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Self-Handicapping and Managers’ Duty of Care

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This Symposium Essay focuses on the relationship between managers' duty of care and *self-handicapping,* or constructing obstacles to performance with the goal of influencing subsequent explanations about outcomes. Conventional explanations for failures of caretaking by managers have focused on motives (greed) and incentives (agency costs). These accounts of manager behavior have led some modern jurists, concerned about recent corporate scandals, to advocate for stronger deterrent measures to realign manager and shareholder incentives.

Self-handicapping theory, by contrast, teaches that bad manager behavior may occur even when incentives are well aligned. Highly successful individuals in particular come to fear the pressure of replicating past success. To avoid the regret associated with the future failure that they anticipate, such individuals then create hurdles (through active or passive self-sabotage) or excuses. When failure comes, individuals hope to shift attention from their personal merits to the handicap. Research shows that self-handicapping "works." Indeed, managers in failing firms who self-handicap may escape with their reputations and compensation burnished.

In this Essay, I summarize an extensive body of research on self-handicapping that surprisingly has not been well explored by corporate law theorists. I then suggest that modern corporate scandals traditionally understood as products of failures of monitoring—like Enron—might be better explained, in part, as a function of self-handicapping by managers. This explanation supports recent efforts to move beyond a purely carrot-and-stick model of corporate governance. Finally, I briefly discuss mechanisms to reduce self-handicapping by corporate officers; in particular, making them self-aware and selecting executives less prone to engage in this type of wasteful activity. The law has a potential role to play in this process, but its proper focus is directors'

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negligence in hiring, not managers' failures in taking business risks.

Authors commonly introduce their works in symposium issues with a few disclaiming words. They identify their scholarship as a "Symposium Essay," not an "Article"; a "sketch" of an answer, not a fully fleshed out argument. Casual readers might conclude that law professors are unusually humble and resist trumpeting the novelty and sophistication of their scholarship.[1]

Social psychologists might instead believe that symposium authors seek to avoid reputational sanctions for publicizing arguments they have not fully worked out.[2] Scholars try to signal an excuse for underdeveloped pieces: "I haven't worked as hard on this paper as I would have if it were a 'real' article." The goal of this excuse making is simple: disappointed readers will attribute blame away from the author's perceived acuity and professional reputation.

This is a Symposium Essay about the psychology of creating such pre-excuses for failure. Rather than focus on academics, I will examine the failings of overconfident corporate managers.[3] My primary goal is to introduce legal readers to a well-known phenomenon from social psychology literature: self-handicapping.[4] I will illustrate this behavioral bias by taking a close look at the fiduciary duty of care applicable to corporate managers under state law.[5] As I will show, the prevalence of self-handicapping

1. *But cf.* David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395 (2006) (providing a general theory of exaggerated sales talk).

2. *See generally* Jon Hanson & David Yosifon, *The Situational Character: A Critical Realist Perspective on the Human Animal*, 93 GEO. L.J. 1, 98–99 (2004) (arguing that people tend to create "situational factors" on which to blame potential failures when they are unsure of success).

3. By "managers" I mean officers—those who run the day-to-day operations of the business. *See* Lyman P.Q. Johnson & David Millon, *Recalling Why Corporate Officers Are Fiduciaries*, 46 WM. & MARY L. REV. 1597, 1621–22 (2005) (explaining the distinctions between managers, officers, and directors).

4. Self-handicapping has rarely been explored in law reviews, with only twenty-two citations to the term in the Westlaw's Journals database (JLR). Most work treats the phenomenon with respect to academic performance. *See, e.g.*, Barbara Glesner Fines, *Competition and the Curve*, 65 UMKC L. REV. 879, 900 (1997) (explaining bad course selection as a self-handicapping mechanism); Denise Riebe, *A Bar Review for Law Schools: Getting Students on Board to Pass Their Bar Exams*, 45 BRANDEIS L.J. 269, 337–38 (2007) (discussing student use of self-handicapping to compensate for expected poor grades). Others have discussed self-handicapping as a more general situational characteristic. *See, e.g.*, Hanson & Yosifon, *supra* note 2, at 98–99. Only one paper, by George Triantis, considers self-handicapping in the corporate context. George G. Triantis, *Debt Financing and Motivation*, 31 U. RICH. L. REV. 1323 (1997). I discuss that paper *infra* at note 56.

5. I pass over the implications of Sarbanes-Oxley, realizing that the Act (a) creates important federal duties for senior managers and (b) exerts gravitational force on state law, pulling it toward a regime of greater manager accountability. *See* Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified as amended in scattered sections of 11, 15, 18, 28, and 29

complicates efforts to properly motivate managers to exercise optimal care.

I begin by summarizing two familiar puzzles facing theorists of the duty of care. In Part I of this Essay, I will explore these puzzles in greater detail.

First, violations of the caretaking duty rarely produce monetary damages against corporate directors or officers.[6] Shareholders possess a right to careful corporate stewards, but defenses like the business judgment rule ("BJR"), exculpation, and indemnification make the right's remedy nearly illusory.[7] Despite this illusory care regime, most directors and officers are careful most of the time.[8] This seeming paradox creates a familiar problem and a flowering of behavioral, legal, and sociological literatures explaining the presence and degree of care in the absence of sanctions.[9]

Second, corporate fiduciary duties, like the duty of care, are almost never conceived of as applying simply to managers (as opposed to directors).[10] So rarely have managers faced liability that it is unclear, at this late date, what substantive standards of care they face, at least under the default rules of Delaware law.[11] Why

U.S.C.).

6. *See infra* notes 24–29 and accompanying text.

7. Over time, the duty of care's toothless maw has disgorged a bestiary of analogies. *See* Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1095 (1967) (noting that liability for care would result in "the proverbial shaving of pigs—much squeal and little wool"); Lynn A. Stout, *On the Proper Motives of Corporate Directors (or, Why You Don't Want to Invite* Homo Economicus *to Join Your Board)*, 28 DEL. J. CORP. L. 1, 7 (2003) (noting that a "director is statistically more likely to be attacked by killer bees than she is to have to ever pay damages for breach of the duty of care").

8. Stout, *supra* note 7, at 8.

9. *See infra* notes 52–56 and accompanying text.

10. Exceptions include Z. Jill Barclift, *Senior Corporate Officers and the Duty of Candor: Do the CEO and CFO Have a Duty to Inform?*, 41 VAL. U. L. REV. 269, 282 (2006) (arguing for an affirmative duty owed by senior officers to directors to inform them of material facts); Lawrence A. Hamermesh & A. Gilchrist Sparks III, *Corporate Officers and the Business Judgment Rule: A Reply to Professor Johnson,* 60 BUS. LAW. 865, 870–75 (2005) (asserting that the BJR applies to officers); Dennis R. Honabach, Smith v. Van Gorkom*: Managerial Liability and Exculpatory Clauses—A Proposal to Fill the Gap of the Missing Officer Protection*, 45 WASHBURN L.J. 307, 324–41 (2006) (proposing the expansion of exculpation for officers); Lyman P.Q. Johnson, *Corporate Officers and the Business Judgment Rule*, 60 BUS. LAW. 439, 440 (2005) (arguing the BJR "does not and should not be extended to corporate officers"); Johnson & Millon, *supra* note 3 (discussing the various fiduciary duties of officers); Cheryl L. Wade, *Corporate Governance Failures and the Managerial Duty of Care*, 76 ST. JOHN'S L. REV. 767, 770 (2002) ("Much has been written about the directorial duty of care, including analyses that distinguish standards applicable to inside and outside directors. Much less has been written about the managerial duty of care.").

11. *See, e.g.*, Johnson & Millon, *supra* note 3, at 1631–35 (noting areas of uncertainty). This uncertainty is less evident outside of the common law arena.

has such uncertainty persisted as a structural component of corporate jurisprudence, which usually values predictable outcomes to litigation?[12] As importantly, assuming that the duty of care applies differently to managers than to directors, will managers take care in response to potential legal sanctions?

Self-handicapping provides a new way of thinking about these long-standing puzzles. It explains the "immunity" stance of the care doctrine: more legal sanctions may perversely increase negligence, not decrease it. It also suggests reasons to believe that managers' reactions to increased liability regimes are likely to be unpredictable, and therefore cautions against drastic changes in the current legal framework. Uncertainty may be more powerful medicine for laziness than clarity.

