CORPORATE LAW AND STAKEHOLDERS: MOVING BEYOND STAKEHOLDER STATUTES

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I. INTRODUCTION: USING CORPORATE LAW TO ENCOURAGE MORE REGULAR AND EARNEST CONSIDERATION OF STAKEHOLDERS

Dixie and Mike Yeck were elated at the opportunities that lay before them.[1] The Yecks were both employed at Enron and felt secure enough in their finances to purchase a new home.[2] They were looking forward to raising their newborn daughter in their new house.[3] Unfortunately, their elation was short-lived.[4] Both Dixie and Mike were among the approximately 4,000 Enron employees who lost their jobs after the company filed for bankruptcy.[5] In addition to losing their jobs, the Yecks lost nearly $150,000 from their employee investment plans.[6] Facing these grim financial circumstances, the Yecks sadly hung a "for sale" sign in their front yard.[7]

In 2000, WorldCom opened the door to a world of opportunities for dozens of minority engineering students.[8] The company pledged $10 million to help pay for the college tuition of engineering students chosen by the National Action Council for Minorities in Engineering ("Council").[9] However, WorldCom had made only one installment on its pledge before the company went bankrupt.[10]

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1. Patricia Kilday Hart, *A Spectacular Fall, An Uncertain Future, 4,000 Laid-off Enron Staffers Scramble to Start Over*, BOSTON GLOBE, Dec. 8, 2001, at C1.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. Robert Ingrassia, *They Gave and It Hurts*, DAILY NEWS, Sept. 24, 2002, at 9.
9. *Id.*
10. *Id.*

Subsequently, WorldCom informed the Council that it would not provide the rest of the promised funds.[11] As a consequence, approximately sixty minority engineering students do not know how they will pay for the rest of their college education.[12]

Appleton Paper employees recently fulfilled a long-standing dream. They took $107 million from their 401(k) retirement accounts and purchased the company for which they worked. [13] A few months later, these proud and loyal employees must have questioned whether they had done the right thing. Appleton, a "homespun" Wisconsin company that has been in business for almost 100 years,[14] is facing an uncertain future because Enron was its sole supplier.[15] When Enron filed for bankruptcy, it could no longer provide Appleton Paper with pulp.[16] Appleton recently laid-off eighty employees and the remaining employees' hopes for a comfortable retirement were thwarted.[17]

The stories of Dixie and Mike Yeck, the minority engineering students, and Appleton Paper are just a handful of the thousands of stories about people and organizations affected by the corporate debacles of 2002.[18] While most Americans are aware that these corporate downfalls negatively impacted stockholders,[19] fewer

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11. *Id.*
12. *Id.*
13. Bob Port, *Paper Co. Workers' Dream Shredded*, DAILY NEWS, Feb. 13, 2003, at 9.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.* For several years, the local United Way in Portsmouth, New Hampshire graciously accepted the donations of Dennis Kozlowski and his company, Tyco. *Id.* Kozlowski was one of United Way's top donors and the organization came to depend on his donations to support various programs. *Id.* After the downfall of Tyco, however, the funding from Kozlowski and his fallen company has nearly ceased and the Portsmouth chapter is looking into cutting programs. *Id. See also* Bill Murphy, *Dwindling Lay Foundation Can't Fulfill Year's Pledges*, HOUS. CHRON. Dec. 7, 2002, at 35. Kenneth Lay, Enron's fallen leader, was once the proprietor of a $52 million foundation that contributed to dozens of charities. *Id.* In 2002, the foundation's value plummeted to $2.4 million. *Id.* The decline in value left recipients of Lay's donations, such as the Museum of Fine Arts in Houston, Zoo Friends of Houston, and the Barbara Bush Foundation for Family Literacy, without their promised funds. *Id. See also* Michael Wilson, *Turmoil at WorldCom: The Hometown*, N.Y. TIMES, June 28, 2002, at C1. Clinton, Mississippi's local hockey team, the Jackson Bandits, was eagerly awaiting the day when it could play in its new hockey arena. *Id.* WorldCom founder Bernard Ebbers, who established the company in his old college town of Clinton, had promised to build a new arena for the team. *Id.* After the downfall of Ebbers' company, the Bandits' hopes for a new arena have been put on hold and the team's future is uncertain. *Id.*
19. *See generally* Marcia Vickers et al., *How Corrupt is Wall Street?*, BUS. WK., May 13, 2002, at 36. Vickers points out that a tremendous "furor" resulted from the losses that shareholders incurred during these corporate downfalls. *Id.* at 37. This furor was, according to Vickers, "more thunderous than the one unleashed by Michael R. Milken's junk-bond schemes in the 1980s, the Prudential-Securities limited-partnership debacle in the early 90s, or the price-fixing on the NASDAQ later in the decade." *Id.*

people appreciate the ways in which they affected stakeholder groups.[20] Stakeholders[21] are people whose financial well-being is tied to the corporation's success, such as employees, suppliers, charities, and communities.[22] The stakeholders of corporations like Enron and WorldCom were seriously affected by these entities' financial breakdowns.[23] Although stakeholders were affected by the corporations' downfalls,[24] they had little, if any, influence in these organizations.[25] Traditionally, stakeholders have not been given a voice in corporations.[26] Without a voice, stakeholders must simply hope corporate leaders will consider their organizations' extensive effects and act responsibly toward all affected groups.[27]

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20. *See* Kristin Loiacono, *Enron and on and on…*, TRIAL, Apr. 1, 2002, at 11. When stakeholders' losses are acknowledged, the media has tended to focus on the stakeholders' lost investments. For example, Loiacono points out that investors, creditors, suppliers, employees and others "have lost real money because they relied on information that later proved to be inaccurate." *Id. See also* Port, *supra* note 13, at 9. The monetary losses of these stakeholder groups are real, but they might also have more incommensurable losses. Appleton Paper, for example, might have lost important business relationships because of their inability to meet their obligations after Enron stopped delivering pulp. *Id.* Additionally, many communities, consumers, and employees were psychologically harmed by the corporate debacles because they shook their confidence in American business. *See, e.g.*, John A. Byrne, *How to Fix Corporate Governance*, BUS. WK., May 6, 2002, at 70 (noting the "growing outrage among corporate stakeholders" as a result of the corporate downfalls in 2002).

21. *See* R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 31 (1984). The term "stakeholder" was originally used at the Stanford Research Institute (now "SRI International, Inc.") in 1963 and it meant "those groups without whose support the organization would cease to exist." *Id.*

22. *See id.* at 24. Business ethics scholar, R. Edward Freeman, put forth a business strategy called stakeholder theory in 1984. *Id.* Freeman realized that, just as stakeholders can be affected by organizations, so too can organizations be affected by stakeholders. *Id.* He argued that it is legitimate for people in the business community "to spend time worrying about [their] strategy for stakeholders because [stakeholders] can affect the accomplishment of [business'] goals and plans." *Id.* at 23.

23. *See id.* Freeman believed that many corporate leaders were unwilling to acknowledge the impact their organizations can have on many people. *Id.* He felt that corporations, businesses, lawyers, and the scholars that study these groups have been in a dangerous form of denial. *Id.* They refuse "to admit that external groups really do have a stake in the firm, and that they can affect the firm." *Id.*

24. *See* Joseph Sora, *The Corporate Presence*, *in* CORPORATE POWER IN THE UNITED STATES 33 (Joseph Sora ed., 1998). Corporate power has stretched its arms to encircle a larger and larger group of people. *Id.* Thus, as Sora notes, "[c]orporate power is not merely a static concept reserved for Wall Street power plays, boardroom coups, or complex arrangements between firms. . . Corporate power, in its fullest sense, is the corporation's permeation into our everyday lives through a variety of subtle, often unnoticed means." *Id.* at 33.

25. *See* John C. Carter, *The Rights of Other Corporate Constituencies*, 22 MEM. ST. U. L. REV. 491, 504 (1992).

26. *Id.*

27. *See* Brian P. Kane, *The Sarbanes-Oxley Act of 2002: Something for Everyone to Worry About*, ADVOCATE, Oct. 2002, at 16. Stakeholders cannot rely heavily on government regulation as a method to promote responsible corporate behavior. Although government regulations purporting to promote corporate responsibility have developed

Yet, stakeholders should not have to merely hope corporate leaders will regularly and earnestly consider their interests. Society can develop mechanisms that encourage corporate leaders to engage in stakeholder consideration. [28] The development of such mechanisms is an appropriate response to corporations' increasing influence over stakeholders.[29] Corporate law can encourage directors and executives to more regularly and earnestly consider stakeholders[30] without imposing on them a legal duty to always act in stakeholders' interests.[31] Instead, corporate law can help leaders become aware of how their decisions affect stakeholders like the Yecks and the minority engineering students.[32] As a result of

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during recent years, corporate leaders themselves still have considerable discretion to direct their companies as they see fit. *See id.*

28. *See* MARINA v.N. WHITMAN, NEW WORLD, NEW RULES 74 (1999). Whitman contends that corporate leaders did regularly and earnestly consider stakeholders' interests prior to the mid-1970s. *Id.* Post-World War II American corporations were characterized by managerial capitalism, which "gave executives great leeway to make choices and set priorities unilaterally." *Id.* at 74. Executives could "use corporate resources to pursue a variety of goals" not just to maximize shareholders' profits. *Id.* at 6. However, as global competition became more intense, the need to raise capital and maintain high profit-levels became increasingly important. *Id.* at 30. In turn, managerial capitalism was replaced with the current era of investor capitalism. *Id.* at 31. While investor capitalism gives shareholders more power to influence corporate decisions, it also focuses more attention on companies' bottom line. *Id.* at 31–32. One effect of this focus is that executives do not have the freedom they once had to consider the interests of groups other than shareholders. *Id.* at 30. *See generally* MICHAEL USEEM, INVESTOR CAPITALISM (1996) (discussing the rise of investor capitalism in America).

29. *See* WHITMAN, *supra* note 28, at 12. Whitman argues that three forces have combined to increase the size and influence of American corporations: global economic integration, domestic deregulation, and the evolution of information and telecommunications technology. *Id.* A combination of these forces led to an unprecedented number of mergers and takeovers, foreign acquisitions, and corporate restructurings. *Id.* at 110. *See also* Institute for Policy Studies, *Top 200: The Rise of Corporate Global Power*, *available at* http://www.ips-dc.org/reports/top200text.htm (last visited Sept. 15, 2003). The Institute for Policy Studies compared the size of countries' economies with the size of corporations' economies. *Id.* The Institute estimates that fifty-one of the world's largest 100 economies are actually corporations. *Id.* Their tremendous size means that corporations exercise power over millions of stakeholders. *Id.*

30. Richard Marens & Andrew Wicks, *Getting Real: Stakeholder Theory, Managerial Practice, and the General Irrelevance of Fiduciary Duties Owed to Shareholders*, 9 BUS. ETHICS Q. 273, 273 (1999) (suggesting ways the law can strengthen stakeholder management practices).

31. *See* Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21 STETSON L. REV. 23, 32 (1991) (pointing out the inherent difficulty of acting in the interest of a large, generalized group such as stakeholders or even shareholders).

32. *See supra* Part I (relaying stories of stakeholders affected by corporate downfalls). *See also* Randy R. Grant, *Measuring Corporate Power: Assessing the Options*, *in* CORPORATE POWER IN THE UNITED STATES 14 (Joseph Sora, ed. 1998). Corporations have the ability not only to "manipulate output and resource prices, [but also to] exert significant control over government policies and household living standards." *Id.*

that awareness, corporations might strive to act more thoughtfully and responsibly toward those stakeholders.[33]

In fact, the law has already started to cultivate a corporate decision-making process that accounts for stakeholders' interests.[34] Nearly all states have enacted laws known as stakeholder statutes that allow corporate directors and executives to consider stakeholders' interests without breaching fiduciary obligations to shareholders.[35] However, stakeholder statutes alone cannot cultivate the regular and earnest stakeholder consideration that is appropriate given corporations' ever-increasing influence over stakeholder groups.[36] Stakeholder statutes do not enable corporate leaders to transcend the physical and psychological distance existing between themselves and stakeholders.[37] Corporate leaders need a mechanism to help them transcend this distance if they are going to engage in more regular and earnest consideration of stakeholder groups.[38]

Although stakeholder statutes fail to close the distance between corporate leaders and directors, the statutes should not be eschewed.[39] Instead, stakeholder statutes should be the first essential building block for the passage of other legislation that does help corporate leaders overcome this physical and psychological distance.[40] This Note argues that, in addition to stakeholder statutes,

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33. *See* Carter, *supra* note 25, at 491. Carter observes that corporations are creations of society's law. *Id.* From this observation he concludes that corporations should "have some obligations to the society from which the law arose." *Id.*

34. Douglas M. Branson, *Corporate Governance "Reform" and the New Corporate Social Responsibility*, 62 U. PITT. L. REV. 605, 636–39 (2001) (discussing the development of stakeholder statutes and a stakeholder approach to corporate law).

