NON-HUMAN STAKEHOLDERS: TESTING THE BOUNDARIES OF STAKEHOLDER THEORY

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Abstract

Stakeholder theory has gained widespread popularity in corporate governance rhetoric. However, this theory's adoption has been accompanied by a correspondingly expansive interpretation of who should be counted as a stakeholder. Many modern stakeholder theorists argue for including the environment and non-human animals ("animals") as stakeholders. This Article provides a valuable framework for assessing the feasibility of these additions.

This Article concludes that including the environment and animals as stakeholders in an analysis of stakeholder ethics is largely untenable. Given the inability to ascertain preferences from animals and the environment, the highly subjective practice of attempting to quantify the benefits and harms attributable to business decisions, and the even more subjective nature of trying to weigh these benefits and harms across broad categories provides such broad latitude that nearly anything could be posited as ethical. With no limiting principle, including these non-human stakeholders creates an arbitrary ethical framework where corporate decision makers are empowered to justify a broad range of behaviors as ethical—a dangerous proposition in corporate America.

This analysis comes at a valuable time as we are at a critical juncture given the convergence of large-scale agriculture, shifting paradigms regarding corporate ethics, and a world population approaching eight billion. For these reasons, this Article serves as a catalyst to spark future research into this subject specifically and the broader subjects of corporate ethics and stakeholder theory generally. With the rise of Environmental and Social Governance ("ESG") investing and increasing numbers of firms supporting stakeholder-based initiatives, this issue will no doubt increase in significance throughout the twenty-first century.

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Introduction

The general premise of stakeholder theory—that business organizations should not simply seek to maximize value for shareholders but instead should seek to create value for all stakeholders of the firm—has gained widespread popularity in corporate governance rhetoric.[1] Many large public company CEOs have embraced stakeholder theory and eschewed the traditional norm of maximizing the firm's value for its shareholders.[2] Additionally, scholars are currently debating the role of stakeholder theory in corporate governance law as it relates to the ongoing drafting of the *Restatement of the Law, Corporate Governance*, which, as of this Article's publication date, remains uncompleted.[3]

While the popularity of stakeholder theory in corporate governance has grown, consensus remains elusive among stakeholder theorists on exactly what the theory is. Critical questions, such as who or what may qualify as a stakeholder and what rights these stakeholders have, remain unanswered. Some have proposed a very broad stakeholder theory where virtually anyone or anything that affects or is affected by the firm is considered a stakeholder and thus should be given attention by management.[4] Others have proposed narrower versions of stakeholder theory in which a smaller subset of entities that possess certain characteristics are classified as "legitimate" or "salient"

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1. *See* Lisa M. Fairfax, *Stakeholderism, Corporate Purpose, and Credible Commitment*, 108 VA. L. REV. 1163, 1166 (2022) (discussing adoption of stakeholder rhetoric from large public company CEOs).

2. *See id.*

3. *See* Lucian A. Bebchuk & Roberto Tallarita, *The Illusory Promise of Stakeholder Governance*, 106 CORNELL L. REV. 91, 95 (2020) (discussing the debate surrounding the inclusion of stakeholder theory in the proposed *Restatement of the Law, Corporate Governance* and advocating for a shareholder centric view of the firm); *see also* William Savitt & Aneil Kovvali, Essay, *On the Promise of Stakeholder Governance: A Response to Bebchuk and Tallarita*, 106 CORNELL L. REV. 1881, 1883 (2021) (responding to Bebchuk and Tallarita's article and advocating for stakeholder theory).

4. *See* Cathy Driscoll & Mark Starik, *The Primordial Stakeholder: Advancing the Conceptual Consideration of Stakeholder Status for the Natural Environment*, 49 J. BUS. ETHICS 55, 56 (2004) (noting broad conceptions of what a stakeholder is, and arguing that the natural environment is the "primordial stakeholder" of the firm); *see also* Mark Starik, *Should Trees Have Managerial Standing? Toward Stakeholder Status for Non-Human Nature*, 14 J. BUS. ETHICS 207, 209-13 (1995) (advancing several arguments for why the natural environment should be considered a stakeholder).

stakeholders that matter (or should matter) to management, either morally or instrumentally.[5]

In this Article, we argue that stakeholder theory's inability to clearly identify who or what counts as a stakeholder illustrates an inherent problem with its breadth and imprecision. These qualities make it unworkable as a basis for corporate governance law and business ethics decision making. This problem is especially pronounced in business ethical dilemmas involving the impacts of business activity on non-human entities. We argue that as currently articulated, stakeholder theory has become an inconsistent, disjointed theory that cannot provide clear managerial guidance to common business ethical dilemmas.

The managerial and ethical theories related to stakeholder theory discussed in this Article are critical to the legal debate surrounding stakeholder theory and have been underdiscussed in the legal literature. Generally, corporate law has a utilitarian basis.[6] Its goal is to create a system of corporate governance that harnesses the economic growth potential of the corporate form to best benefit society.[7] Those that advocate for a shareholder-centric corporate purpose typically argue there is long-term societal benefit created by firms seeking to earn maximal profits for shareholders—a corporate governance model known as shareholder wealth maximization

5. *See* Ronald K. Mitchell et al., *Toward a Theory of Stakeholder Identification and Salience: Defining the Principle of Who and What Really Counts*, 22 ACAD. MGMT. REV. 853, 863 (1997); *see also* Adele Santana, *Three Elements of Stakeholder Legitimacy*, 105 J. BUS. ETHICS 257, 257 (2012) (arguing that for a stakeholder to be legitimate, it must be a legitimate entity, have a legitimate claim, and display legitimate behavior).

6. *See* Thomas M. Jones & Will Felps, *Shareholder Wealth Maximization and Social Welfare: A Utilitarian Critique*, 23 BUS. ETHICS Q. 207, 212 (2013) ("[T]he classic justification for the economic system we call market capitalism is fundamentally utilitarian, a moral perspective that aims to achieve the greatest social benefit net of social cost or, more colloquially, 'the greatest good for the greatest number.'" (citations omitted)); *id.* at 213 ("[Shareholder Wealth Maximization] is a rule-utilitarian element of a capitalist system that is intended to provide long-term benefits to society.").

7. *Id.* at 213.

("SWM").[8] Most stakeholder theorists make similar utilitarian claims that their theory will lead to more long-term societal benefit than SWM.[9]

If stakeholder theory is truly to supplant the prevailing legal norm of SWM, then stakeholder theorists need to clearly establish exactly what the theory is and how it leads to better societal outcomes in specific business situations. Stakeholder theory needs to be an actionable managerial theory that serves as a clear guide for managerial behavior to justify reshaping corporate law.

The most robust and detailed theoretical literature articulating modern stakeholder theory exists in business ethics literature.[10] This literature matters to this discussion because many of the reforms modern legal scholars advocate for have their theoretical basis in this literature. Additionally, if stakeholder theory is enshrined as a corporate governance norm in the law, the theories propounded in this literature have a higher likelihood of being incorporated into corporate governance practice. To date, the legal literature advocating for a shift toward stakeholder-centric corporate governance has not adequately addressed this core business ethics and management literature undergirding stakeholder theory.[11]

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8. *Id.* at 208-09; *see also* Anant K. Sundaram & Andrew C. Inkpen, *The Corporate Objective Revisited*, 15 ORG. SCI. 350, 353 (2004) (listing various arguments for why SWM leads to better societal outcomes than the alternatives, and thus is the preferred corporate goal); *see also* FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 38-39 (1991) (discussing how the norm of SWM leads to optimal societal outcomes). While we realize that U.S. corporate law does not legally require that corporate directors seek to maximize shareholder wealth, nevertheless this is a commonly asserted ethical norm of corporate governance and the assumed priority goal of shareholders, the only stakeholder that currently has the right to vote under corporate law. Thus, this shorthand serves as a point of comparison for this Article.

9. *See* Jones & Felps, *supra* note 6, at 226 ("[S]ome variant of normative stakeholder theory will be capable of better enhancing social welfare than SWM."); *see also* Andrew C. Wicks et al., *Connecting Stakeholder Theory to the Law and Public Policy*, *in* THE CAMBRIDGE HANDBOOK OF STAKEHOLDER THEORY 97, 99 (Jeffrey S. Harrison et al. eds., 2019) ("[B]oth corporate governance and stakeholder theory attempt to structure governance mechanisms so that businesses can maximize value to society.").

10. *See* Michael E. Johnson-Cramer et al., *What We Talk About When We Talk About Stakeholders*, 61 BUS. & SOC'Y 1083, 1091 (2022) (conducting an empirical analysis of the stakeholder literature in leading journals and noting that the largest number of articles appears in the top business ethics journals).

11. *See, e.g.*, Savitt & Kovvali, *supra* note 3, at 1886 (providing a definition of stakeholder theory that does not fully comport with the stakeholder theory literature) ("The stakeholder-facing approach . . . come[s] down to a simple idea [that directors] should also consider the interests of diverse stakeholders—employees, customers, suppliers, the

We advance this argument by applying commonly asserted principles of stakeholder theory to animals and the environment in the modern agriculture and food industry. Ethical and managerial problems faced in the food industry include the industry's impacts on the environment, animals, and human health.[12] For example, in order to produce the amount of food (particularly meat products) necessary to feed a growing populace at an acceptable price, animals in the food supply chain live an existence that many in the modern world consider inhumane.[13] Additionally, many commentators argue that modern large-scale farming practices, such as monoculture farming (single crop) and heavy use of pesticides, herbicides, and fertilizer, are not sustainable and have tremendous negative environmental impacts, such as overuse of water and soil degradation.[14] These environmental issues also impact humans.[15]

If stakeholder theory should be enshrined in corporate law, as some argue,[16] how does it lead to better responses to these dilemmas than the current U.S. model of shareholder-centric corporate governance? If stakeholder theory is a viable managerial and ethical theory, it must be capable of providing guidance to managers of firms in the agriculture industry, an indisputably vital part of the economy, as humans must eat to live. What additional guidance does it give to firm management that SWM does not?

Scholars have developed stakeholder identification theories that identify certain non-human entities, namely, the "natural environment," as stakeholders.[17] Recent scholars have extended this framework to craft a

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community at large—and to have the discretion to manage with these other environmental and social interests in mind."); *see also, e.g.*, Bebchuk & Tallarita, *supra* note 3, at 109-23 (discussing stakeholder theory, but not fully discussing the business ethics literature involving stakeholder classification, measuring stakeholder value, and other areas of controversy in stakeholder theory).

12. *See, e.g.*, Ryan Gunderson & Diana Stuart, *Industrial Animal Agribusiness and Environmental Sociological Theory*, 44 INT'L J. SOCIOLOGY 54, 55 (2014).

13. Michael J. Maloni & Michael E. Brown, *Corporate Social Responsibility in the Supply Chain: An Application in the Food Industry*, 68 J. BUS. ETHICS 35, 39 (2006) (discussing controversial animal welfare practices in the U.S. food supply chain).