Self-handicapping behaviors are "impediments to performance that people construct to protect or enhance their perceived competence."[13] Individuals create such hurdles at specific moments: when they have succeeded in the past but do not know precisely how or why, and when they are confronted with a future task with implications for their egos.[14] Under such circumstances, individuals sometimes seek excuses—either claimed or behavioral—that will deflect future attributions of blame (or success) away from themselves.[15]

Corporate jurists should be interested in self-handicapping because the research challenges a dominant assumption that the law can effectively calibrate its deterrent effects on calculating managers and directors.[16] Recent literature has modified this story,

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The Model Business Corporation Act ("MBCA") has standards of manager conduct that are akin to those for directors, as does the American Law Institute ("ALI"). *See* Barclift, *supra* note 10, at 279–80. Similarly, many officers' duties are mandated by their employment contracts. *See* Johnson & Millon, *supra*, at 1635 (noting the variations of duties for different officers).

12. *See* Honabach, *supra* note 10, at 307, 330–32 (noting the costs of uncertainty and suggesting that the uncertainty is a historic artifact of a time where officer lawsuits were rare).

13. Miron Zuckerman & Fen-Fang Tsai, *Costs of Self-Handicapping*, 73 J. PERSONALITY 411, 411 (2005).

14. For a general model of the relationship between ego and individual welfare, see Botond Köszegi, *Ego Utility, Overconfidence, and Task Choice*, 4 J. EUR. ECON. ASS'N 673 (2006).

15. The degree to which self-handicapping occurs obviously depends on the individual: none of the experiments discussed below observed self-handicapping in one hundred percent of subjects who were expected to self-handicap. This problem is common in experimental psychology and cautions against aggressive interventions that might distort the behavior of otherwise rational actors. *See* Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67, 83–119 (2002) (discussing the relationship between heterogeneous populations of experimental subjects and paternalism in behavioral law and economics).

16. *See, e.g.*, Michael Kent Block et al., *The Deterrent Effect of Antitrust*

focusing on a culture of integrity,[17] or the pressures of a corporate system *in extremis*,[18] but the basic story of caretaking (as opposed to loyalty) has remained the same: lazy managers are either insufficiently motivated or scared.[19] In Part II of this Essay, I will describe contrary self-handicapping explanations for negligence, focusing on several benchmark studies of interest.

In Part III, I will connect these two literatures and suggest ways that self-handicapping helps to explain the current stance of Delaware courts toward managers' duty of care. I suggest that a psychologically realistic model of how executive negligence arises would be skeptical of a strong liability regime. Finally, to the extent that law cannot fully deter misbehavior, I detail how corporations and jurists might work to ameliorate self-handicapping by managers.

I. MANAGERS' DUTY OF CARE

As the organizers of this symposium have recognized, the duties of corporate managers have been long eclipsed in the law reviews and courts by those of their director overseers.[20] The law's curious

Enforcement, 89 J. POL. ECON. 429, 438–39 (1981) (finding that enforcement by the Department of Justice reduced price-fixing in the bread industry); John Braithwaite & Gilbert Geis, *On Theory and Action for Corporate Crime Control*, 28 CRIME & DELINQ. 292, 302 (1982) (arguing that "[c]orporate crimes are almost never crimes of passion; they are not spontaneous or emotional, but calculated risks taken by rational actors."); Raymond Paternoster & Sally Simpson, *Sanction Threats and Appeals to Morality: Testing a Rational Choice Model of Corporate Crime*, 30 LAW & SOC'Y REV. 549, 571 (1996) (concluding that respondents were less likely to express an intention to act criminally if they perceived a punishment aimed at them); Sally S. Simpson & Christopher S. Koper, *Deterring Corporate Crime*, 30 CRIMINOLOGY 347, 360 n.23 (1992) (finding that firms convicted of antitrust violations reduced their future misconduct); Edward A. Snyder, *The Effect of Higher Criminal Penalties on Antitrust Enforcement*, 33 J.L. & ECON. 439, 449–50 (1990) (finding that the number of price-fixing cases fell following the elevation of sanction level).

17. Paternoster & Simpson, *supra* note 16, at 568. *But see* John Braithwaite & Toni Makkai, *Testing an Expected Utility Model of Corporate Deterrence*, 25 LAW & SOC'Y REV. 7, 32 (1991) (finding that nursing home directors' moral beliefs in following standards did not significantly deter them from noncompliance). *See generally* Michael C. Jensen, *Putting Integrity into Finance Theory and Practice: A Positive Approach* (Harvard NOM, Working Paper No. 06-06, 2006, Revised June 2007), *available at* http://ssrn.com/abstract=876312 (discussing integrity in the corporate context).

18. Paternoster & Simpson, *supra* note 16, at 568–69; Sally S. Simpson, *The Decomposition of Antitrust: Testing a Multi-Level, Longitudinal Model of Profit-Squeeze*, 51 AM. SOC. REV. 859, 867–68 (1986).

19. *See* Pasternoster & Simpson, *supra* note 16.

20. *See supra* note 10 and accompanying text. The director literature is itself rich, with varied views on how best to control director misconduct in light of psychological insights. *See, e.g.*, Renee M. Jones, *Law, Norms, and the Breakdown of the Board: Promoting Accountability in Corporate Governance*, 92 IOWA L. REV. 105, 152–57 (2006) (suggesting a personal liability regime for

stance toward director liability—a strong fiduciary regime in theory, but an absence of real liability on the ground—has been fodder for arguments about the proper master of the board:[21] the market or the courts.[22] The rationales for focusing on the duties of directors are many, but reduce to control: directors retain the ultimate "legal trump card" to fire managers; therefore, the law should monitor directors, not their servants.[23]

This exclusive focus on directors' incentives is costly.[24] A suspicion of money damages for breaches of fiduciary duties arises (at least historically) from a worry about chilling entrepreneurship. As Chancellor Allen justified the BJR:

> [Directors] enjoy (as residual owners) only a very small proportion of any "upside" gains earned by the corporation on risky investment projects. If . . . [they] were to be found liable for a corporate loss from a risky project . . . their liability would be joint and several . . . . Given the scale of operation of modern public corporations, this stupefying disjunction between risk and reward for corporate directors threatens undesirable effects. [O]nly a very small probability of director liability based on "negligence", "inattention", "waste", etc., could induce a board to avoid authorizing risky investment projects to any extent![25]

This view that directors reap insufficient gains from corporate operations to justify the losses of litigation based on negligent stewardship is possibly obsolete.[26] But even so, the financial incentives of directors are quite different from those of managers: the deficient-rewards theory seems particularly inapt when applied

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directors calibrated to their net worth).

21. A related question, of course, is whether the board or the shareholders are properly the master of the corporation. For a heterodox view, see Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 563–74 (2003).

22. Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law,* 2002 COLUM. BUS. L. REV. 71, 94–104, 118 (noting that the stringent monitoring regimes imposed by law may reduce intercorporate trust and values, and recommending against putting too much weight on a compliance system in evaluating legal wrongdoing).

23. Stephen M. Bainbridge, *The Business Judgment Rule as Abstention Doctrine*, 57 VAND. L. REV. 83, 105 (2004). Johnson and Millon challenge the legal control model as descriptively inaccurate: officers usually have power over directors by virtue of their knowledge, tenure, and the CEO's position as Chairman of the Board. Johnson & Millon, *supra* note 3, at 1617–20.

24. *See generally* Johnson & Millon, *supra* note 3, at 1605–27 (discussing corporate officer roles).

25. Gagliardi v. Trifoods Int'l, Inc., 683 A.2d 1049, 1052 (Del. Ch. 1996).

26. Richard H. Wagner & Catherine G. Wagner, *Recent Developments in Executive, Director, and Employee Stock Compensation Plans: New Concerns for Corporate Directors*, 3 STAN. J.L. BUS. & FIN. 5, 8–9 (1997) (describing the increasing practice of giving directors stock awards or stock options as part of their compensation packages).

to managers who take large amounts of stock in the corporation as a form of compensation.[27] For such individuals, the rewards for business risk taking are potentially quite rich, and the potential losses in litigation remote and hard to foresee. To the extent that managers are protected by the BJR and exculpation—and it is unclear if they are—jurists must search for new rationales.[28] Nevertheless, corporate scholars routinely lump together the duties of managers and directors without further analysis.[29]

There is a new and developing series of papers that do consider the duties and motivations of managers standing alone. Oddly, most scholars in this managerial project concern themselves almost exclusively on the duty of loyalty.[30] However, because this literature also sheds light on managers' duty of care, I will briefly take a diversion to explain its main findings and conclusions.

