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THE UNOWNED CORPORATION

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A RESPONSE TO Hasko von Kriegstein (2020), "Shareholder Ownership is Irrelevant for Shareholder Primacy", ***Bus Ethics J Rev*** 8(4): 20–26,
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ABSTRACT

In this Response to Hasko von Kriegstein, I defend several claims, including that the publicly-traded corporation and its assets are unowned; that managers may stand in fiduciary relations to shareholders that do not require managers to maximize shareholder wealth; and that the rights of a shareholder and of the owner of a privately-held corporation may differ fundamentally.

A WHILE BACK I argued that because both a publicly-traded corporation and its assets are unowned, managers have some discretion to use these assets for altruistic purposes (Strudler 2017). Hasko von Kriegstein (2020) rejects my arguments. Here I explain why I think he is mistaken to do so. Because of space limits, I will limit myself to clarifying my thesis and rebutting von Kriegstein.

1

Before addressing von Kriegstein's concerns, I would like to clarify an element in my argument that I think he gets wrong. The clarification is worth making now because it has relevance throughout von Kriegstein's discussion. He says that I am committed to the conditional that "if shareholders own the firm, shareholder primacy is

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vindicated." I nowhere embrace that conditional.[2] I instead characterize it as the standard view and try to show that even if we concede the standard view, shareholder primacy is not vindicated.

2

Much of my paper is a defense of the premise that both the corporation and its assets are unowned. von Kriegstein dismisses most of that defense, calling it a red herring. Why the dismissal? Even though I deny shareholders own the firm, I acknowledge that by virtue of shareholder investments in the firm, managers owe shareholders a fiduciary duty. Here I trap myself, von Kriegstein thinks. A fiduciary must maximize satisfaction of his principal's interests, he supposes. Hence even if the shareholders do not own the firm, managers must maximize satisfaction of their interests, which requires maximizing shareholder wealth. And so I defeat my own claim that managers have discretion to use corporate wealth for altruistic purposes.

Although von Kriegstein correctly says that I maintain that managers owe fiduciary obligations to shareholders, he offers no good reason to suppose that my doing so undermines my claim that managers need not maximize shareholder wealth. He does offer a bad reason: that because I accept Deborah Demott's (1988) contention that a fiduciary must act in the best interest of her client, I am saddled with the conclusion that a manager must maximize shareholder wealth. Acting in a person's best interest is not equivalent to maximizing satisfaction of those interests. Indeed, no fiduciary is obligated to maximize the satisfaction of her principal's interests. An example establishes my point. You are a lawyer and therefore have fiduciary obligations to your criminal defendant client, Jeff. You must avoid conflicts of interest and zealously advocate his case. So you must act in Jeff's interests. But you need not, either morally or legally, maximize satisfaction of Jeff's interests. Thus suppose that the more

[2] I can see why one might think that I embrace the conditional. The thought may even be suggested in the sentence that begins this paper. I say "because both a corporation and its assets are unowned, managers have some discretion to use these assets for altruistic purposes." The phrase may seem to suggest that it is only because a corporation is unowned that managers have the relevant discretion. But I mean to contend instead that the (true) premise that a corporation is unowned entails that managers have some discretion to use corporate assets for altruistic purpose. That contention of course is consistent with the idea that there are other reasons that managers have discretion to use corporate assets for altruistic purposes.

waking hours you spend on Jeff's case, the greater the likelihood that he will be acquitted at trial. But you want to take on some pro bono work beyond representing Jeff. If you take on that work, you will still provide excellent representation for Jeff, you will still act in his interests as you zealously defend him, even though you could do more for Jeff if you did not take on the pro bono work. It would be both morally and legally acceptable for you to take on the pro bono task, I maintain. As fiduciaries, managers must do an excellent job for their principals, just as lawyers must do an excellent job for their clients. But neither managers nor lawyers need maximize anything. In saying this, I accord with mainstream law, which requires managers to "enhance" but not maximize shareholder wealth. (American Law Institute 2004). More generally, maximization is overrated (Slote 1989).

