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Humanity Constrains Loyalty: Fiduciary Duty, Human Rights, and the Corporate Decision Maker

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HUMANITY CONSTRAINS LOYALTY: FIDUCIARY DUTY, HUMAN RIGHTS, AND THE CORPORATE DECISION MAKER

Malcolm Rogge[*]

ABSTRACT

This article considers whether the values contained within the idea of human rights have normative priority over economic values as they are inscribed in shareholder-oriented interpretations of the duty of loyalty in corporate law. While stakeholder theorists have sought to expand the ambit of the fiduciary duty—arguing generally that corporate fiduciary law permits managers to take into account a broad range of stakeholder interests—this article shifts the frame of analysis: It proposes that the range of corporate fiduciary loyalty is constrained by human rights as normative values that are distinct from the strictly economic values that are given primacy in the shareholder-centered approach. This constraining effect occurs in decision-making and in appraisals of decisions taken quite apart from whatever fiduciary loyalty is thought to demand as a matter of positive law. In other words, human rights are "parents" of corporate law, rather than the converse.

This article begins by considering a mixed question of law and ethics: Does a loyal corporate fiduciary have the freedom to make decisions concerning human rights for the specific regard of non-shareholders, or must the loyal fiduciary treat human rights concerns in ways that are instrumental to enhancing stockholder interests? In shifting the focus away from what law places *inside* the "urn" of fiduciary duty (away from the debate over what categories of interests the fiduciary is given permission by law to consider), this question concerns itself with the "negative space" that shapes the

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range of fiduciary duties from the outside. This novel approach reconfigures the contours of the shareholder-stakeholder debate by examining the constraints on the fiduciary duty concept within the larger normative ecosystem in which it resides. Recognizing these normative constraints, corporate law should expect only the "reflective loyalty" of flesh-and-blood decision makers.

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INTRODUCTION: CONSTRAINING THE RANGE OF CORPORATE LOYALTY

This article considers whether the values contained within the idea of human rights have normative priority over economic values as they are inscribed in shareholder-centered interpretations of corporate law's duty of loyalty. It is about the interplay of the ideas, normative values, and laws that bring the corporate entity to life through the decisions taken by flesh-and-blood individuals. Focusing on the concept of fiduciary duty as one of the core components of globalized corporate law, this article proposes that the ethical values contained in human rights *constrain* the range of corporate fiduciary duties with respect to decisions made by the flesh-and-blood corporate directors and executives.

The first step of this inquiry is to pose a mixed question of law and ethics: Does a loyal corporate fiduciary have the freedom to make decisions concerning human rights for the specific regard of non-shareholders, or must the loyal fiduciary treat human rights concerns in ways that are instrumental to enhancing stockholders' interests (including stockholder wealth or welfare), or to advancing the corporation's short-term or long-term economic interests? Putting the problem another way: If a corporate fiduciary pays regard to the human rights of "those who suffer"[1] outside of the corporation for non-instrumental reasons, does the decision maker push against (or perforate) the boundaries of mandatory corporate loyalty?[2] This article considers the strength of prior ethical constraints on the range of corporate loyalty when the human rights of people who may be adversely affected by corporate activity are brought into the picture.

While many stakeholder-oriented corporate law theorists have sought to expand the ambit of the corporate fiduciary duty—arguing generally that it already permits managers to take into account the interests of a broad range of stakeholders—this article suggests we shift the frame of analysis. Instead of debating over what concerns are thought to fit *within* the ambit of the corporate fiduciary duty, I propose that we turn our attention to the normative values that stand outside the "urn" of fiduciary duty and constrain its borders. I argue that the reach of corporate fiduciary loyalty is constrained by human rights as normative concerns that are qualitatively and foundationally distinct from the economic values that are given primacy in traditional shareholder-oriented interpretations of corporate law loyalty. My claim

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1. Kaldor's classic statement of the hypothetical compensation test requires that *all those who suffer* as a result of some economic policy or action be *fully compensated for their loss* while still allowing for a net gain for *the rest of the community*:

> There is no need for the economist to prove—as indeed he never could prove—that as a result of the adoption of a certain measure nobody in the community is going to suffer. In order to establish his case, it is quite sufficient for him to show that even if *all those who suffer* as a result are fully compensated for their loss, the rest of the community will still be better off than before.

Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 550 (1939) (emphasis added).

2. Consider former Chief Justice Leo Strine's statement that "the idea that directors can subordinate stockholder interests to other interests of the directors' choosing is strained and at odds with the structure of our overall statute." Leo E. Strine Jr., *The Dangers of Denial: The Need for a Clear-Eyed Understanding of the Power and Accountability Structure Established by the Delaware General Corporation Law*, 50 WAKE FOREST L. REV. 761, 783 (2015) [hereinafter *Dangers of Denial*].

is that the constraining effect of human rights as normative values occurs in decision-making and in appraisals of decisions taken, quite apart from whatever corporate law loyalty is thought to demand as a matter of positive law. Put simply, a business decision maker's concerns about ethics and human rights constrain the ambit of corporate law duties, rather than the other way around.

To illustrate my claim, I offer what I believe to be a helpful visual metaphor: Our task is to perceive what lies in the "negative space" that lies around and outside the positive statutory and doctrinal mandate of corporate fiduciary loyalty.[3] The normative prior constraints of human rights, as grounded in the normative value of humanity, are relevant to decision makers not only for instrumental reasons that serve the corporate or shareholder interest, but as normative ends in themselves. Corporate law loyalty is just one normative constraint that shapes the contours of corporate decision-making among many others; in this sense, we ought not regard it to be an overarching apex duty. The corporate law duty of loyalty lies *within* a normative ecosystem and not above it. We should not regard corporate law as giving fiduciaries "permission" to consider the normative value of respecting human rights when making decisions. Rather, we should recognize that human rights constrain the reach and range of what corporate law fiduciary duties are able to require of decision makers in the first instance. Thus, human rights are "parents" of corporate fiduciary duty laws, rather than the other way around.[4]

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3. *See infra* Figure 1. The negative space that lies around and outside the "urn" of corporate fiduciary duty.

4. Shifting the frame of analysis in this way aligns with Amartya Sen's argument (drawing on the legal philosophy of H.L.A. Hart) that human rights are parents of law, rather than law's offspring. In his Grotius lecture, Sen (referring to H.L.A. Hart) argues that human rights, as ethical principles, are *parents* of law and legislation rather than the other way around. *See* Amartya Sen, *Human Rights and the Limits of Law*, 27 CARDOZO L. REV. 2913, 2918 (2006). Similarly, I argue that human rights are parents of corporate law, rather than the other way around. Hart argues that:

> There is of course no simple identification to be made between moral and legal rights, but there is an intimate connection between the two, and this itself is one feature which distinguishes a moral right from other fundamental moral concepts. It is not merely that as a matter of fact men speak of their moral rights mainly when advocating their incorporation in a legal system, but that the concept of a right belongs to that branch of morality which is specifically concerned to determine when one person's freedom may be limited by another's and so to determine what actions may appropriately be made the subject of coercive legal rules.

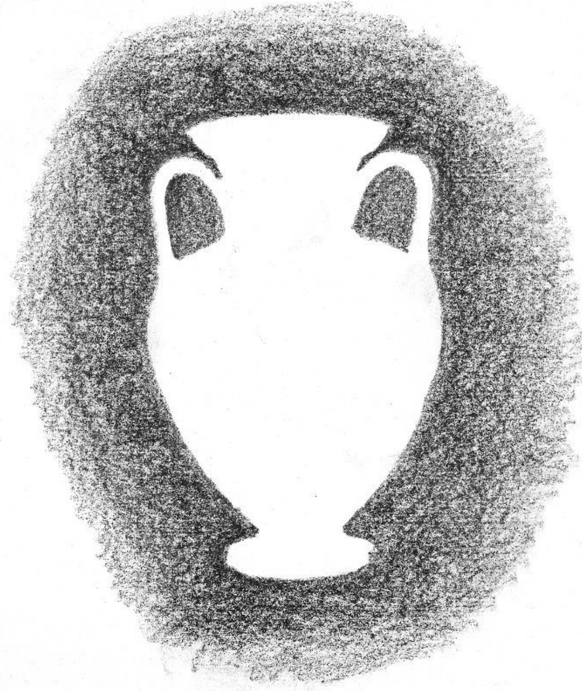

Figure 1. The negative space that lies around and outside the "urn" of corporate fiduciary duty. The statutory and doctrinal range of the fiduciary duty is defined by the image of the urn. This paper is concerned with the constraining force of plural values that lie around and outside the formal boundaries of the legal fiduciary duty. The positive law is shaped by the "negative" space that exists around it. *Illustration*: Malcolm Rogge.

As shown in Figure 1, the range of corporate loyalty is defined not solely by positive law, nor is it circumscribed only by the caveats contained within the business judgment rule and common law corporate law doctrine. Instead, the power and reach of corporate loyalty is constrained by normative values that are inscribed in the idea of human rights as they are recognized globally in various instruments of

H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175, 177 (1955). Sen argues that "the entirely legal routes to understanding human rights are not only misleading, they may also be foundationally mistaken." Sen, *supra*, at 2914.

international law.[5] This means that the center of the corporate decision maker's value universe is not found in the dictates of positive corporate law loyalty, but in the flesh-and-blood decision maker's reflective conscience as an ethical being whose worldview and lived experience are shaped by the idea of human rights, as they are broadly conceived in the world today.

