The Enron Trial Drama: A New Case for Stakeholder Theory

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This much in his defence
I needs must add, he ne'er himself denied
Nor bade me hide it from thee. It was I,
Fearing to wound thee, lady, I who sinned,
If such concealment should be deemed a sin.

(Lichas, the servant of Heracles, admits that he lied to cover the misdeeds of his master.)

From the Trachiniae by Sophocles

I. INTRODUCTION

ENRON'S downfall is the greatest tragedy in corporate history. Its decline, bankruptcy, and trials have made the name Enron iconic of corporate
hubris. The criminal trial of Kenneth Lay, Enron’s former chairman and CEO, and Jeffrey Skilling, Enron’s former CEO and COO, played as classical Greek theater for the American public. Although it was not televised, it drew interest comparable to the O.J. Simpson trial on news sites and blogs. The most active cyber community was the up-to-the-minute reporting on the Houston Chronicle’s website and its Enron: TrialWatch blog, which garnered a devoted following in both legal and business communities. As a corporate law professor, Enron: TrialWatch became part of my daily reading regimen. Although I had a legitimate professional interest in the process and outcome of the trial, the plot twists, haughty wit, appeals to divinity, and the claims of remorse for harm caused to thousands transformed the event into a drama that could have been written by Sophocles.

The trial was a federal criminal prosecution including charges of conspiracy, securities fraud, wire fraud, false statements, and insider trading. On May 25, 2006, the jury found both Skilling and Lay guilty. The vigorous prosecution made it clear that federal prosecutors fully intended to hold senior managers accountable for white collar crime. Prior to the Enron failure, it was common for middle managers to be convicted on securities fraud charges while powerful CEOs avoided prosecution or received lighter sentences. The importance of this trial and verdict for securities law enforcement is clear. However, the verdicts also have significant implications for state corporate law regimes and notions of fiduciary duty.

2. See, e.g., Lauren Steffy, Trials ... and Errors, http://blogs.chron.com/lorensteffy/2006/01/ (Jan. 30, 2006, 07:43 CST) (“They started lining up at 6:30—that’s p.m., as in Sunday night. My former colleagues at Bloomberg were first in line, in course, at the head of the media circus. Others trickled in throughout the night.”).

In the Enron case, the prospect of criminal prosecution clearly failed to provide any deterrence whatsoever. I expect this was because prosecuting and punishing white collar crime has never been a priority in the United States. Historically, white collar fraud has been punished less severely than so-called “blue collar” theft and property destruction cases causing equivalent economic loss to victims.... This light-handed approach to sentencing in white collar cases can be seen in the sentences imposed in the major white collar cases of the late 1980s.

Id.
Many commentators predicted that Lay and Skilling would ultimately be found guilty, although both men seemed to evoke sympathy in jury members at critical junctures during the trial. Particularly with regard to the charges involving complex deal structures and accounting, the criminality of the CEOs’ participation was not self-evident to the jurors. Numerous legal articles and books have attempted to describe abuses of mark-to-market accounting, special purpose entities, loss concealing, and approved self-dealing transactions, all of which contributed to the downfall of Enron, which resulted in massive layoffs, eviscerated pension funds, and billions of dollars of market loss. A priori, it

8. Kent Schaffer, a Houston criminal defense attorney, called the prosecution a “thorough and understandable job,” predicting that “[i]f a part of the jury wants to convict, they have enough with what the government gave them.” Mary Flood, Enron Verdict Hinges on Lay, Skilling Testimony, Experts Say, HOUSTON CHRON., May 8, 2006, at A1, available at http://www.chron.com/disp/story.mpl/front/3849499.html. Similarly, Joel Androphy, another Houston defense attorney, felt that the defense “theme that Enron fell because of market forces ... didn’t work” and “seemed faulty.” Id.


Ms. Vaughan, the entrepreneur, said she wanted to believe the defendants but in the end could not square their version of events with the evidence and the testimony of other Enron executives.

“Early during the trial, I had an admiration for both men—just what they had accomplished in their careers,” she said. “And it was sad to see that in the end it wasn’t accomplished in a respectful manner, having to hurt so many people to get there.”

Id. See also Editorial, Lay, Skilling Guilty On Nearly All Counts, MSNBC NEWS SERV., http://www.msnbc.msn.com/id/12968481/ (last visited Mar. 27, 2007) (“‘I wanted very, very badly to believe what they were saying, very much so,’ juror Wendy Vaughan told reporters after the verdict.”).

10. See Christopher Palmeri, Guilty Verdicts for Enron Brass, BUS. WK. ONLINE, May 25, 2006, http://www.businessweek.com/investor/content/may2006/pi20060525_754989.htm (“It took an awful lot to convince some of us.”); Enron Jury Finally Speaks Out, HOUSTON CHRON., May 26, 2006, at A1, available at http://chron.com/disp/story.mpl/front/3894458.html ("Another juror, Wendy Vaughan, the owner of two local companies, said she wanted to believe both Lay and Skilling at the outset of the trial. But that changed."); Bajaj & Whitmire, supra note 9:

The jurors said they vacillated during the trial as prosecutors and defense lawyers offered competing explanations of the events going on at the company.

“Through 16 weeks of testimony, I would go home one night swayed in one direction,” Mr. Baggett said. “The next day, when cross or direct began, it would go the other direction. And I think we all felt that—you felt like a Ping-Pong ball.”

Id.


We have come to rely on a particular set of assumptions about the connection between stock market prices and underlying economic realities; the reliability of independent auditors, financial standards, and copious disclosure in protecting the integrity of financial reporting;
was not entirely clear that Lay and Skilling’s knowledge and participation in these mechanisms rose to the level of criminal culpability. After the announcement of the verdict, a number of jury members made public statements indicating that they struggled to understand the complexity of Enron’s missteps, but that the degree of harm to employees and the community influenced their decision to convict. To the extent that this phenomenon provides a

the efficacy of corporate governance in monitoring managerial performance; the utility of stock options in aligning managerial and shareholder interests, and the value of employee ownership as both an incentive device as well as a retirement planning tool.