14. *See, e.g., Intensive Agriculture: Characteristics, Examples, and Why Is It Bad?*, FACTORY FARMING AWARENESS COAL. (Dec. 14, 2021), https://ffacoalition.org/articles/intensive-agriculture/.

15. *Id.*

16. *See, e.g.*, Amy K. Lehr, *Fiduciary Duties for a Globalized World: Stakeholder Theory Reconceived*, 27 GEO. MASON L. REV. 81, 131-39 (2019) (proposing a "New Stakeholder Theory" and discussing how it can be integrated into law).

17. *See* Driscoll & Starik, *supra* note 4, at 69.

feminist narrative of stakeholder theory that includes animals as stakeholders.[18] If the aforementioned stakeholder theorists are correct that the proper application of stakeholder theory to animals and the environment is to consider them stakeholders, what is the nature of their interests in the firm that management must or should consider? How are their interests to be balanced against those of other stakeholders, particularly humans? This is a particularly interesting question in the agriculture industry, as well as other industries that rely upon animal products, since regardless of their treatment, most of the animals involved are destined for slaughter. Additionally, stakeholder theorists frequently cite environmental concerns as a reason for adopting stakeholder theory over SWM.[19] Thus, the theory should be particularly applicable to these ethical dilemmas in the agriculture industry.

This Article proceeds in four parts. First, Part I reviews the existing literature on what stakeholder theory is (and is not) as well as the literature on stakeholder identification and classification. It then reviews the stakeholder identification literature that identifies non-human entities such as the natural environment and animals as stakeholders. Then, Part II discusses certain practices in the modern agriculture industry, frequently referred to as "factory farming," as well as some of the current ethical issues within the industry surrounding environmental concerns and animal welfare. Part III then applies both SWM and various versions of stakeholder theory, including the "animals and natural environment as stakeholders" model, to analyze how each decision-making framework guides corporate managers in resolving these concerns. Part III argues that this exercise illustrates the impracticalities of applying stakeholder theory, as it currently stands in the most well-developed literature, to guide the management of firms, particularly in challenging ethical areas. Finally, this Article concludes that applying stakeholder theory to the agriculture industry provides evidence for the proposition that for stakeholder theory to be a useful and meaningful theory of management that can supplant shareholder wealth management, the theory must become more concrete, practical, and actionable.

18. Linda Tallberg et al., *Human-Animal Relations in Business and Society: Advancing the Feminist Interpretation of Stakeholder Theory*, 180 J. BUS. ETHICS 1, 2-3 (2021).

19. *See, e.g.,* Kent Greenfield, *Proposition: Saving the World with Corporate Law*, 57 EMORY L.J. 948, 973-75 (2008) (noting how the SWM norm leads to environmental degradation and promoting stakeholder theory as a solution).

I. Defining Stakeholder Theory

An enduring problem with stakeholder theory is defining it with a reasonable level of specificity and consistency.[20] Stakeholder theory has developed into a very broad concept. Some of its core tenets have been ascribed different meanings by different people such that it is often misunderstood and misapplied by both critics and well-meaning advocates.[21] For Freeman, the most well-known proponent of modern stakeholder theory, breadth and variance in stakeholder theory (which create multiple "narratives" of the theory) is welcome, provided such narratives are useful to the management of a firm.[22] Nevertheless, in order to conduct a rigorous analysis, some relative consistency and certainty regarding the basics of the theory is necessary.[23] This Part will first discuss how stakeholder theory is typically defined in the legal literature and then provide a review of the more robust business ethics literature on the theory.

A. Stakeholder Theory in the Legal Literature

As stakeholder theory has been a popular topic in corporate governance for some time, a robust legal literature exists on the topic. In recent years, the topic has gained momentum, likely due to the increased popularity of stakeholder theory in the popular press as well as the pending *Restatement of the Law, Corporate Governance*.[24] However, most, if not all, of the legal literature does not adequately set out the theory nor discuss the most detailed explication of the theory found largely in the business ethics literature.

The typical legal article arguing for or against stakeholder-based corporate governance uses a broad definition like the following: "[I]n setting corporate policy, directors should not seek only to maximize share price, but should also consider the interests of diverse stakeholders—employees, customers, suppliers, the community at large—and to have the discretion to manage with

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20. Robert Phillips et al., *What Stakeholder Theory Is Not*, 13 BUS. ETHICS Q. 479, 479-80 (2003) [hereinafter Phillips et al., *What Stakeholder Theory Is Not*]; *see also* Johnson-Cramer et al., *supra* note 10, at 1084 ("Even the most committed stakeholder theorists have observed that the field lacks coherence and have wondered aloud about the possibility that we talk past each other due to tensions inherent in a multidisciplinary field.").

21. *Id.* at 480.

22. *See* R. Edward Freeman, *Response: Divergent Stakeholder Theory*, 24 ACAD. MGMT. REV. 233, 235-36 (1999) ("What we need is a conversation that encourages such divergent views, but one that quickly throws out those views that are not useful, not simple, and that do not show us how it is possible to live better.").

23. *See* Phillips et al., *What Stakeholder Theory Is Not*, *supra* note 20, at 479 (noting how the "breadth" of stakeholder theory is one of its "most prominent theoretical liabilities").

24. *See* Bebchuk & Tallarita, *supra* note 3, at 95.

these other environmental and social interests in mind."[25] The article will then proceed to explain how stakeholder-centric corporate governance is either inferior or superior to the prevailing SWM norm.[26] These legal articles spend little to no time discussing the academic theories undergirding a focus on stakeholders and what these theories practically mean to corporate decision making. The underlying assumption in the legal literature seems to be that if corporate law is modified to give managers and directors the freedom to consider all stakeholders' interests as equally important, they will not only do so, but they will know *how* to do so.[27] This assumption lends itself to a few key questions. Who are these stakeholders? How are they to be managed? What goal is the corporate manager to seek in managing them, and how is it to be measured? How is the corporate manager to decide whose interests predominate when conflicts of value arise? These and other challenging topics are discussed in the business ethics literature (although unsatisfactorily), but they are largely ignored in the legal literature, particularly by advocates of stakeholder theory.[28]

One response to this criticism is that these points are not important to legal reform, as the only goal for stakeholder governance is to give directors and officers broader discretion, as the norm of SWM is clearly leading to negative

25. Savitt & Kovvali, *supra* note 3, at 1886; *see also, e.g.*, Aneil Kovvali, *Stark Choices for Corporate Reform*, 123 COLUM. L. REV. 693, 694 (2023) (defining stakeholder governance as "the view that corporate leaders should consider the interests of a broader range of stakeholders, including workers, consumers, and members of surrounding communities" with no further details or discussion provided on the theory); Kishanthi Parella, *Contractual Stakeholderism*, 102 B.U. L. REV. 865, 869, 876-78 (2022) (briefly defining "stakeholderism" with little specificity before moving on to advocate giving stakeholders a cause of action against contracting parties who enter into a contract that negatively affects them); Bebchuk & Tallarita, *supra* note 3, at 103-22 (discussing some management and ethics literature on stakeholder theory, but not fully and adequately setting out the theory); Lehr, *supra* note 16, at 102-04 (pointing out problems with the vague manner in which stakeholder theory is commonly defined in legal literature, but failing to adequately address the management and ethics literature on the topic).

26. *See, e.g.*, Greenfield, *supra* note 19, at 948-51 (arguing for stakeholder governance and how it is superior to the SWM norm without fully explaining what stakeholder governance means, who these firm stakeholders are, or what their rights are).

27. *See, e.g.*, Savitt & Kovvali, *supra* note 3, at 1892-93 ("All stakeholder governance does is encourage a broader field for the exercise of director discretion.").

28. One notable exception to this is a recent article by Robert Miller. *See* Robert T. Miller, *How Would Directors Make Business Decisions Under a Stakeholder Model?*, 77 BUS. LAW. 773 (2022). While he does not survey and apply the business literature on stakeholder theory, he does an excellent job of pointing out the logical decision-making problems of stakeholder theory that are still unaddressed in the business literature.

outcomes.[29] Indeed, this seems to be the basic argument of some stakeholder theory advocates in the legal literature—stakeholder theory cannot be worse than the SWM norm, and thus we might as well try something new.[30] Such a cavalier attitude is not warranted, and if the current legal norm of corporate governance is to be replaced, then deep thought should be given to how the new norm will better guide corporate decision making. Implicit in the debate between SWM and stakeholder theory is the underlying assumption that if corporate governance norms are changed, said changes will affect corporate decision making.[31] Otherwise, advocating for legal reform or retention of the status quo would be meaningless. Accordingly, it is important that advocates of stakeholder-centric corporate governance fully understand and articulate the decision-making theory they are proposing.

One might also argue that academic theories underpinning stakeholder theory are not relevant to "real world" discussions of legal reform. For example, one might argue that if the law is changed to better accommodate corporate managers who consider all stakeholders' interests as equal to those of stockholders, then managers will figure out on their own how best to accommodate these interests, just like we all do in everyday life.[32] However, academic theories have a way of creeping into practice, particularly in the areas of business and economics. Indeed, one of the key arguments for stakeholder governance is that when the theories of SWM advocates like Milton Friedman became mainstream, they heavily impacted corporate decision making for the worse by orienting decision making toward stockholders.[33] A strong argument can be made that a key reason there is a

29. *See, e.g.*, Savitt & Kovvali, *supra* note 3, at 1885-86 (arguing, without citing evidence, that "*[n]obody* thinks the shareholder-maximization governance model is working," and that thus "[t]here must be a better way," which is the stakeholder model).

30. *Id.*

31. *See, e.g.*, Greenfield, *supra* note 19, at 977-78 (arguing that fiduciary duties to a broader array of stakeholders will lead to fairer corporate decision making).

32. *See, e.g.*, Colin Mayer, Essay, *Shareholderism Versus Stakeholderism—A Misconceived Contradiction: A Comment on "The Illusory Promise of Stakeholder Governance," by Lucian Bebchuk and Roberto Tallarita*, 106 CORNELL L. REV. 1859, 1862-67 (2021) (noting that tradeoffs are indeed ubiquitous in business and everyday decision making, and arguing that it is no more difficult to determine them under stakeholder theory than the SWM norm).

33. *See, e.g.*, Savitt & Kovvali, *supra* note 3, at 1883-84 ("This should be the golden age of shareholder primacy. Fifty years ago the principle was announced from the pages of the New York Times Magazine as the intellectual gold standard. Thirty-five years ago it was approved in the courts as a polestar of director decision making in the context of corporate control transactions. In the years since, every element of the corporate governance landscape

current crop of CEOs and policymakers emphasizing stakeholder theory in business practice and corporate governance is because of its prominence in business schools for the past thirty to forty years.[34] If corporate law is oriented away from shareholders and towards creating value for a broad array of stakeholders, corporate decision-makers will look somewhere for guidance on how best to make decisions. The most logical place will be academia.

