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Groundwork Of The Metaphysics Of Corporate Law

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GROUNDWORK OF THE METAPHYSICS OF CORPORATE LAW

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The practitioners of law and economics have done an enormous favor for all of us who are concerned with corporate law. This favor comes in two parts. On the one hand, they have sharpened, indeed radicalized, the paradigm of the stockholder-centric corporation on which corporate law has been built since the middle of this century, revealing as they have done so the startling weaknesses and unreality of that paradigm.[1] On the other hand, these scholars have deconstructed the traditional fiction of the corporation to reveal the reality of competing interests within the corporation that have nonetheless been excluded from the legal model of the corporate form. This, of course, is the contractual model of the corporation.[2] In doing so, they have exposed for attention the interests of a variety of constituents that corporate law has heretofore ignored. Although these scholars have built a new, if highly disputed, model of the corporation as contract to provide an infrastructure to replace the old entity, they have done so with zealous regard for the traditional paradigm that centers on the stockholders.

As a result of these scholars' efforts, the central underlying issues in corporate law have been exposed as never before. What is the nature and the purpose of the corporation in modern American society? Their clear answer is to maximize the wealth of stockholders, as a consequence of which overall social wealth will be maximized by virtue of market mechanisms.[3] In order for this to be accomplished, the markets that revolve around the corporation, including markets for capital, labor, supplies, and outputs, must be kept as efficient as possible, with only the first and, possibly, the second,[4] coming within the province of corporate law. These scholars have identified the costs and barriers which can impede market efficiency, and

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1. The most complete statement of the stockholder-centered approach is FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

2. A good statement of the contractual model of the corporation is provided in Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON U. L. REV. 99 (1989). An insightful analysis of this contractual theory is provided in William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407 (1989).

3. Stockholder wealth maximization is the most efficient model of corporate governance, under the prevailing corporate paradigm. Maximizing stockholder wealth will thus ensure the best allocation and deployment of resources with the result that overall social wealth will be maximized.

4. *See* Eugene Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980) (describing how efficient markets for managers help to discipline corporate governance).

have suggested some of the gains to be realized from removing those costs and barriers.

They have accomplished all of this by reducing the prevailing corporate paradigm to its most elemental level—the pursuit of self-interest by all concerned.[5] Although my use of the collective pronoun suggests unity among legal economists, there are in fact deep divisions among them. But on one aspect of the corporate paradigm they are unanimous: Corporations exist for their stockholders. Only when the corporation is thus focused can the self-interest of corporate actors be used to maximize their own wealth in a way that will lead to increased societal wealth.[6]

Professor Ronald Green recognizes this when he talks about the metaphors of corporate law,[7] metaphors that have been turned into normative principles by law and economics scholars.[8] He writes about the need to abandon these metaphors, in order to enable us both to see and understand that the modern corporation profoundly affects the well-being of a number of constituent groups in addition to the corporation's stockholders, and that in fact corporate directors and managers recognize this. But Professor Green relies too comfortably on metaphor as the problem. The problem is not simply one of metaphor. In fact the problem is far deeper in corporate doctrine and theory and, ultimately, policy. Only when we address social and moral issues in corporate law that appear at this depth can we begin to resolve them. The fact that legal economists have pushed the traditional paradigm to the extreme, exposing its root assumptions, permits us to address the issues at just this level.

We know the way to efficiency. We also have begun to explore the costs of efficiency. Professor Green's paper identifies, as does this Sym-

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5. This model of pursuit of self-interest by all is grounded upon the underlying assumption of neoclassical economics upon which the contractual paradigm is based: that persons by nature act to maximize their own utility. *See* Jules Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's* The Economics of Justice, 34 STAN. L. REV. 1105, 1113 (1982) (book review) (noting utilitarian basis of neoclassical economics).

6. Throughout this Comment I treat the stockholder-centric profit goal as not only the economists' paradigm, but also the reigning paradigm in corporate law, a state of affairs that I believe to be true notwithstanding the recent widespread adoption of corporate constituency statutes. Although I have made a case for how these statutes, and recent case law, can be interpreted as altering this paradigm, it is too early in the process of their development to conclude that they have in fact done so. *See generally* Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579 (1992).

7. Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409 (1993).

8. Dean Robert C. Clark has cogently criticized the metaphor of directors as agents of the stockholders in Robert C. Clark, *Agency Costs versus Fiduciary Duties*, *in* PRINCIPALS AND AGENTS: THE STRUCTURE OF BUSINESS 55 (John W. Pratt & Richard J. Zeckhauser eds., 1985). Professor Victor Brudney has done the same with respect to the contract metaphor. Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985).

posium, some of the values that get left behind when the efficiency model becomes paradigm. Essentially it all boils down to the realization that a single-minded focus on efficiency, on the corporation as a narrowly defined economic institution, sacrifices the human values of those who play a part in its functioning. The efficiency model does this by legally cabining the actions of corporate actors within confining, distinctly nonhuman roles. It is this denial of humanity, which ultimately denies reality, that is at the heart of the current debate over stakeholder status.

Philosopher Elizabeth Wolgast has addressed this tendency to dehumanize from the perspective of moral philosophy.[9] The moral concern stems from the fact that, regardless of our paradigm or metaphors, corporate decisions do have effects, sometimes profound, on the lives of others. How, she asks, can artificial persons be said to have moral responsibility for these decisions when they are made by collectivities of humans in which the moral responsibility for the decision is diffused, and therefore untraceable, and who do not carry out those decisions and therefore do not share in the morally important experience of living through and with those decisions?

The question of moral responsibility is critical because in order to establish the legitimacy of stakeholder concerns in the internal governance of the corporation, we first must determine whether the corporation has an obligation to these stakeholder groups. By this I do not mean, of course, a legal obligation, for the answer given by contemporary legal doctrine is rather clear: it has none.[10] What I do mean is obligation in the ethical or moral sense, in light of the fact that corporations can and do affect the interests of these other constituents.[11] The traditional denial of legal obligation is based upon the ethic of self-reliance, which essentially has been refined to the policy of economic efficiency. In other words, legal decisionmakers have treated nonstockholder constituents as able to protect themselves against corporate externalities created in the pursuit of stockholder profit through the contracting process and, when it fails (as in the case of environmental externalities, for example), through legislation aimed not at the corporate governance process, but at conduct external to it. In the areas of creditors' and employees' rights, which have received the greatest legal attention, the claiming stakeholders are blamed for their own failure to protect themselves. The blame is premised both on the notion that they are able to do so and the belief, noted by Professor Green, that efficient corporate operations will suffer if directors are made to divide their loyalties among potentially competing corporate groups.

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9. ELIZABETH WOLGAST, ETHICS OF AN ARTIFICIAL PERSON (1992).

10. *See* Lawrence E. Mitchell, *The Fairness Rights of Corporate Bondholders*, 65 N.Y.U. L. REV. 1165 (1990) (discussing lack of bondholders' rights); Mitchell, *supra* note 6 (discussing lack of rights of other constituents generally).

11. In his recent Baffi Lecture, Amartya Sen cautions against the dangers of accepting the narrowly focused stockholder profit motive without careful regard for the consequences of doing so. Amartya Sen, *Money and Value: On the Ethics and Economics of Finance*, 9 ECON. & PHIL. 203 (1993).

The question of whether nonstockholder constituents are able to protect themselves is very real and important. Certainly some of these groups do have some opportunity to decide whether or not to deal with a particular corporation and to have some influence upon the terms. Other stakeholder groups, like the broader communities in which the corporations operate, and those asserting environmental interests, have little if any chance to affect their relationship with the corporation, except possibly through the attenuated legislative process. Even those groups that can arguably protect themselves may be able to do so by avoiding a particular corporation—but clearly they cannot avoid dealing with corporations generally. And the bargaining power they have in this respect is sorely limited. A particular union or group of employees bargains with individual corporations, but corporations as an entire category of institution are united by the stockholder profit motive. Thus their power and incentives are backed by the mandate of law, whereas the stakeholder groups are left to exert what private power they may have in individual cases. In other words, the law privileges corporations as a class to behave differently than do natural persons or even other institutions—it privileges them to externalize the costs of stockholder profit maximization on others, and to defend this externalization on the basis of the legal mandate to maximize stockholder profits.