35. *See infra* text accompanying notes 113–18 (explaining shareholder primacy).

36. *See* Edward S. Adams & John H. Matheson, *A Statutory Model for Corporate Constituency Concerns*, 49 EMORY L. J. 1085, 1085 (2000). The Authors note that the "modern corporation . . . creates interdependencies with a variety of groups with whom the corporation has a legitimate concern." *Id.*

37. *See infra* Part III (a) (describing what contributes to these physical and psychological barriers).

38. *See infra* Part III (b) (explaining why distance is a barrier to consideration of stakeholders).

39. *See* Kelley Y. Testy, *Linking Progressive Corporate Law with Progressive Social Movements*, 76 TUL. L. REV. 1227, 1238 (2002) (commenting that the stakeholder model of corporate governance "holds significant promise for spurring more complex analysis of power relationships within the corporation").

40. This Note offers a new piece of legislation aimed at improving stakeholder statutes, but other scholars have also suggested ways in which these laws can be changed. *See, e.g.*, Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as a Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 639 (2002). Greenfield proposes that directors and executives have a legally enforceable fiduciary duty to corporate employees. *Id. But see* Franklin A. Gervutz, *Getting Real About Corporate Social Responsibility: A Reply to Professor Greenfield*, 35 U.C. DAVIS L. REV. 645, 654 (2002) (questioning the practical application of fiduciary duties being owed to employees). *See also* Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 635 (1992). Mitchell proposes a possible enforcement mechanism for the statutes. *Id.* Under his proposal, shareholder primacy would still be in place, but the directors would have to consider the extent to which the proposed

states should adopt innovative stakeholder meeting statutes.[41] Stakeholder meeting statutes would require corporate leaders to periodically hold meetings with stakeholder groups. The purpose of these meetings would be to close the physical and psychological distance between corporate leaders and stakeholders and, in turn, cultivate more regular and earnest consideration of stakeholder interests inside corporate board rooms.[42] By strengthening stakeholder statutes, legal professionals can help to thwart future stories like those of the Yeck family, the minority engineering students, and Appleton Paper.

Part II of this Note explains who stakeholders are, what stakeholder statutes do, and why they were created. Part III considers why stakeholder statutes alone cannot cultivate regular and earnest stakeholder consideration by discussing two factors that have contributed to the physical and psychological distance between stakeholders and corporate leaders. Part III then addresses the effect of this distance on corporate leaders' capacity to regularly and earnestly consider stakeholders. Part IV outlines legislation that could help narrow the distance between stakeholders and corporate leaders, thereby enabling corporate leaders to act more thoughtfully and responsibly toward the myriad of groups they affect.

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actions would harm groups of constituencies. *Id.* Stakeholders would then have standing to challenge decisions if they felt the harm to them was substantial. *Id.* at 635–36. Stakeholders would have the burden of proving the injury violated a legitimate expectation or an implied contract. *Id.* at 636. If the constituents satisfy their burden of proof, then the corporate action would be enjoined or possibly reversed. *Id.*

41. *See infra* Part IV (describing stakeholder meeting statutes). This Note focuses on legal mechanisms for bolstering stakeholder statutes, but other disciplines can also help elevate a stakeholder approach within the law. For example, business academics who have been influenced by Freeman's stakeholder theory have proposed a stakeholder approach to management. *See, e.g.*, Amitai Etzioni, *A Communitarian Note on Stakeholder Theory*, 8 BUS. ETHICS Q. 679 (1998); John Hendry, *Missing the Target: Normative Stakeholder Theory and the Corporate Governance Debate*, 11 BUS. ETHICS Q. 159 (2001); Marens, *supra* note 30, at 30; Bernadett M. Ruf et al., *An Empirical Investigation of the Relationship Between Change in Corporate Social Performance and Stakeholder Performance: A Stakeholder Theory Perspective*, 32 J. BUS. ETHICS 143 (2001); Andrew C. Wicks et al., *A Feminist Reinterpretation of the Stakeholder Concept*, 4 BUS. ETHICS. Q. 475 (1994). *See also* R. Edward Freeman, *The Politics of Stakeholder Theory: Some Future Directions*, 4 BUS. ETHICS Q. 409, 409 (1994). In response to the considerable volume of commentary, criticism, and suggestions, Freeman has reevaluated his original work. *Id.*

42. *See* HARVEY A. HORNSTEIN, THE HAVES AND THE HAVE NOTS 55 (Jim Boyd ed., 2000) (2002) (*citing* N. Deogun, *Pepsi's Mr. Nice Guy Vows Not to Finish Last*, WALL ST. J., Mar. 19, 1997, at B1). This Note is not intended to suggest there are no corporate leaders who try to balance the welfare of stakeholders with the goal of profit maximization, for surely such leaders do exist. Consider Craig Wetherup, a corporate officer with Pepsi Company. Wetherup admitted that he aimed to boost Pepsi's stock price, but stated that "if we get to $55, and the difference between getting from $55 to $60 is to lose our humanity, I wouldn't want to do it." *Id.* at 55.

However, as the Note will discuss, the way in which corporate leaders live, work, and make decisions hinders their capacity to fully grasp and consider stakeholders' interests. Accordingly, many corporate leaders would benefit from legislation that helps them to more fully appreciate their organization's impact. *See infra* Part IV (describing legislation that might achieve this goal).

II. STAKEHOLDER STATUTES: THE NECESSARY FOUNDATION

In the 1980s, innovative corporate governance statutes were adopted by state legislatures across the country.[43] These statutes gave corporate directors and executives legal permission to expand their decision-making processes without breaching their fiduciary duties to shareholders.[44] Specifically, the statutes gave directors and executives permission to consider the interests of groups other than shareholders when making business decisions.[45] Before these statutes were passed, it was not clear whether corporate leaders were legally permitted to consider how their decisions would affect any group other than shareholders.[46] Thus, the statutes were an innovative addition to corporate law.

The statutes are referred to by various names, including "nonshareholder" statutes,[47] "constituency" statutes,[48] and "stakeholder" statutes.[49] Throughout this Note, these laws will be referred to as stakeholder statutes.[50] Stakeholder groups[51]

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43. These statutes were innovative, but they were not the first attempts to reform corporate governance statutes. *See, e.g.* Branson, *supra* note 34, at 608. Branson traces the origins of corporate governance reforms back to John Kenneth Galbraith in the 1960s. *Id.* Subsequent to Galbraith, commentators proposed a weighted voting scheme, socially responsible accounting, and mandatory public interest directors on each board. *Id.* at 612. Others called for "super social audits," which would require corporations to "attempt to quantify every adverse impact the corporation had on environments in which the corporation operated, along with corporate efforts to ameliorate them." *Id.* at 614. Ralph Nader, Joel Seligman, and Mark Green vigorously advocated corporate governance reforms. *Id.* at 615. One proposal would have required corporations to re-incorporate every twenty years so the government could assess the corporation's social responsibility throughout its existence. *Id.* at 616.

44. *See generally* LEWIS D. SOLOMON ET AL., CORPORATIONS LAW AND POLICY 658–892 (4th ed. 1998) (providing a comprehensive discussion of the fiduciary duties owed by corporate directors to shareholders, including the duty of care, the duty of loyalty, and the duty of disclosure).

45. James J. Hanks, Jr., *Playing with Fire: Nonshareholder Constituency Statutes in the 1990s*, 21 STETSON L. REV. 97, 106 (1991). Some statutes permit boards and management to consider the "effects" of their decisions on stakeholder groups and others say directors and management can consider stakeholders' "interests." *Id.*

46. *See id.* at 102. Hanks offers a synthesis of several Delaware Supreme Court decisions regarding directors' capacity to consider stakeholders. He concludes that "any consideration of or benefit for nonshareholder groups must be rationally related to the interests of stockholders." *Id.*

47. Branson, *supra* note 34, at 636.

48. *See* Jonathan D. Springer, *Corporate Constituency Statutes: Hollow Hopes and False Fears*, 1999 ANN. SURV. AM. L. 85, 124 n.2 (1999) (referring to the term "constituency" as "presumably neutral").

49. *See, e.g.*, *id.*

50. FREEMAN, *supra* note 21, at 25. This is an appropriate name because stakeholders are traditionally defined as "all of those groups and individuals that can affect, or are affected by, the accomplishment of organizational purpose." *Id.* It is also appropriate to refer to these laws as stakeholder statutes because the name reminds society that these groups have a *stake* in the corporation's success. *Id.* at 45. The term *stakeholder* rings of legitimacy more strongly than do other terms, such as *constituency*. The term *constituents* invokes images of distant and disinterested persons, rather than persons with an active

include employees, consumers, creditors, suppliers, and communities, among others.[52] While shareholders are also stakeholders in a definitional sense,[53] shareholders are considered a separate group for purposes of this Note.

Stakeholder statutes are intended to promote the interests of groups other than shareholders.[54] The statutes accomplish this goal by giving corporate directors and executives legal permission to consider stakeholders' interests when making corporate decisions.[55] The statutes acknowledge that groups other than shareholders "depend upon the corporation for their welfare."[56] The statutes also recognize that, in addition to shareholders, many other groups are "affected directly by the manner in which management conducts the corporation's affairs."[57] Prior to the enactment of stakeholder statutes, corporate leaders were unsure whether they were legally permitted to consider stakeholders' interests because their fiduciary duties required them to act in accordance with shareholders' interests.[58] Thus, one of the statutes' purposes was to make explicit directors' and executives' ability to consider stakeholder interests without obligating them to act contrary to shareholders' interests.[59] Many commentators believed directors and executives needed to be given this ability after witnessing the deleterious effects of the hostile takeover crisis in the 1980s.[60]

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interest and a significant stake in an organization. Because the latter is the image of stakeholders this Note promotes, the name stakeholder statutes will be used throughout.

51. *See infra* note 21 (citing original definition of "stakeholder").

52. *See* Carter, *supra* note 25, at 491 (noting that "employees, suppliers, creditors, and communities" are the most commonly named stakeholder groups).

53. *See* FREEMAN, *supra* note 21, at 31 (defining stakeholders as "those groups without whom the organization would be unable to exist").

54. *See* Adams, *supra* note 36, at 1088. Stakeholder statutes make explicit the groups of people directors can consider when making decisions. *Id.* In addition to shareholders, the lists include groups such as employees, suppliers, communities, and charities. *Id.* at 1087. *But see* Nell Minow, *Shareholders, Stakeholders, and Boards of Directors*, 21 STETSON L. REV. 197, 237 (1991). Minow contends that the statutes' purpose is misguided and that the duties of care and loyalty to shareholders should be fully restored to guarantee "corporate productivity, competitiveness, and growth." *Id.* at 237.

55. David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223, 225 (1991).

56. *Id.*

57. *Id.*

58. *See* Adams, *supra* note 36, at 1088 (noting that directors had to infer to whom they owed their fiduciary obligations by the absence of explicit language in corporate statutes). *See also* Mitchell, *supra* note 40, at 632. Mitchell contends that the historical purpose of management's fiduciary obligation "has not been to exclude the interests of every group but the stockholders." *Id.* Rather, management's fiduciary obligation was developed to prevent directors from acting solely in their own interest. *Id.* Nonetheless, the law has evolved to create a situation in which directors feel not only that they must not act in their own self-interest, but that they must act solely in the interest of the shareholders. *Id.*

59. *See infra* Part II (c).

60. *See* Testy, *supra* note 39, at 1237. Testy argues that the reason corporate stakeholder statutes developed was because managers needed a reason to reject takeover offers that were beneficial to shareholders. *Id.* By employing the language of stakeholders, managers were able to justify their rejection of a "premium bid and thereby remain in control of their enterprise (and their jobs)." *Id.* Testy concedes that while there most likely

A. The Development of Stakeholder Statutes

Throughout the 1980s, hostile takeovers were commonplace in corporate America.[61] A hostile takeover occurs when outside persons make a bid to current management to takeover the company for a price several times higher than the stock price.[62] Because the offered price is higher than the stock price, stockholders generally receive a financial windfall from takeovers. Thus, corporate leaders risk a breach of their duty to maximize shareholder wealth when they reject these offers. Yet, many corporate leaders want to reject takeover bids because takeovers often result in significant losses to themselves and the corporations' stakeholders.[63]

During the 1980s, stakeholders usually bore the brunt of a hostile takeover's negative ramifications.[64] For example, the takeovers of this era resulted in extensive job losses,[65] diminished security between creditors, suppliers, and corporations,[66] and ruined customer relationships.[67] Hostile takeovers often left communities without the tax benefits, employment opportunities, or the social and charitable advantages they reaped from hometown corporations.[68] The adverse

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was a self-interested reason for corporate executives to be supportive of these statutes, the statutes still developed with an intention of helping improve corporations' treatment of stakeholders. *Id.*

61. *See* Steven A. Rosenblum, *Proxy Reform, Takeovers, and Corporate Control: The Need for a New Orientation*, 17 J. CORP. LAW 185, 188 (1991). The takeover strategists of the 1980s were known as "financial takeover entrepreneurs." *Id.* Because stocks were valued far below the value of corporations' assets, these entrepreneurs were able to "buy low, milk the cash flow, sell off the assets, and, eventually, pocket the difference between what they paid and what the company was really worth." *Id.*

62. *See* Carol B. Swanson, *The Turn in Takeovers: A Study in Public Appeasement and Unstoppable Capitalism*, 30 GA. L. REV. 943, 958 (1996). The original tactic for taking over another company during the 1980s was an "unsolicited, all-cash tender offer." *Id.* at 964. Eventually many of these deals became financed by junk bonds, which are "generally high-yielding, below-investment-grade bonds or preferred stocks." *Id.* at 965 n.77.