Not every stakeholder advocate in the legal literature argues for the same type of corporate reform. Some have argued for relatively modest board representation for certain stakeholders.[35] Some argue for no outright legal reform at all but rather just a shift in understanding that current corporate law is not as shareholder-centric as many in the public believe.[36] Others have proposed far more expansive reforms in the name of stakeholder rights, such as enforceable fiduciary duties to certain stakeholders[37] and a civil cause of action under tort law for stakeholders when corporate contracts negatively affect them.[38] However, all of these proposals share the same basic idea of stakeholder theory: focusing corporate decision making on a broader array of stakeholders will lead to better societal outcomes. The advocates of more expansive reforms need to be able to articulate exactly how such a shift will better guide corporate decision making. Accordingly, we argue that it is important for legal literature to adequately address the robust stakeholder theory literature, including its current trajectory toward broadening the universe of stakeholders that businesses must consider. The business theory

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has been oriented to the shareholder primacy model. . . . [But] [n]otwithstanding remarkable advances in productivity and technology, the corporate economy isn't working.").

34. *See, e.g.*, Anita M. McGahan, *Where Does an Organization's Responsibility End?: Identifying the Boundaries on Stakeholder Claims*, 6 ACAD. MGMT. DISCOVERIES 8, 8 (2020) ("Research published in the 1980s, 1990s, and early 2000s emphasized stakeholder analysis as fundamental to the legitimacy and operation of firms. This line of work has had a profoundly important influence on both management theory and practice." (citations omitted)).

35. *See, e.g.*, Greenfield, *supra* note 19, at 978-79.

36. *See, e.g.*, Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in Corporate Law*, 31 J. CORP. L. 719, 740-42 (2006) (discussing the explanatory value of the team production model of corporate law, which is more stakeholder-centric, and noting that existing corporate law is sufficiently flexible to allow corporations to prefer other stakeholders over shareholders).

37. Lehr, *supra* note 16, at 131-38 (proposing enforceable fiduciary duties to a broad, although undefined, array of stakeholders).

38. Parella, *supra* note 25, at 897 (arguing for the "application of a classic tort duty to the activity of contracting").

that underpins the move toward stakeholder-focused governance must be properly understood.

To further this goal, this Article will next address how stakeholder theory has progressed in the business literature. This literature provides the most in-depth explanation of what stakeholder theory is, how it instructs corporate decision-makers, and in what aspects it remains underdeveloped. A review of this literature reveals that there are significant unanswered questions about stakeholder theory.

B. Stakeholder Theory in the Business and Ethics Literature

At its most basic, stakeholder theory stands for the proposition that businesses affect and are affected by multiple entities (termed "stakeholders") with interests in the firm and these stakeholders must be managed.[39] This stakeholder management includes both a distributive aspect (who benefits from firm outcomes) as well as a decision-making aspect (who gets a say in managerial decision making).[40] While stakeholders' interests will at times conflict, the manager's role under modern stakeholder theory requires more than just balancing these interests as articulated in earlier formations of the theory.[41] Rather, a more fully-developed statement of the theory holds that the manager must seek to create value for all stakeholders before resorting to any trade-offs.[42] Freeman et al. state the managerial concept as:

> The primary responsibility of the executive is to create as much value as possible for stakeholders. Where stakeholder interests conflict, the executive must find a way to rethink the problems so that these interests can go together, so that even more value can be created for each. If trade-offs have to be made, as often happens in the real world, then the executive must figure out how to make the trade-offs, and immediately begin improving the trade-offs for all sides.[43]

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39. *See* Robert A. Phillips et al., *Stakeholder Theory*, *in* THE CAMBRIDGE HANDBOOK OF STAKEHOLDER THEORY, *supra* note 9, at 3, 3 [hereinafter Phillips et al., *Stakeholder Theory*].

40. *See* Phillips et al., *What Stakeholder Theory Is Not*, *supra* note 20, at 487.

41. *See* R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 53 (1984) [hereinafter FREEMAN, STRATEGIC MANAGEMENT].

42. R. EDWARD FREEMAN ET AL., STAKEHOLDER THEORY: THE STATE OF THE ART 28 (2010) [hereinafter FREEMAN ET AL., THE STATE OF THE ART].

43. *Id.*

Thus, the essence of stakeholder theory is that, whenever possible, cooperation rather than conflict among the firm's stakeholders should be sought to create value for as many stakeholders as possible.[44] The core of the theory is that stakeholders' interests are not necessarily, or even frequently, at odds, and it is the manager's task to focus on the joint nature of these interests in managing the firm.[45] By focusing on the symbiotic nature of stakeholder interests before resorting to trade-offs, stakeholder theory posits that the firm will be managed more ethically and create more overall value.[46]

Proponents of stakeholder theory emphasize that it is both a managerial theory and an ethical theory.[47] That is, stakeholder theory unabashedly has a moral component—it is not only concerned with the strategic ramifications of managing stakeholders but also with the normative question of how stakeholders ought to be treated morally.[48] This does not mean, however, that stakeholder theory should be viewed as a comprehensive moral theory that seeks to address every ethical problem that a business organization might face.[49] Rather, it is a theory of organizational ethics that speaks to ethical issues that may occur within the relationships between an organization and its stakeholders.[50] There are numerous moral questions that exist outside of the organizational context and are not directly addressed by stakeholder theory, such as those about human rights or how humanity as a whole should ethically interact with the environment.[51] Stakeholder theorists thus rely upon underlying comprehensive moral theories that are asserted as "normative cores" of stakeholder theory to answer ethical questions about the treatment of stakeholders within the organization.[52] In sum, stakeholder theory cannot, and does not seek to, answer every ethical question an organization might face. However, stakeholder theorists do assert that by focusing managerial

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44. *Id.*
45. *Id.* at 27-28.
46. *Id.*
47. Phillips et al., *What Stakeholder Theory Is Not*, *supra* note 20, at 480 ("Stakeholder theory is a theory of organizational management and ethics.").
48. *Id.* at 480-81.
49. *Id.* at 493 (noting that stakeholder theory is "not a comprehensive moral doctrine").
50. *Id.*
51. *Id.*
52. *See, e.g.*, Norman E. Bowie, *A Kantian Theory of Capitalism*, 8 BUS. ETHICS Q. 37, 47 (1998) (justifying stakeholder theory using Kantian ethics); *see also, e.g.*, Andrew C. Wicks et al., *A Feminist Reinterpretation of the Stakeholder Concept*, 4 BUS. ETHICS Q. 475, 475-76 (1994) (justifying stakeholder theory using feminist ethical theories).

attention on all stakeholders rather than just shareholders, stakeholder theory will produce better overall ethical and societal outcomes than SWM.[53]

1. Defining and Measuring Stakeholder Value and the Corporate Objective Function

Stakeholder theorists fairly consistently hold the above-referenced core tenets of stakeholder theory.[54] However, these core tenets are quite broad and leave many unanswered questions. These include what "stakeholder value" is, how the firm should manage it, and what overall corporate objective function the firm should seek to maximize. On these important points, there is a substantial lack of clarity and consistency among stakeholder theorists.[55]

a) Stakeholder Value and Its Measurement

Stakeholder theory has significant problems with respect to its framing of the corporate objective function. The theory focuses on stakeholder value creation, yet there is no consensus on a definition of "stakeholder value."[56] Some stakeholders' interests (such as suppliers and employees) are largely monetary, and thus value can be measured in dollars. However, for other proposed stakeholders, the measure of value is hard or impossible to quantify.[57] If a group as amorphous as "the community" is a stakeholder, how does a corporate manager define "value" for this group? And won't different community members value different things to different degrees? What about defining value for public interest groups or non-profit organizations that protest for or against the firm's business? Layered on top of all these questions is the issue of measurability—if the "value" is not solely monetary, how does the firm measure it? This is an important question for corporate management, as it is difficult (if not impossible) to determine whether a goal is met when that goal has no measurable outcome.

To add further ambiguity to the practice, implementing stakeholder ethics would also require the highly subjective task of cross-interest weighing. For

53. *See, e.g.*, John Kaler, *Morality and Strategy in Stakeholder Identification*, 39 J. BUS. ETHICS 91, 93 (2002) (discussing the moral and ethical claims of stakeholder theory and how it claims moral and ethical superiority over SWM).

54. *See* discussion *supra* Section I.B.

55. *See* Phillips et al., *What Stakeholder Theory Is Not*, *supra* note 20, at 479-80.

56. *See* Leena Lankoski et al., *Stakeholder Judgments of Value*, 26 BUS. ETHICS Q. 227, 227 (2016) ("[S]ome theorists are seeking to redefine the theory of the firm to suggest that it should be founded on maximizing stakeholder value. However, the construct of stakeholder value itself is inadequately conceptualized within the literature." (citations omitted)).

57. *Id.* at 228 (discussing how stakeholder value is inadequately developed in stakeholder theory).

example, how should a firm weigh the imaginary units of value gained by providing healthcare for part-time workers against the imaginary units of value gained by using slightly more environmentally-friendly packaging? The highly subjective nature of performing this calculus illustrates another difficulty with stakeholder theory, namely, there will be widespread disagreement both inside and among firms as to what course of action is ethical. The problematic nature of this lack of uniformity was recently illustrated when sustainability investment funds determined that Tesla, Inc. did not meet their standards, but ExxonMobil Corporation did.[58]

Stakeholder theorists have tried, and continue to try, to answer this question, but no clear answer has emerged. Harrison and Wicks have asserted, as most stakeholder theorists do, that stakeholder value is a broad concept that includes economic and non-economic outcomes.[59] However, they go further and seek to provide some definitional bounds around the concept. They propose a four-factor model of stakeholder value that includes:

1) stakeholder utility associated with actual goods and services,
2) stakeholder utility associated with organizational justice,
3) stakeholder utility from affiliation, and
4) stakeholder utility associated with perceived opportunity costs.[60]

They propose that managers can measure whether the firm is fulfilling its goal of stakeholder value creation by measuring stakeholder happiness.[61] This would be determined through various methods used by happiness researchers, such as polling or psychological questionnaires that the stakeholders would complete to indicate their level of happiness with the firm.[62] A potential objection to this approach is heterogeneity within

58. Tom Lyon, *How a Sustainability Index Can Keep Exxon but Drop Tesla – and 3 Ways to Fix ESG Ratings to Meet Investors' Expectations*, MICH. ROSS (May 26, 2022), https://michiganross.umich.edu/news/how-sustainability-index-can-keep-exxon-drop-tesla-and-3-ways-fix-esg-ratings-meet-investors.

59. *See* Jeffrey S. Harrison & Andrew C. Wicks, *Stakeholder Theory, Value, and Firm Performance*, 23 BUS. ETHICS Q. 97, 98 (2013) ("Rather than focusing primarily on economic measures of performance, a stakeholder-based performance measure challenges managers to examine more broadly the value their firms are creating from the perspective of the stakeholders who are involved in creating it.").

60. *Id.* at 103.

61. *Id.* at 113.

