

# What Are Larry's Criteria for Good Corporate Law?

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## *Introduction*

It is a pleasure to be commenting on Larry Mitchell's book, *Corporate Irresponsibility*.<sup>1</sup> For years now, Larry has been one of the few voices of conscience in the field of corporate law. Even as stock prices were going through the roof in the mid-eighties and the late-nineties and we were celebrating, Larry would periodically pour icy cold water by asking us to think about matters such as the rising inequality between the rich and poor in this country, the externalization of environmental harms on later generations and the citizens of poorer countries, and on and on. In significant part, this book is the public intellectual face of what Larry has been saying in his academic articles for over a decade.<sup>2</sup> It takes considerable courage to go against the dominant grain of an academic discipline and Larry has consistently shown his willingness to do that. There are many who disagree with Larry's claims about the faults of the current system, but he has made us think hard about the social consequences of our system of corporate law. I suspect that getting his corporate law colleagues to think hard about these matters that were otherwise being ignored has always been Larry's underlying goal. In *Corporate Irresponsibility*, Larry attempts to persuade a broader audience to think harder about the fundamental tenets of corporate law and I applaud him.

The tenet of corporate law that Larry's book hits hardest is the mandate of share value maximization. Larry tells us that the law instructs managers to focus on maximizing stock prices.<sup>3</sup> The logic underlying this is the conceptualization of shareholders as the owners of the corporation and managers as their agents. What these often widely dispersed and numerous shareholders want, of course, is for the market value of their shares to be as high as possible. Larry's book explains why this single-minded focus on share value maximization creates a host of problems that range from inadequate safety precautions for products to an unwillingness to adequately train workers. Many of the problems that Larry identifies are real and serious. But I am

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<sup>1</sup> LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* (2001).

<sup>2</sup> See, e.g., Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263 (1992); Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477 (1995); Lawrence E. Mitchell, *Trust and Team Production in Post-Capitalist Society*, J. CORP. L. 869 (1999).

<sup>3</sup> See MITCHELL, *supra* note 1, at 4.

skeptical that the entire blame for these problems can be laid at the feet of the share value maximization norm. (As an aside, I think that the mandate to managers is not as strong as he suggests.) Nevertheless, it is possible that Larry is right on a number of claims.

For the purposes of my comment, I will concede Larry's claims. Instead of a critique, I have a request—a request for him to set out his criteria for good corporate law. In the paragraphs that follow, I discuss my reasons for making this request. Before proceeding, I should disclose that the idea about the need for a discussion of criteria is one borrowed from my UCLA colleague, Bill Klein. On many occasions, Bill has criticized me for analyzing some particular piece of corporate or securities law without clearly setting forth my evaluative criteria. My lame excuse for not setting forth the criteria was that no one else in corporate law did it (although there is a rich tradition in the tax law area, going back to Adam Smith, of discussing criteria). I am shamelessly turning Bill's criticism of my work on to that of Larry.

Larry is one of the leaders of the Progressive Corporate Law movement. Central to this movement, as I see it, is the claim that the criteria by which law should be evaluated are different from those that the dominant school of thought has been applying. I am sympathetic to certain progressive goals such as redistribution of wealth and ensuring that the weakest members in society have a safety net that will provide them a decent quality of life. I would like to know, however, how these broad goals translate into criteria by which corporate law should be evaluated. Hence, my first reason for requesting Larry's evaluative criteria is to gain clarity about the progressive agenda.

### *I. Clarity on the Progressive Agenda*

The default assumption about the criteria for good corporate law is probably efficiency. Some might add fairness to the mix. My request is for something more than those two vague terms (although they work as a start). Maximizing shareholder value, for example, is a more specific criterion, and it is one on which the shareholder wealth maximization mandate to managers scores highly. Other criteria could include the redistribution of societal wealth, ensuring a basic quality of life for the weakest segments in society, and reducing discrimination against traditionally marginalized groups. One could also see the workplace as a seat of democratic discourse and want the law to further that vision. Or, one might want the law to further family values, or satisfy process goals such as transparency, simplicity and accountability.