Id. See also John C. Coffee, Jr., What Caused Enron: A Capsule Social and Economic History of the 1990s, 89 CORNELL L. REV. 269, 280 (2004) (“Nonetheless, here as elsewhere, logic and experience conflict: Despite the seemingly clear logic of the gatekeeper rationale, experience during the 1990s suggests that professional gatekeepers will acquiesce in managerial fraud, even though the apparent reputational losses would seem to dwarf the gains to be made from an individual client.”); Jonathan R. Macey, Efficient Capital Markets, Corporate Disclosure, and Enron, 89 CORNELL L. REV. 394, 407 (2004) (“[T]he market for corporate control depends on efficiency in the capital markets, but if share prices do not reflect managers’ actual performance, the market for corporate control cannot effectively discipline corporate management.”); Lyman Johnson, After Enron: Remembering Loyalty Discourse in Corporate Law, 28 DEL. J. CORP. L. 27, 52 (2003) (“In the contractarian view, for Enron directors and officers to be loyal to Enron as a company is ludicrous.”); William W. Bratton, Enron and the Dark Side of Shareholder Value, 76 TUL. L. REV. 1275, 1315 (2002) (“When it capitalized the LJM-related Raptor I-IV SPEs, Enron booked the notes issued by the SPEs as assets on its balance sheet and increased its shareholders’ equity in a like amount, as one would do when selling newly issued common stock for cash in a public offering.”); Donald C. Langevoort, The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron, 70 GEO. WASH. L. REV. 968, 973 (2002) (“I fear that near-term stock-price obsession in aggressive knowledge-based organizations is naturally embedded, and not easily overcome.”); ENRON CORPORATE FIASCOS AND THEIR IMPLICATIONS, at xi (Nancy B. Rapoport & Bala G. Dharan eds., 2004):

“Enron” connotes extreme greed and extreme cunning. It connotes a corporate culture run amok, relying on corporate cronyism to support heretofore unsupportable business deals. The key players were larger than life, and their collective fall from grace was cushioned by millions of dollars in salaries, bonuses, and stock options. The story of Enron is still being written.

Id.

12. See Appendix for a detailed breakdown of the nature of juror comments. See also Emshwiller et al., supra note 6; Enron Jury Finally Speaks Out, supra note 10 (“One female juror, speaking after the verdicts were returned, said the jury ‘felt the pain and loss of every employee’ of the defunct company, once the nation’s seventh-largest.; Nick Cohen, Yet Again We Cave Into Religious Bigots. And This Time They’re Hindus, THE OBSERVER, May 28, 2006, at 11 (“Guilty in the eyes of man and God”), available at http://observer.guardian.co.uk/comment/story/0,,1784662,00.html:

Last week, it wasn’t God, but a Texan jury which passed judgment on Lay, finding him guilty of fraud after the collapse of Enron with the loss of all jobs in one of the biggest scams in history. Carolyn Kuchera, a payroll manager, said she and other jurors with managerial responsibilities were used to going home at night “so tired we hardly knew who we were.” They “were always accountable” for their treatment of subordinates and she thought that the employees at Enron were entitled to “the same thing” from Lay. They didn’t get it, which is why he is going to jail.
generalizable example of jury behavior, it raises new questions about corporate governance practices and corporate fiduciary duties.

This article argues that if juries (or judges) are influenced by the magnitude of harm caused by fraudulent, disloyal behavior, especially when it impacts large numbers of working and middle-class employees, it is likely that the same factors will impact the outcome of derivative suits claiming breaches in fiduciary duties brought against officers and perhaps even directors. If concern for employees and communities plays a role in deliberation of federal fraud charges, it may play a role in civil fiduciary duty suits even when the only factual questions concern duties owed to shareholders. Officers and directors who want to avoid personal liability for alleged duty violations may choose to consider impacts on corporate stakeholders, especially employees. This appears consistent with stakeholder and related models of corporate governance advocating that corporate fiduciaries should be able to consider the interests of stakeholders other than shareholders in making business decisions.13

Section II briefly outlines the tragic fall of Enron. Section III recounts significant highlights from the Lay-Skilling trial. Section IV analyzes reported statements made by jury members between May 25 and July 10, 2006. Section V uses this analysis to advocate the need for a stronger emphasis on stakeholder theory.

II. THE RISE AND FALL OF ENRON

Enron emerged as a leader in natural gas transmission after deregulation of the industry in the 1980s. It rationalized prices by mediating relationships between producers and consumers. Under the leadership of Lay, the company gained an intimate understanding of natural gas markets. Building upon this success, Enron began a process of diversification in the 1990s. Many of its new business opportunities leveraged experience gained in the natural gas industry, such as energy derivatives, power generation, and retail electricity, including international projects. Others had few similarities to the core gas business, such as telecommunication and metals. The business press lauded this expansion, but a number of the new ventures failed to meet expectations, thus eroding the overall health of the organization. The massive liquefied natural gas plant in Dabhol, India, the purchase and sale of Nigerian barges, and the broadband business are all examples of Enron’s colossal business blunders. I remember representing a competitor in an international project finance bid in the late 1990s. Enron won the contract with a bid that I could not imagine to be economically viable. Ultimately, it was not.

In the face of losing investments, company executives found ways to bring in money that was essentially unreported debt through “pre-pay” transactions. Although these transactions provided cash flow, they showed a loss on the balance sheet. The solution to this problem came in the form of mark-to-market accounting. In 1992, Enron received Securities and Exchange Commission (“SEC”) permission to use mark-to-market accounting treatment for its core gas business. This allowed Enron to book unrealized expected earnings for long-term deals immediately. When many of these transactions failed to meet targets, the company’s financial wizards developed the Raptors special purpose entities...

15. See BRYCE, supra note 14, at 54-56.
16. Id.
18. Id.
19. See BRYCE, supra note 14, at 289 (noting that the company’s “international business was a mess”).
20. MCLEAN & ELKIND, supra note 14, at 83.
22. MCLEAN & ELKIND, supra note 14, at xxiv.
24. MCLEAN & ELKIND, supra note 14, at 41-42.
("SPEs") as an accounting hedge against losses. The success of this loss-covering mechanism depended on the continued strength of Enron shares that provided the underlying capital for the SPEs. A variation of this strategy involved the sale of underperforming assets to the LJM funds, which CFO Andy Fastow conceived, managed, and owned in part, and from which he received guaranteed returns. Since Enron committed to buying back the assets at a fixed rate of return, these transactions, which were treated as sales, in fact only warehoused poor-performing assets. The LJM interested party transactions made millions for Fastow at the shareholders' expense.