62. *Id.* at 113-14 (discussing the psychological research related to measuring happiness).

particular stakeholder groups, but Harrison and Wicks argue that even if only a majority of a particular group is happy with the firm, then it is likely that this is still a reasonably good measure that the firm is serving the stakeholder group well.[63] However, this overly-simplistic standard views individuals' interests as a binary consideration, ignoring that firm decisions will affect different stakeholders to varying degrees. For example, imagine that a firm could give all workers a one percent raise in lieu of offering on-site daycare, which would slightly increase the happiness of eighty percent of workers. But, this decision would dramatically reduce the happiness of twenty percent of the workers who rely on the daycare. Under a majority rules standard, the answer is emphatic—the on-site daycare should be removed. However, a more nuanced approach might lead to the conclusion that the dramatic effect on the twenty percent outweighs the slight effect on the eighty percent.

While measuring happiness provides a reasonably concrete measure of value, accomplishing this task would be a difficult and cumbersome process for many stakeholder groups. And the fact that a stakeholder group is happy does not mean that the organization has acted ethically, accomplished a particular objective, or behaved in a societally optimal manner. For example, an environmental group might be quite happy that an oil company ceases oil exploration in a particular area. However, that does not mean that this was in the best interests of the firm's long-term survival, or even in the best interest of society or the environment, as this may result in the oil company pursuing other, more dangerous production locations. It is also not clear how a public firm would adequately report on such metrics. Additionally, Harrison and Wicks' proposal still provides no concrete answer regarding how to determine which stakeholders to prioritize when perceptions of value conflict, which will be discussed in more detail later.[64]

Lankoski, Smith, and Wassenhove have proposed the following definition of stakeholder value: "[T]he subjective judgment of a stakeholder, occurring at the individual level, of the total monetary and non-monetary utility experienced as a result of some decision or action by an organization."[65] Through the development of this definition they provide in-depth strategic guidance on how managers can influence stakeholders' perceptions of value.[66] Their definition is certainly detailed and specific, but they provide

63. *See id.*
64. *See* discussion *infra* Section I.B.1.b.
65. Lankoski et al., *supra* note 56, at 233 (italics omitted).
66. *Id.* at 243-45.

no guidance regarding how managers would measure value for the firm or how they would use this definition to manage the firm as a whole.[67]

There are measures of corporate social performance that exist, such as the Kinder, Lydenberg, Domini data.[68] However, while stakeholder theorists have admitted that there is some overlap between concepts like corporate social performance, corporate social responsibility, and environmental, social, and governance reporting, they are separate concepts from stakeholder theory.[69] Thus, the measurements used in these areas are not directly applicable to defining and measuring stakeholder value.

In sum, as the theory stands now, there is no consensus on exactly what the concept of "stakeholder value" is and how to measure it.[70] There appears to be consensus that it is a broad concept that embraces more than purely monetary gain that stakeholders may receive from the firm.[71] However, the consensus ends there. This issue of vagueness in defining and measuring value is in and of itself problematic for the practical application of stakeholder theory, and the vagueness becomes more problematic when considering the other poorly defined areas of the theory.

b) Tradeoffs and the Objective Function

Another significant problem with stakeholder theory is its lack of specificity regarding what goal the corporate manager should seek in managing the firm. Stakeholder theory provides little guidance to managers by simply instructing them to "figure out" how to make trade-offs and then to "improve the trade-offs" for the stakeholders involved.[72] However, exactly what standard should be used to determine how to make these trade-offs is

67. *Id.* at 251 ("[W]e do not speak to how stakeholders aggregate their judgments across multiple actions by a firm.").

68. *See* James E. Mattingly, *Corporate Social Performance: A Review of Empirical Research Examining the Corporation-Society Relationship Using Kinder, Lydenberg, Domini Social Ratings Data*, 56 BUS. & SOC'Y 796, 797 (2017) (discussing and evaluating the Kinder, Lydenberg, Domini CSP data).

69. *See* Phillips et al., *Stakeholder Theory*, *supra* note 39, at 13.

70. *Id.* at 4 ("It is a well-recognized difficulty for stakeholder theory that standard metrics of success are inadequate to capture total value created by the organization.").

71. *See* Lankoski et al., *supra* note 56, at 231 ("Noteworthy in regard to stakeholder value is that value is conceived broadly and as having multiple components that are not necessarily visible, easily quantifiable, or reflected in monetary terms.").

72. *See* Paul C. Godfrey & Ben Lewis, *Pragmatism and Pluralism: A Moral Foundation for Stakeholder Theory in the Twenty-First Century*, *in* THE CAMBRIDGE HANDBOOK OF STAKEHOLDER THEORY, *supra* note 9, at 19, 30.

still a point of contention in stakeholder theory.[73] SWM has an obvious objective function that the firm seeks to maximize—shareholder wealth.[74] Thus, when faced with trade-offs, SWM instructs corporate managers to take the course of action that is most likely to lead to maximal, long-term shareholder benefit.[75] This single objective function is important to corporate management as seeking to maximize across multiple objective functions, given the myriad factors that must be considered to manage a firm, ultimately becomes logically impossible.[76]

Stakeholder theorists have not built a consensus around an objective function for the firm, nor have they even reached a consensus that such an objective function is necessary or desirable.[77] Jones and Harrison have sought to develop a single corporate objective for stakeholder theory that encapsulates the theory's focus on both business concerns (like profits) and overall social welfare.[78] They base their objective on three premises that they argue stakeholder theory should seek: 1) help firms be profitable and provide high shareholder returns; 2) allow firms to simultaneously enhance social welfare through their activities; and 3) retain the profit motive, as the economic incentive to build wealth should not be replaced.[79] Based upon these three premises, they assert that the firm's corporate objective should be to "increase the wealth of its shareholders without reducing (and presumably

73. Phillips et al., *Stakeholder Theory*, *supra* note 39, at 9 ("Clearly more work is required on the question of firm objective functions in stakeholder theory . . . . Your authors/editors disagree on the relative usefulness of these questions, suggesting a ripe space for future research.").

74. *See* Bernard S. Sharfman, *Shareholder Wealth Maximization and Its Implementation Under Corporate Law*, 66 FLA. L. REV. 389, 394-98 (2014) (discussing the norm of SWM embedded in the economic logic of corporate law).

75. *See id.*

76. *See* Michael C. Jensen, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 BUS. ETHICS Q. 235, 238 (2002) ("It is logically impossible to maximize in more than one dimension at the same time unless the dimensions are monotone transformations of one another. Thus, telling a manager to maximize current profits, market share, future growth in profits, and anything else one pleases will leave that manager with no way to make a reasoned decision.").

77. *See* Phillips et al., *Stakeholder Theory*, *supra* note 39, at 9 ("It is even possible that one implication of stakeholder theory is that both objective functions and firm boundaries are no longer necessary to describe and prescribe the stakeholder firm.").

78. *Id.* at 81 (discussing SWM and social welfare and arguing that focusing on SWM does not maximize social welfare, and that stakeholder theory should focus on both, while prioritizing social welfare).

79. *Id.* at 88.

increasing) the aggregate wealth of its other stakeholder groups."[80] As a secondary point to this objective, they argue that firms should only make profit-enhancing trade-offs in the short run if they actually compensate stakeholders for any losses incurred thereby.[81]

Jones and Harrison acknowledge that their proposal is just a starting point and that further development may be necessary to refine it.[82] However, even as a starting point, it is difficult to see how this is a workable standard given the reality of business decision making. Over what time horizon should stakeholder wealth be considered? Are stakeholders entitled to compensation each time a decision that reduces their wealth is made? What is a workable definition of short-term as opposed to long-term profit making? A definition is critical if stakeholders' right to compensation is based upon it. How would such compensation be determined? Since this objective function is focused on the term "wealth" and "compensation," the focus appears to be on monetary interests.[83] However, as previously discussed, stakeholder theory is supposed to focus on a broad conception of stakeholder value that includes both monetary and non-monetary concerns.[84] How are these two concepts reconciled? How are stakeholders compensated for a loss of value that has no monetary basis? As with many of the recent proposals by stakeholder theorists, this objective function creates more questions than answers.

Currently, stakeholder theory does not provide clear answers to how a firm should measure whether it is accomplishing its goals, or even exactly what those goals are, other than broad admonitions to enhance stakeholder value. These theoretical inadequacies are glaring in themselves. However, when added to stakeholder theory's failure to define who or what a firm's stakeholders are with any reasonable degree of specificity, the theory becomes even more impracticable as a guide to good corporate governance.

2. The Stakeholder Identification Problem

Fundamental to applying stakeholder theory is identifying exactly who or what the firm's stakeholders are.[85] This process requires a definition of, or at

80. *Id.*

81. *Id.* at 88-89.

82. *Id.* at 91.

83. *See id.* at 89 (providing an example of their theory of compensation related to compensating employees for insurance losses).

84. *See* discussion *supra* Section I.B.1.a.

85. *See* Eric W. Orts & Alan Strudler, *Putting a Stake in Stakeholder Theory*, 88 J. BUS. ETHICS 605, 606 (2010) ("Stakeholder theory may remain helpful in two other areas of business: theories of the firm and strategic management. In these applications, however, any stakeholder theory requires a coherent definition of 'stakeholders.'").

least some boundaries around, what an organizational stakeholder is.[86] There is still debate in stakeholder literature on the answer to this question,[87] but the most widely used definition, or starting point for a definition, is that propounded by Freeman: "[a]ny group or individual who can affect or is affected by the achievement of the organization's objectives."[88] As Freeman himself noted, utilizing such a broad definition means that virtually any person or organization can be considered a stakeholder, which can make the use of the term essentially meaningless.[89] Others, such as Orts and Strudler, have propounded narrower definitions, arguing that stakeholder status should only be afforded to those "who have significant property rights in the firm or who have significant contractual relations with the firm."[90]

Many other attempts have been made to refine the concept of the stakeholder by using Freeman's broad definition as a starting point before categorizing the large universe of potential stakeholders into sub-groups, such as primary versus secondary or normative versus derivative stakeholders.[91] One of the most common classification methods uses the attributes of power, legitimacy, and urgency to aid managers in determining stakeholder salience, or which stakeholders should matter to the firm.[92] This classification method leads to seven different classes of stakeholders based upon iterations of these three attributes with varying levels of salience to the firm.[93]

These conceptual frameworks for classifying stakeholders are important to stakeholder theory, particularly its practical implementation. However, these classification schemes still do not answer the more fundamental question of who or what qualifies as a stakeholder. This fundamental issue is clearly illustrated in the stakeholder literature asserting non-human entities,

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86. See *id.*

87. *See* Ronald K. Mitchell & Jae Hwan Lee, *Stakeholder Identification and Its Importance in the Value Creating System of Stakeholder Work*, *in* THE CAMBRIDGE HANDBOOK OF STAKEHOLDER THEORY, *supra* note 9, at 53, 53.

