



Fall 9-1-1993

The Modern Corporation: Private Agent Or Public Actor?

Alan Wolfe

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlulr>



Part of the [Business Organizations Law Commons](#)

Recommended Citation

Alan Wolfe, *The Modern Corporation: Private Agent Or Public Actor?*, 50 Wash. & Lee L. Rev. 1673 (1993).

Available at: <https://scholarlycommons.law.wlu.edu/wlulr/vol50/iss4/13>

This Article is brought to you for free and open access by the Washington and Lee Law Review at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Washington and Lee Law Review by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

THE MODERN CORPORATION: PRIVATE AGENT OR PUBLIC ACTOR?

ALAN WOLFE*

I. INTRODUCTION

“[T]heories about ‘what corporations are,’” writes Professor David Millon, “influence thinking about how the law should treat corporate activity.”¹ What, then, are corporations? Millon, reviewing the history of how corporations have been understood in America since the nineteenth century, outlines three areas of definitional contention: (1) the corporation as an entity versus the corporation as simply the aggregate of its particular parts; (2) the corporation as an artificial creation of state legislation versus the corporation as a natural product of human activity; and (3) the corporation as a private body versus the corporation as a public entity charged with public duties.

Because there has never been agreement in this country over what corporations are, skepticism over any assertion that they must—by nature, the laws of God, tradition, or the dynamics of organizational activity—be any one thing is appropriate. Even if the nature of corporations has always been contested, the range of disagreement is not quite as broad as Professor Millon argues. His three categories are all, to one degree or another, reducible to the private body/public entity distinction. To speak of the corporation as an entity or an aggregate is simply another way of asking whether it is public or private. By dividing the corporation into its units, proponents of the aggregate view are making a claim that such units act as individuals and therefore ought to be treated as private agents. Proponents of the entity theory argue that large-scale organizations, precisely because they take on a life of their own, are charged with public functions. Similarly, the debate over the artificiality or naturalness of the corporation is also a debate over the private and the public. If the corporation is created by a state legislature, it has a public origin and therefore can be regulated by the state, but if a corporation is the natural product of individuals, it remains private. In other words, while there will always be debate on what the corporation is, that debate, for a considerable period of time, has revolved around one fundamental issue: is the corporation private or public?

If this is the key question, it is also an awkward question. A number of contemporary intellectual developments, most prominently the rise of feminist theory, have brought into question the whole notion that one can

* University Professor and Professor of Sociology and Political Science, Boston University.

1. David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 241.

make a distinction between the public and the private.² Concerned that the public/private distinction reinforces the powerlessness of women by consigning domestic work to the presumably less valued "private" sector, feminists have shown that families serve public functions and assume public responsibilities. Given this type of criticism, it is not surprising that some writers find the public/private distinction increasingly obsolete, one more nail in the intellectual bankruptcy of contemporary liberalism.³ Recognizing such criticism, Professor Millon insists that his use of the public/private distinction is not based on the notion that the distinction is valuable; it is instead a reflection of how the distinction has been used in legitimating the corporation.⁴

Yet Millon is not quite accurate, for he not only uses the public/private distinction, he celebrates it. In his comments on Chancellor Allen's decision in *Paramount Communications, Inc. v. Time, Inc.*, Millon points out that "[r]ead generously, *Time* implies that all corporate law must take into account its public dimension, and thus corporate law is public law."⁵ If Millon is somewhat ambivalent about whether the public/private distinction should be criticized or used, he is not alone. Many feminists who question the public/private distinction nonetheless are willing to use it to defend the right to abortion, for example, which, significantly enough, has been based not on the notion of women's equality, but rather on the notion of a generalized right to privacy.⁶ In similar fashion, AIDS activists argue for a stronger public commitment to AIDS research and treatment, even while claiming that legislatures and judges should respect the privacy associated with sexual conduct.⁷ Those who question the public/private distinction in one context complain when the Supreme Court, as in *Bowers v. Hardwick*, fails to recognize the very distinction they criticize.⁸

In pointing out that those who are critical of the public/private distinction nonetheless use it, my intention is not to find inconsistency or hypocrisy. Instead, I hope to suggest that, for all its problems, the distinction

2. For contrasting examples, see JEAN B. ELSHTAIN, *PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT* (1981) and CAROLE PATEMAN, *THE SEXUAL CONTRACT* (1988).

3. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982).

4. Millon, *supra* note 1, at 202.

5. 571 A.2d 1140 (Del. 1989); Millon, *supra* note 1, at 261; see also Lyman Johnson & David Millon, *The Case Beyond Time*, 45 BUS. LAW. 2105 (1990).

6. Not all feminists are happy with the right to privacy approach. It has been criticized by Catharine MacKinnon on the grounds that privacy reinforces conceptions of the bourgeois family and women's role within it, as well as on the grounds that a right to privacy makes it more difficult to pursue those who commit violence against women. Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991).

7. For a passionate defense of the right to privacy on cultural issues, see H. N. HIRSCH, *A THEORY OF LIBERTY: THE CONSTITUTION AND MINORITIES* (1992).

8. *Bowers v. Hardwick*, 478 U.S. 186 (1986). I elaborate on these points in greater detail in *Whose Body Politic?*, AM. PROSPECT, Winter 1993, at 99.

between public and private touches on essential issues that cannot be ignored. This distinction is especially important in the context of debates over what corporations are. If we believe that corporations are private agents, they are free to mind their own business outside the purview of the rest of society. They are obligated only to themselves, although presumably they may choose to extend that obligation to others. In addition, they are rights-bearing creatures protected by the same clauses in the Constitution that protect individuals, most significantly, the right to free speech. If, on the other hand, corporations are understood as public actors, all these conclusions are reversed. Corporations have obligations not only to their shareholders, but also to others in the society as well; they have public duties, even to the point of having to accept lower profits than might otherwise be the case. And, of course, the actions of those who make decisions in their name are subject to public review and scrutiny, and could be reversed if found insufficient by standards premised on a notion of the common good.

Precisely because the terms public and private describe so much, a great deal can be gained by claiming the turfs they identify. Certainly corporations themselves have historically chosen to adopt the private vision of this duality as their self-understanding. Due process of law and contractual understandings of obligations facilitated this self-conception, recently aided by the law and economics movement and other approaches rooted in neoclassical or microeconomic theory. Although situations of combined economic stagnation and international economic integration would seem to make the question of the public role of the corporation more salient than ever, a good deal of contemporary economic and legal theory attempts to define the corporation as little more than a large bunch of private actions lumped together.

On the other side of the distinction, reformers and critics of the contemporary corporation emphasize the public side of the equation. This emphasis has existed since the New Deal, even though the postwar period has *not* been characterized by major advances in public theories of corporate activity. Indeed Berle and Means' book, first published in 1932, is still one of the most frequently cited works on corporate governance among reformers.⁹ Since the hostile take-overs and leveraged buy-outs (LBOs) of the 1980s, some have detected a new turn toward the public aspects of corporate governance with the passage of "directors' duties" statutes by a majority of the states. These statutes suggest that directors may look "beyond shareholders" in deciding how to act.¹⁰ While disagreeing about everything

9. ADOLPH A. BERLE, JR. & GARDNER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (rev. ed., Harcourt Brace & World, Inc. 1968) (1932). There has been no great classic since this work, with the possible exception of Chandler's *The Visible Hand*, which is not really about corporate governance in any direct sense. ALFRED D. CHANDLER, JR., *THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS* (1977).

