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Does Profit-Seeking Rule Out Love? Evidence (or Not) from Economics and Law

Julie A. Nelson*

ABSTRACT

Many believe that firms are driven to maximize profits, and therefore are not allowed to take actions that would benefit their workers, communities, or the environment if these actions would reduce profits even slightly. This Essay shows that this belief is not supported by either sound economic evidence or United States statutory and case law. The roots of this belief are, instead, to be found in a centuries-old desire of economists to make our discipline resemble Newtonian physics. Among legal scholars, both misinformation and the use of University of Chicago-style economics have contributed to the belief's popularity. The dualistic "love or money" view appeals to scholars and the public alike because of its simplicity and congruence with cultural gender norms. By reexamining the evidence, rather than adhering to common ideologies, this Essay offers an unconventional analysis of corporate behavior and commodification.

I. INTRODUCTION

Does profit-seeking rule out direct concern for human well-being, environmental sustainability, or the public interest? Many would answer that it does. In contemporary Western culture, we tend to associate profit, money, and markets with coldness, distance, and

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* Associate Professor of Economics, University of Massachusetts Boston. I would like to thank Marion Crain and Kimberly Krawiec for organizing a most stimulating roundtable on "For Love or Money," and Bill Bratton for giving me especially helpful suggestions. In addition to the participants at the roundtable, Marjorie Kelly, Julie Matthaei, and participants at the World Congress for Social Economics in Montreal in 2010 also provided helpful feedback.

self-interest. Care and concern, on the other hand, are associated with love and are thought to reside elsewhere—in families and interpersonal relations, or in benign images of community and public service.

This division between spheres of "money" and "love" permeates many discussions in the social sciences, humanities, and law, and has recently come to the fore in two significant ongoing controversies. One controversy concerns the growing marketization of activities such as childcare and reproductive services. When money enters areas traditionally associated with love, many fear that the activities become "commodified" or "commoditized" and drained of their authentic human meaning.[1] The other controversy—and the main focus of this Article—concerns the social role of business. If businesses must single-mindedly pursue profits, then demanding that businesses become better social actors—more humane in their treatment of employees; more "green" in their environmental impact; more concerned about the effect of their product on the health and well-being of people in their home countries and abroad—would seem like asking for water from a stone. There is a widespread belief that firms must *maximize* profits (i.e., get every last bit of profit they can) to the exclusion of any other goal. It is often claimed that business firms, by their very nature, must therefore reject any proposed action, no matter how much social benefit it could bring or social harm it could prevent, if it would reduce their profits by even one dollar.[2]

1. *See, e.g.*, RETHINKING COMMODIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha E. Ertman & Joan C. Williams eds., 2005) (discussing ongoing debate about commodification of traditional non-commodities); Symposium, *For Love or Money?*, 35 WASH. U. J.L. & POL'Y 1 (2011). I have written on this previously. *See* Nancy Folbre & Julie A Nelson, *For Love or Money—or Both?*, 14 J. ECON. PERSP. 123 (2000) (analyzing potential consequences of money entering the realm of "love"); JULIE A. NELSON, ECONOMICS FOR HUMANS 1 (2006) (critiquing the common belief that money is part of an economic "machine" that is "soulless and inhuman"); Julie A. Nelson, *Can We Talk? Feminist Economists in Dialogue with Social Theorists*, 31 HYPATIA 1051 (2006) (presenting evidence refuting Habermasian divisions between social and economic life).

2. For influential popular statements of this position, see, for example, DAVID KORTEN, WHEN CORPORATIONS RULE THE WORLD 212–13 (1995) (discussing the impossibility of corporations being socially responsible); JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFITS AND POWER 1–2 (2004) ("The corporation's legally defined mandate is to pursue, relentlessly and without exception, its own self-interest,

The idea that firms maximize profits, while extremely powerful at the levels of ideology and broad social belief, is vacuous at the levels of empirical observation and quality social science theorizing. It is not found in practice nearly as often as is generally assumed, nor is it mandated by the "laws of economics" or commanded by statutory or case law.[3] Rather, as this Article demonstrates, the idea was invented and has maintained its power to shape our thinking through mutually reinforcing historical, social, and political processes. The rhetoric of profit maximization serves to distort, rather than illuminate, our social reality.

To be quite clear, this Article does not deny that great harm may result from treating things that are traditionally non-commercial (e.g., childcare, reproduction, human organs, public old-growth forests, or community water rights) as interchangeable "widgets" that can be bought or sold with no concern beyond market value. The Article also does not deny the necessity of significant roles for governments, nonprofits, and community groups in providing what we need to sustain life and in formally or informally regulating the actions of business firms. It further does not deny that firms generally do try to make profits (among other goals).

What this Article *does* seek to discredit is the belief that there is something intrinsic in the economic or legal structure of commerce that forces firms, inexorably, as if run on rails, to neglect values of care and concern in order to strive for every last dollar of profits. This widespread belief detracts from human or ecological welfare for two reasons. First, it lets shareholders, directors, and managers of corporations morally "off the hook" for the social and environmental

regardless of the often harmful consequences it might cause to others."); THE CORPORATION (Big Picture Media Corporation 2003) (based on Bakan's book). That such ideas have attained a considerable following is apparently in myriad books, articles, and blog posts. Typical is a blog post by Pierre H. Vachon (a.k.a. Mentarch):

> The reality is that companies and corporations live by one thing and one thing only: *the bottom line*. Hence, companies and corporations will do anything, regardless of whether they initially had good intentions or not, to keep profits not only high but also to increase them as well. In other words, companies and corporations will cheat, lie or steal . . . . This is simply the nature of the beast.

Mentarch, *When For-Profit Corporations Rule the Day*, SUZIE Q'S TRUTH AND JUSTICE BLOG (Aug. 27, 2007), http://suzieqq.wordpress.com/2007/08/27/corporate-dystopic-future/.

3. *See infra* Parts II, III.

consequences of business decisions. Second, it places the entire burden of maintaining the moral order onto non-business entities, such as government, nonprofits, and families. But these entities may be (and too often are) overwhelmed, lack resources, or be problematic themselves (e.g., corrupt, mismanaged, or abusive). The point of this Article is not to take a Pollyannaish stance towards corporations, but rather to point out that they are complex organizations embedded in complex situations, and can in any given situation act morally or immorally, wisely or unwisely—just like any other human organization.

This Article first describes the economic theory of profit-maximization and investigates the extent to which—given empirical evidence about firm behavior and market structure—profit-maximization can be considered to be an inexorable "drive." Next, the Article examines how the rhetoric of profit maximization has been used within the extremely mixed and contradictory scholarly literature on United States corporate law. Finally, attention turns to the history and philosophy of economics, examining the imaginative whole-cloth *invention* of the theory of profit maximization. The idea that commerce is somehow a morality-free zone of human endeavor is shown to be a matter of ideology and rhetoric, rather than an economic or legal fact.

II. PROFIT MAXIMIZATION AND ECONOMICS

The core model of mainstream economics, as it is taught in the United States and in many other countries, is the "neoclassical" model in which autonomous, rational, self-interested, utility-maximizing individuals and profit-maximizing firms interact on "perfectly competitive" markets. In such a hypothetical economy, all resources should end up being used in the most efficient way possible.

If real-world economies acted exactly as economies in this model, then as a tautology firms would be profit-maximizing. To understand the relationship between this core neoclassical economic reasoning and behavior in actual economies, however, requires a careful understanding of both the core model and of its limitations.

A. Clarifying "Profit," "Competition," and "Efficiency"

A fair amount of confusion surrounds key ideas and terms used in mainstream economic theory. Many people have learned, correctly, that the core model predicts that competition will drive firms, inexorably, to maximize profits. Typical of this argument, for example, is legal scholar Kent Greenfield's claim that if a firm fails to maximize shareholder return, "the market will punish the managers severely. The stock price will fall, making the company a target for takeover. Companies whose managers act as if they have duties to stakeholders other than shareholders are squeezed out of the market."[4]

But people often misunderstand the exact meaning economists give to the terms "competition" and "profit." Because of this, they misinterpret much of the empirical evidence on market behavior as supporting their arguments, when in fact such evidence works *against* them.[5] Some people, particularly those in the "law and economics" field, also tend to associate economic analysis with the particular brand of economics promulgated by the Economics Department of the University of Chicago. The Chicago school takes arguments based on efficiency to extreme lengths. On closer examination, these may appear less than convincing.

1. Profit

Take first the issue of profit. The phrase "profit-maximization" is often identified directly with "greed," by commentators from the political left as well as by many persons-on-the-street.[6] For example, spectacular compensation packages granted to Chief Executive Officers (CEOs) may be taken as evidence of a "drive for profit." In the case of a privately owned firm managed by an individual owner/entrepreneur, profits and executive compensation are, for the

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4. Kent Greenfield, *Reclaiming Corporate Law in a New Gilded Age*, 2 HARV. L. & POL'Y REV. 1, 9 (2008).

5. *See infra* Part II.A.1–2.

6. Amit Bhattacharjee, Jason Dana & Jonathan Baron, *Is Profit Evil? Associations of Profit with Social Harm* (Univ. of Pa., Working Paper, 2010) (demonstrating the prevalence among non-economists of the belief that profits are correlated with social harm).

most part, the same thing. But what is often missed in the popular mind is that profits and executive compensation are *not* the same in modern publicly traded corporations, which are the sorts of businesses that now dominate economic activity in many spheres.

Corporations are complexly structured social organizations. The owners of equity shares in a firm (i.e., a corporation's stockholders) are in theory supposed to be the recipients of the firm's profits. Profits are what is left over after all revenues are gathered and all necessary costs—including the costs of salaries for executives and other managers—are paid. The shareholders are supposed to receive the benefits of profits through payments of dividends or through increases in the value of their shares. For this reason, the phrases "maximizing profits" and "maximizing value to shareholders" are often taken as roughly synonymous. A corporation has a Board of Directors that is supposed to oversee the management of the firm, and the Board in turn hires, and approves the compensation packages for, the executives who handle the firm's day-to-day operations. These compensation packages can include salaries (which are direct expenses to the corporation) and stock option bonuses (which dilute the value of outstanding shares). Therefore, "profit maximization" or "maximizing value for the shareholders" should mean *not* paying any more than is strictly necessary to obtain managerial talent; that is, it should require keeping a tight rein on CEO compensation.

