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Corporations Are People Too: A Multi-Dimensional Approach to the Corporate Personhood Puzzle

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Cover Page Footnote

Professor of Law, Chapman University School of Law. B.A., Stanford University; J.D., UCLA School of Law. I gratefully acknowledge Tony Arnold, Deepa Badrinarayana, Daniel Bogart, Timothy Fort, and Scott Howe for helpful comments on previous drafts. I also thank the participants of the faculty workshop at Pepperdine University School of Law where an earlier version of this Article was presented. I thank Dean John Eastman, Dean Emeritus Parham Williams, and Chapman University for generous administrative support. Nicole Cohrs, Oriana Kim-Rajab, and especially Rebecca Conrad provided outstanding research assistance. Special thanks are owed to Randy Ripken for support throughout all stages of this project. This Article is dedicated to my parents without whose support it would never have been written.

**CORPORATIONS ARE PEOPLE TOO:
A MULTI-DIMENSIONAL APPROACH TO THE
CORPORATE PERSONHOOD PUZZLE**

*Susanna K. Ripken**

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I. INTRODUCTION

During the last year, controversy has raged over the unprecedented amount of money authorized by Congress to bail out failing corporations. Mega-corporations like AIG, Citigroup, and Bank of America, have received billions of dollars in federal aid.¹ Auto industry giants also received massive bailout funds.² The policy underlying the decision to rescue such companies was that they are simply too large to be allowed to fail. Their role in the economy, the millions of jobs they provide, and the investments they support, are all deemed to be so significant that letting certain corporations fail completely would arguably have disastrous consequences.³

Opponents of government bailouts asserted that mismanagement and/or greed caused the corporations to falter and, therefore, these companies deserve to be dismantled by the free market. The feeling is that they made their bed, and now they must lie in it. Giving them billion-dollar hand-outs is simply throwing good money after bad. We are not obligated to nourish these giant corporate persons or even to preserve their existence.

Interestingly, the bailout debate raises deeper questions about what it is, exactly, we are bailing out. Who or what is it that we are trying to save? Is it the millions of employees who depend on the continuation of

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1. See Julie Creswell, *Bank of America May Get More Bailout Money*, N.Y. TIMES, Jan. 15, 2009, at B1; David Enrich & Deborah Solomon, *Citi, U.S. Reach Accord on a Third Bailout*, WALL ST. J., Feb. 28, 2009, at B1; Pallavi Gogoi, *AIG Gets \$30 Billion More to Stay Alive: Bailout Swells after \$61.7 Billion Loss Reported*, USA TODAY, Mar. 3, 2009, at 6A.

2. See Edmund L. Andrews et al., *Ailing Industries Pressing to Add Billions to Bailouts*, N.Y. TIMES, Feb. 24, 2009, at A1.

3. See Peter S. Goodman, *Too Big To Fail?*, N.Y. TIMES, July 20, 2008, at A1.

the corporation for their jobs? Is it the shareholders who have risked their capital by investing in the corporation? Is our concern for the customers who look to the corporation to provide essential goods and services? Are we trying to help the suppliers, vendors, and communities that depend on their ongoing relationships with the corporation for their own survival? Or, more cynically, does saving the corporation mean saving the politicians whose political careers are dependent on large annual corporate contributions?

Proponents of corporate bailouts seem to believe the corporation is an aggregate of all those human beings who participate in and depend on the success of the corporate enterprise. When we save the corporation, we are really saving all the individuals who are behind it.⁴ Critics of this approach seem to view the corporation differently. They see the corporation as a separate entity that either succeeds or fails on its own merits. When a corporate person is dysfunctional or begins to fail due to its own systemic weaknesses, then that corporate person should be left alone to die.⁵ Our belief in the survival of the fittest gives us confidence that other corporate entities that are healthier and more efficient will rise up and take the place of weaker ones. The national debate over bailing out corporations reveals that the corporation itself means different things to different people.

These contrasting views of the corporation reveal fundamental concerns about the nature of the corporation and its status as a person in our society. This component of the debate is not new. Whether or not the corporation should be viewed as a separate person that owes and is owed certain obligations has puzzled legal theorists for years.⁶ Because of the

4. See generally Jeffrey D. Sachs, Editorial, *A Bridge for the Carmakers; The Future Is in Sight. They Just Need Help Getting There*, WASH. POST, Nov. 17, 2008, at A19 (arguing the necessity of federal intervention preventing the bankruptcy of car manufacturers in order to protect related industries from failure, safeguard overall domestic production, and prevent a “resulting cascade of failures”).

5. See generally Wayne Allyn Root, Editorial, *Let Newspapers Fail!*, JACKSONVILLE OBSERVER, Sept. 26, 2009, <http://www.jaxobserver.com/2009/09/26/letnewspapers-fail/> (citing the long-term economic benefits of a Darwinian approach to failing corporations and industries, including newspapers, auto manufacturers, and airlines).

6. See, e.g., ERNST FREUND, *THE LEGAL NATURE OF CORPORATIONS* (1897); FREDERICK HALLIS, *CORPORATE PERSONALITY: A STUDY IN JURISPRUDENCE* (1930); H.L.A HART, *DEFINITION AND THEORY IN JURISPRUDENCE: AN INAUGURAL LECTURE* (1953); ALEXANDER NEKAM, *THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY* (1938); S.J. STOLJAR, *GROUPS AND ENTITIES: AN INQUIRY INTO CORPORATE THEORY* (1973); George F. Canfield, *The Scope and Limits of the*

meaning and value we attach to personhood in our society, deciding whether a corporation is a person helps us decide what its rights and duties are and how we can expect it to behave. It gives us a normative framework for how we should view corporations, how they should be treated, and how they should treat us.⁷

Some argue that the corporation is not a person at all. It is merely a legal construct, a fictional entity, an artificial creation of the natural persons who form the corporation for their own purposes.⁸ It has no real, independent ontological existence of its own. It has no body, mind, or soul. The corporation is simply a creature of statute and is dependent on the law to give it form and function.

Others argue that the corporation is not so much a creature of law as it is an association forged by the mutual agreement of the individuals composing it. No corporations would exist and no corporate actions would occur without the actions and consent of the human beings who make up the corporate entity. Corporations themselves cannot literally “act” or “decide” or “intend” apart from their human members. Therefore, the corporation is better described as a collection, or aggregate, of its individual human constituents, without whom the corporation would

Corporate Entity Theory, 17 COLUM. L. REV. 128 (1917); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); John Finnis, *Corporate Persons II: Persons and Their Associations*, in 63 SUPP. VOL.: PROC. OF THE ARISTOTELIAN SOC'Y 267 (1989); Max Radin, *The Endless Problem of Corporate Personality*, 32 COLUM. L. REV. 643 (1932); Paul Vinogradoff, *Juridical Persons*, 24 COLUM. L. REV. 594 (1924); Martin Wolff, *On the Nature of Legal Persons*, 54 L. Q. REV. 494 (1938).

7. This inquiry into corporate personhood involves more than merely asking whether the corporation is a person for legal purposes. Some scholars argue that the narrow question of legal personality should be analyzed purely from a pragmatic instrumentalist approach, i.e., if the corporation is of such a nature that certain rights and duties can be attributed to it, we can label it a person, making the existence of corporate personhood dependent on the circumstances. See, e.g., John Dewey, *The Historic Background of Corporate Legal Personality*, 35 YALE L.J. 655, 659-62 (1926); see also Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861, 865 (1981) (discussing pragmatic instrumentalism and identifying John Dewey as a subscriber of this approach). From this view, it does not matter whether we decide a corporation is a person because the term “person” can signify whatever we want the law to make it signify. See Dewey, *supra*, at 655. This Article seeks to explore other dimensions of corporate personhood beyond just the legal status of corporations.

8. This is often called the artificial entity theory. See *infra* Part II.A.

have no identity or ability to function at all.⁹

Still others believe the corporation is a real person, not an artificial, fictional entity. It is an independent reality that exists as an objective fact and has a real presence in society.¹⁰ It is not the law that gives the corporation life. The corporation exists prior to and separate from the state; the state merely grants it official recognition and permission to operate. Under this view, the corporation is separate and distinct from the individuals who participate in the corporate enterprise. Employees can come and go without affecting the continuity or identity of the organization itself. As a whole that is greater than the sum of its parts, the corporation is a real person, qualitatively different in kind from the human persons who are part of its make up.

All of these personhood theories of the corporation have their own normative features. Viewing the corporation as a creature of statute and a product of state action supports a public-oriented view of corporations and corporate law. The laws that create corporations should shape them to act in ways that serve the public interest.¹¹ In contrast, if the corporation is viewed as an aggregate of its human members, then corporations should be regarded as the product of private initiative, private contract, and private property arrangements.¹² The rights and duties of

9. Many refer to this view as the aggregate, associational, or contract theory. See *infra* Part II.B.; PHILLIP I. BLUMBERG, *THE MULTINATIONAL CHALLENGE TO CORPORATION LAW: THE SEARCH FOR A NEW CORPORATE PERSONALITY* 27 (1993).

10. This theory is called the real entity, natural entity, or organic theory. See *infra* Part II.C.

11. Historically, corporate law reflected a public-oriented view of corporate activity, as early corporations were created for the public benefit. See Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1425 (1982) (noting that regulatory public law premises had dominated the law of corporations prior to 1819); see also JAMES W. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE LAW OF THE UNITED STATES: 1780-1970* 17-21 (1970) (discussing the special charters that historically were granted to corporations that served a public utility function); D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 292-96 (1998) (discussing the relationship between early business corporations and the public interest).

12. This private model of the corporation focuses on the "private relations between the shareholders of the corporation and management" and on "the governance problems that arise inside the corporation." David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 201-02. The distinction between public and private views of the corporation is part of a much larger, ongoing debate over the fundamental nature and purpose of corporations. See Lawrence E. Mitchell, *Private Law, Public Interest?: The ALI Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 871, 872, 877-80 (1993) (discussing the contrasting public and private views of the corporation and corporate

the corporation are simply the rights and duties of its individual members. The law should support the rights of these private parties and avoid interfering with their consensual actions.¹³ Alternatively, if the corporation is a real person in society, it should bear the same legal, social, and moral responsibilities that natural persons carry, as well as the same rights and protections.

Each of these conceptions of the corporate person captures elements of truth, and each makes valid points. But they cannot all be accepted at the same time because they dictate diametrically opposing results. The recent controversy over the wisdom of bailing out our country's mega-corporations has revealed that the role of corporations in our lives is incredibly complex, and no one of the current legal theories of the personhood of corporations, standing alone, is sufficient to give us a completely satisfactory picture of the corporation and its place in our society. We need more than just our legal academic perspective to understand the nature and purpose of the large corporation. The corporation is a multi-faceted entity that requires several different lenses to see it in its entirety.

The corporation can be viewed independently from the lenses of philosophy, law, moral theory, political science, sociology, psychology, organizational theory, theology, and economics, all of which highlight separate but essential features of the corporate person. Depending on the lens one chooses to utilize, the subject bears a very different image. Taken together, they reveal that the corporation is a multi-dimensional person with coinciding and conflicting properties that defy classification into a neat and tidy unitary theory. The modern corporation simply cannot be understood apart from the broader context in which it functions, and that context cannot be effectively analyzed without multiple academic perspectives.

This Article takes a unique interdisciplinary approach to the puzzle of corporate personhood. It draws upon theories from several different schools of academic thought to shed light on the questions: what is the corporation, and how should it be treated in our complex, modern

law).

13. The "ideology of 'privatization'" has deep roots in political and economic "laissez-faire" theory. See Joan Williams, *The Development of the Public/Private Distinction in American Law*, 64 TEX. L. REV. 225, 225 & n.5 (1985) (discussing "laissez-faire" theorists' antagonism toward government interference with the private sphere of economic activity).

society? Part II of the Article begins with a summary of the legal theories of corporate personhood. Historically, three different conceptions of the corporation appeared in cycles as political and economic climates for business changed in America during the 19th and 20th Centuries.¹⁴ These legal theories of the corporate person tried to address the issues of corporate purpose, corporate rights, and corporate responsibility.

These issues can be approached not just from a legal standpoint, but also from the viewpoint of moral philosophy. Part III turns to the philosophical dimensions of the corporate person. Moral philosophers have insights about the moral personhood and moral agency of corporations. Some argue the corporation is incapable of having moral responsibilities because it has no conscience or capacity to act or feel.¹⁵ Others insist that the corporation as an entity is a moral person and can carry moral responsibility for collective acts and intentions that simply cannot be attributed to any one human member.¹⁶

Part IV explores the organizational, psychological, and sociological dimensions of the corporate person. Observers of organizational behavior regard the corporation as an independent, functional entity with decision-making systems that give it a formal identity of its own.¹⁷ The corporation's culture, character, and norms have profound effects on the thoughts, attitudes, and behavior of the individuals who make up the corporation. To the extent individuals' values and principles are shaped by their corporate environment, the individuals are in some sense

14. See Reuven S. Avi-Yonah, *The Cyclical Transformations of the Corporate Form: A Historical Perspective on Corporate Social Responsibility*, 30 DEL. J. CORP. L. 767, 785-813 (2005).

15. See Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, 2 BUS. & PROF. ETHICS J. 1, 6-10 (1983) (arguing moral responsibility cannot be ascribed to corporations because they cannot fulfill the *actus reus* and *mens rea* elements). Some philosophers argue that even if corporations are capable of acting intentionally, they still do not qualify as moral persons because they are incapable of having the same moral rights as humans. See, e.g., Thomas Donaldson, *Moral Agency and Corporations*, 10 PHIL. CONTEXT 54, 58 (1980).

16. See, e.g., PETER FRENCH ET AL., CORPORATIONS IN THE MORAL COMMUNITY 12-23 (1992).

17. See ARTHUR G. BEDEIAN, ORGANIZATIONS: THEORY AND ANALYSIS 5 (1980) (“[O]rganizations exhibit a tendency to . . . take on a momentum of their own . . . [and] develop a unique self, a distinctive identity, that is referred to . . . as *organizational character*.”). See generally ORGANIZATIONAL IDENTITY: A READER (Mary J. Hatch & Majken Schultz eds., 2004); DAVID A. WHETTEN & PAUL C. GODFREY, IDENTITY IN ORGANIZATIONS 1-80 (1998).

creatures of the corporation, rather than the other way around.

The complex social dimension of corporations relates to another aspect of corporate personhood with important consequences for society: the political role of corporations. Drawing on political theory and philosophy, Part V examines the corporation as a political entity. The appropriate role for large corporations in a democratic society is tied to our deeper political convictions about government power and individual freedom.

In addition to the role that corporations play as legal, economic, social, and political institutions, the corporate person may also have theological significance. Part VI considers the possible spiritual dimension of the corporation, an element that is not often discussed in mainstream academia. Proponents of the spiritual approach to corporations believe the corporation is an instrument that can be used for the spiritual flourishing of human beings and for the common good of society.¹⁸ The normative applications of this spiritual approach to corporations are similar to those of communitarian or stakeholder models of the corporation.¹⁹ The maximization of profits is an important objective of corporate activity, but should not be regarded as the sole or primary purpose of the corporation.

In stark contrast to the ideas associated with the spiritual model, the economic theory of the corporation repudiates the belief that corporations can or should have any purpose beyond acting as a contractual center for economic exchanges. Part VII describes the neoclassical economic paradigm of the corporation. Under this model, the corporate person is merely a fiction that serves as a nexus of contracts among the firm's various individual participants.²⁰ Market forces bring share-

18. See, e.g., TIMOTHY L. FORT, *ETHICS AND GOVERNANCE: BUSINESS AS MEDIATING INSTITUTION* 25-28 (2001); see also *id.* at 179-98 (discussing the connections between theology and business).

19. See R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation*, in *ETHICAL THEORY AND BUSINESS* 56, 56 (Tom L. Beauchamp & Norman E. Bowie eds., 6th ed. 2001). "[S]takeholder theory argues that the corporation ought to be managed for the benefit of all affected by corporate actions, not simply the shareholders." FORT, *supra* note 18, at 125. Kenneth Goodpaster explains that the term "stakeholder" was invented in the 1960s as a play on the term "stockholder" to indicate that there are other members of the corporation, in addition to the stockholders, who have a "stake" in the decisions of the firm. Kenneth E. Goodpaster, *Business Ethics and Stakeholder Analysis*, 1 *BUS. ETHICS Q.* 53, 54 (1991).

20. See Michael C. Jensen & William H. Meckling, *Theory of the Firm*:

holders, managers, creditors, employees, suppliers, and others together to seek the benefit of their mutual bargains. Their web of interrelated contracts is what constitutes the corporation. As a normative matter, the private parties who participate in the corporate enterprise should be free to order their affairs in whatever manner they choose without government regulation or interference. The corporation's primary concern should be to maximize profits; it should not be asked to carry the same social, moral, or ethical duties of persons in society. The nexus of contracts model has become the dominant paradigm in legal academia today. This Article argues that the model's preoccupation with the contractual elements of the corporation obscures the complex reality of the corporate person.

Part VIII of this Article presents an argument for adopting a multi-dimensional model of the corporation. The many interdisciplinary approaches to corporate activity all represent different and valid ways of analyzing the separate dimensions of the corporate person. Each theory informs the other, and only when they are taken together can they tell the full story of the corporation.

This Article asserts that laws and public policies must be sensitive to the multi-faceted nature of the corporation. What the recent debate over corporate bailouts teaches us is that corporations are multi-dimensional creatures that serve different functions for different people.²¹ In some sense, we are all dependent on the corporation for our

Managerial Behavior, Agency Costs and Ownership Structure, 3 J. FIN. ECON. 305, 311 (1976). Michael Jensen and William Meckling are generally credited with first formulating the model of the corporation as a nexus of contracts in 1976. See Charles R.T. O'Kelley, *The Entrepreneur and the Theory of the Modern Corporation*, 31 J. CORP. L. 753, 763 (2006). They described the corporation not as a separate and independent, real entity, but rather, as the center of a set of contracts. Jensen & Meckling, *supra*, at 311. Many legal commentaries have utilized and elaborated on this theory to explore its implications for corporate ownership and control. See, e.g., Barry D. Baysinger & Henry N. Butler, *Anti-Takeover Amendments, Managerial Entrenchment, and the Contractual Theory of the Corporation*, 71 VA. L. REV. 1257 (1985); Henry N. Butler, *The Contractual Theory of the Corporation*, 11 GEO. MASON L. REV. 99 (1989); Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989); Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395 (1983); William A. Klein, *The Modern Business Organization: Bargaining Under Constraints*, 91 YALE L.J. 1521 (1982); Jonathan R. Macey, *Fiduciary Duties as Residual Claims: Obligations to Nonshareholder Constituencies from a Theory of the Firm Perspective*, 84 CORNELL L. REV. 1266 (1999).

21. While I have used the national debate over corporate bailouts as a way of

well-being, and it is in turn dependent on us for its well-being. The corporation is a constantly evolving entity, and its place in our lives depends on our own continually changing moral, legal, philosophical, and political imagination. The law of corporations should reflect the dynamic nature of the theories that describe the corporate person, and should avoid any narrow or fixed framework for analyzing corporate activity.

II. LEGAL THEORIES OF THE CORPORATE PERSON

A. Corporation as an Artificial and Dependent Person

One way of describing the corporation is to say that it is nothing more than a legal construct. It is an artificial creation of human beings and the law. We give it personhood status solely as a legal fiction to facilitate commerce. By calling the corporation a person, the law grants it the capacity for legal relations of all kinds. The corporation has standing to enter into contracts, to hold property, to sue and be sued, and ultimately to carry on business in the corporate name.²² The artificial person theory is thus composed of two separate elements: (1) the fictional aspect, and (2) the dependence aspect, i.e., the corporation's dependence on the law to give it legal personality.

The fictional component emphasizes that the corporation is a human invention, unlike the natural persons who create the corporation for their own use.²³ When we refer to it as a person, we do so only out of convenience. It is an abbreviation we adopt for the practical purpose of making the corporation the bearer of specific rights and duties under

illuminating the broader issue of corporate personhood, this Article is neither about the bailout controversy itself nor about its appropriate resolution. Rather, I believe the arguments surrounding the corporate bailout debate reveal deeper concerns about who or what it is we are trying to save with bailout money. It is this topic about the complex nature and role of the corporate person in our society that is addressed by this Article.

22. See MODEL BUS. CORP. ACT § 3.02 (2005).

23. See Jeffrey Nesteruk, *Persons, Property, and the Corporation: A Proposal for a New Paradigm*, 39 DEPAUL L. REV. 543, 564 n.133 (1990) ("A corporation is artificial in that it is a human creation subject to human choices."); James V. Schall, *The Corporation: What Is It?*, 4 AVE MARIA L. REV. 105, 118 (2006) (describing the corporation as primarily a human invention created for man's use).

the law.²⁴ No one actually believes a corporation is a real person. Everyone recognizes that this fictional person is merely a legal abstraction. In fact, legal personality can be given to just about any object if it is deemed to serve the ends of justice.²⁵

The dependence aspect of the corporation means that corporations cannot exist without the law's consent. Also referred to as the concession theory, it argues that corporations are legally formed when the state approves their charters, and therefore, the personhood of corporations is merely a government concession.²⁶ The classic statement of the theory is Chief Justice Marshall's description of the corporation in *Trustees of Dartmouth College v. Woodward*: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it"²⁷ The corporation is artificial, fictional, and conditional because it cannot come into being unless and until the law sanctions it.

The artificial person or concession theory dominated American thinking about corporate personhood in the first half of the 19th Century.²⁸ Corporations during that period required a special act of the state legislature to approve their charters on a case by case basis.²⁹

24. See JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 27 (Roland Gray ed., MacMillan 1921) (stating that "person" usually means a human being, "but the technical legal meaning of a 'person' is a subject of legal rights and duties"); Wolff, *supra* note 6, at 506 (arguing that the legal fiction of the corporation is an abbreviation allowing us to apply the same legal rules to human beings and corporations).

25. See Richard Tur, *The "Person" in Law*, in *PERSONS AND PERSONALITY: A CONTEMPORARY INQUIRY* 116, 121 (Arthur Peacocke & Grant Gillett eds., 1987) (referring to a case where an Indian idol was given legal personality); see also Arthur W. Machen, Jr., *Corporate Personality*, 24 *HARV. L. REV.* 347, 350 n.9 (1911) (noting that purely inanimate objects may be personified, e.g., the estate of a deceased person, a jury, or a community).

26. See Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 *DEL. J. CORP. L.* 283, 292-93 (1990). The theory has been called several different names, including the state grant theory, the fictitious personality theory, the artificial personality theory, and the concession theory. Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 *WASH. & LEE L. REV.* 1421, 1424 (2006).

27. 17 U.S. (4 Wheat.) 518, 636 (1819).

28. See William W. Bratton, Jr., *The "Nexus of Contracts" Corporation: A Critical Appraisal*, 74 *CORNELL L. REV.* 407, 434 (1989); Michael J. Phillips, *Reappraising the Real Entity Theory of the Corporation*, 21 *FLA. ST. U. L. REV.* 1061, 1065 (1994).