63. Millon, *supra* note 55, at 224. At first the takeover trend went unnoticed, but as the takeovers' deleterious effects became apparent, more people began to speak out against these corporate strategies. *Id.*

64. Rosenblum, *supra* note 61, at 204. While stakeholders generally suffered deleterious consequences from hostile takeovers, many argue that shareholders, both past and present, benefited from the movement. *Id.* at 190–94. The shareholder rights movement grew out of the hostile takeover era and shareholder organizations "aimed at removing takeover defenses and facilitating changes in corporate control" were formed. *Id.* at 190.

65. *Id.* at 204.

66. *Id.*

67. *See* Rosenblum, *supra* note 61, at 188. An anti-takeover backlash emerged after the takeovers began to reap tremendous losses on stakeholders, particularly employees and communities. *Id. See also* Millon, *supra* note 55, at 234. The acquisitions required corporations' credit to be freed up, thereby forcing management to cut costs. *Id.* The most common cost-cutting measures were massive employee layoffs and plant and office closings. *Id. See also* Martin Lipton, *Takeover Bids in the Target's Boardroom*, 35 BUS. LAW 101, 104 (1989) (arguing that the interests of a few shareholders are being put before the economic health of the entire country).

68. Rosenblum, *supra* note 61, at 204.

consequences suffered by stakeholders[69] during this era dramatically illustrated that corporate directors had "few, if any, direct [legal] obligations to non-shareholder constituencies."[70] Corporate leaders did have an obligation, however, to maximize shareholder wealth, and doing so often came at stakeholders' great expense.

In an attempt to remedy this dilemma, members of the legal community began advocating an approach to corporate law that allowed for stakeholder consideration.[71] Stakeholder statutes were developed[72] to provide corporate leaders with a mechanism for considering stakeholder interests without breaching their fiduciary obligations to shareholders.[73] Stakeholder statutes' proponents sought to change corporate law to reflect their belief that "[c]orporations are more than just investment vehicles for owners of financial capital." [74] Proponents argued that corporate law should account for corporations' impact on groups besides shareholders by allowing directors and executives to consider how their actions will affect stakeholders.[75] After witnessing the deleterious effects hostile takeovers reaped on stakeholders, many state legislatures agreed with the stakeholder statutes' proponents and readily adopted the laws.[76]

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69. *See generally* Millon, *supra* note 55, at 241. Arguably, takeovers' deleterious effects were not immediately apparent. This is partly because the drawbacks of takeovers and mergers were counterintuitive to the fundamental assumptions of the time. *Id.* Until this takeover phenomenon, profit maximization was believed to be a strategy that benefited everyone. *Id.* As Millon puts it, "larger pies imply larger servings for all." *Id.* It was not until the takeover boom that some people realized a larger pie does not always get divided up equitably.

70. *See* Carter, *supra* note 25, at 504. *See also* Rosenblum, *supra* note 61, at 204 (noting that economists have concluded that corporate executives' willingness to breach "implicit contracts with employees, suppliers, and other stakeholders" contributed to the proliferation of takeover activity).

71. *See, e.g.*, A.A. Sommer, Jr., *Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33, 39 (1991). Some corporations did, or were attempting to, implement a stakeholder approach to their business practices before the stakeholder statutes were passed. *Id.* Several companies had already included this type of provision in their governing standards. *Id.*

72. *See* SOLOMON, *supra* note 44, at 122 (noting that these statutes were "typically enacted together with antitakeover legislation to protect corporate directors who oppose[d] a hostile bid for control").

73. *See* Branson, *supra* note 34, at 605 (noting that the call for corporate governance reform is not a new one).

74. Millon, *supra* note 55, at 226.

75. See Ryan J. York, *Visages of Janus: The Heavy Burden of Other Constituency Anti-takeover Statutes on Shareholders and the Efficient Market for Corporate Control*, 38 WILLAMETTE L. REV. 187, 189 (2002).

76. *See* Hanks, *supra* note 45, at 97. Hanks observes that, in just a few years, "these statutes have evolved from an interesting intellectual curiosity to an apparent fixture in the corporation codes of more than half the states." *Id.*

B. Stakeholder Statutes Vary Across States

The Pennsylvania legislature passed the first stakeholder statute in 1983[77] and forty other states have subsequently implemented similar statutes.[78] A notable exception[79] is Delaware, where a majority of corporations are incorporated.[80] Nonetheless, stakeholder statutes still apply to hundreds of corporations in the states that have adopted the statutes.[81]

Generally, stakeholder statutes give corporate directors and executives permission to consider stakeholder groups, including employees, suppliers, customers, creditors, and communities, when making decisions.[82] Wyoming's statute is an example of a comprehensive stakeholder statute:[83]

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77. 15 PA. CONS. STAT. § 1715 (2002). *See also* Roberta S. Karmel, *Implications of the Stakeholder Model*, 61 GEO. WASH. L. REV. 1156, 1157 (1993).

78. *See* ALA. CODE § 10-2B-11.03(C) (2002); ARIZ. REV. STAT. § 10-2702 (2002); ARK. CODE ANN. § 4-27-1202(C) (Michie 2002); COLO. REV. STAT. § 7-106-105(7) (2002); CONN. GEN. STAT. § 33-756(d) (2003); FLA. STAT. ch. 607.0830(3) (2002); GA. CODE ANN. § 14-2-202(b)(5) (2002); IDAHO CODE § 30-1702 (Michie 2002); 805 ILL. COMP. STAT. 5/8.85 (2002); IND. CODE § 23-1-35-1(d) (1995); IOWA CODE § 491.101B (2001); KY. REV. STAT. ANN. § 271B.12-210(4) (2002); LA. REV. STAT. ANN. § 12:92(G) (West 2002); MASS. GEN. LAWS ANN. ch. 156B, § 65 (West 2003); ME. REV. STAT. ANN. tit. 13-A § 716 (West 2002); MINN. STAT. ANN. § 302A.251(s) (West 2002); MISS. CODE ANN. § 79-4-8.30(f) (2002); MO. ANN. STAT. § 351.347(1) (West 2002); MONT. CODE ANN. § 35-1-815(3) (2002); BUS.-ELECTRONIC RECORDS-MISC. PROVISIONS, Ch. 395, S.B. 436 (2003) (codified at NEV. REV. STAT. § 78.138(4) (2002)); N.H. REV. STAT. ANN. § 293-A:12.02(C) (2002); N.J. STAT. ANN. § 14A: 6-1(2) (West 1998); N.M. STAT. ANN. 53-11-35(D) (Michie 2002); N.Y. BUS. CORP. § 717(b) (2002); N.D. CENT. CODE § 10-19.1-50(6) (2001); N.C. GEN. STAT. § 55-11-03(C) (2002); OHIO REV. CODE ANN. § 1701.59(E) (West 2002); OR. REV. STAT. § 60.357(5) (2001); 15 PA. CONS. STAT. § 1715(a) (2002); R.I. GEN. LAWS. § 7-5.2-8(a) (2002); S.C. CODE ANN. § 33-11-103(c) (Law. Co-op. 2002); S.D. CODIFIED LAWS 47-33-4 (Michie 2002); TENN. CODE ANN. § 48-103-204 (2002); TEX. BUS. CORP. ACT. ANN. art. 5.03 (Vernon 2001); UTAH CODE ANN. § 16-10a-1103(3) (2002); VT. STAT. ANN. tit. 11A, § 11.03(c) (2002); VA. CODE ANN. § 13.1-718(c) (Michie 2002); BUS. CORP. ACT, CH. 35, S.B. 5123 (2003) (codified at WASH. REV. CODE § 23B.11.030(3) (2003)); WIS. STAT. ANN. § 180.0827 (West 2002); WYO. STAT. ANN. § 17-16-830(e) (Michie 2002).

79. *See also* York, *supra* note 75, at 189–90. Alaska, California, Kansas, Maryland, Michigan, Nebraska, Oklahoma, and West Virginia also have not adopted stakeholder statutes. *Id.* In addition, the District of Columbia, Puerto Rico and the Virgin Islands have not yet adopted these statutes. *Id.* at n.13.

80. *Id.* at 189–90. *But see* Unocal Corp. v. Mesa Petroleum Co., 493 A.2d 946, 955–56 (Del. 1985). The Delaware Supreme Court has authorized the board of directors to consider other stakeholder interests during takeover negotiations. *Id. See generally* Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO L. REV. 709 (1987) (discussing why corporations tend to incorporate and reincorporate in Delaware).

81. *See* Hanks, *supra* note 45, at 97.

82. *See* Karmel, *supra* note 77, at 1163.

83. *See* Adams, *supra* note 36, at 1088–89. Adams analyzes the scope of stakeholder statutes across jurisdictions. The Wyoming statute covers the major elements of all stakeholder statutes. *Id.* at 1088.

> For purposes of subsection (a) of this section, a director, in determining what he reasonably believes to be in or not opposed to the best interests of the corporation, shall consider the interests of the corporation's shareholders and, in his discretion, may consider any of the following: (i) The interests of the corporation's employees, suppliers, creditors, and customers; (ii) The economy of the state and nation; (iii) The impact of any action upon the communities in or near which the corporation's facilities or operations are located; (iv) The long-term interests of the corporation and its shareholders, including the possibility that those interests may be best served by the continued independence of the corporation; and (v) Any other factors relevant to promoting and preserving public or community interests.[84]

Other states' statutes are similar to Wyoming's, but the specifics vary among states.[85] Stakeholder statutes vary in four significant respects.[86] The first difference is whether consideration of stakeholders is mandatory or permissive.[87] Connecticut is the only state that requires directors and executives to consider stakeholders' interests.[88] All other states have permissive stakeholder statutes.[89] Certain states "underscore the optional nature of these considerations by specifying that directors may consider these interests at their discretion."[90] Thus, with the exception of Connecticut, most states have left consideration of stakeholder groups entirely to corporate directors' and executives' discretion.

A second variation among stakeholder statutes is whether they extend permission to consider stakeholders only to directors, or to both directors and corporate officers. Most statutes specifically grant permission to the board of directors.[91] For example, Wyoming's statute specifies that "a director . . . may consider . . . the interests of the corporation's employees, suppliers, creditors, and customers."[92] While most states follow Wyoming's model and grant permission only to directors,[93] several states' statutes extend permission to both directors and

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84. WYO. STAT. ANN. § 17-16-830(e). *Cf.* IDAHO CODE § 30-1702. Idaho's statute is an example of a considerably shorter stakeholder statute. It reads, "In addition, a director may consider the interests of Idaho employees, suppliers, customers and communities in discharging his duties."

85. *See Infra* Part II (b).

86. *See* Springer, *supra* note 48, at 101–02. Another less significant difference among the states' statutes is that some states give corporations the option to keep the statutes' language in their charter. *Id.* Georgia, Tennessee, and Pennsylvania contain such provisions. *Id.*

87. *See id.* at 101.

88. CONN. GEN. STAT. § 33-756(d).

89. *See, e.g.*, WYO. STAT. ANN. § 17-16-830(e). Wyoming's statute says that a director "shall consider the interests of the corporation's shareholders," but they "may consider" other stakeholder groups. *Id.*

90. *See* Springer, *supra* note 48, at 101.

91. *See* Millon, *supra* note 55, at 277 n.74.

92. WYO. STAT. ANN. § 17-16-830(e).

93. *See* Springer, *supra* note 48, at 96. In fact, the parties invoking these statutes have largely been corporate directors. *See, e.g.*, ER Holdings Inc. v. Norton Co., 735 F. Supp. 1094 (D. Mass. 1990); Hilton Hotels Corp. v. ITT Corp., 978 F. Supp. 1342 (D. Nev.

officers.[94] For example, Illinois' statute specifies that "[i]n discharging the duties of their respective positions, the board of directors, committees of the board, individual directors and individual officers [may consider various stakeholder groups]."[95] However, if the statutes' intention is to permit consideration of stakeholder interests at the executive level,[96] then the intention is best served by allowing both directors and officers to consider stakeholder groups.[97] Even though executives are not included in the statutory language of many laws,[98] it is still beneficial to facilitate decision-making processes in which executives might consider stakeholders' interests.[99]

A third significant variation is that states' stakeholder statutes apply in different circumstances.[100] Most statutes give corporate leaders permission to

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1997); AMP Inc. v. Allied Signal Inc., 1998 U.S. Dist. LEXIS 15617, at 1 (E.D. Pa. 1998); Basswood Partners v. NSS Bancorp, 1998 Conn. Super. LEXIS 317, at 1.