The phenomenon of spectacular CEO compensation, which is sometimes granted even after poor performance, is hence strong evidence *against* that the idea that firms are actually governed with a single-minded focus on shareholder value. Shareholders are well aware of the distinction between profits and executive compensation, and are among the groups most outraged by the recent skyrocketing compensation packages.[7]

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7. Rik Kirkland, *The Real CEO Pay Problem*, FORTUNE, July 10, 2006, *available at* http://www.money.cnn.com/magazines/fortune/fortune_archive/2006/07/10/8380799/ (discussing the outrage expressed by large institutional investors about the "deeply dysfunctional" CEO compensation system); Cari Tuna, *For Some CEOs, the Perks Keep Flowing*, WALL ST. J., Apr. 3, 2009, at B9 (concerning "shareholder revolt"); *Nay on Pay: Rewarding American Bosses*, ECONOMIST, May 15, 2010, at 95 (disussing shareholder rejection of executive pay packages).

2. Competition

Now consider the issue of "competition." The business media carry plenty of stories about strategic campaigns by firms trying to increase their market shares, corporate expansions and mergers, and the sizeable profits earned by many companies. The power of companies with overwhelming market share to foist on consumers products that do not measure up to expected standards of quality (e.g., Windows Vista) or to charge outlandish prices (e.g., airline fares between underserved cities) may just seem to follow from the "drive" for profits. It is often thought that firms "compete" with each other for the highest profits by strategizing to get the largest market share. While the occurrence of such phenomena in actual commerce is not in doubt, it is very far from what economists mean by "competition."

According to mainstream economic theory, it is in "perfectly competitive" markets that "market discipline" is a major force. In perfectly competitive markets—as any student in Economics 101 learns—there are so many small-scale buyers and small-scale sellers of the good in question that no one buyer or seller can control, or even influence, the price; all units of the good in question are identical and interchangeable (the "homogeneity" assumption); firms can freely enter and exit the industry; and buyers and sellers have complete and flawless knowledge of everything relevant, such as the qualities of the good or techniques of making it, the actions of others in the market, and relevant aspects of the future (the "perfect information" assumption).[8] In such a situation, each individual seller of a good would have a negligible market share, no brand name, no patents, no advantaged access to distribution networks—in short, no characteristics that distinguish it from any of the other numerous small, powerless suppliers. The amount of economic profit each seller would make, the theory tells us, would be *zero*.[9] A firm that

8. *See, e.g.*, WILLIAM J. BAUMOL & ALAN S. BLINDER, MICROECONOMICS: PRINCIPLES AND POLICY 194 (10th ed. 2006).

9. *See id.* at 205. The concept of "economic profit" includes a return to equity holders just equal to what they could have gotten elsewhere. So in terms of a*ccounting* profits—the sort of profits we see reported in the newspapers—the theory of perfect competition predicts a uniform rate of return on equities across all firms.

does not do its absolute utmost to keep revenues up and costs down would, in this story, make negative economic profits and fail.[10]

Strategically competing to increase market share is therefore *not* what mainstream economic theory means by "competition." When firms are able to gain market share and market power, they *reduce* the level of competition, in the economist's sense. When an industry or market is dominated by only a few firms (oligopoly) or one firm (monopoly), the market discipline "drive" to maximize profits, hypothesized for perfectly competitive firms, can be considerably weaker or completely absent.[11] If their market power is firmly bolstered by things like patents, private knowledge, strong brand names, control of important assets, business practices that discourage the entry of potential competitors, or political influence, they may make abnormally high profits for long periods of time, even without operating efficiently.[12] They still *could*, in theory, pursue maximum profits (and mainstream theory assumes that they do), yet there is no market discipline "stick" that tells them that they *must* do so.

3. Efficiency

In the theoretical perfectly competitive market, every resource is put to its most (market-) valued use. An inefficient situation is one in which the same resources could be used to create something of more value, or the same product could be made in a less costly way. Why would people choose to have less when they could have more? Some economists liken staying in an inefficient situation to leaving dollar bills lying on a sidewalk. Since we do not observe people leaving dollar bills lying on a sidewalk, they reason, we should likewise not see people tolerating inefficiency in economic affairs. One more step

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10. According to mainstream economic theory, this sort of "market discipline" competition would have salutary effects because it would drive all the many perfectly competitive firms to operate efficiently. In a dynamic setting, it is also thought to drive firms to innovate—to come up with new or improved products—and to quickly adopt innovations, in an attempt to make (quickly vanishing) positive profits.

11. Mainstream economic theory generally considers the case where individual firms have market power to be second-best, if not outright damaging, compared to the perfectly competitive market, because it creates inefficiency. *See* BAUMOL & BLINDER, *supra* note 8, at 211–56.

12. *Id.*

in this logic takes us to the claim that whatever outcomes we observe from voluntary exchange in competitive markets must be efficient.

While sometimes thought of as "the" economic method of explanation, efficiency arguments are in fact most characteristic of one particular school of economics, that associated with the University of Chicago Economics Department. Broadly adapting Darwinian-like arguments about competition eliminating weak (that is, inefficient) actors, the Chicago school has great faith in the "self-regulation" of markets.[13] They therefore believe that government involvement in economic affairs is nearly always unnecessary and pernicious. Much of the "law and economics" field has been dominated by the Chicago school through the influence of scholars such as Gary Becker and Richard Posner.[14]

Many other economists, however, disagree. The standard Principles of Economics textbook approach starts with perfect competition, but then makes the picture more complicated. The textbooks discuss monopoly and oligopoly, externalities, public goods, imperfect information, and other causes of "market failure"—that is, situations in which reliance on markets leads to inefficient outcomes.[15] And many contemporary economists go beyond the

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13. *See, e.g.*, Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & ECON. 301, 301 (1983) (asserting that "[a]bsent fiat, the form of organization that survives in an activity is the one that delivers the product demanded by customers at the lowest price while covering costs" and citing to research on natural selection).

14. A. Mitchell Polinsky & Steven Shavell, *Law, Economic Analysis of*, THE NEW PALGRAVE DICTIONARY OF ECONOMICS ONLINE, http://www.dictionaryofeconomics.com/article?id= pde2008_L000038 (last visited May 15, 2011).

15. Introductory textbooks argue that firms with market power will usually produce at less than the efficient level. Some also mention that they may become complacent and fail to seek out profitable innovations, or that they may deliberately keep their profits below the maximum possible in order to avoid attracting government regulatory attention.

Externalities (such as pollution) mean that there are benefits and costs to economic activity that are not reflected in market prices.

Public goods (such as police protection) would be produced at inefficiently low levels without the use of non-market institutions.

Imperfect knowledge about the quality of goods or services—or simply about an uncertain future—also may result in *ex post* inefficient outcomes.

Textbooks generally advocate governmental action in the form of breaking up or regulating monopolies and providing public goods. They also discuss potential roles for government legislation and regulation in dealing with externalities and information problems. The amount of emphasis given to market inefficiency and government action differs according to the standard textbook critiques, discussing how human psychology of cognition and motivation, history, organizational structure, habits and norms, concentrations of power, social context and cultural biases, uncertainty about the future, political struggles, and other phenomena play important roles in shaping economic life.[16] While most economists recognize the logic of the dollars-on-the-sidewalk argument, we also recognize that in the real world choices are rarely, if ever, so easy or so clear. We discern in the arguments from Chicago-style economists a tautology: They see efficient markets everywhere because they take an assumption of market efficiency as their starting point.[17]

predilections of a textbook's authors, but a textbook that completely ignores these issues would be considered seriously incomplete.

16. *See, e.g.*, COLIN F. CAMERER ET AL., ADVANCES IN BEHAVIORAL ECONOMICS 3–13 (2004) (discussing behavioral economics); OLIVER E. WILLIAMSON, THE ECONOMIC INSTITUTIONS OF CAPITALISM (1998) (discussing "New" Institutionalist economics); PAUL R. KRUGMAN, THE RETURN OF DEPRESSION ECONOMICS 102–03, 111–13 (2000) (discussing Keynesian economics). While these varieties of economics tend to follow the mainstream in their methods and definitions of economics, a variety of "heterodox" schools offer deeper critiques. *See, e.g.*, Geoffrey M. Hodgson, *The Approach of Institutionalist Economics*, 36 J. ECON. LITERATURE 166 (1998) (discussing "Old" institutional economies); PAUL DAVIDSON, THE KEYNES SOLUTION: THE PATH TO GLOBAL ECONOMIC PROSPERITY (2009) (discussing Post-Keynesian economics). For discussions of feminist economics, socio-economics and radical economics, see articles in *Feminist Economics*, the *Review of Social Economy*, and the *Review of Radical Political Economy*, respectively.

To get a flavor of these arguments, consider two often-discussed critiques of the idea that efficiency will always prevail. The first, from the field of economic history, concerns the contemporary prevalence of the QWERTY keyboard. While a simple efficiency argument would dictate that this keyboard layout must dominate alternatives because of its superiority in speed or ease of use, the actual history shows something quite different. It was invented as a way to *slow down* typing since, at the time, jamming of mechanical keys was a problem. *See* Paul A. David, *Clio and the Economics of QWERTY*, 75 AM. ECON. REV. 332, 332–33 (1985). The second critique comes from noting that it takes time for competitive processes, even if they are present and strong, to do their selective work. While Chicago-style economists like to concentrate on the (supposedly efficient) "long run" case, John Maynard Keynes once famously quipped, "In the long run, we are all dead." JOHN MAYNARD KEYNES, A TRACTION MONETARY REFORM (1923). That is, perhaps what actually matters most for economic analysis and human life is in the (possibly inefficient) "short run."