These and similar strategies for inflating returns and hiding losses (the "schemes") allowed Enron to grow unabated until 2001. Officers, accountants, attorneys, the board of directors, stock analysts, and even the SEC failed to stop this cycle before bankruptcy became inevitable. Not surprisingly, Enron imploded once the schemes came to light in November 2001. It filed for bankruptcy on December 2, 2001, resulting in a $61 billion share value loss, the layoff of 4,000 employees, and $1.3 billion in 401(k) losses.

Of the many schemes to support Enron's share price, the self-dealing LJM partnership involving CFO Andy Fastow provides the clearest example of fraud and breach of the duty of loyalty. Fastow's guilt appeared to be a foregone conclusion, but extending blame to CEOs Lay and Skilling required an intricate strategy on the part of federal prosecutors. The schemes to hide losses and bolster revenues seemed to violate the Generally Accepted Accounting Principles ("GAAP") that financial statements reflect economic reality, but Lay and Skilling insisted that the accounting devices were technically allowed under the rules at the time, or that in instances involving actual fraud, they were unaware of it.

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26. Id.
27. BRYCE, supra note 14, at 223-39. See also Lay-Skilling Trial to Bring Conclusion to Host of Charges Stemming from Enron Collapse, POWER MKTS. WEEK, Dec. 19, 2005, at 1. Fastow named the LJM funds using the first initials of his wife and sons. Id.
28. Id.
30. Second Interim Report of Neal Batson, supra note 17, at 47.
31. Kroger, supra note 7, at 111-12.
35. Id.
36. Id. at 270-76.
Unfortunately for both Lay and Skilling, the federal government, and eventually the jury, disagreed.

III. THE TRIAL

Congressional hearings investigating the fall of Enron began in January 2002. Federal regulators and prosecutors moved carefully, beginning with action against Arthur Anderson, Enron's auditor. Investigations proceeded, and a number of strategic indictments were made. The first indictment was on Halloween in 2002, for Fastow, who became a key government witness in the Lay-Skilling trial. Fastow eventually pled guilty in January 2004 and agreed to assist ongoing investigations in exchange for leniency for his wife, who was also charged with Enron-related tax fraud. The government secured much of his testimony before it brought charges against Skilling and Lay on February 19, 2004, and July 8, 2004, respectively. Like Fastow, a number of key witnesses, including Mark Koenig, Ken Rice, Paula Reiker, David Delainey, and Ben Glisan, Jr. also entered into strategic plea agreements. Importantly, Enron's Chief Accounting Officer Richard Causey, who was charged with securities

38. See The Enron Collapse, supra note 29.
fraud and conspiracy, pled guilty on December 28, 2005. This simplified the overall case against Skilling and Lay and opened up the possibility that Causey would testify for the prosecution. The jury was seated on January 30, 2006 and opening arguments began the next day.

A. Prosecution Witnesses

The prosecution called a number of former Enron employees to testify against Lay and Skilling. The first witness it called was Mark Koenig, the former head of Investor Relations. Koenig testified that Skilling had misled the public by portraying Enron's retail division as prospering in order to keep share prices artificially high. Next, Ken Rice, the former head of Enron's broadband business, took the stand on Valentine's Day. Rice claimed that he repeatedly misled investors by exaggerating broadband business prospects and that this practice was expected by senior management. He specifically testified that Skilling personally made a number of misleading statements to an analyst in a conference call held on March 23, 2001. Paula Reiker, former head of Investor Relations, secretary to the board of directors, and trustee for the employee retirement plan, began her testimony February 22, 2006. Reiker testified that she and Lay followed the company practice of misrepresenting the health of the company in order to inflate share value. The ex-CEO of Enron's retail division,
David Delainey took the stand on March 1, 2006. Delainey claimed that he and other managers conspired to mislead shareholders by moving losses into units or entities that avoided reporting them. He admitted to lying and asserted that the rest of the management team had done the same.  

Fastow began his testimony in early March with the defense’s cross-examination on March 13. Fastow admitted to improperly taking profits related to self-dealing transactions, but he claimed that these transactions were structured with the approval of senior management in order to hide losses and bolster Enron’s stock price. The defense maintained that the Raptor deals, in particular, were completely legal, notwithstanding Fastow’s guilty plea for a related charge. Of all the insider witnesses, Fastow’s testimony was the most problematic and the jurors found it difficult to evaluate his veracity and the relative weight of his testimony.

Sherron Watkins, the famous whistleblower in the Enron case, took the stand on March 15, 2006. If there are any heroes in the Enron tragedy, Watkins is chief among them. She was the whistleblower who took her concerns directly to Lay in a seven-page e-mail that outlined misallocations of loss and numerous problems with the Raptor deals. She proposed specific remedies to bring Enron’s accounting statements into compliance with GAAP and SEC disclosure requirements. Her letter to Lay, dated August 15, 2001, predicted the


57. Id.

58. Mark Babineck, Evidence Buried the Testimony of Lay, Skilling, HOUSTON CHRON., May 26, 2006, at A3, available at http://www.chron.com/disp/story.mpl/special/enron/3898746.html (“Fastow was Fastow,” Martin said of the mastermind behind some of Enron’s complicated schemes. ‘We knew where he was coming from, we could tell that. We kind of discounted some of it.’”).


I am incredibly nervous that we will implode in a wave of accounting scandals. My 8 years of Enron work history will be worth nothing on my resume, the business world will consider the past successes as nothing but an elaborate accounting hoax. Skilling is resigning now for ‘personal reasons’ but I think he wasn’t having fun, looked down the road and knew this stuff was unfixable and would rather abandon ship now than resign in shame in 2 years.

Id.