94. *See e.g.*, 805 ILL. COMP. STAT. 5/8.85; ME. REV. STAT. ANN. tit. 13-C § 831; WIS. STAT. ANN. § 180.0827. *See also* Millon, *supra* note 55, at 277 n.74.

95. 805 ILL. COMP. STAT. 5/8.85.

96. *See* Gregory S. Rowland, *Earnings Management, the SEC, and Corporate Governance: Director Liability Arising From the Audit Committee Report*, 102 COLUM. L. REV. 168, 182 (2002). Rowland acknowledges that the board of directors was once considered "a passive, old-boys club" that rubber-stamped management's decision. *Id.* at 181. But Rowland points out that this model "did not endure" and that a movement toward an active board of directors became the norm. *Id. But see* John W. Rogers, Jr., *The Patient Investor: The Board Factor*, FORTUNE, July 8, 2002, at 180. However, the recent business scandals indicate that, in fact, boards are not effectively scrutinizing officers' decisions. *Id.* The scandals reveal how the true decision-making power lies with a corporation's officers and top managers and not with the board of directors. *See generally* Ira M. Millstein & Paul W. MacAvoy, *The Active Board of Directors and Performance of the Large Publicly Traded Corporation*, 98 COLUM. L. REV. 1283 (1998); Melvin A. Eisenberg, *The Board of Directors and Internal Control*, 19 CARDOZO L. REV. 237 (1997).

97. *See generally* Rogers, *supra* note 96, at 180. Critics have voiced concern about boards of directors' participation, or at least acquiescence, in the ill-conceived financial dealings of companies such as Enron, WorldCom, Global Crossings, Tyco, and numerous other entities. *Id.* The recent slew of misstated earnings have left many investors asking: "Where was the board?" *Id.* Rogers believes that investors should look more closely at "the caliber of the board" if they are concerned about its ability to prevent the company from ending up in ruins. *Id.*

98. WILLIAM KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS 39 (6th ed. 1998). One could also argue that permission to consider stakeholders does extend to corporate officers. This interpretation is reasonable because it is "relatively well settled" law that both officers and directors have the same legal duties. *Id.* Knepper and Bailey's authoritative work states that "the law is relatively well settled that officers will be held to the same duty of care and business judgment standards as directors." *Id.* Additionally, eighteen states have statutes specifying that corporate officers are subject to the same duties as directors. *Id. See also* REVISED MODEL BUS. CORP. ACT § 8.42 (1998). The Revised Model Business Corporation Act treats the duties of directors and officers alike. *Id.* However, permission to consider stakeholders is distinct from a duty owed to shareholders and thus the permission might not extend to officers.

99. *See* SOLOMON, *supra* note 44, at 349–54 (discussing how officers are empowered through agency theory to act in a variety of ways on behalf of the corporation).

100. Springer, *supra* note 48, at 100.

consider stakeholders' interests in any circumstance.[101] Under these statutes, corporate leaders could consider stakeholder interests when contemplating a change in company control, relocation of a facility, bonuses to executives, and numerous other situations.[102]

In contrast, nineteen states allow stakeholder consideration only during takeover or change of control situations.[103] Although stakeholder interests are certainly at risk in a change of control situation,[104] this view is less inclusive than state statutes recognizing that stakeholder interests are implicated by almost all corporate decisions. Further, more expansive statutes allow consideration of stakeholders' interests whenever corporate leaders wish to consider them.[105]

Finally, stakeholder statutes differ as to what corporate leaders are permitted to consider. Some statutes permit corporate leaders to consider the "effects" of their decisions on stakeholders.[106] Other stakeholder statutes permit corporate leaders to consider the "interests" of stakeholders.[107] Additionally, most stakeholder statutes allow consideration of both short and long-term interests.[108] For example, Minnesota's statute provides: "[i]n discharging the duties of the position of the director, a director may, in considering the best interests of the corporation, consider . . . the long-term as well as the short-term interests of the corporation and its shareholders. . . ."[109]

While differences do exist among stakeholder statutes, [110] the significance of these differences is limited because the essence of the stakeholder statutes

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101. *Id.*

102. *But see In re* McCalla Interiors, Inc., 228 B.R. 657 (Bkrtcy. N.D. Ohio 1998); Basswood Partners v. NSS Bancorp, No. CV980163412S 1998 Conn. Super. Lexis 317 (Conn. Super. Ct. Feb. 6, 1998) (invoking corporate stakeholder statutes in a non-takeover situation).

103. Springer, *supra* note 48, at 100. *See also* ALA. CODE § 10-2B-11.03; ARIZ. REV. STAT. § 10-2702; ARK. CODE ANN. § 4-27-1202; COLO. REV. STAT. § 7-106-105(7); KY. REV. STAT. ANN. § 271B.12-210(4); LA. REV. STAT. ANN. § 12:92(G); MO. ANN. STAT. § 351.347(1); MONT. CODE ANN. § 35-1-815(3); BUS.-ELECTRONIC RECORDS-MISC. PROVISIONS, Ch. 35, S.B. 5123; N.H. REV. STAT. ANN. § 293-A:12.02(C); N.J. STAT. ANN. § 14A: 6-1(2); N.C. GEN. STAT. § 55-11-03(C); S.C. CODE ANN. § 33-11-103(c); S.D. CODIFIED LAWS 47-33-4; TEX. BUS. CORP. ACT. ANN. art. 5.03; UTAH CODE ANN. § 16-10a-1103(3); VT. STAT. ANN. tit. 11A, § 11.03(c); VA. CODE ANN. § 13.1-718(c); BUS. CORP. ACT, Ch. 35, S.B. 5123 (allowing corporate leaders to consider the interests of stakeholders in change of control transactions).

104. *See* Lipton, *supra* note 67, at 104. *See also* Rosenblum, *supra* note 61, at 188.

105. Mitchell, *supra* note 40, at 642–43 (recognizing "the inextricable interdependence" between stakeholders and corporations).

106. Hanks, *supra* note 45, at 105.

107. *Id.* at 106.

108. Springer, *supra* note 48, at 97.

109. MINN. STAT. ANN. § 302A.251(s).

110. *See infra* Part II (b).

remains the same.[111] Essentially, all stakeholder statutes give corporate leaders permission to expand their decision-making processes such that they can consider stakeholders' interests.[112]

C. Stakeholder Statutes as a Radical Change in Corporate Law

By giving corporate leaders permission to consider stakeholders, stakeholder statutes represent a radical change in corporate law.[113] Prior to stakeholder statutes, corporate leaders could not be sure if they were permitted to consider stakeholders' interests.[114] Corporate leaders could only be certain that they were "legally required to manage a corporation for the exclusive benefit of its shareholders."[115] This legal requirement, known within corporate law as the "shareholder primacy norm,"[116] refers to "this conception of management's responsibility and also to corporate law's commitment to shareholder welfare as the primary objective of corporate activity."[117] The shareholder primacy norm dictates that when corporate leaders make decisions affecting the organization, their decisions must aim to maximize shareholders' wealth.[118]

The desirability of the shareholder primacy norm is deeply rooted within corporate law.[119] Corporate law reflects the belief that "[f]iduciary duties owed by

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111. Springer, *supra* note 48, at 96 (noting that "most of these . . . statutes are similar in form").

112. *See id.* at 97.

113. *See* ABA Committee on Corporate Laws, *Other Constituency Statutes: Potential for Confusion*, 45 BUS. LAW. 2253, 2253 (1990). The ABA Committee on Corporate Laws boldly stated that stakeholder statutes "may radically alter some of the basic premises upon which corporation law has been concerned. . . ." *Id.*

114. *See* Springer, *supra* note 48, at 105. The justification for this can be attributed to "shareholders' position as residual claimants who are generally entitled only to what is left of the corporation after all other contracts are fulfilled." *Id.*

115. *See* Macey, *supra* note 31, at 23.

116. *See generally* D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277 (1998).

117. Millon, *supra* note 55, at 277 n.2. *See also* Gervutz, *supra* note 40, at 650. In response to Greenfield's article, Gervutz argues that courts will accept almost any argument for why a decision is in the interest of shareholders. *Id.* Judges prefer not to scrutinize corporate decisions, which helps to reinforce the shareholder primacy norm. *Id.*

118. *See* Adams, *supra* note 36, at 1094 (noting that corporate law has traditionally directed corporate leaders to maximize shareholder wealth). *But see* Steven M. H. Wallman, *Understanding the Purpose of a Corporation: An Introduction*, 24 J. CORP. L. 807, 809 (1999). Wallman argues that having corporate executives act solely in the shareholders' interest is actually detrimental to the success of the organization. *Id.* He contends that "the share-price maximization standard leads to poor results [and] long-term disadvantages for society. . . ." *Id.* The new global economy and the corporations that operate in it "need to understand . . . the notion of the corporation as a way of focusing inputs—human and financial capital—in a way that maximizes benefits for society." *Id.* at 818.

119. *See* Adolph A. Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931). Berle was one of the earliest proponents of the shareholder primacy norm. Berle maintained that a corporation's powers are "at all times exercisable only for the ratable benefit of all the shareholders as their interest appears." *Id. But see* E.

management to shareholders and shareholders alone are necessary to ensure that shareholders' interests . . . be protected."[120] Because advocates of the shareholder primacy norm believe that corporations' primary goal should be maximization of shareholder wealth,[121] they are critical of measures that might impinge on this goal.[122] Hence, proponents of the shareholder primacy norm fear that stakeholder statutes will distract corporate leaders from the task of maximizing shareholders' returns.[123] Such proponents worry that the laws "will upset the shareholder primacy norm by changing the fiduciary duties that directors owe to shareholders,"[124] and that directors will use the statutes to justify their decisions[125]

Merrick Dodd, *To Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932). Dodd was Berle's staunchest opponent, and the two scholars engaged in a dialogue that became known as the Berle-Dodd debate. While Berle supported the shareholder primacy norm, Dodd believed that corporations did not exist merely to serve the interests of shareholders. *Id.* According to Dodd, corporations should strive both to make a profit and to provide social benefit to the community. *Id. See also* Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1208 (2002). Berle's perspective prevailed as the dominant conception of the corporation. *Id.* However, after his view became accepted, Berle actually conceded that Dodd's view was a better model. In other words, Berle conceded that corporations should act in the entire community's interest rather than just in the shareholders' interest. *Id.* at 1208–09. *See generally* ADOPLH A. BERLE, THE 20TH CENTURY CAPITALIST REVOLUTION 169 (1954).

120. Springer, *supra* note 48, at 106.

121. *See* Hanks, *supra* note 45, at 110. Hanks explains that directors have traditionally been obligated to maximize shareholders' wealth because that would result in maximization of corporate wealth. *Id.* He goes on to argue that corporate wealth should remain in the stockholders' hands rather than be redistributed to stakeholders. *Id.* at 112. *But see* Morey McDaniel, *Stockholders and Stakeholders*, 21 STETSON L. REV. 121, 141 (1991). McDaniel argues that corporations and society benefit when corporations redistribute shareholders' returns to other stakeholders. *Id.*

122. *See generally* Jeffrey N. Gordon, *What Enron Means for the Management and Control of the Modern Business Corporation: Some Initial Reflections*, 69 U. CHI. L. REV. 1233, 1234 (2002). Potentially, after the 2002 corporate debacles, people might be more inclined to question the primacy of shareholders' interests. Gordon points out the ways in which the Enron bankruptcy challenged very basic assumptions about conducting business in America during an era of "shareholders capitalism." *Id.*

123. *See* Macey, *supra* note 31, at 36. One argument commonly leveled against stakeholder statutes is that the statutes erode legal protections for the groups who most need them: shareholders. *Id.* The argument assumes that shareholder primacy is justified because "shareholders face more daunting contracting problems than other constituencies." *Id.* Advocates of this position contend that other stakeholder groups, such as workers, bondholders, communities, and creditors, can enter into such contracts thereby augmenting their power and control. *Id.*

124. Springer, *supra* note 48, at 106. The social desirability of this change should be questioned. Springer describes what critics of the statutes fear: stakeholder statutes "might prevent directors from shuttering a factory for fear of disrupting a community and causing job loss, even though doing so may benefit shareholders financially." *Id.* Springer makes the questionable assumption that shuttering the factory would clearly be what the shareholders would want and, in fact, what would be in their best interest.