Perhaps more importantly, once the stakeholder has entered into a contractual relationship, if any, with the corporation, it loses all control over the conduct of that relationship outside of the contract terms.[12] And the contract terms in any relational contract will necessarily be incomplete.[13] Nor can these groups look to contract doctrine to protect them, because in cases in which the meaning of the only nontextual remedy, the implied covenant of good faith, has been applied, courts have defined and limited it by the motive of stockholder profit and by narrow reference to the necessarily limited contractual terms.[14] Thus the corporation's directors can assume a monopoly of power, and the self-protective ability of even contracting stakeholders is dramatically diminished if not entirely lost.

It is this monopoly of power that gives rise to the moral dilemma. Corporations do have the power to affect others' interests. We would expect human persons who possess such power to act with a sense of their own moral accountability. Not only do we not expect corporations to so act; we have legally prohibited them from doing so.

The prohibition takes the well-known doctrinal form of the profit purpose, judicially articulated in its most famous form in *Dodge v. Ford Motor Co.*[15] and most recently enshrined, with unsatisfying modifications,

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12. Economist Oliver Williamson has recognized that stakeholders lose control of their relationship with the corporation, outside the contract terms, in his transactions cost model of the corporation. *See* Oliver Williamson, *Corporate Governance*, 93 YALE L.J. 1197 (1984).

13. IAN R. MACNEIL, THE NEW SOCIAL CONTRACT (1980); William W. Bratton, Jr., *The Economics and Jurisprudence of Convertible Bonds*, 1984 WIS. L. REV. 667, 691-92.

14. *See* Mitchell, *Fairness Rights*, *supra* note 10.

15. 170 N.W. 668 (Mich. 1919).

in the recently adopted American Law Institute's *Principles of Corporate Governance*.[16] This doctrine, far more than metaphor, legally mandates the corporation's purpose as generating profits for its stockholders. It thus creates the corporation, as Wolgast has noted, as a very strange type of person, one with an end, a substantive "good" if you will, that sets it dramatically apart from other types of persons. But it does more. By mandating stockholder profit as the sole justification for the corporation's existence, it casts the flesh and blood persons who animate the corporation in roles that conform them to corporate personhood, thereby requiring them to abandon the personhood they otherwise have achieved as human beings. When directors act as directors, when managers act as managers, they too act as persons whose sole good, whose moral reality, consists in the generation of profits for stockholders. In effect, they are legally absolved of the moral accountability of persons, and take on the moral parameters of the role. They thus justify their conduct by reference to the morality of this role, rather than by reference to their own personhood. The consequence is that these corporate actors have no feeling of moral accountability, because in law, and thus perhaps in fact, they have none.

Of course all of this turns on whether one believes in a concept of personhood that transcends one's socially constructed roles. I will not elaborate on the argument for this, but simply accept that such a concept is valid and refer the reader to arguments made elsewhere, on which I base this discussion.[17] For purposes of my argument, however, I need not defend this proposition, because the legal economists also have premised their arguments on the assumption that there is a reality of personhood that transcends role. That concept is the model of economic man.

Economic man is rational. As defined by the legal economists, this rationality requires that he maximize his utility in all of his activities. In the corporate sphere, which undeniably is, at its core, an economic aspect of life, this maxmimization of utility requires that he maximize his own wealth from the corporation. The economic paradigm of the corporation is based upon this concept of personhood, and the traditional paradigm of corporate law probably is as well.[18]

Again by exposing this essential element of personhood, the legal economists have done us the favor of clarifying the issues and facilitating our discussion of the corporate paradigm on precisely these terms. And again, by pushing this element to its extreme, they have revealed the

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16. PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS § 2.01 (Proposed Final Draft 1992). For a discussion of how this provision fails to get beyond the traditional paradigm, see Lawrence E. Mitchell, *Cooperation and Constraint in the Modern Corporation* (forthcoming).

17. *See* Mitchell, *supra* note 16.