61. Id.
implosion of the company. She met with Lay on August 22 to discuss her concerns and present a more-detailed account of the problems at Enron. Lay acknowledged her concerns and let her know that the company’s outside counsel, Vinson & Elkins, would handle the inquiry. Although there is no indication that Enron’s managers took appropriate steps to uncover the alleged fraud, Watkins later discovered a memo, dated two weeks after her meeting with Lay, in which Vinson & Elkins confirmed that “Texas law does not currently protect whistleblowers.”

Finally, Ben Glisan, former Enron treasurer, took the stand on March 21. Although he was quite critical of Lay at trial, Glisan never agreed to testify for the prosecution as part of his plea agreement. Thus, his testimony was less vulnerable to tainting claims by the defense. Glisan testified that Lay knew of the fraud in Enron’s accounting and disclosure practices.

The testimony of senior Enron officials revealed the complexity of the questionable practices and transactions. However, the sheer amount of damning testimony and its relative consistency created the strong impression that Lay and Skilling were aware of fraud and failed to prevent it. With so many senior officials testifying, the prosecution did not need to rely exclusively on any single witness.

B. Skilling and Lay Testify in Their Defense

Skilling was on the stand from April 10 through April 18. Although the jury reacted coolly to his initial comments, within a day they were laughing at his jokes. In his testimony he reviewed the charges against him and refuted them line by line. He explained the complicated structures used by Enron and characterized them as perfectly legal. According to observers, the jury seemed

62. Id.
64. Id.
65. Id. Watkins also describes her loss of access, benefits, and responsibilities after her meeting with Lay. Id.
70. Mary Flood, Skilling Testifies He Wasn’t Aware, Would’ve Called FBI: Line by Line, Ex-CEO Details His Objections to Charges, Accusers, HOUSTON CHRON., Apr. 13, 2006, at A1 (“The 12 jurors and four alternates, many of whom seemed to have trouble looking at Skilling when he first took the stand Monday, are getting more accustomed to him and seemed reasonably engaged even during the dullest moments Wednesday.”).
to warm to him. He claimed not to know of Fastow's illegal activity. The prosecution questioned Skilling regarding an investment in his then-girlfriend's business. While interesting, it had little relevance for the trial. After reviewing transcripts and reports of his testimony, many readers of the Enron: TrialWatch blog wondered whether the prosecution could recover.

Lay's testimony was not as successful as Skilling's. Lay was described as "testy" and did not appear to build a strong rapport with the jury. He was steadfast in his claim of innocence. He blamed market speculators, the financial press, and a handful of corrupt insiders like Fastow for the unfortunate demise of his beloved company. Lay was neither as charismatic nor as smooth as Skilling. The strongest portion of his defense was the testimony by respected business and community leaders regarding his character.

His attempts to control testimony and the lawyers raised questions regarding his
capacity to avoid micromanaging and whether a compulsive micromanager could be unaware of the deep problems at Enron.\textsuperscript{81} 

The jury deliberated for less than six days and found Lay guilty of all six counts against him and Skilling guilty of nineteen of the twenty-eight counts against him.\textsuperscript{82} The jury found Skilling not guilty of nine of the ten insider trading charges and guilty for all of the eighteen remaining charges, including conspiracy, securities fraud, and false statements. Though Skilling faced up to a 185-year jail sentence, he ultimately received a twenty-four year prison sentence on October 23, 2006.\textsuperscript{83} Lay was also found guilty on four counts related to bank fraud in a parallel bench trial, but he died before sentencing on July 5, 2006.\textsuperscript{84}

81. \textit{See} Babineck, \textit{supra} note 58 (quoting Douglas Baggett: "'I saw in both men, very smart, very brilliant people, but particularly with Skilling, I think he knew that business inside out,' he said. 'There's no way he didn't know what was going on.'"); Bajaj & Whitmire, \textit{supra} note 9 ("'It is hard to believe,' said Deborah Smith, the jury forewoman, 'that someone, such a hands-on individual, could not possibly know the things that were going on within the company.'"); Mark Babinceck & David Kaplan, \textit{Enron Jury Guided by Prayer. Evidence}, \textit{Houston Chronicle, May 27}, 2006, at A1, available at http://www.chron.com/disp/story.mpl/special/enron/3901043.html:

Still, Fernandez said it was interesting watching the defendants spin Enron in a post-Enron world.

"I just thought they were trying to be controlling and trying to control the trial itself. In my opinion, I think if they didn't know, they should have found out somehow what was going on," said Fernandez, who described Lay's sometimes combative nature as "feisty."


Vaughan, owner of a roofing contracting company and a fitness concern, said, "I felt like in the position they were in, it was their duty to know what was going on and they should have gone farther to know what was going on."

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That point was reinforced for Delgado when Skilling stepped off the witness stand and used a complicated chart to explain for them how Enron set its risk margins for trading activity.

"To say he was not involved, that's not credible," Delgado said, noting that Skilling was as proficient in the explanation as the risk expert who testified.

\textit{Id. See also} Babineck, \textit{supra} note 58 ("'Both defendants said they had their hands firmly on the wheel,' Delgado said. 'I can't say I don't know what my teachers are doing in the classroom. To say you didn't know what was going on in your own company was not the right thing.'").


Former Enron CEO Jeff Skilling was sentenced today to 24 years in prison for his role in the energy company's 2001 collapse in what has become one of the nation's biggest corporate scandals.

U.S. District Judge Sim Lake ordered Skilling to home confinement with an ankle bracelet to monitor his movements. He told the U.S. Bureau of Prisons to recommend when Skilling should report to prison and suggested he be sent to the federal facility in Butner, N.C.
IV. THE JURORS

After the announcement of the verdict, ten of the twelve jurors disclosed their identities and made public statements. At least one statement has an anonymous attribution and may have been made by one of the other two jurors. The ten disclosed jurors include: forewoman Deborah Smith, who works in human resources; Douglas Baggett, a manager in Shell Oil's legal department; Freddy Delgado, an elementary school principal; Dana Fernandez, a clerk for Judge Sherman Ross in the Harris County Criminal Court; Jill Ford, a woman in her mid-twenties who was a college student in Houston when Enron collapsed; Kathy Harrison, an elementary school teacher; Carolyn Kuchera, a payroll manager; Donald Martin, an electrical designer; Nancy Thomas, a retiree; and Wendy Vaughn, who works in roofing sales and as a personal fitness trainer. This Section analyzes the juror's statements and the factors that led to Skilling's and Lay's convictions.