I. DEFINING LOYALTY

A. LOYALTY AS THE "GRAVITATIONAL FORCE" OF CORPORATE LAW (BUT NOT THE ONLY FORCE THAT MATTERS)

In his well-known treatise on corporate law, Robert C. Clark emphasizes the centrality of "loyalty" in shaping past and present corporate law:

> The overwhelming majority of particular rules, doctrines, and cases in corporate law are simply an explication of this duty [of loyalty] or of the procedural rules and institutional arrangements involved in implementing it. The history of corporate law is largely the history of the development of operational content for the duty of loyalty. Even many cases that appear to be about dull formalities or rules of the road in fact involve disputes arising out of alleged managerial disloyalty . . . . [T]his general fiduciary duty of loyalty is a residual concept that can include factual situations that no one has foreseen and categorized. The general duty [of loyalty] permits, and in fact has led to, a continuous evolution in corporate law.[6]

It would not be an exaggeration to say that corporate law's fiduciary loyalty mandate is tantamount to the "holy grail" of corporate law: Loyalty is an essential aspect of corporate law, though its precise meaning is never grasped completely. The core of loyalty is elusive by design. To employ another metaphor, corporate loyalty is no less than the gravitational force that holds corporate law, the corporate entity, and

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5. *See, e.g.*, G.A. Res. 217 (III), International Bill of Human Rights (Dec. 10, 1948) (The International Bill of Human Rights is regarded to include the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its two Optional Protocols.).

6. ROBERT C. CLARK, CORPORATE LAW 34, 141 (1986) (emphasis omitted) [hereinafter CORPORATE LAW].

the corporate system in place in the world. Without the ideas of fiduciary loyalty, duty, and trust, the corporate form would not be viable as a vehicle for investment, nor would the corporate system "hang together" in the world.[7] And so, a theory about the place of human rights in business decision-making and in the world's corporate system must contend with the omnipresence of fiduciary loyalty as a value, theme, and foundational concept in globalized corporate law.

In the early days of the "holding corporation," beginning in the State of New Jersey in the 1890s, related corporate entities were referred to as parent and daughter corporations.[8] In today's world of multinational enterprises, corporate groups (also known as "poly-corporate" enterprises[9]) are joined together by equity relationships among parent and subsidiary corporations. Functionalist corporate law theorists regard limited liability as playing an "entity shielding" role in corporate law.[10]

We ought to regard the duty of loyalty as playing an entity-synthesizing function—in other words, corporate law's loyalty mandate (among other ideational factors) makes the abstract, legally constituted corporate edifice hang together in the world.[11] The duty of loyalty synthesizes the flesh-and-blood decision maker's reflective conscience with the abstract corporate legal entity. With the globalization of the corporate system and its core ideational components, the entity-synthesizing function of loyalty takes on global significance. Without loyal fiduciaries acting on behalf of each separate entity in the group,

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7. On what makes things in the world "hang together," see John G. Ruggie, *What Makes the World Hang Together? Neo-Utilitarianism and the Social Constructivist Challenge*, 52 INT'L ORG. 855 (1998).

8. The equity relationships (wholly owned subsidiaries and affiliates) may also be accompanied by extensive contract relationships with other entities, such as joint venture agreements with other firms or governments.

9. The "poly-corporate" enterprise is comprised of several separately incorporated entities that are combined into a corporate group or holding company structure. For a discussion on the emergence of the modern poly-corporate enterprise, see JOSÉ ENGRÁCIA ANTUNES, LIABILITY OF CORPORATE GROUPS: AUTONOMY AND CONTROL IN PARENT-SUBSIDIARY RELATIONSHIPS IN US, GERMAN AND EU LAW: AN INTERNATIONAL AND COMPARATIVE PERSPECTIVE (1994).

10. On the essential role of "entity shielding" and "asset partitioning" in corporate law, see Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333, 1336 (2006).

11. The entity-synthesizing function is a counterpart of the "entity shielding" function of limited liability and separate legal personality. *Compare id.*, *with* Ruggie, *supra* note 7.

there would be no stable foundation for business corporations, multinational enterprises, or the corporate system as it exists in the world today.

The fiduciary duty of loyalty is to the global firm what gravity is to the arch. The duty's force holds each of the components in place, forming a resilient structure that may take many forms. We might call this resilient yet abstract structure the loyalty architecture of a business association or corporate group, and we might visualize it in the following way:

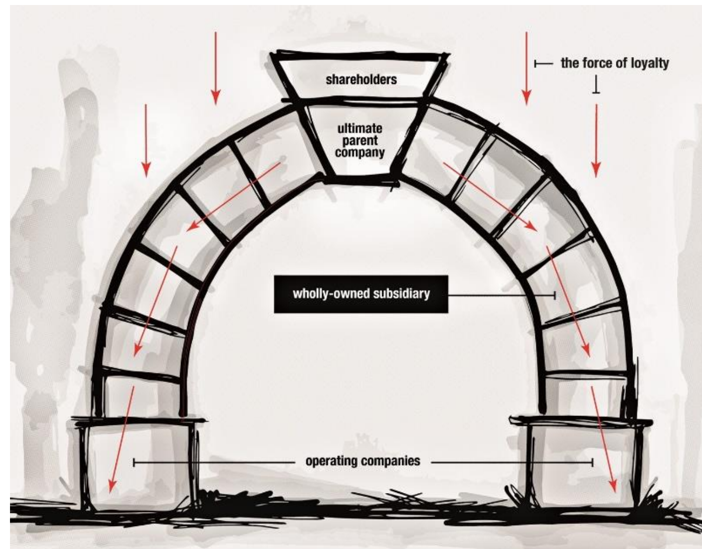

Figure 2. The force of loyalty as the gravity that holds the corporate edifice together. Each stone in the arch represents a legally separate company in a corporate group. The red arrows show how the directional force of loyalty (manifested in the actions and decisions made by flesh-and-blood fiduciaries) holds the legally constituted edifice together as a resilient structure. The keystone is the parent company—as an abstract entity, it does not exert force on its own, but is rather a placeholder. The active "force" that holds the edifice together is exerted through the loyal decision-making of flesh-and-blood persons who have power over each separate corporate entity. As the diagram shows, it is the gravitational force that holds the separate components of the corporate group together, rather than any single abstract corporate entity on its own. Without the force of loyalty acting on corporate decision makers, the abstract corporate entities have no way of maintaining any coherent relation to one another in the world. *Illustration*: Karen A. Justl (for this paper).

As a universal value in the world's corporate system, the force of loyalty acts upon all corporate entities like a gravitational force, pulling the various components of the enterprise together in the same way that gravity pulls separate stones together to form an arch. By holding managers and directors to basic standards of behavior through a flexible and "residual" fiduciary rule, the edifice of the corporate group takes shape and maintains its integrity and malleability over time.[12] The demands of loyalty are defined by statutory and doctrinal expectations of appropriate conduct for flesh-and-blood decision makers, and yet, as I argue below, such demands are tempered and constrained by exogenous values that reside in the negative space around and outside of those very statutory and doctrinal constructs. As stated above, the duty of loyalty should not be regarded as an overarching apex duty, rather, it exists within an ecosystem of other norms and values that interact. In today's global ecosystem of ideas, norms, values, and laws, human rights are parents of business law rather than business law's offspring.

While many values and ideational factors are needed for the corporation to "hang together" in the world, the corporate duty of loyalty is regarded as playing a very specific role in this regard: the duty of loyalty is imposed on the corporation's flesh-and-blood decision makers to put a "brake" on managerial self-dealing that would undermine the shareholders' interests.[13] The principal-agent theory of the corporation goes a step further: by this view, the shareholders are

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12. Allen et al. speak of the fiduciary duty as embodying the "duty of obedience to the documents creating the relationship . . . the duty to obey the principal's commands." WILLIAM T. ALLEN, REINIER KRAAKMAN & GUHAN SUBRAMANIAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATIONS 26 (4th ed. 2012) (emphasis omitted). But, Clark states in his corporate law casebook that "the relationship between shareholders and directors is not well described as being between principals and agents." CORPORATE LAW, *supra* note 6, at 22.

13. For example:

> [M]anagement has a great deal of power, which it can use both for good—to increase firm value—and for bad—to line its own pockets. Without any requirement to act on behalf of shareholders, there would be little to stop management from overpaying itself, hiring friends and relatives as consultants, and buying inputs from other firms in which it has an ownership interest at inflated prices. Moreover, it is hard to write a contract that specifically rules out all the possible bad actions that management might undertake. Making management a fiduciary of shareholders puts a brake on these activities, in general terms, by exposing a manager who acts openly to enrich himself at the expense of shareholders to a law suit.

Oliver Hart, *An Economist's View of Fiduciary Duty*, 43 U. TORONTO L.J. 299, 303 (1993)

regarded as superior "principals," while the day-to-day decision makers who are appointed to manage the corporation are regarded as their subordinate "agents."[14] The hierarchical dimension of the corporate structure is manifested by the inferior agent's "duty to obey the principal's commands."[15] It is thought that strict discipline of subordinate agents is required to fulfill the legal entity's economic function as a reliable and maximal vehicle for investment by the superior principals.[16] Dereliction of duty, abuse of power, or self-dealing by the directors and officers in any of the legally separate components will weaken the superior-inferior/principal-agent structure as a whole, and if left unchecked, such transgressions will destroy or corrupt the corporate enterprise beyond recognition.

In a world of multinational enterprises, transnational loyalty architectures hold together the poly-corporate groups that span continents today. With loyal fiduciaries acting at the helm of each legally separate entity in the group, the multinational enterprise holds its form against innumerable pressures that would otherwise bring it down. A theory of human rights and business must contend directly with the normative force of corporate law loyalty within the globalized corporate system. The maxim *humanity constrains loyalty* takes us one step closer towards the goal of articulating a theory of human rights and business.