88. FREEMAN, STRATEGIC MANAGEMENT, *supra* note 41, at 46.

89. FREEMAN ET AL., THE STATE OF THE ART, *supra* note 42, at 208.

90. Eric W. Orts & Alan Strudler, *The Ethical and Environmental Limits of Stakeholder Theory*, 12 BUS. ETHICS Q. 215, 219 (2002).

91. *See* Yves Fassin, *Stakeholder Management, Reciprocity and Stakeholder Responsibility*, 109 J. BUS. ETHICS 83, 84 (2012) (discussing various classification schemes in the stakeholder theory literature); *see also* Andrew Crane & Trish Ruebottom, *Stakeholder Theory and Social Identity: Rethinking Stakeholder Identification*, 102 J. BUS. ETHICS 77, 78-80 (2011) (providing a broad survey of various attempts to identify and classify stakeholders).

92. Mitchell et al., *supra* note 5, at 865-68.

93. *Id.* at 872.

like animals and the natural environment, are stakeholders.[94] Clearly, animals and the natural environment are salient to the management of any agricultural business because the business is reliant upon them to produce its products. However, the animals' salience to the business does not answer the core definitional question of whether the animals, as a non-human entity, can be considered a stakeholder regardless of their salience. The fact that this question is still not clearly answered in the stakeholder literature illustrates the level of confusion that exists in stakeholder theory due to its welcoming of "divergent narratives."[95]

A body of literature currently exists that takes concepts from the stakeholder identification literature—namely, the Mitchell et al. classification scheme and extends them to argue that both the natural environment and animals should be considered stakeholders.[96] In early formulations of stakeholder theory, stakeholders were discussed almost exclusively in human terms.[97] Non-human entities were either expressly or implicitly excluded from listings of organizational stakeholders.[98] Starik argues that this exclusion of non-human entities is erroneous and that the natural environment is a particular non-human entity that deserves consideration as a stakeholder for a myriad of reasons.[99] His argument is largely instrumental but also includes normative ethical aspects. From an instrumental standpoint, he posits that since the natural environment is important to business success, can affect the organization, and cannot be sufficiently represented by human proxies, it is worthy of stakeholder status.[100] From a normative ethical standpoint, he notes that stakeholder theory has developed from a purely managerial theory to one with ethical connotations, and that many emerging ethical theories such as deep ecology, social ecology, and ecofeminism lead to the conclusion that the natural environment is morally considerable and thus should be included in the theory as a stakeholder in its own right.[101]

Driscoll and Starik extend this basic argument in a subsequent article that asserts that the natural environment is not only a stakeholder but a firm's

94. *See* Driscoll & Starik, *supra* note 4, at 56; *see also* Starik, *supra* note 4, at 209-13.
95. *See* Freeman, *supra* note 22, at 235-36.
96. *See generally* Mitchell et al., *supra* note 5.
97. *See* Starik, *supra* note 4, at 208.
98. *Id.*
99. *Id.* at 209-13.
100. *Id.*
101. *Id.* at 211.

"primary and primordial" stakeholder.[102] They expressly reject human agency as a necessary prerequisite to stakeholder status or salience.[103] Instead, borrowing the elements of power, legitimacy, and urgency from the Mitchell et al. stakeholder classification scheme,[104] they argue that the natural environment possesses all three attributes to a high degree.[105] In addition to these three attributes, they argue for an expanded set of criteria that includes the attribute of "proximity"—the state of being close in space, time, or order.[106] Because the natural environment has a high level of proximity to all firms in that it is all-encompassing, it follows that the natural environment is "one or more firm critical stakeholders."[107]

Recently, Tallberg et al. extended and applied Driscoll and Starik's model to assert that animals are stakeholders.[108] Using a feminist understanding of stakeholder theory and expanding Driscoll and Starik's concept of proximity to include "close emotional bonds and affective social relationships through an ethic-of-care framing," they argue that the close emotional bonds that humans form with animals justifies animals' inclusion as stakeholders.[109] They go on to provide examples from two organizations, an animal shelter and a dog-sledding business, to illustrate how humans work with animals to establish "animal stakeholdership."[110]

These are but two examples of a current stream of research in stakeholder theory justifying non-human entities as stakeholders.[111] There has been some push back, however, against this view in the stakeholder literature.[112] The dissension surrounding this topic shows that there is still little consensus among stakeholder theorists regarding who or what qualifies as a stakeholder. Currently, there is not even clarity in the theory regarding what humans or groups of humans should count as stakeholders, much less what

102. *See* Driscoll & Starik, *supra* note 4, at 57.
103. *Id.* at 61.
104. *See generally* Mitchell et al., *supra* note 5.
105. Driscoll & Starik, *supra* note 4, at 61-63.
106. *Id.* at 63.
107. *Id.* at 64.
108. *See* Tallberg et al., *supra* note 18, at 3-4.
109. *Id.* at 2.
110. *Id.* at 6-11.
111. *See, e.g.*, Teea Kortetmäki et al., *Particularizing Nonhuman Nature in Stakeholder Theory: The Recognition Approach*, 185 J. BUS. ETHICS 17, 17 (2022) (discussing the stream of stakeholder research arguing for "nonhuman nature" as a stakeholder).
112. *Id.* at 19 (discussing arguments against considering non-human entities as stakeholders).

non-human entities should qualify as stakeholders.[113] This is not merely an academic question as all the aforementioned questions regarding the practical implementation of stakeholder theory are further exacerbated when non-human stakeholders are considered. As one simple example, if measuring and defining stakeholder value is difficult across the potential universe of human stakeholders, it is virtually impossible when non-human stakeholders are involved. The fact that the theory is actively being enlarged to include non-humans as stakeholders further clouds the picture and makes the theory more impracticable as a useful theory to guide business behavior or public policy.

C. Conclusion

As the foregoing discussion illustrates, one of the most pressing problems for stakeholder theory is that its expansive breadth has resulted in a corresponding decrease in helpful guidance. This is not a new criticism.[114] However, despite prior recognition of the problem, the theory's scope has only continued to expand. This seems to be by design as Freeman long ago encouraged these "divergent narratives" of stakeholder theory.[115] However, while Freeman encouraged the growth of the theory in new and interesting directions, he admonished that narratives that were not useful should be discarded.[116] Unfortunately, it does not appear that useless narratives of the theory have been discarded and useful narratives followed. Instead, the theory has only continued to grow like an unruly vine that is never pruned. As it currently stands in the most robust academic literature, the theory has become hopelessly convoluted and inconsistent. This makes it difficult to apply as a basis for corporate governance reform, and the ideas in this literature run the risk of permeating corporate decision making more than they already have.

To illustrate the problems this can create, this Article applies stakeholder theory, as it is currently set out, to an actual business decision-making situation. The modern agriculture industry will serve as this case study. This is an ideal industry to illustrate the problems with modern stakeholder theory as agricultural enterprises affect and are affected by numerous human and non-human stakeholders. If stakeholder theory truly serves as a better

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113. *See* Mitchell & Lee, *supra* note 87, at 53 ("[T]o date, the study of stakeholder identification to connect it explicitly to value creation has begun, but is unfinished." (citations omitted)).

114. *See, e.g.*, Orts & Strudler, *supra* note 90, at 605 (arguing that the expansion in "scope and ambition" of stakeholder theory has made it less useful).

115. *See* Freeman, *supra* note 22, at 233.

116. *Id.* at 235-36.

decision-making framework than the SWM norm, then its tenets should provide ample guidance on how to maximize value for the stakeholders involved. Next, this Article discusses the business ethics and governance dilemmas presented by the modern agriculture industry before applying stakeholder theory to them.

II. Ethical Dilemmas in the Modern Agriculture Industry

For many, the words "agriculture" and "farming" likely conjure idealistic images of peaceful pastoral scenes, with rows of crops and farm animals grazing freely in open fields. However, the realities of the modern agriculture industry are far different. Because of environmental, economic, social, and demographic pressures, the modern agriculture industry is focused on producing more food, more efficiently, while using less land.[117] This has led to "factory farming," a commonly used term to describe modern agriculture.[118] In industrialized countries, this focus has led to a drastic increase in food production even though far fewer people are employed in the agriculture sector than in the past.[119] This change from the family farm to the factory farm brings its own set of ethical and managerial concerns. This Article focuses on concerns regarding animal welfare, the environment, and human health that stem from the modern agriculture and food industry.

A. Animal Welfare Concerns

The pressure for efficient farming has led to animal husbandry practices in the factory farm that are far different from those used in the past on the family farm. In modern factory farming, animals are treated like raw material inputs in a manufacturing process rather than living beings.[120]

In order to produce food at a lower cost, factory farming utilizes concentrated animal feeding operations ("CAFOs"), which produce a greater amount of meat and other animal products at a lower cost while using less

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117. *See generally* C. C. Croney et al., *The Ethical Food Movement: What Does It Mean for the Role of Science and Scientists in Current Debates About Animal Agriculture?*, 90 J. ANIMAL SCI. 1570, 1570-71 (2012) (discussing the many activists interested in the "new ethical food movement").

118. *Id.* at 1570.

119. Robert Paarlberg, *The Ethics of Modern Agriculture*, 46 SOC'Y 4, 5 (2009) ("Between the late 19th Century and the late 20th Century, the percentage of citizens employed in farming in the United States fell from 50% to just 3%.").

120. *See* Maloni & Brown, *supra* note 13, at 39.

land.[121] For example, egg-laying hens are commonly kept in battery cages where up to seven to eight hens share a small cage with insufficient room to freely move or even spread their wings.[122] Chickens raised for meat fare little better. These chickens are typically kept together in large, crowded buildings in "deep litter" composed of some type of bedding, such as wood chips or cornhusks, that quickly becomes filled with the chickens' own excrement.[123] These conditions lead to an ammonia-filled living environment that is irritating, stressful, and deleterious to the birds' health.[124] Poultry animals are not alone in this treatment—pigs are also commonly kept in a highly confined environment where they cannot exhibit natural behaviors, and both dairy and beef cattle are frequently kept in confined conditions for at least part of their lives.[125]

The blame for these practices is typically laid at the feet of economic concerns coupled with demographic growth. As the world population grows, the need for food grows accordingly. Additionally, as developing countries industrialize and their citizens' incomes rise, their populaces tend to consume more meat.[126] This industrialization has led to large countries like China consuming more meat, pressuring the food industry to produce ever larger amounts of meat at lower prices.[127] Since farms are also businesses, they seek to produce this food at a profit. Thus, some have argued that the modern economic push to maximize shareholder wealth incentivizes intensified farming where animals are packed into tighter spaces to reduce costs, resulting in the inhumane treatment of animals.[128]

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121. *See* CARRIE HRIBAR & MARK SCHULTZ, NAT'L ASS'N OF LOC. BDS. OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES 1 (2010), https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf (describing CAFO operations and the efficiencies derived therefrom).

122. Nancy M. Williams, *Affected Ignorance and Animal Suffering: Why Our Failure to Debate Factory Farming Puts Us at Moral Risk*, 21 J. AGRIC. & ENV'T ETHICS 371, 375 (2008).

