

# LESSONS FROM A PROPHET ON VOCATIONAL IDENTITY: PROFIT OR PHILANTHROPY?

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## I. INTRODUCTION

After sifting through state statutes that codify corporate behavior and the decisions interpreting those statutes, corporate attorneys may serve their clients *and* improve our society if they also consulted the teachings of a Baptist preacher. The Baptist preacher to whom I refer is Dr. Martin Luther King, Jr., and the lessons for attorneys and law professors concerned with social justice that can be derived from his life and teachings were the focus of the 1998 Southeast/Southwest Law Teachers of Color Conference. The utility of Dr. King's instruction and the value of his model for ethical living are obvious for civil rights attorneys and other jurists closely concerned with constitutional law issues. Less obvious is the significance of Dr. King's exemplar and instruction for corporate lawyers.

The usefulness to corporate lawyers of Dr. King's insights becomes evident after reading the book that served as the fountainhead of discussion at the conference, *Toward a Theology of Radical Involvement: The Theological Legacy of Martin Luther King, Jr.*, written by Dr. Luther K. Ivory. The principles relating to moral and ethical living espoused by Dr. King are especially instructive for those corporate lawyers who believe that it is imperative for corporations to behave in ways that are socially responsible.

Many labels have been invoked to describe the man that Dr.

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King was. Too many have called him a dreamer, suggesting that dreaming of a better world was his most significant undertaking. Others have described Dr. King as "creative theologian," "social strategist," "apostle of nonviolence," "communist," "American loyalist," "militant," and "humanist."<sup>1</sup> There are even some who have described him as a prophet.<sup>2</sup> One of Dr. King's prophecies has great relevance for those who guide and monitor corporate conduct. In describing Dr. King's appraisal of American life, Luther Ivory writes, "[t]he nation had buried its national conscience underneath the capitalistic principle of profit maximization. . . . The bodies of black and poor folk had been commodified and sacrificed for the benefit of others."<sup>3</sup> I consider this mid-twentieth century observation and commentary on American life prophetic because of recent corporate activity that continues to commodify poor people so that shareholders can reap profits.

In this Essay, I focus on the way in which corporate law may shape educational policy in a particular context and potentially preclude the attainment of equal educational opportunity, especially for children who are poor. The factual context upon which I focus is the management of public schools by private, for-profit companies. I call these private companies that undertake the education of children so that their shareholders may profit "Education Companies." The human commodities who are the source of profit for the shareholders of the Education Companies are generally students who are poor.<sup>4</sup>

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1. LUTHER D. IVORY, TOWARD A THEOLOGY OF RADICAL INVOLVEMENT: THE THEOLOGICAL LEGACY OF MARTIN LUTHER KING, JR. 25 (1997).

2. *Id.*

3. *Id.* at 63-64.

4. Before its contract was terminated, one Education Company, Education Alternatives, Inc., managed schools in Hartford, Connecticut. George Judson, *Hartford Hires Group to Run School System*, N.Y. TIMES, Oct. 4, 1994, at B1 [hereinafter Judson, *Hartford Hires*]; George Judson, *In Hartford Schools, Exhaustion Creates Opportunity*, N.Y. TIMES, Oct. 5, 1994, at B8 [hereinafter Judson, *In Hartford*]; Beth Wade, *The Business of Educating. (Public-Private Partnerships)*, AM. CITY & COUNTY, Jan. 1995, at 24. Hartford, Connecticut's largest school district, which serves 24,000 students, is also the state's poorest school district. Judson, *Hartford Hires*, *supra*, at B1. The performance of Hartford students on standardized tests is the lowest in the state, and scores continue to decline. *Id.* Even though the Hartford school district receives more money for each student than many of Connecticut's wealthiest districts, one member of the Hartford school board lamented that "the budget seems to always be shrinking." Wade, *supra*, at 24. Hartford's dropout rate is also higher than the nation's average. William Celis III, *Hartford Seeking a Company to Run Its*

## II. CONFLICTS IN THE EDUCATIONAL COMPANIES' PURPOSES

The assumption by private companies of public duties that are traditionally performed by government actors is called privatization.<sup>5</sup> In contrast, a more narrow definition of privatization is the outright transfer of public assets to a private company that assumes complete responsibility for the assets.<sup>6</sup> Upon transfer, the private company must answer only to its shareholders.<sup>7</sup> When Education Companies manage public schools, the typical arrangement does not fit within this narrow definition.<sup>8</sup> According to Baltimore Schools' Superintendent Walter Amprey, the undertaking of a school's management by Education Companies "[i]s not privatization."<sup>9</sup> Amprey states, "[w]e are not handing our schools over to the private sector."<sup>10</sup>

One writer described the Education Companies' management of public schools as privatization, but said that the term "public-private partnership" more accurately describes the agreement between the Education Companies and the public authorities that relinquished management.<sup>11</sup> Taxpayers continue to finance the schools, which remain open to the public, and the Education Companies are accountable to the public administrations that were previously responsible for the schools'

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*Public Schools*, N.Y. TIMES, Apr. 19, 1994, at A1.