10. Eric W. Orts, *Beyond Shareholders: Interpreting Corporate Constituency Statutes*, 61 GEO. WASH. L. REV. 14 (1992).

else, James Hanks and David Millon agree that such laws may have radical consequences for how we define the corporation.¹¹

In this Article I will use the debate that has grown out of efforts to redefine the constituencies of the corporation as well as the academic theories that underlie the debate to address the issue of the public/private distinction and its relevance for corporate law. Like many other contemporary writers, I will find flaws in the public/private distinction. In particular, I will argue that both sides in these controversies have problems determining where to draw the boundary between these realms, although the kinds of problems they have differ. The economic theorists of the firm solve the problem by drawing the line as close to the private side as possible. In so doing, I will argue, they distort the true nature of a corporation. As their theories become divorced from reality and instead become normative pleas for what a corporation should be, they need to justify drawing the line where they do. They have been unable, however, to develop a convincing justification. This is in part because their notions of privacy differ so greatly from those generally associated with the liberal tradition.

On the other side of the distinction, the problem is reversed. Advocates for greater public responsibilities of corporations do not have a clear and precise place in which to draw the boundary between public and private. Consequently, their notions lack principled consistency and vary depending on whose interests they are trying to protect. Although this may make for inconsistent law, such ambiguity makes sociological sense because it recognizes that, in reality, corporations combine elements of both private and public responsibility. Given that both approaches are flawed, I will conclude that the flaws of inconsistency are far less serious than those of unreality. Therefore, any efforts to rethink corporate law should begin with the public side and move toward the private rather than the other way around.

II. THE FIRM AS IT IS OR THE FIRM AS IT OUGHT TO BE

The discipline of economics, and to some degree the academic study of the law, has been trying to determine what a corporation is. One answer to this question is especially intriguing, for its implications are quite revolutionary. This answer, developed from Ronald Coase's seminal article on the theory of the firm, states that a corporation is an umbrella that enables private parties to contract with each other more efficiently by limiting the costs of the transactions between them.¹² As interpreted by some of its advocates, the importance of this theory is that it rejects as metaphysical, as well as empirically false, the notion that corporations are legal entities brought into being by state action. Some advocates for this point of view

11. James J. Hanks, Jr., *Playing with Fire: Nonshareholders Constituency Statutes in the 1990s*, 21 STETSON L. REV. 97 (1991); David Millon, *Redefining Corporate Law*, 24 IND. L. REV. 223 (1991).

12. Ronald Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937).

claim that states do little more than register private decisions already made by private parties.¹³

This perspective emphasizes that anything done by a corporation could be done by individuals without the corporate structure, but the costs of their cooperation would be enormous.¹⁴ Firms, therefore, are functionally similar to markets, but organizationally different. They are shells—"a legal fiction that serves as a nexus for a mass of contracts which various individuals have voluntarily entered into for mutual benefit,"¹⁵ as one writer puts it—that permit a division of labor to take place with relatively minimal friction. In particular, corporations make it possible for those who have money, but little managerial ability, to enter into contracts with those who have managerial skills but little money. If neither party to the contract believed that the contract was working—if the shareholders were dissatisfied with management or if management ignored the interests of the shareholders—the contract would fall apart. The fact that the corporation exists is proof that the contract is mutually beneficial.

Although corporations facilitate routinized private transactions, costs still remain. The potential for free riding exists in any cooperative venture. Shirking, opportunism, and other attempts to gain benefits without paying costs will be common. In addition, managers monitor the production process, but someone has to monitor the monitors. Those who view the corporation as a nexus of private contracts have thought long and hard about all these problems. Some of them argue that hierarchy develops inside the corporation as a way of constraining opportunism.¹⁶ Others point to the disciplining effects of external markets, such as the market for managers themselves or the stock market, which allow shareholders to remove their funds from one firm and invest them in another.¹⁷ The many constraints and checks on the parties to the contract generated by mutual advantage minimize the need for government regulation. The recognition of fiduciary duties—the responsibility of directors and managers to care about the firm and remain loyal to the interests of the stockholders—is the only necessary

13. Robert Hessen, *A New Concept of Corporations: A Contractual and Private Property View*, 30 HASTINGS L.J. 1327 (1979).

14. The key works that launched this perspective are Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 AM. ECON. REV. 777 (1972); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976); and Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J. L. & ECON. 327 (1983).

15. Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982).

16. The costs of opportunism and shirking have been particularly stressed by those who take a neo-institutionalist view of the firm as a bundle of contracts, especially Oliver Williamson. See, e.g., OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM: FIRMS, MARKETS, AND RELATIONAL CONTRACTING* (1985).

17. Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110 (1965).

regulation.¹⁸ Therefore, much of corporate law is unnecessary, if not harmful.¹⁹

In the absence of any challenge to Berle and Means' 1932 work from a reform perspective, the nexus of contracts approach has become the most theoretically sophisticated way of answering the question of what managers and shareholders owe each other. There will inevitably be conflicts between managers and shareholders, this perspective acknowledges, but this does not necessarily constitute a problem—certainly not a problem that ought to be solved by greater shareholder democracy or external regulation. Shareholders are seen best not as the actual "owners" of the firm—no one can own legal fictions—but rather as the "residual claimants" who have the right to leftover income after the firm concludes its business. Residual claimants sell their willingness to take risks. Therefore, it is not necessary for them to know the activities of the managers. They can, in other words, remain "rationally ignorant" of management activities as long as managers give them adequate returns on their investments. Managers, in turn, are the agents of the shareholders, tied to them by mutual interest in making a profit. Whatever conflicts that might develop between shareholders and managers usually can be controlled by limiting the costs of their agency relationship. While managers might be tempted to ignore shareholder's interests—for example, by accepting a lower offer for the firm by an outside purchaser—this will happen rarely in reality. Internal and external markets constrain both parties. Consequently, the problems identified by Berle and Means—especially the problem of the separation between ownership and control—are really nonexistent problems.

Thinking about the corporation as a nexus of contracts is the latest version of a historical tradition emphasizing laissez-faire. Indeed, in some versions, the conclusion that government should not intervene in private economic life is the accepted fact and the intellectual analysis follows.²⁰ Because it is so closely associated with laissez-faire, the nexus of contracts approach leans toward the private side of the public/private distinction; private actors ought to be given the benefit of all doubts. Both the defenders and the critics of this approach understand it as individualistic in inclination. "The contractual theory views the corporation as founded in private contract," writes Henry Butler.²¹ Similarly, William Bratton, who is critical of this trend, points out that this approach "is merely the latest in a long series of attempts to describe and justify the phenomenon of collective production in individualist terms."²²

18. Kenneth E. Scott, *Corporate Law and the American Law Institute Corporate Governance Project*, 35 STAN. L. REV. 927 (1983).

19. Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288 (1980); Jensen & Meckling, *supra* note 14.

20. This seems particularly true of Fischel, *supra* note 15.

21. Henry N. Butler, *The Contractual Theory of the Corporation*, GEO. MASON U. L. REV. 100 (1989).

22. William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1472-73 (1989).

Because this approach seems so relentlessly private and individualistic, it should provide a straightforward mechanism for deciding where the line between private and public ought to be drawn: as close to the former, and as far away from the latter, as possible. One of the attractive features of this theory is that it makes the task of boundary drawing so simple. But this approach sacrifices something to gain this clarity. One question always seems to arise in dealing with the way economic theorists of the firm have influenced corporate law: is the notion of the corporation as a nexus of contracts an empirical description of the world as it is or a normative prescription of the world as it ought to be? If our answer to this question is the former, then drawing the boundary close to the private poses no problems because one need only find the line that already exists. But if the nexus of contracts theory of the firm is normative, then drawing the line close to the private at least raises one significant problem: by what justification should the line be drawn there and nowhere else?

Those writing within the tradition of the economic theory of the firm undoubtedly think of themselves as realists who are describing people as they actually are. This theory does not posit, as some versions of the invisible hand do, any "natural" harmony of interests that will emerge out of the single-minded pursuit of self-interest. The vision of human nature associated with theorists in this tradition is anything but Rousseauian. Terms such as "opportunism" or "shirking" are meant to be an acknowledgement of a theory that understands human beings in Hobbesian terms. The concept of the person as these writers understand it seems explicitly counter-utopian.

Moreover, the economic theory of the firm is not premised on any kind of technological or functional utopianism in which all the parts will be smoothly integrated into a well-functioning whole. At first glance, the division of labor as these writers understand it seems to share much in common with early Durkheimian functionalism: managers with skill meet investors with money and the result is harmony.²³ But just as Emile Durkheim turned away from pure functionalism to symbols, the collective conscience, and, ultimately, the mind as a way of understanding what holds human beings together in groups, the economic theorists of the firm do not, finally, rely on pure functionalism either. For them, either strong authority or some conception of obedience to rules insures that the opportunities for free-riding and other forms of contract breaking will not get out of hand.

Finally, writers in this tradition strive, if anything, for a kind of *hyper-realism* when describing situations of possible moral ambiguity. A good deal of the rhetorical power of their writing comes from the shock value of defending unpopular positions, such as justifying the huge debt accumulated in the wake of LBOs or dismissing the concerns of workers and the local community when firms move or go out of existence. This kind of hyper-realism is illustrated by Daniel Fischel, who urges that we always

23. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* (George Simpson trans., 1933).

keep in mind "the fundamental distinction between conduct that is detrimental to investors—theft, for example—and conduct that may be morally objectionable to some but beneficial to investors."²⁴ Among the latter are such things as corrupt practices, environmental degradation, and criminal acts. Leaving aside for the moment whether these practices are only detrimental to some—crime is usually understood to harm the entire society, not just the immediate victims—Fischel goes on to state that the existence of such criminal conduct actually demonstrates why the economic theory of the firm is empirically realistic:

If anything, the widespread practice of these alleged "abuses" proves precisely the opposite proposition from that stressed in the [Securities and Exchange Commission on Corporate Accountability] Report—that managers are in the main fully dedicated to the goal of maximizing shareholders' wealth, and no regulative intervention in this regard is needed.²⁵

Words such as these, which come fairly close to outright justification of criminal conduct, would seem to clinch the case that a Machiavellian realism pervades the economic theory of the firm.

Yet what a strange realism this is. After all, large corporations are composed of people who speak many different languages, have never met each other, work in positions defined by different degrees of power and responsibility, and have wildly different motives, loyalties, and talents. Can contracts exist between people who never meet, have nothing in common, and are unavailable to pass judgment on the behavior of the other parties to the contract? Perhaps they can in a metaphorical sense, in roughly the same way that early social contract theorists understood the body politic to operate. But no one ever claimed that the social contract was an *empirical* description of actual real-world events. In the liberal tradition—up to and especially including John Rawls—the social contract has been a thought experiment designed to answer "what if" questions, not "what is" questions.

Even as a metaphor, however, the notion of the firm as a nexus of contracts has problems. Again a comparison to Durkheim may be in order. The real question for Durkheim was not, as it is for the economic theorists of the firm, who monitors the monitors. It was the prior question, first posed by David Hume to the early social contract theorists, of what contract makes it possible to have contracts.²⁶ Answering that question became Durkheim's life-long quest, for he was convinced that he would never understand society as it actually exists without understanding what held the moral order together. Because economic theorists do not ask this question,

24. Fischel, *supra* note 15, at 1267.

25. *Id.*

26. DAVID HUME, *Of the Original Contract*, in *ESSAYS: MORAL, POLITICAL, AND LITERARY* 443 (T. H. Greene & T. H. Grose eds., 1907).

but merely assume that contracts can be enforced without understanding the larger language, culture, mores, and traditions of the firms within which the contracts exist, the economic theory of the firm does not readily qualify as an empirical description of real firms in the real world. The theory is not quite as realistic as its practitioners suggest.

Indeed, in many ways, the economic theory of the firm, while seeking a form of hyper-realism in some areas, becomes quite idealistic in others. Bratton has argued that the economic theory of the firm would have remained obscure were it not for the merger mania of the 1980s, which suddenly made the question of the duties of directors and shareholders front-page news.²⁷ The same development illustrates why the theory fails as a description of reality, because real-world politicians, as well as the general public, responded to the LBOs by questioning the absolute right of directors to further the self-interest of shareholders with no other questions asked. Indeed, it was not just legislators who began to argue that directors had larger duties; directors—at companies such as MacDonal'd's, Control Data, One Bancorp, and GTE—did so themselves.²⁸ Since efforts to broaden the duties of directors beyond the shareholders are as much real world phenomena as crime or blackmail, why did they happen?

Economic theorists are never at a loss to answer a question like this. Public choice theory readily explains legislation guiding directors' duties by arguing that the directors of firms facing hostile takeovers act as an interest group to have such legislation passed and in that way are demonstrating the power of self-interest.²⁹ Such a theory does not explain why directors themselves might consider duties beyond those owed to shareholders, but presumably the economic theorists can develop an explanation based on rational choice to account for that situation as well. There is something unsatisfying about these explanations; since one can always find an interpretation that will support a self-interested explanation, it should not be surprising that, as an explanation of such things as directors' duties statutes, these efforts are, in Eric Orts' words, "empirically incorrect."³⁰ But that is not my point in discussing the matter in this context. Rather, I want to emphasize the way in which acts that are seemingly disinterested or altruistic cause economic theorists of the firm to shift their arguments in significant ways.

