Berkeley Business Law Journal

Volume 2 | Issue 1 Article 14

January 2005

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Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z38J862

Vulnerability and Efficiency (of What?)

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What are the criteria by which one can measure the quality of corporate law? Bill Klein has been comprehensive, if not exhaustive, in creating a list of values against which corporate law ought to be tested. There are, to my mind, two core metrics of good corporate law from which evaluation of many of Bill's criteria flow: good corporate law should facilitate the efficient production of goods and services, and in the process, it should appropriately protect those who are vulnerable to the variety of negative externalities created by production.[1] As I will argue, corporate law can only facilitate the efficient production of goods and services by getting out of the way. This is to say that it must, to be successful, unmake particular aspects of corporate law and the norms that attend them—particularly the norm, if not the law, of encouraging efficient wealth maximization. At the same time, fostering the efficient production of goods and services, with perhaps the backstop of stronger sanctions for managerial shirking and self-dealing, may well lead to appropriate managerial protection of the vulnerable. There is little that the law can do to foster good business, but there is a role for the law to ensure accountable business.

In addition to these two criteria, in order to create or identify good corporate law, we must pay attention to the factors that make good law in general. This is a matter that not only should be measured by contemporary norms but also by an understanding of the historical results of laws enacted or adjudicated at different times in our history—laws that may or may not have worked, and in either case, the underlying factors that caused these results. Here, one enters the realm of history and jurisprudence to get at the broader underlying social, political, and economic factors that drove the creation of these laws. Only when we peel back the doctrine—whether grounded in precedent or economics or anything else—to reveal the ideology beneath it, can we meaningfully evaluate the quality of law.

I. EFFICIENCY OF WHAT?

Beginning at least in the early 1970s, the prevailing yardstick by which the

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1. In most cases, this latter requirement would be accomplished by causing the corporation to internalize those externalities.

quality of corporate law has been measured is its efficiency. But efficiency, like equality, is an empty concept, an abstract idea. Efficiency requires nothing more than the minimization of wasted resources in pursuit of some goal. (Equality requires nothing more than treating some identified things alike with respect to some subject.) In order to evaluate the efficiency of a legal regime, one must know the subject to which the metric of efficiency applies. The answer that corporate scholarship and corporate law provide is simple: corporate law is good when it encourages the efficient maximization of wealth.

Wealth maximization is an odd subject of efficiency. Leaving aside the question of whether the maximization of wealth has intrinsic value (I believe it does not),[2] in this part of this essay I want to address the question whether one can maximize wealth by maximizing wealth. Say I wake up one morning and decide to pursue the maximization of my personal wealth. There is no venue in which I can simply pursue the maximization of my own wealth. I cannot search the want ads for a job, the stated end of which is to maximize my wealth. To accomplish this goal, I need to do something different. I first need to decide what remunerative enterprise both suits my talents and my tastes. Talent is an obvious consideration. I could, for example, decide that becoming a professional quarterback would yield the highest returns. But to look at me is to know that I have no chance of becoming a water boy, let alone a professional quarterback. To pursue professional football would be foolish in light of my goal. Investment banking is probably a better option.

There are issues of taste within the range of options provided by my talents. Investment banking or entrepreneurship might yield the best monetary results. But I do not want to suffer the long hours and drudgery of an investment banker, and I am unwilling to take the risks of an entrepreneur. Besides, I like being a legal academic. So I decide to keep my job and maximize my consulting time within university rules or write books for a mass market. By doing so, I will have maximized my wealth within the boundaries I have set for my choice. (It is worth noting that, given my talents, I have distinctly not maximized my wealth in an absolute sense.)