B. DISTINGUISHING LOYALTY IN CORPORATE LAW FROM ALLEGIANCE IN CORPORATE CULTURE

For clarity's sake, it is crucial to distinguish between corporate law's loyalty mandate and the broader and looser cultural expectation of

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14. In his critique of the principal-agent theory of the corporation, in his section titled, "Managers Are Not Agents of Stockholders," Clark explains that "[t]hough lawyers use the concept of agency in a variety of senses, the core legal concept implies a relationship in which the principal retains the power to control and direct the activities of the agent." *See* Robert C. Clark, *Agency Costs Versus Fiduciary Duties*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55, 56 (John W. Pratt & Richard J. Zeckhauser eds., 1985) [hereinafter *Agency Costs*].

15. *See* ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 12, at 26.

16. *See generally* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. (forthcoming Dec. 2020), https://ssrn.com/abstract=3547409.

allegiance within a business.[17] It is also important to understand how loyalty and allegiance interact. At the same time, it is essential to recognize that a corporation's employees (as subordinates) are expected to respect and comply with the directions given by their superiors, including those policies set by the highest decision-making authorities of the corporation. While the duty of loyalty has a distinctly legal flavor, the sense of allegiance that company directors and employees feel towards the company has a distinctly cultural and psychological dimension. In most companies, a blanket cultural value of allegiance to the firm is instilled across the enterprise. Every person who works for a firm is expected to identify with that firm to some degree, whether a low-level employee or division boss. The firm is a team; the managers and employees of the firm play on the same team. Everyone on the team is expected to pool their efforts to advance the firm's objectives. The broad expectation of allegiance to the corporate team is entirely distinct from the demand of corporate loyalty, and yet, the cultural allegiance of all members of the team is no less critical for realizing the firm's goals. Indeed, "[w]ithout a powerful corporate culture, a company cannot fuse high performance with high integrity at all levels in all locations—from the gritty shop floor in Western China to the sleek headquarters tower in New York."[18]

Within the firm, a corporate culture of allegiance is promoted and mandated for employees through the internally-oriented logic of employment law. Whereas corporate law's loyalty mandate for managers crystalizes in the fiduciary duty concept, in employment law, the allegiance of servant to master is based on expectations of subservience and obedience. An employee's allegiance to the firm arises out of a duty to obey superiors; hence, an employee who does not demonstrate sufficient allegiance to the firm is regarded as insubordinate. The value of allegiance is critical for the operational success of a firm insofar as the diligent efforts of the firm's employees are required to meet the firm's objectives. At the same time, the value of

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17. Ben Heineman, the former General Counsel of General Electric, defines corporate culture as "the shared principles (the values, the policies, and the attitudes) and the shared practices (the norms, systems, and processes) that influence how people feel, think, and behave, from the top of the corporation to the bottom, all across the globe." BEN W. HEINEMAN, THE INSIDE COUNSEL REVOLUTION: RESOLVING THE PARTNER-GUARDIAN TENSION 92 (2016).

18. *Id.* at 91.

fiduciary loyalty is critical for the structural and organizational coherence of any corporate entity and corporate group.

The value of fiduciary loyalty plays a distinct role in the ontology of the corporate entity or corporate group. Contrary to what the principal-agent theory of corporate governance seems to imply, the demand of loyalty is not properly analogous to the master-servant dichotomy that lies at the foundation of employment law. Moreover, as Clark has argued, the relationship of a corporate fiduciary to the corporation is not properly characterized solely in terms of a contractual relationship, as the "nexus of contracts" theory of corporate governance holds.[19] In direct opposition to the nexus of contracts theory of the firm, Clark argues that "[m]ost of the particular rules that make up the legal relationships among corporate officers, directors, and stockholders—that is, the relationships that constitute corporate law and give operational meaning to the legal concept of the corporation—are not the product of actual contracts made by the persons subject to them."[20] As Clark argues, the authority of the corporate director is derived from the corporate law statute rather than by any term that is stipulated in an "actual contract"—she is elected by the shareholders and is given authority to manage the business by statute.[21] By this understanding, the manager is an elected "director" or appointed "officer" of the corporation, and is not a subordinate employee, nor de-facto agent of the shareholders.[22] The corporate director's authority to make decisions on behalf of the corporation does not rest in the director's contractual relationship to the legal entity. The loyalty mandate of corporate law is distinct from the obedience mandate that subordinate employees owe to their superiors. It is critical to understand this distinction when considering the relationship of corporate decision makers to the

19. *See Agency Costs*, *supra* note 14, at 60. In his critique of Jensen and Meckling's influential theory of the private corporation, Clark asks: "[I]s it realistic or useful to view the modern public corporation as consisting only, or even principally, of a set of contracts? I think not. [Jensen and Meckling's] extreme contractualist viewpoint is almost perverse. It is likely to blind us to most of the features of the modern public corporation that are distinctive, puzzling, and worth exploring." *Id. See generally* Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

20. *See id.* In making his argument, Clark quotes extensively from Jensen & Meckling. Jensen & Meckling, *supra* note 19, at 311.

21. *See Agency Costs*, *supra* note 14, at 56–57, 60.

22. *See id.* at 56.

corporation and its shareholders, and it is critical for understanding the range and limits of corporate law's fiduciary mandate, as we shall see below.

As argued above, the character of fiduciary loyalty to the corporation is qualitatively, ontologically, and legally distinct from the loyalty that is expected of servant to master and of "agent" to "principal." With this distinction in mind, we can better articulate how human rights and the value of humanity as normative ends in themselves lie in the negative space that exists around and outside the positive range of corporate law's fiduciary mandate.

As normative values, human rights have a constraining influence and effect on the range of fiduciary loyalty that is expected of, and may be demanded of, corporate decision makers. By this exogenous constraining effect, corporate decision-making is influenced and circumscribed by the value of human rights and humanity independent of the results of quantitative economic cost-benefit analysis with regard to business risk and return on investment. This is not to say that concerns about business risk and return on investment are irrelevant when it comes to matters of human rights. Rather, the point is that the values of human rights are not subordinate to the value of corporate loyalty. Human rights as normative values do not have subordinate normative status compared to corporate loyalty as a duty, or as a value, that a corporate fiduciary is expected to honor. In other words, the corporate loyalty mandate is by no means the apex duty that stands in priority to all other normative values that a corporate decision maker must contend with in day-to-day and long-run decision-making.

To recapitulate: The firm's culture of allegiance is amorphous and all-encompassing. In contrast, a director's legal duty of loyalty is more precisely defined, yet still sometimes fuzzy. Corporate directors are expected to follow the particular fiduciary mandates of the jurisdiction in which the corporation is domiciled, and so, the details of their legal duties may vary depending on what geographical division their company is based in and what law applies.[23] That being said, it is also quite

23. *See* DETLEV F. VAGTS, WILLIAM S. DODGE, HAROLD HONGJU KOH & HANNAH L. BUXBAUM, TRANSNATIONAL BUSINESS PROBLEMS 161–62 (5th ed. 2014). The malleable fiduciary duty concept exhibits some plasticity across legal systems—its contours vary from place to place. Legal scholars Lucian Bebchuk and Mark Roe note that while "general principles of corporate law may often be the same across countries," such as the fiduciary principle, the principles may be implemented in different or even radically different ways. Lucian A. Bebchuk & Mark J. Roe, *A Theory of Path*

evident that the global parent company may establish firm-wide policies to which the directors and managers of all subsidiary entities in the group owe their allegiance.[24] For instance, the parent company board might seek to embed a global policy to respect human rights across the firm.

Closely related to its policy-setting role, the parent company also strives to set the overall culture of the organization—directors and managers throughout the group are expected to conform to the norms and values that percolate from the top.[25] The parent company has many tools at its disposal to inculcate such allegiance among the enterprise's personnel, including incentives, stipulated obligations in contracts, and global training programs.[26] Putting all of this together, it becomes clear that managerial decision-making at all levels within the corporate group structure is shaped by an amalgam of intra-firm norms and values (blanket allegiance, policies, business culture), legal obligations (fiduciary duties, contractual commitments), as well as industry standards, voluntary codes, and expressions of "soft law."[27] The corporate fiduciary mandate exists within this amalgam of norms.

Dependence in Corporate Ownership and Governance, 52 STAN. L. REV. 127, 154–55 (1999).

24. Heineman writes:

> The expression of . . . fundamental corporate principles or aspirations will take many written forms in all the basic documents of the corporation from the short to the long, from the summary to the detailed: for example, a code of conduct; a guide to the spirit and letter of core company policies; detailed guidelines for each policy area (e.g., antitrust, labor, and employment); the Annual Report; the Proxy Statement; a Citizenship Report; governance guidelines; and organic, accessible education and training materials . . . . No task of the General Counsel is more important than working with the CEO and other senior leaders on the forceful, continuous delivery of these core aspirations.

HEINEMAN, *supra* note 17, at 92–93.

25. On risk management, fiduciary duties, and the "tone at the top," see Martin Lipton, *Risk Management and the Board of Directors*, HARV. L. SCH. F. ON CORP. GOVERNANCE AND FIN. REG. (July 28, 2015), https://corpgov.law.harvard.edu/2015/07/28/risk-management-and-the-board-of-directors-3/ [https://perma.cc/ZA4M-SHV8].

26. *See* HEINEMAN, *supra* note 17, at 91–128 ("The Cultural Imperative"). Vagts et al. note that "[t]he efficiency of the overarching corporate structure may be reinforced by means such as a training program, conveying to executives from different societies a sense of the X Company 'way of doing things.' Incentive programs will reinforce the tendency to pursue the general goals which central headquarters sets." VAGTS ET. AL, *supra* note 23, at 186.

27. Writing in 1997, Peter Muchlinski proposed, "it is arguable that a 'proto-law' is emerging where the [multinational enterprise] establishes firm-wide internal codes of

The range of the fiduciary mandate, I argue, is constrained and circumscribed by values that reside within the negative space that lies around and outside of the borders of positive law. We shall now consider how this complex assemblage of norms, values, rules, and laws (in positive and negative space) shape managerial decision-making at various levels of the firm on matters that relate to human rights.