The rational choice model explains disloyalty as an agency cost: managers lack incentives and sanctions that align their incentives with the shareholders.[31] Loyalty is a more serious problem than care, in this view, because it retards full disclosure and resulting market discipline. Thus, the law punishes disloyalty by managers severely, denying such conduct the protection of the business judgment rule or exculpation.[32]

By contrast, a recent strand of literature suggests that

27. *See* Bainbridge, *supra* note 23, at 117 (noting that outside directors are sometimes required to buy stock to help align incentives); Johnson, *supra* note 10, at 458–59 (arguing that stock makes up a large portion of officer compensation). *But see* Honabach, *supra* note 10, at 333–34 (arguing that the expected liability costs of modern corporate litigations would be beyond the means of most managers).

28. *See* Hamermesh & Sparks, *supra* note 10, at 874–75 (arguing that liability for managers would result in passing hard decisions to the board); Honabach, *supra* note 10, at 324–41 (noting that only seven states provide exculpation for managers, and suggesting several grounds for expanding manager immunity, including diversification).

29. *See, e.g.*, ROBERT CLARK, CORPORATE LAW § 3.4 (1986) (describing the duty of care as applying to "directors and officers," but focusing discussion on the motives of directors); JAMES D. COX & THOMAS LEE HAZEN, CORPORATIONS 800 (2d ed. 2003) (stating in the index: "Officers and Agents, fiduciary duties of. *See* Directors"); J. Gordon Christy, *Corporate Mismanagement as Malpractice: A Critical Reanalysis of Corporate Managers' Duties of Care and Loyalty*, 21 HOUS. L. REV. 105, 105 n.1. (1984) ("As used herein, the terms 'managers' and 'management' refer to inside directors and senior executive officers who dictate corporate policy.").

30. Why this should be is itself puzzling. Negligence, not disloyalty, would seem to be the more common agency cost created by managers. *See, e.g.*, Christy, *supra* note 29, at 107–08 (summarizing the then state-of-the-art literature on management negligence).

31. *See* Pasternoster & Simpson, *supra* note 16, at 550–51 (summarizing literature on the rational choice model).

32. *See* Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 180 (Del. 1986) (shifting the burden to the board given allegations of self-dealing).

managerial disloyalty is a structural component of how corporations select executives.[33] Professor Donald Langevoort, for example, illustrates how executives' disloyal psychological character is a product of a tournament of selection that they must win to rise in the corporate pyramid.[34] Executives attain their position by taking risks at successive iterations of a game in which the "finalists will be those risk-takers lucky enough to have avoided the predictable failures" that accompany business endeavors.[35] The tournament inevitably produces overconfident managers.[36] Similarly, because "conscience is likely to be a burden in a fast-paced, competitive setting," managers winning tournaments will be "ethical[ly] plastic[]" and Machiavellian.[37]

The implication of this behavioral perspective is that the amount of manager disloyalty is not only related to the extant deterrence regime, but also the CEO's insecurity. Langevoort predicts more dishonesty as the CEO perceives higher levels of threat to her incumbency by the board.[38] She will "rationalize" bad news, "deflect responsibility," and withhold information from the board as bad results accrue.[39] Such responses suggest that audit controls (and the law generally) ought to be cognizant of CEOs' increasing propensity to deceive as the pressure on their incumbency increases.[40]

As I have suggested, this new managerial loyalty literature sheds light on managers' duty of care. Take, for example, new accounts explaining Enron's fall (in part) as a result of managerial negligence: a "singular ineptness below the level of the board."[41] That ineptness arose from (among other things) an unwillingness to

33. *See* Donald C. Langevoort, *Resetting the Corporate Thermostat: Lessons from the Recent Financial Scandals About Self-Deception, Deceiving Others and the Design of Internal Controls*, 93 GEO. L.J. 285 (2004).

34. *Id.* at 299 (introducing the idea of the tournament of selection).

35. *Id.* at 300. For other work developing this tournament model, see Troy A. Paredes, *Too Much Pay, Too Much Deference: Behavioral Corporate Finance, CEOs, and Corporate Governance*, 32 FLA. ST. U. L. REV. 673, 684–85 n.41 (2005) (summarizing the literature).

36. Langevoort, *supra* note 33, at 301.

37. *Id.* at 303.

38. *Id.* at 304–08; *see also* Kath Hall, *The Psychology of Corporate Dishonesty*, 19 AUSTL. J. CORP. L. 268 (2006) (discussing the various reasons for corporate dishonesty, including self-image, avoidance of "ego-threatening information," and commitment to prior decisions). Hall attributes a prominent Australian corporate scandal to executives' desire to blame a deteriorating financial position on external events; screening out of contrary, ego-threatening, information; and strategic over-persistence. *Id*. at 272–74 (discussing HIH Insurance scandal).

39. Langevoort, *supra* note 33, at 307–08.

40. *Id.* at 316–17; *see also* Hall, *supra* note 38, at 286 (suggesting that the law has to understand dishonesty to properly regulate it).

41. Deborah A. DeMott, *Inside the Corporate Veil: The Character and Consequences of Executives' Duties*, 19 AUSTL. J. CORP. LAW 251, 254 (2006).

work on the "workaday, boring details."[42] In response to this negligence, Professor Deborah DeMott suggests a renewed commitment to a duty of care for managers: the law should "mandat[e] that an executive exercise care and diligence[]" and encourage officers to separate themselves from an organizational culture of slackness.[43] This work parallels the rational choice theory of managers' duty of loyalty.

By contrast, Professor Troy Paredes has applied Langevoort's tournament model to managerial caretaking.[44] Overconfidence leads managers to "take excessive risks . . . even when they are acting in good faith and trying to maximize shareholder value."[45] Later, when such projects begin to fail, managers double down their bad bets, "creating distortions and inefficiencies," if not "outright fraud."[46] Paredes attributes overconfidence, in part, to the "atmosphere of deference" surrounding CEOs.[47] He recommends that courts "take a tougher stance when enforcing fiduciary obligations under the duty of care."[48] This tougher stance would amount to scrutiny of decision making to look for debiasing by the board of CEO overconfidence.[49]

Such different perspectives on managers' duties have a common theme: the problem of care is largely external to CEOs, who are simply maximizing their self-interest as they see it. As Langevoort states, unlike directors, "CEO[s] [are] highly motivated" by equity incentives, and that "power and status follow handsomely as well."[50] Similarly, were the law to provide a better package of "sticks" that governed managers' care, there would be less shirking, more attention to details, and better returns on shareholders' investments.[51] On this account, managerial negligence is potentially remediable through familiar devices: allocations of stock,[52] targeted insurance and legal fees,[53] social norms,[54] and legal sanctions.[55]

42. *Id.* at 255 (internal quotation omitted).

43. *Id.* at 266; *see also* Johnson & Millon, *supra* note 3, at 1639–42 (suggesting that conceiving of managers as agents will reinforce the duty of care and lead to less negligence).

44. Paredes, *supra* note 35.

45. *Id.* at 688.

46. *Id.* at 689.

47. *Id.* at 721.

48. *Id.* at 749.

49. *Id.* at 749–51.

50. Langevoort, *supra* note 33, at 297.

51. *See* DeMott, *supra* note 41 (explaining the merits of below-the-board duty of care); Johnson & Millon, *supra* note 3, at 1638–43 (noting the deterrence benefits of a renewed set of manager fiduciary duties); Wade, *supra* note 10, at 785 (arguing that improved communication between officers and the board would encourage monitoring and improve shareholder wealth).

52. *See, e.g.*, Iman Anabtawi, *Secret Compensation*, 82 N.C. L. REV. 835, 836 (2004) (describing stock options as the "centerpiece of the vast majority of executive compensation packages beginning in the early 1990s").

53. *See, e.g.*, Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts*, 7 U.C. DAVIS

Thus, scholars believe that the law has a motivational role: encouraging executives toward diligence by tying their egos closer to the corporation's success.[56]

II. SELF-HANDICAPPING: A LITERATURE REVIEW

This section explores the idea that managers may fail to take care for reasons that are unrelated to the proper setting of incentives and sanctions by law. Shirking by managers does not occur simply because managers have too little at stake in the corporate enterprise, but in some circumstances because they are *too* involved with the corporation's success. That is: manager negligence may be a deliberate strategy to self-handicap. I make this claim in two parts. First, I describe the general self-handicapping findings, its relationship to effort, and preliminary work on reducing self-handicapping in experimental settings. Second, I describe some very new work on corporate executive self-handicapping and its relationship both to firm value and CEO compensation.

A. *Self-Handicapping: A Literature Review*

Modern work on self-handicapping started in 1978 with a pair of articles by Steven Berglas and Edward Jones.[57] Their basic

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BUS. L.J. 55 (2006) (commenting on the behavioral effects of advancement of fees).

