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

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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 supported neither by sound economic evidence and arguments, nor by 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 look like Newtonian physics. Among scholars of law, both misinformation and the use of University of Chicago-style economics have contributed to the belief's popularity. Among scholars and the public alike, the dualistic "love or money" view is appealing because of its simplicity and congruence with cultural gender norms. Reexamining the evidence, rather than adhering to common ideologies, this essay offers an unconventional analysis of corporate behavior and commodification.

Keywords: profit maximization, shareholder value, corporations, law, economics, gender, commodification, corporate social responsibility.

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I. Introduction

Does profit-seeking rule out direct concern for human well-being, environmental sustainability, and the public interest? Many would answer, "Of course." In contemporary Western culture, we tend to associate profits, money, and markets with coldness, distance, and self-interest. Care and concern, on the other hand, are associated with love, and thought to reside elsewhere—in families and interpersonal relations, or in benign images of community and public service.

This dualistic 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 major ongoing controversies. One of these is concerned with 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 the present article—is about the social role of business. If businesses single-mindedly pursue profits, then it seems that demanding that they become better social actors—more humane in their treatment of employees, more green in their environmental impact, more concerned about the effect of what they sell on health and well-being in their home countries and abroad—is like asking for water from a stone. There is a widespread belief that firms must *maximize* profits—that is, 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 would reduce their profits by even one dollar.

The idea that firms maximize profits, while extremely powerful at the level of ideology and broad social belief, is, however, vacuous at the levels of empirical observation and quality social science theorizing. It is not seen in practice nearly as often as generally assumed, nor mandated by the "laws of economics," nor commanded by statutory or case law. Rather, this essay will demonstrate, 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.

[1] See, for example, discussions in MARTHA ERTMAN & JOAN WILLIAMS, Rethinking Commodification: Cases and Readings in Law and Culture (NYU Press 2005), and other essays in the present "For Love or Money?" symposium. I have written on this previously, for example in NANCY FOLBRE & JULIE A NELSON, *For Love or Money - or Both?*, 14 J. Econ. Perspect. 123-140 (2000); JULIE A. NELSON, Economics for Humans (University of Chicago Press 2006).

To be very clear, this essay does not deny that great harm can be done by treating traditionally non-commercial things such as childcare, reproduction, human organs, public old-growth forests, or community water rights as though they are interchangeable "widgets" that can be bought or sold with no concern except for their market value. It 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 and informally regulating how this provision is done. It does not deny that firms generally do try to make profits (among other goals).

What this essay *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 consequences of business decisions. Second, it puts the entire burden for maintaining the moral order onto non-business entities, such as government, nonprofits, and families. But such organizations may be (and too often are) overwhelmed, lack resources, or—romanticized images aside—themselves be problematic (e.g., corrupt, mismanaged, or abusive). This point of this essay is not to take a Polly-Anna 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 essay 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, it examines how the rhetoric of profit maximization has played out within the—extremely mixed and contradictory—scholarly literature on United States corporate law. Then, 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 given.

II. Profit Maximization and Economics

The core model of mainstream economics, as it is taught across 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 (market-) valued way possible—that is to say, efficiently.

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

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

A fair amount of confusion surrounds key ideas and terms in mainstream economic theory. People have heard, correctly, that the core model predicts that competition will drive firms, inexorably, to have to maximize profits. Typical of his 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 will be squeezed out of the market."[2]

But people often misunderstand the specific meaning economists give to the terms "competition" and "profit," and so misinterpret much empirical evidence on market behavior as supporting their arguments, when in fact such evidence works *against* them. Some people—and perhaps in particular those in the "law and economics" field—also tend to associate economic analysis with one particular brand of economics, that 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.

Profit

Take first the issue of "profit." The phrase "profit maximization" is often identified directly with "greed," especially by commentators from the political left. As a result, spectacular compensation packages being granted to Chief Executive Officers (CEOs) may, for example, 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, in fact, pretty much the same thing. But what is often missed in the popular mind is profits and executive compensation are *not* the same thing in modern publically-traded corporations—the sort of businesses that now dominate economic activity in many spheres.