There are many ways I might go about maximizing my wealth. But one thing I surely would *not* do is set out to maximize my wealth *simpliciter*. Leaving aside more complex considerations, I would not pursue my wealth maximization directly for practical reasons. First, there is no way, in the abstract, to pursue the maximization of one's wealth. As I suggested in the preceding paragraph, wealth maximization can only occur within a given context. Second, and perhaps more important, to announce to a potential employer or to the potential consumers of the goods and services I might

2. In this I join Dworkin. *See* Ronald Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980); LAWRENCE E. MITCHELL, CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT ch. 4 (2001).

produce, that wealth maximization was my goal would be self-defeating. Economic sociologist Ronald Burt put this perfectly in the context of friendship: "Judging friends on the basis of their efficiency is an interpersonal flatulence from which friends will flee."[3] Similarly, doing business for the express purpose of your own wealth maximization is an economic flatulence from which potential consumers and employers also would likely flee.[4]

Everyone understands that people and corporations engage in business to make money. But for employers and consumers to know that your primary goal is wealth maximization ought to, at the least, make them suspicious of your dedication to your job and to the excellent provision of goods and services. While investment bankers might be employable with this articulated goal, they still can maximize their wealth (honestly) only by putting together good deals, underwriting high quality stock, and giving good advice to clients. And it would seem apparent that a manufacturer of baby food that announced its goal as maximizing corporate wealth instead of producing safe and high quality baby food would find few parents willing to trust its products.

That wealth maximization as a personal or corporate goal is bad business should be immediately obvious. Few corporations announce to their potential customers that the purpose of their existence is to maximize wealth (the institutional investor industry perhaps excepted). An hour in front of the television, or with a newspaper, magazine, or annual report, reveals advertisements that focus on product and service quality.[5] Even articles and interviews about successful companies and its business leaders and entrepreneurs generally reveal an at least articulated concern with the production of the best goods and services possible. If it was the case that wealth maximization was a goal that actually maximized wealth, one would expect that many corporations (as well as individuals) would proudly proclaim this as their maxim and directly pursue it. But they do not. That they do not should be enough evidence that the direct pursuit of maximum wealth is not a productive goal. If it is not a productive goal, facilitating its efficient achievement through corporate law is pointless and quite possibly, destructive.

This is not to say that entrepreneurs, corporate executives, investment bankers, and even law professors do not sometimes (or even often) attempt to maximize their wealth and the wealth of their corporations within a given context. But most of them understand they will never maximize their wealth by proclaiming that fact. They might, in the case of corporations, attract capital, although I doubt very successfully (but that is a discussion for a longer paper).[6]

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3. RONALD S. BURT, STRUCTURAL HOLES: THE SOCIAL STRUCTURE OF COMPETITION 24-25 (1992).

4. Even Citibank advertises in various media that money is not the most important thing.

5. Enron, in its famous 2001 Annual Report, is an exception.

6. If I am right about the self-defeating nature of claims to maximize wealth, there is no reason to

They would not generate the profits necessary to achieve this goal. If facilitating the efficient maximization of wealth is undesirable from a business perspective, corporate law that encourages it is not good corporate law.

There is another disadvantage to adopting direct wealth maximization as a criterion of good corporate law. This criterion, as do all criteria, helps to shape and direct the behavior of corporate management. The corporate management that pursues wealth maximization is likely to generate more negative externalities than the corporate management that pursues other goals.[7]

The standard answer to the foregoing observation is that negative externalities that evade market correction should not be addressed by corporate law but by external laws or regulations, like labor law, environmental law, and contract law. The standard reason for this answer is, of course, the idea that to interfere with wealth maximization as a corporate goal by forcing the internalization of externalities by the corporation itself is to create inefficiencies. This may be true. But if I am right, that aiming directly at wealth maximization is itself unproductive, there is no reason to worry about creating inefficiencies in the pursuit of an unproductive goal.

The preceding argument is not meant to deny the importance of wealth. It is clear that any society, individual, or business corporation needs to generate and acquire wealth in order both to survive, and at least in the case of society and individuals, to pursue other goals. Since wealth is valuable, the efficient creation of wealth is also desirable, preventing wasted or misused resources. But if wealth maximization provides a self-defeating goal of corporate law, an incoherent metric of efficiency, we must search for a more effective one.