5. E.S. SAVAS, PRIVATIZATION: THE KEY TO BETTER GOVERNMENT 3 (1987). The definition of privatization may also include the relinquishment of public services traditionally performed by the government to private companies. See Howard C. Gelbutch, *Privatization: The Sale of the Century*, APPRAISAL J., Oct. 1993, at 478. Gelbutch defines privatization as the "full or partial transfer of select government responsibilities to the private sector." *Id.* Further, it can be defined as "the contracting of public services to the private sector." *Id.* Under this definition, assumption of school management by Education Companies may be considered privatization.

6. Chester E. Finn, Jr. & Diane Ravitch, *Magna Charter? A Report Card on School Reform in 1995*, POLY REV., Fall 1995, at 45.

7. *Id.*

8. See *id.*

9. Charles Mahtesian, *The Precarious Politics of Privatizing Schools*, GOVERNING MAG., June 1994, at 46.

10. *Id.*; see also Diane Ravitch & Joseph Viteritti, *A New Vision for City Schools*, PUB. INTEREST, Jan. 1, 1996, at 3 (describing proposals to strengthen and energize public education).

11. Elissa Silverman, *Learning Curve: Failures in School Privatization*, THE NEW REPUBLIC, Jan. 29, 1996, at 10.

management.<sup>12</sup> If dissatisfied with the Education Companies' results, the public authorities that relinquished the schools' management may terminate the contract and once again assume the schools' management.<sup>13</sup> In other words, under the control of the Education Companies, the schools remain public assets, but the private businesses perform the services provided by the schools.

The Education Companies target schools in crisis, often those attended by the poorest students, promising to do a better job than the school board.<sup>14</sup> According to one commentator, "[t]he appeal of private management in education rests on the notion that American schools are failing and that something radical is needed to save them."<sup>15</sup> In 1993, the United States Education Department found that more than two-thirds of the students in the fourth, eighth, and twelfth grades were not competent readers, and that a dismally small percentage of these students was able to understand and solve mathematical problems.<sup>16</sup> Unfortunately, American children perform at levels far below the children of other Western countries, and more students are dropping out of school.<sup>17</sup>

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12. See generally Wade, *supra* note 4, at 24 (discussing the roles of school boards and private companies in "public-private partnerships in education").

13. *Id.* One Hartford school board member pointed out that the school board makes all final decisions and retains the power to cancel the contract. *Id.*

14. See, e.g., Judson, *Hartford Hires*, *supra* note 4, at B1 (documenting EAP's takeover of Hartford, Connecticut's largest and most besieged school district, where nearly two-thirds of the students were on welfare).

15. Peter Applebome, *Class Notes*, N.Y. TIMES, Nov. 2, 1994, at D23.

16. Joan C. Szabo, *New Approaches to Education Reform*, NATION'S BUS., Mar. 1994, at 30.

17. Robert H. Wessel, *Privatization in the United States*, BUS. ECON., Oct. 1995, at 45. In order to help mitigate these increasing problems, parents and school districts have solicited private companies to provide tutoring services for children needing help. Jenny Cardenas, *Commercial Tutoring Filling Learning Gap for Some Pupils*, THE PRESS-ENTERPRISE, Jan. 29, 1996, at B01 (explaining that school districts in several cities have contracted with private companies that provide remedial help in math and reading for students who are not in special education programs); see also Mary Jane Smetanka, *Trying to Make the Grade; Private Companies in Public Education*, STAR TRIB., Mar. 1, 1996, at 1A (explaining that some private organizations only take over certain parts of the learning process, rather than the entire school system). One company offering tutoring services, Sylvan Learning Centers, describes itself as a "fix-it shop for students who have learning gaps." Joel Turner, *Sylvan Vows to Make the Grade*, ROANOKE TIMES & WORLD NEWS, Jan. 30, 1996, at C1.

The problems are especially severe in urban schools.<sup>18</sup> The Education Companies offer to save these schools which are plagued with financial hardship and poor student performance.<sup>19</sup> For example, one Education Company, Education Alternatives, Inc. (EAI), was organized to rescue students from inefficient and ineffective schooling.<sup>20</sup> One commentator noted that "[a]lmost by definition, any district interested in [EAI's] services would be in crisis."<sup>21</sup> School districts looked to the company to "improve the efficiency of day-to-day operations of the schools and ultimately improve student achievement."<sup>22</sup> EAI's founder, John Golle, is an entrepreneur who "became frustrated with the educational system in the United States" as a result of his two sons' negative experiences in public schools, and he is now on a "mission of revamping and revitalizing school districts around the country."<sup>23</sup>

Corporate social responsibility discourse has focused on the extent to which corporate managers should look beyond shareholder interests when making business decisions.<sup>24</sup> So far, the debate has centered around the extent to which directors and officers may consider the interests of nonshareholder constituencies such as suppliers, employees, consumers, and the communities in which the companies do business.<sup>25</sup> Private, for-profit corporations that assume the public function of educating children have a profound impact on society. They are unique, and

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18. See generally Ravitch & Viteritti, *supra* note 10, at 3 ("In city after city, the reports of corruption, disorder, neglect, and low educational achievement are legion. Urban education is in deep trouble . . .").