A. Methodology

The basis for this analysis is a review of all public statements made by Enron jurors between May 25 and July 9, 2006. The initial searches were made on LexisNexis® and Google™ on July 10, 2006. I searched for each juror, looking for articles or pages containing their names and Enron, and identified ninety distinct reported statements during this period. Additional hits appeared merely to reprint previously reported stories. Carolyn Kuchera made the fewest public statements (two), and Doug Bagget made the most (twenty). The mean number of statements per disclosed juror is nine. I then organized statements by substantive topic:

- Respect for defendants;
- Bad character of defendants;
- Witnesses not coerced;
- Defendants knew or should have known;
- Verdict based on careful review of the evidence;

Id. 84. See Kurt Eichenwald, An Enron Chapter Closes: The Overview; Enron Founder, Awaiting Prison, Dies in Colorado, N.Y. TIMES, July 6, 2006, at A1.
85. See Appendix and discussion infra Section IV.
86. Bajaj & Whitmire, supra note 9.
87. Id.; Flood, supra note 82.
88. Bajaj & Whitmire, supra note 9.
89. Babineck & Kaplan, supra note 81.
90. Bajaj & Whitmire, supra note 9.
91. Id.
92. Id.
93. Id.
94. Id.
95. Babineck & Kaplan, supra note 81.
THE ENRON TRIAL DRAMA

- Witness testimony weighted according to believability;
- Very complex finance and accounting issues;
- Outcome unclear until the end of deliberation;
- Concern for harm to employees and the community; and
- Hope that the outcome will act as a deterrent.96

The most common type of statement notes the bad character of Lay, Skilling, or both.97 This includes references to their greed, controlling nature, and "disgraceful" conduct. The second most common type of statement indicates concern for the tremendous harm to innocents: employees, 401(k) holders, investors, and family members.98 Four statements indicate that attitudes in the jury shifted throughout the trial and that there was no resolution until the deliberations.99

B. Analysis

Two of the most intriguing reactions from the jurors involved concern for employees and other innocent parties and admission of the complexity of the issues. Although three jurors repeatedly indicated that their deliberation was based "only on the facts," at least one of this group (Delgado) also indicated that he had difficulty understanding the accounting testimony.100 In total, six jurors specifically referred either to the complexity of the facts or to the nature and

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96. A number of other topics are addressed by the statements, but they are not germane to this study.
97. See Appendix. See also Bajaj & Whitmire, supra note 9:

The jurors said that they found it appalling that Mr. Lay had mismanaged his own finances and was selling his own Enron shares even as he assured employees and shareholders that the company was fiscally sound.

"I thought that was a disgrace," Donald Martin, an electrical designer, said.
A moment later Mr. Delgado echoed that thought. "That was very much the character of the person that he was. He cashed out before the employees did."

Id. See also Babineck, supra note 58:

The subject of Lay secretly selling millions of dollars worth of Enron stock back to the company in the waning months seemed to irk jurors, even though they understood it was legal.

"He just defined the word 'intent' for many of us," said Doug Baggett, 55, citing a key requirement for a conviction. Electrical designer Don Martin, 66, called Lay's behavior "a disgrace."

Id.
98. Id. See also sources cited supra note 12.
99. Id. See also sources cited supra note 10.
100. See Appendix. See also sources cited supra notes 10 & 81 and infra note 109 (citing interview of juror Freddy Delgado).
Several of these statements seem to represent the views of the jury in general.

1. Concern for Employees and Other Innocents

The jurors’ statements emphasizing the scope of the harm, the innocence of the victims, and the special consideration deserved by employees raises a number of interesting questions. Did the jury consider these factors in reaching a verdict? Are employees presumed to be owed a special duty by management? Even if the jury scrupulously obeyed instructions, was it possible for them to not be influenced by these concerns?

We cannot know for certain whether the scope of harm influenced the outcome of the trial, but the fact that it is mentioned by jurors at all indicates that it played some role in their deliberation process even though they never specifically addressed it in the group. Their statements regarding duties owed to employees are perhaps more telling. One juror mentioned that, as a manager, she believes that Lay and Skilling had the same kind of duty to employees that she does: “[Managers] are always accountable for [the] treatment of subordinates and … employees at Enron were entitled to ‘the same thing’ from Lay. They didn’t get it, which is why he is going to jail.”

This is not a fiduciary or other legal duty, but it does imply an assumed obligation owed to employees, at least in the minds of some jury members. In determining guilt or innocence, jurors are not allowed to apply their own standards of conduct or to create duties that do not exist in law. However, recent behavioral research indicates that juries are not always able to ignore the

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101. See Appendix. See also sources cited supra notes 10 & 81 and infra note 109 (citing interview of juror Freddy Delgado).
102. See Enron Jury Finally Speaks Out, supra note 10.
103. Cohen, supra note 12, at 11.
104. Jury Instructions at 2, United States v. Skilling, Cr. No. H-04-025, (S.D. Tex. May 15, 2006) (“You must not substitute or follow your own notion or opinion as to what the law is or ought to be. It is your duty to apply the law as I explain it to you, regardless of the consequences…. It is also your duty to base your verdict solely upon the evidence, without prejudice or sympathy.”). For federal model jury instructions, see Kevin F. O’Malley, Jay E. Grenig & Hon. William C. Lee, Federal Jury Practice and Instructions: Criminal § 12.01 (5th ed. 2000):

It is your duty as jurors to follow the law as stated in all of the instructions of the Court and to apply these rules of law to the facts as you find them to be from the evidence received during the trial…. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base any part of your verdict upon any other view or opinion of the law than that given in these instructions of the Court just as it would be a violation of your sworn duty … to base your verdict upon anything but the evidence received in the case…. In resolving the issues presented to you for decision in this trial you must not be persuaded by bias, prejudice, or sympathy for or against any of the parties to this case or by any public opinion.