II. HUMAN RIGHTS, HUMANITARIAN MOTIVES, AND CORPORATE LAW DUTIES

What, if anything, does the law require of business decision makers who face a quandary over respecting human rights and advancing the economic interests of the corporation and its shareholders? For over a century, Anglo-American legislators, jurists, scholars, and practitioners have disagreed about how to referee the colliding internal and external demands on corporate managers. At the very least, jurists mostly seem to agree that a for-profit corporation is not a community service organization, nor a philanthropic cause. Nonetheless, there remains a strong sense that a business corporation has a social role to play, and that corporations have responsibilities to the broader community as well as to shareholders. Indeed, the United Nations Guiding Principles on Business and Human Rights, adopted by the UN Human Rights Council in 2011, asserts that corporations have a responsibility to respect human rights.[28] A brief review of leading cases in the United States reveals just

practice to be followed by managers and employees." PETER MUCHLINSKI, GLOBAL LAW WITHOUT A STATE 83 (Gunther Teubner ed. 1997). He notes that "industry-wide codes of practice can act as a benchmark for assessing the reasonableness or otherwise of individual corporate behaviour," and suggests that in the future, courts will consider these codes as benchmarks in assessing the requirements of the duty of care (in tort). *Id.* at 84. By this feedback loop, "such applications of voluntary industry codes go beyond internal self-regulation and contribute to the content of 'official' law. At this point the voluntary code becomes a method of affecting the external environment." *Id.*

28. *See* John Ruggie (Special Representative of the Secretary-General), *Rep. on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises: Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, 13, U.N. Doc A/HRC/17/31 (Mar. 21, 2011) (explaining that the corporate responsibility to respect human rights is "a global standard of expected conduct for all businesses"). For a recent survey of the global uptake of the corporate responsibility to respect human rights and corporate "human rights due diligence" in domestic legislation and soft law mechanisms around the world, see John G. Ruggie et al., *Making 'Stakeholder*

how unsettled the question of a corporation's social role and community responsibility remains. Even today, after a century of debate, jurists and scholars continue to clash on the subject.

The somewhat crude, but intuitive, distinction between for-profit corporations and philanthropic *not-for-profit* causes was at the center of the seminal and much disputed case of *Dodge v. Ford Motor Co.*, heard by the court over a century ago.[29] In that case, the Michigan Supreme Court found that automaker Henry Ford wrongly subordinated the interests of shareholders for the benefit of other stakeholders, including his employees.[30] The minority shareholder plaintiffs, the Dodge brothers (who also happened to be in the auto manufacturing business) alleged that Mr. Ford chose to substantially lower the sale price of the Ford Motor Company's automobiles rather than pay a dividend to the stockholders.[31] The alleged redirection of profits occurred during a period of remarkable growth of the Ford company.[32] The company was doing extremely well.[33] Demand for Ford automobiles was high, and the public was benefitting directly from Ford's decision to lower the cost of a new car.[34] The Dodge brothers felt that they had been treated unfairly and had been wrongly deprived of corporate benefits that ought to have accrued to them as shareholders.[35] While the lower cost to the consumer was certainly a social benefit for non-shareholders, the brothers argued that such benefit came at a direct cost to Ford shareholders.[36] The effect of Ford's decision was to trade off shareholder gain for non-shareholder gain, and this, they argued, was improper.[37] They alleged that Ford intended "to continue the corporation henceforth as a semi-eleemosynary (i.e. semi-charitable) institution and not as a business institution."[38] To support their assertion, the brothers pointed to a public statement made by Ford, where he said, "[m]y ambition . . . is to employ

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Capitalism' Work: Contributions from Business & Human Rights 5–27 (Harv. Kennedy Sch. Fac. Rsch., Working Paper No. 20-034, 2020).

29. Dodge v. Ford Motor Co., 170 N.W. 668 (Mich. 1919).
30. *See id.* at 684.
31. *See id.* at 682–83.
32. *See id.* at 683.
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*

still more men; to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and their homes."[39] By these words, the Dodge brothers alleged that Mr. Ford had publicly disclosed that he intended to run the business primarily for philanthropic ends rather than to make a profit for its shareholders.[40] Mr. Ford, in effect, was running a for-profit corporation as if it were a not-for-profit organization. This move, they argued was *ultra vires* his role as a corporate fiduciary in a for-profit business enterprise.[41]

For his part, Ford argued that humanitarian motives were permitted in business decision-making, insisting that "[a]lthough a manufacturing corporation cannot engage in humanitarian works as its principal business, the fact that it is organized for profit does not prevent the existence of implied powers to carry on with humanitarian motives [and] such charitable works as are incidental to the main business of the corporation."[42] The court was not impressed by this argument, concluding that Mr. Ford's motives and actions were tantamount to undermining the "for-profit" status of Ford Motor Co.[43] The court's remarkable statement on the primary purpose of a business corporation warrants full reproduction here:

> The difference between an incidental humanitarian expenditure of corporate funds for the benefit of the employés [sic], like the building of a hospital for their use and the employment of agencies for the betterment of their condition, and a general purpose and plan to benefit mankind at the expense of others, is obvious. There should be no confusion (of which there is evidence) of the duties which Mr. Ford conceives that he and the stockholders owe to the general public and the duties which in law he and his codirectors owe to protesting, minority stockholders. A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.
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> . . . .

39. *Id.* at 671.
40. *See id.* at 672.
41. *See id.* at 681, 683–64.
42. *Id.* at 684.
43. *Id.*

> [I]t is not within the lawful powers of a board of directors to shape and conduct the affairs of a corporation for the merely incidental benefit of shareholders and for the primary purpose of benefiting others, and no one will contend that, if the avowed purpose of the defendant directors was to sacrifice the interests of shareholders, it would not be the duty of the courts to interfere.[44]

While the court stated that devoting profits to purposes other than enriching the shareholders was beyond the lawful power of management, its language left much room for interpretation, especially regarding the quantum of "incidental benefit" that might lawfully accrue to non-shareholders.[45] In the result, the court determined that Mr. Ford acted outside his lawful powers as a board member and upheld the lower court's decree that Ford Motor Co. must pay a dividend to the stockholders.[46] By this decision, certain humanitarian motives of company directors to benefit the wider community were subordinated by law to the for-profit purpose of the business corporation.[47]

The obvious question which arises today is whether a corporate decision maker who gives priority to concerns about the human rights of non-shareholders undermines the for-profit purpose of the business organization. As in *Dodge*, the question might be answered by examining whether the corporate decision maker's humanitarian motives were "incidental" to increasing stockholder wealth, or whether they were part of a "general purpose and plan to benefit mankind at the expense of [the shareholders]."[48] By this reasoning, if the corporate decision maker considers the human rights of non-shareholders in a way that is instrumental for short-term or long-term stockholder gain, then no issue arises.

If, on the other hand, the corporate decision maker sacrifices shareholder gain to protect the human rights of non-shareholders, without regard to shareholder interests, then by this reasoning, the

44. *Id.*

45. *Id.* at 684 (describing such a use of profits as "sacrific[ing] the interests of shareholders").

46. *Id.* at 685.

47. Though much debated, it has been suggested that Mr. Ford expounded on the social purpose of his pricing policy as a ruse, his true motive being to harm certain minority shareholders who also happened to be his main industry competitors—the Dodge Brothers. *See* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 315–20 (1998).

48. *Dodge*, 170 N.W. at 684.

decision maker undermines the for-profit purpose of the corporation. As the court stated, "[a] business corporation is organized and carried on primarily for the profit of the stockholders" and "[t]he discretion of directors . . . does not extend . . . to the reduction of profits . . . in order to devote them to other purposes."[49] In other words, a corporate director may expend corporate funds for the "incidental" benefit of non-shareholders, but may not expend corporate funds for the "general purpose" of benefitting non-shareholders.

There are, however, important ways in which the distinction between "incidental" and "general purpose" social benefit in *Dodge* does not translate well regarding concerns over human rights. There is no sense in which the violation or protection of a human right should be regarded as a merely "incidental" matter from any perspective: Respect for human rights is not a matter of philanthropy. The court's reasoning reflects an *instrumentalist* approach—the limits of this approach when dealing with human rights issues will be addressed in the following section.

The circumstances of *Dodge* were distinct from situations that fall within the ambit of "business and human rights," in which people with no connection to the corporation may face grave threats to their personal security, fundamental freedoms, or way of life because of some action taken by the company or linked to the company. And so, we must go further in our inquiry about if and when humanitarian motives and priority concern for the human rights of non-shareholders might constrain the range of corporate loyalty.

A. THE "PRIMACY" GIVEN TO SHAREHOLDERS IS CONSTRAINED BY AN ECOSYSTEM OF NORMS AND VALUES

Facially, the words of the Michigan Supreme Court in 1919 appear to be unambiguous: "[a] business corporation is organized and carried on primarily for the profit of the stockholders."[50] And yet, much debate has ensued over the last century about whether or not these words inscribe the principle of *shareholder primacy* into corporate law. This debate remains unresolved and passionately argued even today.[51] In

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49. *Id.*

50. *Id.*

51. *See generally* Bebchuk & Tallarita, *supra* note 16; Malcolm Rogge, *Bringing Corporate Governance Down-to-Earth: From Culmination Outcomes to*

2008, Lynn Stout contended that without *Dodge*, the positive law supporting shareholder primacy was very thin.[52] Some scholars have argued that the century-old *Dodge* decision has been misread—that it is not properly regarded as a case about the limits of social responsibility of business.[53] They argue that the case is really about minority shareholder oppression, the abuse of director power, and unfair treatment.[54] For instance, D. Gordon Smith emphasizes that the case involved a closely held corporation, and argues that its application to the modern, diffusely owned, publicly traded company is very limited.[55] Similarly, Einer Elhauge argues that "the case really involved a conflict of interest raising duty-of-loyalty concerns," such that its relevance to the question of corporate social responsibility is questionable.[56] Today, the case of *eBay Domestic Holdings, Inc. v. Newmark* (the "Craigslist case") is regarded by many as a reaffirmation of the essential distinction between a for-profit and not-for-profit organization.[57] The rapidly growing popularity of ESG (environmental, social, and governance) factor investing over the last decade has reignited the debate over

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Comprehensive Outcomes in Shareholder and Stakeholder Capitalism, 35 NOTRE DAME J.L. ETHICS & PUB. POL'Y (forthcoming Feb. 2021).