19. See *Private Management of Public Schools Grows*, BUS./EDUC. INSIDER, Sept. 1994, at 1 (stating that an education researcher and author of a 1994 report from the Program on Reinventing Public Education suggested that Education Companies may provide salvation for the most troubled schools).

20. Judson, *In Hartford*, *supra* note 4, at B8.

21. *Id.*

22. Richard H. Mattoon & William A. Testa, *Midwest Approaches to School Reform*, ECON. PERSP., Jan./Feb. 1995, at 2.

23. Lewis D. Solomon, *The Role of For-Profit Corporations in Revitalizing Public Education: A Legal and Policy Analysis*, 24 U. TOL. L. REV. 883, 892 (1993).

24. See, e.g., Morey W. McDaniel, *Stockholders and Stakeholders*, 21 STETSON L. REV. 121, 121-22 (1991) (arguing in favor of statutes that permit directors to consider nonshareholder interests); David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 203-04 (same).

25. See David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373 (1993).

their societal impact is significant because they engage in businesses where human beings are the source of shareholder profit. These human beings constitute a new corporate constituency that has emerged with the advent of the Education Companies.

When a private corporation assumes the task of public education, to whom should directors owe fiduciary duties? Should the legal obligations of Education Company officers and directors extend to constituencies other than the shareholders and the public agency with whom they contract? Whose interests should enjoy primacy when private corporations execute public tasks? Should shareholder interests be paramount? Or, should the interests of the students be foremost in the minds of corporate directors?

Even though these issues have been well settled as they relate to the typical corporation,<sup>26</sup> it is imperative that these questions be examined when for-profit corporations fulfill certain civic duties. This context is unexplored by commentators who are engaged in the discourse concerning the identification of the precise beneficiaries of the corporate director's consideration and fiduciary obligations, as well as the ranking in importance of the interests of the corporation's various constituencies.<sup>27</sup> The identification of the constituents whose interests should enjoy primacy when directors of Education Companies perform their duties involves considerations that are unlike those that are involved when examining the fiduciary obligations of the directors of typical corporations.<sup>28</sup>

In an article discussing private companies in the education business, Professor Lewis Solomon describes some of the difficulties afflicting public education in this manner: "[T]he local school district, with an exclusive franchise—a virtual monopoly except for limited competition from parochial schools and private, non-profit schools—has little incentive to change. *Nothing exists to put students' interests first.*"<sup>29</sup> Is it possible to protect the

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26. 9 ZOLMAN CAVITCH, BUSINESS ORGANIZATIONS § 108.02(3) (1998).

27. See *id.*

28. See *infra* notes 59-82 and accompanying text.

29. Solomon, *supra* note 23, at 884 (emphasis added). Even the suspected Unabomber, Theodore Kaczynski, has commented on the growing complexities inherent in educating this nation's children. Michael Taylor, *Kaczynski May Have Sought Job at Firm Assailed in Manifesto*, S.F. CHRONICLE, Apr. 25, 1996, at A4 (explaining

students' interests in an adequate education when shareholders enter the picture by investing in private companies that provide education? Under general corporate law principles, directors must place shareholder interests before the interests of any other corporate constituencies.<sup>30</sup> This means that the interests of students who attend schools managed by private corporations may be second to the interests of shareholders who look to corporate managers to maximize corporate profits.<sup>31</sup>

It is likely that sometimes the shareholders' interests in profit maximization converge with the interests of students who attend schools managed by private companies. At these times, the company, and therefore the shareholders, will profit, and the desire of students and parents for improved educational opportunities will be fulfilled. What should happen, however, when shareholder and student interests conflict? When private companies manage public schools, potential clashes between shareholder and student interests are predictable. Should managers of Education Companies spend corporate funds to hire teachers with more experience, or should they use corporate earnings for higher shareholder dividends? Should Education Company managers hire more teachers for each student, or should they save the cost of extra teachers so that shareholder profits will be increased? At what point should these companies stop pouring money into improving the students' education so that more funds are available for shareholders? If one teacher for every twenty-five students is good, would not one teacher for every twenty students be better? Should the company settle for one teacher for every twenty-five or thirty students in order to save money so that it will eventually yield a greater profit for shareholders?

The Education Companies' managers may be motivated to economize, sometimes at student expense, in order to yield

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that Kaczynski may have applied for a job as a proctor with a private company that offers professional examinations). In his manifesto, which was published in *The Washington Post*, the Unabomber wrote, "[e]ducation is no longer a simple affair of paddling a kid's behind when he doesn't know his lessons and patting him on the head when he does know them." *Id.*

30. See *Newell Co. v. Vermont Am. Corp.*, 725 F. Supp. 351, 371 (N.D. Ill. 1989); *Dodge v. Ford Motor Co.*, 170 N.W. 668, 682 (Mich. 1919).