17. The Chicago school economists have replies—often rather clever and elegant ones—to those who point out cases of apparent market power and non-profit-maximizing behavior. Large, powerful firms, for example, may be thought to so fear the smallest threat of competition that they are induced to act as efficiently as the "perfectly competitive" firms of the theory. Extremely high CEO salaries might be justified as efficient on the grounds that they are necessary in order to attract the necessary managerial talent in a highly competitive market for executives. Those less convinced of the extent and strength of competition, on the other hand,

B. The Empirical Evidence: Business Leaders Face Choices

The economic-theory-dictates-a-drive-for-market-share story about profit maximization confuses two very different meanings of "competition." Which meaning of the term seems to be empirically more important in contemporary industrialized economies: razor's edge conditions forcing zero-profit conditions on anonymous firms (as assumed in the Chicago school) or strategic jockeying among large and powerful corporations?[18]

1. The Reality

Companies like Wal-Mart, ExxonMobil, IBM, Verizon, Microsoft, Goldman-Sachs, and Citibank are hardly the sort of anonymous, powerless companies that populate the neoclassical theory of perfect competition. With large market shares, immense financial resources, and active lobbying arms, they are more creators of markets than slaves to them. Because the economic conditions they face do not dictate their decisions, these companies normally operate with some "slack" or "surplus"—that is, some excess of revenues over strictly necessary expenses. This slack gives them some room for discretion. They may choose to pay outlandish salaries to their CEOs, buy corporate jets, hire lobbyists, go on acquisitions binges, or manage in a lazy and antiquated fashion.[19] Or they could do other, positive, things. Since many large businesses are not on a razor's edge of competition, economic pressure does not *dictate* that they keep their costs at an absolute minimum and always seek to increase their revenues, no matter what.

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in addition to noting the tautological nature of the arguments, may point out that these arguments conveniently serve the interests of powerful companies and wealthy in-groups.

18. The point here about importance is a relative one. Some industries, such as subcontracted clothing assembly, are very competitive on a global scale. Economists sometimes talk about "dual-sector theory," which is the idea that economies can be dominated by an oligopolistic center surrounded by a competitive fringe. NEVA GOODWIN ET AL., MICROECONOMICS IN CONTEXT 421 (2d ed. 2009).

19. Recent empirical evidence shows that the level of management skill varies widely across contemporary firms, providing evidence against the notion that all firms are driven to efficient operation. *See* Nicholas Bloom & John Van Reenen, *Why Do Management Practices Differ Across Firms and Countries?*, 24 J. ECON. PERSP. 203 (2010) (presenting evidence that variations in the quality of management may explain difference in productivity).

Since information in the real world is far from "perfect," these companies may also invest in large quantities of dodgy assets. The recent financial crisis has presented quite a challenge to the economics profession. It seems that something went very wrong with the pricing of housing and related financial assets during the period leading up to 2007, and that this caused the resulting financial crisis. Mainstream economists, even some with notably conservative or Chicago leanings, have had renewed reason to engage in soul-searching about whether the model of perfect markets is such a good starting place for our analysis.[20]

2. Why It Matters

None of the preceding is meant to deny that firms usually try to be profitable, or that they generally have to take market conditions and the actions of their competitors or potential competitors into account when making their decisions. The point is that while competition is often thought of as an omnipresent and powerful force in economics, akin to gravity in physical science, it is resisted at many points (just as, in the physical world, airplanes resist gravity) and is also far from the *only* powerful influence on economic behavior.

Nor is the point to deny that greed-fed pursuit of money or power or both can often motivate the decisions of board members and executives. The point to be taken from the arguments made above is that there is considerable empirical evidence that many firms—and especially large, powerful ones—remain in business and even

20. *See, e.g.*, Paul Krugman, *How Did Economists Get It So Wrong?*, N.Y. TIMES, Sept. 2, 2009, § 6 (Magazine), at 36, *available at* http://nytimes.com/2009/09/06/magazine/06Economic-t.html; Edmund L. Andrews, *Greenspan Concedes Error on Regulation*, N.Y. TIMES, Oct. 23, 2008, at B1; John Cassidy, *Rational Irrationality, Interview with Richard Posner*, NEW YORKER, Jan. 13, 2010, http://www.newyorker.com/online/blogs/johncassidy/2010/01/interview-with-richard-posner.html. A notable exception is the case of University of Chicago economist Eugene Fama, creator of the "efficient markets" theory. This theory, which asserts that that asset prices efficiently reflect information about economic fundamentals, is now highly doubted by most observers of the recent financial crisis. Facts, however, are no match for a strongly held belief in markets, competition, and efficiency. Fama continues to deny that asset bubbles can exist. *See* John Cassidy, *Rational Irrationality, Interview with Eugene Fama*, NEW YORKER, Jan. 13, 2010, http://www.newyorker.com/online/blogs/johncassidy/2010/01/interview-with-eugene-fama.html.

flourish while making decisions that are not in the best interest of their shareholders.

This may seem like a hair-splitting argument to those who, when using "profit maximization," simply refer more vaguely to greed, monetary incentives, or making *some* profit. But, for those considering the role of "love" in business relations (that is, the role of social responsibility, interpersonal relations, or considerations of care) the distinction is important. If corporations, by their own intrinsic nature or the nature of markets, *must* always single-mindedly serve the economic interests of their shareholders, their decision-makers *cannot* act out of any other concern. They cannot, if this is so, act out of concern for employees, communities, customers, creditors, the natural environment, or society and humanity at large—groups often referred to as corporate "stakeholders"[21]—if such action would damage profits even slightly.

Of course, in many cases, taking care of these other stakeholders in the short run can benefit shareholders in the long run by improving worker morale or a company's reputation. There is likely much to be gained by promoting the idea of "doing well by doing good."[22] Arguably, in terms of concrete consequences, it may not matter much whether a company treats its employees well or goes "green" because these practices can be expected to increase profits or because the management believes that the company has a responsibility to do the right thing. However, for thinking about the role of business in society and about likely company actions over the long term under changing conditions, it makes a big difference. Do we believe that companies are mechanical actors "driven" by a single goal? If so, we must rest our hopes for responsible behavior on government

21. R. EDWARD FREEMAN, STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH 24–27 (1984) (describing "stakeholders" as "groups and individuals that can affect, or are affected by," a firm's accomplishments).

22. *See, e.g.*, ROY M. SPENCE, JR. WITH HALEY RUSHING, IT'S NOT WHAT YOU SELL, IT'S WHAT YOU STAND FOR: WHY EVERY EXTRAORDINARY BUSINESS IS DRIVEN BY PURPOSE (2009) (praising companies that are "driven by purpose"); RAJENDRA S. SISODIA, DAVID B. WOLFE & JAGDISH N. SHETH, FIRMS OF ENDEARMENT: HOW WORLD-CLASS COMPANIES PROFIT FROM PASSION AND PURPOSE 16–17 (2007) (noting that certain generous corporations, or "Firms of Endearment," can return more to investors than the S&P 500 firms); RIANE EISLER, THE REAL WEALTH OF NATIONS: CREATING A CARING ECONOMICS 47–68 (2007) (arguing that businesses must be "socially and financially profitable").

legislation and regulation, consumer pressure, or the rise of a completely "alternative" (e.g., cooperative) economy. We must also assume that corporate actions that appear to be in the public interest are always merely cosmetic, instrumental, and contingent. On the other hand, what if corporations are complex social organizations embedded in, and acting upon, their social and natural environment? In this case, rather than envisioning corporations as wild bulls to be strongly fenced in, or evil entities to be entirely supplanted, one must consider the possibility that they may be able to commit their own (considerable) energies to social and environmental good.

The empirical evidence suggests that many firms *are* able to diverge from profit maximization in order to choose to do socially deleterious things. Why, then, would they *not* be able to choose to diverge from profit maximization for other, more worthy, reasons?

III. PROFIT MAXIMIZATION AND THE LAW

What about the argument that profit maximization is required by law? In legal scholarship, the idea that the purpose of a firm is profit maximization is often stated in terms of the "shareholder primacy" doctrine, which states that directors and managers must strive to serve the interests, usually assumed to be exclusively financial, of shareholders above any other goal. But the status of this doctrine is in dispute. Debates in favor of or against the doctrine are said to go back to a famous debate in the 1930s between Adolph A. Berle, Jr., and E. Merrick Dodd, Jr.,[23] and continue in high volume today. To an outsider approaching these legal debates, the divergence of contemporary opinions and the degree of confidence with which they are variously asserted are striking.

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23. Berle was in favor of shareholder primacy. Adolf A. Berle, Jr., *For Whom Corporate Managers Are Trustees: A Note*, 45 HARV. L. REV. 1365, 1365–72 (1932). Dodd argued for a broader view. E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1145–63 (1932).

A. The Arguments in Favor

On the "pro" side, some contemporary legal scholars believe that profit maximization is required by law, or at least that it used to be the law though more recently it has become somewhat attenuated or challenged.[24] Another belief is that, while it was not clearly the law in the past, it is clearly the law now.[25] Finally, there is the belief that, while there are some exceptions in practice, it is still the dominant legal understanding[26] and force guiding business decisions,[27] so that new or reformed rules for enterprise would need to be established to permit the pursuit of social goals.[28]

Proponents interpret laws related to fiduciary duty as prescribing maximization of shareholder value. Legal cases often cited in favor of shareholder primacy include *Dodge v. Ford Motor Co.* ("A business corporation is organized and carried on primarily for the

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24. For example, Alissa Mickels refers to "the *historical* role of making a profit." Alissa Mickels, *Beyond Corporate Social Responsibility: Reconciling the Ideals of a For-Benefit Corporation with Director Fiduciary Duties in the U.S. and Europe*, 32 HASTINGS INT'L & COMP. L. REV. 271, 302 (2009) (emphasis added). Lisa M. Fairfax argues that while shareholder primacy is "traditional" and "prevailing" and seems to guide current conduct, it is also at odds with recent upsurges in stakeholder rhetoric used by corporations, which respond to a perhaps stakeholder-based public norm concerning corporate purposes. Lisa M. Fairfax, *The Rhetoric of Corporate Law: The Impact of Stakeholder Rhetoric on Corporate Norms*, 31 J. CORP. L. 675, 711–12 (2006).

25. *See, e.g.*, Greenfield, *supra* note 4, at 6 ("Traditionally, large corporations were seen as quasi-public institutions with social responsibilities that came as condition of their charter. But beginning just over a century ago . . . [c]orporations came to be seen as supremely private entities, whose primary purpose was making money."); Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 468 (2001) ("The triumph of the shareholder-oriented model of the corporation over its principal competitors is now assured, even if it was problematic as recently as twenty-five years ago.").