54. *See* Edward B. Rock & Michael L. Wachter, *Norms & Corporate Law Introduction*, 149 U. PA. L. REV. 1607 (2001) (discussing how corporate norms shape conduct).

55. *See, e.g.*, Simpson & Koper, *supra* note 16 (analyzing the effects of legal sanctions on corporate deterrence).

56. I borrow the idea of the psychologically motivational role of corporate law from George Triantis's excellent essay on corporate debt and its relationship to the behavioral theory of learned helplessness. *See* Triantis, *supra* note 4. Triantis observes that debt is usually thought of as an important and immediate goad to care: "the consequences of missing a scheduled debt repayment are typically far more grave than those that follow a reduction in dividends or a decision not to repurchase stock." *Id.* at 1327. However, the motivating effects of debt or equity depend on the "self-efficacy" of the individual manager: "a person's judgment of her capabilities to organize and execute courses of action required to achieve designated performance demands." *Id.* at 1334. As Triantis further concludes, managers may fall victim to learned helplessness, which engenders self-handicapping. *Id*. at 1341.

57. Steven Berglas & Edward E. Jones, *Drug Choice as a Self-Handicapping Strategy in Response to Noncontingent Success*, 36 J. PERSONALITY & SOC. PSYCHOL. 405 (1978) [hereinafter Berglas & Jones]; Edward E. Jones & Steven Berglas, *Control of Attributions About the Self Through Self-Handicapping Strategies: The Appeal of Alcohol and the Role of Underachievement*, 4 PERSONALITY & SOC. PSYCHOL. BULL. 200 (1978) [hereinafter Jones & Berglas]; *see generally* Phyllis A Siegel et al., *Reducing the Tendency to Self-Handicap: The Effect of Self-Affirmation*, 41 J. EXPERIMENTAL SOC. PSYCHOL. 589, 589–90 (2005) (summarizing the literature). For a history of self-handicapping that explores its roots in the clinical and social psychology

experimental framework is now canonical. Subjects volunteering to participate in an experiment were told that taking one of two drugs halfway through a two-round IQ test would markedly change their performance.[58] One drug, Actavil, would supposedly "facilitate intellectual performance"; the other, Pandocrin, "was expected to inhibit or disrupt intellectual performance."[59] Finally, subjects were told that the IQ test was hard and that they should not expect to do particularly well. In reality, the drugs were placebos, and the test only had one manipulated round, mixing impossibly hard and merely difficult questions.[60]

The experimenters divided the subjects into two groups, later labeled (1) the *noncontingent success condition* and (2) the *contingent success condition*.[61] They gave the noncontingent success subjects an impossibly hard test, but gave the contingent success subjects questions tailored to their ability.[62] All subjects were told after completing the test that "Yours was one of the best scores seen to date!"[63] Thus, Group 1's success was not contingent on their effort and ability; Group 2, by contrast, might fairly believe that the test measured their worth.[64]

Berglas and Jones then gave subjects in both conditions the choice of whether to take Actavil or Pandocrin before beginning the next round.[65] Subjects could take a variety of doses of the drug, or none at all, "according to [their] own personal preference . . . [and] to what [they found] most interesting."[66]

Overall, seventy percent of the men in the noncontingent success group chose to take the Pandocrin drug, while only thirteen percent of the men in the contingent success group did. For women, the percentages were forty percent and twenty-six percent respectively.[67] (A later experiment suggested that the women attributed their success in both conditions to luck at higher rates

traditions, see Raymond L. Higgins, *Self-Handicapping: Historical Roots and Contemporary Branches*, *in* SELF-HANDICAPPING: THE PARADOX THAT ISN'T 1 (Higgins et al., eds., 1990).

58. Berglas & Jones, *supra* note 57, at 408 (noting that subjects who were drug abusers or unwilling to take drugs in an experimental setting were excluded).

59. *Id*. (noting that subjects were told that the predicted effects were uncertain).

60. *Id.*

61. *Id.*

62. The experimenters ranked each question based on difficulty and gave subjects easier or harder questions depending on how they did on the previous one. *Id.*

63. *Id.* (internal quotation omitted).

64. *Id.*

65. *Id.* at 409. Some subjects had their scores publicized; other subjects' scores were hidden. *Id.*

66. *Id.* (internal quotation omitted).

67. *Id.* at 412.

than the men.)[68] Self-handicapping theorists have replicated such drug experiments many times.[69]

Why would individuals take a debilitating drug? Berglas and Jones hypothesized that individuals in the noncontingent success condition felt a lack of control over a potential failure with a high ego impact. They sought to avert self-doubt by shifting blame to outside factors (like the drug). Thus, Berglas and Jones defined self-handicapping as "any action . . . that enhances the opportunity to externalize (or excuse) failure and to internalize . . . success."[70]

Later theories tied self-handicapping to attribution theory, which explains when and why others attribute blame to our actions.[71] Under that theory's *discounting principle*, "failure under extenuating circumstances is not taken as proof of incompetence."[72] And under the *augmentation principle*, "success despite obstacles is seen as evidence of especially high ability."[73] This suggests that the audience for self-handicaps may not be internal, as Berglas and Jones had suggested, but rather external. It also suggests that it is the lack of control over outcomes, not the failure itself, which individuals fear.[74] Later experimental work supported these

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68. *Id.* at 416.

69. *See, e.g.*, Frederick X. Gibbons & William P. Gaeddert, *Focus of Attention and Placebo Utility*, 20 J. EXPERIMENTAL SOC. PSYCHOL. 159 (1984); Jalie A. Tucker, et al., *Alcohol Consumption as a Self-Handicapping Strategy*, 90 J. ABNORMAL PSYCHOL. 220 (1981) (finding that male subjects drank more alcohol when they had no ability to practice to improve their performance in a non-contingent success condition).

70. Berglas & Jones, *supra* note 57, at 406.

71. *See* Shari Seidman Diamond et al., *Juror Questions During Trial: A Window into Juror Thinking*, 59 VAND. L. REV. 1927, 1957 n.63 (2006) ("Attribution theory focuses on how people arrive at causal explanations for events."); Lesley Wexler, *Limiting the Precautionary Principle: Weapons Regulation in the Face of Scientific Uncertainty*, 39 U.C. DAVIS L. REV. 459, 508–10 (2006) ("Attribution theory is a 'general conception of the way people think about and analyze cause-effect data.'").

72. Roy F. Baumeister & Steven J. Scher, *Self-Defeating Behavior Patterns Among Normal Individuals: Review and Analysis of Common Self-Destructive Tendencies*, 104 PSYCHOL. BULL. 3, 8 (1988).

73. *Id*.

74. Thompson and Richardson, for example, administered a commonly-used self-handicapping scale to experimental subjects. Ted Thompson & Anna Richardson, *Self-Handicapping Status, Claimed Self-Handicaps and Reduced Practice Effort Following Success and Failure Feedback*, 71 BRIT. J. EDUC. PSYCHOL. 151 (2001). They then divided individuals into groups and ascertained how much behavioral self-handicapping (taking practice problems) individuals with high and low self-handicapping traits engaged in. They found that prior success did not significantly affect handicapping, but rather the lack of a relationship between effort, prior success, and future success. Such a lack of relationship led, in their research, to helplessness and less practice. *Id. But see* Steven Berglas, *Self-Handicapping Behavior and the Self-Defeating Personality Disorder: Toward a Refined Clinical Perspective*, *in* SELF-DEFEATING BEHAVIORS: EXPERIMENTAL RESEARCH, CLINICAL IMPRESSIONS, AND PRACTICAL IMPLICATIONS 261, 269 (Rebecca C. Curtis ed., 1989) (suggesting that self-

attributive intuitions.

In one experiment, male subjects were told that they were participating in an experiment to determine if either of two drugs (Actavil and Pandocrin, again) used to treat metabolic disorders would have a measurable effect on performance on an IQ test.[75] The men were divided into contingent and noncontingent success groups using Berglas and Jones's method.[76]

Experimenters then allowed subjects to take their drug of choice in *public* (in front of the experimenter) or in *private* (when the experimenter was out of the room and allegedly would not know which drug the subject had taken).[77] Subjects ingested either drug at a variety of dosage levels, based on preference.[78]

Overall, forty-two percent of subjects in the *public* drug-choice condition chose the debilitating drug. But only seven percent of subjects in the *private* drug-choice condition did so![79] That is, subjects exhibited self-handicapping only when others were watching them (and presumably would have knowledge of their excuse).[80] This data suggests that the "presence of another person is a necessary condition for self-handicapping behavior."[81] Thus, self-handicapping is best seen as a "self-presentation strategy."[82]

Why? Conceivably, when we are watched, we are more likely to want to create public excuses for our looming failures, but in the privacy of our minds, excuses are less attractive.