31. See *Newell*, 725 F. Supp. at 371-72; *Dodge*, 170 N.W. at 681-82.

greater profit for shareholders. This conflict between student and shareholder interests becomes more apparent upon considering the fact that the decision to economize is more than the mere exercise of one of several options available to directors. Economizing to maximize profits, even when it compromises student interests, may be required under corporate law.<sup>32</sup>

In Hartford, Connecticut, where EAI, a private corporation, managed certain public schools, the school board retains all control over final decisions.<sup>33</sup> This observation indicates that Education Company managers are accountable to school boards. This accountability may provide some amount of protection for the students. However, while Education Company managers may be accountable to the school board, they are also accountable to shareholders and are required under corporate law to maximize shareholder profits.<sup>34</sup> Under corporate law, Education Company managers must elevate shareholder interests over the interests of other constituencies, including the students they promise to rescue.<sup>35</sup> As discussed in the next section, Dr. King's model for ethical living may offer some insight for corporate lawyers, officers, and directors who face this conflict of interest.

### III. INSIGHTS FOR CORPORATE ACTORS FROM DR. KING

According to Dr. Ivory, social activists whose moral and ethical approach to social change was based on theological thought focused on the development of individual character and not on the collective societal "character."<sup>36</sup> Ivory notes:

Much attention was given to the moral content of individual life-

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32. *Dodge*, 170 N.W. at 682 (stating that under principles of corporate law, a corporation's managing agents have discretionary power with regard to distribution of profits). Inserting the profit factor into the education business is not all bad. In the private school context, the pursuit of profit has led education managers to do their best to serve student needs. See Thomas Toch et al., *Investment in Learning*, U.S. NEWS & WORLD REP., Dec. 9, 1991, at 77.

33. Judson, *Hartford Hires*, *supra* note 4, at B1; see Wade, *supra* note 4, at 24.

34. See *Dodge*, 170 N.W. at 680 (explaining that a corporation exists for the purpose of maximizing shareholder profit).

35. See *id.*

36. IVORY, *supra* note 1, at 9.

styles and interpersonal relationships. . . . [I]f the salvation of enough individuals could be achieved, the society would derivatively, by association, experience a similar transformation. . . . [S]cant attention was given to an analysis of sin and redemption in powerful corporate structures operating in the culture of the day.<sup>37</sup>

Dr. King, however, focused on collective conduct that is the defining characteristic of corporate activity. Ivory explains that "[t]he proactive nature of King's theology sponsors a variety of resistance efforts designed to activate struggle against institutional arrangements that perpetuate injustice in society."<sup>38</sup>

Dr. King's critique of the nation's capitalistic obsession with wealth maximization is a direct attack on corporate conduct. Merrick Dodd, a Harvard professor who believed that corporations have a social function in addition to an economic function, would have found an ally in Dr. King.<sup>39</sup> In the social responsibility discourse, the debate has been between two fundamentally different camps. Dodd belonged to the camp of communitarians who encourage corporate officers and directors to consider the interests of all groups affected by corporate activity.<sup>40</sup> According to communitarians, in addition to fulfilling expectations of shareholder wealth maximization when making business decisions, corporate officers and directors should consider nonshareholder groups such as employees, consumers and the communities in which the companies do business.<sup>41</sup>

At the opposite end of the spectrum from the views of communitarians are those of contractarians, who look at the corporation as a web of contracts.<sup>42</sup> Part of this contractual web is the common law of the various states that requires shareholder interests be to be paramount when corporate officers and directors make business decisions.<sup>43</sup> For the most part,

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37. *Id.*

38. *Id.* at 17.

39. See generally Merrick Dodd, *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932) (discussing the concept that the corporation has both an economic and social function and the ways in which that idea shapes legal theory).

40. See *id.*

41. See Millon, *supra* note 25, at 1373.

42. *Id.* at 1378-79.

43. *Id.* at 1378.

contractarians see profit maximization as the corporation's sole purpose, with no consideration to be given nonshareholder interests beyond that which is either required under the law or necessary to maximize shareholder wealth.<sup>44</sup> Under the contractarian theory, the various groups affected by corporate activity can bargain or contract with the corporation for protection.<sup>45</sup> The position of contractarians is most memorably articulated in the writings of Professor Adolf Berle who participated in the famous debate with Dodd that unfolded in the pages of the *Harvard Law Review*.<sup>46</sup>

That Dodd would have found an ally in Dr. King is evident upon considering the moral law system to which Dr. King subscribed. One set of laws from this system was communitarian law which related to issues of cooperation, social devotion and, of course, community.<sup>47</sup> Dr. King "viewed life as a dynamic theater of interactive forces" and believed that "[h]uman beings must manage conflicting realities and guide them toward morally positive ends."<sup>48</sup> The "conflicting realities" or "interactive forces" with which corporate managers must deal are the competing constituent groups: shareholders, communities, consumers and employees. The moral code to which Dr. King subscribed would require corporate officers and directors to carefully consider the impact of corporate activity on nonshareholder constituencies, sometimes making decisions for the benefit of such constituencies, even at the expense of shareholder wealth maximization.