26. Mickels, *supra* note 24, at 282 ("Scholars claim that a corporate manager's only objectives are to sustain monetary growth for the company and to increase company and shareholder value.").

27. Greenfield, *supra* note 4, at 8–9 ("The fact remains, however, that because of a mix of law, norms, and market dynamics, the touchstone of corporate success is the maximization of shareholder return. There are exceptions . . . . But these exceptions are just that, and are unsustainable in the long term. On the whole, shareholder primacy is a fact of life in the United States in the early twenty-first century.").

28. *See, e.g.*, Mickels, *supra* note 24, at 279–80 (calling for alternative legal forms supporting "For-Benefit" corporations); Greenfield, *supra* note 4, at 5 (calling for "reforms"); Cheri A. Budzynski, *Can a Feminist Approach to Corporate Social Responsibility Break Down the Barriers of the Shareholder Primacy Doctrine?*, 38 U. TOL. L. REV. 435, 438 (2006) (calling for a standard of "care").

profit of the stockholders")[29] and *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.* (once a firm is being sold, the directors should aim at "getting the best price for the stockholders").[30] The case of *Equity-Linked Investors v. Adams*, where the court granted the interests of holders of common stock priority over those of holders of preferred stock, may also be mentioned.[31] In *In re The Walt Disney Co. Derivative Litigation*, the Delaware court explicitly adopted the position that the goal of a corporation is profit maximization, making references to "efforts to maximize shareholders' investment" and the corporate decision-makers' duty "to make informed decisions on behalf of the shareholders."[32]

Some argue that directors who fail to maximize value for shareholders will commonly face shareholder derivative suits, in which shareholders bring complaints about management decisions before a court.[33] Fear of such suits is thought to goad managers to stay on the narrow path of profit-maximization. In addition, drawing on arguments from economics, it is also argued that non-profit-maximizing firms will be subject to hostile takeovers or other forms of "market discipline."[34] Yet another argument is that profit maximization has a noted advantage over other possible goals for firms because of its "tidy," single-valued, relatively simple nature, as opposed to the more vague and potentially conflicting balancing of multiple stakeholder interests.[35] Some argue that shareholder

29. Dodge v. Ford Motor Co., 170 N.W. 668, 684 (Mich. 1919).

30. Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc., 506 A.2d 173, 182 (Del. 1986).

31. Equity-Linked Investors, L.P. v. Adams, 705 A.2d 1040, 1042 (Del. Ch. 1997).

32. *In re* The Walt Disney Co. Derivative Litig., 907 A.2d 693, 698 (Del. Ch. 2005). I thank Bill Bratton for alerting me to these last two cases.

33. Mickels, *supra* note 24, at 273. While acknowledging that successful suits against corporations for excessive charitable donations have not in fact occurred, Mickels's arguments for explicit new "For-Benefit" language in corporate bylaws and state statutes implicitly assumes such suits are a common and significant obstacle to socially responsible behavior under existing regimes. New legal approaches would allow For-Benefit corporations to "avoid shareholder derivative suits when other [that is, non-shareholder] contituents are served." *Id.* at 273.

34. For example, Greenfield argues that if a firm fails to maximize shareholder return, "the market will punish the managers severely. The stock price will fall, making the company a target for takeover. Companies whose managers act as if they have duties to stakeholders other than shareholders are squeezed out of the market." Greenfield, *supra* note 4, at 9.

35. *See* Fairfax, *supra* note 24, at 680 (noting the seeming advantage of shareholder primacy theory's "tidy focus"); *see also* Michael C. Jensen, *Value Maximization, Stakeholder*

primacy, along with measuring the success of management decisions by stock market prices, has been proven by economic logic to be the most efficient mode of organization.[36] Proponents of this view point out that the Principles of Corporate Governance put forward by the American Law Institute (ALI) describe the corporate objective as "business activities with a view to enhancing corporate profit and shareholder gain."[37] One example the ALI discusses concerns keeping a money-losing manufacturing plant open indefinitely for the sake of the workers. The ALI concludes that such an action would be unacceptable.[38]

Others are more careful in their endorsement of shareholder primacy, noting that while they believe it to be the law in theory, its enforcement in practice is compromised by the "business judgment rule."[39] That is, since it might be nearly impossible in practice to predict whether a particular business decision will lead to good or bad outcomes, courts generally defer to the informed judgment of a business's managers. As a result, executives are largely protected from the sorts of shareholder lawsuits that more naïve commentators seem to assume are common and effective. In the more sophisticated literature, the problem is often seen as one of making corporate managers *more* responsive to shareholders so that a corporation will do what it presumably *should* do (i.e., maximize profits).[40] Borrowing from economic principal-agent theory, a voluminous literature has

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Theory, and the Corporate Objective Function, J. APPLIED CORP. FIN., Fall 2001, at 8, 9 (arguing in favor of the "clarity of mission provided by a single-valued objective function").

36. *See* Hansmann & Kraakman, *supra* note 25, at 441, 449 ("[T]he market value of the publicly traded corporation's shares is the principal measure of its shareholders' interests. . . . [T]his model offers greater efficiencies than the principal alternatives.").

37. AM. LAW INST., PRINCIPLES OF CORPORATE GOVERNANCE § 2.01(a) (1994).

38. *Id.* § 2.01, cmt. i, illus. 19.

39. *See, e.g.*, Mickels, *supra* note 24, at 283 ("When making day-to-day decisions, courts apply the business judgment rule . . . ."); Fairfax, *supra* note 24, at 685 ("When applied, the business judgment rule results in . . . wide discretion afforded to directors to make decisions on behalf of the corporation, apparently even those that forgo shareholder profit. . . . In fact, outside of the takeover context, there are no reported cases in which courts have overturned directors' decision to favor a constituent group over-shareholders' profit.").

40. *See, e.g.*, William W. Bratton, *Supersize Pay, Incentive Compatibility and the Volatile Shareholder Interest*, 1 VA. L. & BUS. REV. 55, 57 (2006) ("The discussants all posit the maximization of shareholder value as the firm's objective and agree that such value as the firm's objective and agree that such value can be enhanced by aligning management's interests with those of the shareholders.").

arisen concerning how to properly incentivize executives with salary and bonus packages.[41]

Notably, conservative University of Chicago economist Milton Friedman is often quoted as saying that the duty of corporate executives is to "make as much money as possible" for the shareholders.[42] Some proponents of this view claim that the dispute has been definitively settled. Henry Hansmann and Reinier Kraakman wrote in their 2001 article, *The End of History for Corporate Law*, that "there is today a broad normative consensus that shareholders alone are the parties to whom corporate managers should be accountable."[43]

B. The Arguments Against

It is undeniable that creating returns for shareholders is generally an important corporate goal. However, people who argue against shareholder primacy view corporations as social organizations who must to some degree balance the concerns of various stakeholders, rather than slavishly serve only one constituent. Opponents of the doctrine of shareholder primacy argue that profit maximization is not the law now, nor has it ever (to any appreciable extent) been the

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41. Michael Jensen and William Meckling's article *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure* is widely credited as providing the theoretical justification for using stock options to (supposedly) give corporate managers incentives that would serve shareholder interests: "One solution to [differing goals] would be to establish incentive compensation systems for the manager or to give him stock options." Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305, 353 (1976).

42. *See* Greenfield, *supra* note 4, at 8 (quoting Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 32). Interestingly, however, Friedman went on to state that executives operate within an ethical context: their goal "generally will be to make as much money as possible *while conforming to their basic rules of the society, both those embodied in law and those embodied in ethical custom*." Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES, Sept. 13, 1970, at 32 (emphasis added). While clearly an endorsement of shareholder primacy, Friedman's view is hence not necessarily the simple endorsement of profit-at-any-cost that it is often taken to be.

43. Hansmann & Kraakman, *supra* note 25, at 441; *see also* William W. Bratton & Michael L. Wachter, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 J. CORP. L. 99, 100, 102 (2008) ("Shareholder primacy prevails today as the dominant view . . . . Today's mainstream assumes maximal returns to the firm as the only end . . . .").

law.[44] They point out that a mandate to maximize shareholder value is not based in statutory law, and only very rarely applied in case law.

Contrary to popular belief, state laws that charter corporations do not mandate profit maximization.[45] Even in Delaware, where many corporations are chartered because of its advantageous codes, the corporate code states that corporations may be formed "to conduct or promote any lawful business or purpose."[46] Nor do most firms choose to incorporate shareholder primacy as a goal in their own charters.[47] On the contrary, many seem eager to express their dedication to broader responsibilities.[48]

Those who dispute shareholder primacy call attention to the fact that fiduciary duty is generally interpreted as the duty of officers to serve "the corporation", which is vaguely defined, and inclusive of interests beyond shareholder financial interest.[49] The main purpose of this duty is not to raise shareholders above all other stakeholders, but rather to prevent self-dealing by the managers themselves.[50] The ALI's Principles of Corporate Governance, while recognizing the goal of shareholder gain, also allows consideration of ethical issues and diversion of resources to serve public goals.[51] A decision to keep

44. *See* Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 738 (2005) ("Corporate managers have never had an enforceable legal duty to maximize corporate profits. Rather, they have always had some legal discretion (implicit or explicit) to sacrifice corporate profits in the public interest.").

45. *Id.*

46. Lynn A. Stout, *Why We Should Stop Teaching* Dodge v. Ford, 3 VA. L. & BUS. REV. 163, 169 (2008) (internal quotations omitted).

47. Lynn A. Stout, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 S. CAL. L. REV. 1189, 1207 (2002).

48. Claudio Loderer et al., *Shareholder Value: Principles, Declarations, and Actions*, 39 FIN. MGMT. 5, 11–19 (2010) (noting that more corporate website mission statements reference social responsibility than reference importance of shareholders); Martin Calkins & Jonathan B. Wight, *The Ethical Lacunae in Friedman's Concept of the Manager*, 11 J. MARKETS & MORALITY 221, 229 (2008) ("A slew of management and leadership literature indicates that managers and entrepreneurs are not motivated primarily by profit maximizing . . . .").

49. *See, e.g.*, Stout, *supra* note 46, at 169 ("The Delaware corporate code . . . does not define the corporate purpose as shareholder wealth maximization."); Elhauge, *supra* note 44, at 769 ("But duty of care laws never define the 'best interests of the corporation' as meaning solely the interests of shareholders, nor do they ever define the interests of the corporation or shareholders to mean solely their financial interests.").