The ordinary explanation of such events is that just as some people sometimes engage in corrupt practices, other people at other times—or even the same people at other times—engage in altruistic and responsible ones. The one practice is as real as the other. Comfortable in one aspect of the real world and uncomfortable in another, however, economic theories waiver

27. Bratton, *supra* note 22, at 1474.

28. Orts, *supra* note 10, at 20 n.27.

29. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Roberta Romano, *The Political Economy of Takeover Statutes*, 73 VA. L. REV. 111 (1987).

30. Orts, *supra* note 10, at 78.

back and forth from a hyper-realistic posture when it comes to the less attractive features of human conduct and a counter-factual posture when it comes to the more attractive ones. The notion that what seems to be altruism is really self-interest is a way of arguing that what seems to be real is not really real at all—hardly a position compatible with taking the world as it is. Under these conditions, we are told to look behind the veil, to consider alternative theories, to discount what appears to be the case—all rhetorical styles that are as common to Marxism as they are to microeconomic theorists. Presented with a real world fact—state legislators really did pass laws potentially broadening director's duties—this approach responds by reinterpreting such reality out of existence through the suggestion that such efforts “may represent rent-seeking efforts, not altruistic attempts at remedying existing wrongs.”³¹

In its counter-realistic guise, the economic theory of the firm can be understood as addressing a Ulysses-at-the-mast problem.³² Tempted by the siren call of immortality or simply the recognition that comes from doing good, or acting as obedient citizens when legislators pass laws telling them of their obligations, both directors and shareholders require a mechanism that will tie them to the mast of mutual self-interest even when they are otherwise inclined to defect. That mechanism is the economic theory of the firm. It exists, and it obtains its power, because so long as it is in place, real people will have an ex post facto justification for going against their good will and sense of community belonging. At the moment, the economic theory of the firm is experiencing great strength in legal circles.³³ It is the only well-developed theory of corporate governance in existence, far stronger in its intellectual appeal and internal logic than anything proposed by those who would regulate corporate activity in the public interest.

But if the theory of corporate governance is strong, one of the reasons is that, in the real world, public efforts to regulate corporations are also strong. The economic concept of the firm is reactive in the sense that it requires real world behavior to run contrary to the theory in order for the theory to gain adherents. Putting the matter another way, if corporations were so self-evidently little more than a nexus of contracts, there would be no need for a vigorous group of academic thinkers to assert that they were; it is because the theory makes so little sense to state legislators and ordinary people affected by corporate decisions that we have the theory in the first place.

However realistic and empirically descriptive the economic theory of the firm may be about firms themselves—as ought to be clear, the theory is not especially empirically adequate—it is rather unrealistic when it comes

31. Roger Dennis & Dennis R. Hornabach, *Corporate Governance Theory in the 1990s*, 44 RUTGERS L. REV. 533 (1992).

32. JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* (1979).

33. See Dennis Honabach & Roger Dennis, *The Seventh Circuit and the Market for Corporate Control*, 65 CHI.-KENT L. REV. 681 (1989).

to explaining the political environment within which efforts to regulate firms take place. Because the external environment, however, makes the economic theory of the firm attractive, *the economic theory of the firm is incapable of explaining what gives rise to the economic theory of the firm*. A theory that can explain everything but itself would still not be a realistic theory. The economic theory of the firm is not an empirical science because it explains its own subject—the firm itself—poorly and the external environment not at all.

If the economic theory of the firm is not a realistic science, it is also not a utopian prescription. The economic theory of the firm shifts from an explanation of the world to a description of a counter-factual disutopia. On the one hand, the theory claims that individuals are never accountable for their actions. On the other hand, it anticipates that individuals *will* want to take responsibility for their actions, necessitating a justification for informing them that they would be wrong to do so. Because it has this ambiguous relationship to reality, the economic theory of the firm cannot be understood as simply an effort to describe the world as it is. Moreover, the hypothetical aspects of the theory become more important precisely in those periods in which the theory itself becomes more important. If, therefore, the economic theory of the firm is a normative description of a different set of social arrangements than the ones that currently exist, it must include some justification, in terms of human improvement, for the changes that will result from its adoption.

III. THE TRANSFORMATION OF THE PRIVATE

The process of drawing the line between private and public is neither natural nor automatic. The line is drawn differently in different times and different places, and law, including corporate law, is one of the major mechanisms by which it is drawn. One of the great traditions in the West has involved the development of the justification for expanding the private realm, even if at the expense of the public. Liberal thinkers liked the notion of privacy, and considered themselves individualists, for a reason. Individualism and privacy were important because they enabled people to become autonomous and moral agents, responsible for their own fate.

John Locke, who argued for the sanctity of private property, was a deeply religious thinker as well as one of the founders of modern psychology. These intellectual interests led him to a concern not only for the protection of the individual against government, but also for the moral and intellectual capacities of the individual.³⁴ The great thinkers of the Scottish Enlightenment were similarly preoccupied not only with liberty, but with the moral conditions that made liberty possible.³⁵ Similarly, Immanuel Kant viewed

34. See JOHN DUNN, *THE POLITICAL THOUGHT OF JOHN LOCKE: AN HISTORICAL ACCOUNT OF THE ARGUMENT OF THE "TWO TREATISES OF GOVERNMENT"* (1969).

35. See *WEALTH AND VIRTUE: THE SHAPING OF POLITICAL ECONOMY IN THE SCOTTISH ENLIGHTENMENT* (Istvan Hont & Michael Ignatieff eds., 1983).

human beings as moral agents capable of taking responsibility for their acts.³⁶ Perhaps John Stuart Mill made the clearest link between liberal theory and a certain conception of the person:

If we ask ourselves on what causes and conditions good government in all its senses, from the humblest to the most exalted, depends, we find that the principal of them, the one which transcends all others, is the qualities of the human beings composing the society over which government is exercised. . . .

. . . .

Government consists of acts done by human beings; and if the agents . . . are responsible, or the lookers-on whose opinion ought to influence and check all these, are mere masses of ignorance, stupidity, and baleful prejudice, every operation of government will go wrong; while, in proportion as the men rise above this standard, so will the government improve in quality. . . .³⁷

In short, the liberal suspicion of government was rooted in the idea that something was fundamentally wrong with paternalistic and feudal tendencies of government to assume responsibility for individuals. People needed to develop their capacities to choose and to make decisions, for, in exercising those capacities, they would develop their own sense of personal responsibility.

By contrast, little sense of personal responsibility exists in the theory of the corporation as a nexus of contracts. The intellectual effort behind the theory has emphasized not the freedom individuals will have to act, but rather the constraints they will be placed under by the contracts that bind them. This emphasis is especially prevalent in the work of neo-institutionalists such as Oliver Williamson, who tends to be more concerned with real world corporations and how they actually work than are some of the model builders who are more purely contractarian in their approach.³⁸ From Williamson's perspective, hierarchy and, at least within the firm, some strong form of authority, is a recognized need. Corporations may be free to act in external markets, but internally they are anything but free. Indeed, their internal structure seems to resemble that of the government that writers from this perspective generally fear. The corporation, as Max Weber wrote of the state, becomes the place where legitimate power is concentrated for collective ends. Thus, in Williamson's view, the individuals who populate firms are not engaged in any process of maturation and self-development that will enable them to take responsibility for the consequences of their actions. They are, rather, egos on the loose, always tempted to reach short-term solutions, which requires that a firm hand be exercised over them. Far from responsible agents, responsibility will be taken for them.