Dr. King's wisdom concerning the notion of interdependence among the various groups and individuals that make up our society would enable corporate officers and directors to understand that shareholder wealth/corporate profit is best attained through a communitarian approach that protects *both* shareholder *and* nonshareholder interests. Dr. King felt that "[g]enuine community must concretely reflect, in its institutional

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44. *Id.*

45. *Id.*

46. See generally Adolf Berle, *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365 (1932) (arguing against abandonment of the doctrine that proper corporate purpose is shareholder wealth maximization).

47. IVORY, *supra* note 1, at 51.

48. *Id.* at 56.

structures, the principle of interdependence."<sup>49</sup> Furthermore, "[t]hroughout his life of public service, King never wavered from the maxim he considered to be axiomatic: that 'other-preservation'—the capacity to imagine one's own destiny as inseparably interconnected with that of others—was 'the first law of life.'"<sup>50</sup>

For corporate officers, the lessons of Dr. King's interdependence maxim are obvious and invaluable. Corporate officers and directors must preserve the "other," the nonshareholder constituencies. They must preserve the interests of consumers, or no one will buy the company's products or subscribe to the company's services. Corporate managers must protect the interests of employees, or there will be no one to carry out the work of the corporation which can only act, and thereby profit, through human endeavor. More specifically, the Education Companies' profitability depends on the success of the students they purport to educate. If the Education Companies fail to adequately manage the schools they take over, at best, the companies will lose their contracts with school boards. At worst, the students will suffer lost educational opportunities that can never be replaced.

According to Ivory, Dr. King agreed with the anthropological theory that "groups tend to behave in significantly less moral and just ways than individuals."<sup>51</sup> While this observation certainly supports King's critique of corporate conduct, the focus on *corporate* morality may be one of the reasons that groups behave less ethically than individuals.<sup>52</sup> Unless the focus is on individual conduct, each individual may be able to hide behind the corporate veil, thereby avoiding personal accountability.<sup>53</sup> In other

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49. *Id.* at 59.

50. *Id.* at 67 (endnote omitted).

51. *Id.* at 64.

52. See, e.g., *American Med. Ass'n v. United States*, 130 F.2d 233, 253 (D.C. Cir. 1942) (concluding that the conviction of the corporation did not depend on the guilt of the corporation's agents). *But cf.* Brent Fisse, *Reconstructing Corporate Criminal Law—Deterrence, Retribution, Fault, and Sanctions*, 56 S. CAL. L. REV. 1141, 1149 (1983) ("When people blame corporations . . . they are condemning the fact that people within the organization collectively failed to avoid the offense to which corporate blame attaches.").

53. See *K.C. Roofing Center v. On Top Roofing, Inc.*, 807 S.W.2d 545, 549 (Mo. Ct. App. 1991) (explaining that the corporate veil is pierced when plaintiff shows an individual had complete domination of the corporate entity, that the individual used such control to commit fraud or wrong, and that the wrong caused the injury or

words, it seems that discussions of corporate morality *must* include discussions of individual morality.

Ivory states that "King's perspective may provide helpful insights in efforts aimed at the . . . humanization of economic institutional forces operating in a market culture."<sup>54</sup> But corporations need not be humanized. They are already human in that they are simply a conglomeration of humans who have chosen the corporate form as a way to do business. Because corporate conduct is simply collective human conduct, Dr. King's insights must be directed at individual conduct. Therefore, there must be a combined focus on individual behavior and the collective behavior of the individuals who act on the company's behalf. Instead of talking about CORPORATE morality, corporate lawyers must pierce the corporate veil and talk about COLLECTIVE morality—collective in the sense that it requires ethical and moral decision making on the part of all the flesh and blood people who make up the corporation. That is more realistic. It simply does not make sense to talk about corporate morality as though the corporation is truly separate from the people who *are* the corporation.<sup>55</sup>

#### IV. VOCATIONAL IDENTITY: PHILANTHROPY OR PROFIT

According to Ivory, Dr. King struggled with a "crisis of vocational identity."<sup>56</sup> This struggle involved more than choosing an appropriate occupation in medicine, law or religion.<sup>57</sup> The crisis derived from a sense of obligation to lead an exceptional life that

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unjust loss).

54. IVORY, *supra* note 1, at 18.

55. See Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811 (1935). Cohen describes the corporate presence in the following way:

Nobody has ever seen a corporation. What right have we to believe in corporations if we don't believe in angels? To be sure, some of us have seen corporate funds, corporate transactions, etc. (just as some of us have seen angelic deeds, angelic countenances, etc.). But this does not give us the right to hypostatize, to 'thingify,' the corporation . . . .