50. Self-dealing refers to a manager making decisions that serve his or her own personal advantage, rather than benefiting of the corporation (e.g., misappropriating funds or hiring unqualified relatives).

51. AM. L. INST., PRINCIPLES OF CORPORATE GOVERNANCE § 2.01(b)(2)—(3); *see also*

a manufacturing plant open for three months, at a loss of hundreds of thousands of dollars, in order to give time for workers to adjust is, for example, considered consistent with legal principles.[52]

Opponents note that the often quoted language from *Dodge*—a case from 1919—was merely judicial dicta, and argue that the decision on the merits of case actually concerned the duty of majority shareholders to not trample on the rights of minority shareholders, and was not about the social responsibility of business.[53] *Equity-Linked Investors* likewise shows the courts intervening to resolve disputes among shareholders, and does not shed light on the issue of whether shareholders' interests take primacy over, or should be balanced with, the interests such as those of workers, communities, or the environment. Those who dispute shareholder primacy point out that the doctrine stated in *Revlon* was later so narrowed by the Delaware courts that it has become "doctrinal deadwood."[54] Shortly before *Revlon*, the Delaware courts in *Unocal Corp. v. Mesa Petroleum Co.*[55] opined that, in fulfilling their duties to "the corporate enterprise," directors should consider "the impact on 'constituencies' other than shareholders (that is, creditors, customers, employees, and perhaps even the community generally)."[56] Shareholder primacy opponents point to constituency statutes, adopted in a majority of states, that explicitly give managers the discretion to consider the interests of non-shareholder groups.[57] They emphasize that the "business judgment rule" gives directors and managers considerable leeway in their decisions.[58] A court will usually accept any business purpose expressed by managers, or may even create a justification should the managers fail to give one.[59]

Elhauge, *supra* note 44, at 738.

52. AM. L. INST., PRINCIPLES OF CORPORATE GOVERNANCE § 2.01, cmt. i, illus. 20.

53. Stout, *supra* note 46, at 167–68; D. Gordon Smith, *The Shareholder Primacy Norm*, 23 J. CORP. L. 277, 315–20 (1998).

54. Stout, *supra* note 47, at 1204; *see also* Fairfax, *supra* note 24, at 686.

55. 493 A.2d 946 (Del. 1985).

56. Stout, *supra* note 46, at 170 (quoting *Unocal*, 493 A.2d at 954, 955).

57. Elhauge, *supra* note 44, at 861–62.

58. *See* Eric Talley, *On the Demise of Shareholder Primacy (or, Murder on the James Trains Express)*, 75 S. CAL. L. REV. 1211, 1212–13 (2002); Elhauge, *supra* note 44, at 738 (arguing that the business judgment rule gives managers discretion to profit-sacrifice).

59. *See* Stout, *supra* note 46, at 171 (discussing judicial eagerness to protect directors in *Shlensky v. Wrigley*, 237 N.E. 2d 776 (Ill. App. 1968)).

Opponents also argue that, while hostile takeovers make the headlines, they are relatively rare in practice.[60] They point to specific cases of long-running firms that have shamelessly pursued goals other than profit maximization.[61] They argue that the idea that there is one identifiable "shareholder interest" to be pursued is mythical:

> Different shareholders have different investment time frames, different tax concerns, different attitudes toward firm-level risk due to different levels of diversification, different interests in other investments that might be affected by corporate activities, and different views about the extent to which they are willing to sacrifice corporate profits to promote broader social interests.[62]

Some use sophisticated arguments from options theory, contracting, and bargaining to create logical arguments for a stakeholder view.[63]

Some literature on the "con" side claims that the dispute has been definitively settled. Eric Talley writes that "the shareholder primacy argument has increasingly become a straw person among academics."[64] He summarizes contemporary corporate law as: "Don't jerk around any constituency too badly, and you'll be ok."[65]

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60. Talley, *supra* note 58, at 1212 ("[O]ne need not presume . . . that the specter of an acquisition constitutes a defining characteristic of a firm's identity.").

61. *See, e.g.*, Matthew T. Bodie, *AOL Time Warner and the False God of Shareholder Primacy*, 31 J. CORP. L. 975, 976 (2006) ("[T]he executives at AOL believed in the faith of shareholder primacy. . . . Time Warner, on the other hand, had a culture that placed the institution above the shareholder, and journalistic ethics above any requirement to make short-term profits."); *see also* ANDRÉ SCHIFFRIN, THE BUSINESS OF BOOKS: HOW INTERNATIONAL CONGLOMERATES TOOK OVER PUBLISHING AND CHANGED THE WAY WE READ 73–102 (2001) (discussing differences between the goals behind book publishing resulting from changes in ownership and management at Random House).

62. Stout, *supra* note 46, at 174; *cf.* Bratton, *supra* note 40, at 57 ("This Article unpacks the notion of the shareholder, introducing a more particularized account in which the unitary model of the shareholder disintegrates into a differentiated cast of characters made up of investors, speculators, noise traders, fundamental value investors, short-term holders, long-term holders, dumb money, and smart money.").

63. *See*, *e.g.*, Stout, *supra* note 47, at 1195–99 (outlining efficiency arguments in Margaret Blair and Lynn A. Stout's "Team Production" model); Talley, *supra* note 58, at 1214 (briefly discussing of Talley's work using contracting theory).

64. Talley, *supra* note 58, at 1214.

65. *Id.* at 1216 (internal quotations omitted).

C. An Analysis

While those arguing the "pro" side may grant that the "con" arguers have valid points and that there are exceptions to profit maximization, they generally dismiss these points as (isolated) exceptions that prove the (general) rule. But the discussion on the "pro" side tends to slide from an argument about what firms are *actually* required to do by law, to what they *should* be required to do. It becomes an ontological or teleological discussion about the true "nature" or "purpose" of business. The arguments in favor of strict shareholder primacy seem to have a relative dearth of empirical support, instead relying to a large degree on a particular, narrow body of economic theory. The profit maximization doctrine appears to operate far more strongly at the level of theory or ideology than at the level of actual practice in business management and corporate law. In short, it seems to be a case of "transcendental nonsense."[66]

To see how thoroughly the (faulty) Chicago-style, perfect-free-markets-and-efficiency argument has permeated this literature, consider again *In re The Walt Disney Co. Derivative Litigation*.[67] The case is a classic shareholder derivative suit, of the sort that many imagine to be effective in enforcing profit maximization. Former Disney president Michael Ovitz had been granted severance pay in an amount that the court acknowledged was "breathtaking."[68] A group of shareholders subsequently sued, alleging that when the CEO and board approved the pay and severance packages, they breached their fiduciary duty.[69] The rhetoric of the decision makes it clear that the court believed that, as an ontological issue, increasing shareholder value is the proper purpose of a corporation. But does this judgment confirm that profit-maximization is legally enforceable and that executives who fail to do what the shareholders want will be reprimanded or punished by the courts? Far from it! The court ruled *against* the shareholder plaintiffs on the grounds that "[t]he redress

66. Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 812 (1935) (noting that legal abstraction, or "transcendental nonsense," is "entirely useless when we come to study, describe, predict, and criticize legal phenomena").

67. 907 A.2d 693 (Del. Ch. 2005).

68. *Id.* at 698.

69. *Id.* at 697.

for failures that arise from faithful management must come from the *markets*, through the action of shareholders and the *free flow* of capital," and *not* from the courts.[70] Concluding that the decision-makers' actions, while falling "significantly short of the best practices of ideal corporate governance," did not constitute gross negligence, the court invoked the business judgment rule.[71] Enforcement of "best practices," it said, should be left to the free market.[72]

Rather than asserting shareholder primacy as a principle enforceable in the courts, the court in *Disney* leaves the enforcement up to Chicago school "self-regulating" markets. Following the Chicago school, the court found that there is no need for "interference" by any state organization—including the court itself.[73] This is a rather stunning result: the law-and-economics approach at this point devolves into a situation where legal institutions themselves are seen as redundant.

70. *Id.* at 698 (emphasis added).

71. *Id.* at 697.

72. Another facet of the case also illustrates the influence of Chicago economics. The court found "thorough and convincing" an economic argument concerning the valuation of options that was based on the Black-Scholes option model. *Id.* at 745. Fischer Black and Myron Scholes both spent time in the University of Chicago economics department and, while their work received a Nobel Prize, it has since become quite controversial. Scholes's own investment company (LTCM) required a bailout from the Fed, and some suggest that the popularity of the model contributed to the subprime crisis. *See* PABLO TRIANA, LECTURING BIRDS ON FLYING: CAN MATHEMATICAL THEORIES DESTROY THE FINANCIAL MARKETS? 177–242 (2009) (critiquing the Black-Scholes model). The ALI, in contrast, points out several weaknesses in relying on markets to enforce good management:

> The discipline of the product and new-capital markets, while significant, is also subject to important limitations. For example, a corporation may earn profits and survive for a long time despite bad management, just as it may incur losses or even fail despite good management. A corporation with a large cash flow may be able to meet its capital needs through internal and even external financing although its profits are lower than good management would produce. Similarly the discipline of tender offers is limited by a number of elements, including the high costs of takeover bids, the need to offer a premium well above the market, the defensive techniques available under the relevant statues, and the time lag often experienced by the public in ascertaining lack of managerial efficiency.

AM. L. INST., PRINCIPLES OF CORPORATE GOVERNANCE Part III.1 (introductory note). The ALI gives these as reasons why oversight by a board of directors and its committees is important.

73. *Disney*, 907 A.2d at 698 (regulation must "come from the markets").

The influence of Chicago-style thinking is also apparent in many of the arguments made by those on the other side of the fence. Those who dispute that profit maximization is dictated by law often couch their arguments primarily in terms of efficiency.[74] While theoretical arguments based on efficiency may be interesting, one should keep in mind that, outside of the world of idealized perfect competition, just because something can be shown to be efficient does not mean that it necessarily exists (or vice versa). Of course, theories about efficiency can be used to argue why the legal system *should* endorse a particular goal or structure. But, contrary to some economists' elevation of efficiency to a *summum bonum*, in this normative case it also needs to be remembered that there are a number of other worthy goals for corporate behavior besides efficiency.[75] These may include justice; fairness; commitment; aiding the needy, future generations, or the environment; or practicalities of implementation. The neglect of such goals seems to be the result of the influence on scholarly legal debate of an overly economistic approach.