18. For a more elaborate statement of my views on the legitimacy of this model of the person, see Lawrence E. Mitchell, *Corporate Nature Versus Human Nature, in* CRITICS OF INSTITUTIONS: LAW AND ECONOMICS (Robin Malloy ed., forthcoming).

weaknesses inherent in the concept of personhood and, ultimately, the corporate paradigm.

Nobody is rational in the way that the economists suggest.[19] There is substantial evidence that persons forego self-interest in a wide variety of circumstances, heeding the calls of duty, restraint, altruism, and friendship.[20] Of course economists have argued that these apparently other-regarding behaviors can be explained on the basis of self-interest, but the arguments so severely attenuate the concept of self-interest that they destroy the utility of the concept. Moreover, even those economists who have found an apparently biological[21] or psychological basis[22] in self-interest for other-directed conduct hardly deny that the conduct itself accounts for the interests of others, in a manner similar to, although differently motivated than, other-regarding conduct based on moral precepts. To sustain the notion that self-interest is the exclusive human motivation is to so broaden the concept of self-interest that it denies the explanatory power of the model of self-interest.

There is at least one possible way in which the model of self-interest can be broadened to cover other-regarding conduct, but the argument as formulated is foreign to the economists' conception of self-interest. Neera Kapur Badhwar has argued that not only are altruistic acts compatible with a type of self-interest, but the relevant self-interest both has independent moral significance and is essential to the truly altruistic character of such acts.[23] Badhwar examines the case of people who rescued Jews from the Nazis in occupied Europe during World War II and concludes that some class of these people acted from the self-interested motive of affirming their altruistic identity, a motive Badhwar describes as different from the desire to make one feel good about oneself or seek any other type of internal or external personal reward:

> Because altruism was a central and unambiguous part of their very identity, rescuers had an interest in helping others not just for the sake of those others, but also for the sake of being true to themselves and affirming themselves. And the two motivations had a necessary connection because each was part of a wholehearted altruism, acting from which meant that in acting on the one they would also, necessarily, act on the other.[24]

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19. Well, almost nobody. In a well-known experiment designed to test whether individuals are prone to engage in economic "free-riding," Gerald Marwell and Ruth Ames found that only one class of persons is so inclined: graduate students in economics. *See* Gerald Marwell & Ruth E. Ames, *Economists Free Ride, Does Anyone Else?*, 15 J. PUB. ECON. 295, 309 (1981).

20. For an extended discussion of duty, restraint, altruism and friendship see JAMES Q. WILSON, THE MORAL SENSE (1993).

21. *See, e.g.*, ROBERT H. FRANK, PASSIONS WITHIN REASON (1988).

22. *See, e.g.*, ROBERT M. AXELROD, THE EVOLUTION OF COOPERATION (1984).

23. Neera Kapur Badhwar, *Altruism versus Self-Interest: Sometimes A False Dichotomy*, *in* ALTRUISM 90 (Ellen Frankel Paul et al. eds., 1993).

24. *Id.* at 115.

This obviously is quite a different conception of self-interest, one that is concerned in a Kantian way with persons, including oneself, as ends in themselves, which is quite foreign to the economists' explanations that view other-regarding conduct as a means to achieving one's own, more temporal ends. The self-interest in affirming one's altruistic identity is of a very different nature than behaving altruistically to gratify one's emotional or physiological desires.

A more important question is whether we want people to premise their actions on the basis of self-interest. In light of the legal economists' argument, the question becomes compelling. To the extent that we actually accept the model as an explanation for human behavior, we run the significant risk of creating a self-fulfilling prophecy—that is, we accept it as a justification for our own behavior, regardless of what we believe our motivations to be.[25] Perhaps more significantly, we accept it as an adequate justification of the institutional roles premised upon it. We are thus faced with a question that is answered not by reference to essential human nature, since obviously both self-interest and concern for others coexist within us,[26] but a question that is answered by choice: how should we behave as human beings?

This, of course, is a fundamentally moral question.[27] But it is one that is no less relevant when we are talking about persons acting within corporations than when we are talking about their actions in other spheres of life. And, as I have suggested, it is a question that necessarily is posed by the legal economists, precisely because it is so definitively answered by their assumptions of personhood that undergird their model of the corporation.