36. See IMMANUEL KANT, *FOUNDATIONS OF THE METAPHYSICS OF MORALS* (1959).

37. JOHN STUART MILL, *CONSIDERATIONS OF REPRESENTATIVE GOVERNMENT* 37-39 (Cuiran V. Shields ed., 1958).

38. See WILLIAMSON, *supra* note 16.

Pure contractarian theorists, who emphasize the voluntary rather than constraining features of interaction, surprisingly, allow for even less sense of personal responsibility for decision. The image of the persons who enter into contracts is more important than whether the contracts are voluntary or forced. Such persons are not understood to be agents who develop their human capacities through learning and experience; "rationally ignorant" people are still ignorant. The economic theory of the firm assumes whatever plausibility it may have by "dumbing down" the parties that constitute the firm. It presumes that expectations of reward act to determine the choices people will make. In fact, such people do not actually make decisions; the economic advantages or disadvantages of their actions make the decisions for them. It is as if expectations of gain are a kind of thermostat; trip the meter one way and one kind of decision is made, trip it another and another is made. The people involved in this process give up their responsibility to the economic calculus. All such people therefore become indistinguishable from one another; if one person for any reason fails to act properly, another one will take his or her place. Such individuals may be persons, but they are not responsible selves in the way many liberal theorists imagined human beings.

The contrast between early liberalism and contemporary microeconomic theory can perhaps be put this way: early liberals viewed the market, individualism, and voluntary choice as empowering mechanisms that would strengthen people's character. Contemporary economic writers view individuals as empowering the market to work in more efficient and productive ways, even at the risk of disempowering the capacities of the people who act in the market. F. A. Hayek, one of the intellectual originators of this approach, conveyed some sense of this disempowerment. As Hayek stated:

So long as management has the one overriding duty of administering the resources under its control as trustees for the shareholders and for their benefit, its hands are largely tied; and it will have no arbitrary power to benefit this or that particular interest. But once the management of a big enterprise is regarded as not only entitled but even obliged to consider in its decisions whatever is regarded as the public or social interest, or to support good causes and generally to act for the public benefit, it gains indeed an uncontrollable power—a power which could not long be left in the hands of private managers but would inevitably be made the subject of increasing public control.³⁹

What Hayek does not say is that if managers are not permitted to take their social responsibilities into account—if the only thing that can guide them is their economic relationship with shareholders—then they are relatively powerless human beings. They follow rules that they have no capacity to alter. Whatever the economic advantages that may come to them, the

39. 3 FRIEDRICH A. HAYEK, *LAW, LEGISLATION, LIBERTY* 82 (1979).

psychological advantages are minimal. They face no moral dilemmas, Kohlbergian or otherwise.⁴⁰ If chimpanzees could be trained to count, they would be just as good, if not better, managers than human beings.

The economic theory of the firm implies that individuals are monads who lack responsibility for their actions. They cannot take credit for correct judgments or take responsibility for incorrect judgments. Moreover, this lack of responsibility is not just a byproduct of the theory but one of its central components. Writers in this tradition go out of their way to establish that neither corporations themselves nor the people who constitute them can be thought of as having moral responsibilities. As Daniel Fischel writes:

Those who argue that corporations have a social responsibility and, therefore, that managers have the right, and perhaps the duty, to consider the impact of their decisions on the public interest, assume that corporations are capable of having social or moral obligations. This is a fundamental error. . . . Since it is a legal fiction, a corporation is incapable of having social or moral obligations, much in the same way that inanimate objects are incapable of having these obligations. Only people can have moral obligations or social responsibility. . . .⁴¹

In this passage the corporation is redefined as an "inanimate object" no different than a rock. But of course the corporation is different from a rock, for, even under Fischel's own account, it is a nexus of contracts between people. Even more oddly, Fischel states that "only" people can have social responsibility, as if a corporation had nothing to do with people. But while this may be true in the abstract, it is not true that people within the firm can have social responsibility, for writers in this tradition are insistent that actors within a firm have obligations defined only by profit maximization, not by general moral or social responsibilities. Fischel thus indirectly suggests an alternative definition of the firm; *a firm is a device through which human beings, who have moral obligations, come together for the purpose of ridding themselves of their capacity to exercise moral obligations*. The corporation, according to the economic theory of the firm, is a mechanism of responsibility displacement. This displacement of responsibility that characterizes the economic theory of the firm is accomplished in two steps. First, responsibility is taken from people and placed instead in either the hierarchical authority or the transactions that take place between people. Second, the institutional structures that come into being as a result of this displacement of responsibility are then stripped of responsibility by calling them legal fictions or artifacts. When the entire process is complete, the modern corporation is defined as a self-perpetuating system in which everyone follows a predetermined set of rules that results in the economic betterment of all.

40. LAWRENCE KOHLBERG, *THE PHILOSOPHY OF MORAL DEVELOPMENT* (1981).

41. Fischel, *supra* note 15, at 1223.

If this conclusion is correct, then the basis of the individualism and respect for privacy sought by writers in this tradition stands in sharp contrast not only to liberal political theory, but also to other efforts to justify privacy. The reasoning behind some versions of the right to abortion, for example, assigns a priority to privacy not only as an end in itself, but also because privacy will further the ability of an individual to grow into a responsible human being. This reasoning surfaces in the Supreme Court's decision in *Griswold v. Connecticut*, which, in striking down laws regulating the ability of married individuals to choose birth control for use in their own bedrooms, replaced a feudal legacy of intervention in people's lives with the eighteenth and nineteenth century notion of individual responsibility for individual conduct.⁴² *Roe v. Wade* also touched on this theme by giving women the right to control their own bodies in the first trimester of pregnancy,⁴³ even though *Roe*, by some feminist accounts, did not go far enough. Robin West, for example, wrote that

Women need the freedom to make reproductive decisions not merely to vindicate a right to be left alone but often to strengthen their ties to others: to plan responsibly and have a family for which they can provide, to pursue professional or work commitments made to the outside world, or to continue supporting their families or communities.⁴⁴

These considerations, which touch on the kinds of moral dilemmas explored by Lawrence Kohlberg and Carol Gilligan—dilemmas that cannot even arise in the Hayekian view of liberty—imagine the person in a very different way than does the economic theory of the firm.⁴⁵

By contrasting the way privacy is treated in the economic theory of the firm literature against the way it is conceptualized in other areas, two sharply different visions of liberty emerge. One kind of privacy constructs people; the other deconstructs them. One envisions growth and development; the other envisions automatic, preprogrammed responses. One includes an incentive to learn, which is why free speech has aspects of a private right; the other is indifferent in the face of ignorance. The literature spawned by the economic theory of the firm clearly is individualistic, but what is more important is the kind of individuals it envisions. These individuals are not people as most of liberal political theory has always understood them.