Id.
scope of alleged harm and these sorts of informal moral expectations.\textsuperscript{105} This bias is not limited to juries; the research also found that judges exhibit the same degree of bias.\textsuperscript{106} If these biases are inherent in fact-finding by juries and judges, perhaps the concerns they address ought to be included in actual legal standards or at least considered by fiduciaries. In the case of corporate governance and fraud, this might mean that the interests of employees and communities may prevail over short-term shareholder wealth maximization concerns. Section IV further addresses this idea below.

2. Admission of Complexity

Law and business professors have been writing about Enron's structural and accounting mechanisms for concealing losses since late 2001.\textsuperscript{107} There is still some disagreement among experts as to the legality and appropriateness of some of these strategies.\textsuperscript{108} The question of Skilling and Lay's guilt is even more attenuated. "They were accountants," [juror] Delgado [said], "They mumbled, and I didn't know anything about what they talked about. Math never was my best subject. Fortunately, we got to take notes."\textsuperscript{109} If these issues were so complex that jurors did not fully understand them, how did they come to a verdict? If their statements are any indicator, the number and consistency of prosecution witnesses, the sheer volume of documentary evidence, the estimation of the defendants' moral character, and the magnitude of the harm all played a role.\textsuperscript{110} So, although corporate managers may attempt to skirt the edges of legality, juries may ultimately hold them accountable using different criteria than the black letter law.\textsuperscript{111}

V. Stakeholder Theory

Stakeholder theory departs from the traditional corporate governance theory of shareholder primacy. Advocates of the stakeholder theory suggest that corporate managers should consider interested stakeholders in corporate decision-making, including employees, shareholders, customers, the local communities, and governments.\textsuperscript{112} I use the term "stakeholder theory" very broadly so as to include

\begin{thebibliography}{9}
\bibitem{id} Id. at 1323-24.
\bibitem{generally} See generally sources cited supra note 11.
\bibitem{appendix} See Appendix.
\bibitem{wistrich2} See generally Wistrich et al., supra note 105.
\end{thebibliography}
the stakeholder movement of the late 1980s, the team production model, corporate social responsibility, and some foreign corporate governance regimes, such as codetermination in Germany and the de facto system in Japan. All of these models challenge the shareholder primacy standard and allow or require boards to consider the interests of employees and other groups with a stake in the enterprise. This Section will begin by describing and critiquing shareholder exclusivity in historical context and then move on to compare the various stakeholder theories and their significance in light of the Enron trial.

A. The Predominant Corporate Governance Model: Shareholder Exclusivity

The contractarian model of the corporation proposed by many legal scholars is sometimes linked to shareholder wealth maximization and the shareholder\textsuperscript{114} (or, in some cases, director)\textsuperscript{115} primacy model. Thus, it may be categorized as a shareholder exclusivity model. The first part of the model is not terribly controversial—the separation of ownership and management; shareholders who are the owners of the firm elect directors who hire professional managers to run the day-to-day operations of the corporation. The separation of ownership and control in public companies is said to be acceptable to shareholders because directors and managers owe shareholders (and no other parties) the fiduciary duties of loyalty and care, which is related to the second part of the model—the exclusive obligation to maximize shareholder wealth. Proponents of shareholder exclusivity argue that if other parties are owed duties, investors will be less willing to part with capital because profits might be diverted to others. The typical hypothetical for illustrating this tension is a plant closing. Managers could increase the value of the corporation’s shares if an unproductive plant were closed; at the same time, such a closing would displace workers and disrupt the community in which the corporation is situated. Under the shareholder primacy norm, managers must close the plant to fulfill their duty to shareholders, despite the harm to workers and other nonshareholder communities that such a closure would engender.

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\textsuperscript{113} See infra Section V.B. (discussing stakeholder theories).


\textsuperscript{118} Id. See also Bainbridge, supra note 116, at 1430-31.

\textsuperscript{119} Testy, supra note 13, at 1231.
The iconic case for shareholder exclusivity is the Michigan Supreme Court's 1919 decision in *Dodge v. Ford Motor Co.*\(^{120}\) In that case, the Dodge brothers brought suit to force distribution of an extraordinary dividend,\(^ {121}\) which Henry Ford had stopped paying in 1916 in order to raise wages, lower prices, and expand production facilities.\(^ {122}\) According to the court, if Ford had justified his business decisions as being in the best interest of the shareholders, his decisions would have stood.\(^ {123}\) However, because Ford admitted on the stand that he intended to benefit employees and customers rather than shareholders directly, his actions were cast as eleemosynary and inappropriate.\(^ {124}\) In reality, there were a number of other competitive, reputational, and tax issues that likely influenced both the decision to withhold dividends and the character of Ford's testimony.\(^ {125}\) Even so, corporate law textbooks typically note this case as stating the rule of shareholder primacy, that is that directors and managers have a duty to maximize returns for shareholders alone and may not consider other interests.\(^ {126}\) In reality, this is not the rule in most states.\(^ {127}\)

The contractarian model is powerful in both its descriptive and predictive capacities from a certain point of view. However, shareholder exclusivity in particular presumes a significant level of development, such as reasonably efficient markets and sophisticated infrastructures, and stability, such as reliable means of legal enforcement for contracts and fiduciary duties. Major fraud and business failures over the past five years have demonstrated the difficulty of holding managers accountable to shareholders even with sophisticated corporate laws and securities regulations.