What might this be? The obvious candidate to serve as a metric of good corporate law is the efficient production of goods and services. This is, after all, what corporations do. And the efficient production of goods and services means, at least in the long term, the production of high quality goods and services. After all, it is the production of superior goods and services (even by investment bankers and mutual funds) that brings in the profits. And if this is the best way to bring in the profits which permit corporate growth and wealth production, then the efficient production of goods and services ought to be our goal.

If I am correct, one fair question is why the efficient production of goods and services, rather than the efficient maximization of wealth, has not been pursued by courts, legislatures, and scholars as the desirable corporate goal and as the measure of good corporate law. It seems to me that the answer must be that the efficient production of goods and services is not a goal over which

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expect that potential shareholders would be less aware of this fact than managers and others, and would expect greater institutional success and ultimately profit in other corporations.

7. LAWRENCE MITCHELL, CORPORATE IRRESPONSIBILITY (2001).

corporate law has any control. Efficient production of goods and services is a function of the quality of internal corporate organization, the quality of the technology used, the skill and dedication of management and employees, and the correct gauging of supply and demand, among other things. While corporate law can help to reduce the agency costs created by the separation of ownership and control of the corporation, it can do nothing affirmative to forward the tasks of management or the performance of the corporation. Law can set agendas; it can control agency costs and transaction costs. It can, in other words, attack and solve problems. It cannot do the corporation's job, nor can it do much to ensure that managers and corporations do their jobs.[8]

The best that corporate law can do (other than prohibit, which it shares in common with most law), is to let skilled corporate managers run the corporation. And it does. The business judgment rule is the doctrine developed to leave managers alone to order corporate affairs in the best way possible. Sometimes management does a good job; sometimes it does a bad job. But it is managements' job, not that of the law, to facilitate efficient corporate production.

The business judgment rule, however, creates false consciousness in managers and shareholders. It does not provide the latitude it professes. Instead, over the last thirty years, corporate law has constricted the business judgment rule within the norm of wealth maximization as the appropriate metric for good corporate law. The reason is that probably the one affirmative purpose that corporate law can fulfill is to articulate the corporation's purpose and the corporation's goal. It has done this first by transferring managements' fiduciary duties from the overall good of the corporation to maximizing wealth. It then shifted those duties from the corporation (which may or may not make a difference but again must be left for exploration in a longer paper) to the shareholders. Finally, it reduced the shareholders to wealth maximizers to complete the matrix underlying doctrinal development.

Wealth maximization for shareholders is perhaps the one positive goal at which corporate law can aim and can enforce. It can do nothing to promote and enforce other, more coherent, goals, like the production of high-quality goods and services while protecting the vulnerable from harm. Since the business of courts, legislators, and scholars is corporate law, it is perfectly understandable that corporate law has aimed at this attainable goal rather than goals unattainable by law. Unfortunately, it is not a goal worth pursuing on any analysis.

8. One could argue that the administrative state through highly involved and specified regulatory agencies could help in the performance of these jobs. Maybe, and maybe not. But if it can, applying this model to corporate law would create far more state intervention than I suspect even the most radical of us, whose thought remains within the broad rubric of capitalism, would find comfortable.

II. VULNERABILITY[9]

The proposition that the encouragement of efficient production of high quality goods and services (by leaving management to set its own goals) is one of the criterion for measuring good corporate law leads to the next: good corporate law is corporate law that protects those vulnerable to the corporation in its goal of producing goods and services. These two criteria are, at bottom, connected. The connection is that the corporation that pursues the first goal will, perhaps not inevitably, but likely, also avoid harming those vulnerable to it. This is not an argument in favor of corporate legal duties to stakeholders (although such an argument could, but need not, follow from it). Instead, it is an argument about power and accountability, as well as simple good business.

Why should corporate law protect the vulnerable?[10] A fundamental correlative in Anglo-American law is that power comes with accountability, exemplified clearly in the fiduciary obligations imposed in our own area of study as well as in the basic structure of our government, contracts law, tort law, and the like. Corporate law may or may not do a good job of tying power to accountability in the case of stockholders (which I will discuss later), but it virtually ignores others vulnerable to the corporation. (The bevy of stakeholder statutes adopted in the late 1980s and early 1990s have turned out so far to be nothing but a reiteration of the business judgment rule while maintaining the corporate goal of wealth maximization.)