125. *See, e.g.*, Amanda Acquisition Corp. v. Universal Foods Corp., 877 F.2d 496 (7th Cir. 1989); Baron v. Strawbridge Clothier, 646 F. Supp. 690 (E.D. Pa. 1986); Abrahamson v. Waddell, 63 Ohio Misc. 2d 270 (1992). *See* Springer, *supra* note 48, at 114.

regardless of whether the directors legitimately acted in stakeholders' interest.[126] Generally, those opposing stakeholder statutes are wary of the potential disruption such statutes might have on corporate law's traditional focus on the maximization of shareholder wealth.[127]

Advocates of stakeholder statutes, however, welcome the disruption to corporate law.[128] They support the challenge the statutes present to the "collective delusion about the divine right of the shareholder."[129] Additionally they maintain that critics' fears about the statutes are unfounded.[130] The statutes' advocates point out that stakeholder statutes are merely permissive and therefore do not usurp rights from shareholders.[131] With the exception of Connecticut, no state obligates corporate leaders to even consider stakeholders, let alone to act on their behalf.[132] Because the statutes are merely permissive,[133] a director might not be able to invoke a statute as a justification for his or her decision. The threat to shareholders is further weakened by the fact that stakeholders do not have standing to enforce

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In fact, several courts have upheld stakeholder statutes as "an effective means" for directors to defend against a takeover. *Id.* It is, of course, difficult to determine if these were instances in which the directors were using the statutes to mask other motives or whether they genuinely felt that stakeholders' interests were an important consideration in rejecting the takeover.

126. *See* York, *supra* note 75, at 208. The statutes are "a subterfuge for management, allowing them to extract gains rightfully belonging to the corporation's shareholders." *Id. See also* Jonathan R. Macey & Geoffrey P. Miller, *Corporate Stakeholders: A Contractual Perspective*, 43 U. TORONTO L. J. 401 (1993). One fear in regard to these statutes is that they would allow managers to "rationalize dubious or arbitrary corporate strategies that reduce the overall value of the firm on the suspect grounds that some nonshareholder constituency will benefit." *Id.*

127. *See* Adams, *supra* note 36, at 1097–98. Some people argue that stakeholder statutes unconstitutionally disrupt traditional norms of shareholder maximization. *Id.* Stakeholder statutes could be challenged as a violation of the Fifth Amendment, which prohibits takings. *Id.* at 1097. However, the takings argument does not appear particularly strong because it merely reallocates a burden. *Id.* at 1098. *But see* Gervurtz, *supra* note 40, at 651–52. Even if the shareholder primacy norm were to be relaxed, other forces, such as market pressures, the need to generate capital, business norms, and the threat of hostile takeovers, would sustain adherence to the norm. *Id.* Merely relaxing the norm will not remove it from influence. *Id.* at 653.

128. *See* Millon, *supra* note 55, at 226. The disruption was welcome because many came to believe that "[c]orporations are more than just investment vehicles for owners of financial capital." *Id.* The statutes attempted to "redefine management's responsibilities in light of this fact." *Id.*

129. Majorie Kelly, *The Incredibly Unproductive Shareholder*, HARV. BUS. REV., Jan. 1, 2002, at 18.

130. *See, e.g.*, Mitchell, *supra* note 40, at 584. Mitchell argues that "[c]ontrary to the fears of critics, the news is not bad." *Id.* The statutes merely question the norm of shareholder primacy. *Id.*

131. *See* Testy, *supra* note 39, at 1237 (noting that the permissive nature of the statutes limits their effect on corporate decision-making).

132. *See infra* Part II (b).

133. *See* Millon, *supra* note 55, at 256. Millon points out that because of the statutes' permissive language, "nonshareholders gain nothing from these statutes beyond what directors choose to give." *Id.*

their rights in court.[134] Thus, stakeholder statutes do disrupt the traditional corporate law assumptions, but this disruption is not as significant as critics claim.[135]

Nonetheless, some stakeholder statute supporters hoped the new laws would cultivate a new approach to corporate law.[136] They hoped that stakeholder statutes would be the first step toward fostering a business environment in which corporate leaders more regularly and earnestly consider how their decisions impact stakeholder groups.[137] As one scholar observes, "perhaps the greatest value of [stakeholder] statutes is aspirational – that they point the way toward a change in corporate law that will account actively for [stakeholder] interests."[138]

III. BUILDING UPON STAKEHOLDER STATUTES

Stakeholder statutes generated considerable debate both prior to and after their enactments.[139] The scholarly debate dedicated to these statutes suggests that their influence was fairly significant.[140] However, reflecting on the statutes' impact after nineteen years, it seems that stakeholder statutes "have realized neither the

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134. Springer, *supra* note 48, at 108. Although most statutes do not specifically say that stakeholders lack standing, "it is unlikely that courts would imply standing under a discretionary statute." *Id.* Four states do specify that the stakeholders lack standing. *See* GA. CODE ANN. § 14-2-202(b)(5); BUS.-ELECTRONIC RECORDS, MISC. PROV. Ch. 35, S.B. 5125; N.Y. BUS. CORP. § 717(b); 15 PA. CONS. STAT. § 1715. *See generally* Hanks, *supra* note 45, at 116–17 (discussing whether stakeholders have implicit standing under the statutes and the implications if they do not).

135. *See* Springer, *supra* note 48, at 108. The statutes could have altered the course of corporate law more significantly if they had granted stakeholders standing to enforce the statutes. *Id.* Although stakeholders are the intended beneficiaries of the statutes, they have no mechanism for ensuring these intended benefits. *Id.* Because stakeholders lack standing to bring lawsuits, the suits that have been brought under these statutes have done little to advance stakeholders' interests within corporate law. *Id.*

136. *See* Mitchell, *supra* note 40, at 610. In 1992, Mitchell argued that stakeholder statutes "are only the most obvious feature of the re-ordering of the corporate legal landscape" in regard to shareholder and stakeholder interests. *Id.* Thus, Mitchell contends that stakeholder statutes are the first of many steps that have loosened the grip of the shareholder primacy. *Id.* However, Mitchell's evidence seems rather limited in light of his sweeping conclusion.

137. Springer, *supra* note 48, at 104. While the statutes' supporters were pleased that the laws were passed, most believed the statutes did not go far enough. *Id.* Thus, the laws were seen as an important first step toward cultivating more stakeholder consideration. *Id.*

138. *Id.* at 104–05.

139. *See, e.g.*, Carter, *supra* note 25; Hanks, *supra* note 45; Karmel, *supra* note 77; Macey, *supra* note 31; Gregory H. Matthews & Steven A. Reed, *Broadening Corporate Discretion Through Constituency Statutes: A Pennsylvania Case Study*, 17 No. 2 ACCA DOCKET 36, 45 (1999); Millon, *supra* note 55; Mitchell, *supra* note 40; Springer, *supra* note 48; Stout, *supra* note 119; York, *supra* note 75.

140. *See* Robert A. Phillips, *Stakeholder Theory and A Principle of Fairness*, 7 BUS. ETHICS Q. 51, 51 (1997) (noting that if stakeholder theory's success is measured "by the number of scholars who have become interested" in fields related to the theory, then it "has met with a good deal of success").

hopes they initially inspired nor the fears they initially instilled."[141] In light of the statutes' minimal influence,[142] some scholars have recommended abandoning them in favor of other reforms.[143]

One scholar urges "those concerned about the effects of corporate decisions on society… to use tools other than [stakeholder] statutes in their struggle."[144] However, this Note argues that stakeholder statutes should not be disregarded[145] because of the benefits that could be reaped by their proliferation and improvement.[146] Stakeholder statutes are an important recognition "of the modern corporation's profound effect on the lives of a variety of groups not traditionally within the corporate law structure."[147] Those who want corporations to be "more reflective of the role [they] actually play in our society"[148] should try to build upon the foundation stakeholder statutes have laid.[149] While stakeholder statutes have laid the groundwork for a stakeholder approach to corporate law, they must be bolstered by other legislation or case law to be truly effective.

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141. Springer, *supra* note 48, at 85. *See also* Joseph William Singer, *Jobs and Justice: Rethinking the Stakeholder Debate*, 43 U. TORONTO L. J. 475, 505 (1993) (arguing that these statutes are not radical enough to have an impact).

142. Kathleen Conn, *When School Management Companies Fail: Righting Educational Wrongs*, 31 J.L. & EDUC. 245, 257 (2002) (arguing that the statutes have "failed to accomplish their goals").

143. Springer, *supra* note 48, at 123–24.

144. *Id.* at 86.

145. *See* R. Edward Freeman, *Business Ethics at the Millennium*, 10 BUS. ETHICS Q. 169, 170 (2000). Freeman would most likely agree that stakeholder statutes should not be abandoned despite the struggle to improve their effectiveness. In a recent article, Freeman urged scholars and managers not to forsake the stakeholder model of management even though it seems difficult to implement within a capitalist economy. *Id.* He believes capitalism can mesh with strategic stakeholder management. *Id.*

146. *See* Carter, *supra* note 25, at 514–15. Currently, if a corporation somehow damages a stakeholder group, the law will generally not offer any relief to the stakeholders. Corporate executives have "little direct liability to various constituencies other than shareholders." *Id.* at 515. Hence, more legislation might be necessary to provide relief for such harm.

147. Mitchell, *supra* note 40, at 584.

148. *Id.*

149. *See* Millon, *supra* note 55, at 261. Millon observes several barriers to stakeholder statutes' effectiveness. *Id.* First, stakeholders do not have the right to vote in regard to corporate decisions or to choose corporate leaders. *Id.* Second, executive compensation schemes are tied to high stock prices, which align executives' interests with shareholders. *Id.* Finally, there are "market-based incentives" that discourage consideration of stakeholders, such as competition with other corporations, the need to keep costs low, and the desire to keep stocks high. *Id.* These barriers "suggest that there will be substantial incentives for management to pursue profit maximizing options even when it is aware of foreseeable, substantial negative effects on particular nonshareholders" and even if stakeholder statutes apply. *Id.* at 263.

A. Physical and Psychological Distance as a Barrier to Stakeholder Consideration

Stakeholder statutes alone will never foster the regular and earnest consideration that is necessary for corporate leaders to act more thoughtfully toward stakeholder groups than they currently do.[150] The statutes cannot foster this type of consideration in part because they do not help corporate leaders transcend the physical and psychological distance existing between themselves and stakeholders.[151] Social science research indicates that when physical and psychological distance exists between an actor and a recipient, the actor is less likely to appreciate, or even to be concerned about, the consequences of his or her decisions for the recipient.[152] Thus, if stakeholder statutes are going to help corporate leaders to appreciate corporations' impact on stakeholders, then the statutes must be coupled with mechanisms that narrow the physical and psychological distance between corporate leaders and stakeholders.[153]

The nature of the modern corporation makes it extremely difficult for corporate leaders to transcend the physical and psychological distance between themselves and stakeholders.[154] While a myriad of factors have contributed to the widening distance between these groups, two factors have significantly augmented the distance between corporate leaders and stakeholders.[155] First, as corporations

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150. Wai Shun Wilson Leung, *The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime that Recognizes Non-Shareholders Interests*, 30 COLUM. J.L. & SOC. PROBS. 587, 620 (1997). Leung contends that "the existing corporate regime [including stakeholder statutes] fails to adequately protect the interests of non-shareholding stakeholders." *Id.* Leung then argues for additions to stakeholder statutes that would bolster their impact. *Id.* He recommends that directors have a legally mandated duty to act in stakeholders' interests and that stakeholders be given standing to bring derivative suits. *Id.* at 621.

151. *See generally* Thomas M. Jones, *Ethical Decision Making by Individuals in Organizations: An Issue-Contingent Model*, 16 ACAD. OF MGMT. REV. 366, 376 (1991). This Article uses "distance" in the same sense as many social science researchers use "proximity." The proximity of a moral issue refers to the "feeling of nearness that the moral agent has for victims (beneficiaries) of the evil (beneficial) act in question." *Id.* Proximity problems arise when the agent is psychologically or physically distant from the affected person or group. *Id.* Social science research indicates that when the consequences of one's decisions are distant and unobservable, then one will not be as concerned about the consequences. *Id.* at 377.

152. *See infra* Part III (b).

153. Mitchell, *supra* note 40, at 642. This type of regular and earnest consideration recognizes that "participants in a common enterprise are charged with some level of concern for one another's welfare." *Id.*

154. *See* WHITMAN, *supra* note 28, at 109–13 (detailing the ways in which corporations have changed over the past several decades and also how those changes have affected stakeholders).