Within the scope of this Comment, I can only provide the outlines of an answer to this question.[28] And I will do so first by refining the question itself through an examination of the premise of the phrase I used in the

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25. WILSON, *supra* note 20, at 229-30. It is interesting to note that during the past year a great deal of commentary has suggested that Americans are becoming more concerned with questions of their individual and collective responsibilities for others, in contrast to the early 1980s when the predominant social ethos was that self-interest, indeed greed, were not only valid but desirable social traits. A brief, if unscientific, look at American history reveals a pattern of these two ethos alternating over time. It is worth noting, though I am not able to draw any strong conclusions from this, that the Reagan administration which took office in 1981 slightly preceded the predominance of the ethic of self-interest and self-reliance, and that the Clinton administration, which took office in 1993 espousing communitarian philosophy, coincided with the reemergence of an ethic of concern and responsibility. The weak conclusion that I draw from these observations is that how we behave is very much affected by how we believe we should behave, and that how we believe we should behave as a society and individuals within a society is importantly affected by how our leaders tell us we should behave.

26. ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS (1975); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976).

27. ARISTOTLE NICOMACHEAN ETHICS, Book 1, at 1094a25 (Terence Irwin trans., 1985).

28. I take up these issues (and others) in more detail in Mitchell, *supra* note 16.

preceding paragraph, ". . . when we are talking about persons acting within corporations. . . ." I will then address what seems to me to be the clear answer to this question and suggest some of its implications. I will show, I hope, that the best answer demands a broader concept of the person than that assumed, or asserted, by the legal economists and instantiated in the law of corporations. This broader understanding of the person necessarily leads to the conclusion that some constituency consideration is not only appropriate but necessary to permit corporate actors to function as persons.

"Persons acting within the corporation." The phrase suggests a setting apart of a person's actions in one context or role from those in others. Do persons acting within a corporation differ from persons acting in their family relationships or their relationships with those in their institutions of worship or in their country clubs or in the other institutional roles they play in our society? Evidence exists to suggest that we think that they do, or at least that persons acting within corporations think that they do. Jay Lorsch, in *Pawns or Potentates*,[29] interviewed a large number of corporate directors who asserted their beliefs that they had responsibilities to those outside the law-given framework of the corporation, but that their ability to act upon those responsibilities was severely constrained by the legal mandate to act only in the interests of the stockholders. And our common parlance abounds with references to the idea that the business context is somehow different, that "business is business."[30] As Alan Wolfe has illustrated in his book, *Whose Keeper?*,[31] the idea of a business morality set apart from a person's normal moral context traces at least as far back as Adam Smith. Wolfe himself, in that book, although less so in his paper for this conference,[32] while supporting a more communitarian vision of our social institutions, seems to regard business as a sphere apart. So the idea of a distinct business persona that is somehow different from a person's "normal" persona appears to be pervasive. Even one of the great moralistic judges, Benjamin Cardozo, recognized a distinct "morals of the marketplace" that was somehow separate and apart from the morals applicable outside the marketplace.[33]

What does this mean? It suggests that a different moral code governs business relations. While it may be that the legal economists' notion of self-

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29. JAY LORSCH, PAWNS OR POTENTATES: THE REALITY OF AMERICA'S CORPORATE BOARDS (1989).

30. See especially the delightful, and pointed, response of the Once-ler in Dr. Seuss's THE LORAX: "For business is business and business must grow, regardless of crummies in tummies you know." Ronald Gilson, one of the leading legal economists in the corporate field, has used this line as the epigraph to his book on corporate acquisitions. RONALD A. GILSON, THE LAW AND FINANCE OF CORPORATE ACQUISITIONS xix (1986). One suspects that Gilson is deliberately disregarding Seuss's irony.

31. ALAN WOLFE, WHOSE KEEPER? (1989).

32. *See* Alan Wolfe, *The Modern Corporation: Private Agent or Public Actor?*, 50 WASH. & LEE L. REV. 1673 (1993).