123. Rose Zuzworsky, *From the Marketplace to the Dinner Plate: The Economy, Theology, and Factory Farming*, 29 J. BUS. ETHICS 177, 179 (2001).

124. *Id.*

125. *See* Joel Novek, *Pigs and People: Sociological Perspectives on the Discipline of Nonhuman Animals in Intensive Confinement*, 13 SOC'Y & ANIMALS 221, 222 (2005); *see also* HRIBAR & SCHULTZ, *supra* note 121, at 17 (providing a table of various agricultural animals kept in CAFOs).

126. Joshua Frank, *Is There an "Animal Welfare Kuznets Curve"?*, 66 ECOLOGICAL ECON. 478, 482 (2008).

127. Evelyn B. Pluhar, *Meat and Morality: Alternatives to Factory Farming*, 23 J. AGRIC. & ENV'T ETHICS 455, 456 (2010).

128. *See* Zuzworsky, *supra* note 123, at 179; *see also* Williams, *supra* note 122, at 376.

In addition to these commonplace CAFO practices, employees in factory farms have frequently been accused of intentionally inflicting harm on animals. These situations usually come to light through undercover investigations by members of animal rights groups such as Mercy for Animals.[129] To gain access to farms, these undercover investigators obtain employment at the farm or animal processing plant to surreptitiously spy on the business to uncover abuse. For example, one such investigation by Mercy for Animals resulted in video of employees at a Minnesota hog farm slamming piglets to the ground in order to kill them with blunt force trauma—a practice called "thumping."[130] The farm defended such practices as being commonplace and within industry guidelines.[131] In another investigation, Mercy for Animals members alleged that a Butterball turkey plant abused baby turkeys by cutting and burning off their toes and beaks without painkillers and grinding up sick or wounded birds alive, posting a video online of the treatment observed.[132] While some of the practices uncovered at these farms are outside the bounds of what is considered acceptable in modern farming and committed by employees who were later fired,[133] one could argue that it is the factory farming environment itself that leads to a callous attitude towards animal welfare that creates this potential for abuse.

B. Environmental Concerns

In addition to these animal welfare concerns, modern agriculture practices (both animal and crop) raise significant environmental concerns. These problems have been known for quite some time.[134] The negative environmental impacts of modern agriculture include, among other

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129. *See Undercover Investigations*, MERCY FOR ANIMALS, https://mercyforanimals.org/investigations/ (last visited Aug. 28, 2023).

130. *Id.*

131. Mike Hughlett, *Animal Advocates Allege Cruelty at Pipestone Hog Farm*, STAR TRIBUNE (Minneapolis) (Oct. 29, 2013), https://www.startribune.com/animal-advocates-allege-cruelty-at-pipestone-hog-farm/229681581/.

132. *Undercover Investigations*, *supra* note 129.

133. Anna Schecter et al., *Tyson Foods Dumps Pig Farm After NBC Shows Company Video of Alleged Abuse*, NBC NEWS (Nov. 20, 2013), https://www.nbcnews.com/news/other/tyson-foods-dumps-pig-farm-after-nbc-shows-company-video-f2D11627571.

134. *See, e.g.*, Robert I. Papendick et al., *Environmental Consequences of Modern Production Agriculture: How Can Alternative Agriculture Address These Issues and Concerns?*, 1 AMER. J. ALT. AGRIC. 3, 3 (1986) (discussing various environmental problems created by modern agriculture production techniques).

problems, soil erosion, pollution from synthetic chemical pesticides and fertilizers, and overconsumption of water.[135]

1. Soil Erosion and Degradation

Excessive soil erosion and decreased soil quality from modern farming techniques have been concerns since at least the 1970s.[136] When natural lands are cultivated, particularly for annual crop production agriculture, the removal of vegetation and disturbance of the surface soil can lead to loss of soil nutrients and increased soil erosion.[137] This process is referred to as nutrient "stripping" or "mining," and leads to loss of nutrients in soil that are replaced either by fertilization or through other land management techniques such as planting cover crops or adding organic matter back to the soil.[138]

Research from the Intergovernmental Panel on Climate Change (IPCC) indicates that this method of farming is not sustainable and will continue to have mounting negative impacts.[139] According to this IPCC report, soil degradation and other related problems contribute to climate change, are affected by climate change, and negatively impact natural-resource based livelihoods, particularly in developing countries.[140] The IPCC report claims that at least some of this ongoing land degradation can be avoided or even reversed, but it will require large-scale change from current agricultural processes used in industrial agriculture to more sustainable land management and farming practices.[141]

2. Synthetic Chemical Fertilizer and Pesticide Pollution

Modern agriculture is heavily reliant upon chemical fertilizers to replace soil nutrients and chemical pesticides to control crop-destroying pests.[142]

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135. *See* Leo Horrigan et al., *How Sustainable Agriculture Can Address the Environmental and Human Health Harms of Industrial Agriculture*, 110 ENV'T HEALTH PERSPS. 445, 445 (2002).

136. Papendick et al., *supra* note 134, at 3 (noting, in 1986, that most of the data in the United States related to soil erosion was from a national study in the 1970s).

137. W.S. Jang et al., *The Hidden Costs of Land Degradation in US Maize Agriculture*, EARTH'S FUTURE, Dec. 16, 2020, at 1, https://agupubs.onlinelibrary.wiley.com/doi/full/10.1029/2020EF001641.

138. *Id.*

139. *See* INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (IPCC), CLIMATE CHANGE AND LAND 53-56 (Priyadarshi R. Shukla et al. eds. 2019), https://www.ipcc.ch/site/assets/uploads/sites/4/2022/11/SRCCL_Technical-Summary.pdf.

140. *Id.* at 53.

141. *Id.* at 55-56.

142. Horrigan et al., *supra* note at 135, at 446.

According to the United Nations Environment Programme ("UNEP"), between 2002 and 2018, pesticide use per hectare of cropland increased by thirty percent, and fertilizer use increased by twenty-three percent for nitrogen, thirteen percent for phosphorus, and fifty-six percent for potassium.[143] UNEP posits that although food production benefits from the use of these chemicals, there are also numerous negative consequences from their heavy use.[144]

Pesticides adversely impact non-target organisms, and the residue from pesticides can linger in the environment for long periods of time.[145] Additionally, target pests become resistant to many pesticides, necessitating the development of new pesticides to control these now-resistant pests.[146] Nitrogen and phosphorous fertilizers drain off of fields and into both freshwater and coastal areas, leading to harmful algae blooms and so-called "dead zones" with insufficient oxygen.[147] Chemical fertilizers have also disrupted the planetary balance of the nitrogen and phosphorous cycles.[148] As with soil degradation, UNEP contends that the current rate of use of fertilizers and pesticides is not sustainable, and a change to more sustainable agricultural practices is necessary.[149]

3. Water Consumption

Agriculture accounts for most of the water used worldwide, exceeding both industrial and municipal use.[150] According to the Organisation for Economic Co-operation and Development (OECD), agricultural irrigation accounts for seventy percent of water use worldwide.[151] Overuse of water is depleting aquifers, particularly in areas like the western United States that

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143. UNITED NATIONS ENV'T PROGRAMME, ENVIRONMENTAL AND HEALTH IMPACTS OF PESTICIDES AND FERTILIZERS AND WAYS OF MINIMIZING THEM: SUMMARY FOR POLICYMAKERS 1, 9 (2021), https://wedocs.unep.org/xmlui/bitstream/handle/20.500.11822/34463/JSUNEPPF.pdf?sequence=13.

144. *Id.* at 9-10.

145. *Id.* at 16.

146. *Id.* at 17.

147. *Id.*

148. *Id.* at 18.

149. *Id.* at 20.

150. *See* Horrigan et al., *supra* note 135, at 447.

151. *Managing Water Sustainability Is Key to the Future of Food and Agriculture*, ORGANISATION FOR ECON. CO-OP. & DEV. (OECD), https://www.oecd.org/agriculture/topics/water-and-agriculture/ (last visited Aug. 28, 2023).

are heavily reliant on irrigation for farming.[152] Because water rights are not traded on a national market like many other commodities and access to water varies by jurisdiction, water is frequently inadequately priced into the cost of goods, like crops, which can lead to its overconsumption.[153] This dynamic often leads to highly contentious legal battles between states.[154]

The United Nations Food and Agriculture Organization ("UNFAO") states that there are currently sufficient freshwater resources globally to sustain agricultural and industrial development.[155] However, UNFAO notes that increasing water use is an area of growing concern.[156] In the last century, water use grew at twice the rate of the population.[157] While the amount of freshwater that exists globally is vast, this amount of water is not distributed equally across the globe nor is it all accessible for human use.[158] Thus, UNFAO has significant concerns regarding whether the current use of water in agriculture is sustainable and calls for different agricultural processes to irrigate more efficiently.[159]

C. Human Health Concerns

These and other issues arising from the modern agriculture industry also have direct negative effects on human health. CAFOs produce significant amounts of manure that are concentrated in one area, which can spread bacteria and also seep into groundwater and surface water.[160] Many of the pathogens found in manure can spread to humans.[161] In the past, CAFOs

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152. *See* Dan Charles, *Without Enough Water to Go Around, Farmers in California Are Exhausting Aquifers*, NPR (July 23, 2021, 10:29 AM), https://www.npr.org/2021/07/22/1019483661/without-enough-water-to-go-around-farmers-in-california-are-exhausting-aquifers.

153. *See* Paolo D'Odorico et al., *The Global Value of Water in Agriculture*, 117 PNAS: PROC. NAT'L ACAD. OF SCIS. U.S. AM. 21985, 21985 (2020), https://www.pnas.org/doi/epdf/10.1073/pnas.2005835117.

154. *See, e.g.*, Christopher Flavelle, *As the Colorado River Shrinks, Washington Prepares to Spread the Pain*, N.Y. TIMES (Jan. 31, 2023), https://www.nytimes.com/2023/01/27/climate/colorado-river-biden-cuts.html.

155. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, WATER FOR SUSTAINABLE FOOD AND AGRICULTURE 1 (2017), https://www.fao.org/3/i7959e/i7959e.pdf.

156. *Id.*

157. *Id.*

158. *See id.* (noting that while there is no global shortage of water, there are regional shortages of water and only 0.003% of all fresh water that exists globally is considered freshwater resources available for human use).

159. *See id.* at 12.

160. *See* HRIBAR & SCHULTZ, *supra* note 121, at 2-4.

161. *Id.* at 8-9.

heavily used antibiotics in feed, mainly to stimulate faster growth in livestock.[162] There is strong evidence that this heavy use of antibiotics has led to antibiotic-resistant bacteria, which has caused antibiotics to be less effective in humans.[163] While the Federal Drug Administration implemented rules in 2017 to ban the use of medically important antibiotics solely to promote growth, critics assert that the livestock industry continues to overuse antibiotics.[164]

The effect of agricultural chemicals on humans remains controversial. For example, the commonly used herbicide, glyphosate (branded "Round-up"), has been the subject of numerous studies and lawsuits alleging that it is a human carcinogen.[165] However, the Environmental Protection Agency continues to find that glyphosate, when used as directed, is not a human carcinogen.[166] These sorts of debates are common when synthetic chemicals are involved, as it can be difficult to determine the impact that many environmental contaminants have on humans.