155. *See* Leo E. Strine Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There?*, 75 S. CAL. L. REV. 1169, 1186 (2002). Strine acknowledges that it is difficult for corporate leaders to actively consider stakeholders. *Id.* He notes that corporate governing bodies "tend to act in ways that put the interests of those with the most clout at the forefront," and those with the most clout are stockholders, top management, and executives. *Id.* In America's corporate

become larger, the decision-makers become further removed from the stakeholders they affect.[156] Decision-making power was once vested within local communities where corporate leaders were able to see the connection between their decisions and the well-being of stakeholders.[157] Now, however, most corporations are massive bureaucracies in which key decision-makers might have little meaningful interaction with employees, vendors, suppliers, consumer advocates, charities, or local communities.[158] Essentially, corporations' decision-making processes have become less personalized, thereby expanding the distance between corporate leaders and stakeholders.[159]

A second factor contributing to the distance between corporate leaders and stakeholders is the increasing disparity in wealth between these two groups.[160] The physical and psychological distance between these groups has grown as the wealth of executives and directors has increased.[161] The increasing size of American corporations has contributed to their profitability, and the increase in profits has translated into higher compensation packages for corporate leaders.[162]

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legal system, "there is no reason to expect that the interests of the stockholders and top managers will not predominate over those of labor and the community," especially considering that "only capital has the right to vote!" *Id.* at 1187.

156. *See* WHITMAN, *supra* note 28, at 110. There has been "a shift of ownership and decision-making power from local communities to headquarters elsewhere, often in another state or country." *Id.*

157. *Id.*

158. *Id.* ("Regional or national differences in cultures, traditions, and expectations are also likely to alter and complicate the relationship between company and community.").

159. *See* Art Wolfe, *The Corporate Apology*, 33 BUS. HORIZONS 10, 11 (1990). The way in which corporate leaders think about stakeholders also adds to the psychological distance between these two groups. *Id.* Executives, directors, managers, and even the average corporate employees are "trained to view human beings as units or numerical symbols." *Id. See also* Dennis A. Gioia, *Pinto Fires and Personal Ethics: A Script Analysis of Missed Opportunities*, 11 J. OF BUS. ETHICS 379, 380 (1992). Ford Motor Company knew the Pinto's design was likely to cause injuries and deaths. *Id.* When Ford's management was deciding whether to make a correction to the faulty Pinto, they engaged in an impersonal "cost-benefit analysis." *Id.* at 381. This analysis included numerical valuations for "180 burn injuries" and "180 burn deaths." *Id.* These valuations subverted the reality that unless Ford took the necessary corrective action, almost 400 people would either die painful deaths or suffer serious injuries while trapped inside their cars. *Id.* When corporate officers make decisions that negatively impact stakeholder groups, such as the decision made by Ford not to correct the problem with the Pinto, they often rationalize their choices. *Id.* at 382. The rationalization process allows corporate leaders to think about the impersonal numerical impact rather than the impact on real stakeholders.

160. *See infra* text accompanying notes 160–69 (discussing disparity between wages and salaries).

161. *See* Paul Krugman, *For Richer: How the permissive capitalism of the boom destroyed American equality*, N.Y. TIMES MAG., Oct. 20, 2002, at 62. Krugman contends that over the past ten years executive lifestyles have become more lavish, extravagant and opulent than at almost any point in American history. *Id.* Krugman, a noted economist, declared that wealthy executives live in the "new Gilded Age." *Id.*

162. Byrne, *supra* note 20, at 72. During the 1990s, it was common for CEOs to be compensated with stock options. *Id.* As the bull market ran its almost unbelievable course, the value of CEOs' stock options typically soared. *Id.* Yet, even as the market began

During the 1990s, CEO pay rose by 340%[163] while "rank-and-file wages" increased by a mere thirty-six percent.[164] The American worker's average annual salary was only $35,864 in 1999.[165] In that same year, the top 100 CEOs made an average of 1000 times this salary.[166] The difference in income between these groups influences more than the size of the house in which they live.[167] It can also influence the social circles in they interact, the concerns they have for the future, and the values they hold.[168] The disparity between the lifestyles of executives and stakeholders makes stakeholders' interests, concerns, and fears ever more distant to corporate leaders.[169]

B. The Effects of the Physical and Psychological Distance between Stakeholders and Corporate Leaders

The physical and psychological distance between corporate leaders and stakeholders has significant implications for the former's capacity to fully consider the interests of the latter.[170] Social psychologist Stanley Milgram is best known for exploring the effects of physical and psychological distance on a person's willingness to inflict harm on another person.[171] In the early 1970s, Milgram conducted a controversial experiment in which the participants were told to administer electrical shocks to other persons.[172] Initially, the participants were in a separate room from the shock recipients where they could barely see or hear the recipients.[173] Milgram discovered that the participants were surprisingly willing to administer the shocks when the recipients were not within close physical proximity.[174] Yet, the willingness to administer the shocks significantly decreased when the victims were physically closer.[175] While only 35 percent of the participants refused the instruction to administer a shock in the remote condition, 60 percent of the participants refused the instruction when the victim was in the

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to falter, and shareholders "lost their shirts . . . executives went right on raking in the dough." *Id.*

163. Krugman, *supra* note 161, at 64. *See also* Byrne, *supra* note 20, at 72.

164. Byrne, *supra* note 20, at 72.

165. Krugman, *supra* note 161, at 67.

166. *Id.* at 64.

167. *Id.* at 77.

168. *Id.* (exploring wealth's influence on values and political philosophies).

169. *Id.* (expressing concern that the disparity in values and priorities between wealthy Americans and average Americans will trigger a breakdown in democracy).

170. *See* Gioia, *supra* note 159, at 388. Gioia astutely observed, "[A]lthough we might hope that people in charge of important decisions, such as safety recalls, might engage in active, logical analysis and consider the subtleties in the many different situations they face, the context of the decisions and their necessary reliance on schematic processing tends to preclude consideration." *Id.*

171. STANLEY MILGRAM, OBEDIENCE TO AUTHORITY (1974).

172. *Id.* at 33.

173. *Id.*

174. *Id.* Twenty-six out of the forty participants were willing to administer the shocks until the most potent one could be given. *Id.*

175. *Id.* at 36.

same room.[176] When the participants were told they had to touch the victim's hand to administer the shock, 70 percent of them refused to do so.[177] Though Milgram's experiment involved an extreme condition in a manipulated environment,[178] it does indicate a greater willingness to ignore the negative impact of a decision when the victim is physically, and in turn psychologically, distant from the person doing the harm.[179]

Milgram offered several explanations for why the proximity of the victim to the participant was a significant factor in the participants' willingness to administer the shocks.[180] He reasoned that when the victim is physically close to the participant, the victim "intrudes on the subject's awareness, since he is continuously visible."[181] This intrusion places the victim within the subject's cognitive field.[182] As one participant commented: "[y]ou really begin to forget that there's a guy out there . . . [f]or a long time I just concentrated on pressing the switches and reading the words."[183] Corporate officers find themselves in similar situations in the sense that they become absorbed by the demands of the professional world in which they operate.[184] Officers concentrate on the narrow tasks at hand, just as the subjects in Milgram's experiment concentrated on completing the tasks of the experiment.[185] However, in the corporate world, stakeholders are rarely as able to physically intrude on the officers' awareness as were the victims in the experiment.[186]

Milgram also speculated that the "physical separation of the act and its effects" makes it difficult for the subject to comprehend the consequences of his actions.[187] Without observing the implications of her decision, a person is less likely to appreciate her decision's gravity.[188] Corporate leaders do not always

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176. *Id.*
177. *Id.* at 34.
178. *Id.* at 33.
179. *Id.* at 34–39 (discussing this increase in willingness).
180. *Id.* at 41.
181. *Id.* at 38.
182. *Id.*
183. *Id.* The participants were reading instructions to those who were being shocked.
184. *See* PATRICIA H. WERHANE, MORAL IMAGINATION AND MANAGEMENT DECISION-MAKING 11 (R. Edward Freeman ed., 1999). Werhane discuses the myriad of factors that can absorb executives' time. *Id.* Some managers become extremely "focused on their roles and role responsibilities." *Id.* Others are absorbed by organizational history or corporate culture. *Id.* These factors make it difficult for managers to step back and look at the context in which they are making their decisions. *Id.*
185. *Id.* at 11 (noting that "in many situations managers have a narrow perspective" and are unable to conjure up a variety of options).
186. Marleen A. O'Connor, *The Human Capital Era: Reconceptualizing Corporate Law to Facilitate Labor-Management Cooperation*, 78 CORNELL L. REV. 899, 901 (1993). The Author notes that corporate directors are not likely to consider labor's interests when making decisions. *Id.* The Author attributes this lack of consideration to workers' inability to influence directors through collective bargaining. *Id.*
187. MILGRAM, *supra* note 171, at 39.
188. *Id.*

observe the consequences of their decisions, especially the financial and psychological harm they might have helped inflict on employees, creditors, consumers, or community members.[189] Corporate decisions' effects on stakeholders are neither as salient nor as visible as the anger of the board members, the institutional investors, or the other officers when stock prices drop and expenses start rising.[190] Thus, just as Milgram's participants who could not see the victims being shocked were more likely to continue shocking them,[191] so too might corporate officers be more likely to continue disregarding, if not harming, groups who are out of their sight.[192]

Finally, Milgram concluded that the physical separation between the victim and the participant enhanced the relationship between the experimenter and the participant.[193] As Milgram notes, "[t]here is an incipient group formation between the experimenter and the subject, from which the victim is excluded."[194] Because the victim is distant from the subject, the victim is deprived "of an intimacy which the experimenter and the subject could feel."[195] Similarly, corporate officers rarely establish relationships with stakeholders significant enough to override the relationships they have with other powerful groups, such as other executives, directors, or even shareholders.[196] Just as the experimenter and the participant made decisions in a room separate from the victim, so too do corporate officers, directors, and senior managers make decisions separate from most stakeholders.[197] The effect of this separation is that corporate leaders are less

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189. *See* S.W. Sussman & L. Sproull, *Straight Talk: Delivering Bad News through Electronic Communication*, 10 INFO. SYS. RES. 150, 150 (1999). In a 1999 study, Sussman and Sproull studied how people who delivered bad news to others felt when they delivered the news via e-mail as opposed to in person. *Id.* The researchers found that people were less emotionally bothered when they could deliver the bad news through an e-mail message than when they had to do it face-to-face. *Id.* at 164. Sussman and Sproull's findings suggest that proximity issues could become even more pervasive as impersonal technologies become the accepted communication mode. *Id.*

190. Wolfe, *supra* note 159, at 11. Wolfe observes that usually "the effects on others . . . seem remote and separate" from the business persons making the decisions. *Id.* While the effects on others remain somewhat unreal to managers, "[w]hat is more real to these managers are the implications on their department, their jobs, their budget." *Id.*

191. MILGRAM, *supra* note 171, at 34.

192. *See* WERHANE, *supra* note 184, at 13. Werhane laments managers' inability to escape traditional modes of thinking and consider the larger consequences of their actions. *Id.* She contends that if managers were able to enhance their "moral imagination," then they would be more likely to "disengage themselves . . . from a dominating conceptual scheme" and reflect on the impact of their decisions. *Id.*

193. MILGRAM, *supra* note 171, at 39.

194. *Id.*

195. *Id.*

196. *See* Ronald K. Mitchell et al., *Toward a Theory of Stakeholder Identification and Salience: Defying the Principle of Who and What Really Counts*, 22 ACAD. MGMT. REV. 853, 865–67 (1997) (discussing how a stakeholder group's power and legitimacy can predict whether managers consider their interests).

197. FREEMAN *supra* note 21, at 70. Freeman notes that stakeholders interact with the corporation through various transactions. *Id.* However, he points out that corporate

likely to think about those groups who are distant from them, and more likely to think about the ones who are near.[198]

Other social science research has examined the relationship between distance and decision making.[199] James Waters and his colleagues studied "the kind and extent of issues that managers think about in moral terms" with the hope of discovering "why some issues are seen as involving moral concerns and others not."[200] After conducting extensive interviews with managers, the researchers drew two relevant conclusions.[201] First, managers were more likely to identify ethical issues if they believed they had the ability or power to influence the situation.[202] In situations where managers had less apparent power, they were less likely to describe the circumstance in moral terms.[203] Thus, corporate leaders who have permission to consider stakeholders' interest might be more likely to think about their decisions' ethical and moral implications.

A second observation from Waters' study is that when ethical issues related to a group were closer to the managers' own interests, managers saw those issues as more salient.[204] For example, purchasing agents more readily identified ethical issues regarding suppliers than did sales managers.[205] This result could be attributed to the fact that purchasing agents regularly interact with suppliers whereas sales managers do not.[206] Similarly, sales managers were more concerned about ethical issues regarding consumers than were purchasing agents.[207] Thus, Waters' research indicates that managers are more likely to identify ethical issues when those issues affect stakeholder groups they interact and deal with on a regular basis and when the issues align with managers' own interests.[208]

Waters' and Milgram's research indicates that physical and psychological distance influences how people perceive and treat others.[209] This conclusion has implications for our understanding of stakeholder statutes. The evidence implies that corporate leaders are hindered in their capacity to consider stakeholders because of the physical and psychological distance between themselves and

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decision-making processes are not always equipped to successfully carry out these transactions. *Id.*

198. MILGRAM, *supra* note 171, at 39.

199. *See infra* text accompanying notes 171–98.