33. Meinhard v. Salmon, 164 N.E. 545 (N.Y. 1928). Of course Cardozo did not believe that such morals were applicable to intimate business relationships like partnerships.

interest is too narrow, it certainly is the case that an embedded corporate law concept demands that corporate actors go about their duties solely in pursuit of stockholder profits. Other considerations that might occur to them outside the corporate context, perhaps even in their own personal business dealings, are to be put aside under sanction of law. This general mandate of profit maximization, while described as the "purpose" of the corporation, thus defines the role of every actor within the corporation. And by so defining and constraining those roles, it excuses corporate actors from moral responsibility for actions taken within those roles that adversely affect others in ways that we normally would consider immoral. Moreover, by doing so, it not only absolves corporate actors from moral responsibility, but permits them to deny any moral accountability. No feelings of guilt are required when the stream is polluted or the baby food is diluted or the Pinto explodes. The institution defines the moral role, and in the case of the corporation the moral role is narrow indeed. So, as David Luban suggests in a related context, we must determine whether the role itself is morally justifiable.[34]

The legal economist would tell us that it is. Although persons may act in seemingly altruistic ways outside of the corporation, although for self-interested motives, there is a societal good in having corporations and their actors work to maximize profit without regard to other considerations. That good is the overall maximization of social wealth, in which the corporation is a vital tool, which would necessarily be impeded by permitting corporate actors to deviate from the strict model by creating inefficiencies in the form of increased monitoring costs.[35] Thus the morality of the role is justified by utilitarian philosophy. Permitting the functional specialization that leads to maximum social utility requires moral specialization as well. If corporate actors were to be concerned about the effects of their actions on persons other than stockholders, they could not perform their tasks efficiently.

But this leads to the important question of whether the specialized roles we have created for corporate actors are the roles of persons? Does one who acts only with the narrow and exclusive purposes of corporate actors behave as a person? Again, the question of the nature of personhood is one that is well beyond the scope of this Comment. But, also again, I need not explore it to disprove the economists' claims, for even the legal economists have a richer conception of person than corporate automaton. Even they allow for other-regarding behaviors, when it is necessary to maximize one's own self-interest. But the corporate role we have defined excludes the possibility, or at least the legality, of such other-directed behavior. So "normal" economic behavior and corporate behavior conflict.

And on a broader concept of personhood, the conflict is even sharper. As Wolgast asks in exploring the notion of corporate personhood:

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34. DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

35. I need not, for purposes of this Comment, examine the morality of the goal of increased societal wealth. I think a sufficiently persuasive answer is provided by Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191 (1980).

> Understood as devices for making money, corporations more closely resemble machines than human beings. Humans have no such limited "purpose," and their connections with others include many that are (financially) unprofitable and even taxing. The question must be addressed, then, in what sense are we to understand the fictional personhood of such entities?[36]

By transitivity, it is a question that must be asked of those who assume the limited roles that the law sets forth for corporate actors. And the answer to the question, an answer with which, as I have suggested, the economists must agree, is that corporate actors are no types of persons at all.

What is the consequence of concluding that the roles filled by corporate actors in our reigning paradigm of the corporation are not the roles of persons? It seems to me that at least two possibilities follow. The first is that we need not treat corporate actors as persons at all, at least while they are acting within the confines of their corporate roles. The second is that we need to change the roles so that these corporate actors can function as socially embedded persons, regardless of whether they are acting in their corporate capacity.

The first consequence leads to a number of possible moves. The first is that corporate actors, while so acting, need not be granted the panoply of rights that persons in our society have been granted. The freedoms we associate with personhood are based on the liberal ideal of autonomous actors defining and seeking their ends. And we restrain these freedoms only to the extent necessary to ensure that their actions do not impede the autonomy of others. Yet, by definition, corporate actors within their roles are disabled from defining their ends, and can work only towards the end that is given to them by the role. Thus the predicate for granting those rights is gone. And we are thus free to restrain these actors to any extent desirable so that their role performances will best achieve our collective vision of social welfare. By transitivity, of course, this denial of personhood would extend to the corporation, which traditionally and constitutionally has been granted such status. The way is thus clear to regulate the corporation extensively to achieve social purposes.