Of course, a loss of productive soil and adequate freshwater will directly impact human lives.[167] Humans must eat and drink to live. Thus, if modern industrial agricultural practices deplete these important resources in an unsustainable way, loss of human life will result. Nevertheless, modern industrial agriculture has also allowed humanity to produce enough food to feed our growing population.[168]

D. Conclusion

This section provides a brief survey of a few of the difficult ethical issues that business leaders in the agriculture industry must deal with. Agriculture is intimately and inextricably intertwined with the complex interactions of

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162. *Id.* at 10.

163. *Id.*

164. *See* Chris Dall, *FDA Reports Another Rise in Antibiotic Sales for Livestock*, UNIV. MINN. CTR. INFECTIOUS DISEASE RSCH. & POL'Y (CIDRAP) (Dec. 16, 2020), https://www.cidrap.umn.edu/antimicrobial-stewardship/fda-reports-another-rise-antibiotic-sales-livestock.

165. *See Glyphosate*, ENV'T PROT. AGENCY (EPA), https://www.epa.gov/ingredients-used-pesticide-products/glyphosate (Sept. 23, 2022).

166. *Id.*

167. *See* Eric C. Brevik & Lynn C. Burgess, *The Influence of Soils on Human Health*, NATURE EDUC. KNOWLEDGE PROJECT, https://www.nature.com/scitable/knowledge/library/the-influence-of-soils-on-human-health-127878980/ (last visited Aug. 28, 2023); Tim Smedley, *Is the World Running Out of Fresh Water?*, BBC (Apr. 12, 2017, 2:17 PM), https://www.bbc.com/future/article/20170412-is-the-world-running-out-of-fresh-water.

168. Ted Nordhaus, *Big Agriculture Is Best*, FOREIGN POL'Y (Apr. 18, 2021), https://foreignpolicy.com/2021/04/18/big-agriculture-is-best/.

humans with animals and the natural environment. These interactions create incredibly challenging ethical dilemmas: humans must eat to live, but the mass production of food inevitably has a significant impact on the environment. And as long as humans continue to eat meat, animal welfare will continue to be an ethical concern. Thus, the agriculture industry represents a particularly rich environment to apply stakeholder theory to because this industry creates just the type of externalities that stakeholder theorists claim would be better mitigated through application of stakeholder theory.[169] If stakeholder theory indeed represents a better and more ethical way to manage a business that impacts multiple stakeholders, then the theory should have a particularly strong application to a business in this industry. However, it is not clear how a firm should apply stakeholder theory to decision making in this area. Are animals and the environment in the modern food supply chain stakeholders of the companies in this industry? If so, what are their rights and how should they be treated? How are their interests weighed against those of human stakeholders? Applying stakeholder theory to the agriculture industry and comparing it to how the SWM norm would apply to the same dilemmas provides insight regarding some limits of stakeholder theory and how the theory needs further development before it can serve as a suitable basis for corporate law.

III. Comparing and Contrasting Stakeholder Theory and SWM in the Agriculture Industry

Stakeholder theory states that the firm's objective is to seek cooperation among the firm's various stakeholder groups in order to maximize value for all of the stakeholders involved.[170] Under the norm of SWM, the firm is free to consider the interests of any stakeholder group that it desires when making decisions; however, the ultimate objective is to maximize the value of the firm for the benefit of its shareholders.[171] Comparing and contrasting these two corporate decision-making frameworks by applying them to the specific business ethics dilemmas in the agriculture industry previously discussed provides insight into the high level of indeterminacy in decision making created by stakeholder theory.

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169. *See* Jones & Felps, *supra* note 6, at 226 ("[S]ome variant of normative stakeholder theory will be capable of better enhancing social welfare than SWM."); *see also* Wicks et al., *supra* note 9, at 99 ("[B]oth corporate governance and stakeholder theory attempt to structure governance mechanisms so that businesses can maximize value to society.").

170. *See* FREEMAN ET AL., THE STATE OF THE ART, *supra* note 42, at 28.

171. *See* Sharfman, *supra* note 74, at 394-98 (discussing the norm of SWM embedded in the economic logic of corporate law).

A. Applying Stakeholder Theory

The first issue the corporate manager must address when applying stakeholder theory is identifying the relevant stakeholders at issue so their interests can be considered. As noted previously, stakeholder theory provides little specific guidance in this endeavor.[172] There are some stakeholders that are easy to identify for virtually any business including stockholders, creditors, customers, suppliers, and the like. These are parties that all stakeholder theorists would doubtlessly agree are stakeholders of the firm whom decision-makers should consider.[173] Notably, however, these categories of stakeholders are not monolithic and will likely have divergent interests and values, an issue which will be discussed later.

1. Stakeholder Identification

Outside this list of obvious stakeholders, the task of stakeholder identification becomes far more difficult. If we start with Freeman's broad standard of "anyone who affects or is affected by the company's business," the list of stakeholders is boundless.[174] Those who protest against man-made climate change point out that every human on the planet is in some way affected by companies within the agriculture industry, notably through their environmental effects.[175] Thus, stakeholder theory needs a limiting principle to make it a valid managerial decision-making tool. However, even when applying the Mitchell et al. classification framework and focusing on stakeholder salience,[176] there are still problems of breadth.

For example, both the natural environment and animals are obviously salient to the operation of companies within the agriculture industry.[177] Are they then, as some stakeholder theorists advocate, stakeholders?[178] If so, decisionmakers must determine which animals are stakeholders of the firm. For a firm that raises animals for slaughter, it would seem those animals should be considered stakeholders due to their intimate contact with the firm. However, what does it mean to have a stakeholder raised by the firm solely to be killed? If valuing stakeholders as an end in themselves means anything, then surely it means firms cannot raise stakeholders simply to slaughter them. But what about companies that raise crops? They frequently use pesticides to

172. *See* Orts & Strudler, *supra* note 85, at 605-06.
173. *See* Sharfman, *supra* note 74, at 395 n.28.
174. *See* FREEMAN, STRATEGIC MANAGEMENT, *supra* note 41, at 46.
175. *See* Horrigan et al., *supra* note 135, at 445.
176. *See* Mitchell et al., *supra* note 5, at 865-68.
177. *See* Driscoll & Starik, *supra* note 4, at 58; Horrigan et al., *supra* note 135, at 448.
178. *See* Tallberg et al., *supra* note 18, at 3.

kill pests that endanger crop yields.[179] Are these animals stakeholders? If they are not stakeholders, exactly what ethical basis is there for saying they are not if domesticated animals raised for slaughter are?

When the environment is identified as a stakeholder, these same types of questions arise. What aspect of the environment is the stakeholder? Driscoll and Starik assert that nature is the "primordial stakeholder,"[180] but this provides minimal practical guidance. Agriculture does not impact each part of the environment in the same way,[181] so considering the natural environment as a single stakeholder is not helpful to decision making. Over what time horizon are the environment's interests to be considered? Given that plants, streams, and air are incapable of formulating preferences, how would it be possible for anyone to voice the preferences of these stakeholders? If the environment itself is considered the stakeholder, as opposed to human actors (such as activist groups) serving as the environment's human proxy, does that not give the firm's managers free range to treat the environment however it desires while claiming its actions are in the environment's best interests?

This is only one of the myriad questions about stakeholder identification that stakeholder theorists seemingly admit they cannot answer.[182] Stakeholder theory gives firm managers a decision making framework that identifies an infinite number of stakeholders and leaves corporate managers open to criticism by everyone, but ultimately accountable to no one. To effectively implement stakeholder theory into the law, a limiting principle must be developed to determine exactly who these relevant stakeholders are. As of yet, no such limiting principle has been developed. And even once the set of relevant stakeholders is adequately defined, significant problems still exist regarding how to determine what their interests are and how the firm is to value them when making decisions.

2. Determining and Managing Stakeholder Value

Assuming that our agricultural firm is able to identify its relevant stakeholders, next stakeholder theory provides that the firm should seek to coordinate these stakeholders' interests to maximize joint value for all

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179. *See* Horrigan et al., *supra* note 135, at 446.

180. *See* Driscoll & Starik, *supra* note 4, at 57.

181. *See* Horrigan et al., *supra* note 135, at 445; Papendick et al., *supra* note 134, at 3.

182. *See* Phillips et al., *Stakeholder Theory*, *supra* note 39, at 4 (noting stakeholder theory's ongoing problem with defining the "boundaries" of the firm, which entails in part determining who is a stakeholder of the firm that matters and who is not).

stakeholders.[183] If trade-offs are to be made, the firm's executives should make them and then continue to maximize value for all.[184] This is much easier said than done.

Determining what each stakeholder group values and then trying to maximize those values across multiple stakeholders is a difficult, if not impossible, task particularly when those values conflict. However, a problem that must be addressed before that point is how to balance interests within stakeholder groups, as each individual member of a stakeholder group will likely value different outputs from the firm.[185] For example, for a firm that processes and sells chickens, many customers will prefer chicken at the cheapest possible price and will have little to no concern for environmental problems or the chickens' welfare.[186] A certain subset of customers will care deeply for the environment and animal welfare and desire chicken that is processed according to accepted environmental and animal welfare standards. Which customer group's values should be maximized? What standard should govern how the firm decides to make these trade-offs? A large firm might be able to offer products to attempt to satisfy both customer groups, but a smaller firm may not. But what if the larger firm is offering a product for a small group of customers that highly values environmental and animal welfare concerns but cannot profitably do so? Should it continue to offer this product? Stakeholder theory provides no clear answers other than "use your discretion."[187]

Once firms identify multiple stakeholders, particularly non-human ones, the problem becomes much more difficult. If modern farming does indeed have a negative impact on the environment, such that it is unsustainable,[188] does stakeholder theory require a shift to sustainable practices immediately, regardless of the impact on food prices? There seems to be no limiting principle under stakeholder theory that would prevent a corporate manager from prioritizing long-term environmental concerns over customers or even the firm's survival itself. And if the shift to sustainable farming practices

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183. FREEMAN ET AL., THE STATE OF THE ART, *supra* note 42, at 27-28.

184. *Id.*

185. *See* discussion *supra* Section I.B.1.a (discussing the difficulties with determining and measuring stakeholder value).

186. *See* discussion *supra* Section I.B.1.a.

187. *See* Mayer, *supra* note 32, at 1862-67.

188. *See* discussion *supra* Section II.B (discussing the environmental impacts of modern agriculture).

raises the price and availability of food, it is the poorest customers that would suffer the most.[189]

And then what about animals? If animals are indeed stakeholders of the firm, it seems the only way to truly value them is to stop killing them. If a stakeholder can be killed, then stakeholder value is a largely meaningless concept. If stakeholder theorists concede that non-human stakeholders are in a different ethical category than humans, such that humane (by whose standards is anyone's guess) treatment prior to slaughter adequately recognizes their interests, then we are back to the issue of food prices. How should the corporate manager weigh the value of animal suffering in the food supply chain against the needs of low-income consumers for affordable meat?