In contrast to the American shareholder exclusivity model, we see the interconnectedness of corporations, labor, governments, communities, banks, and other parties in countries attempting to promote democratic and market institutions. In Iraq, Afghanistan, and Russia it becomes clear that the ability of passive investors to earn returns on equity investments depends on the level of development and stability of local communities.\(^ {128}\) To that extent, passive investors might be willing to transfer rents to the state, employees, creditors, and others who are able to create a climate that makes positive passive investment returns possible. Viewing this situation exclusively from the point of view of

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120. 170 N.W. 668 (Mich. 1919).
121. *Id.* at 668-69.
122. *Id.* at 671.
123. *Id.* at 683-85.
124. *Id.*
investors in sophisticated markets like the United States discounts the role of other economic actors who make passive investment reasonably secure. Infrastructure degradation, environmental harm, labor unrest, social unrest, consumer fear, and other factors outside of the control of shareholders or managers could conspire to erode the underlying development and stability that make complex capital markets successful. Lest critics dismiss this view as naive, note that successful economies, such as those in Germany, the United Kingdom, and Japan, all acknowledge a more substantial role for employees in corporate governance than is allowed by shareholder exclusivity or most U.S. jurisdictions.129

B. American Stakeholder Theories

The approaches scholars have previously lumped together as stakeholder theories have roots in early scholarship that incorporated a communitarian ethic into the analysis of corporate decision-making.130 These arguments have resurfaced periodically in various forms. Corporate social responsibility scholarship in the 1970s advocated a stricter regulatory response.131 Stakeholder theory came in vogue in the late 1980s as managers sought ways to frustrate hostile takeovers.132 According to the shareholder exclusivity model, directors and managers should not prevent these transactions if they are in the best interest of the shareholders,133 even when takeovers result in officer layoffs and manager interests conflict with shareholder interests.134 The stakeholder theory of the 1980s provided managers with a justification for considering interests other than those of shareholders, particularly in the takeover context.135 This particular manifestation was not necessarily progressive, but it did result in legal reform that could establish a basis for more progressive change.

Currently, the weak form of basic stakeholder theory is that managers and directors ought to be allowed to consider interests other than shareholder wealth maximization. This is the rule in most states today.136 By contrast, the strong form of basic stakeholder theory requires that directors and managers consider the interests of competing stakeholders. This form necessitates a clear definition of whose interests must be considered and in what context. The only state that has adopted this rule is Connecticut.137

129. See, e.g., O'Connor, Labor's Role, supra note 13.
130. See generally Drucker, supra note 13.
134. Id.
135. Id. at 94-96.
136. Id. at 94-96.
137. Id. at 101.
Scholars Margaret Blair and Lynn Stout advocate a more coherent and rigorous expression of this view, and have proposed the so-called Team Production Model.\textsuperscript{138} In this model, managers, shareholders, employees, creditors, and local communities act as a team.\textsuperscript{139} Directors act as independent mediators and apportion rents to the various participants.\textsuperscript{140} This approach acknowledges the interdependence of the participants and proposes to be more efficient in the allocation of returns.\textsuperscript{141}

Finally, contemporary corporate social responsibility scholarship attempts to quantify social costs more broadly by considering environmental and political concerns as well as the interests of traditional stakeholders.\textsuperscript{142} This body of work incorporates a number of critical lenses for evaluating corporate theory and practice, including critical race theory, feminist jurisprudence, and environmentalism.\textsuperscript{143} The advantage of this approach is that it is holistic, but the breadth of its scope makes evaluating competing interests a challenging task.

C. The Role of Stakeholder Interests in Foreign Corporate Governance Structures

Considering the interests of groups other than shareholders is not merely theoretical. A number of countries require that boards address the concerns of employees. Shareholder-owned corporations in Germany, known as Aktiengesellschafts or AGs, use a structure referred to as codetermination.\textsuperscript{144} Essentially, this guarantees that employees—either directly or through labor organizations—have board representation.\textsuperscript{145} In very large AGs, such as Siemens, shareholders elect half of the supervisory board (the equivalent to the American corporate board of directors).\textsuperscript{146} Employees and unions elect the other half.\textsuperscript{147} Thus, directors have an obligation to their electoral constituencies that avoids complicated competing fiduciary duties.\textsuperscript{148} However, this sort of major structural change would be difficult in American corporations without some

\begin{itemize}
\item \textsuperscript{138} See generally Blair & Stout, supra note 13.
\item \textsuperscript{139} Id. at 250-53.
\item \textsuperscript{140} Id. at 270-79.
\item \textsuperscript{141} Id.
\item \textsuperscript{142} Testy, supra note 13, at 1238.
\item \textsuperscript{143} Id. at 1248-51.
\item \textsuperscript{144} Mark J. Roe, German Codetermination and German Securities Markets, 5 COLUM. J. EUR. L. 199, 199-200 (1999) (arguing that codetermination has created problems in boardroom dynamics and has negatively impacted securities markets in Germany). \textit{See also} O'Connor, Labor's Role, supra note 13, at 102-03 (arguing that elements of codetermination provide a helpful contrast for analyzing corporate governance in the United States); Dieter Sadowski et al., \textit{Employees and Corporate Governance: Germany: The German Model of Corporate and Labor Governance}, 22 COMP. LAB. L. & POL'Y J. 33, 36-40 (2000) (explaining the legal framework of the German codetermination system).
\item \textsuperscript{145} Sadowski et al., supra note 144, at 37.
\item \textsuperscript{146} Id.
\item \textsuperscript{147} Id.
\item \textsuperscript{148} Franck Chantayan, \textit{An Examination of American and German Corporate Law Norms}, 16 ST. JOHN'S J. LEGAL COMMENT. 431, 444-45 (2002).
\end{itemize}
compensation for existing shareholders who would sacrifice a percentage of control.

In addition, large Japanese corporations use what Marleen O’Connor refers to as a Neutral Referee Model, in which corporate boards consider the competing interests of shareholders and employees. Long-term stability and profitability may require that employee interests trump short-term wealth maximization gains. The challenge of adopting such a system in the United States would be to define a clear test for balancing these interests.

China is also an interesting example. Large Chinese corporations have been growing so fast that there is tremendous demand for shares. Limits on foreign ownership have magnified this phenomenon. As a practical matter, shareholders in Chinese corporations have few mechanisms for holding management accountable for maximizing returns. Managers tend to be beholden to government interests, which value factors such as the needs of local industry, export volume, and full employment. As the Chinese economy continues to expand, its model for governance is likely to play a more significant role internationally.

So, both theory and competing practice provide potential alternatives to shareholder exclusivity, especially with regard to concern for employee interests. This is reinforced by research indicating that permissive stakeholder statutes in


150. O’Connor, Labor’s Role, supra note 13, at 108 (“Rather than provide direct representation on the board as under the German system, directors’ fiduciary obligations would be altered so that directors would have the duty to balance the competing considerations of workers and shareholders in an equitable manner.”).