The economic theory of the firm would suffer no infirmity if real life individuals were as psychologically and cognitively "thin" as the theory posits, because science has no other obligation than to describe the world it finds. But because the economic theory of the firm is normative—because

42. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

43. *Roe v. Wade*, 410 U.S. 113 (1973).

44. Robin West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43, 84-85 (1990).

45. For an exploration of some of these moral dilemmas, see RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* 30-67 (1993).

it recognizes that human beings are in fact richly complex in their motivations, and therefore require a theory that tells them *not* to pay attention to their own complexity—it must justify its prior commitments to the value of privacy. Classical liberalism contained such a powerful justification. But the economic theory of the firm is handicapped by its own limited views of human beings. Unlike explicitly reformist theories, which argue that as a result of some action currently not taking place in the real world, people will be morally improved, this theory says that we need to change the world to make people more morally impoverished. If that statement is the justification for priority of the private sphere, it is, unlike the justification contained in liberal political theory, a very weak one.

Although the economic theory of the firm precisely draws the line between private and public, the theory pays two prices for this clarity, and either of these make adoption of that boundary very expensive. First, the theory requires that individuals be less than they are capable of being. More importantly, however, this judgment is made arbitrarily, representing little more than the values of those who argue that human beings *ought* to be less than they can be. Were we to conclude that firms should be seen as nothing more than a nexus of individuals seeking to maximize their self-interests, we would have drawn the boundary between private and public in an arbitrary fashion based on little more than what some rather idiosyncratic writers think, even though most people, including most historical liberal theorists, think otherwise. This ground seems extremely unpromising as a basis upon which completely to revise the way we conceive corporations in the modern world.

IV. THE BOUNDARIES OF THE PUBLIC

Because the LBO and hostile take-over mania of the 1980s seemed to put at risk any number of constituents of the corporation other than directors and shareholders, including workers, suppliers, and members of the local community, any theory that seems to exclude such additional constituents from the relevant decisionmakers is bound to appear unfair. As a result, even though the take-over mania has subsided, efforts to rethink what a corporation is in ways that would include new constituents have also arisen in recent years.

Unlike the nexus of contracts approach, advocates of the public responsibility of the corporation have no developed theory to which they can turn. Compared to the sense of certainty with which the economic theory of the firm draws the public/private line in legal questions, advocates for the public point of view tend to be uncertain and tentative, as if they realize that this line can never be drawn in any one place. This uncertainty puts them at a rhetorical disadvantage, but it also may provide a realistic advantage in dealing with corporations as they actually are.

For example, those who speak for the public side of the public/private distinction seem more *ad hoc*—and more defensive—in their arguments. Even those who advocate drawing the line to be more inclusive of the public

concede much to the private view of the corporation. For one thing, no one challenges the notion that no matter how the public/private line is drawn in the future, directors of companies, in their private capacities, will always exercise the most important role in corporate governance. Professor Bratton, who is critical of the notion of the corporation as a nexus of contracts, writes that "[c]orporate law is not an entirely 'private' proposition," but then adds "even though it tends to lie on the private side of the broader continuum of public and private law."⁴⁶ Similarly, Professor Mitchell does not argue that a tradition of public law ought to replace private law in dealing with the modern corporation. Rather, his point is that "re-emerging public law aspects of corporate law can be reconciled with the private law model of directorial management, permitting us to retain both the efficiency aspects of the latter approach and the legitimacy and fairness functions of the former."⁴⁷ Private law, with respect to the corporation, is clearly here to stay. In contrast to advocates of the nexus of contracts approach, who view themselves as self-proclaimed revolutionaries, defenders of public law are quite circumspect in their claims.

This sense of caution also emerges when we consider the ways in which advocates of greater responsibility consider specific reforms. Professor Marleen O'Connor, for example, writes that "[t]he scope and content of the directors' fiduciary duties could be redefined to require directors to defend the employees' interests during fundamental corporate changes."⁴⁸ Not only does this formulation recognize the decisionmaking responsibilities of directors, it also restricts limits on their autonomy to periods of significant corporate turbulence. Presumably at more normal times, more normal governance will remain in place. When contemplating the parameters of those extraordinary duties, O'Connor does not venture far: "At a minimum, . . . any corporation that closes a plant or orders a mass dismissal should pay severance benefits according to the employee's years of service and should continue health care insurance for a period of time."⁴⁹ One may consider such proposals radical in the sense that American corporate leaders currently do not have such duties. One could imagine, however, other governance regimes in which corporate leaders would be happy to pay so low a price to escape any other kinds of obligations they might face.

Perhaps this caution stems from the uncertainties of drawing a new line between private and public, compared to the certainties of keeping an existing line in place. If we change that line, the result may not only be greater corporate accountability and responsibility, but also new difficulties associated with establishing a new boundary. The most important of these

46. William W. Bratton, *Public Values and Corporate Fiduciary Law*, 44 RUTGERS L. REV. 675, 696 (1992).

47. Lawrence E. Mitchell, *A Theoretical and Practical Framework for Enforcing Corporate Constituency Statutes*, 70 TEX. L. REV. 579, 584 (1992).

48. Marleen A. O'Connor, *Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Displaced Workers*, 69 N.C. L. REV. 1189, 1252 (1991).

49. *Id.* at 1254.

difficulties is determining which new groups ought to be represented at the corporate governance table. There are two ways to approach this problem. One approach is to draw the new line conservatively, admitting just one or two new parties to the table. The other approach is to draw it expansively, admitting many new members to the table. Each approach presents its own difficult issues.

If we adopt the conservative approach, then which new constituents of the corporation should we admit? Those most affected by corporate decisionmaking seem to have the greatest claim. If this is the primary criterion, no other group has as strong a claim as those who work for a particular company, especially those who have worked there for a long time. Certainly the proposals made by writers such as Marleen O'Connor and Katherine Stone for including workers in any discussions of corporate responsibility are powerful ones.⁵⁰ They do entail at least one major risk: labor can be as much a self-interested actor as any other participant in corporate governance. Including labor as a relevant party may broaden somewhat the social bargain contemplated by the corporation, but it also may leave the present model completely in place. The line between public and private, in other words, would not necessarily be redrawn if labor were included, assuming that labor is just one more private party to the contract.