Corporations are complexly structured social organizations. The owners of equity shares in a firm—that is, 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 in, and all necessary costs—including the costs of compensating 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

[2] KENT GREENFIELD, *Progressive Visions of the Corporation: Reclaiming Corporate Law in a New Gilded Age*, 2 Harv. L. & Pol'y Rev., 9 (2008).

often taken as roughly synonymous. A corporation has a Board of Directors which is supposed to oversea 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. So "profit maximization" or "maximizing value for the shareholders" should mean *not* paying any more than is strictly necessary to get managerial talent—that is, it should require keeping a tight rein on CEO compensation.

The phenomena of spectacular CEOs compensation—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 profits. Shareholders are well aware of the distinction between profits and executive compensation, and are among the groups most outraged by the skyrocketing compensation packages of recent decades. Articles in investor-oriented media outlets such as *Fortune*, the *Wall Street Journal*, and *The Economist* attest to this.[3]

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, about corporate expansions and mergers, and about 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 (think Windows Vista) or to charge outlandish prices (think airline fares between underserved cities) may just seem to follow from the "drive" for profits. Firms "compete" with each other for the highest profits, it is often thought, by strategizing to get the largest market share, provide the minimum possible in terms of product, and price the highest. While the occurrence of such phenomena in actual commerce is not in doubt, this 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 Econ 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, relevant aspects of the future, etc.—the "perfect information" assumption).[4] 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

[3] RIK KIRKLAND, *The Real Ceo Pay Problem*, Fortune June 30, 2006..CARI TUNA, *For Some Ceos, the Perks Keep Flowing*, Wall Street Journal April 3, 2009; , *Nay on Pay: America's Shareholders Find a Voice to Condemn Undeserved Compensation*, The Economist May 13, 2010.
[4] E.g., WILLIAM J. BAUMOL & ALAN S. BLINDER, Microeconomics: Principles and Policy 194 (Thomson Southwestern 10th ed. 2006).

suppliers. And the amount of economic profit each seller would make, the theory tells us, would be *zero*.[5] A firm that does not do its absolute utmost to keep revenues up and costs down, then, would, in this story, make negative economic profits and fail.[6]

Strategically competing to increase market share is *not*, then, 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.[7] If their market power is firmly shored up—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 above-normal profits for long periods of time, even without operating in a particularly efficient way.[8] They *could* still, in theory, pursue maximum profits (and mainstream theory—the history of which will be discussed below—assumes that they do), but there is no market discipline "stick" that tells them that they *must* do so.

Efficiency

In the theoretical situation of perfect competition, every resource would end up being put to its most (market-) valued use. An inefficient situation is one in which more value could be made from the same resources, or the same product could be made in a less costly way. Why would anyone choose to have less when they could have more? Some economists liken staying in an *in*efficient 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. Therefore—one more step in this logic tells us—whatever we observe arising from voluntary exchange in competitive markets must be efficient.

While sometimes thought of as "the" economic way of explaining things, arguments from efficiency are in fact most characteristic of one particular school of economics, that associated with the University of Chicago economics department. Adapting, in broad brush, Darwinian-like arguments about competition eliminating weak

[5] E.g., 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.
[6] This sort of "market discipline" competition would have salutary effects, according to mainstream economic theory, 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.
[7] Mainstream 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.
[8] E.g., BAUMOL & BLINDER, Chap. 11 and 12.

(that is, inefficient) actors, they have great faith in the "self-regulation" of markets.[9] 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 this school of economics, through the influence of scholars such as Gary Becker and Richard Posner.

Many other economists, however, beg to differ. The standard Principles of Economics textbook approach starts with perfect competition, but then—even for beginning students—makes the picture more complicated. The textbooks go on to discuss monopoly and oligopoly, externalities, public goods, imperfect information, and other causes of "market failure"—that is, cases in which reliance on markets leads to inefficient outcomes.[10] And many contemporary economists go beyond than the standard textbook critiques, discussing how the actual 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.[11] While most economists

[9] See, for example, the arguments used in the first few pages of EUGENE F. FAMA & MICHAEL C. JENSEN, *Separation of Ownership and Control*, 26 J. Law Econ. 301-325, 301 (1983), a widely-cited article on corporate control. It begins with the statement "Absent 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," citing research on "natural selection."