52. Lynn A. Stout, *Why We Should Stop Teaching Dodge v. Ford*, 3 VA. L. & BUS. REV. 163, 165 (2008).

53. *See* D. Gordon Smith, *eBay v. Newmark: A Modern Version of Dodge v. Ford Motor Company*, THE CONGLOMERATE (Sept. 9, 2010), [hereinafter *A Modern Version of Dodge v. Ford*], https://www.theconglomerate.org/2010/09/ebay-v-newmark-a-modern-version-of-dodge-v-ford-motor-company.html [https://perma.cc/M5GB-6PVL]. *But cf.* Stephen Bainbridge, *Is Dodge v. Ford Motor Company a Close Corporation/Controlling Shareholder Case?*, PROFESSORBAINBRIDGE.COM (May 5, 2012), http://www.professorbainbridge.com/professorbainbridgecom/2012/05/is-dodge-v-ford-motor-company-a-close-corporationcontrolling-shareholder-case.html [https://perma.cc/GU22-SPLV].

54. *See A Modern Version of Dodge v. Ford*, *supra* note 53.

55. *See id.* Bucking the trend in 1997, Smith argued that "the shareholder primacy norm is nearly irrelevant to the ordinary business decisions of modern corporations." D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 279 (1998).

56. Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 772–73 (2005). According to this argument, Mr. Ford's true motivation was to induce the stock price to drop so that he could buy back the Dodge Brothers' share of Ford stock. *See id.*

57. 16 A.3d 1 (Del. Ch. 2010). In the Craigslist case, the Court of Chancery of Delaware opined that "[t]he corporate form . . . is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment." *Id.* at 34.

whether corporate fiduciaries have a duty to *maximize* profit (and thereby maximize shareholder value).[58]

In a now classic paper in corporate law theory, Henry Hansmann and Reinier Kraakman argued in 2000 that corporate law around the world was "converging" on the State of Delaware's shareholder primacy model.[59] They concluded that "[t]he shareholder-oriented model has emerged as the normative consensus not just because of the failure of the alternatives, but because important economic forces have made the virtues of that model increasingly salient."[60] The validity of their "convergence" claim was contested from the outset and continues to be debated today.[61] Without a doubt, seminal cases from the United States, in particular from the Delaware Court of Chancery, have had tremendous influence on lawyers, business managers, and legislators in jurisdictions worldwide. It bears noting that the majority of the world's largest and most successful companies are incorporated in Delaware.[62]

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58. *See generally* Bebchuk & Tallarita, *supra* note 16; Rogge, *supra* note 51.

59. *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001). Recent reforms of Finnish corporate law, it is argued, support Hansmann and Kraakman's "convergence" theory. *See* Ville Pönkä, *The Convergence of Law: The Finnish Limited Liability Companies Act as an Example of the So-Called "Americanization" of European Company Law*, 14 EUR. CO. L. 22, 22 (2017).

60. Hansmann, *supra* note 59, at 449.

61. For instance, in his chronicle of the "industrialization of English law," Professor Ron Harris also observes a style of "convergence" in the corporate form; however, he rejects the view that there has been a monocausal trend towards efficiency in the historical development of the corporation. *See* RON HARRIS, INDUSTRIALIZING ENGLISH LAW: ENTREPRENEURSHIP AND BUSINESS ORGANIZATION, 1720-1844, at 15 (2000). Harris shows how contingent political interests and public debates played an important role in how corporate law was taking shape during the 18th and 19th centuries. *See id.* Professors Roe and Bebchuk also evince skepticism, arguing that the "convergence of corporate structures" is not inevitable given vast differences in "opinions, culture, ideology, and political orientation" in different jurisdictions. *See* Bebchuk & Roe, *supra* note 23, at 132. Such factors, they argue, "impede" convergence. *Id.*

62. During the period from 1930 to 2010, more than half of all U.S. corporations (new and existing) were domiciled in Delaware; by 2010, approximately 70% of *newly* incorporated U.S. public companies were incorporated under Delaware law. *See* Sarath Sanga, *Network Effects in Corporate Governance*, 63 J.L. & ECON. 1, 17–18, 21, 48 (2020). In 2015, 66% of the world's Fortune 500 firms were Delaware corporations and 86% of all IPOs involved a Delaware corporation. *See* J.J. Harwayne Leitner & Leanne C. McGrory, *The "Delaware Advantage" Applies to Nonprofits, Too*, BUS. L. TODAY (Nov. 20, 2016), https://www.americanbar.org/groups/business_law/publications/blt/2016/11/01_leitner/ [https://perma.cc/FG64-MCRN].

Chief Justice Leo Strine of the Delaware Supreme Court (as he then was) believes that the ongoing rift over shareholder primacy lies in confusion between what the law is and what it should be—between *lex lata* and *lex ferenda*.[63] He argues that, like it or not, the overall power and accountability structure of Delaware corporate law is consistent only with a view that the primary purpose of a business corporation is to make money for shareholders.[64] Strine's own restatement of the law is that "within the limits of their discretion, directors must make stockholder welfare their *sole end*, and that other interests may be taken into consideration only as a means of promoting stockholder welfare."[65] Moreover, he argues that the Delaware Supreme Court has "highlighted the instrumental nature of other constituencies and interests. Non-stockholder constituencies and interests can be considered, but *only instrumentally*."[66] This approach, Strine argues, bespeaks the intent of the "power and accountability structure" that is built into the Delaware corporate law statute.[67] In *A Legal Theory of Shareholder Primacy*,

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63. *See* Leo E. Strine, *The Inescapably Empirical Foundation of the Common Law of Corporations*, 27 DEL. J. CORP. L. 499, 500 (2002).

64. *See Dangers of Denial*, *supra* note 2, at 766. Strine refers specifically to Delaware corporate law, though the corporate law of other jurisdictions shares many of the same features. *Id.* He writes: "advocates for corporate social responsibility pretend that directors do not have to make stockholder welfare the sole end of corporate governance, within the limits of their legal discretion . . . ." *Id.* at 763. He argues that the overall power and accountability structure of Delaware corporate law "focuses corporate managers on stockholder welfare by allocating power only to a single constituency, the stockholders." *Id.* at 766.

65. *Id.* at 768 (emphasis added). This approach appears to align adroitly with the instrumental approach advocated by Michael Jensen, who, in rejecting stakeholder theory, argues that "[v]alue maximization (or value seeking) provides the following answer to the tradeoff question: Spend an additional dollar on any constituency provided the long-term value added to the firm from such expenditure is a dollar or more." Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 22 J. APPLIED CORP. FIN. 32, 36 (2010).

66. *Dangers of Denial*, *supra* note 2, at 771 (emphasis added).

67. *See id.* at 780–81. It should be noted that while Strine describes what he understands to be the *apparent* demands of positive law, he is not arguing about what the law ought to be. His view is that a revival of externality regulation is needed to address concerns about the adverse impacts of corporations in society. He is also on record stating, "no one occupying a position of trust and authority over an organization that affects the many may escape the responsibility to apply one's conscience—one's sense of right and wrong—when deciding how to manage the organization." Leo E. Strine, Jr., *Corporate Power is Corporate Purpose II: An Encouragement for Future*

Robert Rhee echoes Strine's argument while adducing empirical evidence that U.S. courts are increasingly expressive about the shareholder value maximization imperative.[68] Rhee's conclusion is unequivocal: "shareholder primacy is *judge-made law*."[69] Generalizing to the United States as a whole, he argues that "[s]hareholder primacy does not exist as a single locus rule-sanction in the form of an enforceable fiduciary duty, but instead weaves through a series of rules of corporate law and the architecture of the corporate and market systems."[70] And yet, Allen, Kraakman, and Subramanian understand shareholder priority as a *value*, not as law per se: "shareholder priority more closely resembles a deep but implicit value in American corporate law than a legal rule in any normal sense."[71]

And so, the debate over shareholder primacy and the core purpose of the corporation in law and in culture continues among the most eminent jurists, scholars, and commentators.[72] As this debate remains

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Consideration from Professors Johnson and Millon, 74. WASH. & LEE L. REV. 1165, 1166 (2017).

68. *See* Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Apr. 11, 2017) [hereinafter *Shareholder Primacy*] (emphasis added), https://corpgov.law.harvard.edu/2017/04/11/a-legal-theory-of-shareholder-primacy/ [https://perma.cc/GH7H-A2MD].

69. *Id.*; *see also* Robert J. Rhee, *A Legal Theory of Shareholder Primacy*, 102 MINN. L. REV. 1951, 2016–17 (2018).

70. Rhee, *supra* note 69, at 1967.

71. *See* ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 12, at 271.