I suppose before going further, it is useful to summarize why these categories of persons are vulnerable to the corporation (or really to corporate management). Shareholders present an easy and obvious case, and I think require no explanation. If nothing else, corporate law does purport to demand corporate and managerial accountability to shareholders. Creditors, whether we might choose to protect them through corporate law, are in a somewhat similar position to shareholders in their reliance upon corporate management. Employees often stake their careers on individual corporations (and usually the range of corporations in which they might seek employment), although we choose to rely principally on contract law (including contracts created through collective bargaining in increasingly shrinking union membership) to protect them. Customers rely upon the continuing existence of the corporation for its products and services (and things like spare parts, follow-up, warranty fulfillment, and the like). Suppliers not only rely on the corporation as an outlet for their products but (at least those who sell on credit) also have some credit

9. For a detailed argument that recognition of the vulnerability of others is at the heart of social and legal justice, see LAWRENCE E. MITCHELL, STACKED DECK: A STORY OF SELFISHNESS IN AMERICA (1998).

10. By the "vulnerable" I mean, in this context, the commonly understood broad group of those affected by corporate power, including shareholders, creditors, employees, customers, suppliers, and the broader community.

risk in the corporation. The broader community is perhaps most vulnerable of all, reliant on corporations for continued economic progress and financial well-being, employment and secure retirement opportunities for its members, and respectful corporate treatment of the environment. Communities are also vulnerable to corporate power in the increasingly rare company town, to corporate influence in state and federal elections, and to corporate creation of preferences and values through advertising and the sponsorship of television programs (and, increasingly, movies). In light of the corporation's omnipresence in American life, communities and societies are vulnerable to the corporate shaping and legitimating of life pursuits, the structure of the various aspects of peoples' lives, and the incorporation and perhaps the engineering of social values.

I think it is indisputable that all of us are indeed vulnerable to corporate power in these and other ways, regardless of how we choose to deal with our vulnerability. Why has corporate law not demanded the accountability of corporations and their management to all of these vulnerable groups (except, perhaps, the shareholders)? The standard answer is that each of these groups—that is, all of us—have self-protective opportunities that shareholders lack. Creditors can negotiate detailed contracts, employees have the ability to contract and self-protect prior to accepting employment. Customers (who need not buy) and suppliers (who need not sell) can contract as well. The community—at least in the organized form of the state—can pass laws to force negative externalities back into the corporation with fines, penalties, and perhaps even criminal sanctions for undesirable behavior.

The standard argument has a point. But it is nonetheless insufficient in tying corporate power to corporate accountability. Leaving aside the question of whether contracting and external laws truly are adequate and effective to *protect* these vulnerable groups, the problem with the standard argument is that it leaves the corporation with no incentive to behave accountably for the exercise or abuse of its power with respect to these other vulnerable groups. The only corporate accountability is to obey the law, the most minimal form of accountability we expect of ourselves. The only time that accountability is realized is when the corporation gets caught.

The distinction between general accountability and legal accountability is important. Law has its limits. The corporation that has the obligation only to follow the law will, more often than not, find ways around it or at least develop the ability to cut very close to the boundaries. It can and will play probability games with the likelihood of enforcement and the pain of the sanction as coordinate variables. Perhaps most important, this approach cannot impose on corporations accountability commensurate with their power. The effects of corporations' exercise of that power often are subtle and certainly too pervasive to expect contract and statute to cover all of them. As with humans, most of whose behavior is regulated only secondarily by law and more pervasively by social norms and internal values, the only way for the corporation to be held accountable and therefore to behave responsibly in a way commensurate with its power is for it to internalize that obligation.