A different strand of research focuses on factors correlated with

handicapping is marked by timing: "following a success and in anticipation of threats to the esteem gains derived from success feedback," and that self-handicapping occurs "only in response to successes deemed noncontingent" (citation omitted)).

75. Thomas A. Kolditz & Robert M. Arkin, *An Impression Management Interpretation of the Self-Handicapping Strategy*, 43 J. PERSONALITY SOC. PSYCHOL. 492, 495 (1982).

76. *Id.*

77. *Id.*

78. *Id.* at 497.

79. *Id.* at 499.

80. *Id.* at 500.

81. *Id.*

82. *Id.* at 501. In another experiment, psychologists asked female subjects to work on an alleged IQ test. Gibbons & Gaeddert, *supra* note 69, at 164–69. The women were provided with a drug that they were told hurt, had no effect on, or helped memory. Experimenters assigned half the women to a cubicle with a mirror that faced them, and half to a cubicle containing a mirror facing away from them. The experimenters found no significant differences between reported ability, number of problems attempted, or percent correct in any of the different subsets of subjects. However, women who took the (allegedly) performance-inhibiting drug and did not see themselves in the mirror *believed* that the drug was more inhibiting than women who did see themselves in the mirror. Conversely, when the drug they ingested was performance-enhancing, such women disclaimed its effects more than subjects who were focused on their emotional state by the mirror. *Id.*

increased levels of handicapping.[83] I will focus on two such inciting variables: (1) *insecurity* and (2) *beliefs about the innateness of intelligence*.[84]

There is a relationship between self-handicapping and self-esteem. Obviously, individuals with no self-esteem will have little incentive to self-handicap.[85] Neither will individuals with a reflexive and strongly confident view of their abilities.[86] Therefore, self-handicapping is greatest when individuals have an "uncertain self-evaluation."[87] In one experiment designed to test this view, Robert Harris and C.R. Snyder sorted subjects based on their reported self-esteem, told them that they were to take an important IQ test, and suggested that practice would improve their scores.[88] Harris and Snyder found that uncertain men practiced for the test less than secure men and insecure women.[89] Such individuals reaped a benefit—less anxiety—from their failure to practice.[90]

Second, a belief in "smartness" itself increases the likelihood to self-handicap.[91] Some individuals believe that intelligence itself is a fixed commodity; others believe that it is fairly malleable.[92] In a recent study, subjects were divided into groups based on their theory of intelligence.[93] They were then asked how willing they would be to

83. *See generally* Elizabeth A. Self, *Situational Influences on Self-Handicapping*, *in* SELF-HANDICAPPING, *supra* note 57, at 37, 38–53 (describing eliciting factors of self-handicapping).

84. A third important inciting characteristic is gender. Research has consistently shown that men behaviorally self-handicap at higher rates than women, while women engage in claimed handicapping more than men. Zuckerman & Tsai, *supra* note 13, at 432 (reviewing literature but not finding the effect in a particular experiment). The mechanism of this distinction is unclear, although recent research has theorized that men are working to protect their higher perceived status by creating excuses for failure. *See* Jeffrey W. Lucas & Michael J. Lovaglia, *Self-Handicapping: Gender, Race, and Status*, 10 CURRENT RES. SOC. PSYCHOL. (2005), *available at* http://www.uiowa.edu/~grpproc/ crisp/crisp.10.16.html (finding that Caucasian men self-handicap at greater rates than women and minorities).

85. Berglas & Jones, *supra* note 57, at 406.

86. Robert N. Harris & C. R. Snyder, *The Role of Uncertain Self-Esteem in Self-Handicapping*, 51 J. PERSONALITY & SOC. PSYCHOL. 451, 451 (1986).

87. *Id.*

88. *Id.* at 452–53.

89. *Id.* at 456.

90. *Id.*

91. *See, e.g.*, Malcolm Gladwell, *The Talent Myth*, NEW YORKER, July 22, 2002, at 28 (arguing that the fall of Enron was related to an overemphasis on innate ability instead of performance).

92. *See generally* Ying-yi Hong, et al., *Implicit Theories, Attributions, and Coping: A Meaning System Approach*, 77 J. PERSONALITY & SOC. PSYCHOL. 588 (1999) (connecting attribution theory to self-handicapping).

93. Subjects were given three statements, and asked to state their agreement with each statement on a scale ranging from 1 (strongly agree) to 6 (strongly disagree). The statements were: (1) "You have a certain amount of intelligence and you really can't do much to change it"; (2) "Your intelligence is something about you that you can't change very much"; and (3) "You can learn

take a remedial course that was crucial to their academic success in the social sciences.[94] Participants were finally divided into two groups based on their previous high/low performance in the subject matter.[95]

Overall, previous high-performing students were uniformly unlikely to be willing to take the remedial course.[96] Poor performing students, by contrast, were divided.[97] Those who believed in a theory of malleable intelligence were more inclined to take the course than those who believed in fixed intelligence.[98]

A second experiment in this line connected theories of intelligence to self-handicapping. Experimenters first prepped subjects to believe in a system of intelligence by reading a scholarly article stating either that genetics or environment predicted intelligence.[99] Then, the subjects took a very hard IQ test. Half of the subjects were then told they had done satisfactorily (at the sixty-sixth percentile); half were told they were unsatisfactory (at the twentieth percentile).[100]

Subjects had a choice: did they want to practice for the next round of testing? Most individuals exposed to the theory of malleable intelligence chose to practice—around seventy percent.[101] However, those who were exposed to a fixed-intelligence framework divided sharply.[102] Only 13.3% of the subjects who had done poorly in the first round and believed that IQ is innate wanted to practice, while two-thirds of the subjects who had done well wanted to practice.[103]

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new things, but you can't really change your basic intelligence." *Id.* at 590. Individuals with mean scores of 3.0 or lower were classified as "entity theorists," believing that intelligence is fixed, while those with scores of 4.0 or above were classified as incremental theorists, believing that intelligence is not fixed. Those with scores between 3.0 and 4.0 were indeterminate, and those participants were eliminated from the study. *Id.* at 591.

94. *Id.* at 593. The course was English. The subjects were Hong Kong university students. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* On an eleven-point scale, with zero being "certainly no" and ten being "certainly yes," the malleable-intelligence, low-performing students averaged a 7.00; the fixed-intelligence, low-performing students averaged a 5.62. The comparable scores for high-performing students were 5.00 and 4.77, a statistically insignificant difference. *Id.*

99. *Id.* at 594. Shockingly, it appears that simply reading one or the other of these theories, and being tested on it as a "reading comprehension," has effects on individuals' beliefs about the relationship between intelligence and effort. *Id.* (surveying previous research). This result suggests that individuals' theories of intelligence are not particularly robust.

100. *Id.* at 595.

101. *Id.*

102. *Id.*

103. *Id.* at 595–96.

B. The Self-Handicapping of Corporate Managers

Theorists divide self-handicapping into *behavioral* and *claimed* excuses. Behavioral self-handicapping is actually doing things that make subsequent success less likely; claimed self-handicapping is making excuses before the fact.[104] Claimed self-handicapping is common: individuals claim anxiety, moods, hypochondria, or shyness before being evaluated (whether or not actually suffering such conditions).[105] Behavioral self-handicapping falls into fewer categories: drug and alcohol abuse, setting unrealistic goals, and reducing effort.[106]

Experiments examining effort are hard to design.[107] Self-handicapping experiments work by making subjects feel upset and helpless: loafing following such unpleasant experiences may not be calculating, but instead restorative.[108] In one study working around this problem, subjects were separated into two groups: (1) some were told they were taking the Culture Fair Test of General Intelligence, a good predictor of success in life; (2) others were told that they were working on problems designed for a research class.[109] Subsets of subjects were given easy sample problems, others hard ones.[110] Finally, before the "actual test" was to be administered,[111] experimenters distributed a questionnaire about the amount of effort the subjects intended to exert.[112] Subjects in the "A" group—those taking a test that would help to define their success in life and who had experienced hard sample questions—reported that they planned to exert significantly less effort on the second part of the exam.[113]

Experimenters searching for a theoretical connection between self-handicapping and effort suggest that "a high level of effort makes an ability attribution for failure all the more likely."[114] That

104. Baumeister & Scher, *supra* note 72, at 8.

105. *Id.* (summarizing the literature).

106. *Id*.

107. An early work in this field is Arthur Frankel & Melvin L. Snyder, *Poor Performance Following Unsolvable Problems: Learned Helplessness or Egotism?*, 36 J. PERSONALITY & SOC. PSYCHOL. 1415 (1978).