3

von Kriegstein has other objections. He maintains that I make mistaken criticism of work by Margaret Blair and Lynn Stout. Blair and Stout (1999) famously argue that shareholders do not own the corporation. I agree with them on that point, though I find their argument for it inconclusive. They argue that because shareholders do not control the firm, they do not own it. For several reasons, I argue, the concept of control is too murky to support their conclusion. von Kriegstein does not review the reasons that I find the concept of control murky, but instead focuses on one alleged weakness in my account. In arguing against Blair and Stout, I incorrectly assume that they are treating control as a sufficient condition for corporate ownership, when instead their interest is in showing that control is a necessary condition for corporate ownership, according to von Kriegstein. Further, he maintains, I fail to show that control is not a necessary condition for ownership. I do not believe that I make the interpretive mistake von Kriegstein alleges. But an interpretive excursion into the relevant texts would be needlessly distracting. So I will address the substantive issue, arguing that it seems doubtful that control is a necessary condition for ownership. Consider this case, which I borrow from my earlier paper. I have a fee simple title to some land. I lease it to you for fifty years. I still own it but do not control it. So control is not necessary condition for ownership. von Kriegstein has no relevant complaint against my doubts regarding Blair and Stout.

von Kriegstein suggests that I take an incoherent position, maintaining that "a fiduciary I entrust with managing my firm [is] required to deliver maximal returns, while a fiduciary I entrust with managing my shares in a firm is merely required to deliver reasonable returns." But I never claim that a fiduciary I entrust with managing my firm is required to deliver maximal returns. Why does von Kriegstein suggest otherwise? He is convinced that I am committed to the conditional I identified at the beginning of this paper: "if shareholders own the firm, shareholder primacy is vindicated." As I remark earlier, I reject that conditional. My own view is that even if ownership of a firm entitles one to wealth maximization, ownership of shares does not. That view implies nothing about whether managers should maximize anything. von Kriegstein, however, seems to believe that if the sole owner of a firm has the right to maximal profits, then shareholders of the firm do, too. I see no reason to think that that conditional is correct.

To answer the charge of incoherence, l will concede, arguendo, that the sole owner of a firm has the right to maximize his firm's profits, even if that involves requiring the manager of his firm to do so on his behalf. Now consider, Reggie, the sole owner of the Acme Corporation. Suppose that Reggie makes a deal with a law firm to take Acme public. When the deal is done, he receives cash and be-comes a minority shareholder in the firm. I maintain that even if Reggie had the right to maximized profits when he was the sole owner of the firm, he has no right to insist that management maximize his profits when he is a mere shareholder. This contrast bothers von Kriegstein. Why should the transition from sole owner to shareholder involve giving up the right to insist on profit maximization? My answer is that the sole owner of the corporation and the shareholder own fundamentally different things. Let me make the point with an extravagant example. Suppose that when Reggie was sole owner of a firm, he traded his ownership for a fleet of exotic cars. Plainly his ownership of the fleet of exotics cars would give him no right to insist that the firm maximize profits. Even if sole ownership give you the right to profit maximization, what you trade for sole ownership need not. Now imagine that instead of trading for the cars, Reggie traded for corporate bonds. These bonds give him a right to a return realized in interest payments, but no say in how the corporation is run. So Reggie, as a mere bondholder, has no right that the firm maximize profits. My position is that stocks here function like bonds. They give you a right to expect a certain return, sometimes a right to vote on select corporate issues, but a right to nothing materially more. How one figures the return differs for stocks and bonds; in the latter case, it is fixed interest but in the former it is dividends and a reasonable share of the profits as expressed by changes in stock valuation. It follows that there is no conceptual tension between (1) the proposition that the sole owner of a firm has the right to see profits maximized and (2) the proposition that when the sole owner trades his ownership for mere stocks, he no longer has a right to see profits maximized. If you own something and then sell it, what you get in exchange need not have the same properties as does the thing you originally owned. von Kriegstein worries excessively about the tension between thinking that a sole owner has a right to profit maximization and thinking that a shareholder does not.

von Kriegstein may want more. He may want me to prove the truth of (2), not merely to establish that there is no tension between (1) and (2). I am unsure what could count as a proof of either (2) or its denial. But I believe that the discussion above offers more than an argument that there is no tension between (1) and (2). It also suggests an argument from analogy. Bondholders do not own the firm. Instead they have a right to a specific return on investment. Shareholders do not seem significantly different. They get a right to a return on investment, though it is figured differently than the bondholder's right, and may be coupled with a few other rights. Bondholders and shareholders seem sufficiently similar so that it makes sense to say that neither owns the firm.

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