Implicit in Larry's discussion, I think, are a set of more specific criteria. For example, his book tells us that he cares about workers having long-term employment and having employers make adequate investments in their human capital.<sup>4</sup> He also wants protections against corporations attempting to exploit workers in countries with repressive regimes like Burma. The problem here is that we are guessing at Larry's criteria. It is not clear whether I have identified real criteria or symptoms of a failure to satisfy

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<sup>4</sup> See generally *id.* at 208-50.

some larger and broader criteria. And, even in terms of these criteria, there is the question of ordering. In wanting long-term employment, is Larry talking about U.S. workers? He probably is, given that we are discussing U.S. corporate law. But doesn't long-term employment for U.S. workers reduce the likelihood that firms will move their operations to poorer countries—countries where the workers may have a far greater need for jobs? As noted, Larry clearly cares about foreign workers because he talks about human rights violations against the Burmese workers. But is there a sliding scale? Does he care more about domestic workers (wanting long term employment and human capital development for them) and less about foreign workers (wanting to protect them only against human rights violations)? If part of the progressive agenda is to protect the weakest in the global society (such as the workers in places like Somalia, Burma, and Bangladesh), then I am not so sure preserving long term employment for a subgroup of U.S. workers is the best way to do this. My guess is that Larry has an explanation and that I have probably misread his implicit criteria; but, the confusion of having to guess at the implicit criteria is precisely why I'm making my request.

Then there are matters such as reducing workplace discrimination against outsider groups. Larry's book contains little discussion of workplace discrimination. Plausible stories exist as to why the goals of profit maximizing can result in higher levels of discrimination. These stories can be improved even more when one adds the fact that managers tend to focus excessively on short-term results. The question, then, is whether Larry thinks that the criteria of reducing workplace discrimination against groups such as racial minorities and women is a valid one by which to evaluate corporate law. If so, how important is that goal? Larry talks about wanting workplaces where there is more trust. But proposals to revise the law to enable employers to create workplaces where there is more trust always trouble me because trust is a fuzzy concept and employers tend to trust those who look like them.

Finally, there is the question of creditors' rights. Larry cares about creditors, but I am confused as to how such rights relate to the broader progressive agenda. To the best of my knowledge, the types of creditors involved in the disputes that Larry discusses are large institutions (insurance companies, hedge funds, and the like). From a progressive point of view, I am not sure why I should care very much about these institutions. In the context of a poor developing country that is struggling to make its debt payments, my sympathies are with the debtor and not with the creditors. Again, although there may be an explanation for why protecting creditors' rights is important—for example, if these rights are violated too often, it is likely to make borrowing more difficult and reduce the level of economic activity—I would like to hear that explanation.

## *II. Designing Mechanisms*

Once we know Larry's criteria for evaluating corporate law, we will be able to debate remedies. Larry's central remedy seems to be modifying corporate law to give more power to the managers and directors. It is not clear to me, however, why giving more power to the existing set of directors and managers will further many of the goals of the progressives. Take, for exam-

ple, the criteria of reducing workplace discrimination or helping the weakest in society. Or take the broader goal of redistribution. Are existing managers (primarily wealthy, middle-aged, white men) going to be any better at achieving this goal than are shareholders? The cynic in me expects that managers will be more likely to redistribute wealth to themselves. Indeed, the class of shareholders is probably far *less* representative of the rich and privileged in society than the class of managers.

### *III. Should Corporate Law Be Concerned with Such Matters?*

The standard refrain when there is a discussion about achieving progressive goals through corporate law is that such goals are better achieved through the tax system. I am not persuaded that is always the case. Instead, I think that it is probably the case that corporate law is superior to tax law at satisfying certain criteria. Once progressives specify a set of criteria, we can move to a debate as to whether corporate law is the best mechanism for addressing those concerns. The debate that I am asking for, of course, is a cousin of the debate that is standard fare in the public economics world. We could benefit from having that debate in corporate law. I am optimistic that such a debate about criteria will be the first step toward a discourse between the currently antagonistic camps that make up the corporate law academe.