108. Common examples are listening to music or watching television. *Cf.* Tom Pyszczynski & Jeff Greenberg, *Determinants of Reduction in Intended Effort as a Strategy for Coping with Anticipated Failure*, 17 J. RES. PERSONALITY 412, 413 (1983) (summarizing and criticizing earlier studies).

109. *Id.* at 415.

110. *Id.* at 415–16 (describing the method).

111. It never was. Subjects were instead debriefed after taking the questionnaire. *Id*. at 416.

112. *Id.*

113. *Id.* at 416–17 (out of nine points, the hard-test subgroup reported that they would, on average, exert a 7.30 in effort—the same as the subjects who were not taking an important test at all—while the subjects exposed to easy questions reported an intended effort of 8.55).

114. *Id.* at 420.

is: the harder you try, the more likely that failure will be blamed on your worth. So there is at least some theoretical basis for understanding why corporate managers might shirk their duties when the law punishes a corporate failure with personal liability. This argument follows even though the actual likelihood of punishment is low: managers, subject to risk aversion, may overreact to low probability punishments that have extreme consequences for their self-image.[115] Such punishments will link the executive's ego and the corporation's success ever more closely together, resulting in the risk that failure will be attributed to the manager. The tighter this link—the higher the expected costs of negligence—the more executives may self-handicap.

Another very recent study focused directly on claimed manager self-handicapping and its consequences for firms.[116] Siegel and Brockner focused on the use, effectiveness, and market effects of *external* and *internal handicaps* presented in the annual letters sent by CEOs to shareholders as a part of the federal securities disclosure regime.[117] External handicaps for these purposes were obstacles outside the firm: "increased competition, economic recession, or the rising prices of raw materials." Internal handicaps, by contrast, included: "restructuring, loss of personnel, and operating challenges faced by particular product lines or areas of business."[118]

In their first study, Siegel and Brockner asked business students to act as investors in a fictitious firm, and provided the students a 1995 President's letter, financial information about the firm's competitors, the firm's performance from 1991 to 1994, and the firm's "actual" performance for 1995.[119] In one version of the letter, the CEO claimed external handicaps, in another, internal handicaps, and in a third, a mixed message.[120] Various scenarios manipulated the firm's prior performance and subsequent

115. A newly articulated cultural status model provides a helpful theoretical framework that explains why managers may fear the embarrassing prospect of liability for shirking: risks that affect an individual's place within a group ranking are likely to be perceived as especially significant and odious. *See* Dan M. Kahan et al., *Gender, Race, and Risk Perception: The Influence of Cultural Status Anxiety* (Yale Law Sch. Pub. Law & Legal Theory Research Paper Series, Working Paper No. 86, 2005), *available at* http://ssrn.com/abstract=723762.

116. Phyllis A. Siegel & Joel Brockner, *Individual and Organizational Consequences of CEO Claimed Handicapping: What's Good For the CEO May Not Be So Good for the Firm*, 96 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 1 (2005).

117. *Id.* at 3, 6. Previous work had found that this letter was the "most widely read part of the annual report," and that there was "an association between the information content of the President's Letter and firm-specific accounting and market-based performance measures." *Id.* at 6.

118. *Id.* at 3.

119. *Id.* at 5–6.

120. *Id.* at 6–7.

performance.[121] Students then undertook two tasks: they priced the firm's stock the day after the firm reported its 1995 financial results and offered a recommended change to the CEO's salary from its 1994 base.[122]

The results of this experiment were surprising. External handicaps influenced valuations of the firm and CEO compensation. They reduced firm value in all performance conditions.[123] With respect to CEO salary, when prior performance was negative, external handicaps negatively affected the base salary,[124] but when the prior performance was good, external handicaps resulted in a six percent net gain for the CEO's recommended salary.[125]

These findings led Siegel and Brockner to a market test: they looked at a sample of publicly traded firms in 1994 and 1995, coding each firm's President's Letters for handicapping traits.[126] Using an event study analysis, Siegel and Brockner looked at the impact of later earnings announcements on firm value and on CEO compensation, specifically, the amount of the CEO's bonus.[127] Holding all else equal, they found that external handicapping correlated with a decrease in firm value, but internal handicaps did not.[128] By contrast, they did not fully replicate their experimental results for CEO compensation, although there was limited support for the hypothesis that external handicaps tended to insulate CEOs from market sanctions when their prior (good) performance was not replicated.[129] That is, self-handicapping by CEOs seems to serve the classic goal of deflecting blame for failure.[130] As Siegel and Brockner point out, these

> findings . . . raise a potential conundrum in that under some conditions, an external claimed handicap that is favorable to the CEO may be disadvantageous to the firm. . . . [W]hen prior firm performance is good, the results . . . showed that external claimed handicapping had a positive effect on CEO

121. *Id.* at 7.

122. *Id.* at 7–8 n.1 (noting that the study thus was looking to perceived value, instead of investor behavior, but suggesting that investor predictions should closely correlate with observed stock prices).

123. In the external handicapping conditions, the average stock price predicted was $47.21; "in the absence of such handicaps, the average price was $48.21." There was no such effect for internal handicaps. *Id.* at 9.

124. Specifically, holding the handicap condition constant, subjects recommended a 6.91% decrease in salary, but with the external handicap, the recommended decrease was 7.35%. *Id.* at 10.

125. *Id.* (recommending a 4.90% increase instead of a 2.01% decrease)

126. *Id.* at 12.

127. *Id.* at 12–13.

128. *Id.* at 14.

129. *Id.* at 17. As Siegel and Brockner acknowledge, investor views and the views of the boards of directors with respect to CEO compensation may be in accord only rarely. *Id.*

130. *Id.* at 17–18.

pay, but a negative effect on firm value.[131]

III. HOW SHOULD THE LAW BEST PREVENT MANAGER NEGLIGENCE?

A. Negligence and Self-Handicapping

Early in this Essay, I suggested that the doctrine of managerial caretaking results in two puzzles. As I hope the reader will see, self-handicapping sheds some light on both of these problems and suggests reasons to doubt changes to the law that would increase the expected sanctions associated with managerial negligence. Essentially, self-handicapping theory undermines the idea that more liability for managers' shirking will result in more caretaking. The opposite may be true. The theory also suggests reasons to think that managers are more susceptive to this perverse incentive problem than directors, because their success is so publicly linked to that of the corporation.

In this Part, I support these conclusions in more detail. Before doing so, I briefly observe that there are reasons to believe that managerial liability for negligence will be ineffective apart from those suggested by self-handicapping theory. If managers are in truth rendered overconfident by corporate design, as Langevoort and Paredes suggest, it is hard to imagine that they would refrain from status-affirming activity (like entrepreneurship) simply because they face the uncertain sanction of the duty of care. Only ten percent of drivers think themselves worse than the *average*:[132] what percent of corporate executives would imagine they were grossly negligent?

However, the optimism theory does not exclude the possibility that a targeted liability regime might result in more care. In Langevoort's model, if we believed that managers were optimistic but prone to negligence, we might increase the scope of the duty of care when the company's financial condition was in decline.[133] But such dynamic sanction regimes seem, in this context, costly to administer and easy to game.[134]

Self-handicapping, by contrast, offers a more radical critique of the application of tort law to corporate executives. Even a targeted tort regime may increase, not decrease, negligence. To understand why, consider that a duty of care claim is less likely to be brought where the company's shares have increased in value, because

131. *Id.* at 17.
132. Robert H. Frank, *Why Is Cost-Benefit Analysis So Controversial?*, 29 J. LEGAL STUD. 913, 929 (2000).
133. Thus, for example, the business judgment rule might only shield decision making made in profit-making quarters!
134. Donald C. Langevoort, *The Organizational Psychology of Hyper-Competition: Corporate Irresponsibility and the Lessons of Enron*, 70 GEO. WASH. L. REV. 968, 972–73 (2002).

damages may be harder to prove. But a company's share price is highly variable: even managers who have successfully passed through the gates of the tournament of selection will not necessarily associate hard work with increased firm value. They will realize that there are many factors in valuation—including many external to the firm that the manager cannot control.[135]

Facing this noncontingent success condition, the manager has two defensive maneuvers close to hand. We have seen evidence of the first: claiming external handicaps in disclosure documents, so as to deflect blame from the manager's performance. Such external handicaps do reduce firm value, but they may increase the manager's own compensation.[136] Indeed, the ubiquity of cautionary statements in securities disclosures, even before the Private Securities Litigation Reform Act's (commonly known as PSLRA) safe-harbor provision, is evidence of prevalence of the self-handicapping among even confident corporate executives.

