arises from their behavior, causing disasters such as Bhopal. It is their nature.

19. See generally GREENFIELD, *supra* note 12.