Lynn A. Stout suggests that the appeal of profit maximization thinking among legal scholars is that it "serves professors' pressing need for a simple answer to the question of what corporations do,"[76] and that by using something propounded by Ph.D. economists it "lent an attractive patina of scientific rigor" to the study of corporations.[77] This latter point brings us to the topic of economics and its status as a "science."

IV. THE INVENTION AND PERSISTENCE OF AN IDEOLOGY

While the idea that businesses make profits has probably been around for as long as business itself, the belief that firms must *maximize* profits originated in the discipline of economics. While

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74. *See, e.g.*, Stout, *supra* note 47, at 1197–99; Jill E. Fisch, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 J. CORP. L. 637, 640–46 (2006).

75. For more discussion on this, see Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 536 (2006) (arguing that some scholars' "reliance on the normative criterion of efficiency commits them to an impoverished conception of ethics").

76. Stout, *supra* note 46, at 175.

77. Lynn A. Stout, New Thinking on "Shareholder Primacy" 5 (Jan. 10, 2005) (unpublished manuscript), *available at* http://www.law.ucla.edu/docs/bus.sloan-stout.pdf.

people in law, social science, the humanities, or journalism who use this phrase might assume that the idea came from diligent, empirical research by economists studying the actual workings of firms, the real story is quite different. Profit maximization is, in reality, a theoretical invention, deeply rooted in particular (and quite peculiar) ideas of what an economy is, what science is, and what a firm is. The first section below outlines the developments within the discipline of economics that led to the doctrine of profit maximization, while the second section sets these developments within a larger historical and social context.

A. The Roots of "Profit Maximization"

One can think of the historical development of the doctrine of profit maximization as having roughly three major stages. These are briefly sketched below.

The first stage was the origination, during the classical period of economics, of the idea that the economy is a machine driven by the energy of self-interest. Scottish philosopher Adam Smith is widely considered to be the originator of market views of economics. While he was actually a much more subtle thinker (especially on topics of moral philosophy), he is mostly known in contemporary circles for expressing the idea that the individual pursuit of self-interest might be coordinated to serve the social good by the invisible hand of the market system. Since Smith wrote at the time of the Industrial Revolution, when people were fascinated with factories and technology, he used the popular mechanistic metaphors of his day. "Power and riches" he wrote, are "enormous and operose machines."[78] The "wheels," he continued, can be made to move in harmony when one attends to "the connexions and dependencies of its several parts."[79] The idea of the economy-as-machine appeared a few years earlier in the work of François Quesnay and the Marquis de Mirabeau in 1763, and was carried forward in the later work of classical economists Thomas Robert Malthus and Karl Marx in their

78. ADAM SMITH, THE THEORY OF MORAL SENTIMENTS pt. IV.I.8 (1759).
79. *Id.* pt. IV.I.11.

search for "laws" of economics that would be similar to the "laws" of Newtonian physics.[80]

Sixty years later, the development of profit maximization theory entered its second stage with the creation of the image of "economic man." John Stuart Mill's 1836 essay "On the Definition of Political Economy" attempted to define economics as a scientific enterprise, distinct from other endeavors.[81] Mill did not deny that, empirically speaking, people care about each other, are emotional, and are embedded in society.[82] But he felt that a certain narrowing of assumptions about human behavior was necessary for economics, since he took geometry as his model of science.[83] Political Economy and geometry, he claimed, both "must necessarily reason . . . from assumptions, not from facts."[84] In order to get to a pure abstract definition of "man" that could be used in this deductive science, he separated the sciences into four parts. Physical science, Mill said, would deal with physical laws in the material world.[85] Ethics would deal with conscience, duty, and other feelings relevant to a person's dealings with other people.[86] Social economy would study life in society.[87] Economics proper would deal with what is left over after the body, ethics, and social relationships have been removed: a creature "who desires to possess wealth, and who is capable of judging of the comparative efficacy of means for obtaining that end"[88]—an autonomous, self-interested, and rational agent, later dubbed *homo economicus*, or "economic man." Mill, to his credit, argued that no political economist would ever be "so absurd as to suppose that mankind" is really described by only these parts of human nature, and that in any practical application economics would

80. *See* Abhijit Vinayak Banjeree, *Inside the Machine: Toward a New Development Economics*, BOSTON REV., Mar.–Apr. 2007, http://bostonreview.net/BR32.2/banerjee.php (discussing the history of the "economy-as-machine" metaphor).

81. John Stuart Mill, *On the Definition of Political Economy; and on the Method of Philosophical Investigation in That Science*, 4 LONDON & WESTMINSTER REV. 1 (1836).

82. *Id.* at 10.

83. *Id.* at 16–17.

84. *Id.* at 16.

85. *Id.* at 5–6.

86. *Id.* at 10.

87. *Id.* at 11.

88. *Id.* at 12.

need to be complemented by the other sciences and experience.[89] But it was the elegance of his stripped-down agent, not these caveats, that has been carried forward in economic thought.

Even as Mill was writing, the groundwork was being laid for the third stage in the development of "profit maximization": the discovery of a way of drawing a closer analogy between economics and Newtonian physics through the use of differential calculus. Augustin Cournot's 1838 volume *Researches into the Mathematical Principles of the Theory of Wealth* contained the first statement of profit maximization.[90] He modeled a monopolist as having a mathematical revenue function and a mathematical cost function, both of which increase with the quantity of output it sells.[91] By rules of calculus and many assumptions about the nature and shape of these hypothetical curves, the function that subtracts costs from revenues—that is, the "profit function"—is maximized when the first derivatives of the two curves are set equal to each other.[92] Cournot's work, however, was ignored for decades. It was not until later in the 1800s, in the time period in the history of economics known as the "marginalist revolution," that the use of calculus became more widespread to explain consumer behavior (maximization of utility) as well as firm behavior (maximization of profit). Figures such as Francis Edgeworth, Vilredo Pareto, William Stanley Jevons, and Leon Walras developed these methods.[93] With the publication of Alfred Marshall's *Principles of Economics* in 1890, the mathematical and diagrammatic analysis of maximization behavior became enshrined as the backbone of "neoclassical" economics, which is the dominant school to this day.[94]

The problem is not that people use metaphors such as "the economy is a machine," with its corollary "a firm is a profit function." We need metaphors to be able to think at all. But problems

89. *Id.* at 13, 24.

90. ANTOINE AUGUSTIN COURNOT, RESEARCHES INTO THE MATHEMATICAL PRINCIPLES OF THE THEORY OF WEALTH (1838).

91. *Id.* at 56–65.

92. INGRID HAHNE RIMA, DEVELOPMENT OF ECONOMIC ANALYSIS 221 (7th ed. 2009).

93. *Id.* at 255.

94. ALFRED MARSHALL, PRINCIPLES OF ECONOMICS (1890); *see also* RIMA, *supra* note 92, at 318–48.

arise when metaphors become atrophied, or when they are so much a part of our thinking that we forget that they are simply tools and not literal representations.[95] The idea that firms not only *make* profit, but must also *maximize* profits, was born out of particular metaphorical understandings of economies, science, and business.

B. Socio-Historical Context

The developments within economics reflected a larger historical and cultural picture. As a number of writers on the history and philosophy of science pointed out during the 1980s, dualisms such as those shown in Table 1 have underlain much of Western philosophy and culture.[96] Rationality, autonomy, and math, for example, all have masculine cultural associations and have come to be associated with science and power in the realms of market and state. Emotion, dependence, and qualitative analysis, on the other hand, have all commonly been seen as more feminine and associated with the humanities or family life. This view was institutionalized into notions of science during its Enlightenment-era origins, when the scientific enterprise was described as attempting to "raise a masculine

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95. Alfred Marshall himself, interestingly enough, was very aware that he was using physics-like equations metaphorically, and that these metaphors had limitations:

> It has been well said that analogies may help one into the saddle, but are encumbrances on a long journey. It is well to know when to introduce them, it is even better to know when to stop them off. Two things may resemble one another in their initial stages; and a comparison of the two may then be helpful; but after a while they diverge; and then the comparison begins to confuse and warp the judgment.

ALFRED MARSHALL, MECHANICAL AND BIOLOGICAL ANALOGIES IN ECONOMICS (1898), *reprinted in* MEMORIALS OF ALFRED MARSHALL 312, 314 (A.C. Pigou ed., 1925)). His followers, however, have not been so cautious.

96. *See, e.g.*, EVELYN FOX KELLER, REFLECTIONS ON GENDER AND SCIENCE (1985) (presenting a collection of essays focusing on how a "complex dynamic" of cognitive, emotional, and social forces has driven the interplay of science with masculinity and femininity); SANDRA HARDING, THE SCIENCE QUESTION IN FEMINISM (1986) (discussing feminist science critiques which note that the history and philosophy of science has been shaped by the masculine/feminine dualism); Susan Bordo, *The Cartesian Masculinization of Thought*, 11 SIGNS 439, 448–56 (1986); BRIAN EASLEA, WITCH HUNTING, MAGIC AND THE NEW PHILOSOPHY: AN INTRODUCTION TO DEBATES OF THE SCIENTIFIC REVOLUTION 1450–1750 (1980) (discussing the gender dualisms during the scientific revolution of the sixteenth and seventeenth centuries).

Philosophy . . . whereby the Mind of Man my be ennobled with the knowledge of Solid Truths."[97]

TABLE 1: SPLITTING THE WORLD: WESTERN PHILOSOPHY

Higher Order	Lower Order
mind	body
rationality	emotion
autonomy	dependence
self-interest	other-interest
quantitative	qualitative
general	particular
masculine	feminine

It is critically important to note that the point being made is about *how we think,* and not about differences between men and women. Feminists often make a distinction between "sex" and "gender," wherein sex refers to biological differences between males and females, while gender refers to cultural beliefs constructed on the base of (preponderant) sexual dimorphism.[98] Therefore, the issue is not whether men, for example, have more mind or less body than women: they manifestly do not. Rather, the point is that there is a deep cultural pattern of defining male as being dichotomously different from, and more powerful than, female, and defining minds as being radically disconnected from, and more powerful than, nature, matter, and emotion.