Managers may also begin to shirk. Recall the newly articulated link between Enron and the duty of care. Professor DeMott relates the story of Jeff McMahon, who succeeded Andrew Fastow as Enron's CFO.[137] On joining the company:

> McMahon . . . learned that Enron lacked any method with which to track its cash and thereby determine just how much cash the organisation had available to it at a particular time. . . . Said McMahon, "That's *impossible*! We're a Fortune 50 company. We *have* to be tracking our cash." A company that did not track its cash was comparable to an individual who failed to balance his or her checkbook. . . . "[A]pparently Fastow had always thought that Enron would have more than enough cash to spare", and, given that assumption, neglected to develop any cash-tracking systems.[138]

This is a plausible account, and it supports DeMott's defense of a powerful new tort regime directed at managers. Enron's officers (like Fastow) had shirked their responsibilities—out of laziness and disinterest—in favor of a focus on more interesting activities, like the "creative use of special-purpose entities."[139] According to this traditional view, a real, damage-based remedy for failures of managers' duty of care may have prevented Enron's fall.

However, this account of Fastow's negligence misses an important psychological component of his failure. Self-handicapping theory suggests that Fastow would, in a sense, be *happy* about a story that blamed his failures on laziness. Imagine a contrary story

135. *See generally id.* (discussing personality traits in highly competitive organizations).
136. Siegel & Brockner, *supra* note 116, at 17.
137. DeMott, *supra* note 41, at 255.
138. *Id.* (internal citation omitted).
139. *Id.* at 255–56.

about Fastow's motivations, drawn from the same source:

Andy Fastow was an "incredibly insecure man."[140] A graduate of Tufts and Northwestern Business School, Fastow had puffed his resume to land his first job at Enron.[141] Although he lacked the "knowledge" to be Enron's CFO,[142] and was mocked within the organization for his lack of business ability,[143] he had risen rapidly by virtue of his skill in manipulating financial instruments and betting (successfully) on the rise in Enron's stock.[144] Apart from his expertise in manipulating financial earnings, Fastow was not respected for his smarts: "He was a good average performer, but you weren't held in awe of his intellect," said a former boss.[145]

Surrounding Fastow were Ivy-Leaguers led by Jeff Skilling, who prioritized innate intelligence above all other traits.[146] Over time, Skilling came to rely on Fastow for increasingly dubious transactions involving highly complex accounting treatment that Fastow may have lacked the skills to fully understand.[147] Driven by disloyalty and insecurity, Fastow increasingly shirked his responsibility as a CFO, leaving the details of Enron's global financial position to others in favor of managing relationships with bankers.[148]

This account, too, is incomplete and potentially misleading—Fastow's negligence and disloyalty ran hand-in-hand.[149] However, it

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140. BETHANY MCLEAN & PETER ELKIND, THE SMARTEST GUYS IN THE ROOM: THE AMAZING RISE AND SCANDALOUS FALL OF ENRON 139 (2003).

141. *Id.* at 134–37.

142. One insider suggests he could not "dissect a balance sheet." *Id.* at 140.

143. He was known within Enron as "Andy Fast-Out" for having been removed from a revenue-generating project after just nine months. *Id.* at 138–39.

144. *Id.* at 132–70.

145. *Id.* at 136 (internal quotation omitted).

146. *Id.* at 31 (relating the story of Skilling's interview with Harvard Business School); *id.* at 55–56 (describing Enron's meritocracy culture); *id.* at 63–64 (describing corruption of the performance system).

147. *Id.* at 155–61.

148. *Id.* at 163–65 (describing Fastow's manipulations of lenders).

149. I recognize that there are some risks in engaging in a "clinical" approach to the behavioral story of an enormously complicated event, like Enron's collapse. But, as Langevoort has pointed out:

> Though risky because single observations will not always conform to even the most well-established behavioral predictions, this exercise has the virtue of presenting a richly defined situation as a reality check. From a legal perspective, this exercise can be used to evaluate that behavior—by understanding it better, we might become better able to assess its blameworthiness, for example.

Donald C. Langevoort, *Reflections on Scienter (and the Securities Fraud Case Against Martha Stewart That Never Happened)*, 10 LEWIS & CLARK L. REV. 1, 2 (2006). Moreover, as Jonathan Lipson, who read a draft of this Essay, commented, Enron's Special Purpose Entities were intended to generate cash, suggesting that Fastow *was* concerned about cash-flow. The point of the alternative storytelling above is not to suggest that Enron fell because Andy does capture a potential explanation for the lack of financial controls at Enron. Enron's sloppy bookkeeping may have resulted from Andy Fastow's self-handicapping strategy. Insecure about his intelligence and faced with a task (managing Enron's finances) that ultimately depended for its success on the random walk of Enron's stock price, Fastow might have decided to shirk—to fail to act when a reasonable manager would have—rather than have a later failure be attributed to his lack of intelligence. This strategy has been partly successful: we conventionally describe Andy Fastow as greedy and criminal, but not foolish.[150]

In short, managers who are grossly negligent may behave this way as a method of self-protection, not merely because the law insufficiently encourages their diligence. Indeed, the self-handicapping literature, when read as a whole, suggests that increasing the legal sanctions for negligence will have perverse effects: it might reinforce the link between executive ego and corporate success, making executives *more*, not *less*, willing to shirk.[151] Considering the costs of imposing new legal duties on managers, we should consider whether other methods of control on caretaking are available.

Finally, this potentially negative relationship between legal sanctions and care sheds light on the persistent uncertainty of Delaware law's treatment of managerial duties. Commentators have suggested that history and procedural accident explain the unresolved sources and scope of managers' duty of care.[152] But such contingent explanations are not fully satisfying. Another possibility is that the law recognizes the psychological differences between managers and directors, and the possibility but not certainty, that sanctions are self-defeating for managers. Uncertainty thus may provide a more efficient liability regime than we would originally have suspected.

Fastow was too insecure to manage the books, but to illustrate how a more stringent care regime might have unintended and unfortunate consequences.

150. MCLEAN & ELKIND, *supra* note 140, at 150–51.

151. The point that incentives may act in perverse ways is not unique to the care problem. *See* Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199, 211 (2006) (noting that certain types of "lazy or careless decision making" will be unaffected (at best) by incentive structures).

152. For example, until recently, the Delaware Chancery Court lacked jurisdiction over fiduciary suits against officers who were not directors. *See* Robert B. Thompson & Hillary A. Sale, *Securities Fraud as Corporate Governance: Reflections Upon Federalism*, 56 VAND. L. REV. 859, 905 (2003) (noting "hole" in Delaware law). By statute, this "hole" was filled in 2004. DEL. CODE. ANN. tit. 10, § 3114 (Supp. 2006) (Revisor's note stating that the act became effective January 1, 2004). Such suits are also traditionally understood as derivative, providing additional hurdles to recovery. *See* Donald C. Langevoort, *Agency Law Inside the Corporation: Problems of Candor and Knowledge*, 71 U. CIN. L. REV. 1187, 1206–07 (2003).

B. Ameliorating Self-Handicapping: Toward Rethinking Disney

Over the short term, self-handicapping feels good.[153] In sports, for example, self-handicapping (like lack of practice) may enable insecure players to enjoy physical activity instead of simply focusing on wins and losses.[154] However, over time, studies have shown that individuals who score high on measures of self-handicapping are less healthy, confident, happy, and drug-free than those who self-handicap less.[155] Self-handicappers fail more in their jobs and education than those who do not.[156]

In response, scholars have looked for ways to reduce the tendency to self-handicap among groups or in situations where it is common.[157] This recently developing literature seems to have different strands: (1) changing how individuals think about themselves; and (2) changing how individuals react to others' impressions of them.[158]

For example, some experiments report that simply reinforcing a subject's self-esteem reduces self-handicapping.[159] This works by having subjects write about a value that they believe important to them (e.g., religion) in a short essay before having the opportunity to engage in self-handicapping behavior in a two-stage IQ test.[160] Doing so significantly reduced the likelihood that subjects would self-handicap.[161]

A second way to ameliorate self-handicapping is to change individuals' beliefs about how others will perceive their success and failure. Preliminary work in this project has focused on grade schoolers.[162] In a series of experiments, children praised for their

153. Zuckerman & Tsai, *supra* note 13, at 413 (summarizing literature on short-term effects of self-handicapping).

154. Roberta K. Deppe & Judith M. Harackiewicz, *Self-Handicapping and Intrinsic Motivation: Buffering Intrinsic Motivation From the Threat of Failure*, 70 J. PERSONALITY & SOC. PSYCHOL. 868, 872 (1996) (analyzing pinball playing).