29. See LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 188-201 (2d ed.

States typically granted corporate charters for enterprises that served a public function and met specific social needs, e.g., public utilities, banks, insurers, transportation services, and water works.³⁰ “[T]he corporate privilege was granted sparingly; and only when the grant seemed necessary in order to procure for the community some specific benefit otherwise unattainable.”³¹ Thus, legislative approvals of charters were seen as special grants or privileges by the sovereign, underscoring the view of corporations as concessions of the government. The state played a decisive role in creating corporations and circumscribing their actions within limited spheres of activity. Early charters often contained specific provisions maintaining some measure of control over corporations to protect the public from abusive corporate practices.³²

The fiction theory normatively supported a public oriented view of corporations and corporate law. Because the corporation derives its existence from the state, the corporation presumably is incorporated for public purposes and the state can regulate its operations for the public interest.³³ What the state can give, the state can take away. The very

1985).

30. See HURST, *supra* note 11, at 15, 17-18; William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 STAN. L. REV. 1471, 1484 (1989); see also Martha T. McCluskey, *The Substantive Politics of Formal Corporate Power*, 53 BUFF. L. REV. 1453, 1475-76 (2006). Because corporations were considered bodies created by law for the purpose of attaining some public end, they were therefore “arms of the state.” Warren J. Samuels & Arthur S. Miller, *Introduction: Corporate America*, in CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 1, 3 (Warren J. Samuels & Arthur S. Miller eds., 1987) [hereinafter CORPORATIONS AND SOCIETY].

31. *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 549 (1933) (Brandeis, J., dissenting).

32. For example, states often strictly regulated banking activity through limited powers granted in bank charters and through strict construction of those charters by the courts. Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441, 1444 (1987). Sometimes legislatures required corporations to give equal voting power to smaller investors, provide favorable treatment to the poor, or ensure that investors and managers could be individually liable for corporate debts. See McCluskey, *supra* note 30, at 1478. At times, states even regulated the prices that corporations could charge and the rate of return that investors could earn. *Id.* at 1476. Courts also tended to support broad state powers over corporations. See, e.g., *Leep v. St. Louis, I.M. & S. Ry. Co.*, 25 S.W. 75, 81 (1894) (holding that even though legislatures lacked the power to dictate how natural persons paid their employees, legislatures had the power to do so with corporate employers).

33. Many legal opinions reflected this view. See, e.g., *Hale v. Henkel*, 201 U.S. 43,

laws that create corporations can also constrain them to act in ways that benefit, or at least do not harm, the public.³⁴

By the mid-19th Century, special chartering gave way to general incorporation statutes. Special incorporations for businesses were regarded as the corrupt result of legislative bribery, political favoritism, and monopolistic practices.³⁵ In response to public dissatisfaction, states adopted general incorporation statutes allowing businesses to incorporate freely without special grants from the legislature.³⁶ The act of incorporation with the state was merely a formality of filing and played little role in the personhood of corporations. The idea that corporations existed only because of the concession of the state held far less force and was replaced with the belief that the corporation actually owed its existence to the individuals who formed the corporation to conduct their business. As a result, the artificial person theory of the corporation diminished in relevance over time.

B. Corporation as an Aggregate Person

An alternative view of the corporate person arose during the last half of the 19th Century. The aggregate theory emphasized that the

74 (1906) (“[T]he corporation is a creature of the State. It is presumed to be incorporated for the benefit of the public.”). Chief Justice Marshall explained it as an exchange between the corporation and the state: “The objects for which a corporation is created are universally such as the government wishes to promote. They are deemed beneficial to the country; and this benefit constitutes the consideration, and, in most cases, the sole consideration of the grant [of incorporation].” *Trs. of Dartmouth Coll. v. Woodward*, 17 U.S. 518, 637 (1819); see also A.A. Sommer, Jr., *Whom Should the Corporation Serve? The Berle-Dodd Debate Revisited Sixty Years Later*, 16 DEL. J. CORP. L. 33, 36 (1991) (noting that while the organizers of early corporations did expect profits from the business, “the corporations were to serve a public purpose and as such were overseen closely by the state which sanctioned their organization”).

34. See Timothy L. Fort, *Goldilocks and Business Ethics: A Paradigm That Fits “Just Right”*, 23 J. CORP. L. 245, 260 (1998).

35. See Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 181 (1985); Mark, *supra* note 32, at 1453-54; see also CHRISTOPHER D. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 20 (1975).

36. See FRIEDMAN, *supra* note 29, at 512 (“It was cheap and easy to incorporate under general laws—a few papers filed, a few forms and signatures; the privilege of incorporation lay open to whoever wanted it.”); see also STONE, *supra* note 35, at 20 (noting that by the end of the 19th Century, general incorporation statutes had displaced special charters entirely).

corporation could not be formed without the action and agreement of human beings. In fact, no corporate acts would ever occur without the human persons who made up the corporate entity. Therefore, the corporation was seen more as a collection, or aggregate, of individuals who contracted with each other to utilize the corporation for their mutual benefit.³⁷ The aggregate theory, also called the contractual or associational theory, holds that the corporate person has no existence or identity that is separate and apart from the natural persons in the corporation.³⁸ The entity is “owned, managed, and administered by *people*, [and] its so called actions are but manifestations of actions by real persons.”³⁹ It makes no sense to see the corporation literally as a distinct person.

Under this view of the corporate person, “the rights and duties of an incorporated association are in reality the rights and duties of the persons who compose it, and not of an imaginary being.”⁴⁰ The United States Supreme Court implicitly relied on this view in *Santa Clara v. Southern Pacific Railroad* when it declared that a corporation is a person for purposes of the Fourteenth Amendment and, thus, its property cannot be taxed differently from the property of individuals.⁴¹ The underlying reasoning was that the corporation’s property was really just the property of the individual shareholders who owned the corporation, and therefore should be protected in the same manner.⁴² “To deprive the

37. This theory resonates with an “inherence theory” of corporations which suggests that “men have a natural right to form a corporation by contract for their own benefit, welfare, and mutual self-interest.” ROBERT HESSEN, IN DEFENSE OF THE CORPORATION 22 (1979). “In this conception, the corporation was not a creature of the state but of individual initiative and enterprise.” Horwitz, *supra* note 35, at 184-85.

38. 1 VICTOR MORAWETZ, A TREATISE ON THE LAW OF PRIVATE CORPORATIONS 1-2 (2d ed. Boston, Little, Brown & Co., 1886) (It is “self-evident that a corporation is not *in reality* a person or a thing distinct from its constituent parts. The word ‘corporation’ is but a collective name for the incorporators or members who compose [it]”); PATRICIA H. WERHANE, PERSONS, RIGHTS, AND CORPORATIONS 51 (1985) (“Corporations have no reality over and above their constituents, because they are created by and function only because of them.”).

39. Donald R. Cressey, *The Poverty of Theory in Corporate Crime Research*, in 1 ADVANCES IN CRIMINOLOGICAL THEORY 31, 36 (William S. Laufer & Freda Adler eds., 1989).

40. 1 MORAWETZ, *supra* note 38, at 3.

41. 118 U.S. 394 (1886).

42. Morton Horwitz explained that the Court’s decision relied on the aggregate theory arguments of John Pomeroy, counsel for the railroad company, and Justice Field

corporation of its property . . . is, in fact, to deprive the corporators of their property [T]he courts will look through the ideal entity and name of the corporation to the persons who compose it, and protect them.”⁴³

The normative implications of the aggregate paradigm are that corporations should be regarded as the product of private initiative and natural market forces, that corporations reflect forms of private property and private contract, and that corporate law should therefore be viewed as private law, not public law. Unlike the artificial person or concession theory, the aggregate theory supports a hands-off, anti-regulatory approach to corporations.⁴⁴ Instead of seeing the corporation as existing for the public interest, the aggregate theory views the corporation as existing for the private interests of the individuals who constitute it. The role of the law is to support the rights of these private parties and avoid interfering with their consensual actions.⁴⁵

By the early 20th Century, dispersed shareholder ownership and immense growth in the size of corporations revealed a deep separation of ownership and control in large corporations.⁴⁶ Widely scattered shareholders of giant corporations were passive investors with small individual holdings who did not control the corporation in any mean-

in his circuit court opinion in the companion case, *County of San Mateo v. Southern Pacific Railroad Co.*, 13 F. 722 (C.C.D. Cal. 1882). See Horwitz, *supra* note 35, at 177-78. Justice Field wrote: “It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation.” *County of San Mateo*, 13 F. at 744.

43. *Railroad Tax Cases*, 13 F. 722, 747-48 (C.C.D. Cal. 1882), *appeal dismissed as moot sub nom.* *San Mateo v. S. Pac. R.R. Co.*, 116 U.S. 138 (1885); *Santa Clara v. S. Pac. R.R. Co.*, 18 F. 385 (C.C.D. Cal. 1883), *aff’d*, 118 U.S. 394 (1886).

44. See Bratton, *supra* note 30, at 1489-90.

45. See David Millon, *The Ambiguous Significance of Corporate Personhood*, 2 STAN. AGORA: ONLINE J. LEG. PERSP. 39, 42 (2001). Alternatively, a broader conception of the aggregate paradigm could support a more communitarian view of the corporation. For example, if one were to say that the corporation is an aggregation of not only the corporation’s individual shareholders, but also its employees, creditors, suppliers, and local communities, then their corporate membership presumably entitles them to certain rights and protections, and the law should support their interests as well. See Abram Chayes, *The Modern Corporation and the Rule of Law*, in *THE CORPORATION IN MODERN SOCIETY* 25, 41 (Edward Mason ed., 1959) [hereinafter *CORPORATION IN MODERN SOCIETY*].

46. ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 119-25 (1932).

ingful sense. The large corporation appeared to take on its own identity as a functioning organization, separate from the individual shareholders who came and went without changing the nature of the organization's operations. It made it difficult to continue to see the corporation as an aggregate of the individual shareholders.⁴⁷ The corporation by its nature had a longevity, a perpetual existence, that its individual members did not share. Because the aggregate theory was not an entirely satisfactory description of the corporate person, a new theory, the real entity theory, emerged to explain the personhood of corporations.

C. Corporation as a Real and Independent Person

At the turn of the 20th Century, the real entity, or natural entity theory became the popular way of describing the corporate person.⁴⁸ It posited that the corporation's existence is not only independent of the individual members who compose the corporation, but also independent of the state that legally recognizes its form.

In contrast to the artificial person theory, the real entity theory views the corporation as an undeniably real and non-imaginary person.⁴⁹ As one commentator suggested, that which is artificial can still be quite real. An artificial lake is not an imaginary lake; it is something very real that we can see and touch.⁵⁰ Although a corporate legal personality can be regarded as a fiction, the entity which is personified is certainly not fictional. It is a full-fledged, living reality that exists as an objective fact and has a real personality in society.⁵¹

Rejecting the concession theory's view of the corporation as dependent on the state for its existence, the real entity theory holds that the corporation exists prior to and separate from the state. Just as the

47. See Phillips, *supra* note 28, at 1067-68.

48. See Jess M. Krannich, *The Corporate "Person": A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 80 (2005); see also Blumberg, *supra* note 26, at 295 (noting that the theory had different names: "natural entity, or real entity, or realism theory").

49. See W. Jethro Brown, *The Personality of the Corporation and the State*, 21 L. Q. REV. 365, 370 (1905).

50. Arthur W. Machen, Jr., *Corporate Personality*, 24 HARV. L. REV. 253, 257 (1911).

51. See Katsuhito Iwai, *Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance*, 47 AM. J. COMP. L. 583, 584 (1999).

state may record the birth of every baby, or the sale of every land parcel, so does the state record the formation of every corporation—a formation that occurs by virtue of agreement of the private parties who constitute the business, not by virtue of any state action.⁵² The large corporation is simply a natural outgrowth of the economic tendency toward business combination.⁵³ Rather than being a creature of the state, the corporation is a naturally existent entity “which has compelled the law to grant it official recognition.”⁵⁴

The real entity theory views the corporation as distinct from the individuals who participate in the corporate enterprise. Real entity proponents believe the corporation is much more than the sum of its individual parts. When several people come together to form an association for some shared purpose, the group entity is larger than and different in kind from the members themselves.⁵⁵ The corporation is an independent entity whose existence and identity remain the same, even if its membership of individuals changes over time or is in a constant state of flux.⁵⁶ This is because one of the distinguishing features of

52. Robert Hessen, Editorial, *Creatures of the State? The Case Against Federal Chartering of Corporations*, BARRON'S NAT'L BUS. & FIN. WKLY., May 24, 1976, at 7. The state merely adds “legal legitimacy” to the corporation by its public recognition of the entity, but it has nothing to do with the actual creation of the corporation. Roger Pilon, *Corporations and Rights: On Treating Corporate People Justly*, 13 GA. L. REV. 1245, 1305 (1979). “What really happens is that the state finding certain persons standing in a certain relation to each other and acting as a unit, upon a request from them, authorizes the group to embark upon a certain course of activity.” George F. Deiser, *The Juristic Person*, 57 U. PA. L. REV. 300, 304 (1909).

53. Horwitz, *supra* note 35, at 197; Krannich, *supra* note 48, at 81 (noting that the real entity metaphor grew out of the belief that the corporate entity seemed to be a natural way of conducting business).

54. Brown, *supra* note 49, at 370; *see also* Edward S. Mason, *Introduction, in CORPORATION IN MODERN SOCIETY*, *supra* note 45, at 1 (arguing that the law does not create the corporation but instead acts simply as “a device for facilitating and registering the obvious and the inevitable”). One commentator observed that corporations “existed and were recognized before a theory was invented to explain their existence and recognition.” W.M. Geldart, *Legal Personality*, 27 L. Q. REV. 90, 96 (1911).

55. *See* Bryant Smith, *Legal Personality*, 37 YALE L.J. 283, 286 (1928).

56. *See* PETER A. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* 19-30 (1984) (demonstrating that the identity of a corporation is independent of the aggregate identities of those associated with it at any particular time, in spite of the fact that its operations require that persons be associated with it); Brown, *supra* note 49, at 366-67 (observing that the corporation remains the same although its personnel changes entirely). In fact, Arthur Machen argued that “any group whose membership is

large corporations is their longevity. “[O]rganizations can persist for several generations . . . without losing their fundamental identity as distinct units, even though all members at some time come to differ from the original ones.”⁵⁷

Under the real entity view, a corporation can have its own will and pursue its own goals in a way that cannot be equated with the will and goals of each individual member. The corporation has a “collective consciousness” or “collective will” that results from discussion and compromise among the individual members, and may not reflect the particular preferences of any one person.⁵⁸ Actions of the corporation are qualitatively different from those of its individual constituents, who each may have contributed some part to the act, but no one person can be said to be responsible for the unified corporate action.⁵⁹ “[A]n organization may produce consequences, like profits, that are true properties of the organization; they come about because of the way

changing, is necessarily an entity separate and distinct from [its] constituent members.” Machen, *supra* note 50, at 259. Some even argued that corporations can exist for periods of time, with all of their rights and duties, despite having no members whatsoever. Roger Scruton, *Corporate Persons*, in 63 SUPP. VOL.: PROC. OF THE ARISTOTELIAN SOC’Y 239, 246 (1989); see also MEIR DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATION 46-49 (1986) (telling an allegory of the “Personless Corporation” to show that one may “strip the corporation of all individuals and yet preserve, both conceptually and legally, the identity of [the corporation]”).

57. PETER M. BLAU & W. RICHARD SCOTT, FORMAL ORGANIZATIONS: A COMPARATIVE APPROACH 1 (1962). In fact, some argue that the existence of the organization “typically predates the membership in it of any particular individual.” DAN-COHEN, *supra* note 56, at 50; see also PETER F. DRUCKER, CONCEPT OF THE CORPORATION 21 (1972) (“The corporation is permanent, the shareholder is transitory. It might even be said without much exaggeration that the corporation is really socially and politically a priori whereas the shareholder’s position is derivative . . .”).

58. See OTTO GIERKE: ASSOCIATIONS AND LAW: THE CLASSICAL AND EARLY CHRISTIAN STAGES 7 (George Heiman ed. & trans., 1977) (“The association, or group, is a living entity Every group has a real and independent communal life, a conscious will, and an ability to act that are distinct from the lives and wills of its individual members.”); Deiser, *supra* note 52, at 301, 310 (referring to the “collective consciousness” as the corporation’s personality).

59. I have discussed elsewhere the ways in which the acts of the corporation sometimes may not sensibly be reduced to the actions of individuals within the organization. See Susanna M. Kim, *Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations*, 2000 U. ILL. L. REV. 763, 790-91; see also WERHANE, *supra* note 38, at 51 (arguing that “not all actions of corporations are redescribable merely as individual actions”).

people behave *together*, not just as aggregate effects of their separate behaviors.”⁶⁰ Corporations can initiate and be responsible for their own actions and intentions. From a criminal law perspective, a corporation could be convicted of a crime, due to its own organizational acts and culpable intent, independent of any criminal conviction of particular individuals within the corporation.⁶¹ By assuming that the corporation is a separate person, the real entity theory allows it to be treated much like an autonomous individual.

Real entity theorists believe this view of corporations comports with common sense and is consistent with our natural compulsion to see organizations as independently functioning realities.⁶² It is relevant that we regard corporations as persons in our ordinary thinking and discourse. Our normal linguistic usage reflects our perception of corporations as persons who “act,” “decide,” “think,” and “feel,” on their own. We say, for example, that Nike *denied* that it *knew* about the wrongdoing, Exxon *believes* it *treats* its employees fairly, AOL *signed* a merger agreement with Time-Warner, and the Disney Channel *loves* young audiences. We use singular verbs and possessive pronouns when we refer to corporations,⁶³ and we describe groups in terms that do not refer to their constituent members.⁶⁴ The corporation’s personhood

60. MICHAEL KEELEY, A SOCIAL-CONTRACT THEORY OF ORGANIZATIONS 230 (1988).

61. Corporate criminal liability emerged at the turn of the 20th Century, about the time the real entity theory took hold. The seminal case recognizing corporate criminal liability was *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909). For discussions of the real entity theory’s implications for corporate criminal liability, see Patricia S. Abril & Ann Morales Olazabal, *The Locus of Corporate Scierter*, 2006 COLUM. BUS. L. REV. 81, 103-10 (2006); Eric Colvin, *Corporate Personality and Criminal Liability*, 6 CRIM. L.F. 1, 1-2, 23-25 (1995).

62. See Harold J. Laski, *The Personality of Associations*, 29 HARV. L. REV. 404, 405 (1916) (“Clearly, there is compulsion in our personalising [the corporation]. We do it because we must. We do it because we feel in these things the red blood of a living personality.”); Machen, *supra* note 25, at 363 (“We do not need to be instructed to regard a corporation as an entity and to regard that entity as a person: our minds are so constituted that we cannot help taking that view.”).

63. See Sanford A. Schane, *The Corporation Is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 601 (1987). We say “[t]he corporation has aligned itself with labor,” not “[t]he corporation have aligned themselves with labor.” *Id.* Sanford Schane’s article discusses the linguistic basis for treating the corporation as a person. He argues that it is a part of ordinary language to speak about institutions as though they are persons, and that this way of speaking is independent of the law. *Id.* at 595.

64. “For example, while Germany is said to be populous, no individual German can be so described; and when one says that a corporation is large, one is not referring to the

status is woven into the fabric of our language, indicating the corporation's nature as a real and independent person, or at least our inevitable tendency to accept it as such. This is the way we talk and think about corporations, and that has to be relevant for something.⁶⁵

The real entity theory supports two contrasting normative visions of the corporation. On the one hand, if the corporation is viewed as a real and natural entity, much like an individual person, the corporation should be entitled to the same rights and privileges that are afforded to natural persons. Property rights in particular stand out among those that ought to be protected.⁶⁶ Indeed, in the constitutional arena, the Supreme Court has held that corporations are entitled to protections of their property rights.⁶⁷ Interestingly, the Supreme Court has also held that corporations are entitled to various liberty rights under the Constitution.⁶⁸ The Court has often justified those decisions by utilizing

size of its members." Phillips, *supra* note 28, at 1105 n.237 (citing Richard T. De George, *Social Reality and Social Relations*, 37 REV. METAPHYSICS 3, 9-10 (1983); Anthony Quinton, *Social Objects*, 1976 PROC. ARISTOTELIAN SOC'Y 1, 8).

65. Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 491-92 (2006) (discussing our linguistic tendency to attribute culpable intent to entities and arguing that "[w]orking out ground rules for such talk is unnecessary" because the "words themselves show that we understand entities to exist independent of individual actors and to be responsible"). *But see* Phillips, *supra* note 28, at 1105-06 (responding that these linguistic points do not necessarily prove the corporation's real existence outside of thought and language). However, there is the possibility that if "language continually treats corporations as real entities, presumably they are real entities under the only available test of reality." *Id.* at 1106 n.243.

66. *See* Mark M. Hager, *Bodies Politics: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV 575, 580 (1989).

67. *See* Covington & Lexington Tpk. Rd. Co. v. Sandford, 164 U.S. 578, 592 (1896) ("It is now settled that corporations are persons within the meaning of the constitutional provisions forbidding the deprivation of property without due process of law, as well as a denial of the equal protection of the laws.").

68. For example, the Supreme Court has held that corporations are entitled to protections from unreasonable searches under the Fourth Amendment, *see Hale v. Henkel*, 201 U.S. 43, 76 (1906), protection from double jeopardy under the Fifth Amendment, *see United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977), free speech rights under the First Amendment, *see First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), and right to trial by jury under the Seventh Amendment, *see Ross v. Bernhard*, 396 U.S. 531, 542 (1970). *See generally* Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990) (discussing Supreme Court jurisprudence for corporate guarantees under the Bill of Rights).

language similar to that used to protect the liberty rights of individual human beings.⁶⁹ Under this approach, corporations should be viewed as private institutions, rather than public ones, and should be free from heavy state regulation of corporate activity.⁷⁰ The corporation is a product of private entrepreneurial initiative and natural market tendencies toward economic consolidation. It is not a creature of the state and thus is not beholden to the state for its existence or operations.

On the other hand, a slightly different interpretation of the real entity theory implies a more public-oriented view of corporations. If the corporation is a real person in society, it should have the same sorts of moral and social responsibilities that individuals have.⁷¹ As a citizen of a larger community, it enjoys certain rights and privileges, but it should also bear the corresponding duties of a citizen “to be sensitive to the impact of its activities on others, including not just its investors, but also employees, creditors, consumers, and the larger society in which it operates.”⁷² Big business is not just a matter of private concern because everything it does is bound to affect the public in significant ways.⁷³ The role of the law is to regulate corporations to use their powers not merely to maximize profits for their shareholders, but also to benefit other participants in the corporation and promote the good of the general public.⁷⁴ This view supports a public law of corporations.

69. *See, e.g.,* *Dow Chem. Co. v. United States*, 476 U.S. 227, 236 (1986) (observing that a corporation does have a reasonable, legitimate, and objective expectation of privacy within the interior of its covered buildings for purposes of the Fourth Amendment); *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 569 (1977) (observing that the Fifth Amendment’s double jeopardy clause protects accused defendants from the fear of embarrassment, anxiety, and insecurity, and holding that the clause protects a corporation from further prosecution). However, the Fifth Amendment privilege against self-incrimination has been denied to corporations on the grounds that it is a purely personal right applying only to natural persons. *See United States v. White*, 322 U.S. 694, 698 (1944).

70. *See* Millon, *supra* note 12, at 202-03.

71. *See* Jeffrey Nesteruk & David T. Risser, *Conceptions of the Corporation and Ethical Decision Making in Business*, 12 BUS. & PROF. ETHICS J. 73, 77 (1993).

72. Millon, *supra* note 45, at 48.

73. *See* Harold J. Laski, *The Basis of Vicarious Liability*, 26 YALE L.J. 105, 111-12 (1916).