200. James A. Waters et al., *Everyday Moral Issues Experienced by Managers*, 5 J. BUS. ETHICS 373, 373 (1986).

201. *Id.* A less pertinent conclusion drawn from the research was that "managers identify transactions as involving personal moral concern when they believe that a moral standard has a bearing on the situation. . . ." *Id.*

202. *Id.*

203. *Id.*

204. *Id.* at 374.

205. *Id.* The researchers point out, however, that "when the individual responses are collected and viewed as a whole, one is struck with the range of activities about which the group of managers express moral concern." *Id.*

206. *Id.* at 375.

207. *Id.*

208. *Id.*

209. *See infra* Part III (b).

stakeholders.[210] Accordingly, any efforts aimed at encouraging corporate leaders to consider stakeholder interests should try to narrow the distance between these groups. One method of accomplishing this goal is through stakeholder meeting statutes.

IV. STAKEHOLDER MEETING STATUTES

A. Closing the Distance between Corporate Leaders and Stakeholders

For corporate law to cultivate more regular and earnest consideration of stakeholders' interests, new ways must be devised to narrow the physical and psychological distance between corporate leaders and stakeholders.[211] If the law can help close the distance between these groups, then corporate leaders might be more likely to act responsibly and thoughtfully toward all groups affected by their actions.[212] In their current form, however, stakeholder statutes fail to offer substantive guidance for narrowing this distance.[213] The statutes do not provide mechanisms, or even suggestions, for how officers should discern stakeholders' interests.[214] Absent such guidance, corporate officers are not likely to develop mechanisms on their own to decipher the nature of these interests,[215] especially

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210. *See id.*

211. *See* Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. OF MGMT. REV. 65, 76 (1995). Donaldson and Preston remind readers that the law's efficacy is not always certain: "[i]ndeed, even if the stakeholder concept is implicit in current legal trends . . . one cannot derive a stakeholder theory of management from a stakeholder theory of law…." *Id.* at 76–77.

212. *See* FREEMAN, *supra* note 21, at 74. Stakeholder management capability must be implemented through the philosophy of voluntarism, which means that "an organization must on its own will undertake to satisfy its key stakeholders." *Id.* Part of the voluntarism philosophy is to "design and implement communication processes with multiple stakeholders." *Id.* at 78.

213. Hanks, *supra* note 45, at 113 (1991). Hanks notes that the statutes do not help corporate leaders determine "how much weight should…be given to the interests of one constituency versus other possible claims of the same constituency." *Id.* The statutes also lack standards for determining what it means to "consider" these interests or how one should go about such consideration. *Id.* at 114.

214. Millon, *supra* note 55, at 242–43. The statutes allow corporate leaders to consider stakeholders, but they do so while "clinging to the traditional formulation of management's duty as owing to the corporation. . .and its shareholders." *Id.* at 242. Another problem is that the statutes "offer little, if any, guidance about how management is to exercise this new power." *Id.* at 243.

215. *See* FREEMAN, *supra* note 21, at 188. Freeman outlines several obstacles to implementing a stakeholder management approach. These obstacles might also explain why corporate leaders are not likely to seek out stakeholder-oriented strategies on their own. *Id.* The obstacles include: 1) executives' aversion to uncovering difficult issues; 2) top management not being actively involved or supporting the stakeholder management strategy; 3) lower and middle management not being able to implement such a strategy; and 4) executives experiencing a paralysis of analysis because of all the information they receive. *Id.* at 188–90.

when the consideration is merely an option and not a mandate. [216] To remedy this situation, states should enact laws requiring corporate leaders to hold and attend stakeholder meetings. Stakeholder meeting statutes would help narrow the distance between the two groups and, in turn, encourage the thoughtful decision-making that should be expected of corporate leaders. [217]

B. The Applicability and Frequency of Stakeholder Meeting Statutes

Stakeholder meeting statutes would require publicly-traded corporations[218] to periodically hold meetings with stakeholder groups. Individual states could determine the stakeholder groups that corporations would be required to meet. These groups could include employees,[219] members of the community, consumer advocacy groups representatives, suppliers, local government leaders, and creditors.[220] Stakeholders would not be required to attend the meetings, but attendance would be mandatory for a specified number of corporate leaders. The statutes would mandate a minimum number of corporate leaders, including directors, executives, and senior management, to attend the meetings. The number of leaders required to attend would also be determined by the individual states.

In addition to requiring a minimum number of corporate leaders to attend the meetings, a limited number of invitations would also be issued to stakeholders. This number could depend on the size of both the corporation and the affected stakeholder group, but the number should be kept manageable due to the meetings' format.[221] For large corporations, employees would be randomly assigned numbers

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216. *See generally* Etzioni, *supra* note 41, at 686. Etzioni notes that although some laws reflect stakeholder theory, there are actually very few legal mechanisms for implementing a stakeholder approach. *Id.*

217. *See* FREEMAN, *supra* note 21, at 73. Freeman, the architect of stakeholder theory, realized that a company must have mechanisms to implement a stakeholder management approach. He notes that "[s]uccessful transactions with stakeholders are built on . . . having processes to routinely surface their concerns." *Id.*

218. The reason why this proposal will be limited to publicly-traded corporations is because the regulatory structure needed to enforce such laws is already in place in regard to these entities. *See generally* JOHN H. MATHESON, PUBLICLY-TRADED CORPORATIONS (1983) (providing a comprehensive overview of how publicly-traded corporations are regulated).

219. *See, e.g.*, O'Connor, *supra* note 186, at 901. While most people would agree that employees' welfare should at least be considered by corporate leaders, the Author contends that the employees' interests are not likely to be taken into account by management. *Id.*

220. *See* M. Starik, *Should Trees Have Legal Standing? Toward Stakeholder Status for Non-Human Nature*, 14 J. BUS. ETHICS 207, 208 (1995). Employees, communities, suppliers, creditors, and consumer groups are the most commonly cited stakeholder groups. There are, however, other things affected by corporations. For example, as Starik points out, "non-human life forms" are affected by corporations. *Id.* Environmental advocacy groups could represent these non-human interests. *Id.* at 213. However, corporate executives' time and resources are limited, so holding meetings with such groups might be unfeasible.

221. *See generally* Etzioni, *supra* note 41, at 684. The number of community members who can attend could be contingent on both the community's size and the

that would correspond with the meeting they can attend. The reason for limiting the number of stakeholders who can attend each meeting is to prevent the meetings from becoming unwieldy and unproductive.[222]

States can also dictate how often stakeholder meetings should be held. At a minimum, the meetings should be held once a year for each stakeholder group. If a corporation has multiple offices, plants, or factories, then the meeting could be held in different locations each time. Additionally, the meetings' occurrences should not be contingent on a major event, such as a takeover, merger, acquisition, or bankruptcy filing.[223] The purpose of stakeholder meetings is to encourage stakeholder consideration during all kinds of decision-making processes.[224] Such processes could range from issuing bonuses to compliance with accounting standards and implementing new safety standards, and should not be limited to change of control circumstances.[225] By limiting stakeholder meetings to change of control transactions, corporate leaders are sent the message that stakeholder consideration is important only in the rare instance when major change is on the horizon.[226] The message stakeholder meetings should send is that stakeholders' interests should regularly be considered inside the corporate boardroom.[227]

C. The Format of Stakeholder Meeting Statutes

Once the stakeholders and the corporate leaders are gathered together, stakeholder meetings would proceed in a statutorily-mandated format. Specifically,

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corporation's importance within the community. Etzioni details several ways that communities can invest in corporations, including building roads, providing free land, giving low-interest loans, and bending or suspending zoning, pollution, noise control, and traffic regulations. *Id.* Etzioni argues that investment should directly correlate to a community's decision-making powers in the corporation. *Id.* at 687. Etzioni's model could be useful in determining the frequency of stakeholder meetings.

222. *See infra* Part IV (b)-(c).

223. Some stakeholder statutes are limited to mergers and change-of-control situations. *See, e.g.*, CONN. GEN. STAT. § 33-756(d) (2003); LA. REV. STAT. ANN. § 12:92G (West 2002); MO. REV. STAT. § 351.347 (2002); OR. REV. STAT. § 60.357 (2002).

224. *See* Bryan W. Husted, *Organizational Justice and the Management of Stakeholder Relations*, 17 J. BUS. ETHICS 643, 647 (1998). A stakeholder approach to management implies that the corporation is "responsive to the concerns of its stakeholders precisely because those stakeholders can affect the plans and activities of the firm." *Id.*

225. *See infra* Part I. The stories relayed at the beginning of this Note demonstrate that events other than change of control agreements can seriously and adversely affect stakeholders' interests.

226. *See* Mitchell, *supra* note 40, at 634. Stakeholder consideration is important to all corporate decisions because stakeholders are "relatively vulnerable" groups. *Id.*

227. *See* Husted, *supra* note 224, at 648. Some corporations have implemented ethics committees as a mechanism for encouraging stakeholder-responsive behaviors and for reviewing questionable business behaviors. *Id.* However, these committees "do not usually incorporate members who represent the interests of stakeholders." *Id.* Thus, the likelihood that ethics committees will cultivate regular and earnest stakeholder consideration is low.

these meetings would be held in a small group format.[228] Conducting the meetings in this format helps fulfill the goal of stakeholder meetings, which is to close the distance between these groups so corporate leaders will more regularly and earnestly consider stakeholder interests.[229] One corporate official would be assigned to each small stakeholder group. The group would sit together and discuss items on a prepared agenda. Stakeholders would have the opportunity to share their stories of how the corporation influences them and ask questions of corporate officers.[230] The corporate officers should rotate between groups, thereby increasing the number of stakeholders with whom officers interact.

Conducting stakeholder meetings in this format helps avoid the problems that befall shareholder meetings.[231] Shareholder meetings are not conducted in a manner that facilitates meaningful dialogue or insightful commentary about company performance.[232]

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228. *See* Lewis D. Solomon, *Humanistic Economics: A New Model for the Corporate Constituency Debate*, 59 U. CIN. L. REV. 321, 343–44 (1990). The small group format provides employees and other stakeholders a voice in the organization affecting them. The effect of having a voice is not only that the management learns more about stakeholders' needs, but also that stakeholders are more thoughtful about their obligations and more enthusiastic about the organization's success. *Id.*

229. *See* Dawn S. Carlson et al., *The Impact of Moral Intensity Dimensions on Ethical Decision Making: Assessing the Relevance of Orientation*, 14 J. MANAGERIAL ISSUES 15 (2002). In a recent study, Dawn Carlson concluded that the affected group's proximity to the decision maker did "have a significant impact on the moral judgment of a situation such that the closer in proximity an individual was to the situation, the greater the perception of ethicality." *Id.* These findings suggest that managers are less likely to consider the ethical consequences of inflicting harm on stakeholder groups if those stakeholders are themselves physically distant and if their interests are also distant from managers' interests. *Id.*

230. *See* Martha Minow, *The Hope for Healing: What Can Truth Commissions Do?*, *in* TRUTH V. JUSTICE 235, 241 (Robert I. Rotberg & Dennis Thompson eds., 2000). Minow highlights the benefits to both victims and perpetrators of hearing each other's stories. *Id.* Minow advocates the use of truth commissions, which are tribunals set up to hear victims' stories of human rights violations and other egregious acts of violence. *Id.* She argues that "telling and hearing narratives of violence in the name of truth can promote healing for individuals and for society." *Id.* While Minow's work focuses on storytelling related to serious human rights violations, it also highlights the "restorative power" of being given a voice. *Id.* at 243.

231. *See* Doug Donovan, *Must the show go on?*, FORBES, May 18, 1998, at 20. For Donovan's article, Chief Executive Officers ("CEOs") were asked to give their opinions on annual shareholders' meetings. *Id.* Many CEOs expressed negative opinions. *Id.* For example, William M. Gibson, the President of Manugistics Group, Inc. stated bluntly that shareholders' meetings "are not relevant any more." *Id.*

232. *See* Editorial, *Annual Meetings Are a Boon to IR, Not a Burden*, INVESTOR RELATIONS BUS., Apr. 22 (2002), at 1. *See also* Mark E. Budnitz, *Chapter 11 Business Reorganization and Shareholder Meetings: Will the Meeting Please Come to Order, or Should the Meeting be Cancelled Altogether*, 58 GEO. WASH. L. REV. 1214, 1227 (1990) ("In the real world the shareholder meeting does not play the role envisioned by the legal model.").