155. Zuckerman & Tsai, *supra* note 13, at 431; *cf.* Deppe & Harackiewicz, *supra* note 154, at 874 (suggesting that self-handicapping may reduce the entry costs to difficult tasks and allow individuals to "build competence and gain confidence" over time).

156. Raymond L. Higgins & Steven Berglas, *The Maintenance and Treatment of Self-Handicapping: From Risk-Taking to Face-Saving—and Back*, *in* SELF-HANDICAPPING, *supra* note 57, at 187, 195–214 (discussing self-defeating self-handicaps); *see also* Zuckerman & Tsai, *supra* note 13, at 432 (reviewing the literature).

157. *See generally* Self, *supra* note 83, at 37, 53–62 (describing inhibiting factors).

158. Siegel et al., *supra* note 57, at 590. Another possibility is membership on a team. *Id.*

159. *Id.* at 590–91.

160. *Id.* at 593.

161. *Id.* at 594.

162. Claudia M. Mueller & Carol S. Dweck, *Praise for Intelligence Can Undermine Children's Motivation and Performance*, 75 J. PERSONALITY & SOC. PSYCHOL. 33 (1998).

intelligence after taking a test did less well on subsequent tests, enjoyed the experience less, and attributed failures to their innate worth, while subjects praised for their effort on the first test worked harder and did better, while attributing failure to lack of effort rather than worth.[163] That is, praise for intelligence seems to result in subjects believing that their performance is connected to their innate smartness, and has pernicious consequences for future self-handicapping.[164]

The literature to date has not explored whether strategies like these might work for corporate executives. Even if they did, the challenges to reducing potential self-handicapping in such individuals are many. First, and most significantly, we need more research to determine when negligence by corporate executives may legitimately be termed self-handicapping, instead of a failure of a monitoring regime. Empirical work in this arena will be difficult to design, although comparing identifiable markers of negligence, like restatements of financial results, with different regimes of caretaking across the states would be a place to start. Also, further work on claimed self-handicapping in securities disclosures would prove useful and enrich recent debates about the appropriateness of the bespeaks-caution defense.[165]

Second, to the extent that overconfidence is a structural aspect of manager psychology, it might be hard to generate concern about a psychological impediment that affects individuals with uncertain self-confidence. However, this concern may be ameliorated by noting the imprecision of all behavioral research and the common-sense observation that individuals who are exceedingly self-confident in their public persona may be, in fact, quite uncertain about their own skills.

Third, senior managers will have little patience for self-affirmation sessions like those described above. Suggesting that counseling will reduce managerial laziness is probably a counterintuitive idea to individuals socialized to believe that monetary incentives serve that precise function.[166] As Jeff Skilling remarked: "This touchy-feely stuff isn't as important as cash. That's what drives performance."[167]

Rather than focusing on managers, corporate jurists might

163. *Id.* at 48–49.
164. *Id.* at 50.
165. *See, e.g.*, David A. Hoffman, *The "Duty" To Be a Rational Shareholder*, 90 MINN. L. REV. 537, 587–88 (2006) (criticizing the bespeaks-action defense from a behavioral perspective).
166. There is one extant study supporting this view. *See* Jeff Greenberg, et al., *Effect of Extrinsic Incentives on Use of Test Anxiety as an Anticipatory Attributional Defense: Playing It Cool When the Stakes Are High*, 47 J. PERSONALITY & SOC. PSYCHOL. 1136 (1984) (finding that financial stakes ameliorated self-handicapping in certain circumstances).
167. MCLEAN & ELKIND, *supra* note 140, at 55.

consider a debiasing approach. As Professors Jolls and Sunstein explain, debiasing is "intervening in and altering the situation that produces the boundedly rational behavior," instead of simply focusing on the "provision of financial incentives."[168] In the corporate arena, debiasing is most often accomplished through changing the structure of board decision making.[169] Similarly here, the law could help companies to avoid handicapping managers by optimizing executive selection.

Senior corporate executive personality tends to snowball throughout the organization.[170] As the Enron example demonstrates, a single executive with a strong focus on innate intelligence can prove problematic for an entire company. Therefore, well-run corporations should select against this character trait and choose executives who believe that business acumen is a learned, and flexible, trait. Similarly, executives could be tested based on their tendency to self-handicap using the self-handicapping scale developed by Jones and Rhodewalt.[171] Indeed, psychological testing is an increasing part of the head-hunting process at major corporations, although firms have traditionally selected managers based on their political skills and ethical mindsets, and not these more care-related characteristics.[172]

The law could encourage selection of managers with an eye toward self-handicapping. To do so, the law might hold directors liable for hiring practices that do not (at least) consider an executive's potential tendency to be self-destructive. That is: the law should continue to treat negligence as a gatekeeping problem, but should be less hesitant to impose liability on boards.[173] Rather than developing and enforcing substantive standards of care for business-related activities, a subject far outside judicial core competencies, courts would simply evaluate personnel decisions and procedures.

The court in *Disney* obviously turned its back on such a

168. Jolls & Sunstein, *supra* note 1511, at 211.

169. *Id.* at 219.

170. Randall S. Peterson *et al.*, *The Impact of Chief Executive Officer Personality on Top Management Team Dynamics: One Mechanism by Which Leadership Affects Organizational Performance*, 88 J. APPLIED PSYCHOL. 795 (2003) (relating CEO personality to top management team dynamics using archival sources and case studies).

171. *See* Frederick Rhodewalt, *Self-Handicappers: Individual Differences in the Preference for Anticipatory, Self-Protective Acts*, *in* SELF-HANDICAPPING, *supra* note 57, at 69, 77.

172. *See* Karraker v. Rent-A-Center, Inc., 316 F. Supp. 2d 675, 677, 681 (C.D. Ill. 2004) (describing the practice of requiring managers to take a personality test).

173. On gatekeeping, see Jill E. Fisch & Kenneth M. Rosen, *Is There a Role For Lawyers in Preventing Future Enrons?*, 48 VILL. L. REV. 1097 (2003) (discussing the role of the corporate lawyer as gatekeeper).

substantive examination of the board's role in hiring.[174] It justly feared creating new avenues for liability and reducing entrepreneurship.[175] But, ironically, in sanctioning negligent hiring, the court may have increased the pressure to monitor managers. Jurists seeking a remedy for corporate wrongdoing have been forced to look elsewhere: this very symposium is evidence that the renewed effort to prevent corporate fraud may result in calls for managerial liability.

There are some problems with my proposal, which render it, at best, premature. For one, what if self-handicapping traits were correlated with others that spark performance? A liability regime might chill board innovation in hiring. Additionally, we should perhaps resist a purely gatekeeping approach more generally: why not simply punish shirking itself, rather than its potential?[176]

Further, I do not mean to suggest that we can cure managerial self-handicapping with a legal regime. This Essay's ambitions are decidedly more modest: (1) to introduce readers to the idea of self-handicapping and to suggest its confounding relationship to an effective care regime; and (2) to provide new ways to defend the current (low-liability) stance of Delaware jurisprudence with respect to managers.

An Essay with grander scope—one that was not cabined in by length constraints or the author's own demerits—might suggest that the self-handicapping literature offers a challenge to tort law rules outside of the corporate context. Law often purports to govern the behavior of successful, confident individuals through tort sanctions—attorney malpractice rules are another salient example.[177] If the duty of care will cause corporate executives to shirk when it hopes to create care, might it cause lawyers and other professionals to do the same? This is a potentially deep question, whose answer might unsettle some of our received wisdom about the deterrent effect of liability regimes in a commonly reoccurring context. But I do not purport to answer it here. After all, this was just a Symposium Essay.

174. *In re* Walt Disney Co. Derivative Litig., 906 A.2d 27, 61 (Del. 2006).

175. *See* Justice Jack B. Jacobs, Remarks at the 2007 AALS Panel: Dimensions of *Disney*, *available at* http://www3.cali.org/aals07/mp3/ (follow "AALS 2007 Dimensions of Disney 20070103 PM.mp3" hyperlink).

176. Two reasons suggest themselves. Shirking, of course, is costly to identify before it causes damage. Moreover, extensive monitoring regimes reduce intra-organizational trust and cooperation.

177. *See, e.g.*, Susan Daicoff, *Asking Leopards to Change Their Spots: Should Lawyers Change? A Critique of Solutions to Problems with Professionalism by Reference to Empirically-Derived Attorney Personality Attributes*, 11 GEO. J. LEGAL ETHICS 547, 573–74 (1998) (commenting on the possibility of more or different regulation of attorneys).