[10] 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, and/or that they may even deliberately make lower-than-possible profits in order to avoid attracting government regulatory attention. Externalities (such as pollution) mean that there are benefits or 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 can result in *ex post* inefficient outcomes. Textbooks generally advocate governmental action in breaking up or regulating monopolies and providing public goods, and 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 predilections of a textbook's authors, but a textbook that completely ignored these issues would be considered seriously incomplete.

[11] See, for example, discussions of behavioral economics (e.g., COLIN F. CAMERER, et al., Advances in Behavioral Economics (Princeton University Press 2003)), economic history (see below), "New" Institutionalist economics (e.g., OLIVER E. WILLIAMSON, The Economic Institutions of Capitalism (Simon and Schuster 1998)), and Keynesian economics (e.g. PAUL R. KRUGMAN, The Return of Depression Economics (W. W. Norton & Company 2000)). While these varieties of economics tend to follow the mainstream in their definition of economics and their methods, a variety of "heterodox" schools offer deeper critiques. See, for example, "Old" institutional economics (e.g. GEOFFREY M. HODGSON, *The Approach of Institutionalist Economics*, 36 J. Econ. Lit. 166-192 (1998)), Post-Keynesian economics (e.g. PAUL DAVIDSON, The Keynes Solution: The Path to Global Economic Prosperity (Palgrave Macmillan 2009)), socio-economics (e.g. articles in the *Review of Social Economy),* radical economics (e.g. articles in the *Review of Radical Political Economy),* and feminist economics (discussed later in this essay).

Consider, to get a flavor of these arguments, two much-discussed critiques of the idea that efficiency will always win out. The first, from the field of economic history, concerns the contemporary prevalence of the QWERTY keyboard. While a simple argument from efficiency would dictate that this keyboard layout must have dominated alternatives because of its superiority in speed or ease of use, the actual history is quite different. It was invented as a way to *slow down* typing during the period in which jamming of mechanical keys was a problem (see PAUL A. DAVID, *Clio and the Economics of QWERTY*, 75 Amer. Econ. Rev. 332-37 (1985). The second example comes from noting that it *takes time* for competitive recognize the logic of the dollars-on-the-sidewalk argument, we also recognize that in the real world choices are not always—if ever—so easy or so clear.

There is a popular belief that only profit-maximizing, efficient firms can survive the evolutionary pressures of competitive markets. As a logical corollary, it follows that the firms we see (if we have sufficient belief in market competition) *must be* efficient and profit-maximizing. The result is a tautology: "What we see must be efficient because we have assumed efficiency."[12] One should be aware, however, that this is only a minority, and extreme, view among economists, and not "the" economic approach.

B. The Empirical Evidence: Business Leaders Face Choices

So the economic-theory-dictates-a-drive-for-market-share story about profit maximization mixes up two very different meanings of "competition." Which meaning of the term—razor's edge conditions forcing zero-profit conditions on anonymous firms (as assumed in the Chicago school), on the one hand, or strategic jockeying among large and powerful corporations, on the other—seems to be empirically more important, in contemporary industrialized economies?[13]

The Reality

Wal-Mart, ExxonMobil, IBM, Verizon, Microsoft, Goldman-Sachs, Citibank, and the like 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 to them, they 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

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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." That is, perhaps what actually matters most for economic analysis and human life is in the (possibly inefficient) "short run."

[12] The Chicago school economists have, of course, replies—and often rather clever and elegant ones—to those who would 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, 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.

[13] The point here about importance is a *relative* one. Some industries, such as subcontracted clothing assembly, are, in fact, very competitive on a global scale. Economists sometimes talk about "dual-sector theory"—the idea that economies can be dominated by an oligopolistic center, surrounded by a competitive fringe. See NEVA GOODWIN, et al., Microeconomics in Context 421 (M.E. Sharpe Second ed. 2008).

on acquisitions binges, or manage in a lazy and antiquated fashion.[14] 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.