The notion of "economic man," initiated by Mill, is doubly gendered—and doubly biased. First, in omitting all aspects of human life having to do with bodies, emotion, dependence, or other-interest, it highlights only culturally masculine-associated notions of humanity and precludes consideration of feminine-associated ones. Not only are the traditionally female occupations of feeding, cleaning, and nursing bodies made invisible, but *everyone's* experiences of social

97. KELLER, *supra* note 96, at 52 (quoting Henry Oldenburg).
98. Recent feminist literature has become more complicated as scholars deal with intersexuality, transsexuality, and the like. But the sex/gender distinction provides a rough typology that is useful when examining cultural stereotypes.

life in general (and of dependency in childhood, illness, and old age in particular) are denied. "Economic man," in contrast to real humans, neither needs care nor has any responsibility or desire to give it. Secondly, the origin of, and continued allegiance to, "economic man" reflects the impact of a gender-biased view of scientific endeavor, which prioritizes mathematical and abstract (Newtonian) physics-like thinking, and hence is prone to favor a metaphor of mechanical markets over more rich or nuanced notions of sociality. Feminist philosophers of science have noted how this requires an understanding of scientific objectivity as based on a mythical image of distance and disconnection, rather than on a more rigorous base of engagement and critique.[99]

In summary, classical and neoclassical economists did not discover a cold and heartless economic reality and then choose assumptions of self-interest and maximization because these best fit what they observed. Rather, economists created an image of economies as cold and heartless, and foisted it on the world in large part because it bolstered the image of economists as high-status, non-"sissy," hard scientists. The fact that it provides intellectual justification for self-interested actions on the part of some rich and well-established actors in society—who have had considerable political power—no doubt has contributed to the maintenance of its popularity and status.

C. The Persistence of Dualistic Thinking

Not everyone aspires to be a "hard" scientist, and yet there persists the gendered association of economics with all things cold and antisocial. Within the feminist academic community, a number of scholars take what is sometimes called a "relational feminist" approach and further build on these dichotomies. Legal scholar Cheri A. Budzynski, for example, uses such dualistic thinking to contrast a status quo in tort law that emphasizes efficiency, profit-

99. KELLER, *supra* note 96, at 6–12; SUSAN R. BORDO, THE FLIGHT TO OBJECTIVITY: ESSAYS ON CARTESIANISM & CULTURE 97–118 (1987) (discussing the "masculinization of thought" which took place in Europe in the seventeenth century); *see also* JULIE A. NELSON, FEMINISM, OBJECTIVITY AND ECONOMICS (1996) (discussing gender, specifically masculine-biased notions, in the field of economics).

maximization, and reason with a more "feminist" (or, more accurately, stereotypically "feminine") orientation towards an "ethic of care" that includes emotion and abandons efficiency.[100] In *The Commercialization of Intimate Life*, sociologist Arlie Hochschild repeatedly frames her argument in terms of two worlds: a harsh, depersonalized world of intrinsically destabilizing capitalism, and an ethical, caring world of non-monetized family and community relations: "When in the mid-nineteenth century, men were drawn into market life and women remained outside it, female homemakers formed a moral brake on capitalism."[101]

Another example comes from an older piece on the topic of this symposium: the 1960 article *Love and the Business Corporation* by Bert S. Prunty.[102] His rhetoric explicitly associates profit interests in corporate law with masculinity, while associating philanthropy-allowing developments in corporate law with a lack of masculinity. The "once *virile* ultra vires doctrine" was weakened by the growing permission of philanthropy, he writes, although the limitation of philanthropy to purposes in the corporate interest means that "the dictum of *Dodge v. Ford* has not been *emasculated*."[103]

A clue to the persistence of such images may be found in recent psychological research on "cognitive schema." This term refers to the ways that we "organize incoming information and integrate it—through no conscious act of will—into clusters."[104] Stimuli that correspond to an existing schema can be more rapidly processed than stimuli that must be individually sorted and assimilated piece by piece. Categorization according to associations with masculinity or femininity is one notable method of clustering.[105] For example, in one

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100. Budzynski, *supra* note 28, at 459–60.

101. ARLIE RUSSELL HOCHSCHILD, THE COMMERCIALIZATION OF INTIMATE LIFE: NOTES FROM HOME AND WORK 8 (2003).

102. Bert S. Prunty, Jr., *Love and the Business Corporation*, 46 VA. L. REV. 467 (1960).

103. *Id.* at 468, 475 (emphasis added).

104. Steven B. Most et al., *Auditory Stroop Reveals Implicit Gender Associations in Adults and Children*, 43 J. EXPERIMENTAL SOC. PSYCHOL. 287, 287 (2007).

105. *See generally* Kristine M. Knutson et al., *Neural Correlates of Automatic Beliefs About Gender and Race*, 28 HUM. BRAIN MAPPING 915, 927 (2007) (identifying specific brain activity associated with the expression and suppression of stereotypic gender attitudes); Sandra Lipsitz Bem, *Gender Schema Theory: A Cognitive Account of Sex Typing*, 88 PSYCHOL. REV. 354, 355 (1981) (describing a "gender schema" as a gender-based "network of associations that organizes and guides an individual's perception"); Brian A. Nosek et al., *National Differences*

type of experiment, subjects are asked to push a particular keyboard button when a stimulus flashed on a screen matches certain conditions. The experiment found that combinations that are consistent with an association of "male" with "strong," or "female" with "weak," which are common in the dominant American culture, tend to be more quickly processed, on average, than ones that combine "female" with "strong."[106] Moreover, research on "cognitive fluency" suggests that what we consider easy we are also more likely to think of as true.[107] As academics we like to think of ourselves as sophisticated and eager to delve into complexities, but it may be worthwhile to reflect on the extent to which common gender dualisms and the desire for quick and simple answers may be behind our thinking on "love *versus* money."

D. Overcoming Dualistic Thinking

While our minds may have a tendency to think otherwise, we live in a world that includes weak men, strong women, money used in loving ways (e.g., gifts and assistance),[108] close relationships used in cold ways (e.g., abuse), emotions manipulated in markets (e.g., advertising), and rationality used at home (e.g., the fact that smooth household functioning takes thought). Most academics would acknowledge that our motivations for work include both extrinsic ones (e.g., we need to support ourselves and our families) and intrinsic ones (e.g., intellectual stimulation). Simple dualisms such as male/female, money/love, and reason/emotion cannot be the whole story. In the psychological research, being able to think in ways contrary to existing schema is often interpreted as a sign of mental agility. Similarly, not having blinders on when we look at

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in Gender-Science Stereotypes Predict National Sex Differences in Science and Math Achievement, 106 PROC. NAT'L ACAD. SCI. 10593–97 (2009).

106. Knutson et al., *supra* note 105, at 916.

107. Drake Bennett, *Easy = True: How 'Cognitive Fluency' Shapes What We Believe, How We Invest, and Who Will Become a Supermodel*, BOSTON GLOBE, Jan. 31, 2010, http://www.boston.com/bostonglobe/ideas/articles/2010/01/31/easy_true/.

108. *See* VIVIANA A. ZELIZER, THE PURCHASE OF INTIMACY 27 (2005); VIVIANA A. ZELIZER, THE SOCIAL MEANING OF MONEY 71–118 (1994) (exploring the nature and history of money used in interpersonal and intimate relations).

commercial life may expose to us richer realities and future possibilities.

V. THE RELATIONAL ECONOMY

Mainstream economic thought, built on a machine metaphor and physics-mimicking methodology, encourages us to think of the economy as something set apart from society, running according to its own "laws" and powered by the "drive" to profit-maximize. Stepping outside of that narrow dogma, however, reveals a much richer and more complex world of people, motivations, institutions, and relationships, even within the spheres of business and markets.

A. Alternative Schools of Thought

Work within feminist, social, and ("Old") Institutionalist economics takes as a starting point the social embeddedness of economic life.[109] A large business literature exists concerning the creation of value not for just shareholders, but for workers, consumers, communities and others within corporate institutions.[110] Social and ecological innovations such as triple bottom line accounting are being taught at some business schools and achieving a following among some business leaders.[111] Many business relationships are governed by implicit (as opposed to explicit, cold, and distant) contracts because of psychological reasons related to motivation and trust, as well as foundational problems of uncertainty

109. BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS (Marianne A. Ferber & Julie A. Nelson eds., 1993) (collection of essays introducing feminist approaches to economics, all of which in some way allude to embeddedness); Hodgson, *supra* note 16, at 168–69. *See generally* John B. Davis & Wilfred Dolfsma, *Social Economics: An Introduction and a View of the Field*, *in* THE ELGAR COMPANION TO SOCIAL ECONOMICS 1, 2–3 (John B. Davis & Wilfred Dolfsma eds., 2008).

110. *See, e.g.*, JAMES C. COLLINS & JERRY I. PORRAS, BUILT TO LAST: SUCCESSFUL HABITS OF VISIONARY COMPANIES 46–79 (1994) (discussing companies which view business as more than simply profit maximization); FREEMAN, *supra* note 21 (discussing the importance of promoting the idea of these various "stakeholders," rather than only shareholders, having interest in a firm); *see also* sources cited *supra* notes 22, 61.

111. *The Triple Bottom Line: Student Activists Demand More from B-Schools*, KNOWLEDGE@WHARTON (May 19, 2003), http://knowledge.wharton.upenn.edu/article.cfm?articleid=773.

and lack of information.[112] A number of scholars of business contracts emphasize their often incomplete and relational or expressive nature: Since completely specified contracts would be impossible to write, impossible to enforce, and bind their parties to things that might not be in their mutual advantage in the future, ongoing communication is of the essence of many commercial and financial relationships.[113] Market relationships, while often envisioned as impersonal and "arm's length," may in fact include considerable interpersonal dimensions. Much scholarship in economic sociology and the social study of finance explores these points, by investigating phenomena such as reputation, trust, or collusion.[114] Often, of course, such studies are dismissed as "soft" or "non-rigorous" by those who argue for "hard," "bottom-line" profit-maximization views of commercial life. The reader, however, should weigh how well the socially embedded versus "machine" views hold up against real-world evidence.