*Id.*

56. IVORY, *supra* note 1, at 38.

57. *Id.*

fulfilled a desire to play an important part "in the drama of human history."<sup>58</sup> The directors and managers of Education Companies have similarly assumed a significant role in the drama of human history. They have chosen to engage in a business in which the most momentous of human dramas unfolds: the education of the young. How should they carry out their chosen vocation? Should personal profit or the profit of shareholders be their paramount objective? Or should the type of business in which the Education Companies engage require their officers and directors to look beyond personal profit, or shareholder profit?

Dr. King's vocational dilemma required him to search for a way of life and work that would enable him "to look outward toward the needs of others rather than solely or even primarily at one's personal needs, objectives, and desires."<sup>59</sup> Individuals such as Dr. King, who have assumed special roles in society have had to make personal sacrifices for the benefit of others. Corporations, or more accurately, the individuals who have chosen the corporate form as a way to do business, that have assumed special roles in society such as educating the young must also work for the benefit of others, specifically, their students. Dr. King sacrificed his personal safety and assumed huge demands on his time, and the corporate analogue to such sacrifice would be smaller corporate profits and shareholder wealth.

There should be a heightened corporate social responsibility when corporations choose to play a significant role in the human drama. The company that educates children performs a service that is essential to the child and society in general.<sup>60</sup> The requirement under corporate law of shareholder wealth maximization is inappropriate when businesses insert themselves into the lives of students who depend on the business to provide the education that will enable them to survive in the future.

The Education Companies are in the rescue business. EAI's founder, John Golle, has emphasized the role that his company plays as a rescuer.<sup>61</sup> One reporter summed up this rescue-ori-

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58. *Id.*

59. *Id.*

60. Toch, *supra* note 32, at 76 (observing that some assert "that education . . . serves important public purposes: in particular, forging common bonds among one of the world's most pluralistic peoples").

61. Amy Virshup, *Schools and Capitalism* 101, THE WASH. POST MAG., Apr. 7,

ented philosophy by stating that "Golle preaches that privatization can rescue troubled urban schools" and that he "truly believes in his self-proclaimed duty to save the children of America."<sup>62</sup> Others perceive EAI as a rescuer also. For example, an analyst at Lehman Brothers referred to EAI as a "pioneer," concluding that EAI's work is crucial.<sup>63</sup>

EAI looks for the schools that are most plagued with problems and promises to improve the students' performances while spending less money than previous plans.<sup>64</sup> Indeed, EAI has rescued students from severely dilapidated school buildings. The description of one school at the time it was taken over by EAI is haunting: "graffiti covered the halls, crack vials littered the grounds, students did not have enough textbooks and, because the toilets did not work, the children sometimes defecated or urinated in stairwells."<sup>65</sup> Golle, EAI's founder, promised to transform such troubled public schools into "community sanctuaries."<sup>66</sup> He described himself as a missionary, and EAI's work as a "mission . . . to improve the education of children in America, one child at a time."<sup>67</sup>

Since EAI has come to the rescue of students who attend inadequate schools, the question arises as to whether corporate law should impute some legal obligation on EAI's directors to

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1996, at 11.

62. *Id.* at 11, 14.

63. *Id.*; see also Bruce Shapiro, *Privateers Flunk School Privatization of Schools*, THE NATION, Feb. 19, 1996, at 4. (stating that Golle was treated as a "savior" of troubled schools, but calling him the "repo man" because of his attempt to repossess computers EAI had placed in one of the schools it managed).

64. George Judson, *Bad Times for Education Company Force a Shift in Vision*, N.Y. TIMES, Dec. 7, 1995, at B1; see also Judson, *In Hartford*, *supra* note 4, at B8; Editorial, *School Privatizers in Retreat*, N.Y. TIMES, Feb. 12, 1996, at A14; William Celis, III, *Hopeful Start for Profit-Making Schools*, N.Y. TIMES, Oct. 6, 1993, at A1 ("We think we have one of the solutions to turning around public schools.").

65. Celis, *supra* note 64, at A1. In Hartford, where EAI took over the management of the entire city school district, a teacher, prior to the take-over, complained that there was no copying machine in the school and no construction paper or globe for her geography class. Nancy Gibbs, *Schools For Profit*, TIME, Oct. 17, 1994, at 48. EAI also managed several severely troubled schools in Baltimore where there had been a fifty percent dropout rate. Mark Goldberg, *An Interview with Mayor Kurt Schmoke: Education in Baltimore*, PHI DELTA KAPPAN, Nov. 1995, at 234; Silverman, *supra* note 11, at 10.