Why do we not demand accountability of the corporation, to whom all of us are, after all, vulnerable? If all of us are indeed vulnerable to the corporation, it would be impossible to compel the corporation, as a legal matter, to care for all of us without creating the corporate equivalent of walking on eggshells. We could use the law to protect one vulnerable group at a time. But to attempt to protect all together, except by means of the most general and therefore meaningless of principles, would produce corporate paralysis. The interests of each group, and therefore its legally crafted protections, would at least some of the time conflict with those of other groups. Each corporate misstep with respect to a given group would be a broken eggshell, a legal violation of that group's rights. These conflicting interests also lead to the conclusion that corporate law cannot protect the aggregate of the vulnerable as a single class either. The use of corporate law to protect the vulnerable would create legal obligations forcing corporations to override their goal of producing goods and providing services.

But we still face the nagging problem that power implies accountability. How can corporate law instantiate this value? Some have suggested that the business judgment rule provides sufficient latitude to permit corporate managers to balance the interests of the vulnerable, thus providing a reasonable measure of protection. But in light of the false claims of the business judgment rule I discussed above, the business judgment rule, at least when bounded by the corporate norm of wealth maximization, fails. Perhaps the business judgment rule, expanded by a corporate norm of efficient production of goods and services, could well achieve this goal. But as I already have noted, the business judgment rule in this much broader context can provide only latitude, not restraint. We do not need law beyond the simple legal empowerment of directors in order to provide this latitude.

Thus the only thing corporate law effectively can and does do is to *discourage* corporate protection of the vulnerable. It does this by adopting the norm of corporate wealth maximization which is, by general agreement, most efficiently achieved by tying management's obligation to the shareholders. The successful corporation becomes the one that best achieves the goal of wealth maximization, now with the specific addition of wealth maximization for the stockholders. Given corporate structure and limited liability, this almost surely means externalizing as many of the costs of wealth maximization on other vulnerable groups as the corporation can get away with. Corporate law can ensure the adequate protection of only one vulnerable group. In so doing, it consigns the others to even greater vulnerability.

But it does even more. It creates competitive disadvantages for managers who do want to work, within such breadth as the business judgment rule permits them, to balance the vulnerabilities of various corporate groups. Those who follow the ruling norm attract more capital from shareholders mistakenly convinced of its virtues, thus increasing share prices and lowering the corporation's cost of capital, at least in the short term. Those who forego current profits and share price increases for broader accountability and more generalized goals face the prospect of being eliminated in the takeover market or at least of suffering in the capital markets.[11]

What is the solution to this dilemma? As before, it appears to be adopting the efficient production of goods and services as a primary criterion by which good corporate law is measured. The efficient production of goods and services requires willing shareholders and creditors, skilled and hardworking employees (and, perhaps, loyal employees or at least content employees), satisfied and loyal consumers, and suppliers willing to deal with the corporation on reasonable terms. It requires a supportive community, willing to provide tax incentives where desirable, to ensure reasonable taxation and satisfactory infrastructure, to provide quality utilities, schools, health care facilities, transportation, and the like, and generally to facilitate the corporation's ability to pursue this goal.

It appears that the conclusion towards which I am heading is that the best corporate law is no corporate law (leaving aside, for the moment, the desirability if not necessity of securities laws and basic structural rules). For it is markets—not just the capital market but the product market, the employment market, the supply market, and the like—that provide the kinds of incentives necessary to ensure that the corporation not only acts efficiently but accountably.

It is tempting to conclude that we need no corporate law, other than basic structural and governance laws, to leave the rest to market forces and the occasional intervention of external regulation. But not yet. I must still discuss the application of the second criterion, protection of the vulnerable, to what might be the most vulnerable group of all—the shareholders. To that I now turn, at the same time as I touch upon the promised jurisprudential history that reveals the underlying reason corporate law winds up discouraging corporations from fulfilling the two criteria. The conclusion is that some straightforward realism—some honest policy talk in corporate law—would likely produce the kinds of rules that adequately restrain managerial shirking and self-dealing necessary to allow corporate law otherwise to get out of the way of the things corporations do best.