This may explain why some writers who argue on behalf of labor as a party to the corporate contract do not object to the nexus of contracts approach—as long as labor is included as one of the parties to the contract. Generally, critics of the nexus of contracts approach have great respect for what they are criticizing. Professor Millon, for example, speaks of this approach as a “novel and sophisticated” version of the aggregate theory of the corporation.⁵¹ But Professor Stone goes well beyond such rhetorical recognition. She writes that “new theories of the corporation give a much more rich and complex picture of the interests of corporate actors, which advocate a broader view of corporate governance.”⁵² This criticism is particularly true of Oliver Williamson’s version of the theory. Stone states, “Williamson’s model of corporate governance, in which governance roles are determined by the types of investments and safeguards of each constituency, can illuminate these new developments in labor participation, and can help us reconceptualize a new role for labor in corporate decision making.”⁵³ Indeed, Stone adds that under this theory, “labor stands formally on an equal footing with all other contenders for power within the concern.”⁵⁴

50. *Id.*; Katherine Van Wezel Stone, *The Legacy of Industrial Pluralism: The Tension Between Individual Employment Rights and the New Deal Collective Bargaining System*, 59 U. CHI. L. REV. 575, 641 (1992).

51. Millon, *supra* note 1, at 231.

52. Stone, *supra* note 50, at 641.

53. Katherine Van Wezel Stone, *Labor and the Corporate Structure: Changing Conceptions and Emerging Possibilities*, 55 U. CHI. L. REV. 73, 161 (1988).

54. *Id.* at 152.

This is an odd reading of the nexus of contracts approach, a good deal of which is devoted to demonstrating that residual claimants, not labor, play the major role as parties to the corporate contract.⁵⁵ Certainly Professor O'Connor finds the nexus of contracts approach hostile to labor, which plays only a transitory role in most of these theories.⁵⁶ But if O'Connor's interpretation is more faithful to the nexus of contract literature's intentions, Stone still makes an important point, even if indirectly. There is no reason why labor could not become an important player as corporations restructure. But that role would not necessarily be one in which labor would stand for a larger public interest. The equation of labor with the larger public—a legacy of the Marxian notion that workers speak for the universal—is, in watered down form, the legacy of the New Deal approach to collective bargaining, an approach toward which Professor Stone is increasingly critical.⁵⁷ By her way of thinking, labor can be reconceptualized as an interest group, one more claimant for scarce goods, and it can operate by the same rules of self-interest under which all other interest groups operate.

It seems, then, that if we draw the new line between public and private narrowly so as to include labor, we gain, as we do with the economic theory of the firm, the advantage of definitional clarity; we know who the parties to the bargain are. At the same time, however, we sacrifice the very reason for wanting to redraw the line in the first place, which is to expand the definition of public responsibilities. By reconceptualizing labor as one more interest group, we also reconceptualize it out of the public domain.

The alternative method would be to draw the line between public and private in a new place entirely. This method would have the advantage of raising fundamental questions about corporate governance. It would stimulate a larger debate on public responsibility and raise major issues of ethical obligation. A redrawn line would please sociologists, theologians, advocates of greater corporate responsibility, and some politicians. But where, exactly, should this new line be drawn? That is not an easy question to answer.

An extreme case illustrates some of the difficulties involved. Joseph Singer, in trying to establish a claim for property rights in the job, argues as follows:

Rather than asking "who owns the factory?," we should ask "what relationships should we nurture"? We should encourage people to rely on relationships of mutual dependence by making it possible for everyone to form such relationships and by protecting those who are most vulnerable when those relationships end.⁵⁸

55. This is especially true of Alchian and Demnetz.

56. O'Connor, *supra* note 48, at 1204.

57. Stone, *supra* note 50.

58. Joseph W. Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 751 (1988).

Many questions exist about the kinds of relationships we ought to nurture, but it is by no means clear that the realm of corporate governance is one place in which such questions should be posed. Such questions—proper for the realm of the family or the realm of the church—are inappropriate for the realm of the economy. Unless we recognize different spheres of activity, each with its own code of ethical or moral behavior, we solve the demarcation problem between private and public by including everything within the realm of the public.

No matter how well-intentioned such a broadening of the public sector may be, it is a dangerous move, which would leave individuals at the mercy of governmental intrusion into their most intimate affairs. Singer, to be sure, is very vague on the question of who the “we” is that ought to concern itself with the kinds of relationships we nurture, but if he is serious that society should take an interest in these matters, the only effective agency to do so is the state. One need not be an advocate of the nexus of contracts approach to recognize that corporations are primarily in the business of making goods and providing services, and that the most we would want the public sector to do is to ensure that they carry out their proper task efficiently and fairly. To give corporations a whole set of new tasks seems to take the problem of corporate governance to a potentially unmanageable new level.

In short, anyone who argues for shifting the existing boundary will face problems. Shift the boundary too narrowly, and the boundary does not shift at all. Shift it too radically, and the boundary completely disappears. Facing a problem as serious as this, one can be forgiven for concluding that perhaps the boundary should be left in place.

V. MUDDLING THROUGH

But does the boundary ever stay in place? We are, let us remember, talking about changing the ways in which we think about where the line between public and private should be drawn. But if we focus instead on where it actually is drawn, we discover that tentativeness and caution are the appropriate responses. Corporations really are both private and public simultaneously. They are not states; they carry out economic activities for a profit, a profit that justifiably is returned to those who take the risk of investing in what they do. At the same time, corporations are not purely private individuals. They are institutions that sometimes act as quasi-governments and, even when they do not, they take actions that affect every aspect of people's lives, including people who have no formal contractual relationship with them.

The real people who compose the corporate structure recognize both sides of these relationships. Directors know that they must deliver on promises to make returns on investments; they rarely need legal or economic theory to remind them. But they also know, even if economists do not, that they are tied to the communities in which they exist and have relationships with those who work for them. From their point of view, community

service or philanthropy make perfect sense. They are realistic responses to actual situations, not hidden forms of self-interested behavior. Just as they do not need economists to tell them to make money, they do not need legislators and reformers to tell them that their institutions affect the lives of millions.

If directors recognize both private and public obligations, should not we have a theory that also recognizes both? Advocates for the public side of the corporation do suggest that directors have private responsibilities. But advocates for the private side—at least those involved in the legal aspects of the economic theory of the firm—rarely recognize that directors also have public responsibilities. The realism inherent in this caution suggests that the public advocates have the better case.

This case will not neatly consolidate all the principled issues raised by the corporate governance debate. The public side of the debate presents suggestions for models rather than models themselves. Some of these suggestions are more sociological than legal. Gunther Teubner, for example, argues that we should think more about functions than about constituencies when considering issues of corporate governance. A knowledge of the factors necessary for large private organizations to carry out their obligations to their workers and their communities yields standards that can be used to establish corporate responsibility.⁵⁹ Philip Selznick makes proposals along similar lines. Large scale institutions cannot be understood without consideration of the ways in which they succeed or fail in promoting the moral competence of the agents that compose them. Corporate governance is a question of “high” politics—of the meaning of community—as much as it is a question of power.⁶⁰

Recent literature emphasizes the need to bring greater recognition of the public side of corporate activity into the discussion of corporate law. Professor Millon and Professor Mitchell have proposed two general approaches. Millon’s approach seems to establish new rights for nonshareholders, whereas Mitchell’s approach seeks common-law solutions by establishing a new test that would enable potential constituents to challenge the actions of corporate boards. I will conclude by suggesting that the latter is more in accord with the realism I have been advocating in this Article.