74. Millon, *supra* note 12, at 220. George Deiser stressed the need to regulate real corporate entities, paying particular attention to businesses’ internal and external affairs. *See* Deiser, *supra* note 52, at 309. Early real entity theorists believed that the theory supported a stronger regulatory environment for corporations and supported greater tort and criminal liability for corporate persons who violated the law. *See* Hager, *supra* note

The three legal theories (artificial/fiction, aggregate, real/natural entity) all provide their own unique insights into the legal personhood of corporations. Courts have used all three theories to support their decisions, sometimes invoking multiple theories in a single case.⁷⁵ Although the theories appear to contradict each other at times, each theory plays a complimentary role in describing a certain aspect of the corporation. As we shall see, theories from other academic disciplines illuminate additional elements of the corporation. The following section explores various philosophical aspects of the corporate person.

III. PHILOSOPHICAL DIMENSIONS OF THE CORPORATE PERSON

Moral philosophy has much to say about corporate personhood. If corporations are persons, they may have not only legal rights and duties, but also moral rights and duties from a philosophical perspective. For example, if I deliberately poison someone, I am morally responsible for that act. If a corporation deliberately poisons a community by leaking toxic chemicals into the groundwater, is the corporation likewise morally responsible? Moral responsibility means that the person's action is worthy of praise or blame for the action's consequences, aside from any legal accountability that may arise from it.⁷⁶ "The presence or absence of corporate moral personhood determines whether corporations are subject . . . to blame for their failure to meet [their moral] obligations."⁷⁷ The focus is on the moral blameworthiness of the corporation itself, not the blameworthiness of its individual members. It asks

66, at 587-89, 604-09, 627 (discussing the views of Gierke, Deiser, Laski, and Maitland).

75. In *Hale v. Henkel*, for example, the Supreme Court relied on the artificial person theory to hold that corporations are not entitled to the Fifth Amendment privilege against self-incrimination. 201 U.S. 43, 70 (1906). The Court stated that "the corporation is a creature of the State . . . presumed to be incorporated for the benefit of the public." *Id.* at 74. In the same opinion, the Court used the aggregate theory to decide that corporations are protected by the Fourth Amendment from unreasonable searches. *Id.* at 71. The Court stated that a "corporation is, after all, but an association of individuals under an assumed name and with a distinct legal entity." *Id.* at 76.

76. Paul B. Thompson, *Why Do We Need a Theory of Corporate Responsibility?*, in SHAME, RESPONSIBILITY AND THE CORPORATION 113, 116 (Hugh Curtler ed., 1986).

77. Michael J. Phillips, *Corporate Moral Personhood and Three Conceptions of the Corporation*, 2 BUS. ETHICS Q. 435, 436 (1992).

whether the corporation is a person capable of making moral choices and distinguishing between what is morally right and wrong.

Society often condemns harmful corporate actions as being immoral and inexcusable.⁷⁸ The large scale reach and operations of corporations today have the potential to inflict tremendous harm on individuals, the environment, and the international community. Corporate actions have been implicated in many cases involving devastating environmental disasters, hazardous and defective products, employee alienation and discrimination, and occupational diseases.⁷⁹ This has led some commentators to call the corporation a “pathological institution” with almost psychopathic traits reflecting its single-minded interest in profits and its lack of moral concern for others.⁸⁰ As a philosophical matter, the question whether it is appropriate to hold corporations morally blameworthy has been difficult to resolve.

A. Arguments Against Corporate Moral Personhood

From one point of view, attributing moral blame to a corporation is “no wiser than attributing intention and blame to a dagger, a fountain pen, a Chevrolet, or any other instrumentality of crime.”⁸¹ It is not the corporation that has blameworthy intentions and commits blameworthy acts, but the individuals in the corporation who engage in the

78. See THOMAS DONALDSON, *CORPORATIONS AND MORALITY* 1-2 (1982). Donaldson discusses the case of a corporation in Japan that was forced by the courts to pay massive damages for dumping poison in the ocean. The poison triggered crippling birth defects in local communities. The corporation, however, had broken no laws because the dumping levels fell within accepted ranges under Japanese regulations. The verdict against the corporation nonetheless “expresse[d] the common intuition that corporations have a *moral*, and not merely legal, character.” *Id.* at 2. We have a tendency to ascribe moral responsibility to many collective groups, such as nations, towns, clubs, and teams. See D.E. Cooper, *Collective Responsibility*, 43 *PHIL.* 258, 258 (1968).

79. Some argue that the profit-making dynamic of the corporation causes it to dangerously minimize, if not ignore, many of the concerns of the flesh-and-blood individuals who populate the world in which it operates. See JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 71 (2004) (describing the views of Robert Monks, author of *THE EMPEROR’S NIGHTINGALE: RESTORING THE INTEGRITY OF THE CORPORATION IN THE AGE OF SHAREHOLDER ACTIVISM* (1998)).

80. See BAKAN, *supra* note 79, at 1-2, 56-57. But see Ian B. Lee, *Is There a Cure for Corporate “Psychopathy”?*, 42 *AM. BUS. L.J.* 65, 68-73 (2005).

81. Albert W. Alschuler, *Ancient Law and the Punishment of Corporations: Of Frankpledge and Deodand*, 71 *B.U. L. REV.* 307, 313 (1991).

wrongdoing.⁸² Therefore, only the individuals, not the corporation, may be regarded as moral persons who are morally accountable for their actions. Moral personhood requires a certain level of autonomy: moral responsibility for an act can be attributed only to the person who originated the act in his own body, a body over which he or she has direct autonomous control.⁸³ Since corporate action never originates in a body belonging to the corporation, but in the bodies of human beings who directly control their own actions, corporations do not originate acts in the manner required for moral responsibility to apply. Therefore, it is inappropriate to blame or punish a corporation for acts brought about wholly by bodily movements that are under the autonomous control of agents other than itself.⁸⁴

The same reasoning applies to the element of corporate intentionality. Moral responsibility requires that a person's actions be intentional, but corporations are incapable of having their own intentions because they do not have minds; rather, their intentions are really just the intentions of their human members.⁸⁵ It is inappropriate to speak *of* the goals and intentions of an organization; rather, we should speak of the goals and intentions *for* the organization of various individual human constituents.⁸⁶ Drawing upon the same principles of individualism

82. See Jan E. Garrett, *Unredistributable Corporate Moral Responsibility*, 8 J. BUS. ETHICS 535, 539-544 (1989) (rejecting the theory that corporations can be morally responsible and criticizing the idea that corporate responsibility cannot be redistributed to the individuals involved); see also WERHANE, *supra* note 38, at 39.

83. See Velasquez, *supra* note 15, at 7. The importance of the body exists in many philosophical conceptions of personhood. See, e.g., THE PHILOSOPHY OF THE BODY: REJECTIONS OF CARTESIAN DUALISM (Stuart F. Spicker ed., 1970) (collecting several essays that discuss the philosophical conception of the body as it relates to personhood).

84. Elizabeth Wolgast calls this a state of "fractured autonomy" and concludes that, in these circumstances, "it is theoretically impossible for one person to take responsibility for actions done by another." ELIZABETH WOLGAST, ETHICS OF AN ARTIFICIAL PERSON: LOST RESPONSIBILITY IN PROFESSIONS AND ORGANIZATIONS 64-65 (1992). If this paradigm is correct, "it means that an artificial person cannot act fully and morally *by definition*." *Id.*; see also Velasquez, *supra* note 15, at 7 (arguing that corporations cannot be morally responsible for the actions of its agents).

85. See Larry May, *Vicarious Agency and Corporate Responsibility*, 43 PHIL. STUD. 69, 71 (1983); see also Velasquez, *supra* note 15, at 8-9 (discussing the inability of corporations to have their own intentions).

86. Christopher McMahon, *The Ontological and Moral Status of Organizations*, 5 BUS. ETHICS Q. 541, 545 (1995) (describing a portion of the views of Michael Keeley). Michael Keeley argues that "organizations have no intentions or goals at all." Michael

underlying the aggregate theory of corporate personhood in the legal realm, this philosophy concludes that any good or evil that corporations do essentially comes down to the actions and intentions of the individuals within the corporation.

Some philosophers argue that even if we could prove corporations can have their own intentions, such intentionality is only a necessary, not a sufficient, condition for moral personhood. The essential component of moral responsibility that corporations lack is the capacity to feel emotion.⁸⁷ Human beings feel pain, suffer pangs of conscience, and experience moral blame, shame, and anguish due to their actions. Corporations, however, do not have a heart or soul and lack the ability to empathize with others who are affected by corporate acts. Thus, without a conscience, corporations cannot be regarded as morally responsible persons.⁸⁸

A related philosophical argument is that corporations are simply not the types of entities that can be categorized as moral persons because of their own structural constraints. Philosopher John Ladd believes corporate organizations are more “like machines,” than persons, and “it would be a category mistake to expect a machine to comply with the principles of morality.”⁸⁹ This is because formal organizations like corporations must act exclusively to maximize the achievement of a specified set of goals, e.g., profit. That is how they are structured and that is how they are to be evaluated. “[A]ny considerations that are not related to the aims or goals of the organization are automatically

Keeley, *Organizations as Non-Persons*, 15 J. VALUE INQUIRY 149, 149 (1981). This does not mean that one cannot make moral judgments about corporations as social systems. *See id.* at 154.

87. *See* Richard T. DeGeorge, *Corporations and Morality*, in SHAME, RESPONSIBILITY AND THE CORPORATION, *supra* note 76, at 57, 62; Rita C. Manning, *Corporate Responsibility and Corporate Personhood*, 3 J. BUS. ETHICS 77, 80 (1984).

88. *See* Thomas Donaldson, *Personalizing Corporate Ontology: The French Way*, in SHAME, RESPONSIBILITY AND THE CORPORATION, *supra* note 76, at 99, 109-10 (arguing that a creature can be rational and intentional, but without a heart or the ability to sympathize with others, it cannot be a moral person); Larry May, *Negligence and Corporate Criminality*, in SHAME, RESPONSIBILITY AND THE CORPORATION, *supra* note 76, at 137, 152-56 (arguing that the corporation does not have a conscience which is distinct from its members' consciences). Some theorists have argued that emotion and arousal level is integral to ethical decision-making even for individual human beings. *See* Alice Gaudine & Linda Thorne, *Emotion and Ethical Decision-Making in Organizations*, 31 J. BUS. ETHICS 175, 179-84 (2001).

89. John Ladd, *Morality and the Ideal of Rationality in Formal Organizations*, 54 MONIST 488, 500 (1970).

excluded as irrelevant to the organizational decision-making process.”⁹⁰ Like a machine, a corporation is unable to understand the language of morality and cannot take into account moral considerations in its decision-making. This theory admonishes us not to expect corporations or their official human representatives “to be honest, courageous, considerate, sympathetic, or to have any kind of moral integrity. Such concepts are not in the vocabulary, so to speak, of the organizational language-game.”⁹¹ In fact, acts such as “[s]ecrecy, espionage and deception do not make organizational action wrong; rather they are right, proper and, indeed, *rational*, if they serve the objectives of the organization.”⁹²

The difficulty that many moral philosophers, including John Ladd, seem to have with the prospect of granting corporations moral personhood status is that, by doing so, corporations will have not only moral responsibilities but also moral rights.⁹³ Even if we would like to impose duties on corporations to act morally, we feel uncomfortable with the idea that corporations would then, in turn, have moral rights to be treated and respected as persons. One way of grappling with this dilemma is to invoke the Kantian moral philosophical distinction between means and ends. According to Kant, all human beings are ends in themselves and should always be treated as such, never as means to another end.⁹⁴ In contrast, corporations are human creations that are

90. *Id.* at 496.

91. *Id.* at 499. Thus, corporations seem to be logically locked into selfishness by virtue of their structure as formal organizations. See McMahon, *supra* note 86, at 551.

92. Ladd, *supra* note 89, at 500. John Ladd does believe that a corporation can incorporate moral considerations into its goal set, but these would simply be limiting conditions on corporate action, not an authentic use of moral language. See Thompson, *supra* note 76, at 131. Some scholars rely heavily on this philosophy to argue that corporations should not be treated as persons for criminal law purposes. See Martin Benjamin & Daniel A. Bronstein, *Moral and Criminal Responsibility and Corporate Persons*, in CORPORATIONS AND SOCIETY, *supra* note 30, at 277, 277-79.

93. See, e.g., Keeley, *supra* note 86, at 154 (fearing that “the moral-person approach, while assigning responsibilities to organizations, at the same time assigns them inordinate rights to pursue organizational welfare”); Ladd, *supra* note 89, at 508 (arguing that because corporations “are not moral persons, and have no moral responsibilities, they have no moral rights”).

94. Immanuel Kant’s moral theory of autonomy gave rise to his well-known formulation of the categorical imperative: “Act in such a way that you treat humanity, whether in your own person or in the person of another, always at the same time as an end and never simply as a means.” IMMANUEL KANT, GROUNDING FOR THE

formed as means to achieve the ends of those human beings who choose to participate in the corporate enterprise.⁹⁵ If corporations have the same moral standing as natural persons, then corporations are entitled to the same moral rights, in particular, the right to be treated as an end in itself. Many moral philosophers denounce that result because, among other problems, it leads to bizarre conclusions.⁹⁶ For example, the involuntary dissolution of a corporation would be comparable to murder, and the voluntary merger of one company into another would be a form of suicide.⁹⁷ To avoid this result, theorists like John Ladd argue that moral personhood, with its concomitant moral rights and responsibilities, should not extend to corporations. Instead, corporations should be viewed as creations, or machines, serving solely as means to achieve human ends, and their moral responsibility should be exhausted

METAPHYSICS OF MORALS 36 (James W. Ellington trans., 1981). See generally HARDY E. JONES, KANT'S PRINCIPLE OF PERSONALITY 15-26 (1971); RALPH C.S. WALKER, KANT: THE ARGUMENTS OF THE PHILOSOPHERS 151-59 (1982).

95. See John Ladd, *Persons and Responsibility: Ethical Concepts and Impertinent Analogies*, in SHAME, RESPONSIBILITY, AND THE CORPORATION, *supra* note 76, at 77, 95. In Kantian terms, organizations do not hold the same elevated status that individuals do: "While the Kantian notion of individual autonomy is closely linked to the perception of individuals as ends, formal organizations exist only as means. As such they are not equal members in the Kantian kingdom of ends, and they do not deserve or admit of the special kind of respect that gives rise to the individual's [autonomy rights]." DAN-COHEN, *supra* note 56, at 61.

96. See Roger F. Gibson, Jr., *Corporations, Persons, and Moral Responsibility*, 21 J. THOUGHT 17, 24 (1986) (noting with dismay that if corporations are admitted into the moral community, it "would have the effect of assigning to corporations all of the rights, privileges, duties, and obligations accorded biological person[s]"); Keeley, *supra* note 86, at 154 (warning that by giving corporations moral personhood status, "we may give away too much in the way of corporate rights to gain too little in the way of corporate accountability"). David Ozar argues that corporations do not have moral rights because corporations are purely conventional creatures that are created by continued acts of acceptance of relevant social rules. See David T. Ozar, *Do Corporations Have Moral Rights*, 4 J. BUS. ETHICS 277, 280 (1985).

97. See Ladd, *supra* note 95, at 86 (rhetorically asking, "If a corporation is dissolved or incorporated into another one, is that a denial of its right to life? Has the corporation been murdered?"); McMahon, *supra* note 86, at 549 ("An organization can divide into two or more organizations, or two or more can merge into one. Are we to regard such processes as contrary to the survival interest of the organizations that cease to exist as a result, or not?"); Raymond S. Pfeiffer, *The Meaning and Justification of Collective Moral Responsibility*, 2 PUB. AFF. Q. 69, 75 (1988) ("It is one thing to be told that a corporation should not be dissolved because jobs would be lost. But it is quite another to advocate the moral sanctity of a corporate internal decision structure.").

by their legal responsibility.⁹⁸

However, an alternative, more nuanced approach may be to say that corporations are moral actors for purposes of having moral responsibilities, but are not full-fledged moral persons entitling them to exercise moral rights.⁹⁹ Because corporations do not have the same standing as autonomous persons in the Kantian kingdom of ends, they cannot claim full moral personhood status, and we can treat them as moral subjects for some purposes, but not for others.¹⁰⁰

B. Arguments in Favor of Corporate Moral Personhood

To the extent that intentionality and the ability to act are important components of moral personhood, some philosophers believe the corporation possesses both. In many cases, the acts and intentions of a corporation simply cannot be attributed to those of its individual human members.¹⁰¹ To be sure, a corporation is dependent on human persons to carry out its actions, but the collective nature of the corporation can translate individual actions into corporate ones.¹⁰²

98. See DeGeorge, *supra* note 87, at 60-61; R.E. Ewin, *The Moral Status of the Corporation*, 10 J. BUS. ETHICS 749, 749 (1991).

99. There may be different ways to arrive at this conclusion. Patricia Werhane argues that corporations are "secondary moral agents," not full persons, and therefore lack the same rights that individuals do. See WERHANE, *supra* note 38, at 57-62. From an autonomy perspective, Meir Dan-Cohen argues that organizations cannot make the same claims or have the same rights as individuals because corporations are more like intelligent machines. DAN-COHEN, *supra* note 56, at 57, 62. Richard DeGeorge makes the distinction between moral actors and moral persons and argues that as creatures of law, corporations have no independent status or claim to a certain kind of treatment based on their moral status, even though they do have moral responsibilities. See DeGeorge, *supra* note 87, at 63-64, 70-71.

100. One may object to this approach as being an inconsistent, all too convenient method of avoiding the consequences of viewing corporations as moral persons. See, e.g., W. Michael Hoffman & Robert E. Frederick, *Corporate Moral Responsibility: A Reply to Professor Gibson*, 21 J. THOUGHT 27, 32 (1986) (arguing that "[i]f corporations are moral persons, or at least like them in the morally relevant aspects, then we must treat them as such regardless of the disadvantages").

101. See David T. Risser, *Power and Collective Responsibility*, 9 KINESIS 23, 23, 28 (1978).

102. Certain acts, such as declaring a dividend or agreeing to a merger, are inherently corporate acts. They cannot be executed solely by individuals, but only by corporate bodies pursuant to relevant rules and policies. Although each member of the board of directors has the power to vote in favor of such actions, only the board as a

It is not always appropriate to limit moral responsibility to the individual members of the corporation because sometimes immoral corporate actions are the result of a series or combination of blameless primary individual actions. No one person is at fault for the harm caused by the collective corporate act.¹⁰³ A large corporation's organizational design may not allow individuals in different sections of the corporation to communicate effectively with one another, making it difficult for them to foresee the potentially harmful impact of their combined individual actions. It may be impossible to identify any individual wrongdoers when dozens of corporate departments and hundreds of employees are involved in the entire decision-making process, all contributing only a finite amount to the final corporate action.¹⁰⁴ It is a structural feature of the corporation that allows for a nexus of actions by its members to ultimately produce harm, a result that can only properly be attributed to the corporation, not the individuals themselves.¹⁰⁵ In

whole can authorize them. The authorization is a corporate action that constitutes more than the aggregation of all individual actions. See Paul E. Wilson, *Barring Corporations from the Moral Community—The Concept and the Cost*, 1 J. SOC. PHIL. 74, 75 (1992) (“[T]he idea that individuals are independently responsible for the execution of all acts seems to ignore the fact that some acts are public acts accomplished only through cooperative effort.”).

103. See WERHANE, *supra* note 38, at 56.

104. In such cases, trying to pinpoint individual responsibility is futile:

Large corporations, employing thousands of people and making millions of decisions, impose impossible burdens on society to isolate and identify a particular individual to be held responsible where only the last link in the long decision chain is visible. Even if the entire corporate decision process were exposed to public scrutiny, it might still be impossible to isolate and identify the guilty person because of the collectivity of actions that resulted in law violation and the lack of specific intent or direct knowledge on the part of the thousands of people who may have contributed in some minuscule sense to that direction.

S. Prakash Sethi, *Executive Liability for Corporate Law Violations*, 5 L.A. BUS. & ECON. 10, 15 (1980).

105. LARRY MAY, *THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM, AND CORPORATE RIGHTS* 87 (1987); Michael B. Metzger, *Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects*, 73 GEO. L.J. 1, 57 (1984). There may be situations where different employees of the corporation each know a certain portion of information, but there is nothing in the company's internal operating procedures to bring the agents together. If harm occurs as a result of a corporate act, it may be more reasonable to blame the corporation rather than the employees who each separately could not have foreseen the dangers. See Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1490 n.180 (1982). Manuel Velasquez disagrees. He maintains that in those situations where wrongdoing

fact, in some corporate structures, the individual might well be said to be dispensable because certain wrongful corporate acts could persist even if particular individuals were removed from the system. In those situations, the corporation should be morally responsible for the policies and practices that provide the environment in which individual actions are likely to combine to cause harm.¹⁰⁶

Some philosophers argue that not only can corporations act in ways that are distinct from their members' acts, but corporations can also have their own intentions, i.e., "a deliberate disposition to do something in a certain manner or to realize a state of affairs."¹⁰⁷ Corporate intent, or will, is not the same as the individual intentions or wills of the corporation's members.¹⁰⁸ For example, in the corporate decision-making process, certain individuals may be asked for their input on discrete, isolated issues without being informed of how the input will be incorporated in the big picture. As a result, none of them fully understand the larger implications of their singular contributions.¹⁰⁹ It is inappropriate in such cases to pinpoint the final intent of the corporation on specific individuals who each played only a small role in forming the broader intentionality of the corporation:

[T]he claim that corporate intentions can be nothing but the intentions of individuals does not seem correct . . . Human motivation is complex, and it would be implausible to think that corporate

has occurred but no identifiable human beings knew about or intended that outcome, the corporate act is simply one for which no one is morally responsible: "it is an unintentional happening." See Velasquez, *supra* note 15, at 10.

106. Patricia H. Werhane, *Corporate and Individual Moral Responsibility: A Reply to Jan Garrett*, 8 J. BUS. ETHICS 821, 822 (1989); see also Pfeiffer, *supra* note 97, at 73; Thompson, *supra* note 76, at 123. One concern that some commentators have with placing blame on the corporation is that it may have the tendency to obscure the blameworthy individuals within the corporation who will escape moral judgment. See Velasquez, *supra* note 15, at 15. However, holding a corporation morally responsible does not preclude individual members from responsibility for their own culpable conduct as well. The two forms of moral responsibility are not mutually exclusive.

107. WERHANE, *supra* note 38, at 36.

108. Virginia Held, *Corporations, Persons, and Responsibility*, in SHAME, RESPONSIBILITY AND THE CORPORATION, *supra* note 76, at 161, 171. Of course, corporate intent, or mens rea, is an important and accepted feature of laws that impose criminal and civil liability on corporations. See generally V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355 (1999) (discussing corporate mens rea).

109. See DAN-COHEN, *supra* note 56, at 32-33.

decisions do reflect the intentions of the members in a completely reducible way. It is much more believable to think that as a multitude of persons with varying amounts of power and influence contribute to a corporate decision, the outcome is certainly shaped in ways that produce corporate "intentions" quite different from those that entered into the process.¹¹⁰

The collective nature of the corporation's decision-making system transforms the individual inputs, making the individual intentions and actions unrecognizable when the final corporate intention is formulated.