11. *See* MITCHELL, STACKED DECK, *supra* note 9.

III. IT'S LIKE LOCHNER

What I have so far written suggests that there is no hope for corporate law. Law cannot make a positive difference in the business context. It can only make things worse. But perhaps there is hope that we can create a positive role for corporate law, not in promoting the right kind of efficiency, as I have already discussed. But corporate law might provide a useful role in protecting vulnerable groups. To see how this might be accomplished, I will now turn to corporate law's treatment of the one vulnerable group it acknowledges—the shareholders.

Corporate law fails to protect shareholders at the same time as it claims to do exactly that. When we stop to uncover the underlying ideology of corporate law in the shareholder context, we find an ideology *not* of legal protection of shareholders but of shareholder self-protection. It is from this ideology of self-protection that we can begin meaningfully to discuss the criterion of protecting the vulnerable. At the same time, we can begin to see the deception of self-protection as a realistic option. Ultimately, as I have argued, the criterion of protecting the vulnerable must turn on the purpose of corporate law. And discussion of that purpose brings us back, full circle, to the question: "efficiency of what?"

There has, over the last several decades, been a pronounced tendency of corporate law to emphasize shareholder self-protection over fiduciary protection.[12] While this is most clear in the realm of the duty of care and justifications for the broader business judgment rule, it also is the case with the duty of loyalty which, except (to some extent) for the takeover realm in which most recent cases have occurred, allows the board procedurally to fulfill what used to be treated as substantive obligations. The justifications are shareholder choice and the ability of shareholders to self-protect through diversification and research. The result is that the shareholder receives little, if any, legal protection.

Shareholder self-protection completely flips the traditional norm of fiduciary protection, which is premised on our recognition of the beneficiary's vulnerability to the fiduciary's power. There may be reasons of economics and social policy that justify this flip—business certainty in decision making and encouraging managerial risk-taking are the most prominent. But justifying by claims that shareholders adequately can inform themselves in choosing investment opportunities and management teams, can effectively vote, and can diversify their portfolios, is deceptive. Disclosure and diversification are legal

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12. Some of the most direct articulations of this norm are Judge Winter's well-known opinion in *Joy v. North*, 692 F.2d 880 (2d Cir. 1982), and the Delaware Chancery Court and Supreme Court opinions in *Time v. Paramount*, 571 A.2d 1140 (Del. 1990). Countless cases apply this norm although with less honesty than in the cases cited.

and financial devices that conceal within them the fact that corporate law has shifted from a fiduciary ethic to an ethic of shareholder self-protection, treating shareholders as the least-cost avoiders of harm. In so doing, they mask the entire issue of vulnerability in corporate law.

While most corporate lawyers do not pay a lot of attention to legal history, there is a parallel history of this flip (albeit in the opposite direction). The infamous *Lochner* era,[13] which began in the 1880s and continued until the second quarter of the New Deal, was an era in which freedom of contract trumped all other values and concerns and in a similar if not exactly parallel way, served as an abstraction to conceal vulnerability. Worker and consumer protective legislation repeatedly was struck down by a Supreme Court devoted to preserving the ideal of freedom of contract (often, by the way, to the disadvantage of business).[14] Legislative protection, it was held, unduly interfered with the choices people could make as to how long they worked, the conditions under which they were willing to work, the manufacturers with whom people were willing to deal, and the like. True, long hours might be damaging to safety and health, working conditions might be hazardous, and products might be impure. But workers and consumers might choose to deal with substandard employers and manufacturers anyway in exchange for perceived compensating advantages like higher income and lower prices.

Hidden beneath these judicial pronouncements was, of course, a strong (if poorly implemented) bias toward economic development through the free market, despite potential harms caused to workers and consumers. Despite protestations of free choice, it was and is obvious that, for the most part, the choices were illusory. The argument for free choice, as the concepts of disclosure and diversification, conceals the reality that in fact most workers and consumers had little free choice, just as shareholders cannot really protect themselves very effectively (except by foregoing the opportunity to become shareholders).