66. Virshup, *supra* note 61, at 11.

67. *Id.*

the students to exercise due care when managing schools. Under traditional corporate law analysis, directors owe fiduciary duties only to the corporation and its shareholders.<sup>68</sup> Corporate law is silent on the issue of obligations owed by directors of private companies that deal in human capital. There are, however, tort law principles of duty and obligation that apply to individuals as rescuers that may provide some helpful insights when corporations attempt rescue. For example, under tort law, there is no duty to take affirmative steps to assist or protect another.<sup>69</sup> If, however, an individual undertakes the rescue of another by taking "charge and control of the situation," a duty is born.<sup>70</sup> Once performance has begun the rescuer owes the object of her rescue attempt a duty "to use reasonable care for the protection of" that person's interests.<sup>71</sup>

Commentators have frequently made comparisons between corporations and individuals.<sup>72</sup> The privileges and duties of in-

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68. The duties presently owed by a director are illustrated by *Metropolitan Life Insurance Co. v. RJR Nabisco*, 716 F. Supp. 1504 (S.D.N.Y. 1989). The fiduciary duty of RJR Nabisco's directors was found not to extend beyond shareholders to bondholders. *Metropolitan Life*, 716 F. Supp. at 1524-25. The director's obligations to the bondholders, just like EAI's obligations to teachers and students, exist only within the scope of the contract with the corporation. See *id.* The question that I am posing is whether it extends to obligations for which the contract does not provide, such as those duties owing from directors to shareholders.

69. See RESTATEMENT (SECOND) OF TORTS § 314 (1965); PROSSER & KEETON ON TORTS § 56 (1984). There are, of course, exceptions and qualifications to the basic rule that individuals owe no duty of care for nonfeasance. Actors owe a duty to assist when they "know[] or [have] reason to know" that they have harmed another, even if the harm did not result from tortious conduct. *South v. National R.R. Passenger Corp.*, 290 N.W.2d 819, 837 (N.D. 1980); *Maldonado v. Southern Pac. Transp. Co.*, 629 P.2d 1001, 1003-04 (Ariz. Ct. App. 1981). There is also a duty to take affirmative steps to assist or protect another when there is a special relationship between the would-be rescuer and the person needing rescue. See, e.g., *Tarasoff v. Regents of Univ. of Calif.*, 551 P.2d 334, 347 (Cal. 1976) (relationship between a psychotherapist and patient); RESTATEMENT (SECOND) OF TORTS § 314A (1965) (custodial relationship); *id.* § 314B (relationship between employer and employee).

70. *Farwell v. Keaton*, 240 N.W.2d. 217, 220 (Mich. 1976) (quoting PROSSER ON TORTS § 56 (1971)).

71. *Id.*

72. See, e.g., Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation: An Inquiry into the Causes of Corporate Immorality*, 73 TEX. L. REV. 477 (1995) (applying principles of psychology to the corporate enterprise); Jeffrey Nesteruk, *Corporations, Shareholders, and Moral Choice: A New Perspective on Corporate Social Responsibility*, 58 U. CIN. L. REV. 451 (1989) (analyzing the impact of an individual investor's morality on corporate social responsibility).

dividuals have, by analogy, been granted and imposed upon corporations.<sup>73</sup> Similarly, consider the application of tort law principles that apply to individuals as rescuers to corporations such as EAI that attempt rescue.<sup>74</sup> When it enters into a contract to manage schools, a company like EAI "takes charge and control" of the students' education.<sup>75</sup> When a corporation attempts to rescue students, the interests of the students may best be served by borrowing from these tort law principles and requiring that EAI's rescue be carried out with due care.<sup>76</sup>

Think about some of the reasons for imposing a duty of care upon a rescuer under tort law. The person rescued is in a vulnerable position. The rescuer may not make matters worse. In other words, if a person undertakes a rescue attempt, he or she may not do so negligently. However, there is no legal duty imposed on Education Companies to ensure that matters are not worsened when they come to the rescue of students.

Corporate attorneys who advise the officers and directors of the Education Companies may offer Dr. King's example and the example of other individuals who engage in similar rescue-based occupations. For instance, firefighters and police officers who rescue others from harm in order to earn a living are motivated, in part, by personal profit. They expect to receive a salary. Their conduct, however, is expected to manifest ideals that extend beyond the attainment of profit. Nonetheless, police officers and firefighters are not expected to place the safety of others before

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73. See Jeffrey Nesteruk, *Bellotti and the Question of Corporate Moral Agency*, 1988 COLUM. BUS. L. REV. 683, 692 (discussing the application of the First Amendment to corporate speech).

74. See RESTATEMENT (SECOND) OF TORTS §324 (1965).

75. See *Farwell*, 240 N.W.2d at 1220.

76. The RESTATEMENT has a slightly different formulation of duty of care. See RESTATEMENT (SECOND) OF TORTS § 324 (1965). It imposes liability if the rescuer fails to exercise reasonable care to secure the safety of the person, or if the actor discontinues aid, and "by so doing he leaves the [person] in a worse position than when the actor took charge of him." *Id.* Applying this formulation to the dilemma facing the EAI directors described in footnote 63, *supra*, if EAI were to remove the computers in the middle of the school year, the students would not be placed in a worse position than they were in before EAI's intervention. They did not have computers before, and they do not have them now; their position is the same. Assume, instead, that EAI provided new textbooks to replace outdated textbooks. Since EAI's intervention, the outdated textbooks have been discarded. If EAI were to remove the new textbooks because the government failed to pay for them, the students would be left without books. This, in fact, would leave the students in a worse position.

their *personal profit* (unless they are volunteers). However, because they are in the "rescue business," these professionals are expected to put the interests of those they rescue before their own interests in *personal safety*.