Millon argues that the statutes passed by states in the wake of the outcry over LBOs and hostile take-overs cannot be dismissed as not having established any new rights.⁶¹ On the other hand, it is difficult to conclude that any of the statutes do establish any new rights, for only one of them makes mandatory the obligation of directors to consider the interests of nonshareholders, and even that statute is vague. But problems of interpre-

59. Gunther Teubner, *Corporate Fiduciary Duties and Their Boundaries*, in *CORPORATE GOVERNANCE AND DIRECTOR’S LIABILITIES: LEGAL, ECONOMIC, AND SOCIOLOGICAL ANALYSES OF CORPORATE SOCIAL RESPONSIBILITY* 149-77 (Klaus J. Hopt & Gunther Teubner eds., 1985).

60. PHILIP SELZNICK, *THE MORAL COMMONWEALTH: SOCIAL THEORY AND THE PROMISE OF COMMUNITY* 350-54 (1992).

61. Millon, *supra* note 11, at 256-57.

tation aside,⁶² it is not clear that Millon is actually proposing that non-shareholders have rights against corporate directors. Voting rights, for example, have not been established by these statutes. His most exclusive standard for corporate responsibility reads as follows: "In managing the company in a manner that pays due regard to profit maximization over the long-term, management should honor the legitimate expectations of non-shareholder constituencies if abrogation of existing relationships is necessary to serve the larger interests of the corporate enterprise as a whole."⁶³ This language does not express a right against management. Instead, it establishes a general duty for management, that, as Millon acknowledges, should be viewed as more symbolic than actual.

But even if we wanted to change the world in order to give nonshareholders rights against directors, could we? Everyone in society is a non-shareholder of any given corporation except the shareholders, which makes the term "nonshareholder" fairly close to meaningless. An inability to define precisely which nonshareholders would have rights against a corporation dooms a rights-based approach to this issue. Rights are only meaningful when those who exercise them are responsible members of a particular community. It is clear, for example, that the citizens of a state ought to exercise rights against a state. Citizens of other states have rights against their own states, but their rights against a state of which they are not a citizen are contingent at best. But nonshareholders are often nonshareholders of every corporation. So are animals and inanimate objects. If there are to be rights established against directors, we need criteria that determine which nonshareholders have such rights and why.

Other problems might develop even if we were able to delimit successfully those who could claim rights against a corporate board. Rights can be easily abridged unless they are determined to be fundamental. But how many fundamental rights can there be? Is the right to a job within any particular firm equivalent to the right to free speech or the right to an abortion—both of which have been claimed as fundamental rights? One might argue that the right to work and to secure a livelihood ought to be as fundamental as any other right. The right to earn a livelihood, however, is not a right to a particular job, to be asserted against a particular corporate board. Rights, moreover, are timeless; corporate activity is not. One does not have to be a great friend of the sanctity of private profit to recognize that rights established against a corporation could prevent that corporation from taking steps necessary to be competitive. It may be possible to establish a public interest in corporate activity without formally establishing new rights against corporate directors.

Professor Mitchell proposes to allow the appropriate nonshareholder constituencies of a corporation to emerge over time in response to litigation.

62. Millon's interpretation of these statutes is challenged by Orts, *supra* note 10, at 80-84.

63. Millon, *supra* note 11, at 268.

Mitchell suggests that the precedents and procedures necessary to shift the boundary in significant ways currently exist in corporate law. He proposes a test in which those injured by the actions of a corporate board, assuming that those injured had a direct or implied contract with the board, could bring action in which "the burden would be placed on the board to prove that its actions were undertaken in pursuit of a legitimate corporate purpose rather than in the interests of the board itself."⁶⁴ If the plaintiffs demonstrate that the same purpose could have been achieved without the injury—or with less injury—they could obtain an injunction preventing the board's actions.

Mitchell proposes no clear standard concerning "which constituents have standing to enforce the duty."⁶⁵ He suggests settling this issue on a case-by-case basis. In addition—this is surely a problem of more concern to a sociologist than to a legal scholar—this approach represents an expansion of litigation and judicial decisionmaking when more informal methods may be preferable. Still, Mitchell recognizes that public and private are different realms in which pluralistic standards ought to apply:

In this role, the board serves as an independent mediator of a variety of legitimate economic and personal interests in the corporation. This role acknowledges that the modern large corporation has become a pluralistic entity. It also acknowledges the interdependence of corporate constituent groups and the importance of each in attaining corporate success.⁶⁶

Mitchell thus solves the problem of demarcation between private and public by deferring the problem to some future time.

This may be the best solution available. If the corporation is both a private and a public institution, perhaps the only way to develop a reasonable approach to its activities is to determine which side to emphasize depending on the particular situation we are confronting. Because I am not a lawyer, I am not especially bothered that such an approach might produce inconsistent results. My own preference would not be for reformed corporate law, but for questions involving the duality of the corporation to be resolved nonlegally as often as possible. But we must have law and that law must cover corporations. What more could we do, under such circumstances, than to construct a legal system that is as multifaceted—or, if one prefers, contradictory—as the reality it would presumably regulate?

VI. CONCLUSION

There are obvious problems with the public/private distinction, but that distinction is here to stay. If we value both sides—if we think that there is a place for privacy and capitalist initiative, but also a place for larger social and moral obligations that private actors owe to the public—we will have

64. Mitchell, *supra* note 47, at 636.

65. *Id.* at 638.

66. *Id.* at 640.

to add either a public dimension to private law or a private dimension to public law. The question is not whether to embrace one or the other but how best to find the appropriate mixture.

It is not the case that, historically speaking, we began with private corporate law and added a public dimension to it. Corporations have had a public dimension from the very beginning. If anything, the notion of a private corporation is more artificial—more the product of legislation—than the notion of a public corporation. If this is true historically, when the liberal tradition in political theory was grounded in a broad conception of privacy, it ought to be even more true today, when, at least among those writing in the tradition of the economic theory of the firm, there is a less compelling justification for a retreat into privacy. If we are to find a balance between the public and private roles of corporations, it makes little sense to start with the private and add a public dimension, because the question of where the private begins and ends is always somewhat arbitrary.

It makes far more sense, in seeking balance, to begin with the corporation as a public entity and to develop a conception of the private from that starting point. A system of legal rules ought to recognize the world that it regulates. If the world is complex, the legal rules should be complex. Drawing the line between public and private in a way that is clear, but that achieves its clarity because it distorts reality, seems less promising a starting point than one that takes reality into account, even if the result is rules that, because ambiguous, require common sense and pragmatic reasoning.

I do not suggest what those rules ought to be; it is far beyond my competence even to introduce such issues. If social science is to make a contribution to the debate over corporate governance, it can do so by other means than writing legal codes. The major contribution of social science is to suggest that the worlds created by human beings rarely can be governed by rules that seek automatic, preprogrammed responses. The corporation is one of the most ingenious social institutions ever created. It never governs itself, but rather is governed. How it ought to be governed is a question that will always elicit different, even passionately contested, points of view. The one thing we should expect from those points of view is faithfulness to reality itself.