Now the case of shareholders seems a little less sympathetic to us than the case of exhausted bakers. After all, for most of us, employment is a necessity, while shareholding is not. No corporation has a monopoly on providing investment opportunities and thus corporations can tailor their disclosures and attitudes toward shareholders as they like. (Berkshire Hathaway is the standard example of this, but the very fact that Berkshire Hathaway typically is the one example that comes to mind is in itself telling.) On the other hand, in practice, it is competitively advantageous (or else the practice would not have developed) for a corporation to conceal through disclosure as much as it can,

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13. Lochner v. New York, 198 U.S. 45 (1905).

14. For business' desire for stronger regulation, see LAWRENCE E. MITCHELL, THE SPECULATIVE SOCIETY: A HISTORY OF THE DEVELOPMENT OF AMERICAN CORPORATE CAPITALISM (forthcoming 2005).

and anyone who successfully has practiced corporate law, even briefly, has mastered this art.

A brief example of judicial cynicism toward disclosure is provided by the Chancery Court opinion in *Lewis v. Vogelstein.*[15] There the court allowed corporate non-disclosure of directors' valuation of options to be granted to them as compensation because of the alleged indeterminacy of such valuations. The court's reasoning—that the Black-Scholes model did not apply and thus no determinate valuation could be achieved—concealed the rather obvious fact that the directors certainly had to have had some pretty definite idea of value, both from a common sense perspective in accepting such compensation (who takes an offer of compensation without knowing its value?) and perhaps more importantly, in order to satisfy the limited requirements of the business judgment rule. The case provides an excellent example of the judiciary's compliance in concealing its encouragement of shareholder self-protection in circumstances where the ability to self-protect was implausible, while at the same time professing its desire to protect shareholders. The result is bad corporate law.

Unlike Utica bakers, shareholders can diversify. So are they really like workers who have no choices? In a sense they are. Certainly shareholders can self-protect through diversification which reduces overall portfolio risk. What this claim inevitably leaves out, however, is that while overall portfolio risk may be reduced, shareholders still lose money when a corporation suffers because of managerial shirking or self-dealing. Judicial and scholarly assertions to the contrary, diversification does not lessen the risk of stockholder harm from managerial shirking or mismanagement of, or self-dealing in, a particular corporation. Diversification lessens the overall pain, but a loss is a loss and the shareholder nevertheless has lost her money.

At the same time, managerial knowledge that shareholder self-protection is the governing norm at least has the significant potential to erode feelings of accountability toward the corporation and its shareholders. Such knowledge allows management to disregard the reality that, diversified or not, shareholders remain vulnerable to it. If fiduciary obligations toward shareholders, who still have formal claim to the duty, are relatively meaningless, then managerial attitudes towards others vulnerable to the corporation can be aggressively (if not intentionally) indifferent.

Business certainty and risk taking are positive values. Reductionist jurisprudence is a means both of concealing and fostering these goals. But a reductionism on top of which protection of at least one class of the vulnerable also is continually asserted as a value, when in fact such protection is lacking, is dangerous. It encourages false expectations of corporate management,

15. 699 A.2d 327 (Del. Ch. 1997).

expectations that, when frustrated, produce public outcry and sometimes unwise legislative fixes as well as exaggerated market reactions. It also fails to recognize the reality of the power of the corporate state over everyone's lives, and allows the state, through its formalistic laws, to subjugate its larger responsibility of ensuring social protection to the interests of business. These interests certainly are important, but when they are allowed to take precedence over the interests of the people, they have the potential ultimately to subjugate our lives to those interests, to increase our vulnerabilities to those interests. Corporate law that so easily abjures the need to encourage the right kinds of efficiency, while at the same time avoiding protection of the vulnerable, is bad corporate law. Good corporate law starts from the proper identification of corporate ends, the limitation of corporate power by limiting corporate ability to externalize too much, and eliminating managerial power to externalize its own interests. This it cannot do. This it does by leaving business to business. Perhaps the best corporate law is no law at all.