They may also—since information in the real world is far from "perfect"—do things such as invest in large quantities of dodgy assets. The recent financial crisis has, in fact, presented quite a challenge to the economics profession. Most economists now believe 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[15]—and even some with notably conservative or Chicago leanings[16]—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.[17]

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 a powerful force in economics, akin to gravity in physical science, it is far from the *only* thing influencing economic behavior.

Nor is the point to deny that greed-fed pursuit of money and/or power can often be behind the decisions of board members and executives. The point here is that *there is considerable empirical evidence that many firms—and especially large, powerful ones—remain in business and even 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, by "profit maximization," simply mean to refer more vaguely to greed, or monetary incentives, or making *some* profit. But, for considering the role of "love" in business relations—the role

[14] 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. Perspect. 203-224 (2010).
[15] E.g., PAUL KRUGMAN, *How Did Economists Get It So Wrong?*, New York Times (2009).
[16] E.g., EDMUND L. ANDREWS, *Greenspan Concedes Error on Regulation*, New York Times October 23, 2008; JOHN CASSIDY, Rational Irrationality, *Interview with Richard Posner*, http://www.newyorker.com/online/blogs/johncassidy/2010/01/interview-with-richard-posner.html (January 13, 2010).
[17] A notable exception is the case of University of Chicago economist Eugene Fama, creator of "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, Teflon-coated belief in markets, competition, and efficiency, combined with a strong tolerance for odd reasoning. Fama continues to deny that asset bubbles can exist. See JOHN CASSIDY, Rational Irrationality, *Interview with Eugene Fama*. http://www.newyorker.com/online/blogs/johncassidy/2010/01/interview-with-eugene-fama.html (January 13, 2010).

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 their employees, communities, customers, creditors, the natural environment, or society and humanity at large—groups often referred to as corporate "stakeholders"[18]—if such action would damage profits to even the slightest degree.

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."[19] Some might argue that, 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. But for thinking about the role of business in society, and about likely company actions over the long term and 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 all hopes for responsible behavior on government legislation and regulation, consumer pressure, or the raising of a completely "alternative" (e.g. cooperative) economy. If so, we must assume that corporate actions that appear to be in the public interest are always merely cosmetic, instrumental, and contingent. Or are corporations 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, the idea that they may be able to commit their own (considerable) energies to social and environmental good becomes an opportunity worth considering.

The empirical evidence suggests that many firms *are* able to diverge from profit maximization in order to choose to do socially deleterious things, and still continue on. 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

[18] R. EDWARD FREEMAN, Strategic Management: A Stakeholder Approach (Pittman 1984).
[19] See, for example, ROY M. SPENCE, It's Not What You Sell, It's What You Stand For: Why Every Extraordinary Business Is Driven by Purpose (Penguin Group 2009); RAJENDRA S. SISODIA, et al., Firms of Endearment: How World-Class Companies Profit from Passion and Purpose (Wharton School Publishing 2007); RIANE EISLER, The Real Wealth of Nations: Creating a Caring Economics (Berrett-Koehler Publishers 2008); MARTIN CALKINS & JONATHAN B. WIGHT, *The Ethical Lacunae in Friedman's Concept of the Manager*, 11 J. Markets Morality 221-238 (2008).

shareholders above any other goal. But the status of this doctrine is much in dispute. Debates in favor of and against it are said to go back to a famous debate in the 1930s between Adolph A. Berle Jr. and E. Merrick Dodd, Jr.,[20] and continue in high volume today. To an outsider coming to these legal debates the divergence of contemporary opinions, and the degree of confidence with which they are variously asserted, are striking.