B. "Commodification" versus "Commoditization"

What about the issue of "commodification"? If the economic world is actually highly relational, does that mean there is nothing to fear from the inroads of markets or commercially-oriented values? Here it is important to distinguish between two quite different meanings of the terms "commodify" or "commoditize."

Within the social science literature, particularly in areas influenced by Marxist thought or dealing with globalization, "commodification" (or, more rarely, "commoditization") generally

112. Ernst Fehr & Armin Falk, *Psychological Foundations of Incentives*, 46 EUR. ECON. REV. 687 (2002).

113. IAN R. MACNEIL, CONTRACTS: INSTRUMENTS FOR SOCIAL COOPERATION: EAST AFRICA (1968) (one of the generative sources of relational contract theory); Stewart Macaulay, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 NW. U. L. REV. 775, 795 (2000); Gillian K. Hadfield, *An Expressive Theory of Contract: From Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 U. PA. L. REV. 1235, 1283–84 (1998).

114. Marieke de Goede, *Resocialising and Repoliticising Financial Markets: Contours of Social Studies of Finance*, ECON. SOC.: EUR. ELECTRONIC NEWSLETTER, July 2005, at 19, 20–21 (2005); THE HANDBOOK OF ECONOMIC SOCIOLOGY 3–25 (Neil J. Smelser & Richard Swedberg eds., 2d ed. 2005); Marion Fourcade & Kieran Healy, *Moral Views of Market Society*, 33 ANN. REV. SOC. 285, 288–89 (2007).

means the commercialization of something not formerly bought and sold. The connotation is negative, since it is assumed that placing a monetary value on something drains it of its intrinsic value and uniqueness, causing a loss of authentic values.[115]

Within the business literature, on the other hand, "commoditization" (or, more rarely, "commodification") refers to making something into a very *specific* type of good or service.[116] A good or service is a "commodity" when all units of it are indistinguishable from one another. Raw materials and minerals, for example, are called commodities because one bushel of wheat or bar of gold of a specific type and grade is physically indistinguishable from another. Not all goods and services are commodities, since many recognizably differ from each other along dimensions such as quality, brand name, reputability of the supplier, or the relationship between the supplier and purchaser. A purchaser who prefers one brand of canned corn over another, or a parent who finds the services of one child care provider to be superior to those of another, for example, are *not* buying "commodities." Within the business literature, the terms carry no unambiguous positive or negative association. Businesses that have market power based on unique features of their product will resist allowing it to become a widely supplied, undistinguishable commodity. On the other hand, buyers of a good may often want the standardization and lowered prices from increased competition that a degree of commoditization can bring.[117] For goods and services that are commodities, a buyer may simply look for the lowest price, since all other factors are held constant.

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115. *See, e.g.*, *Globalization Glossary*, GENDER & HEALTH COLLABORATIVE CURRICULUM PROJECT (July 29, 2008), http://www.genderandhealth.ca/en/modules/globalization/globalization_glossary.jsp.

116. *See Commodification*, THE FREE DICTIONARY, http://financial-dictionary.thefreedictionary.com/commodification (last visited Mar. 3, 2011); *Commoditize*, MERRIAM-WEBSTER, http://merriam-webster.com/dictionary/commoditize (last visited Mar. 3, 2011). For a brief and cogent discussion of the difference between the business view and the Marxist view, see Douglas Rushkoff, *Commodified vs. Commoditized*, DOUGLAS RUSHKOFF (Sept. 4, 2005), http://rushkoff.com/2005/09/04/commodified-vs-commoditized/.

117. While Rushkoff notes that commoditization is a problem for manufacturers, for example, *The Free Dictionary* notes that commoditization "leads to lower prices," which are presumably of benefit to consumers. *See* sources cited *supra* note 116.

Where things get confused is at the distinction between the market/nonmarket boundary and the commodity/non-commodity boundary. The Marxist-influenced view assumes that once something is traded in capitalist markets, it automatically becomes a commodity: marketization equals commoditization equals the erasure of unique values. This belief arises from the more fundamental conviction that the economy is an asocial machine, and that businesses have no choice but to treat everything strictly according to their market values and contributions to profit maximization. This Article has sought to shed doubt on this model.

The business definition, on the other hand, recognizes that commodities are a special category. In general, goods and services can be traded in markets *and* have distinguishing characteristics. When it is recognized that business behavior and market trades are embedded in social relations, then one can more precisely identify the case of harmful commoditization. It does not occur simply with marketization, but with a particular kind of marketization that overlooks unique characteristics and special relationships that should be preserved. Corporate leaders who treat their employees as merely rented hands and brains, interchangeable and expendable, exhibit anti-social values, as do those who recognize environmental problems only when they become explicit cost items on their income statements. Choosing to encourage employee morale and loyalty, on the other hand, or to contract with more ethical subcontractors and greener suppliers, is an alternative, non-commoditizing possibility.[118] Even some types of goods normally called "commodities" may be treated in a non-commoditized way. For example, while bars of gold may be physically identical, a purchaser who is cognizant of the effect of mining on human and ecological well-being may distinguish between them based on the practices under which the gold was extracted.

While scholars outside of business tend to draw the "commodification" line at the market borderline, many scholars

118. In reality, the entry of corporations is neither a necessary nor sufficient condition for commoditization of the negative variety. Some state and non-profit educational institutions, for example, have adopted commodifying philosophies. *See* DEREK BOK, UNIVERSITIES IN THE MARKETPLACE: THE COMMERCIALIZATION OF HIGHER EDUCATION (2004).

inside worry about the commoditization of business and finance themselves. Many business organizations have had cultures that have included a feeling of pride in their product or in their historical legacy.[119] A number of commentators have lamented the tendency for recent waves of mergers and acquisitions by private equity firms to commoditize business itself, erasing aspects of social meaning, institutional identity, and professional ethics within the commercial world.[120] Others have contrasted "commodified" financial instruments to more traditional long-term banking relationships.[121] This shift contributed to the explosion of standardized securities of dubious worth that created the recent financial crisis.[122]

One could argue that the huge increases in CEO salaries seen in recent decades are partly due to managerial services being "commoditized" by way of adoption of neoclassical theories of "economic man." Unable to believe that any executive would have sufficient incentive to manage a business in the interest of shareholders (and/or employees, customers, the community, society, etc.) for a mere fair and reasonable salary, neoclassical economists invented the aforementioned "principal-agent theory."[123] Giving CEOs stock options and bonuses based on company share prices or other contingent goals would, it was believed, align their pecuniary interests with the shareholders' and lead to greater efforts towards profit maximization.[124] But if executives are opportunistic enough to

119. *See* sources cited *supra* note 110.

120. *See, e.g.*, Peter Osnos, *Buyers and Sellers*, CENTURY FOUND (Nov. 27, 2006), http://www.tcf.org/commentary/2006/nc1449 (protesting against "the notion of media businesses as commodities"); Julie Creswell, *Profits for Buyout Firms as Company Debt Soared*, N.Y. TIMES, Oct. 5, 2009, at A1 (description of the Simmons mattress company case).

121. *See, e.g.*, Raghuram G. Rajan, *Has Finance Made the World Riskier?*, 12 EUR. FIN. MGMT. 499, 504 (2006) (discussing "commodified" financial transactions as compared to long-term banking relations).

122. Douglas W. Diamond & Raghuram G. Rajan, *The Credit Crisis: Conjectures about Cases and Remedies*, 99 AM. ECON. REV. 606 (2009).

123. *See* Jensen & Meckling, *supra* note 41.

124. In marked contrast to economists' treatment of the male-dominated occupation of CEO, economists' attention to occupations dominated by women can go to the opposite gendered extreme. *See, e.g.*, Anthony Heyes, *The Economics of Vocation or 'Why Is a Badly Paid Nurse a Good Nurse'?*, 24 J. HEALTH ECON. 561 (2005) (arguing that the way to get good performance from nurses is to pay nursing *badly*, since this would presumably guarantee that only altruists would take the job). For a critique of Heyes's article, see Julie A. Nelson & Nancy Folbre, *Why a Well-Paid Nurse Is a Better Nurse*, 24 NURSING ECON. 127 (2006).

care only about their own compensation and not about the unique history and qualities of their company, they are also opportunistic enough to figure out how to game this system. A number have done exactly this, aiming to maintain a short-term illusion of profitability just long enough to cash in their options, or sitting as directors on each others' boards and granting each other big bonuses based on meeting routine goals. Others who are less opportunistic have resisted these temptations.

Commentators often use terms like "market values" or "business interests" to point to dehumanizing, social-meaning-depleting values of profit maximization at all costs.[125] The essence of deleterious commoditization, however, is the assumption that everything is interchangeable, commensurable, quality-less and quantifiable into a corporate "bottom line"—not something intrinsic in business or markets per se. We do business leaders, ourselves, and the world an extreme disservice if we impute to all businesses and markets only the "love-less" characteristics and motivations invented by the neoclassical model of economics.

VI. CONCLUSION

The sort of commoditization which is to be feared is not the simple entry of prices, money, or market relations into realms of significant human and social meaning. Commercial relations are often themselves saturated with social meaning and relationality. Rather, it is the entry of narrow, profit-maximization *values* and related specific structures that, by reducing the value of everything to its contribution to a "bottom line," threaten to drain human meaning.

The role of academics in economics, the other social sciences, and law in this process is a very important one. To the extent that we teach that firms *must* maximize profits or shareholder value because that is their "nature" or "purpose," we undermine the very social values that we believe we are defending. Not only do we perpetuate a myth, we promote a dangerously self-fulfilling prophecy.

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125. *See, e.g.*, David Loy, *Religion and the Market* (1997), http://www.religiousconsultation.org/loy.htm ("[M]arket values lead to a decline in the quality of our social relationships . . . .").

It is easy to think in "love versus money" terms, and many pressures in society and politics push in that direction. Because conventional narrow economic theory is currently elevated in prestige above the actual observation of economic life, challenging this dualism within scholarly work is often met with much condescension. If we are to have any hope at all, however, of creating a more humane economy, we need to consider real-world phenomena of "love *and* money," and explore the opportunities these present. Incorporating these into our theory and practice, we might have a chance of building an intellectual, moral, commercial, and political infrastructure that could sustain human and ecological life.