Philosopher Peter French believes it is a corporation's intentionality that gives it the status of a moral person because intentionality is both a necessary and sufficient condition for moral personhood.¹¹¹ French argues that corporate intentionality may be traced to the corporation's internal decision structure (CID Structure). CID Structures have two elements: (1) an organizational flowchart delineating the various levels within the corporate hierarchy and (2) corporate rules that are usually manifested in corporate policy.¹¹² Before the corporation acts, it must first contemplate that action and determine whether it is appropriate and feasible. The CID Structure receives input from various individuals within the corporate hierarchy, evaluates that information in light of basic corporate policies, and engages in a decision-making and ratification process. "When operative and properly activated, the CID Structure accomplishes a subordination and synthesis of the intentions and acts of various biological persons into a corporate decision."¹¹³ Corporate acts may be done for corporate reasons that are qualitatively different from the individual reasons component members may have for doing what they do. The CID Structure provides the corporation with

110. Held, *supra* note 108, at 171-72. To illustrate her point, Virginia Held describes a hypothetical case in which a corporation's ultimate intention to proceed with moving a plant is not the true intention of any of the corporate executives who collectively made the final decision. *See id.* at 171. David Risser uses a similar example to show how each member of a board of directors may have the intention to directly address a corporate pollution issue, but because they cannot agree on a unified corporate political position, they compromise and adopt a policy to suppress the pollution issue, a stance that does not reflect the intention of any of the individual members. *See Risser, supra* note 101, at 29-30; *see also* Thomas W. Smythe, *Problems About Corporate Moral Personhood*, 19 J. VALUE INQUIRY 327, 328 (1985).

111. *See* Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 211, 215 (1979).

112. *See* FRENCH, *supra* note 56, at 41.

113. *Id.*

the capacity to act intentionally and to order its behavior.¹¹⁴ Corporations with CID Structures that facilitate non-programmed, non-routinized, adaptive decisionmaking meet the conditions of moral personhood.¹¹⁵ What this shows, according to French, is that corporations can be intentional actors and therefore exist as “full-fledged moral persons” with all the rights, privileges, and duties that such status implies.¹¹⁶

An alternative method of establishing corporate moral personhood is to identify the features belonging to human beings that make them moral persons, and then project moral responsibility onto corporations if they display those same features. Kenneth Goodpaster and John Matthews argue that two essential traits which are rooted in long and diverse philosophical traditions and which characterize the morally responsible person are: rationality (the capacity of rational decision-making) and respect (the awareness of the effects of one’s decisions on others).¹¹⁷ Because corporations are capable of gathering information about the impact of their actions on others and using it to make decisions, corporations exhibit both rationality and respect and, hence, can be considered moral persons.¹¹⁸ In fact, in light of the bounded rationality of human reasoning, corporations may be even more capable than human beings of acting in a purposeful, rational, and calculating manner, incorporating multiple concerns in their decision-making processes. This proposition has led one commentator to argue that corporations “can and should have access to practical and theoretical knowledge which dwarfs that of individuals,” and therefore corporations

114. See *id.* at 44.

115. See Peter A. French, *Principles of Responsibility, Shame, and the Corporation*, in SHAME, RESPONSIBILITY AND THE CORPORATION, *supra* note 76, at 17, 37.

116. See French, *supra* note 111, at 207. For a critique of French’s views on corporate intentionality and moral personhood, see DONALDSON, *supra* note 78, at 20-23; MAY, *supra* note 105, at 69-72. *But see* Christopher Meyers, *The Corporation, Its Members, and Moral Accountability*, 3 BUS. & PROF. ETHICS J. 33, 38 (1983) (relying on French’s “perceptive and plausible” account of the CID Structure); Thompson, *supra* note 76, at 133 (finding French’s theory “logically coherent” and “a good way to determine the ontological standing of corporat[ions]”).

117. See Kenneth E. Goodpaster & John B. Matthews, Jr., *Can a Corporation Have a Conscience?*, HARV. BUS. REV., Jan.-Feb. 1982, at 132, 134.

118. *Id.* at 135-36. The authors respond to nine separate objections to treating a corporation as a morally responsible person. *Id.* at 139-41. For a critique of their views, see Gibson, *supra* note 96, at 17-19.

“must have, in addition to good intentions, superhuman intelligence.”¹¹⁹ Under this view, corporations should be held to even higher moral standards than human beings when corporations fail to utilize such intelligence in morally appropriate ways.

C. Comments

The corporate moral personhood question has important normative implications. Those who argue in favor of moral personhood believe corporations should have moral obligations that go beyond the demands of both the law and market forces. Corporate activity has the capacity to improve as well as damage human life. If responsibility is typically tied to capacity, we are inclined to assign moral responsibility to corporations for the good and bad outcomes they are capable of producing. We ask, at the very least, that corporations “do no unjustifiable harm.”¹²⁰ We expect corporate activity to produce benefits in our society, but not at too high a cost to our own personal and societal welfare.

I believe many of those who argue against corporate moral personhood hold the same normative outlook on corporate activity, but they fear the consequences of concluding that corporations are moral persons. They worry that granting corporations personhood status will somehow diminish the status of human persons and eclipse individual rights when juxtaposed against larger-than-human corporate persons.¹²¹ They would prefer to reject the concept of corporate moral personhood altogether to avoid the risk of giving so much to corporations that individuals end up having less. However, it is not entirely clear that viewing corporations as moral persons would necessarily have that effect.

Whether or not corporations are metaphysical moral persons, the impact they have on society creates a tendency to feel that corporations must be controlled to comply with the demands of morality. We may not believe a vicious dog has a moral responsibility to refrain from attacking a child, but we must nonetheless control its behavior because

119. DONALDSON, *supra* note 78, at 125.

120. DeGeorge, *supra* note 87, at 69.

121. See, e.g., WERHANE, *supra* note 38, at 40 (“If a corporation is a moral person, what is the status of employee-persons? Are they lesser moral persons?”); Velasquez, *supra* note 15, at 15 (expressing concern that we may be “tempted to look upon the corporation as a larger-than-human person whose ends and well-being are more important than those of its members”).

of the dangers its actions pose to others. If we focus primarily on the social impact of corporate activity, it may make little difference how we define the corporation either legally or morally. Instead, we could work on shaping corporate behavior to conform with our notions of what is just. We may ultimately decide that we are all better off concluding that corporations are moral persons with moral obligations, even if we cannot prove it in purely philosophical terms.

The philosophical discussion of corporate personhood tends to press hard on analogies to individual personhood, but we may be missing something by relying so heavily on standards of individual moral responsibility. It might be more helpful to analyze corporations as unique entities with functions and features that cannot be equated with those of human individuals. Rather than employing the same standards of moral personhood and responsibility that apply to individuals, we could consider devising criteria of moral personhood and responsibility that are specifically tailored to corporations.¹²² “Instead of assuming that a single concept of moral agency underlies both human and corporations, why not consider the prospect of a double concept? Why not consider the possibility that both human and corporation qualify as moral agents, and yet refuse to reduce each agency to a common denominator?”¹²³ Such an approach would accept the distinct and special nature of the corporation as a person without diminishing individual personhood with its accompanying rights and duties.

Beyond legal and philosophical theories of corporate personhood, we can gain even greater understanding of the uniqueness of the corporate person from the perspectives of organizational theory, psychology, and sociology. As the following section explains, these social science disciplines offer important insights into the nature of the corporation, its role in society, and its powerful influence on human thought and behavior.

122. See Held, *supra* note 108, at 168. Virginia Held believes that “we need to recognize two different kinds of responsibility: corporate and personal.” *Id.*; see also Cooper, *supra* note 78, at 263 (noting that we should “cease to assume that the standards used for judging individuals should be the same as those we use for judging collectives”).

123. Donaldson, *supra* note 88, at 111.

IV. ORGANIZATIONAL, PSYCHOLOGICAL, AND SOCIOLOGICAL DIMENSIONS OF THE CORPORATE PERSON

A. Organization Theory and Psychology

Organizational theory is concerned with the structure and processes of organizations.¹²⁴ It starts with the premise that organizations are not like people, and a “preoccupation with natural persons [can] get in the way of a fuller understanding of organizational reality.”¹²⁵ When a group of individuals, in a cooperative effort to achieve specified goals, join together to form an organization, “there is created something new in the world that is . . . different in quantity and quality from anything present in the sum of the efforts of the [individuals]” who constituted it.¹²⁶ Organizations produce and affect real behavior that would not otherwise exist without the organization.

There are dozens of approaches in organizational theory to define what the organization is and how it functions.¹²⁷ What binds the various lines of thought together is the object of study—the large complex organization—which is believed to have several essential characteristics making it a unified and distinctive phenomenon. These characteristics include structure, permanence, decision-making, large size, formality, complexity, functionality, and goal orientation.¹²⁸

124. HENRY L. TOSI, THEORIES OF ORGANIZATION 1-2 (2d ed. 1984). In organization theory, the main focus of analysis is the organization and not the individuals within it. *Id.* at 2, 13. See generally MARY J. HATCH & ANN L. CUNLIFFE, ORGANIZATION THEORY: MODERN, SYMBOLIC, AND POSTMODERN PERSPECTIVES (2006).

125. See Michael B. Metzger & Dan R. Dalton, *Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency*, 33 AM. BUS. L.J. 489, 492 (1996).

126. Chester Barnard, *The Functions of the Executive*, in TOSI, *supra* note 124, at 62, 65.

127. For example, an organization can be seen as a cultural product, an independent agency, a system of structures and functions, an exchange agent with environment, a structure in action over time, a processing system, an input-output system, or a structure of subgroups. TOSI, *supra* note 124, at 17; see also Jeffrey Pfeffer, *Organizations and Organization Theory*, in 1 THE HANDBOOK OF SOCIAL PSYCHOLOGY: THEORY AND METHOD 379, 379 (Gardner Lindzey & Eliot Aronson eds., 1985) (noting the broad interdisciplinary nature of organization theory).

128. See DAN-COHEN, *supra* note 56, at 31-38 (discussing eight clusters of organizational properties). Henry Tosi identifies a related set of essential characteristics that includes large size, formalization, rationality, hierarchical structure, and

The field of organizational behavior examines individual and group behavior within organizations from a psychological standpoint.¹²⁹ It demonstrates the ways corporate persons affect the thoughts, attitudes, and behavior of natural persons. Situational forces can lead people to act differently in group settings than they would as solitary individuals. For example, the psychological tendency called “risky shift” occurs when people in groups, who must reach a consensus on an appropriate level of risk for a given situation, typically select a risk level that is higher than their own individual risk tolerance.¹³⁰ Collective corporate decisions often reflect an acceptance of risk most people would regard as unacceptable had they been asked to make the decision alone. “Groupthink” is the process by which group members desire so strongly to conform to a group mode of thinking, it overrides their ability to realistically evaluate alternative courses of action.¹³¹ Group loyalty can lead members to continue with certain policies, even when those policies are obviously working out badly and have unintended consequences that disturb the conscience of each member.¹³² Individuals can internalize group goals and norms through a process of socialization that pressures dissenting members to conform.¹³³ The group takes on an *esprit de*

specialization. See TOSI, *supra* note 124, at 2-3.

129. For a good discussion of multiple theories of organizational behavior, see generally JOHN B. MINER, ORGANIZATIONAL BEHAVIOR: FOUNDATIONS, THEORIES, AND ANALYSIS (2002).

130. See ROBERT S. FELDMAN, SOCIAL PSYCHOLOGY 466 (1995); SHELLEY E. TAYLOR ET AL., SOCIAL PSYCHOLOGY 293-94 (9th ed. 1997).

131. IRVING L. JANIS, GROUPTHINK: PSYCHOLOGICAL STUDIES OF POLICY DECISIONS AND FIASCOS 9 (1982).

132. *Id.* at 11. In fact, group members may have a tendency to become overly optimistic and disregard facts that signal danger. See *id.* at 174. The group setting only heightens the psychological biases that already exist in individuals. I have discussed elsewhere the human tendency toward excessive optimism and confirmation biases motivating individuals to resist evidence their prior decisions may have been wrong. See Susanna Kim Ripken, *The Dangers and Drawbacks of the Disclosure Antidote: Toward a More Substantive Approach to Securities Regulation*, 58 BAYLOR L. REV. 139, 168-76 (2006).

133. See JANIS, *supra* note 131, at 175. Observers of organizational behavior often comment on the role of organizational cultures in socializing members to adopt organizational perspectives. See, e.g., ANTHONY DOWNS, INSIDE BUREAUCRACY 233-36 (1967); GARY JOHNS, ORGANIZATIONAL BEHAVIOR: UNDERSTANDING LIFE AT WORK 288-91 (1983); JOE KELLY, ORGANIZATIONAL BEHAVIOUR: AN EXISTENTIAL-SYSTEMS APPROACH 344-51 (rev. ed. 1974); JOHN P. KOTTER & JAMES L. HESKETT, CORPORATE CULTURE AND PERFORMANCE 7 (1992); ROBERT PRESTHUS, THE ORGANIZATIONAL

corps, or force of its own. People are changed and affected by being in groups, whether they are conscious of it or not. Thus, the organizational structure has a way of absorbing individual attitudes and creating a collective corporate perspective in their place.

These psychological dimensions of organizational behavior lend support to the idea that the corporation is not the sum total of the individuals in the organization, but rather, an entity supplying an environment that affects the behavior of its individual members in very real and powerful ways. How can the corporate environment exert such influence? Much of it comes from the culture and character of the corporation.

B. Corporate Culture

At the most fundamental level, the culture of the corporation plays a significant role in influencing individuals within the organization. Corporate culture is “the body of shared beliefs, values, expectations, and norms of behavior that shape life in the organization.”¹³⁴ The cultural values and principles of the corporation are conveyed by way of examples, from which members of the organization learn what sorts of behavior and attitudes are permitted and rewarded. A certain corporate ethos develops, an “abstract and intangible character” that is “separate from the substance of what [the corporation] actually does.”¹³⁵ It per-

SOCIETY 7-8, 16 (1962); PHILIP SELZNICK, LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION 17-18 (1957).

134. EDWIN HARTMAN, ORGANIZATIONAL ETHICS AND THE GOOD LIFE 149 (1996). The popular business management literature is filled with guidebooks that describe corporate culture and provide managers with tips on fostering successful cultures. See, e.g., TERRENCE E. DEAL & ALLAN A. KENNEDY, CORPORATE CULTURES: THE RITES AND RITUALS OF CORPORATE LIFE (1982); ROB GOFFEE & GARETH JONES, THE CHARACTER OF A CORPORATION: HOW YOUR COMPANY'S CULTURE CAN MAKE OR BREAK YOUR BUSINESS (1998); JEROME WANT, CORPORATE CULTURE: ILLUMINATING THE BLACK HOLE (2006). Stanley Davis notes that several other popular terms may be used to describe corporate “culture,” including “being, core, . . . ethos, identity, ideology, manner, patterns, philosophy, purpose, roots, spirit, style, vision, and way.” STANLEY M. DAVIS, MANAGING CORPORATE CULTURE 1 n.1 (1984). Some authors try to identify specific traits associated with “excellent” corporate cultures. See, e.g., THOMAS J. PETERS & ROBERT H. WATERMAN, JR., IN SEARCH OF EXCELLENCE: LESSONS FROM AMERICA'S BEST-RUN COMPANIES 13-16 (1982) (listing eight attributes of highly regarded companies).

135. See Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1123 (1991). Courts also have recognized

meates the organization and can remain the same for years even though some or all of the individual members change. For example, researchers have found that certain corporations display consistently ethical or unethical conduct over time, reflecting the persistence of particular corporate cultures fostering such behavior.¹³⁶

In organizations with strong corporate cultures, the culture is integrated into the lives of the members and it becomes difficult to see oneself apart from it. There are psychological and sociological dimensions to this integration: “[G]roups are not only external features of the world that people encounter and interact with, . . . they are also *internalized* so that they contribute to a person’s *sense of self*. Groups define who we are, what we see, what we think and what we do.”¹³⁷ People naturally develop a sense of loyalty to groups, identifying with the goals and values of the group and making them their own.¹³⁸ Strong cultures

the existence of corporate culture. *See, e.g.*, *Dunkin’ Donuts Mid-Atlantic Distrib. Ctr., Inc. v. NLRB*, 363 F.3d 437, 442 (D.C. Cir. 2004) (finding corporate “anti-union conduct so pervasive as to have created a corporate culture of lawlessness”) (citation omitted).

136. *See* MARSHALL B. CLINARD & PETER C. YEAGER, *CORPORATE CRIME* 58-60 (1980) (summarizing research). Research showed that certain corporations were “multiple violators,” with a measurable percentage of violating corporations committing a disproportionate share of infractions. *See id.* at 116-19. One longitudinal study revealed that certain corporations acted as criminal “recidivists,” exhibiting chronic violations of the law even after convictions and punishment. *See id.* at 126-27. Researchers concluded that some corporations “have developed a corporate atmosphere favorable to unethical and illegal behavior.” *Id.* at 117. Tamar Frankel describes corporate culture as a “social habit” and notes that certain corporate behaviors, “like old habits,” can persist in spite of changes in management and personnel. Tamar Frankel, *Using the Sarbanes-Oxley Act to Reward Honest Corporations*, 62 *BUS. LAW.* 161, 162-65 (2006).

137. *See* S. ALEXANDER HASLAM, *PSYCHOLOGY IN ORGANIZATIONS: THE SOCIAL IDENTITY APPROACH* 22 (2001); *see also* ROBERT C. SOLOMON, *ETHICS AND EXCELLENCE: COOPERATION AND INTEGRITY IN BUSINESS* 161 (1992) (“[W]hat we think of ourselves and how we behave is molded through and through by the various groups and institutions of which we have been members, beginning with our family and our schools and culminating, for millions of people, in the corporation.”). Robert Solomon argues that it is wrong to distinguish between “who I really am” and “the person I am on the job” because “*corporate role identity* is genuine identity,” and it arises naturally out of the integration of our personal values and corporate values. SOLOMON, *supra*, at 161.

138. *See* John M. Darley, *The Cognitive and Social Psychology of Contagious Organizational Corruption*, 70 *BROOK. L. REV.* 1177, 1191 (2005) (“When an

can actually help determine what makes one happy and what kind of person one wants to be, in part, by defining for the person what counts as success. In Frankfurtian terms, cultures can affect one's second-order desires, causing one not only to want certain things, but also to want to want them, i.e., to desire to be the type of person who values these things.¹³⁹ For example, in a corporate culture that values competitiveness, one not only wants to win, but also wants to change one's personality to be the sort of person who genuinely values winning.¹⁴⁰ To the extent individuals' principles are shaped by their corporate environment, they are, in some sense, creatures of the corporation.¹⁴¹

From a moral perspective, corporate cultures can influence individual moral choices. Research has shown that "individual characteristics alone are insufficient to explain moral and ethical behavior."¹⁴² Corporate culture affects the degree to which an individual can spot an ethical issue or interpret a given situation as raising moral concerns.¹⁴³ If the social consensus within the organization indicates that certain types of questionable acts are acceptable or expected, individuals may not see the behavior as being ethically problematic at all. It is "the individual's perception of social consensus within that individual's relevant social sphere that is most important in determining whether an individual will recognize a moral issue."¹⁴⁴ Organizations can induce

individual is a member of a group, in the sense that she is committed to the purposes of the group and that a group has tasks to do, the task of the individual is to first become a prototypical member of that group, and then help the group as best she can in reaching its goals.").

139. See Edwin M. Hartman, *The Commons and the Moral Organization*, 4 BUS. ETHICS. Q. 253, 255 (1994). Harry Frankfurt's well-known philosophical theory of the concept of the person posits that having freedom of will is essential to being a person, and that one has this freedom of will only when one can have the will one wants to have, i.e., the capacity for second-order desires. See Harry G. Frankfurt, *Freedom of the Will and the Concept of a Person*, 68 J. PHIL. 5, 5-20 (1971); see also DANIEL C. DENNETT, *BRAINSTORMS: PHILOSOPHICAL ESSAYS ON MIND AND PSYCHOLOGY* 283-85 (1978) (discussing Frankfurt's theory).

140. See Hartman, *supra* note 139, at 255.

141. See SOLOMON, *supra* note 137, at 152.

142. Bart Victor & John B. Cullen, *The Organizational Bases of Ethical Work Climates*, 33 ADMIN. SCI. Q. 101, 103 (1988).

143. See James R. Rest, *The Major Components of Morality*, in *MORALITY, MORAL BEHAVIOR, AND MORAL DEVELOPMENT* 24, 24 (William M. Kurtines & Jacob L. Gewirtz eds., 1984).

144. Kenneth D. Butterfield et al., *Moral Awareness in Business Organizations: Influences of Issue-Related and Social Context Factors*, 53 HUM. REL. 981, 990 (2000).

normally “good” and “ordinary” individuals to temporarily ignore the moral consequences of their actions and engage in acts that in hindsight seem astonishingly immoral.¹⁴⁵ In the grip of “groupthink,” group members can come to believe unreservedly in the morality of their group and disregard the moral ramifications of their actions.¹⁴⁶

Sociologists have identified certain criminogenic or crime-facilitative corporate systems in which internal cultural factors generate or encourage criminal activity within the organization.¹⁴⁷ Corporate cultures with heavy demands to achieve certain profit goals can cause deviant behavior.¹⁴⁸ The corporate environment presents pressures or extremely tempting conditions that facilitate the commission of crime by members of the corporation.¹⁴⁹ Individuals who initially feel uncom-

Ethical decision-making is “very much a social process. If a decision maker perceives that others in the social environment will see an issue as ethically problematic, she or he will be more likely to consider the ethical issues involved.” *Id.* at 1001.

145. See John M. Darley, *How Organizations Socialize Individuals into Evildoing*, in CODES OF CONDUCT: BEHAVIORAL RESEARCH INTO BUSINESS ETHICS 13, 13-14 (David M. Messick & Ann E. Tenbrunsel eds., 1996). John Darley notes that individual-level psychology is largely irrelevant to “organizational pathology,” which often produces evil actions by individuals in organizations. *Id.* at 41. A more sociological description is needed to explain “how human institutions can purposely move or accidentally lurch toward causing these actions, somehow neutralizing or suspending or overriding or replacing the moral scruples of their members.” *Id.*

146. See JANIS, *supra* note 131, at 174.

147. See Martin L. Needleman & Carolyn Needleman, *Organizational Crime: Two Models of Criminogenesis*, 20 SOC. Q. 517, 518 (1979).

148. See CHARLES H. MCCAGHY, *DEVIANT BEHAVIOR: CRIME, CONFLICT, AND INTEREST GROUPS* 218 (1976); W. B. Fisse, *The Social Policy of Corporate Criminal Responsibility*, 6 ADEL. L. REV. 361, 377 (1977-78); see also LaRue T. Hosmer, *The Institutionalization of Unethical Behavior*, 6 J. BUS. ETHICS 439, 439-47 (1987) (showing how unethical behavior is driven by divisionalized corporate structures and management styles that cause different sectors to compete against each other to reach profit goals).