There is a more fundamental problem with assessing these trade-offs in value with respect to non-human stakeholders. The environment is incapable of formulating preferences regarding how it wants to be treated. Animals are capable, to a limited extent, of formulating preferences about how they want to be treated, but a fatal problem remains when attempting to consider them as stakeholders. Namely, as a result of their limited cognitive abilities, animals often demonstrate preferences that are antithetical to their true best interests. For example, a seal may flee from a rescuer trying to offer life-saving aid, a dog may eagerly drink antifreeze, and a bird may continuously and purposefully fly into a window upon seeing its reflection.

Because of this, uncertainty would inevitably arise when firms attempt to reach a consensus as to what is best for animal or environmental stakeholders. And whatever consensus is reached, it would ultimately be nothing more than humans' subjective evaluation of what is best for these animal or environmental stakeholders. Accordingly, there is no apparent limiting principle within stakeholder theory as to how the firm should treat these stakeholders. Even when assuming that the best course of action is to substitute human proxies for these non-human stakeholders (such as environmental activist groups and animal rights groups), the same problems remain. These groups will not always agree on what these non-human stakeholders value or what their best interests are.

The answer to these and other questions regarding how to value stakeholders has so far seemed to be an exasperated reply of "managers should use their discretion," which provides no guidance.[190] Of course managers use their discretion when making trade-offs to apply the SWM

189. *See* Nordhaus, *supra* note 168.
190. *See* Mayer, *supra* note 32, at 1867.

norm as well, but they use their discretion with an established objective in mind: maximize shareholder wealth. Thus, there is an objective criterion by which managers, shareholders, and society as a whole can determine whether the managers are exercising their discretion well. Stakeholder theory provides no such objective other than an amorphous concept of maximizing value for all stakeholders.[191]

3. Conclusion

When examining stakeholder theory through a practical business lens, it provides no actionable decision-making criteria to guide managers. It is, in the words of one scholar, "radically indeterminate."[192] The failures of stakeholder theory to speak with any degree of clarity to any business issue makes it a failed model of managerial decision making and ethics unless it can be narrowed by some, as of yet undiscovered, reasonable bounds.[193] These shortcomings make it a particularly poor theory to guide corporate governance law. If stakeholder theory cannot guide managerial decision making, then how can it guide judicial decision making? If stakeholders are given the right to sue under corporate contracts that negatively impact them, as some commentators have suggested,[194] by what standard will judges evaluate corporate decision making? When these various stakeholders' rights conflict, as they invariably will, how will judges determine whether the firm made a reasonable decision? Why would judicial decision making be any better than corporate managerial decision making? If the solution is to apply a judicial abstention doctrine like the business judgment rule to such cases,[195] then giving stakeholders the right to sue provides little advantage over the status quo.

Suppose that certain groups of stakeholders are given the ability to engage in corporate governance, through voting or other means, comparable to that of shareholders, as some commentators have discussed.[196] First, how should

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191. FREEMAN ET AL., THE STATE OF THE ART, *supra* note 42, at 28.

192. *See* Miller, *supra* note 28, at 773 ("The stakeholder model is thus not just insufficiently determinate, but radically indeterminate.").

193. *Id.*

194. *See* Parella, *supra* note 25, at 897.

195. *See* Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 87 (2004) (arguing that the business judgment rule is best understood as a "doctrine of abstention" under which courts abstain from reviewing most corporate decisions).

196. *See, e.g.*, Grant M. Hayden & Matthew T. Bodie, *The Corporation Reborn: From Shareholder Primacy to Shared Governance*, 61 B.C. L. REV. 2419, 2470-77 (2020) (discussing alternative corporate governance arrangements, including granting voting rights to certain stakeholders, such as employees).

the law decide which stakeholders are important enough to have voting rights, and how would these groups be defined? Stakeholder theory currently provides no limiting principle on which to base this decision.[197] But even if a state legislature could develop such a criterion and enshrine it into a corporate statute, the question remains how boards of directors and managers should make decisions. These different stakeholder groups can have radically different interests. Corporate managers would thus essentially be political decision-makers subject to conducting straw polls to attempt to make compromises that would please a majority of their constituency, so they could keep their jobs.[198] Stakeholder theorists have provided no sound theoretical or empirical basis for believing that stakeholder theory would yield better results than the current SWM model, and there are plenty of reasons to believe that it would yield worse results due to the unfettered decision-making authority it gives to corporate decisionmakers. Next, this Article will address how the corporate governance model based upon SWM addresses these same issues in the agriculture industry and provides a more theoretically and practically sound result.

B. Applying SWM

Under the prevailing norm of SWM, the answer to all of the above dilemmas is to make the decision that maximizes corporate value for the shareholders.[199] This does not mean that the firm should ignore the interests of individuals or entities who are not shareholders, including animals and the environment. Indeed, in order to maximize shareholder value, the firm will need to consider the interests of these stakeholders.[200] For example, in the agriculture industry, a firm will likely have to take into account animal welfare concerns when seeking to maximize profits. As consumers become more concerned with animal welfare, firms will need to react to these changing interests to remain profitable. Likewise, it is not in the long-term interests of an agricultural firm to deplete water supplies or otherwise render the environment incapable of growing crops. Under SWM, firms should act

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197. *See id.* at 2441-42 (acknowledging that stakeholder theory as of yet provides no adequate limiting principle for which stakeholders should have a right to engage in corporate governance).

198. *See* Miller, *supra* note 28, at 773-74 (noting how stakeholder theory leads to firms as essentially political organizations where directors yield to lobbying pressure from powerful stakeholder groups).

199. *See* Sundaram & Inkpen, *supra* note 8, at 350.

200. *Id.* at 353 (discussing how the SWM norm can be "manifestly pro-stakeholder").

to alleviate the environmental impacts of their agriculture operations to ensure the sustainability of the business and its customer base.

Doubtlessly, it would be foolish to believe that the SWM norm accomplishes these goals perfectly. Indeed, if it did, then the environmental and health problems discussed herein would either have not occurred or likely would have already been remedied. The SWM norm relies upon market forces and incentives to mitigate potential corporate harms.[201] However, it is well accepted that corporate actions have externalities, such as negative environmental effects, that are not fully accounted for by the market forces that undergird the SWM norm.[202] In the SWM model, laws and regulations, such as those that protect the environment, fill this void and govern business conduct.[203] For example, under the SWM model, companies that raise animals for meat would be expected to treat them as humanely as they felt was necessary to maximize profits. If consumers cared little about the humane treatment of animals, then companies would likewise be expected to care little. Conversely, if consumers cared deeply about the humane treatment of animals, then these companies would act accordingly to maximize profits. To the extent that society felt that companies were not treating animals humanely and that market forces were not adequately constraining them, society could enact laws to increase animal welfare standards.

This system is not perfect. No system of corporate governance will ever be. However, SWM provides a model with sound economic logic that provides clear guidance. More importantly, the SWM model is scalable. As an industry becomes more complex, such as the modern agriculture industry, the SWM model provides clearer guidance. It cuts through the complexity and provides a single objective function on which decision-makers can base their decisions.[204] Using shareholder wealth as a single objective function is not arbitrary because there is accompanying economic logic that, as the residual claimants of the economic fortunes and accompanying risks of the enterprise, shareholders are best suited to have their interests maximized.[205]

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201. *See id.* at 353-54.

202. *See, e.g.*, Bebchuk & Tallarita, *supra* note 3, at 171 (discussing how externalities negatively affect stakeholders).

203. *Id.* at 172.

204. *See* Jensen, *supra* note 76, at 238.

205. *See* Sung Eun Kim, *Dynamic Corporate Residual Claimants: A Multicriteria Assessment,* 25 CHAP. L. REV. 67, 74 (2021) (discussing the economic logic behind the prevailing norm of SWM—that shareholders are the residual claimants of the corporation's successes and failures).

There is also accompanying economic logic that doing so actually maximizes value for all of society, which includes other stakeholders.[206]

Stakeholder theory suffers from the opposite problem. If a firm is small, with very few stakeholders, stakeholder theory still suffers from the same problems of identification and conflicting interests previously discussed. But the smaller the firm, the more likely it can at least try to manage these conflicts in a reasonable manner. However, as an enterprise grows and becomes more complex, this task becomes less feasible. This is the case with human stakeholders, and the problem grows when considering non-human stakeholders. For example, Tallberg et al. use the examples of an animal shelter and a dog-sledding business to advocate that animals should be considered stakeholders.[207] They point out the strong emotional bonds created between humans and animals in these organizations, and the fact that in the dog-sledding business animals share in the labor to justify their inclusion as stakeholders.[208] Even for a small firm, their argument is questionable. How much do the sled dogs really enjoy the grueling work? And if they do, is it not because humans bred them to do this work and sledding is all the dogs know? What about the environmental impact of the dog sledding, or potential impact on wild species? How is this accounted for in stakeholder theory? As shown in the previous section, these ideas become even more problematic the larger the firm grows. When trying to apply stakeholder theory to a large, complex industry like modern agriculture, the theory provides even more confusing and conflicting advice to corporate decision-makers. The more complex the organization or industry, the more important a single objective function becomes.[209]

Conclusion

This Article provides a valuable framework for assessing the feasibility of including animals and the environment as stakeholders under the stakeholder theory. As demonstrated, any attempt to do so is largely untenable. The inability to ascertain preferences from animals and the environment, the highly subjective practice of attempting to quantify the level of benefit and harm attributable to business decisions, and the even more subjective nature of trying to weigh these benefits and harms across categories provides such

206. EASTERBROOK & FISCHEL, *supra* note 8, at 38-39.

207. *See* Tallberg et al., *supra* note 18, at 5-13.

208. *Id.*

209. *See* Jensen, *supra* note 76, at 238 (noting the logical impossibility of maximizing across multiple objective functions in business).

broad latitude that nearly anything could be posited as ethical. This exercise also illustrates how stakeholder theory has similar problems with respect to human stakeholders. With no limiting principle, the practice provides similar guidance to simply dictating, "Do whatever you want to do."

This analysis comes at a valuable time as we are at a critical juncture given the convergence of large-scale agriculture, shifting paradigms regarding corporate ethics, and a world population approaching eight billion.[210] For this reason, this Article should serve as a catalyst to spark future research into this subject specifically and the broader subjects of corporate ethics and stakeholder theory more generally. With the rise of ESG investing and an increasing number of firms supporting stakeholder-based initiatives, this issue will no doubt increase in significance during the twenty-first century.

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210. Weronika Strzyżyńska, *Can the World Feed 8bn People Sustainably?*, GUARDIAN (Nov. 15, 2022, 6:00 AM), https://www.theguardian.com/global-development/2022/nov/15/can-the-world-feed-8bn-people-sustainably.