72. *See, e.g.*, Stefan J. Padfield, *Corporate Governance and the Omnipresent Specter of Political Bias: The Duty to Calculate ROI*, MARQ. L. REV. (forthcoming) (manuscript at 5) ("[N]ot only is shareholder wealth maximization the optimal goal of corporate governance, but it is fairly characterized as the current rule of corporate governance in many relevant jurisdictions including, importantly, Delaware."); Doug Sundheim, *CEOs Have a Responsibility to Help Lead Society*, FORBES (Aug. 4, 2020, 1:48 PM), https://www.forbes.com/sites/dougsundheim/2020/08/04/ceos-have-a-responsibility-to-help-lead-society/#349e375170d5 [https://perma.cc/7K4L-X8LR] (rejecting Harvard economist Greg Mankiw's reiteration of shareholder value maximization as the sole goal for managers, and arguing that "[g]ood CEOs are always weighing social costs that don't immediately show up on the bottom line" and boards should look for "CEOs who can balance the demands of multiple stakeholders."); N. Gregory Mankiw, *CEOs Are Qualified to Make Profits, Not Lead Society*, N.Y. TIMES (July 24, 2020), https://www.nytimes.com/2020/07/24/business/ceos-profits-shareholders.html [https://perma.cc/ZB7E-QRTL]; Martin Lipton, *It's Time to Adopt the New Paradigm*, HARV. L. SCH. F. ON CORP. GOVERNANCE (Feb. 11, 2019), https://corpgov.law.harvard.edu/2019/02/11/its-time-to-adopt-the-new-paradigm [https://perma.cc/QJP8-5KRA]; *see also* Martin Lipton, *The New Paradigm: A Roadmap for an Implicit Corporate Governance Partnership Between Corporations*

unsettled, the question remains of whether shareholder primacy constrains a director's latitude for addressing human rights concerns, or whether the normative value of human rights constrains the power of shareholder primacy and the range of corporate law's fiduciary mandate. As the title of this article suggests, the range of corporate law loyalty is *constrained* by the value of humanity and the idea of human rights, not the other way around.

Almost a century after *Dodge* was decided by the Michigan Supreme Court, the Delaware Court of Chancery revisited the thorny question of corporate purpose in the Craigslist case.[73] Craig Newmark and James Buckmaster, the founders of Craigslist, thought of their online platform of classified advertisements as a community service. Even so, they formed a for-profit corporation and sold a minority interest for a very tidy sum to eBay Domestic Holdings.[74] When eBay sought to monetize the Craigslist service, the controlling Newmark and Buckmaster implemented a defensive stockholder rights plan to stop them.[75] As a minority stakeholder, eBay sued Newmark and Buckmaster, the controlling directors, for breach of fiduciary duty, and petitioned the court to halt the defensive maneuvers.[76]

The Delaware Court of Chancery struck out the stockholder rights plan on the grounds that it violated the controlling directors' fiduciary duties to minority shareholder eBay.[77] In his decision, Chancellor Chandler reaffirmed the centrality of profit making in an organization that is incorporated as a "for-profit" business:

> Jim and Craig did prove that they personally believe craigslist should not be about the business of stockholder wealth maximization, now or in the future. As an abstract matter, there is nothing inappropriate about an organization seeking to aid local, national, and global communities by providing a website for online classifieds that is largely devoid of monetized elements. Indeed, I personally appreciate and admire Jim's and Craig's desire to be of service to

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and Investors to Achieve Sustainable Long-Term Investment and Growth, INT'L BUS. COUNCIL OF THE WORLD ECON. F. (Sept. 2, 2016), https://www.wlrk.com/webdocs/wlrknew/AttorneyPubs/WLRK.25960.16.pdf [https://perma.cc/9P4T-J6J3] [hereinafter *The New Paradigm Roadmap*].

73. eBay Domestic Holdings, Inc. v. Newmark, 16 A.3d 1, 34 (Del. Ch. 2010).

74. *See id.* at 8, 11–12.

75. *See id.* at 14–15, 22.

76. *See id.* at 25.

77. *See id.* at 34–35.

> communities. The corporate form in which craigslist operates, however, is not an appropriate vehicle for purely philanthropic ends, at least not when there are other stockholders interested in realizing a return on their investment. Jim and Craig opted to form craigslist, Inc. as a *for-profit Delaware corporation* and voluntarily accepted millions of dollars from eBay as part of a transaction whereby eBay became a stockholder. Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form. Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The "Inc." after the company name has to mean at least that.[78]

Echoing the words from *Dodge* almost one hundred years later, Chancellor Chandler held that in a for-profit corporation, the standard to follow is "to promote the value of the corporation for the benefit of its stockholders," and that the corporation "is not an appropriate vehicle for purely philanthropic ends."[79] In this context, corporate concern for the interests of non-shareholders is within bounds if it is required by law, or if it serves to promote the value of the corporation for the stockholders. By this reading, we might fairly characterize Delaware corporate law as mandating an instrumentalist approach to philanthropy and corporate social responsibility ("CSR").[80] We shall now consider whether the instrumentalist imperative that is apparently inscribed in Anglo-America's most important corporate law makes it more difficult for corporate decision makers to give priority to respect for human rights, and we will consider how the maxim *humanity constrains loyalty*

78. *Id.*

79. *Id.* Note that the Oxford English Dictionary defines philanthropy as, "[t]he desire to promote the welfare of others, expressed especially by the generous donation of money to good causes." *Philanthropy*, OXFORD ENGLISH DICTIONARY (2d ed. 1989), https://www.lexico.com/en/definition/philanthropy [https://perma.cc/TB26-YVRY]. The origins are "[e]arly 17th century via late Latin from the Greek philanthrōpia, from philanthrōpos 'man-loving.'" *Id.*

80. Some argue that corporate directors and managers have internalized the *instrumentalist* approach to social responsibility (including concerns about human rights), regardless of whether such an approach is legally required. In his analysis of Delaware's seminal decision in *Revlon, Inc. v. MacAndrews & Forbes Holdings*, 506 A.2d 173 (Del. 1986), and the uptake of the shareholder primacy norm in U.S. courts, Rhee suggests that the uncertainty around *Revlon* may have led to "overcompliance" with the norm: "When the boundaries of a rule are uncertain and the law is applied in an open-ended and potentially ex-ante indeterminate manner, law and economic literature has shown that the uncertainty can lead to over-compliance as parties may be incentivized to take additional precautions." Rhee, *supra* note 69, at 2015.

reframes the problem by giving priority to the normative value of human rights over corporate law loyalty.

B. THE INSTRUMENTALIST IMPERATIVE MEETS THE CATEGORICAL IMPERATIVE

Chief Justice Leo Strine (as he then was) opines that "*Dodge v. Ford* and *eBay* are hornbook law because they make clear that if a fiduciary admits that he is treating an interest other than stockholder wealth as an end in itself, rather than an instrument to stockholder wealth, he is committing a breach of fiduciary duty."[81] He warns of the perils of confessing to treat people outside the corporation as ends in themselves: "When a fiduciary confesses that he in fact harbors the personal motive to put another interest, of whatever kind, ahead of the stockholders, the foundational premise of the business judgment rule is absent."[82] In other words, a manager who makes such a confession creates a litigation risk for herself and risks waiving the protection of the business judgment rule. On its face, this self-styled "clear-eyed" characterization of Delaware corporate law has troubling implications for decision makers who must weigh the distinct concerns of human rights risk to outsiders (risks to people) and corporate insiders (risks to business). But perhaps we should not overreact, as an ethically conflicted manager need only state for the record that her decision to respect human rights redounds to the benefit of the stockholders—she need only show that there is some plausible business case for her decision.[83]

This technical fix via the business judgment rule may be pragmatically satisfying, but is it ethically tenable with regards to human rights concerns? Ethicists will recognize immediately the tension that lies between a strictly instrumentalist approach to the corporate responsibility to respect human rights and the Kantian principle of humanity,[84] which holds that we should never treat humanity as a means

81. *Dangers of Denial*, *supra* note 2, at 776–77.

82. *Id.* at 778–79.

83. *See* Padfield, *supra* note 72, at 9–10.

84. Kant's principle of humanity is interpreted by ethicist Christine Korsgaard, such that, "[h]uman *freedom* is realized in the adoption of humanity as an end in itself . . . Kant first argues that there must be an unconditional end; second, that the end must be humanity." Christine M. Korsgaard, *Kant's Formula of Humanity*, 77 KANT-STUDIEN 183, 186 (1986).

to an end, but always as an end in itself.[85] The instrumentalist imperative articulated in the cases discussed above, and reaffirmed by Chief Justice Strine's "clear-eyed" interpretation of corporate law sits uneasily with the values of "humanity, justice, generosity, and public spirit" that were so important in Adam Smith's THEORY OF MORAL SENTIMENTS.[86] When concerns about human rights enter the picture, the categorical priority that Strine gives to stockholder wealth is no longer tenable. Paying regards to the potentially adverse impacts on human rights of business activity is not analogous to taking up a philanthropic cause. While philanthropy is praiseworthy, the idea of corporate respect for human rights is more closely tied to a sense of obligation than it is to voluntarism. With this sense of obligation in mind, the strictly instrumentalist treatment of non-shareholder interests is an inadequate framework for considering the interplay of a corporation's economic interests (and by extension, the shareholder's economic interests) and human rights concerns.

The question that this article addresses is what space remains in corporate law to acknowledge the idea of human rights as parents of law rather than treating corporate respect for human rights as a shareholder value-enhancing, instrumental risk management tool.[87] In its starkly realist formulation, mandatory instrumentalism takes us to an ethical impasse, as treating the corporate responsibility respect to human rights as a device to be employed for the ultimate benefit of stockholders constitutes the very negation of human rights as normative precepts.[88]

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85. Sen critiques the engineering approach to economics in which human beings are treated as a means rather than ends in themselves. *See* AMARTYA SEN, THE IDEA OF JUSTICE 254 (2009).

86. *See* ADAM SMITH, THEORY OF MORAL SENTIMENTS 220–21 (Ryan P. Henley ed., Penguin Random House Co. 2010) (1759) [hereinafter THEORY OF MORAL SENTIMENTS].