Generally, shareholder meetings are conducted in a traditional "town hall" format in which the corporate leaders sit on a stage or at the head of the room and the shareholders remain in the audience.[233] Individual shareholders who wish to voice their opinion rise from the crowd and speak into a microphone as a large clock ticks away the time they have been allocated – generally two to three minutes.[234] The CEOs are likely to respond with a scripted answer that has been prepared before the meeting.[235] Corporations are also advised to "take care of all legally required items first so that if a confrontation erupts during the question period, you can adjourn the meeting without penalty."[236] This impersonal and expedited format is not satisfying for shareholders and augments executives' feelings that the meetings are nothing more than a legal hassle.[237]

Essentially, shareholder meetings have become legally-mandated events that companies try to make as quick and painless as possible.[238] Although there are similarities between shareholder and stakeholder meetings, the latter can be more meaningful than the former for several reasons. First, the law will not strictly dictate stakeholder meetings' content as occurs with shareholder meetings.[239] Participants in stakeholder meetings would be free to discuss topics they choose, subject to the duties corporate officers owe shareholders.[240] Second, stakeholder meetings' small group format would allow for more meaningful dialogue between

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233. *See, e.g.*, Stanley Bing, *The Shareholders Are Revolting!*, FORTUNE, June 24, 2002, at 202 (amusing description of a shareholder meeting that highlights the town hall format's pitfalls).

234. D. Craig Nordlund, *Planning and Conducting the Annual Shareholders Meeting*, *in* PREPARATION OF ANNUAL DISCLOSURE DOCUMENTS 631, 653 (2002) (PLI Corporate Law and Practice Course Handbook Series No. B0-018D, 2002). AT&T often places time clocks in full view of the audience and then restricts the speaker to two or three minutes. *Id.*

235. *Id.* at 649. Organizers of shareholder meetings are cautioned that "[i]t is very important to brief the CEO and all other speakers on possible questions from shareholders. You should provide sample answers for all sensitive questions. Most large accounting firms provide booklets containing sample questions and answers." *Id.*

236. *Id.* at 650.

237. Donovan, *supra* note 231, at 20. The Executive Director of the International Society of Meeting Planners, Robert Johnson, had this advice for executives who want to avoid the shareholder meeting: "[I]f your company is having trouble and you don't want too many shareholders to show up, some companies schedule their meetings for July 3. Also, have the meeting somewhere far from the company and most shareholders—like in Alaska." *Id.*

238. Ken Kurson, *Shareholders Meetings, Strictly By the Book*, MONEY, Apr. 12, 2001, at 26. Deloitte and Touche prepared an eighty-one page "cheat sheet" that consists of prepared answers to typical shareholder questions. *Id.* With its "14 sector-specific response categories, the document is an exhaustive effort to keep clients from uttering an unfiltered word." *Id.* Executives justify using the booklet by pointing to their potential liability for giving information to one investor, but not another. *Id.*

239. *See* Julie Allecta, *Investment Company Regulation and Compliance: Shareholder Meetings and Shareholder Voting*, American Law Institute, ABA Continuing Legal Education (June 2002) 293, 295. The Investment Company Act of 1940 is a major source of law governing shareholder meetings' requirements. *Id.*

240. *See* SOLOMON, *supra* note 44, at 658–92 (summarizing duties of corporate directors).

participants.[241] Hopefully, the more intimate setting will encourage dialogue about topics that are particularly important to each stakeholder group.[242] A major advantage of stakeholder meetings is that corporations will not be required to invite every stakeholder, as they are required to invite all shareholders to shareholder meetings.[243] This allows the corporation to escape the "town hall" format and thereby cultivate more meaningful interaction between these groups.[244]

D. The Potential Benefits of Stakeholder Meetings

Stakeholder meetings might narrow both the physical and psychological distance between stakeholders and corporate leaders. The meetings' potential to do so is augmented by their small group format.[245] Leaders would sit close and speak directly with the usually faceless stakeholders.[246] Leaders would have the rare opportunity to hear stakeholders' concerns, suggestions, and stories in a personal setting.[247] Narrowing the physical distance would also help eliminate the psychological distance between these groups.[248] As social science research indicates, people are more likely to think about the consequences of their actions when they interact those affected by their decisions.[249] This research indicates that people might adjust their behavior to prevent harm to others when the physical and psychological distance between them is narrowed.[250]

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241. *See, e.g.*, Catherine Siskos, *Shareholders Unite! Dissident Investors In Luby's Cafeterias Used The Internet To Launch A Coup To Take Over The Company*, KIPLINGER'S PERS. FIN., May 1, 2002, at 48. It is important for investors to engage in meaningful dialogue among themselves. Recently investors have begun using the Internet to facilitate such dialogue. *Id.*

242. Nordlund, *supra* note 234, at 649 (warning of executives' potential liabilities when answering questions at shareholder meetings).

243. *See, e.g.*, Donovan, *supra* note 231, at 20. V. William Hunt of Arvin Industries, Inc. noted that his corporations have "14,000-plus employees around the world. It's no longer possible for me to get in front of every one of them each year." *Id.*

244. *See* E.A. LIND & T.R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE 27–55 (1988) (discussing how people's perceptions of fairness are bolstered when they are given a voice in procedures affecting them).

245. *See generally* LARRY LEE BARKER, GROUPS IN PROCESS: AN INTRODUCTION TO SMALL GROUP COMMUNICATION (Karen Hanson, 6th ed., 2001); CRAIG E. JOHNSON, MEETING THE ETHICAL CHALLENGES OF LEADERSHIP: CASTING LIGHT OR SHADOW (2001).

246. *See* Jenny C. McCune, *The Corporation in the Community*, HR FOCUS, Mar. 1997, at 12(2). UPS is a company that values the connection between community and business. *Id.* Company employees take part in a community service program that gives them the chance to interact with people with whom they normally would not. *Id.* UPS actually pays employees their regular salary for participation in this program. *Id.* The company justifies the cost by pointing out that the program "helps participants develop sensitivity" because, as one executive explained, "you couldn't understand someone's problems unless you were in their shoes." *Id.*

247. *See* Minow, *supra* note 230, at 241 (discussing the power of sharing stories).

248. *Id.*

249. *See supra* Part III (b).

250. *See* MILGRAM, *supra* note 171, at 36; Waters, *supra* note 200. Milgram's and Waters' conclusions are vicariously supported by another area of social science inquiry. A number of studies indicate that interpersonal contact can help reduce prejudices. In other

Essentially, stakeholder interests would become more salient to officers because of the interaction at stakeholder meetings. This interaction can make stakeholders' interests, desires, and concerns more tangible to corporate leaders.[251] Narrowing the distance between these groups increases the likelihood that stakeholder interests will be more regularly and earnestly considered inside corporate boardrooms. Hopefully, the interaction that occurs at stakeholder meetings will help corporate leaders more fully appreciate the impact of their decisions and, in turn, act responsibly and thoughtfully toward all stakeholder groups.[252]

V. CONCLUSION: THE HOPE THAT STAKEHOLDER MEETING STATUTES WILL ENCOURAGE MORE REGULAR AND EARNEST STAKEHOLDER CONSIDERATION

When stakeholder statutes were adopted, they were labeled a dramatic departure from the norms of corporate law.[253] Previously, corporate law elevated and protected shareholders' interests above all other groups affected by the corporation.[254] Stakeholder statutes challenged that notion by acknowledging that

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words, if a person interacts with someone against whom they hold a prejudice and the interaction is positive, then that prejudice is likely to be reduced. *See, e.g.*, Thomas F. Pettigrew & Linda R. Troop, *Does Intergroup Contact Reduce Prejudice? Recent Meta-Analytic Findings*, *in* REDUCING PREJUDICE AND DISCRIMINATION 94, 95 (Stuart Oskamp ed., Lawrence Erlbaum Assoc. 2000); Donald L. Rubin & Pamela J. Lannutti, *Frameworks for Assessing Contact as a Tool for Reducing Prejudice*, *in* TRANSCULTURAL REALTIES: INTERDISIPLINARY PERSPECTIVES ON CROSS-CULTURAL RELATIONS 313–26 (Virginia H. Millhouse & Kete Molefi eds., 2001); Laurie A. Rudman et al., *"Unlearning" Automatic Biases: The Malleability of Implicit Prejudice and Stereotypes*, 81 J. PERSONALITY & SOC. PSYCHOL. 856 (2001); Thomas F. Pettigrew & Linda R. Troop, *Does Intergroup Contact Reduce Prejudice? Recent Meta-Analytic Findings*, *in* REDUCING PREJUDICE AND DISCRIMINATION 94, 95 (Stuart Oskamp ed., Lawrence Erlbaum Assoc. 2000).

251. *See generally* Jeffrey L. Seglin, *When to Err on the Side of Disclosure*, N.Y. TIMES, Oct. 20, 2002, at C4. Seglin points out that corporate executives might believe they are acting on shareholders' behalf, and even on behalf of some stakeholders, by hiding or misrepresenting information. *Id.* Hiding such information might be seen as a measure to protect the corporation against legal and financial exposure that could harm shareholders and other stakeholders. *Id.* However, if executives think about the consequences of their decisions in different ways, then they might see the potential deleterious effects of their failure to disclose detrimental information. *Id.*

252. Millon, *supra* note 55, at 268. Just because corporate executives and directors more actively consider shareholders' interests, does not mean that "plants can never be closed or supplier relationships terminated." *Id.* Management might be encouraged to "conduct such transitions in a manner that minimizes losses to the affected parties" if they are permitted to consider stakeholders' interests. *Id.*

253. *See* Mitchell, *supra* note 40, at 642. Stakeholder statutes recognize "the inextricable interdependence of corporate actors [including stakeholders] and the desirability of treating participants in a common enterprise as if they share common goals." *Id.*

254. *See generally* Smith, *supra* note 116 (discussing shareholder primacy norm).

corporations impact groups other than shareholders and that corporate leaders should be permitted to consider these other groups' interests.[255]

However, corporate leaders' capacity to regularly and earnestly consider stakeholders' interests is hindered by the distance separating the two groups.[256] Corporate leaders are both physically and psychologically distant from the stakeholders they impact.[257] This distance makes it more difficult for corporate leaders to earnestly consider their decisions' effects.[258] Because stakeholder statutes do not help corporate leaders overcome this distance, the statutes alone cannot cultivate full consideration of stakeholder interests.

Stakeholder meeting statutes can help cultivate regular and earnest stakeholder consideration because these statutes provide a mechanism for narrowing the distance between corporate leaders and stakeholders.[259] These meetings allow corporate officers to interact with stakeholders in a meaningful way – or at least in a way that is more meaningful than current interactions.[260]

Hopefully, corporate leaders will be more likely to recall these exchanges, think about the issues raised, and consider the implications of corporate decisions[261] after having personally interacted with these groups.[262] In light of the tremendous influence corporations exercise over an increasing number of stakeholder groups, it is time that the law help corporate leaders act more thoughtfully and responsibly toward all stakeholder groups.[263]

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255. *See supra* Part I.

256. *See infra* text accompanying notes 171–98 (describing Milgram's study).

257. *See* WHITMAN, *supra* note 28, at 110 (discussing the shift in corporate decision-making power from localities to distant corporate headquarters).

258. *See* Jones, *supra* note 151, at 376 (exploring the implications of physical proximity on one's behavior).

259. *See infra* Part IV (b).

260. *See* FREEMAN, *supra* note 21, at 70. Freeman understands the importance of interaction with stakeholders, but is also aware that much of the interaction that regularly occurs is not helpful to achieving a stakeholder approach to business decision-making. *Id.*

261. *See id.* at 74. As a result of stakeholder meetings, corporate leaders would voluntarily recall and respond to stakeholders' interests. When Freeman first introduced the idea of stakeholder theory, he was quick to point out that a stakeholder management strategy must be implemented through a philosophy of voluntarism. *Id.* By voluntarism, Freeman meant that "an organization must on its own will undertake to satisfy its key stakeholders." *Id.* Part of the voluntarism philosophy is to "design and implement communication processes with multiple stakeholders." *Id.* at 78.

262. *See* Matthews, *supra* note 139, at 45. The CoreStates/First Union merger is an example of how stakeholders can benefit from more thoughtful consideration of their interests. In addition to the traditional stock swaps between the organizations, First Union also promised to create 3,000 new jobs in the area with the most job losses. *Id.* It set-up up a $16 million employee training fund to help CoreStates workers who lost their jobs as a result of the merger. *Id.* First Union also donated $100 million to a foundation dedicated to bettering the community in which CoreStates was located and they kept CoreStates' charitable commitments at their existing levels. *Id.* at 46.

263. *See* John A. Byrne, *After Enron: The Ideal Corporation*, BUS. WK., Aug. 26, 2002, at 68. Business persons, legislators, and the American public are "yearning for corporate values that reach higher than the size of the chief executive's paycheck or even

the latest stock price." *Id.* Values such as integrity, fairness, and trust need to take on renewed importance in the business world. Additionally, the demand "to make the inner workings of the corporation visible to all constituencies is expected to drive lots of change." *Id.*