149. See Needleman & Needleman, *supra* note 147, at 521. Certain corporate policies may set various quotas and deadlines that place pressures on corporate managers to do whatever is necessary to maximize profits, including illegal or unethical behavior. Sears Auto Centers’ highly criticized practice of overcharging customers for unneeded repairs is an example. Sears employees were required to meet minimum work and sales quotas or face the loss of their jobs. It led them to falsify charges, and ultimately forty state attorney generals filed claims against Sears for these illegal practices. See Lynne L. Dallas, *A Preliminary Inquiry into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron’s Demise*, 35 RUTGERS L.J. 1, 39-40 (2003).

portable with the system may choose to give in to systemic pressures for personal or financial reasons, especially when they are instructed by their supervisors to act in certain ways.¹⁵⁰ Researchers consistently have found that the behavior of supervisors is a dominant influence on individuals' ethical behavior because it provides the model for how subordinates should act in the organization.¹⁵¹ If organizational goals are successfully achieved as a result of unlawful conduct, the conduct tends naturally to be reinforced. In this manner, unlawful behavior receives additional support from systemic and cultural forces in the corporation.¹⁵² Thus, "at least some criminal behavior usefully may be viewed not as personal deviance, but rather as a predictable product of the individual's membership in or contact with certain organizational systems."¹⁵³

Of course, not all individuals will respond in the same manner to organizational pressures. Recognizing that cultural factors play a role in the behavior of individuals does not deny the importance of the interactive relationship between individuals and their environment. Rather, it highlights the power of the corporate culture to shape and direct individual behavior in the corporation.¹⁵⁴ These findings normatively imply that moral individual behavior requires the support of the

150. See, e.g., RALPH ESTES, TYRANNY OF THE BOTTOM LINE: WHY CORPORATIONS MAKE GOOD PEOPLE DO BAD THINGS 158 (1996). A study of newly graduated Harvard MBAs found that "in many cases, young managers received explicit instructions from their middle-manager bosses or felt strong organizational pressures to do things that they believed were sleazy, unethical, or sometimes illegal." Joseph L. Badaracco, Jr. & Allen P. Webb, *Business Ethics: A View from the Trenches*, 37 CAL. MGMT. REV. 8, 8 (1995).

151. See James C. Wimbush & Jon M. Shepard, *Toward an Understanding of Ethical Climate: Its Relationship to Ethical Behavior and Supervisory Influence*, 13 J. BUS. ETHICS 637, 642 (1994).

152. See DIANE VAUGHAN, CONTROLLING UNLAWFUL ORGANIZATIONAL BEHAVIOR: SOCIAL STRUCTURE AND CORPORATE MISCONDUCT 61 (1983); see also Barry D. Baysinger, *Organization Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 341, 365 (1991).

153. Needleman & Needleman, *supra* note 147, at 517. The opposite can also be true: A corporation's culture may do much to cultivate lawful and ethical behavior. See Tim Barnett & Cheryl Vaicys, *The Moderating Effect of Individuals' Perceptions of Ethical Work Climate on Ethical Judgments and Behavioral Intentions*, 27 J. BUS. ETHICS 351, 351, 360 (2000).

154. See Jeffrey Nesteruk, *Legal Persons and Moral Worlds: Ethical Choices Within the Corporate Environment*, 29 AM. BUS. L.J. 75, 85-90 (1991) (calling corporations "moral worlds" that influence and structure the moral choices and behavior of the individuals who inhabit them).

right sort of organization and that corporations should create cultures in which people need not be heroes of self-sacrifice to do the right thing.¹⁵⁵ “[I]t is inappropriate for organizations to rely totally on individual integrity to guide behavior. . . . [Rather], organizations must provide a context that supports ethical behavior and discourages unethical behavior.”¹⁵⁶ The way to build a moral organization is not by ensuring that all individual members are moral people, but by creating an environment in which ordinary people will have reason to act morally.

If corporate culture can be viewed as the character or personality of the corporate person, it not only affects individuals within the corporate setting, but it also affects how the corporation is perceived by outsiders. As the next section explains, there is an external sociological dimension to the corporate person that is an important part of its identity.

C. External Sociological Identity

Corporations have a particular identity and presence in society. As social entities, they literally dominate the landscape. Places of public enjoyment like sports stadiums, parks, and concert halls bear corporate names today, where in times past, such places were often named after public benefactors or heroic figures.¹⁵⁷ Popular culture is filled with images of specific corporate personalities, largely due to corporations’ own use of “branding” techniques to create unique and attractive identities for themselves in the public eye.¹⁵⁸ Ronald McDonald, the Michelin Man, and the Pillsbury Doughboy are easily identifiable corporate symbols. Corporate slogans, such as “Just Do It” for Nike, or

155. HARTMAN, *supra* note 134, at 68, 72.

156. Linda K. Trevino, *Ethical Decision Making in Organizations: A Person-Situation Interactionist Model*, 11 ACAD. MGMT. REV. 601, 614 (1986).

157. Marc Galanter makes this point in his illuminating discussion of the “corporatization of the law.” See Marc Galanter, *Planet of the APS: Reflections on the Scale of Law and Its Users*, 53 BUFF. L. REV. 1369, 1398-1400 (2006).

158. The branding industry has become increasingly important as corporations recognize the value of creating and maintaining successful brand images. The popular business literature is filled with guidebooks on branding methods. See, e.g., ALINA WHEELER, *DESIGNING BRAND IDENTITY: A COMPLETE GUIDE TO CREATING, BUILDING, AND MAINTAINING STRONG BRANDS* (2006); see also ALCYIA PERRY & DAVID WISNOM III, *BEFORE THE BRAND: CREATING THE UNIQUE DNA OF AN ENDURING BRAND IDENTITY* (2003); BERND SCHMITT & ALEX SIMONSON, *MARKETING AESTHETICS: THE STRATEGIC MANAGEMENT OF BRANDS, IDENTITY, AND IMAGE* (1997); PAUL TEMPORAL, *ADVANCED BRAND MANAGEMENT: FROM VISION TO VALUATION* (2002).

“Are you in good hands?” for Allstate Insurance, help to form corporations’ external personality. These symbols and slogans have a way of personifying and linking the corporation to the public. They do so by creating intellectual and emotional bonds with people.¹⁵⁹ Certain mental impressions are triggered when one hears the names of various companies: “Disney is fun,” “Ben & Jerry’s is caring,” and “Apple is innovative.” What corporate marketing strategists and public relations managers recognize is that corporations, as social beings, project a particular image and have a certain relationship with other members of society.

If the corporation is considered a member of society, deeper normative questions arise regarding its role and responsibilities. Aside from the perennial debate whether corporations should operate exclusively to maximize shareholder profits or should carry broader corporate social responsibilities,¹⁶⁰ we might also question whether corporations bind our society together by facilitating the fulfillment of society’s beliefs, hopes, and promises. We might want to examine how

159. See BAKAN, *supra* note 79, at 26; GIEP FRANZEN & MARGOT BOUWMAN, *THE MENTAL WORLD OF BRANDS: MIND, MEMORY AND BRAND SUCCESS* 217-30, 297-310 (2001); MARC GOBE, *EMOTIONAL BRANDING: THE NEW PARADIGM FOR CONNECTING BRANDS TO PEOPLE* xiii-xxxii (2001).

160. This Article does not attempt to address that debate which has been, and continues to be, explored effectively by proponents on both sides. For articles supporting broader corporate social responsibilities and criticizing exclusive shareholder profit-maximization theories, see, for example, Lynne L. Dallas, *Working Toward a New Paradigm*, in *PROGRESSIVE CORPORATE LAW* 36, 36-65 (Lawrence E. Mitchell ed., 1995); Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 *WASH. & LEE L. REV.* 1409 (1993); Kent Greenfield, *There’s a Forest in Those Trees: Teaching About the Role of Corporations in Society*, 34 *GA. L. REV.* 1011 (2000); Lewis D. Solomon & Kathleen J. Collins, *Humanistic Economics: A New Model for the Corporate Social Responsibility Debate*, 12 *J. CORP. L.* 331 (1987); Christopher D. Stone, *Corporate Social Responsibility What It Might Mean, If It Were Really To Matter*, 71 *IOWA L. REV.* 557 (1986). For articles favoring theories of shareholder primacy and profit maximization, see, for example, Eugene V. Rostow, *To Whom and for What Ends Is Corporate Management Responsible?*, in *THE CORPORATION IN MODERN SOCIETY*, *supra* note 45, at 46; Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 *WASH. & LEE L. REV.* 1423 (1993); Jonathan R. Macey, *Externalities, Firm-Specific Capital Investments, and the Legal Treatment of Fundamental Corporate Changes*, 1989 *DUKE L.J.* 173; Milton Friedman, *The Social Responsibility of Business Is To Increase Its Profits*, *N.Y. TIMES*, Sept. 13, 1970, § 6, at 32. See generally Symposium, *Corporate Social Responsibility: Paradigm or Paradox?*, 84 *CORNELL L. REV.* 1133 (1999).

the corporation can be utilized to promote the survival and stability of our modern industrialized society, and whether the corporation's status as an autonomous social entity may conflict with the goals and needs of the society in which it functions.¹⁶¹ In whatever way these questions are resolved, we cannot ignore the expectations we have for corporations to fill multiple social roles in our society: as a source of profitable investment, as a producer of essential products, as a law-abiding citizen, as an honest employer, as a responsible manager of environmental resources, as a charitable neighbor, as a fair competitor, and as an innovative social designer.¹⁶² The fact that corporations can serve these multiple functions speaks to the complexity of our society today and the interdependence between corporations and individuals.

This complex social dimension of corporations raises additional concerns about another aspect of corporate personhood with significant consequences for society - the political role of corporations. The corporation is not only a social entity, but also a political institution with influence and power that, in some ways, masks that of individual citizens. To what extent must we reckon with the corporate person as a political being?

V. POLITICAL DIMENSIONS OF THE CORPORATE PERSON

Political theory and philosophy reveal important insights into the political dimensions of the corporation. In various visions of the political state, the corporate person plays contrasting roles. In some contexts, the corporation is to be feared and restrained. In others, the corporate person is welcomed and encouraged to thrive.

A. Political Individualism v. Political Pluralism

In one possible image of our political structure, only two main entities are significant: the government on the one hand, and isolated individual natural persons on the other. This image comes from a liberal political individualism that sees no significant social or political role for

161. See DRUCKER, *supra* note 57, at 13. The fact that corporations have the capacity to affect society dramatically in both beneficial and harmful ways makes these questions especially important.

162. See STONE, *supra* note 35, at 231-32.

organizations as independent entities.¹⁶³ “In the bipolar political ontology of Anglo-American liberalism, between the state and the individual there is precious little room for metaphysically ‘real’ intermediate entities.”¹⁶⁴ To the extent such entities exist, they are viewed either as creatures and concessions of the state, or as aggregates of their individual members.¹⁶⁵ They are not regarded as entities in their own right wielding any political power or serving any political purpose.

This individualistic conception tends to view the state as an all-powerful entity with a monopoly on the use of coercive force. Deep concern about the state’s potential ability to threaten individual liberties results in an insistence on establishing laws to protect individual rights.¹⁶⁶ There is little concern that corporate persons might grow to be so powerful that they too could have the capacity to violate individual rights. In fact, to the extent corporations are viewed merely as aggregates of individual human members, corporations are simply placeholders for their members, and should be protected against the coercive powers of the state as well. As we have seen, the United State Supreme Court has previously utilized this aggregate view of corporations in holding that they are constitutional persons, entitled to the same protections as natural persons from state deprivations of their property.¹⁶⁷

In contrast to this political individualist perspective, a political pluralist vision recognizes the distinctiveness and significance of organizations in society.¹⁶⁸ Because human beings associate in groups

163. See DAN-COHEN, *supra* note 56, at 164. Meir Dan-Cohen notes that the works of such liberal thinkers as Bruce Ackerman, Ronald Dworkin, Robert Nozick, and John Rawls, do not deal seriously with the role of organizations as separate entities. To the extent organizations are treated at all, they are subsumed in the category of individuals. *Id.* The following discussion owes much to Meir Dan-Cohen’s insights.

164. Teemu Ruskola, *Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective*, 52 STAN. L. REV. 1599, 1704 (2000).

165. These two conceptions of the corporation are expressed in the artificial person and aggregate theories of legal personhood. See discussion *supra* Parts II.A-II.B. These theories of the corporation are in sharp contrast to the real entity theory which does count organizations as separate members of society. See Hager, *supra* note 66, at 612 (“The fiction paradigm held that the only ‘real’ units in political life were individuals on the one hand and the state itself on the other.”).

166. See DAN-COHEN, *supra* note 56, at 164-65.

167. See *supra* notes 41-43 and accompanying text (discussing *Santa Clara v. S. Pac. R.R., Co.*, 18 F. 385 (C.C.D. Cal. 1883), *aff’d*, 118 U.S. 394 (1886)).

168. See Dalia Tsuk, *From Pluralism to Individualism: Berle and Means and 20th-*

to pursue their interests and to accomplish coordinated tasks, groups and organizations are considered important centers of representation and participation. Society consists of more than just atomistic individuals and the all-powerful state; organizational entities also populate the community and are an integral part of society. While recognizing the significance of organizations, political pluralism projects two opposing images of the large corporation. The first sees the corporation as a harmful source of coercive power, the second sees the corporation as a critical instrument of freedom and democracy.

Under the first view, corporations' vast concentrations of wealth give them enormous power, and great care must be taken to protect individuals from the potentially coercive effects of corporate control. Individuals stand in a vulnerable position vis-à-vis large corporate entities because "the moment a powerful group [like the corporation] begins to act toward a common end it produces a capacity for aggression that individuals can only in the rarest cases combat."¹⁶⁹ The dangers associated with abuses of concentrated economic power fuel the concern that the state is not the only source of control to threaten individuals in society. Rather, large corporations similarly possess functions and powers that are traditionally associated with the state, making corporations comparable to sovereign government-like bureaucracies.¹⁷⁰ Under this political pluralist view, corporations are "not only constitutive elements of the modern state, but also centers of political and economic power equivalent to the power of the state."¹⁷¹ Individuals

Century American Legal Thought, 30 L. & SOC. INQUIRY 179, 189-91 (2005) (discussing theories of political pluralism).

169. Deiser, *supra* note 52, at 302. The corporation with its large-scale operations is believed to create incomparable "dangers to life and limb because 'in its methods of operation, it tends to be less careful of human life' than smaller-scale enterprise." Hager, *supra* note 66, at 608 (quoting Laski, *supra* note 73, at 124).

170. Earl Latham, *The Body Politic of the Corporation*, in CORPORATION IN MODERN SOCIETY, *supra* note 45, at 218, 218 (describing large corporations "as . . . system[s] of private government" that "rival the sovereignty of the state itself"); Arthur S. Miller, *Corporations and Our Two Constitutions*, in CORPORATIONS AND SOCIETY, *supra* note 30, at 241, 242 (suggesting that corporations' "power and influence, both externally in the national political order and internally in the so-called corporate community, make them a true form of governance"); Michael Robertson, *Property and Ideology*, 8 CANADIAN J. L. & JURISPRUDENCE 275, 281 (1995) (arguing that corporate power is more like governmental power and that it is misleading to view corporations merely as private property).

171. Tsuk, *supra* note 168, at 181; see also Daniel J.H. Greenwood, *Essential*

arguably can be victims of corporate oppression as easily as victims of state oppression.¹⁷² Their basic rights must be as scrupulously protected from invasion by private corporations as they are from invasion by public government. Indeed, it has been suggested that the constitutional guarantees of the Bill of Rights should be extended to shield individuals from corporate power.¹⁷³

Even deeper suspicion of corporate power arises when corporations transform their massive economic power into significant political influence in the legislative and political arena. Large corporations spend millions of dollars annually in lobbying efforts to impact government policies.¹⁷⁴ Corporate money is used to make campaign contributions, to lobby public officials, and to engage in issue advocacy, sometimes in ways that seem difficult to countenance: “Coal producers, for example, have met efforts to restrict strip mining . . . by arguing in state legislatures that the problem should be dealt with only at the federal level,

Speech: Why Corporate Speech Is Not Free, 83 IOWA L. REV. 995, 1007 (1998) (“The modern publicly traded multinational corporation . . . appears to be as large and well organized, as in control of resources and potential instruments of coercion or power over individuals as are most local governments.”); Tsuk, *supra* note 168, at 180 n.2 (“While the corporation’s power to enforce its rule is different from the power of the sovereign state to do so, the corporation’s economic, social, and cultural impact has become so pervasive in modern society so as to make corporate power, in effect, comparable to the coercive power of the state.”).

172. See Sanford A. Lakoff, *Private Government in the Managed Society*, in PRIVATE GOVERNMENT 218, 225 (Sanford A. Lakoff & Daniel Rich eds., 1973) (noting that private governments “could be even more oppressive than the state”); Samuels & Miller, *supra* note 30, at 6 (arguing that “supercorporations are private bureaucracies” and today “natural persons are overwhelmed by the power of bureaucracies, both public and private”).

173. See, e.g., Adolf A. Berle, Jr., *The Developing Law of Corporate Concentration*, 19 U. CHI. L. REV. 639, 643 (1952); Adolf A. Berle, Jr., *Constitutional Limitations on Corporate Activity—Protection of Personal Rights from Invasion Through Economic Power*, 100 U. PA. L. REV. 933, 943 (1952) (introducing the theme of “constitutionaliz[ing]” the corporation). One commentator argued that the enactment of a “Corporate Bill of Rights” would destroy the myth “that our society is sufficiently atomistic that the only concentration of political and social power against which we must be on our guard is that which resides in the state.” Russell B. Stevenson, Jr., *Corporations and Social Responsibility: In Search of the Corporate Soul*, 42 GEO. WASH. L. REV. 709, 733 (1974).

174. See Jill E. Fisch, *The “Bad Man” Goes to Washington: The Effect of Political Influence on Corporate Duty*, 75 FORDHAM L. REV. 1593, 1605-07 (2006); Katie Thoennes, Comment, *Frankenstein Incorporated: The Rise of Corporate Power and Personhood in the United States*, 28 HAMLINE L. REV. 203, 213-14 (2004).

and in Congress, that the subject should be dealt with exclusively by the states.”¹⁷⁵ Even Justices of the United States Supreme Court have observed that corporations give substantial sums of money to both major national parties and to competing candidates with the expectation that, in return, corporations will gain special access to the officials who are ultimately elected, and with that access, “a disproportionate influence on those in power.”¹⁷⁶ The public is well aware that “[a]t a critical level, [corporate] contributions that underwrite elections are leverage for enormous political influence.”¹⁷⁷ The obvious thrust of corporate political activity is to avoid or soften legal regulation of corporate business.¹⁷⁸ It is argued that such corporate conduct threatens the integrity of democratic politics and undermines public confidence in democratic ideals.¹⁷⁹

Corporate power, seen in this light, poses obstacles to achieving true democratic governance over the conditions of social life. The only countervailing source of power is the state which must protect individual rights from the potentially coercive nature of corporate economic and political control.¹⁸⁰ The state and its arm of enforcement, the law, serve

175. Stevenson, *supra* note 173, at 716 (citing *Hearings on H.R. 60 and Related Bills: Before the Subcomm. on Mines & Mining of the H. Comm. on Interior & Insular Affairs*, 92d Cong. 92-96 (1971)). One commentator has argued that corporations use their powerful political influence to exercise “nondecision-making” power, i.e., the power to bury or prevent an important potential issue from appearing on the agenda anywhere in the political arena. Risser, *supra* note 101, at 25.

176. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 506 (2007) (Souter, J., dissenting).

177. *Id.*

178. The effort appears to be successful, as corporations often have a role in shaping laws that are intended to regulate their business activity. See STONE, *supra* note 35, at 94-95. “[P]ublic policy necessarily tends to be oriented, especially over the long run, in a direction which is fundamentally in line with the interests of the great corporate enterprises. And this will be true even if the interests of the giants are in conflict with other social goals.” Morton S. Baratz, *Corporate Giants and the Power Structure*, 9 W. POL. Q. 406, 413 (1956); see also Galanter, *supra* note 157, at 1399 (noting that corporations have “a privileged position in American government, enjoying subsidies, solicitude, and deference”).

179. David D. Martin, *The Corporation and Antitrust Law Policy: Double Standards*, in *CORPORATIONS AND SOCIETY*, *supra* note 30, at 193, 214; see also Gerald Berk, *Corporate Power and Its Discontents*, 53 BUFF. L. REV. 1419, 1423 (2006).

180. See HENRI S. KARIEL, *THE DECLINE OF AMERICAN PLURALISM* 258 (1961). “Against large-scale groups, only the state can maintain or create rights for the protection of the individual.” *Id.* at 259.

to check corporate power and channel it in ways that preserve individual well-being. A natural corollary to this position is that corporations must not be granted the same sorts of fundamental rights that belong to individuals. “[I]f organizations are seen as potentially repressive systems of governance, treating them as individuals and granting them the protections, immunities, and liberties of individuals will just enhance their repressive power.”¹⁸¹ Therefore, this image of organizational power seeks to impose restraints on the corporate person for the benefit of the public interest.

There is a second view of organizations in the political pluralist vision that defines the corporation not as a source of coercive power, but as an essential instrument for promoting individual welfare and societal democracy. Like the political individualist view, the state here is seen as dangerously omnipotent with the potential to threaten individual rights. The state is too abstract an entity to win the loyalty of individual citizens, who are more likely to identify with the diverse groups and associations they form naturally as social beings.¹⁸² For example, churches, neighborhood groups, voluntary associations, trade unions, political parties, and corporations afford individuals a safe place to form their identities, express their viewpoints, and establish their preferred ways of life.¹⁸³ These intermediate groups serve as buffers between individuals and the government, fostering individual autonomy and shielding citizens from potentially coercive state power.¹⁸⁴ This

181. DAN-COHEN, *supra* note 56, at 176. Some commentators therefore believe that corporations should not have the same rights as individuals to engage in political activity. See, e.g., FRENCH ET AL., *supra* note 16, at 87. A similar result can be reached from a social responsibility standpoint. See Robert B. Reich, *The New Meaning of Corporate Social Responsibility*, 40 CAL. MGMT. REV. 8, 16 (1998) (concluding that the “meta-social responsibility of the corporation, then, is to respect the political process by staying out of it”).

182. See Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1876 (2003).

183. See Tsuk, *supra* note 168, at 190; see also HENRY M. MAGID, ENGLISH POLITICAL PLURALISM: THE PROBLEM OF FREEDOM AND ORGANIZATION 12 (1941) (discussing the view of pluralist John Figgis who believed groups play a vital role in the self-development of individuals). For a discussion of the link between political pluralism and the legal personhood of groups, see generally LEGAL PERSONALITY AND POLITICAL PLURALISM (Leicester C. Webb ed., 1958).

184. See DAN-COHEN, *supra* note 56, at 177; cf. Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 883 (1997) (observing that “religious conservatives [also] place great importance upon local communities and other

conception of groups draws on the image of the medieval institutions of guilds, townships, and free cities that had powers of autonomous self-direction and served as centers for collective and participatory self-government.¹⁸⁵ These groups empowered individuals to determine the course of their own lives, rather than submitting to the direction of a centralized state that was perceived as “anti-democratic, robbing citizens of meaningful political participation and power.”¹⁸⁶ From this perspective, mediating groups stand between individuals and the state and form an essential means of democratic self-rule.

The concept of mediating institutions has been explored in related terms in the business ethics literature. In political discourse, mediating structures are typically associated with the family, religious organizations, neighborhoods, and voluntary groups.¹⁸⁷ In these groups, individuals interact closely with other members, and can see first hand the effects of their actions. This is empowering because it gives individuals a sense of control in knowing that they can make a difference in the group. Business ethicists have suggested that corporations today can, and possibly must, serve as mediating institutions in society.¹⁸⁸ To the extent that so many people spend most of their day working in or interacting with corporate organizations, “the corporation represents a value-laden institution that outranks the local community as a focus of loyalty and a medium for self-realization.”¹⁸⁹ In fact, it has been

mediating institutions as buffers against the encroaching powers of the central state”). For a view that the corporation can serve as a check against the power of government, see Michael Novak, *God and Man in the Corporation*, 13 POL’Y REV. 9, 28 (1980). Michael Novak believes “the publicly held business corporation is arguably the most successful, transformative, and future-oriented institution in the modern world. It has been far more open, more creative, and infinitely less destructive than the nation-state, particularly the totalitarian state.” MICHAEL NOVAK, ON CORPORATE GOVERNANCE: THE CORPORATION AS IT OUGHT TO BE 3 (1997).