87. Florian Wettstein is highly critical of approaches to business and human rights that give priority to instrumental, risk-management uses of human rights in business decision-making. *See generally* Florian Wettstein, *CSR and the Debate on Business and Human Rights: Bridging the Great Divide*, 22 BUS. ETHICS Q. 739, 758 (2012).

88. Consider the instrumental imperative in light of Ronald Dworkin's pronouncements on the non-morality of instrumental intent:

> For the moral value of beneficial activity, considered in itself, consists in the will or intentions of the actor. If he acts out of a desire to improve the welfare of others, his act has inherent moral value even if he does not benefit others. But of course, it has no inherent moral value if he acts with the intention of benefiting only himself.

Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 211–12 (1980).

One unattractive practical implication of the instrumentalist imperative is that if a corporate fiduciary comes to believe that some human rights-respecting action may lead to a reduction in the residual value of the enterprise over the long run (according to whatever valuation method employed), she might feel compelled not to take the rights-respecting approach. The decision maker may feel constrained by fiduciary law in her approach to human rights issues, rather than the other way around. Conversely, the more altruistically inclined fiduciary who uses corporate resources (or who foregoes a lucrative business opportunity) to respect human rights where it seems no plausible benefits accrue to the stockholders conceivably might be called out of bounds by those very stockholders.[89] The burden of loyalty is a plastic though powerful yoke.

Such glum results appear to follow analytically from the doctrinal parameters that Strine has laid out. And yet, an escape might be proposed: One could argue that for decision-making about human rights issues, the formalistic fiscal instrumentalism that applies with regards to corporate expenditures on philanthropy is not applicable.[90] After all, the idea of respecting human rights derives from a sense of obligation, and not from mere kindness. Given the complexity of human rights issues, in most, if not all situations, it would be near impossible to quantify the long run return on investment ("ROI") of any particular human rights-respecting corporate action.[91] In a hypothetical shareholder suit (here, we are in theoretical territory, as no such suit has ever been litigated), the human rights-respecting corporate decision makers would be required merely show that there was some rational basis for their decision, however slight.[92] And yet, this still instrumental move takes us

89. *See* Padfield, *supra* note 72, at 5.

90. On the virtues of inconsistency, see Leszek Kolakowski, *In Praise of Inconsistency*, 11 DISSENT 201 (1964).

91. In arguing that shareholder primacy is law, Padfield asserts that corporate law's fiduciary duty of loyalty entails a duty to calculate return on investment. *See* Padfield, *supra* note 72, at 5.

92. Allen et al. suggest a very permissive standard, i.e. that, "[s]ince the law cannot order directors to make correct decisions by fiat, it follows, in our view, that disinterested directors who act deliberately and in good faith should never be held liable for a resulting loss, no matter how stupid their decisions may seem ex post." ALLEN, KRAAKMAN & SUBRAMANIAN, *supra* note 12, at 231. Steinhardt proposes that the business judgment rule might permit *or even require* management to follow "best practices in the protection of human rights." Ralph G. Steinhardt, *Corporate Responsibility and the International Law of Human Rights: The New Lex Mercatoria*, *in* NON-STATE ACTORS AND HUMAN RIGHTS 177, 214 (Phillip Alston ed., 2005).

even closer to the ethical void—by this minimalist account, a company's human rights-respecting decisions are thought to be *intra vires* based on the mere plausibility that such moves will add to the residual value of the enterprise in some unspecified amount at some unspecified time. It should be apparent that the mere plausibility of increasing value for shareholders in the long run is not a strong normative basis on which to ground decision-making today where human rights are at stake. We want companies to respect human rights out of a sense of obligation, not because of what the directors' reading of the tea leaves might reveal about long run residual outcomes for shareholders.[93]

Nonetheless, for all practical purposes, social responsibility-minded managers might find adequate comfort in the plausible-sounding dictum that respecting human rights is good for business in the long run (one can take this further with the nostrum: What's good for business is good for society). Whether an "intuitive formation of estimates"[94] about the positive market-based synergies that may come with respecting human rights will motivate senior decision makers to implement an effective human rights policy for the global firm is decidedly unclear.[95] This is a question ripe for empirical analysis that goes beyond the scope of this article. When it comes to corporate respect for human rights, one might well ask whether a collectively held hunch about the long run payoff for investors is really what matters. As I have argued here, long-run

93. It should also be noted that what is considered to be a long run horizon to investors is totally distinct from what a local community, individual or family considers as long term. This dissonance is of great relevance to company-community conflict since communities (rights-holders) and investment analysts, bankers, and business managers base their decision-making on very different time horizons. A one- or two-year time horizon is simply untenable for a human rights impact or human rights risk assessment; five years will barely do.

94. FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT 314 (1921).

95. Some firms might see a "first mover" advantage in adopting human rights into their policy framework or some alternative. For example, Barrick Gold was the first major mining company to adopt a firm-wide human rights policy using the United Nations Guiding Principles as a starting point. *See* NIEN-HÊ HSIEH & REBECCA HENDERSON, HARV. BUS. SCH. CASE COLLECTION, *PUTTING THE GUIDING PRINCIPLES INTO ACTION: HUMAN RIGHTS AT BARRICK GOLD (A)* 1010 (2016). While the prospect of positive synergies might motivate a firm to implement a policy to respect human rights, Deniz Utlu and Jan-Christian Niebank consider the need for further research "to understand under what conditions a business risk calculation will result in the implementation of human rights due diligence." DENIZ UTLU & JAN-CHRISTIAN NIEBANK, GERMAN INST. HUM. RTS., CALCULATED RISK: ECONOMIC VERSUS HUMAN RIGHTS REQUIREMENTS OF CORPORATE RISK ASSESSMENTS 19 (2017).

guesstimates about how respecting human rights today is good for shareholders in the long run are beside the point. Let us now return to consider the constraining effect of human rights as normative values on the range of corporate law's loyalty mandate.

C. HUMANITY CONSTRAINS LOYALTY (REFLECTIVE LOYALTY)

In 1957, British jurist Lord Denning wrote that a corporation is led by a "brain and a nerve centre" which is comprised of directors and managers "who represent the directing mind and will of the company."[96] Who is the "master" of this nerve center, if there is one at all?[97] Are the shareholders its master? We have come full circle to the fine distinction that must be made between managerial fiduciary loyalty and employee obedience. As any firm is normally regarded as a hierarchical organization, each act taken by the individual working within it is expected to express allegiance to authority above.[98] Indeed, the

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96. HL Bolton (Engineering) Co. v. TJ Graham & Sons Ltd. [1957] 1 QB 159.

97. On the "organizing authority" and the control of servant by master as a constitutive feature of the firm, see R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937). Coase theorizes that economic activity will be brought inside and coordinated *within* a firm when it is more efficient than entering into transactions for that activity through the market mechanism:

> The question always is, will it pay to bring an extra exchange transaction under the organising authority? At the margin, the costs of organising within the firm will be equal either to the costs of organising in another firm or to the costs involved in leaving the transaction to be "organised" by the price mechanism. Business men will be constantly experimenting, controlling more or less, and in this way, equilibrium will be maintained.

Id. at 404.

98. Ronald Coase articulated how the basic conditions of the master and servant relationship is an essential feature in the economic organization of the corporation. *Id.* at 403–04. In *The Death of Liability*, Lynn LoPucki describes Coase as "characterizing [the] bounds of [the] firm as that range of exchanges over which [the] market system was suppressed and resource allocation was accomplished instead *by authority and direction*." Lynn M. LoPucki, *The Death of Liability*, 106 Yale L.J. 1, 65 n.272 (1996) (emphasis added). Karl Marx writes of the power of command in a capitalist enterprise as not unlike the power of command in a military hierarchy: "That a capitalist should command on the field of production is now as indispensable as that a general should command on the field of battle . . . . An industrial army of workmen, under the command of a capitalist, requires, like a real army, officers (managers), and sergeants (foremen, overlookers), who, while the work is being done, command in the name of the capitalist." Karl Marx, *Capital*, *in* THE ECONOMIC NATURE OF THE FIRM: A READER 50–51 (Louis Putterman & Randall S. Kroszner eds., 1996). He speaks of

subordination of servant-employee to master-employer is a straightforward matter in any business organization—the master orders while the servant complies. Yet, the matter of to whom the company directors owe this style of allegiance, if at all, is not so clear-cut. As Clark writes, the shareholders "never delegated any authority to the directors."[99] In a business corporation, he explains, the directors acquire their authority to manage the business by the operation of corporate law statutes, not by shareholder fiat![100]

The master-servant relationship that is so critical to the coordination of production within a firm for satisfying the material objectives of the business does not apply to the office of the corporate director, whose "special role," as Eugene Fama observed, is "decision making."[101] Corporate law has come to formalize the most basic expectations of decision-making directors and officers by imposing on them the very malleable fiduciary duty of loyalty to the corporation and its shareholders. The varying operative requirements of this duty from one jurisdiction to another are politically and juridically contested in diverse forums—in evolving legal doctrine, in corporate law theory, and in public debates over the social roles and responsibilities of business. By some accounts, as in Strine's interpretation of Delaware corporate law, the fiduciary's pledge of loyalty implies a style of obligation to focus solely on maximizing stockholder welfare (though not necessarily over the short term), to the exclusion of all other interests save for those which fall within the confines of her rather limited directorial discretion.[102] By other accounts, a broader notion of the social purpose

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"barrack discipline" that is needed to keep the factory running: "All combined labour on a large scale requires, more or less, a directing authority . . . . The place of the slave driver's lash is taken by the overlooker's book of penalties." *Id.* at 50, 59.

99. *Agency Costs*, *supra* note 14, at 57.

100. *Id.* at 56–59 ("By statute in every state, the board of directors of a corporation has the power and duty to manage or supervise its business. The stockholders do not . . . . As a matter of statutory law, stockholders' powers in a public corporation are extremely limited . . . . To influence corporate managers, then, stockholders can vote for directors and approve or veto director-initiated organic changes, but cannot do much else." *Id.* at 58–59.

101. Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 290 (1980).

102. See *Dangers of Denial*, *supra* note 2, at 783. In 1996, Frank Easterbrook and Daniel Fischel argued that one "operational assumption of successful firms" is that "the residual risk bearers [shareholders] have contracted for a *promise* to maximize long-run profits of the firm, which in turn maximizes the value of their stock." FRANK H.

of business in society plays a vital role in corporate value seeking[103] and in responsible investment.[104] Either way, the fiduciary's pledge of loyalty to the corporation is a free one—loyalty is gained by appointment, not by coercion or out of necessity. This "free" pledge of loyalty is constrained by an ecosystem of normative values that corporate decision makers inhabit.

We now return to the question with which we began: What is a loyal corporate fiduciary to do when concerns about human rights enter the picture? Four hundred years ago, in the venerated case of Sutton's Hospital, Lord Coke averred that corporations "have no souls" and so "cannot do fealty."[105] In other words, a soulless legal entity has no capacity for loyalty; only its flesh-and-blood decision makers have this ability. Being human, a corporate decision maker's loyalty is expressed in judgment and action that is conscious and reflective, not mechanical

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EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 36 (1996) (emphasis added); *see also* Padfield, *supra* note 72, at 5.

103. Elhauge argues that "shareholder insulation and collective-action problems will make shareholders underresponsive to social and moral sanctions," and so, it is efficient for the board of directors to be responsive to such sanctions, and it is within their managerial discretion to do so. Einer R. Elhauge, *Corporate Managers' Operational Discretion to Sacrifice Corporate Profits in the Public Interest*, *in* ENVIRONMENTAL PROTECTION AND THE SOCIAL RESPONSIBILITY OF FIRMS: PERSPECTIVES FROM LAW, ECONOMICS, AND BUSINESS 48 (Bruce L. Hay et al. eds., 2005); *see also The New Paradigm Roadmap, supra* note 72.

104. New terrain in the debate over fiduciary duties has opened very recently in Canada with respect to indigenous people and responsible investment. *See* JOHN BORROWS & SHAYLA PRAUD, RECONCILIATION AND RESPONSIBLE INV. INITIATIVE, TEACHINGS OF SUSTAINABILITY, STEWARDSHIP, & RESPONSIBILITY: INDIGENOUS PERSPECTIVES ON OBLIGATION, WEALTH, TRUSTS, & FIDUCIARY DUTY 3 (Sep. 25, 2020), https://reconciliationandinvestment.ca/wp-content/uploads/2020/09/Sustain-Stewardship-Responsiblity-v3.pdf [https://perma.cc/Q9XV-EGGN]. While their discussion pertains directly to the fiduciary duty in trusts, the authors describe how indigenous legal orders comprise part of the wider ecosystem of norms for fiduciary decision makers: "[W]e explore the legal orders of a small sampling of indigenous nations and peoples to identify related notions of stewardship, loyalty, responsibility, good faith, obligation, and wealth within their traditional laws. We then explore how Canadian law might recognize these sources of law through sui generis formulations." *Id.*

105. SIR EDWARD COKE, *The Case of Sutton's Hospital*, *in* THE SELECTED WRITINGS AND SPEECHES OF SIR EDWARD COKE 347, 371–72 (Steve Sheppard ed., 2003), https://oll.libertyfund.org/titles/911#Coke_0462-01_622 [https://perma.cc/33N2-X6AN].

or algorithmic.[106] Facing a tragic decision dilemma that involves adverse impacts on the human rights of people outside the corporation, a manager's conscience may weigh heavily.[107] The morally conflicted fiduciary duty-bearer is free to resign her office rather than cross a line in the sand. After all, the individual fiduciary decision maker's loyalty, whether to country, friend, or company, has its own range.

And yet, the fate of others inside or outside the firm may grow worse when the reflective fiduciary gives up her place, as her successor might not be so wise, altruistic, or prudent. Seeing this hazard, the fiduciary might choose instead to keep her role, to use her power perspicaciously, to do what she regards as the right thing as best as she can. And by making this choice, the normative value of humanity and of human rights constrain loyalty to all but her very own conscience.

So, who is the master of the corporate nerve center? It can only be the decision maker's own conscience. The values of humanity and human rights constrain the reach of any free being's pledge of loyalty to the corporation and its shareholders—to recognize this is to practice for oneself and expect from others only reflective loyalty. And thus, corporate law's duty of loyalty must be regarded only as *reflective* loyalty that is bound by the constraints of ethics. The reverse approach—that the corporate duty of loyalty rises above all other normative values as a kind of apex duty–is simply untenable.

III. REFLECTIVE LOYALTY, HUMANITY, AND THE CORPORATE DECISION MAKER

In standard textbooks of microeconomics, the firm is conceived as a unique actor that, if functioning properly, seeks to maximize profit to the exclusion of all others' interests, save for those that have instrumental value to the firm's profit-seeking goals.[108] By this

106. Frank Knight observes that: "The decisive factors in the case [of exercising judgment] are so largely *on the inside of the person* making the decisions that the 'instances' are not amenable to objective description and external control." FRANK H. KNIGHT, RISK, UNCERTAINTY, AND PROFIT 104 (1921) (emphasis added).

107. *See generally* Martha C. Nussbaum, *The Costs of Tragedy: Some Moral Limits of Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1005, 1014–17 (2000) (discussing Nussbaum's "tragic dilemmas").

108. Christian List and Kai Spiekermann describe the growing interest in the thesis that:

> [T]he most parsimonious explanations of the behavior of such collectivities [including corporations] often involve modeling them as purposive, rational agents

abstraction, the firm's flesh-and-blood reflective corporate decision makers are transmogrified into anonymous "agents" of the shareholders whose imperfections as decision-makers (and the costs the shareholders must bear to mitigate such imperfections), may be aggregated into sum "agency costs."[109] By this view, human imperfection, and thereby, human introspection, is regarded as a source of inefficiency. In a theoretical world without such imperfections, the agents' roles as loyal fiduciaries might be programmed and exercised in a mechanical and deductively predictable style; in the real world, theorists propose instead to find ways "to get the incentives right" and ways to eliminate the underlying systemic sources of agency costs where they can.[110]

By this aggregative approach, the flesh-and-blood corporate decision makers are treated as means to an end—they are counted as another factor of production, as are employees, whose residual-reducing costs to shareholders ought to be cut back. The most efficient way to reduce agency costs, by this approach, is to implement system-wide technical fixes using incentives and mixed modes of deterrence, employing the "carrot and stick" devices that are central to the analysis and methods of law and economics. In treating decision makers in this way, the conscious and reflective aspect of individual fiduciary loyalty mostly disappears. The maxim that *humanity constrains loyalty* serves as a normative antidote to instrumentalist thinking of this kind.

I have argued that the force of fiduciary loyalty is tantamount to the gravity that holds the corporate edifice together. And yet, as Clark explained long ago, fiduciary loyalty is a malleable "residual concept."[111] Its demands are precise and nebulous at the same time. Katsuhito Iwai observes that "[t]he most conspicuous feature of fiduciary law is its highly moralistic tone."[112] The word-senses of the

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> in their own right, with preferences and judgments that need not be a simple function of the underlying individual preferences and judgments, although they supervene on them . . . . Even microeconomists take this stance towards some collectives, for example when they model firms as unified rational actors in the theory of the firm.

Christian List & Kai Spiekermann, *Methodological Individualism and Holism in Political Science: A Reconciliation*, 107 AM. POL. SCI. REV. 629, 639 (2013).

109. *See generally* Jensen & Meckling, *supra* note 19.

110. *See* Bebchuk & Tallarita, *supra* note 16, at 29, 30–40.

111. CORPORATE LAW, *supra* note 6, at 141.

112. Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 622 (1999).

fiduciary duties of loyalty, care, and good faith are more closely related to concepts in ethics than to positive law regulatory rules; they exude the moralistic flavor that permeates Adam Smith's treatise on THE THEORY OF MORAL SENTIMENTS[113] more so than the very technical and computational dimensions of THE WEALTH OF NATIONS,[114] though they have great relevance to both. We might think of the fiduciary duty concept as an aspect of corporate morality as much as it is a feature of corporate law. However we define those duties, it should be clear that the contested legal doctrinal demands of the corporate duties of good faith, loyalty, and care are distinct from the moral requirements that similarly titled virtues may entail.[115]

While positive law attempts to circumscribe the substance of corporate fiduciary duties through legal contests in doctrine and scholarship, the fiduciary's choice to exercise reflective judgment with regards to such duties (*qua* virtue and law) is primordially human. And so, I proposed that we strive for and expect of others only reflective loyalty. *Reflective loyalty* recognizes the constraining effect that the values of humanity and human rights have on the reach of loyalty to the corporation and its shareholders.

113. *See generally* THEORY OF MORAL SENTIMENTS, *supra* note 86.

114. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

115. In the Stanford Encyclopedia of Philosophy, John Kleinig characterizes loyalty as a virtue:

> Loyalty is usually seen as a virtue, albeit a problematic one. It is constituted centrally by perseverance in an association to which a person has become intrinsically committed as a matter of his or her identity. Its paradigmatic expression is found in close friendship, to which loyalty is integral, but many other relationships and associations seek to encourage it as an aspect of affiliation or membership: families expect it, organizations often demand it, and countries do what they can to foster it.

JOHN KLEINIG, STAN. ENCYCLOPEDIA PHIL. *Loyalty* (Edward N. Zalta ed., Winter 2017). On the distinction between self-regarding and other-regarding virtues, see Gabriele Taylor & Sybil Wolfram, *The Self-Regarding and Other-Regarding Virtues*, 18 PHIL. Q. 238 (1968).