Similarly, the priorities of a corporation that chooses the "rescue business" may warrant reconfiguration. The students' interests should not be lost in the pursuit of corporate profit. The comparison between corporations and individuals who serve public interests is a comparison between the priority of shareholder interests and the interests of nonshareholder constituencies on one hand, and the officer's personal safety and the interests of the public she serves on the other. If we require certain individuals to risk personal safety in the public's interest, we should also expect corporations to go beyond the traditional paradigm of shareholder primacy and profit maximization when they engage in businesses that deal with the public interest, such as education.

Education Company supporters have responded to such criticism by arguing that reaping profits from the business of education is not new. For many years, businesses have profited from contracts with school districts to provide schools with goods and services such as textbooks, classroom materials, transportation and food preparation.<sup>77</sup> However, Education Company critics find the provision of goods and services for profit meaningfully distinguishable from allowing private companies to take over school curriculum and management. They argue that "contracting out the three Rs to firms with little, if any, experience in educating kids is a voyage into uncharted waters."<sup>78</sup>

Furthermore, comparing the Education Companies to the corporate providers of school services and goods may not be as illustrative as comparing Education Company profits to teachers' salaries. "[T]eachers . . . are also paid with tax dollars . . . . Whether called profit or salary, tax money winds up in the pockets of individuals."<sup>79</sup> Even though teachers profit from the education business just as shareholders do, there is a significant

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77. Mahtesian, *supra* note 9, at 46; John O'Leary & Janet R. Beales, *P.S., Inc. (Private Management for Public Schools)*, REASON, June 1994, at 37.

78. Mahtesian, *supra* note 9, at 46.

79. O'Leary & Beales, *supra* note 77, at 42.

qualitative difference in the nature of the teacher's personal gain. There is a conflict that is inherent when the Education Company conducts business. The fact that the Education Company will earn a profit only if it has saved money by educating its students for less serves as an incentive to cut corners in order to yield profits for its shareholders. The less money spent on children, the more profit available for Education Company shareholders.

There is no comparable conflict for teachers. Teachers need not cut corners for personal profit. Their salary, barring extreme circumstances, is guaranteed. It is true, however, that a teacher may cut corners, not to save money, but to expend less personal effort. Teachers have no professional incentives to perform well. They are compensated even if the job they do is inadequate.<sup>80</sup> But an inadequate teacher who cuts corners in terms of job performance may lose the respect of her supervisors and peers. If an Education Company cuts corners in order to increase profits, parents will be displeased, but shareholders will be delighted. When an Education Company cuts corners to maximize profits, it is doing what is expected of it under corporate law, even if it is not doing what is best for the students.<sup>81</sup>

## V. CONCLUSION

Should a corporation's directors ever be encouraged to undertake a course of action that benefits a nonshareholder constituency when there is no benefit to the short-term or long-term interests of shareholders? The traditional answer to this question is a resounding "no."<sup>82</sup> The answer, however, should be

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80. See *id.* ("In a public monopoly, employees . . . can earn money simply by showing up. When teaching excellence occurs, it is the result of personal initiative rather than systemic rewards. Without competition, employees . . . have little incentive to excel, and their pay often rewards seniority rather than achievement.").

81. See *Dodge v. Ford Motor Co.*, 170 N.W. 668, 680 (Mich. 1919) (explaining that a corporation exists for the purpose of maximizing shareholder profit).

82. See *Guft v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939). The court stated:

A public policy, existing through the years, and derived from a profound knowledge of human characteristics and motives, has established a rule that demands of a corporate officer or director, peremptorily and inexorably, the most scrupulous observance of his duty, not only affirmatively to protect the interests of the corporation . . . but also to refrain from doing anything that

different for private corporations that manage public schools. Because of the unique "corporate" relationship between these companies and the students they serve, the paradigm which dictates that shareholder interests are paramount should be reexamined. The conflicting reality of corporate life requires a balancing of shareholder and nonshareholder interests.

Under current corporate law, however, there is an artificial reality of shareholder primacy where the interests of groups affected by corporate activity are always subordinate to the shareholders' interests in profit-maximization. Corporate lawyers must understand that the corporate enterprise is simply a human enterprise. Dr. King's teachings about interdependence illuminate the fact that the shareholder primacy model belies the reality; in order for shareholders to profit, corporate managers *have to* consider the interests of employees, consumers, and the community.

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would work injury to the corporation, or to deprive it of profit or advantage which his skill and ability might properly bring to it . . . .

*Id.*