185. See Hager, *supra* note 66, at 611-15.

186. *Id.* at 611.

187. See PETER L. BERGER & RICHARD J. NEUHAUS, TO EMPOWER PEOPLE: THE ROLE OF MEDIATING STRUCTURES IN PUBLIC POLICY 3 (1977). *But see* Craig Anthony (Tony) Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441, 461-81 (2007) (arguing that the land use regulatory system in the United States performs primarily mediating functions between people and places, communities and power, and freedom and boundaries).

188. See, e.g., Timothy L. Fort, *Business as Mediating Institution*, 6 BUS. ETHICS Q. 149, 151, 155-57 (1996).

189. Norton E. Long, *The Corporations, Its Satellites, and the Local Community*, in

suggested that the traditional sources of social support such as the family, church, and small town, have declined in our mobile and entrepreneurial society, and corporations have taken their place.¹⁹⁰ It may be unrealistic to envision a large, multinational corporation as a small community of shared values, but corporations may have subgroups within them that can be so characterized. Many people today have such a sense of camaraderie with their work colleagues that they feel closer to their work groups than to their own immediate family members. If corporations, or subparts of them, have become an important form of community, they may be seen as performing an essential mediating function for individuals in society.¹⁹¹ In this light, corporations should not be regarded with suspicion, but embraced as tools for facilitating individual and societal development.

From this point of view, democratic life depends on supporting associational freedom and allowing individuals to pursue their own goals through various voluntary groups like the corporation. Rather than posing a threat to democracy, organizations such as the corporation are constitutive elements of American society and promote its flourishing. They provide a means for individuals to define themselves and their way of life, rather than having these decisions made for them by an all-powerful state.¹⁹² This political pluralist vision regards organizations as intrinsically beneficial and encourages their growth and autonomy, free from state interference in their affairs.¹⁹³ If corporations fit within this

CORPORATION IN MODERN SOCIETY, *supra* note 45, at 202.

190. See DANIEL BELL, *THE COMING OF POST-INDUSTRIAL SOCIETY: A VENTURE IN SOCIAL FORECASTING* 289 (1973); SOLOMON, *supra* note 137, at 146-47; Long, *supra* note 189, at 202 (“[P]eople may be more citizens of the corporations for whom they work than of the local communities in which they reside.”).

191. See Fort, *supra* note 188, at 153-55 (discussing mediating institutions’ societal importance). *But cf.* Hager, *supra* note 66, at 650 (arguing that, for purposes of group free expression rights, corporations are collections of capital, not collections of people, and therefore corporations are very different from trade unions, churches, benevolent societies, and other traditional associational groups that deserve associational freedom rights).

192. See Bainbridge, *supra* note 184, at 897 (concluding that “it is perfectly plausible to think of the corporation as an intermediary institution standing between the individual and Leviathan” and noting that the corporation can “act as a vital countervailing force against the state”).

193. See David Schneiderman, *Harold Laski, Viscount Haldane, and the Law of the Canadian Constitution in the Early Twentieth Century*, 48 U. TORONTO L.J. 521, 529 (1998) (describing the views of pluralist Harold Laski, who “attack[ed] the all-absorptive state and promot[ed] the inherent worthiness of group associations”); Tsuk,

framework, they play an important political role in fostering individual development and restraining the power of government.

B. Comments

The role of the corporate person in our political system is open to different interpretations depending on one's normative vision of the ideal political state. One strand of political pluralism views corporations as sources of oppressive power that must be curbed by the state. Another strand reverses these positions and seeks to protect corporations from coercive state interference in order to preserve individual autonomy. The common thread is a recognition that corporations are socially and politically significant, and have the power to affect society in dramatic ways.¹⁹⁴

To acknowledge that corporations are social and political institutions naturally complicates our understanding of the role of the corporate person vis-à-vis the state and individuals in society. The stakes become much higher. Some have maintained that the struggle over corporate personhood is no less than a part of the larger struggle over the future of American democracy.¹⁹⁵ Because we can so vigorously disagree on our prescriptions for achieving the ideal democratic society, our views of the corporation's role in that endeavor will always be contentious and controversial.

Each of the various theories of the corporation's social and political role reflects a different dimension of the corporate person when viewed through that particular prism. Each viewpoint is informative because each carries an element of truth in its observation. The large corporation

supra note 168, at 192 (noting that pluralists Berle and Means "feared that an overuse of government regulation could eliminate potential benefits of corporate power" and instead wanted to "encourage the development of diverse collective institutions to promote various experiences and actions"); *see also* DAN-COHEN, *supra* note 56, at 177 (noting that the pluralist's concern is for "the autonomy of voluntary associations and their relative immunity from state interference in their internal affairs").

194. As Adolf Berle and Gardiner Means observed: "[A] giant corporation is a tremendous force which can harm or benefit a multitude of individuals, affect whole districts, shift the currents of trade, bring ruin to one community and prosperity to another. The[se] organizations . . . have passed far beyond the realm of private enterprise—they have become more nearly social institutions." BERLE & MEANS, *supra* note 46, at 46.

195. *See* Hager, *supra* note 66, at 639.

indisputably is a source of tremendous political and social power. But so is the government. Both can wield that power coercively. Our task then is to balance these collective centers of power in ways that do not inhibit the productive activities of both. The law can be used as a mediating force to direct and articulate that balancing process.¹⁹⁶ However, that balance must constantly be readjusted as our society and our corporations evolve and grow. The role of corporations is not static, but may change as we play out our ongoing experiment in democracy and work out our societal vision for the good and prosperous life.

The desire to reach that good and prosperous life ties into one dimension of the corporate person that is not often discussed in mainstream academia: the spiritual aspect of corporations. This element can seem trivial and almost nonsensical to many who would prefer to focus on the more traditional disciplines of economics or politics when analyzing corporate activity.¹⁹⁷ However, this Article attempts to present a broader array of disciplinary perspectives on the corporate person. The following section discusses the proposition that certain spiritual elements are part of the corporate person too.

196. See William W. Bratton, *The Economic Structure of the Post-Contractual Corporation*, 87 NW. U. L. REV. 180, 212-15 (1992).

197. See Michael Naughton, *The Corporation as a Community of Work: Understanding the Firm Within the Catholic Social Tradition*, 4 AVE MARIA L. REV. 33, 39 (2006) (describing but disagreeing with “[t]he general impression within the West . . . that religion and theology at best have no relevance for corporate life, and at worst tend to foster incompetence and inefficiency”). Those who do discuss corporations in spiritual terms often appear to feel the need to defend their subject matter. They argue that we should consider all relevant voices in a discussion over the purpose of corporations, whether they are religious or secular. See Helen Alford & Michael J. Naughton, *Beyond the Shareholder Model of the Firm: Working Toward the Common Good of a Business*, in RETHINKING THE PURPOSE OF BUSINESS: INTERDISCIPLINARY ESSAYS FROM THE CATHOLIC SOCIAL TRADITION 27, 44 n.4 (S.A. Cortright & Michael J. Naughton eds., 2002) [hereinafter RETHINKING THE PURPOSE OF BUSINESS]. They believe that intellectual positions based on religious sources can stand or fall on their own merits and should not be rejected on the basis of whether one accepts or rejects the particular religious tradition: “[O]ne would not avoid reading Karl Marx or Frederick Taylor simply because one is not a Marxist or a Taylorist. The Catholic social tradition, with its communal orientation, provides an understanding of organizational purpose that is a serious alternative to that of classical or revised liberalism, and on that basis alone deserves consideration.” *Id.*

VI. SPIRITUAL DIMENSION OF THE CORPORATE PERSON

In addition to the legal, economic, social, and political roles that corporations play in society, some scholars argue that the corporate person also has theological significance.¹⁹⁸ Corporations are means to pursue the worthiest of ends, ends that are higher than themselves and the pursuit of profit. At their best, corporations can become the locus of activities that ultimately serve the ends of justice, liberality, and charity.

A. The Spiritual Identity and Purpose of the Corporation

Modern American theologian, Michael Novak, assigns a full spiritual identity to the corporation, describing it as an “incarnation of God’s presence in this world.”¹⁹⁹ According to his philosophy, the creative and innovative aspects of corporations, the ability of corporations to increase human wealth and thereby combat poverty, the communal environment the corporate workplace provides for people to work out their identities and salvation—all testify to the good and beneficial nature of corporations, and together they offer a type of “metaphor[] for grace, a kind of insight into God’s ways in history.”²⁰⁰ The corporation is seen as a moral institution with the capacity to be a channel of grace for the world if given the freedom to thrive and maximize profits. In contrast, the state is a source of coercive power

198. While there may be other religious traditions that have strong views of the nature and role of corporations in American society, Catholic Social Thought (CST) appears to have played a dominant role in the legal academic writing on the subject in the United States. See, e.g., Stephen M. Bainbridge, *Catholic Social Thought and the Corporation*, 1 J. CATH. SOC. THOUGHT 595 (2004); Jean-Yves Calvez & Michael J. Naughton, *Catholic Social Teaching and the Purpose of the Business Organization: A Developing Tradition*, in *RETHINKING THE PURPOSE OF BUSINESS*, *supra* note 197, at 3; Scott Fitzgibbon, “True Human Community”: *Catholic Social Thought, Aristotelian Ethics, and the Moral Order of the Business Community*, 45 ST. LOUIS U. L.J. 1243 (2001); Mark A. Sargent, *Competing Visions of the Corporation in Catholic Social Thought*, 1 J. CATH. SOC. THOUGHT 561 (2004). Therefore, this Article will focus primarily on the views of CST subscribers.

199. MICHAEL NOVAK, *TOWARD A THEOLOGY OF THE CORPORATION* 39 (rev. ed. 1990).

200. *Id.* at 49. Michael Novak argues that “[b]usiness is a noble Christian vocation, a work of social justice, and the single greatest institutional hope of the poor of the world.” Michael Novak, *A Philosophy of Economics*, 1 U. ST. THOMAS L.J. 791, 791 (2004).

that must be curbed to preserve a free and virtuous society.²⁰¹ It follows that corporations should be allowed to operate without state interference or the burdens of complying with communitarian notions of corporate social responsibility. While this view of corporations has been widely criticized, even by those within the same religious tradition,²⁰² many commentators agree that the corporation has a role in helping human beings achieve the good and virtuous life.

In particular, corporations are regarded as instruments serving natural, human ends, as well as supernatural, spiritual ends. From an Aristotelian perspective, human beings are not intended merely to live, to stay alive, or to survive, but they are intended to “live well,” to flourish, and to live for the highest and noblest things.²⁰³ Corporations provide human beings with the means to flourish by giving them the time and resources to focus on endeavors beyond merely surviving. “[I]f everyone were required to feed, clothe, and otherwise provide for himself and his family . . . with the sole use of his own means and enterprise, . . . [e]ach person would spend all of his time merely surviving,” rather than having the freedom to seek a more enriching existence.²⁰⁴ Corporations serve society by providing essential goods and services that meet the real material needs of consumers. By doing so, they free human beings to engage themselves in the process of achieving the good life.²⁰⁵ Individuals can focus on developing virtues within themselves

201. See NOVAK, *supra* note 199, at 31-34. “[T]he prevailing moral threat in our era may not be the power of the corporations but the growing power and irresponsibility of the state.” *Id.* at 34. In contrast, the corporation is “a useful instrument of social justice, a mediating institution between isolated individuals and the omnipotent state.” *Id.* at 3.

202. See, e.g., Sargent, *supra* note 198, at 577-81, 588-92. Mark Sargent believes “Novak’s theology is more than a little wobbly,” *id.* at 577, and that his anti-communitarian and pro-capitalist arguments are “exactly backwards.” *Id.* at 581.

203. See Schall, *supra* note 23, at 112. “Aristotle’s central ethical concept is a unified, all-embracing notion of ‘happiness’ (or, more accurately, *eudaimonia*, perhaps better translated as ‘flourishing’ or ‘doing well’).” SOLOMON, *supra* note 137, at 105. See ARISTOTLE, *POLITICS*, reprinted in *THE BASIC WORKS OF ARISTOTLE* 1127, 1139-40 (Richard McKeon ed., Benjamin Jowett trans., Random House 1941) (distinguishing between the base pursuit of wealth for its own sake and the more noble pursuit of wealth for the higher purpose of “living well”).

204. Schall, *supra* note 23, at 110.

205. Cf. Naughton, *supra* note 197, at 40 (proposing a “theology of institutions” model of the corporation in which the corporation acts “as a servant to the larger society in such a way that people grow and develop) (citing Robert K. Greenleaf, *The Need for a Theology of Institutions*, in SEEKER AND SERVANT: REFLECTIONS ON RELIGIOUS

and molding a more virtuous society. Corporations that function properly can help make society more just and thus contribute to the common good.²⁰⁶ The common good of the community is the sum of all those social conditions that support the full development of human personality and facilitate the fulfillment of each person's life.²⁰⁷

The corporate person also contributes to the common good of its members. The organizational common good is "the promotion of all the goods necessary for integral human development in the organization"²⁰⁸ It "encompasses everything that is conducive to the human flourishing of each person" in the group.²⁰⁹ Business is considered a community of persons who are forged together by their work and who relate to one another in interdependent ways. Under this view, human beings are inherently social, and their social environment helps shape their moral personality.²¹⁰ One's personal identity and meaning is created and defined by one's interaction with others.²¹¹ For example, a man's identity as a father, son, manager, mentor, and company softball team player is inextricably linked to his relationships with others. The community in which he is embedded plays an essential role in defining who he is. As a community of individuals, the corporation at its best provides a moral environment where individuals can interact and

LEADERSHIP 191 (Anne T. Fraker & Larry C. Spears eds., 1996)).

206. See Domenec Mele, *Not Only Stakeholder Interests: The Firm Oriented Toward the Common Good*, in *RETHINKING THE PURPOSE OF BUSINESS*, *supra* note 197, at 190, 198.

207. Robert G. Kennedy, *Corporations, Common Goods, and Human Persons*, 4 *AVE MARIA L. REV.* 1, 18 n.58 (2006).

208. Alford & Naughton, *supra* note 197, at 38.

209. Mele, *supra* note 206, at 194.

210. See Gerald J. Russello, *Catholic Social Thought and the Large Multinational Corporation*, 46 *J. CATH. LEG. STUD.* 107, 124 (2007); Sargent, *supra* note 198, at 565; see also Scruton, *supra* note 56, at 257 (arguing that "something vital is missing from the natural person who is without the experience of membership—something necessary to his perfection. Lacking it, your attitude to the world and to others is one of 'diminished responsibility,' while your personal relations become defeasible, rescindable, and renegotiable in the interests of gain.").

211. See SOLOMON, *supra* note 137, at 146-48 (discussing the Aristotelian view of man's social nature and asserting that "we find our identities and our meanings only within communities, and for most of us that means at work in a company or an institution"); see also Fort, *supra* note 188, at 152 (discussing sociologist Robert Nisbet's views of human social needs and suggesting that social interaction is required "to create a person's very identity").

develop their identities. If the corporation shows concern for its employees by giving them satisfying work, a voice in the manner of doing their work, the opportunity to fellowship and form friendships, and a fair share of the rewards of the organization's successes, then it supports the dignity and fulfillment of its members as human beings.²¹²

Such a corporate community is where individual members can learn and exercise spiritual virtues. The concept of corporations as mediating institutions reappears in this context. The classic mediating institutions are associated with the family, church, and voluntary associations.²¹³ These are the centers where people learn certain virtues, such as love, patience, respect, kindness, justice, courage, and loyalty. In our modern world, however, the traditional mediating institutions may be giving way to the work environment as the place where virtues will have to be developed. "Work consumes too much time for one to think that virtuous habits are only cultivated in some separate cultural sphere and then brought to the corporation. If the corporation is rightly ordered, it will be a place where the habit of justice [among others] is developed."²¹⁴ Subscribers of this view believe the work environment carries extremely important spiritual significance for individuals: "For many of us, the two most important institutions in our lives are our families and the organizations for which we work. . . . [T]hey are often the two places where we will save or lose our souls."²¹⁵ The corporation thus holds a valuable function as a modern day mediating institution where spiritual and ethical virtues can be fostered.

212. See Kennedy, *supra* note 207, at 29-31. This viewpoint places a special value on human labor. The "best work is not necessarily the work with the best pay. It is the work that most completely draws out the potential of the worker and develops him as a human person . . ." Robert G. Kennedy, *The Virtue of Solidarity and the Purpose of the Firm*, in *RETHINKING THE PURPOSE OF BUSINESS*, *supra* note 197, at 48, 55.

213. See Fort, *supra* note 188, at 150; see also *supra* notes 187-91 and accompanying text (discussing mediating institutions in the political pluralist context).

214. D. Stephen Long, *Corporations and the Common Good*, 4 *AVE MARIA L. REV.* 77, 98 (2006); see also Fort, *supra* note 34, at 264 ("Given that we spend a large percentage of our waking hours working, it is only logical that our moral identities are formed not only in families and churches, but at work as well."). Timothy Fort argues that because "much of a person's conscious life will be involved with work, . . . there is a need to remake corporations into mediating structures themselves." Fort, *supra* note 188, at 150-51. He describes Harvard economist Juliet Schor's work which shows that prior to capitalism, people worked far fewer hours and had much more leisure time than they do today. See *id.* at 151 (citing JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* (1991)).

215. Naughton, *supra* note 197, at 40-41.

The normative goal of this spiritual approach to corporations is not the maximization of profits, but the flourishing of all members of the organization and the common good of the community. Profit-making is considered only a “foundational” or “instrumental” good, which is subordinate to “excellent” or “inherent” goods like human development, moral self-possession, and community.²¹⁶ Instrumental goods are important, and in fact, necessary for achieving excellent goods. However, instrumental goods should not be pursued for their own sake because to do so improperly makes an end out of a means.²¹⁷ Profit-making as an instrumental good is essential because if the corporation does not create sufficient profits, it has no hope of survival and no possibility of contributing to the common good of its members or society.²¹⁸ Even so, profits should be viewed only as an indication, or a byproduct, of a well functioning firm.²¹⁹ They are a measure of its success in operating its business in the appropriate manner. To the extent a corporation is concerned solely with profits as the exclusive objective of its business, it operates out of a truncated view of the purpose of the organization and fails to fulfill its role as a site where excellent goods can be pursued.²²⁰ Treating the acquisition of wealth as an end in itself is considered a vice that “contributes to the spiritual emptiness of a materialistic culture and undermines the common good.”²²¹ The corporation must strive to maintain the proper ordering of

216. See Alford & Naughton, *supra* note 197, at 35-36.

217. See Charles Handy, *What's a Business For?*, HARV. BUS. REV., Dec. 2002, at 49, 51. Charles Handy views this as a moral issue: “To mistake the means for the end is to be turned in on oneself, which Saint Augustine called one of the greatest sins.” Handy does not speak explicitly in terms of “instrumental” or “excellent” goods, but effectively makes the same point: “We need to eat to live; food is a necessary condition of life. But if we lived mainly to eat, making food a sufficient or sole purpose of life, we would become gross.” *Id.* In relating this to the profit motive, he argues that “[t]he purpose of a business . . . is not to make a profit, full stop. It is to make a profit so that the business can do something more or better. That ‘something’ becomes the real justification for the business.” *Id.*

218. See Alford & Naughton, *supra* note 197, at 37.

219. See Kennedy, *supra* note 207, at 25.

220. See Alford & Naughton, *supra* note 197, at 38; see also Kennedy, *supra* note 212, at 59 (arguing that a good corporation “is not one that rejects the criteria of the economic paradigm; it is rather one that meets these criteria and more”). Robert Kennedy believes the “*problem is not that we expect too much of firms, but rather that we are prepared to settle for too little.*” Kennedy, *supra* note 212, at 59.

221. Sargent, *supra* note 198, at 566. Mark Sargent acknowledges that the

instrumental and excellent goods in order for the corporation to serve its spiritually meaningful purpose.

Therefore, according to this view, corporations must be dedicated to supporting the values that bring about the development of all persons and society. As a matter of corporate social responsibility, this means, among other things, corporations should be concerned with protecting the environment, producing quality products that are safe, treating their employees well, preventing global labor abuses, and avoiding cooperation with oppressive government regimes.²²² Corporations should take into account the impact of their decisions on others and try to act in ways that benefit, rather than harm, the community. Some commentators believe the law should be designed to ensure corporate social responsibility and impose on the corporate person “a legally-constituted social conscience,” even if it means shareholder profits may not always be maximized.²²³ Others disagree, arguing that the state should have no role in enforcing mandatory codes of honorable or trustworthy corporate behavior.²²⁴ Ultimately, most agree that when it comes to the spiritual elements of the corporate person, the ideal vision of the corporation is one that fosters human flourishing, protects rather than undermines human dignity, and “brings us closer to God’s kingdom.”²²⁵ It is the means and method by which this ideal can be reached that is the subject of debate.

In contrast, some scholars who hold the same religious views believe corporations have grown so powerful and immoral that they cannot be redeemed, and no amount of idealizing will change this fact: “Though there has been much discussion about making corporations

communitarian vision of the corporation breaks sharply with the shareholder wealth maximization norm that prevails in current economic theory and legal doctrine. *Id.* at 570. Under the communitarian model, the profit maximization norm is thought to blind corporate managers from pursuing more excellent goods. See HELEN J. ALFORD & MICHAEL J. NAUGHTON, *MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION* 47 (2001) (“By elevating shareholder wealth to the status of the ultimate good, the shareholder model in effect erects a ‘tyranny of foundational goods,’ inhibiting managers from considering more excellent goods except as instruments to increase profits.”).

222. See Sargent, *supra* note 198, at 567.

223. *Id.* at 568.

224. See Bainbridge, *supra* note 184, at 893; see also *id.* at 897 (relying in part on some of Michael Novak’s statements to argue that “minimizing state regulation of corporate governance is essential to the preservation of a free, yet virtuous society”).

225. Naughton, *supra* note 197, at 72.

moral or socially responsible, their legal DNA prevents them from acting like humans and having the chance to act in moral ways.”²²⁶ Therefore, the argument goes, the legal personhood of corporations should be abolished so that business people will be obliged to assume personal and social responsibility for their own business actions.²²⁷ The hope is that the abolition of corporations will allow businesses to evolve in ways that will be more accountable to the common good.²²⁸ While this view may seem drastic, it has gained increasing support outside of religious circles in the wake of the corporate frauds and scandals that have occurred in the last decade.²²⁹

B. Comments

Attributing spiritual significance to the corporation creates an ideal vision of what the corporation is and how it should function. The language that is used to speak of corporations in this context is moralistic and philosophical. It seeks to criticize but also to inspire. It shares

226. William Quigley, *Catholic Social Thought and the Amoralism of Large Corporations: Time to Abolish Corporate Personhood*, 5 LOY. J. PUB. INT. L. 109, 109 (2004).

227. *See id.*

228. *See id.* at 129.