A corollary of this freedom to constrain corporate actors and corporations themselves is that we can alter the roles as we see fit. Because the roles are insitutionally defined and because the institutions are socially created through our legal processes, we are free to impose our collective will on the behavior of corporate actors in light of shifting goals. In either case, the consequence of the narrow concept of the corporate actor, with its logical denial of personhood, puts our capitalist ideal in jeopardy, given the extent to which that ideal is realized through corporate conduct. In essence, the nonperson corporation is well poised to be animated by the state.

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36. WOLGAST, *supra* note 9, at 81.

The second consequence it seems to me is both far more consonant with our political and social ideals and is also far more protective of our capitalist system. That consequence is to free corporate actors to behave as morally whole persons, albeit within a particular role. Nothing inherent in the concept of role requires that roles be so narrowly drawn, nor requires that such roles demand a denial of social embeddedness.[37] In fact all of us fill a variety of roles, which sometimes overlap and which often require that we call upon aspects of our other roles in fulfilling the demands of each. I myself am a father, a husband, a teacher, a scholar, an investor, a Jew, and a friend, to name some of the roles I fill on a daily basis. Leaving aside the difficult philosophical question of whether there is a "me" behind these roles (for what it's worth, I believe that there is), it is true at a minimum that the "nexus" of these roles, if you will pardon the expression, substantially defines who I am. It would be impossible for me to function exclusively in one of these roles for any portion of my day by denying the relevance of these other roles to my persona and performance. I am not a psychologist, but I suspect the result would be some form of cognitive dissonance. The fact that corporate actors feel some of this dissonance is demonstrated by Lorsch's survey of corporate directors, most of whom were in fact trying to fill one role exclusively for a portion of their lives.[38] Moreover, it seems undesirable, even if it were possible to achieve without severe psychological distress, to demand that anyone supress these other roles in their daily conduct, because often the experiences people have in these other roles help inform their conduct in other contexts. Allowing corporate actors to recognize the relevance of their other roles would permit them to be more responsive, and more responsible, in fulfilling the functions of their corporate roles.

Making these other roles relevant would also make corporate actors morally accountable for their conduct in their corporate roles. Once the artificially narrow constraint of the profit motive is removed, corporate actors would be empowered to see the corporation as one among a variety of institutions and as having morally relevant effects on others. This hardly means an abandonment of the profit motive, but puts it in a context that more naturally makes it only one of the actor's responsibilities, even if, as Wolfe has suggested and I agree, it is primary among their responsibilities. Corporate actors thus will behave as persons, and can and should be given greater freedom so to act. Because in fact they are persons. And this greater freedom, this greater flexibility, fulfills the demands of efficiency by making the corporation an overall more responsive market-driven institution.

What has all of this got to do with constituencies? The answer should be clear. By modifying, if not eliminating, the narrow concept of corporate purpose, corporate actors, as morally accountable actors, will consider and

37. *See* ALASDAIR MACINTYRE, AFTER VIRTUE 33-34 (1981) (noting ubiquity of role and normal state that roles are not exclusive of one another or one's broader moral context).

38. *See* LORSCH, *supra* note 29.

be mindful of the effects of their behavior on other persons, including those actors most affected by the corporation at any one time.[39] And this modification of corporate purpose, designed as it is specifically to permit these actors to behave as whole, morally accountable persons, necessarily requires that the law permit corporate actors to do so. The recognition by corporations of constituent interests is a logical corollary of recognizing the personhood of corporate actors.

This is not to propose, nor have I advocated, complete anarchy within the corporation. Some legal structure is necessary to direct the corporation's energies and I have elsewhere provided some ideas for such a structure.[40] All that I am suggesting in this Comment is that the paradigm-sharpening by the legal economists demonstrates not only the unreality of that paradigm,[41] but its immorality, as well. It thus clarifies the need for a new model of corporate law. The constituency model of the corporation is merely the structure within which that new paradigm is expressed.

39. Of course it's not this simple—merely changing corporate purpose does not require that corporate actors consider other constituents. For more detailed discussion I refer the reader to WOLGAST, *supra* note 9, and Mitchell, *supra* note 16.

40. Mitchell, *supra* note 6; Lawrence E. Mitchell, *A Critical Look at Corporate Governance*, 45 VAND. L. REV. 1263 (1992).

41. *See* Wolfe, *supra* note 32.