151. See Araki, supra note 149, at 67-68.

152. See Cindy A. Schipani & Junhai Liu, Corporate Governance in China: Then and Now, 2002 COLUM. BUS. L. REV. 1, 66-67 (“[T]he traditional enterprise governance regime is not compatible with the market economy that China is in the midst of developing.”).

153. See id. at 5-6 (noting the state-ownership model was dominant between the 1950s and 1980s, and was “the only legal form available to provide a safeguard for State property”).


155. Schipani & Liu, supra note 152, at 28-30.

Some government agencies still treat SOE-corporatized corporations like traditional SOEs, and control them in traditional ways using excessive administrative power. Such control includes requiring approval of decisions already made by the board of directors, bypassing the general meeting of shareholders, directly appointing directors and executives and interfering with daily operations. For example, a survey in early 1999 reveals that “of the enterprises which are undergoing the reform of establishing a modern enterprise system, officials are still nominated by government departments instead of the board of directors.”

Id. at 29.
the United States may foster less adversarial relationships between management and labor and may contribute to higher corporate returns.\textsuperscript{156}

C. The Enron Jury and Stakeholders

Jury behavior in the Enron trial seems to prove the exclusive shareholder wealth maximization standard a fiction. If judges or juries are inclined to consider, even subconsciously, the scope of harm to innocents, especially employees, in evaluating criminal liability or breaches of fiduciary duty, it would behoove managers and directors to consider the impact of their decisions on all stakeholders within the scope of their legal obligations to shareholders in order to mitigate the possibility of personal liability. There is a growing body of research contending that considering the interests of non-shareholder stakeholders positively contributes to long-term returns and may not ultimately conflict with shareholder interests.\textsuperscript{157} The movement by most states to allow consideration of interests other than short-term wealth maximization gives directors and managers flexibility to address the impact of their decisions on the various factors that make passive capital investment feasible.\textsuperscript{158}

VI. CONCLUSION

A generation ago, corporate managers and directors had comparatively little personal liability.\textsuperscript{159} Senior managers convicted of securities fraud tended to serve light sentences,\textsuperscript{160} and insider boards and authorized self-dealing were more accepted. Before Smith v. Van Gorkom,\textsuperscript{161} director liability for duty of care violations was practically nonexistent.\textsuperscript{162} Responses to the historic business failures at the beginning of the twenty-first century represent a sea change in public tolerance for unfettered corporate managers whose actions generate


\textsuperscript{158} For an interesting discussion of corporate constituency statutes, see Brett H. McDonnell, Corporate Governance and the Sarbanes-Oxley Act, Corporate Constituency Statutes and Employee Governance, 30 WM. MITCHELL L. REV. 1227, 1228 (2004) ("I ultimately conclude that while there are some decent arguments for constituency statutes, and they are not as harmful as many of their opponents feared, they are, all in all, not a good idea. They are a poor substitute for direct employee involvement in corporate governance.").

\textsuperscript{159} See Kroger, supra note 7, at 110-11.

\textsuperscript{160} Id.

\textsuperscript{161} 488 A.2d 858 (Del. 1985).

massive social costs. The convictions of senior officers and directors at Tyco, Worldcom, Healthsouth,\textsuperscript{163} and now Enron reflect this shift. Advocates of stakeholder theory and corporate social responsibility are now taken more seriously in boardrooms and legislatures.\textsuperscript{164} No single alternative view has garnered sufficient momentum to challenge the presumption of shareholder exclusivity directly, particularly in important jurisdictions like Delaware.\textsuperscript{165} However, as managers and directors observe that failure to consider the interests of employees, pension plan participants, and local communities may increase the likelihood of their liability for bad behavior, the newest proponents of stakeholder theory and corporate social responsibility may come from surprising places—CEO suites and corporate boardrooms.

The denouement of the Enron drama continues to play out. The convictions of Lay and Skilling, like the death of Heracles in the Trachiniae, are both tragic and anticipated. Like great classical tragedy, hopefully the Enron trial will prompt a reevaluation of law and ethics that will make future scandals less likely.

\textit{Now out of joint, a thing of shreds I lie}  
\textit{Baffled by hands invisible, I who claim}  
\textit{A mother of the noblest, and for sire}  
\textit{The ruler of the starry heavens, Zeus.}


[A]n overwhelming majority of the respondents acknowledged a wider role for corporations than just maximizing investor returns, though this finding is remarkable in itself. More striking still is the way participants in our online poll saw environmental concerns, the offshoring debate, data protection, and other sensitive matters as potential threats to the creation of value and frankly conceded that their companies handled these issues poorly.

\textit{Id.} See also Bob Felton, PowerPoint Presentation for the Third Annual Directors Training Academy at Seattle University School of Law: Directors Call for an Increasingly Active Role in Value-Added Governance (June 10, 2005) (on file with author) (summarizing the importance of addressing issues other than short term performance goals). But cf. Milton Friedman, \textit{Social Responsibility: 'Fundamentally Subversive'?}, BUS. WK. ONLINE, Aug. 15, 2005, http://www.businessweek.com/magazine/content/05_33/b3947115_mz017.htm.

[T]he secret to successful companies is it [sic] gets its workers to be productive. How does a company pay its workers? It has cash payments. But it has all sorts of add-ons like medical care.

Is it doing that for social responsibility? No, of course not. But because the government treats medical care as tax-exempt when it is provided by the employer, it is in the self interest of the company and the employee to have the employer provide it. That’s not a social responsibility. That’s simply providing something the employees like that makes the job more attractive to them.

\textit{Id.}

\textsuperscript{165} Testy, \textit{supra} note 13, at 1231.
"But of one thing be sure, though I am naught
And cannot stir a step, yet even thus
I am a match for her who wrought my woe
Let her but come that she may learn of me
This lesson to repeat to all, that I
Living and dying chastened all that's vile.

(Heracles uses his own just punishment as a warning for others to avoid his error.)\textsuperscript{166}

\begin{footnotesize}
\begin{enumerate}
\item \cite{sophoclesnote} supra \textsuperscript{1} note 1, at 345.
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APPENDIX

This chart indicates the number of public statements on topics related to this article made by jurors within two months after the Enron trial. Juror names are indicated in the first column. General topics are indicated in the first row.

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