229. Galvanized by the corporate misconduct underlying the collapse of so many large companies, a growing movement of organized activist groups, not associated with any particular religion, seeks passionately to eliminate the personhood of corporations in our legal system. They see their cause as similar to that of the abolitionists who worked to end the institution of slavery: “Slavery is the legal fiction that a person is property. Corporate personhood is the legal fiction that property is a person.” Molly Morgan & Jan Edwards, *Abolish Corporate Personhood*, 59 GUILD PRAC. 209, 214 (2002). Many of these activist groups effectively use the Internet to communicate their message to a worldwide audience. Their Web sites are often quite comprehensive, linking the reader to numerous books, articles, and sources relating to corporate personhood and its effects on society and the law. *See, e.g.*, Reclaim Democracy, <http://www.reclaimdemocracy.org>; Program on Corporations, Law & Democracy, <http://www.poclad.org>; Citizens Intent on Reforming Corporate Accountability, <http://www.firstuucolumbus.org>; Women’s International League for Peace and Freedom, <http://www.wilpf.org>; Community Environmental Legal Defense Fund, <http://www.celdf.org>; Redwood Coast Alliance for Democracy, <http://www.riipublishing.com>; California Center for Community Democracy, <http://www.californiademocracy.org>; Big Medicine Central, <http://www.nancho.net>; Democracy Unlimited of Humboldt County, <http://www.duhc.org> (Web sites last visited Oct. 2, 2009).

much in common with the stakeholder model of the corporation which views all corporate constituents as having a stake in or a claim on the corporation.²³⁰ Each group has a right not to be treated as a means to an end, but as an integral part of the corporation in which all have an interest.²³¹ The stakeholder model requires that all stakeholders' interests must be considered, balanced, and preserved to the greatest extent possible in every action that the corporation takes.

Although the spiritual view of corporations possesses similarities with the stakeholder model, the spiritual approach adds a different element to the analysis. Rather than viewing the corporation as a collection of various group interests, each of which has a right to be protected, the spiritual approach hesitates to use the terminology of "interests" at all because it reflects a self-centered orientation toward life. Instead, the spiritual model values the common good of all. "It has an ethical foundation that both the shareholder and the stakeholder models lack: it is founded not on what each group wants for itself, but on what is normatively good for that group and for others."²³² There is a deeper sense that corporations can and should be "just" and "virtuous" entities.²³³

As much as advocates of the spiritual model may wish that their views be judged on their intellectual merits regardless of one's religious beliefs, it may be difficult for those who do not share the same faith to accept their vision. Critics may feel that discussions of the spiritual element of corporations amount to sermonizing and moral exhortation without a close connection to the real world of business. Proponents of the spiritual model recognize this as an issue and seek to transform their vision into more concrete and practical terms.²³⁴

230. See Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 184-96 (1997) (discussing the stakeholder theory, its development, and some criticisms). Stakeholders include not only shareholders, but also employees, creditors, customers, suppliers, and the larger community. See Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 680 (2006) (describing the conception of the "stakeholder").

231. See Freeman, *supra* note 19, at 56.

232. James Gordley, *Virtue and the Ethics of Profit Seeking*, in RETHINKING THE PURPOSE OF BUSINESS, *supra* note 197, at 65, 78.

233. See Sargent, *supra* note 198, at 571 n.21 (describing the views of Monsignor John A. Ryan).

234. See *id.* at 592. Mark Sargent suggests that "[t]here is a great need for theoretical imagination and practical ingenuity" to overcome the difficulties of

For my purposes, the fact that corporations can be viewed from a spiritual perspective attests to the complexity of the corporate person. The spiritual approach reveals yet another dimension of the corporation, opening up another lens through which it can be analyzed and ultimately judged or praised. Whether or not one agrees with the teachings of the spiritual view, one can acknowledge that it reflects how pervasively the corporation has captured the minds of not only legal scholars, historians, philosophers, political theorists, sociologists, and psychologists, but also religious thinkers. The corporate person is too important a subject to elude the critical examination of even its possible spiritual dimension and purpose.

In stark contrast to the ideas associated with the spiritual model of corporations, the economic theory of corporations repudiates the belief that corporations can or should have any purpose beyond acting as a contractual center for economic exchanges. The following section describes the neoclassical economic approach to the firm. It draws upon a methodological individualist conception of human beings that is radically different from the social conception of human beings so central to the spiritual approach.

VII. ECONOMIC THEORY OF THE CORPORATION

A. Nexus of Contracts Model

The economic paradigm of the corporation relies on a contract metaphor rooted in neoclassical economic theory. Under this paradigm, the corporation is merely a fiction that serves as a nexus of contracts among the firm's various individual participants.²³⁵ These "contracts" are not true contracts as defined by law, but the economist's notion of contracts as reciprocal arrangements involving mutual expectations between parties.²³⁶ The human parties are defined according to the economist's notion of rational self-interested actors who freely contract

implementing the goals of the spiritual model in corporate law. *Id.* Otherwise, the spiritual approach will be nothing other than "a challenging, but ultimately irrelevant set of religious reflections on business organization and behavior." *Id.*

235. The *nexus of contracts* terminology first appeared in 1976. See Jensen & Meckling, *supra* note 20, at 311.

236. See Jeffrey N. Gordon, *The Mandatory Structure of Corporate Law*, 89 COLUM. L. REV. 1549, 1549 (1989).

according to their own utility calculations.²³⁷ The corporation is the center of a mass of contracts between shareholders, managers, employees, creditors, suppliers, and others who come together, as the result of market forces, to gain the benefit of their bargains with each other.

From this perspective, no independent, real corporate entity exists. The idea of a separate corporate person is only a convenient fiction. The corporate entity itself has no precise boundaries, and “it makes little or no sense to try to distinguish between those things which are ‘inside’ the firm . . . from those things that are ‘outside’ of it.”²³⁸ As a result, the concept of the distinct corporate person tends to disappear.²³⁹

Ownership of the firm also disappears as a meaningful concept.²⁴⁰ Since the organization decomposes into a group of identifiable participants who negotiate an equilibrium position among themselves, no one class of participants, not even the shareholder class, has a right to regard itself as the owner of the corporation.²⁴¹ The shareholders are just one

237. See Phillips, *supra* note 77, at 439 (observing that under the nexus of contracts theory, the component human beings “are not flesh-and-blood people, but the utility-maximizing rational actors of economic theory”); see also Bratton, *supra* note 28, at 462 (arguing that the economic theory “depends on rational economic actors denuded of significant human characteristics”). This has been the source of some criticism of the theory because it arguably fails to accommodate human beings in their full variety and complexity. See Phillips, *supra* note 28, at 1111.

238. Jensen & Meckling, *supra* note 20, at 311; see also Oliver Hart, *An Economist's Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1764 (1989). Some scholars believe it is better to use the term “contractual theory” than “nexus of contracts” because the latter might imply “the corporation exists as an entity apart from the contracts among its participants.” Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 3 n.1 (1990). They argue there is no conceptual justification for reifying the mass of interrelated contractual relationships that compose the corporation. *Id.*

239. William T. Allen, *Our Schizophrenic Conception of the Business Corporation*, 14 CARDOZO L. REV. 261, 265 (1992); see also Margaret M. Blair & Lynn A. Stout, *Specific Investment: Explaining Anomalies in Corporate Law*, 31 J. CORP. L. 719, 739 (2006) (criticizing the nexus of contracts model because it fails to tell us exactly where the corporation ends and the rest of the world begins).

240. Eugene F. Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 289-90 (1980); see also Lynne L. Dallas, *Two Models of Corporate Governance: Beyond Berle & Means*, 22 U. MICH. J.L. REF. 19, 23 (1988) (noting that ownership of the firm does not exist under this model “because no one can own a ‘nexus’”).

241. See Jonathan R. Macey, *An Economic Analysis of the Various Rationales for Making Shareholders the Exclusive Beneficiaries of Corporate Fiduciary Duties*, 21

of the various suppliers of inputs whose rights are determined by the many interrelated contracts making up the corporation. That said, the managers are considered the agents of the shareholder principals who agree to bear the residual risk if the firm is not successful.²⁴² In return, the managers' role is to act in ways that maximize shareholder interests. The risk that managers will fail to do so generates agency costs that must be constrained by internal and external market forces if the corporation is to produce gains for all of its constituent parties and ultimately for the shareholders as residual claimants.²⁴³

According to the nexus of contracts model, the corporation springs up naturally as a product of private, voluntary actions by people who are free to contract in their own self-interest.²⁴⁴ The corporation is not a metaphysical entity with its own ontological standing, nor is its existence a privilege bestowed by the state. It is a private undertaking by individual citizens. The nexus of contracts model constitutes a modern variant of the aggregate theory of corporate personhood which says the corporation is nothing more than the collection of individuals who choose to group together to conduct their business in corporate form.²⁴⁵

STETSON L. REV. 23, 27 (1991) (citing J. CHOPER ET AL., CASES AND MATERIALS ON CORPORATIONS 28-29 (3d ed. 1989)).

242. See Blair & Stout, *supra* note 239, at 725 (describing the views of Frank Easterbrook and Daniel Fischel, who argue that even though the "nexus" may not have an owner, it is still conceptually useful to treat the managers as agents of the shareholders who contract to be the firm's residual claimants); see generally FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991).

243. See William T. Allen, *Contracts and Communities in Corporation Law*, 50 WASH. & LEE L. REV. 1395, 1400 (1993).

244. See Bratton, *supra* note 28, at 451.

245. See discussion of aggregate theory *supra* Part II.B. In this sense, the foundational concepts of the nexus of contracts model are not necessarily novel. Although the nexus of contracts theory is regarded as a modern-day economics-based theory, early 20th Century thinkers about the corporate form also made use of contractual concepts when discussing corporate personhood. For example, in 1911, W.M. Geldart's discussion of the legal personality of corporations utilized language that, in hindsight, resonates with the nexus of contracts model:

If we are going to get nearer to the facts, we must at least add the notion of contract to that of co-ownership, a contract made by every shareholder with every other, limiting his right of ownership to a right to share in profits and to vote at shareholders' meetings, contracts between each shareholder and the directors, between each shareholder and every person who supplies a ton of coals or steel rails; innumerable

This model of the corporation is based on a methodological individualist conception of human beings and their behavior. Under this view, the basic unit of analysis for any economic, political, or legal theory is always the atomistic individual, never the group.²⁴⁶ The premise is that “society is constituted of autonomous, equal, units, namely separate individuals, and that such individuals are more important, ultimately, than any larger constituent group.”²⁴⁷ We are each first of all individuals who then enter into various agreements with each other in society.²⁴⁸ Individuals are ontologically prior to corporations, which, as fictions, have significance only because of the freely contracted arrangements of their human constituents.²⁴⁹ This individualist view is linked to classical liberalism, focusing on individual freedom, rather than utilitarian social maximization.²⁵⁰ The individualist conception is

contracts to the making of which he has not given a moment's thought. To escape from the fictitious person we have fallen into the arms of the fictitious contract.

Geldart, *supra* note 54, at 97-98.

246. See Horwitz, *supra* note 35, at 181; Thomas A. Smith, *The Use and Abuse of Corporate Personality*, 2 STAN. AGORA 69, 71 (2001). Some observers believe the emphasis on the individual is found in political philosophies based in natural law. Scruton, *supra* note 56, at 260-61.

247. ALAN MACFARLANE, *THE ORIGINS OF ENGLISH INDIVIDUALISM* 5 (1978); see also May Brodbeck, *Methodological Individualisms: Definition and Reduction*, in READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES 280 (May Brodbeck ed., 1968) (discussing methodological individualism); J.W.N. Watkins, *Methodological Individualism and Social Tendencies*, in READINGS IN THE PHILOSOPHY OF THE SOCIAL SCIENCES, *supra*, at 270-71 (“Every complex social situation, institution, or event is the result of a particular configuration of individuals [W]e shall not have arrived at rock-bottom explanations of such large-scale phenomena until we have deduced an account of them from statements about the dispositions, beliefs, resources, and inter-relations of individuals.”).

248. See SOLOMON, *supra* note 137, at 77. The formation of society itself can be seen as the product of voluntary arrangements, as described by social contract theory. See *id.*; Ruskola, *supra* note 164, at 1622 (“In our legal culture, contract constitutes the dominant paradigm of private ordering which is then projected onto the public sphere as a hypothetical ‘social contract.’”); see also DONALDSON, *supra* note 78, at 39-41 (discussing social contract theory as contemplated by Hobbes, Locke, and Rousseau).

249. See Scruton, *supra* note 56, at 254 (describing the “ontological priority” thesis that we can have human beings without corporations, but no corporations without human beings); see also McMahon, *supra* note 86, at 541 (discussing the ontological status of organizations and describing “ontological individualism” which denies the existence of social objects distinct from the individuals who comprise them).

250. See J. William Callison, *Federalism, Regulatory Competition, and the Limited Liability Movement: The Coyote Howled and the Herd Stampeded*, 26 J. CORP. L. 951, 975 (2001). The liberal individualism that underlies the nexus of contracts model has

appealing because of its emphasis on autonomy, self-realization, and responsibility, as well as its deep commitment to humanism.²⁵¹ It presumes that people are and should be free to make their own choices about how to live their lives and achieve their goals.

Normatively speaking, the nexus of contracts theory not only describes corporations as the center of interrelated contracts between freely contracting individuals, but also asserts that corporations should be permitted to function freely in that way.²⁵² The private individuals who voluntarily enter into these contracts should be given wide discretion to order their affairs in whatever manner they choose.²⁵³ The law should provide only a set of non-mandatory default rules that the parties can change by voluntary agreement if they desire.²⁵⁴ These default rules should be enabling rules that reflect the terms the parties, as rational, informed actors, would have bargained for hypothetically if

links to F.A. Hayek's political theory which envisions the creation of spontaneous social orders when individuals are free to make their own market choices and contracts. All of society benefits when individuals are afforded such autonomy without state interference. See DONALDSON, *supra* note 78, at 70 (discussing Hayek's philosophy). Hayek and Sir Karl Popper are considered the founding fathers of methodological individualism. See Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC'Y REV. 727, 731 (1989).

251. It has been suggested that many in the contemporary legal academy are drawn to liberal individualism, and therefore drawn to the nexus of contracts model because of its intrinsic liberal underpinnings. See Bratton, *supra* note 28, at 457-58; see also David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1388 n.43 (1993) (expressing concern that most elite law school professors "appear to be more or less wedded to the political value judgments that underlie the neoclassical economic approach (i.e. contractarian) to corporate law").

252. See Gordon, *supra* note 236, at 1550.

253. See Butler & Ribstein, *supra* note 238, at 7-8. In this liberal model, the most important laws are those that protect private property rights and enforce contracts. See Allen, *supra* note 243, at 1396; see also Callison, *supra* note 250, at 977 ("[L]iberalism values rules which permit people to live their own lives based on their own preferences, structure their relationships with others, and define their duties to them by means of consent. Contract is a critical focus [because] . . . it is through contract that autonomous individuals define their relationships with others.").

254. See Lucian A. Bebchuck, *Foreword: The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395, 1396-97 (1989); Fred S. McChesney, *Economics, Law, and Science in the Corporate Field: A Critique of Eisenberg*, 89 COLUM. L. REV. 1530, 1537-38 (1989); see also EASTERBROOK & FISCHER, *supra* note 242, at 15; Larry E. Ribstein, *The Mandatory Nature of the ALI Code*, 61 GEO. WASH. L. REV. 984, 989-91 (1993).

they could have done so in a costless setting.²⁵⁵ Individuals can freely contract around these rules and set the terms of their own interactions as they see fit. There should be no government policing of their relationships and contracts; rather, the state should yield to freedom of contract principles.

From this standpoint, corporations should be free to do what they do best, generate profits for shareholders. Under the “shareholder primacy” or “profit maximization” principle,²⁵⁶ the interests of other constituencies must be incidental or subordinate to the corporation’s primary concern for maximizing shareholder wealth. Non-shareholder constituents can all contract for their own protections.²⁵⁷ It follows then that corporations should not be saddled with social or moral responsibilities to non-shareholder constituents. Because the corporation is only “a legal fiction that serves as a nexus for a mass of contracts which various individuals have voluntarily entered into for their mutual benefit, . . . [it] is incapable of having social or moral obligations much in the same way that inanimate objects are incapable of having these obligations.”²⁵⁸ When the corporation maximizes profits, it fulfills all of

255. See EASTERBROOK & FISCHEL, *supra* note 242, at 15; Gordon, *supra* note 236, at 1550-51; see also Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 89-91 (1989).

256. The shareholder primacy principle is widely accepted as a dominant theme of corporate law. See Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 646-47 (2006). A famous judicial articulation of the shareholder primacy principle is found in *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919). “A business corporation is organized and carried on primarily for the profit of the stockholders.” *Id.* at 684. Some have argued that market jurisdictions worldwide have all arrived at, or are in the process of converging toward, the same standard model of shareholder primacy. See Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 439 (2001). But see Adam Winkler, *Corporate Law or the Law of Business?: Stakeholders and Corporate Governance at the End of History*, 67 LAW & CONTEMP. PROBS. 109, 112 (2004) (arguing that “[f]ree market principles and shareholder primacy have not won the day; they exist in corporate law alongside the many other areas of the law of business that do interfere with the free market . . . in the interests of corporate stakeholders”).

257. See John R. Boatright, *Fiduciary Duties and the Shareholder-Management Relation: Or, What’s So Special About Shareholders?*, 4 BUS. ETHICS Q. 393, 395 (1994) (explaining the argument that shareholders are different from bondholders, suppliers, employees, customers and others because non-shareholders are protected by contracts and other safeguards, while the shareholders are left to bear the preponderance of risk).

258. Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV.

its so-called social and moral obligations.²⁵⁹ By maximizing profits, which creates wealth for the entire economy and promotes efficient resource allocation, the corporation ultimately benefits all of its constituencies and society as a whole.²⁶⁰ The more profits a company makes, the more those profits feed back into the system, providing jobs for workers, goods and services for consumers, prosperity for communities, and strong capital markets for the continuous economic growth of society.²⁶¹ Thus, the corporation's main purpose should be to increase the returns to its shareholders, and the law should be structured to avoid distracting corporations from that goal.

B. Comments

Although the nexus of contracts theory is the dominant legal

1259, 1273 (1982). The nexus of contracts theory does not accommodate the concepts of corporate moral agency or personhood. It is an economic theory that understandably speaks in economic terms, not in the language of moral philosophy. Yet, the theory can be used to affirm the conclusions of those who argue against the moral responsibility of corporations from a moral philosophy standpoint. See discussion of philosophical arguments rejecting corporate moral personhood *supra* Part III.A.

259. Milton Friedman famously argued that “there is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game” MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 133 (1962). Some commentators argue that wealth maximization itself can be the most direct route to achieving a variety of moral ends. See, e.g., Stephen M. Bainbridge, *Law and Economics: An Apologia*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 208, 210-12 (Michael W. McConnell et al. eds., 2001).

260. See Michael E. DeBow & Dwight R. Lee, *Shareholders, Nonshareholders and Corporate Law: Communitarianism and Resource Allocation*, 18 DEL. J. CORP. L. 393, 416-19 (1993); see also Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There any “There” There?*, 75 S. CAL. L. REV. 1169, 1170-71 (2002) (describing the belief that “a stockholder-focused approach will, in the long run, generate the greatest benefit for corporate employees and the societies in which corporations operate”). Christopher Stone refers to this as the “polestar” argument because its emphasis on shareholder primacy is not based on supposed obligations to the shareholders per se, but on the belief that shareholder primacy “chart[s] a straight course toward what is best for the society as a whole.” STONE, *supra* note 35, at 85.

261. See EASTERBROOK & FISCHER, *supra* note 242, at 38; see also Mark J. Roe, *The Shareholder Wealth Maximization Norm and Industrial Organization*, 149 U. PA. L. REV. 2063, 2065-66 (2001) (describing the utilitarian basis for the shareholder wealth maximization norm).

academic paradigm of the corporation and corporate law,²⁶² it is certainly not without its critics.²⁶³ Some argue that the theory assumes perfect, complete, discrete, and purposive contracting by rational economic actors, but, in the real world, contracts can and often do fail due to the bounded rationality and intrinsic limits on the problem-solving abilities of human parties.²⁶⁴ Others believe the theory fails to acknowledge that private contracting and economic markets operate against a backdrop of public law, and that the state is always a non-neutral party to the corporate contract.²⁶⁵ Still others speculate on a deeper level that the acceptance of neoclassical economic theory with its emphasis on the pursuit of self-interest and profit maximization is, in part, responsible for such societal harms as the failure of Enron and

262. See Allen, *supra* note 243, at 1400; Winkler, *supra* note 256, at 122.

263. See, e.g., Victor Brudney, *Corporate Governance, Agency Costs, and the Rhetoric of Contract*, 85 COLUM. L. REV. 1403 (1985); Ronald Chen & Jon Hanson, *The Illusion of Law: The Legitimizing Schemas of Modern Policy and Corporate Law*, 103 MICH. L. REV. 1 (2004); Charles M.A. Clark, *Competing Visions: Equity and Efficiency in the Firm*, in *RETHINKING THE PURPOSE OF BUSINESS*, *supra* note 197, at 81; Melvin A. Eisenberg, *The Conception That the Corporation Is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819 (1999); Lyman Johnson, *Individual and Collective Sovereignty in the Corporate Enterprise*, 92 COLUM. L. REV. 2215 (1992); Alan Wolfe, *The Modern Corporation: Private Agent or Public Actor?*, 50 WASH. & LEE L. REV. 1673 (1993). See generally PROGRESSIVE CORPORATE LAW, *supra* note 160. Many critics nonetheless acknowledge the significant contribution the contractual paradigm has made to corporate law. See, e.g., Thomas L. Hazen, *The Corporate Persona, Contract (and Market) Failure, and Moral Values*, 69 N.C. L. REV. 273, 318 (1991) (“I am not suggesting that adherents to a law and economics analysis have not made significant contributions. Indeed, economic analysis must play a significant role in shaping our corporate law.”); Johnson, *supra*, at 2217 (arguing that even though “economics has not, will not, and should not, capture corporate law,” the law of corporations “has forever been changed (and bettered)” by the infusion of the economic model of the firm (emphasis added)).

264. See Bratton, *supra* note 28, at 448-49; Bratton, *supra* note 196, at 183-84.

265. See Hazen, *supra* note 263, at 281 (“The current contractarian view, however, disregards the fact that the sovereign is a party to [the] corporate contract.”); Kent Greenfield, *From Metaphor to Reality in Corporate Law*, 2 STAN. AGORA 59, 63 (2001) (“Even the so-called laissez-faire marketplace is shot through with government, and even the most basic common law entitlements are functions of legal rules.”); Thomas W. Joo, *The Modern Corporation and Campaign Finance: Incorporating Corporate Governance Analysis into First Amendment Jurisprudence*, 79 WASH. U. L.Q. 1, 64-65 (2001) (“In reality, the market operates against a complex background of legal rules. The fact that these rules resist private ordering adds force to the . . . argument that the state cannot remain neutral with respect to the allocation of entitlements.”).

other corporate catastrophes.²⁶⁶

What seems to bother most of the critics of the nexus of contracts theory is that it is incomplete. It offers too narrow a focus, too simplistic a response to the question, what is a corporation? Although the theory has descriptive and normative force, it still seems to present, for many observers, an impoverished way of explaining much of what goes on in corporate life on a daily basis.²⁶⁷ It does not give significance to the social, moral, and political aspects of the corporate person. Ultimately, the fundamental dissatisfaction that many people have with the economic model is that it provides a “thin view of a much more complicated reality.”²⁶⁸

This complaint, however, can be lodged against any one of the personhood theories of the corporation discussed in this Article. By itself, no one theory of the corporate person can adequately and comprehensively explain the nature, role, and purpose of the corporation. The corporation is at once an economic institution, a political force, a social entity, a legal actor, a potential moral agent, a

266. See Cynthia A. Williams, *A Tale of Two Trajectories*, 75 FORDHAM L. REV. 1629, 1649-50 (2006). There is deep concern that the concept of social and moral obligation is undermined by the law and economics theories currently taught in law schools. See *id.* at 1659; see also James Boyd White, *How Should We Talk About Corporations? The Languages of Economics and of Citizenship*, 94 YALE L.J. 1416, 1423 (1985) (arguing that the economic model of wealth underlying the nexus of contracts theory does not account for the true value to the world of wealth that is not reducible to contract exchanges: “open spaces; clean air; good health; an educated population engaged in fulfilling work and leisure; the sense that we all have a stake in the quality of our common life, which alone can make streets safe and clean; and so on. That form of social and cultural wealth is the most valuable kind for all of us . . .”).

