

2009 Mid-Year Conference on Business Associations Trends in Scholarship

Trends in Corporate Social Responsibility Scholarship

Lisa M. Fairfax
University of Maryland School of Law

Corporate law scholarship has long been concerned with whether and to what extent corporations should be managed in a way that goes beyond an exclusive focus on shareholders to take into account non-shareholder stakeholders such as employees, customers, creditors, and the society at large. Indeed, this concern animates a long-standing debate about the appropriate aims of the corporation. Some embrace a shareholder primacy norm insisting that corporate actors should focus primarily, if not exclusively, on maximizing shareholder profits. Others endorse a stakeholder theory of the firm, maintaining that corporations should address the concerns of all corporate constituents or stakeholders, and hence that corporations should act in a socially responsible manner. Despite the long-standing nature of this debate, most corporate scholars seem to agree that the shareholder primacy norm represents the dominant model of corporate governance. Despite this apparent dominance, there nevertheless continues to be significant corporate scholarship on the appropriateness of the stakeholder norm. Moreover, many scholars insist that the stakeholder norm with its attention to social responsibility does play a critical role in corporate affairs. My talk will focus on this role as well as the manner in which corporate governance scandals and the recent economic crisis impact this role.

Over the past several decades, corporate scholars have recognized that corporations can and do act in ways that account for other stakeholders, and hence that most corporations embrace corporate social responsibility in some respect. As an initial matter, my talk will explore the ways in which corporate scholars have highlighted this embrace. For example, Professors Margaret Blair and Lynn Stout argue that boards do not exist solely to protect shareholders, but rather to protect the enterprise-specific investments of all members of the corporate “team” including shareholders, managers, employees and other corporate stakeholders.¹ They further contend that public corporations can be understood as creating a mediating hierarchy pursuant to which the board is given decision-making authority to determine how best to use the team’s corporate assets and balance the competing interests of team members.² Others have suggested that the social responsibility norm may be consistent with the shareholder primacy norm. Thus, many scholars note that the discretion afforded to directors and officers under the business judgment rule gives such directors and officers the freedom to pay heed to the issues of non-shareholder stakeholders and behave in socially responsible ways. In a similar vein, scholars such as Professor Larry Ribstein have

¹ See Margaret M. Blair and Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 Va. L. Rev. 247, 253 (1999)

² See *id.* at 276-277.

noted that various market mechanisms may increase the likelihood that corporate directors and officers pay heed to issues of social responsibility, thereby decreasing the apparent divergence between managing the corporation for shareholders and managing the corporation in socially responsible ways.³ In this regard, many corporate scholars insist that social responsibility is compatible with a long-term view of shareholder primacy. Other scholars contend that even when social responsibility is not compatible with shareholder primacy, there exist situations in which the law enables directors and officers to focus on non-shareholder interests. As Professor Einer Elhauge illustrates, the most notable example of such a situation is corporate managers' ability to sacrifice corporate profits in the area of corporate donations.⁴ Hence, corporate scholarship has recognized the many different ways that corporate social responsibility permeates corporate behavior and challenges the dominance of the shareholder primacy norm, at least in its absolute sense.

Second, my talk will explore the ways in which corporate governance scandals impact the corporate social responsibility debate. On the one hand, corporate scholars have recognized that corporate governance scandals may increase the attractiveness of the social responsibility norm. This is because some view such scandals as an illustration of the manner in which the shareholder primacy norm's attention to short-term profit may incentivize corporate misconduct. Such scandals also spark concern regarding corporations' apparent lack of responsibility and the corresponding need to focus on corporate ethics. In this regard, scholars note that scandals challenge the normative attractiveness of the shareholder primacy norm, thereby making a norm focused on responsibility more appealing. On the other hand, scholars have recognized that governance scandals, and the reforms generated by such scandals, may not create an ideal environment for focusing on issues of corporate social responsibility. For example, scholars have recognized that corporations experiencing financial difficulties are less likely to engage in socially responsible behavior. Moreover, scholars have noted that when reforms focus on financial accountability, they may increase the corporate focus on profits, thereby decreasing corporations' ability to pay heed to matters that extend beyond the corporate bottom line.

Another important trend that has repercussions for corporate social responsibility is the increase in shareholder activism. Indeed, some scholars have suggested that increased shareholder power may have negative consequences for corporate social responsibility by focusing corporate attention towards shareholder concerns and away from the concerns of non-shareholder stakeholders. My talk will explore the scholarship on this issue.

Finally, my talk will examine the manner in which the current financial crisis and recession may influence the corporate social responsibility debate. For example, how does the federal government's increased role in public corporations influence the extent to which corporations can and should focus on non-shareholder constituents and social

³ See Larry Ribstein, *Accountability and Responsibility in Corporate Governance*, 81 *Notre Dame L. Rev.* 1431 (2006).

⁴ See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 *N.Y.U. L. Rev.* 733 (2005).

responsibility? Moreover, to what extent should financially distressed corporations be encouraged to engage in socially responsible behavior? Some corporate scholars already have begun to explore these issues and my talk will analyze that exploration, and thereby discuss how this current crisis may influence future scholarship in the arena of corporate social responsibility.