267. Many commentators argue that the contractarian view of the corporation does not account for real world practice.

People working together in the business do not help each other, work out problems together, grow in competence through shared experience and so on because they have negotiated contracts with each other where it is clear what is the nature of the exchange, what is due, how it is to be paid for, what are the sanctions if the contract is not fulfilled, what are the “get-out” clauses. Businesses would grind to a halt if people adopted this kind of attitude in practice towards their working together within the business.

Naughton, *supra* note 197, at 35 n.9 (quoting Helen Alford, Barbara Sena & Yuliya Shcherbinina, Lecture, Philosophical Underpinnings and Basic Concepts for a Dialogue Between CST and CSR on the “Good Company” 2 (Oct. 2005) (transcript on file with the Ave Maria Law Review)).

268. Kennedy, *supra* note 207, at 24.

spiritual instrument, and more. Thus, the personhood of corporations is necessarily multi-dimensional. Each theory looks at the corporation from a different angle and highlights a different side of the entity. The economic nexus of contracts theory of the corporation is an especially useful tool because it focuses our attention on critical aspects of the corporation. But it is only one tool, and there are many others.

Those who favor the economic theory believe no other theory of the firm presents a credible alternative to the unitary nexus of contracts model. That belief may have validity, but it misses the point to some degree. It assumes we prefer to have a single theory that can explain and predict corporate behavior. If we must choose one or the other, the argument goes, the nexus of contracts model is “better” than all others. I am not convinced such a choice needs to be made. Why do we have to have a single, unitary theory of the corporate person? Is it really necessary to say that at bottom the corporation is *essentially* a nexus of contracts, or *essentially* a legal fiction, or *essentially* a social institution, or *essentially* anything? In my view, the multi-dimensional nature of the corporate person defies unitary classification. As the next section argues, the corporation is an extremely complex entity, and, if we are to understand its nature and purpose in our world, we must be open to seeing it from many different vantage points.

VIII. MULTI-DIMENSIONAL MODEL OF THE CORPORATE PERSON

As we have seen, the corporate person is more than merely a legal actor. Moral philosophy suggests the possibility that corporations are moral persons with the moral responsibility to act in ways that are just, and to conduct their business activities in accordance with moral norms that go beyond what the law requires. Organization theory highlights the sociological and psychological dimensions of organizational behavior, demonstrating that the corporate person has its own character and culture, through which it not only exerts considerable influence over its internal members, but also maintains a certain image and an identifiable presence in society. Political theory and philosophy shed a different light on the corporate person. The lighting in one political pluralist setting casts the corporate person in the role of a mediating institution, serving as a buffer between the individual and the coercive power of the state. However, the lighting in a contrasting pluralist setting reveals a corporate person who wields just as much power as the state. This political power can pose a threat to democracy if left unchecked; the state must serve as a countervailing force to protect

individuals from corporate power. Religious thinkers focus on an entirely different aspect of the corporate person and see it as a center for the spiritual flourishing of its members and society. By cultivating virtues and the common good in a manner that is unique to the corporate person, the corporation takes on theological significance. Economic theory emphasizes the contractual exchanges that are so critical to corporate activity; the corporation resembles a marketplace where individuals draw mutual benefits from their bargains with each other.

When the various academic disciplines are combined, they capture a picture of the corporation that is a composite of all the various images. The goal should not be to oppose them against each other as if one might ultimately triumph over the other, but for each to inform and challenge the others. By simultaneously using these different modes, we move closer to discovering what the corporate person actually is and how we as natural persons are to relate to it.

The philosophy of human personhood is illuminating in this context. Philosophers have concluded that there really is no such thing as *the* concept of the human person.²⁶⁹ This is because we want the concept of personhood to fill so many different functions, but the variety of functions that the concept of a person performs cannot plausibly be combined in a single, all-encompassing theory.²⁷⁰ Even if we could find a common denominator underlying all the different theories of human

269. See Amelie O. Rorty, *Persons and Personae*, in THE PERSON AND THE HUMAN MIND: ISSUES IN ANCIENT AND MODERN PHILOSOPHY 21 (Christopher Gill ed., 1990) [hereinafter THE PERSON AND THE HUMAN MIND]; see also Adam Morton, *Why There Is No Concept of a Person*, in THE PERSON AND THE HUMAN MIND, *supra*, at 39. See generally WHAT IS A PERSON? (CONTEMPORARY ISSUES IN BIOMEDICINE, ETHICS, AND SOCIETY) (Michael F. Goodman ed., 1988).

270. See Rorty, *supra* note 269, at 35. Rorty describes no less than seven important functions that the concept of the person fulfills. See *id.* at 22-35; see also Margaret J. Radin, *The Colin Ruagh Thomas O'Fallon Memorial Lecture on Reconsidering Personhood*, 74 OR. L. REV. 423, 424 (1995) (describing different perspectives on personhood); Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 962-65 (1982) (discussing several different philosophical theories of personhood). The concept of the person is tied to, but distinguishable from, the concepts of the self and of the human being. See David Wiggins, *The Person as Object of Science, as Subject of Experience, and as Locus of Value*, in PERSONS AND PERSONALITY, *supra* note 25, at 56, 57; see also TILL VIERKANT, IS THE SELF REAL?: AN INVESTIGATION INTO THE PHILOSOPHICAL CONCEPT OF 'SELF' BETWEEN COGNITIVE SCIENCE AND SOCIAL CONSTRUCTION (2003) (discussing the concept of the self from multiple academic perspectives).

personhood, it would be so general that it would not be very helpful. As a result, we must conclude that “there is no such thing as the concept of personhood, that there are only highly regionalized functions that seem, erroneously, to be subsumable in a structured concept.”²⁷¹ A man can be seen and spoken of as occupying different identities for different functions: he is a shrewd businessman, a conscientious neighbor, a patriotic citizen, a Christian believer, an affectionate husband, a strict father, and an amateur triathlete. These are all aspects of the same person. Even so, the corporate person can be seen as performing different functions depending on what or whom it is in relation to, and these are all aspects of the same entity.

One might argue, however, that the human person is far more complicated a subject than the corporation, which is simply a human creation designed to perform limited and defined functions. From this view, while it may be impossible to settle on a single theory of the concept of the human person, it is surely feasible to construct a unitary theory of the corporate person, given the more simplistic nature of the corporation. This argument is not convincing. If human beings are so complex that they defy easy classification into one concept of the person, the corporation is even more so, as it is made up of complex human beings plus their ever shifting interrelationships with each other. The collective actions and goals of human persons create another layer of complexity and identity that makes it much more difficult to classify the corporate person.

The concept of the corporate person depends on a mass of legal and non-legal considerations: philosophical, moral, metaphysical, political, historical, sociological, psychological, theological, and economic. The corporation as viewed from one of these schools of thought is not the same corporation as viewed from the others. Of course, there is always the fear that combining academic disciplines will serve only to jumble disconnected terms together and muddle the picture. Joining concepts of the person from different disciplines with completely different meanings may be unhelpful if it causes greater confusion when these terms and concepts conflict.²⁷² Nonetheless, it is worth the risk because it gives us a more accurate view of a complicated reality. The “neat division of labor [among academic disciplines] was never intended to suggest the

271. Rorty, *supra* note 269, at 38.

272. See Christopher D. Stone, *From a Language Perspective*, 90 YALE L.J. 1149, 1159 (1981) (noting the dangers of distortion of meaning when terms from other academic disciplines are imported into discussions of the law).

neat division of reality.”²⁷³ By narrowly limiting ourselves to certain disciplinary viewpoints, we face a danger far greater than a muddled picture. We risk losing our ability to view reality in all of its fullness and to describe it in accurate terms: “Increasingly, it seems, academics expect reality to conform to our own discipline’s necessarily limited models, rather than trying *to synthesize knowledge among disciplines to bring the models closer to reality*. This is a variation of the problem: when you have but a hammer, [you think] everything’s a nail.”²⁷⁴

We know that the various theories of the corporate person exist in tension with each other. The consequences of relying more on one theory than another can be great because each one supports its own normative political or social philosophy. The deep dichotomies between viewpoints reveal conflicting ideals. For example, theories driven by a methodological individualist outlook tend to see the corporation as an aggregate of individuals and place importance on protecting individual rights. The nexus of contracts theory falls into this category. By the same token, theories that emphasize methodological individualism conclude that corporate responsibility ultimately boils down to individual responsibility. Moral philosophical theories that deny any corporate moral personhood reflect this view.

In contrast, theories that assume humans are inherently social beings who naturally form groups tend to see the corporation as a separate entity with its own group identity. Political pluralist theories endorse this concept and give corporations an important role in promoting democracy and protecting individuals from state power. At the same time, accepting the corporation as a distinct entity induces the belief that the corporation itself is responsible for certain behaviors. Theories in organizational behavior and business ethics subscribe to this idea when they hold corporations responsible for corporate cultures that influence the actions of individual members.

In all of these examples, determining which model is appropriate depends on whether one prefers to see human beings as atomistic individuals or as inherently social animals. That dichotomy undoubtedly produces conflict, but it is not ultimately irresolvable. We might be inclined to say that human beings, with their complex nature, fit both paradigms to some degree, and therefore, corporations as even more

273. Owen D. Jones, *Evolutionary Analysis in Law: Some Objections Considered*, 67 BROOK. L. REV. 207, 226 (2001).

274. *Id.* (emphasis added).

complex entities, have many of the properties described by the different theories in similarly varying degrees.

I do not argue that the simultaneous juxtaposition of all of the theories of corporate personhood will be without contention and controversy. There will be, as there always has been, discord among the contrasting normative implications of the various theories. But the more complete a picture we have of the subject of debate, the more informed the debate will be. In my mind, there is no one “right” or “best” description of the corporate person for all purposes and for all time.²⁷⁵ The corporation is a constantly evolving entity that shapes and is shaped by society’s shifting views of the nature of corporate life. Who is to say that the dichotomies and conflicts embedded in current theories of the corporate person will always exist? Our circumstances, our economy, our political structures, our laws, our belief systems, and our culture can change and, with them, our view of corporations. The corporate person is malleable, rather than fixed, and its role in our society is, in part, a product of our own constantly changing moral, legal, philosophical, and political imagination.

What does all of this mean for the law? Just as corporations evolve and our theories of corporations change, the law must develop in a continuously dynamic way. The law is not fixed, nor should it be. As many jurists have noted, the genius of the law is that it “is not simply a deductive exercise” or “an inevitable working out of anything,”²⁷⁶ but rather, it is “a living organism, ever growing and expanding to meet the problems and needs of changing social and economic conditions.”²⁷⁷ As

275. It may, in fact, turn out that the different theories of the corporation constitute answers to different questions or may be tools for different tasks. Cf. HARTMAN, *supra* note 134, at 112 n.9 (citing EDWIN M. HARTMAN, *CONCEPTUAL FOUNDATIONS OF ORGANIZATION THEORY* (1988)). All of the theories might legitimately be used at different times for different purposes.

276. Allen, *supra* note 239, at 278. Chancellor Allen concludes that the law of corporations must be “worked out, not deduced, [and] [i]n this process, efficiency concerns, ideology, and interest group politics will commingle with history . . . to produce an answer that will hold for here and now, only to be torn by some future stress and to be reformulated once more.” *Id.* at 281. Many commentators agree that the law does not deduce or discover legal concepts. Instead, it makes the rules that then help shape economic reality. See Warren J. Samuels, *The Idea of the Corporation as a Person: On the Normative Significance of Judicial Language*, in *CORPORATIONS AND SOCIETY*, *supra* note 30, at 113, 126.

277. *Russick v. Hicks*, 85 F. Supp. 281, 285 (W.D. Mich. 1949). Many observers hold the same view of the United States Constitution, i.e., it is a living, growing document. See, e.g., WOODROW WILSON, *CONSTITUTIONAL GOVERNMENT IN THE*

we formulate laws that regulate corporate activity, we must remain flexible and adaptable as various theories of corporations bring different issues to light. The law, in order to balance the private rights of individuals with the legitimate public concerns of society, should be sensitive to the multi-dimensional nature of the corporate person and the different ways in which it can be viewed.

Some may object to this approach because the inevitable clash of theories can make the construction of law difficult and can lead to inconsistencies. Indeed, some commentators bemoan the fact that the body of law with respect to corporate legal personhood often seems incoherent and contradictory.²⁷⁸ There is a sense that judicial use of corporate legal personhood theories results in post-hoc rationalizations for chosen outcomes and legal reasoning that is purely result-oriented.²⁷⁹ The competing theories of the corporation contribute to the indeterminacy of the law, and this is perceived as being arbitrary and unjustified.²⁸⁰ The implication is that we should adopt a single, coherent theory of the corporate person that, when methodically applied, will produce clear and consistent rules of law.

The problem with this viewpoint is that it misperceives both the value of indeterminacy in the law and the advantage of having multi-dimensional theories of the corporation. The law retains power and legitimacy precisely because it does not emphatically state: “the corpo-

UNITED STATES 69 (1908) (“[T]he Constitution of the United States is not a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of the age.”).

278. Most commentators find this to be especially true in the constitutional law arena. See, e.g., Michael D. Rivard, Comment, *Toward a General Theory of Constitutional Personhood: A Theory of Constitutional Personhood for Transgenic Humanoid Species*, 39 UCLA L. REV. 1425, 1466 (1992) (asserting that “the law of corporate personhood conflicts with itself: corporations are entitled to some liberty rights but not others, and the Court has offered no clear guidelines to support these distinctions”).

279. See, e.g., Note, *What We Talk About When We Talk About Persons: The Language of a Legal Fiction*, 114 HARV. L. REV. 1745, 1754 (2001) (noting that “the various theories of the person that American courts can deploy permit virtually any result” raising the question whether “corporate personhood jurisprudence is purely result oriented”); see also Krannich, *supra* note 48, at 103; Rivard, *supra* note 278, at 1451.

280. John Dewey criticized the lack of clear-cut logical or practical lines between the different theories of personhood, and he argued that “[e]ach theory has been used to serve the same ends, and each has been used to serve opposing ends.” Dewey, *supra* note 7, at 669.

ration is X.”²⁸¹ The conflicting themes that underlie the theories of the corporation—real entity v. aggregate, contract v. concession, individualism v. sociality, public v. private, shareholder primacy v. common good—all exist in constant opposition. They produce contradictory visions of corporate life. However, the “tendency toward contradiction should be accepted, not feared. . . . The contradictions are wholesome. Studying and reflecting on their interplay in the law enhances our positive and normative understanding.”²⁸² As a complex entity that incorporates all of these contradictory concepts, the corporation cannot, nor should it, be reduced to a single simplistic theoretical framework that would necessarily be incomplete. A multi-dimensional approach might make for inconsistent law, but it recognizes the reality of the extraordinary and multi-faceted nature of the corporation. “[T]he flaws of inconsistency are far less serious than those of unreality.”²⁸³

Indeterminacy is built into the law to allow for selective application of different theories of the corporate person, depending on the situation and the issues to be decided. Because the corporation is a bundle of contrasting and coinciding concepts, corporate law must mediate between the various conceptual viewpoints. When a problem occurs that raises two valid but inconsistent normative demands, mediation is required, and choosing between the two is ultimately a matter of judgment.²⁸⁴ Here is where the law benefits from drawing upon a multi-dimensional view of the corporation. This Article recommends that corporate law adopt a broader, more flexible totality of the circumstances approach to legal decision-making and problem-solving. By considering the descriptive and normative components of different theories of the corporate person at once, the law adopts a richer, more informed conception of the corporation. Equipped with this broader perspective, the legal decision-maker is able to render a judgment of high quality, rather

281. See J. William Callison, *Indeterminacy, Irony and Partnership Law*, 2 STAN. AGORA 73, 76 (2001).

282. Bratton, *supra* note 28, at 464-65.

283. Wolfe, *supra* note 263, at 1676. Clear, simple rules of law that are fixed and consistent may offer predictability and stability, but they can also stifle innovation, collaborative problem solving, beneficial negotiations, wealth-maximizing trades, and the operation of multiple forces to resolve socio-legal problems. I am indebted to Tony Arnold for emphasizing this important point. See, e.g., Craig Anthony (Tony) Arnold, *Working Out an Environmental Ethic: Anniversary Lessons from Mono Lake*, 4 WYO. L. REV. 1, 34-39 (2004) (arguing that the role of environmental law is to upset the status quo and thereby encourage negotiation, innovation, and flexible problem solving).

284. See Bratton, *supra* note 196, at 214.

than a judgment that reflects only a narrow set of concerns.²⁸⁵ To aim to adopt a clear-cut, unitary theory of the corporation is to close oneself off to the possibility of drawing on the insights of different theories even as they compete. Thus, the indeterminacy of the law should not be regarded as theoretical failure, but as the beneficial result of a more open-ended approach to corporate personhood.

As theorists, we often strive for coherence and consistency, but perhaps we need to find a way to be more comfortable with ambiguity and conflict. The different spheres of corporate personhood each have a measure of legitimacy. Although they highlight separate aspects of the corporation and even conflict at times, they work together in tandem to give us a more accurate picture of the corporation and its role in society. If we want to deepen our understanding of the corporation, we must be willing to analyze it from diverse viewpoints. We might all benefit from moving toward a multi-dimensional view of the corporate person, rather than insisting on the formulation and acceptance of a single theory that will describe the nature of corporations consistently in all circumstances. We should adopt a more nuanced, multi-faceted, and perhaps "messier" model of the corporation, and we should do so, not with a sigh of resignation or defeat in that we could not compose a more neat and tidy theory of the corporation, but with a satisfaction in knowing that the complex nature of corporations deserves no less than a multi-dimensional definition of the corporate person.

IX. CONCLUSION

The place of corporations in our society and in our law has always been deeply ambiguous. Corporations have been called the "angels and devils" of our economy and politics.²⁸⁶ We fear their bigness, their power, and complexity. "Yet we also plainly want bigness. We feel that we need it; above all, we irresistibly patronize it."²⁸⁷ Perhaps it is this deep and intractable dissonance that explains why "our law and our

285. *See id.* This may lead to privileging different concepts at different points, but this is the nature of mediation. *See Bratton, supra* note 28, at 465.

286. Howard J. Graham, *An Innocent Abroad: The Constitutional Corporate "Person"*, 2 UCLA L. REV. 155, 155 (1955).

287. *Id.* at 157; *see also* CORPORATIONS AND SOCIETY, *supra* note 30, at 4 ("We thus appear to want things both ways: we know, at least intuitively, about the power of business and fear it; at the same time, few wish to forgo the bounty that corporate enterprise provides.").

society [has] been schizophrenic on the subject of corporation law for a long time.”²⁸⁸ Perhaps this is also why we find the ongoing debate over the prudence of bailing out our nation’s giant corporations to be so difficult to resolve. The corporation fills multiple roles and serves many different purposes simultaneously. We see in it a creature that is worth saving because it touches so many lives in different and profound ways. At the same time, we wonder whether it is best to leave it alone to succeed or fail of its own accord. One’s ultimate opinion depends very much on one’s definition of the nature and role of the corporate person in our society, and that definition can be extraordinarily complex.

The corporation is, of course, a fictional legal person with the capacity and standing to do the things that legal actors are entitled to do. To define the corporation as *only* a legal person, however, is to overlook the many other personas of the corporation that cannot be described in legal terms. As this Article has demonstrated, the corporation can also be spoken of in language that is derived from philosophy, moral theory, political science, sociology, psychology, organizational theory, theology, and economic theory. This list is not exhaustive. The corporation is a unique entity that can be studied under multiple disciplines, each revealing a different and significant aspect of the corporation’s personality.

Commentators have lamented that there is no one answer to the “endlessly fascinating but inevitably indeterminate question of corporate personhood.”²⁸⁹ The fact that there is no single overarching theory or correct description of the corporate person has long been viewed as a problem that continually defies resolution. But maybe the true problem lies only in our perspective. I am reminded of an anecdote about a musician who is praised for solving a problem he never knew he had:

Once when I was playing for a musician, he complimented me on the way I played a particular passage. He told me how well I handled a certain modulation and added, “You don’t realize in what a remarkable way you have solved this problem!”

I must say, I was thunderstruck! In the first place, I was not even aware that there was a modulation. (That shows how much *I* know about music! I never think in terms of modulations. I do not deny that they exist; I just don’t think about them.) In the second place, I

288. Allen, *supra* note 239, at 264.

289. Millon, *supra* note 45, at 58; *see also* Callison, *supra* note 250, at 978; Krannich, *supra* note 48, at 90.

was totally unaware of any *problem* let alone *solving* one! The whole idea of “problem solving,” especially in music, strikes me as so weird! Not only weird, but most disharmonious and destructive. Is that how you think of life, as a series of *problems* to be solved? No wonder you don’t enjoy living more than you do!

To compliment a musician, or any other artist, on having “solved problems” is to me absolutely analogous to complimenting the waves of the ocean for solving such a complex system of partial differential equations. Of course the ocean does its “waving” in accordance with these differential equations, but it hardly solves them. I do not claim to know whether the ocean is or is not a conscious being, but if the ocean does think (which wouldn’t surprise me), the one thing I’m sure the ocean does not think about is differential equations.

Perhaps I am allergic to the word “problem.” If so, I am grateful for this allergy. Some of you will say I am only quibbling about words. This is not so. It is *ideas* that count, not words. And I believe that one who feels he is “solving problems” lives very differently from one who does not feel this way. I believe my objection to the notion of “problem” is due to my deep conviction that the moment one labels something as a “problem,” that’s when the real problem starts.²⁹⁰

Lawyers and legal academics naturally tend to see things as problems that need to be fixed, as issues that need resolution. We think in terms of crises and dilemmas for which we seek to find solutions and closure. In the context of corporate personhood, we have been prone to characterize the lack of a simple all-encompassing theory as a problem requiring the proposal of ever grander models of the corporation in an attempt to solve the problem once and for all. Perhaps, however, the problem lies not in the inability to construct such an overarching theory but in characterizing that inability as a problem in the first place. Maybe what we need to do is widen our myopic focus on the nature of the corporate person and get used to speaking about corporations in more open, multi-dimensional terms. In doing so, we might find that our biggest problem has been our tacit disappointment over the failure to compose that elusive all-embracing theory, when what we have is actually far better: the opportunity to draw upon multiple interdisciplinary theories

290. RAYMOND M. SMULLYAN, THIS BOOK NEEDS NO TITLE: A BUDGET OF LIVING PARADOXES 79-80 (1980).

at once to see the corporate person in all of its complexity, even when those theories sometimes conflict or raise more questions than they answer.

Notes & Observations