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.[21] Or that while it wasn't clearly the law in the past, it is now clearly the law.[22] Or that while there are some exceptions in practice, it is still the dominant legal understanding[23] and force guiding business decisions,[24] so that new or reformed rules for enterprise would need to be established to permit the pursuit of social goals.[25]

Proponents interpret laws related to fiduciary duty as prescribing maximization of shareholder value. Legal cases often cited in favor of shareholder primacy include Dodge vs. Ford ("A business corporation is organized and carried on primarily for the profit of the stockholders")[26] and Revlon (once a firm is being sold, the directors should aim at

[20] Shareholder primacy was argued by ADOLF A. BERLE, JR., *For Whom Corporate Managers Are Trustees: A Note*, Harv. L. Rev. (1932) A broader view was argued by E. MERRICK DODD, JR., *For Whom Are Corporate Managers Trustees?*, 45 Harv. L. Rev. (1932).

[21] For example, Alissa Mickels refers to "the *historical* role of making a profit" in 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. 271-303, 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, that 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 Iowa J. Corp. L., 711-12 (2006).

[22] E.g., "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…Corporations came to be seen as supremely private entities, whose primary purpose was making money" in GREENFIELD, 6. Or " 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" in HENRY HANSMANN & REINIER KRAAKMAN, *The End of History for Corporate Law*, 89 Georgetown Law Journal 468 (2001).

[23] E.g., "Scholars claim that a corporate manager's only objectives are to sustain monetary growth for the company and to increase company and shareholder value" in MICKELS, 282.

[24] E.g., "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," in GREENFIELD, 8-9.

[25] See, for example, the call for alternative legal forms allowing "For-Benefit" corporations in MICKELS, 279-280 ; the call for "reforms" in GREENFIELD, 398 , and the call for a standard of "care" in CHERI A. BUDZYNSKI, *Can a Feminist Approach to Corporate Social Responsibility Break Down the Barriers of the Shareholder Primacy Doctrine?*, 38 The University of Toledo Law Review (2006).

[26] Dodge V. Ford Motor Co., 170 N.W. 668, (Michigan 1919).

"getting the best price for the stockholders").[27]

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.[28] In Re the Walt Disney Company Derivative Litigation, the Delaware courts explicitly adopt 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."[29]

Some argue that directors who fail to maximize value for shareholders will commonly face "shareholder derivative suits," in which shareholders bring their complaints about management decisions before a court.[30] Fear of such suits is thought to goad managers to stay on the profit-maximization straight and narrow road. Or, drawing on arguments from economics, it is often argued that non-profit-maximizing firms will be subject to hostile takeovers or other forms of "market discipline."[31] Sometimes, it is argued that profit maximization has a noted advantage over other possible goals for firms, because of its "tidy," single-valued, relatively simple nature, as compared to more vague and potentially conflicting balancing of multiple stakeholder interests.[32] Some argue that shareholder primacy, with the success of management decisions measured by stock market prices, has been proved by economic logic to be the most efficient mode of organization.[33] It is pointed out that the point out the Principles of Corporate Governance of the American Law Institute (ALI) describe the corporate objective as "business activities with a view to enhancing corporate profit and shareholder gain."[34] One of the example the ALI discusses concerns keeping a money-losing manufacturing plant open indefinitely for the sake of the workers. This is not considered justifiable.[35]

[27] Revlon, Inc. V. Macandrews & Forbes Holdings, Inc., 506 A.2d 173, ((Del. 1986).
[28] Equity-Linked Investors, L.P. And Equity-Linked Investors-Ii, Plaintiffs, V. Thomas H. Adams, Sharon B. Webster, Paul O.P. Ts'o, Robert E. Klem, Genta Incorporated, the Aries Funds and Aries Domestic Fund, L.P., Defendants, (Delaware 1997).
[29] In Re the Walt Disney Company Derivative Litigation, (Delaware 2005). I thank William Bratton for alerting me to the last two cases.
[30] MICKELS, 273.
[31] For instance, GREENFIELD, 9 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 will be squeezed out of the market."
[32] See citations in FAIRFAX, n21. See also a notable statement of this from the business literature in MICHAEL C. JENSEN, *Value Maximization, Stakeholder Theory, and the Corporate Objective Function*, 12 Business Ethics Quarterly 235-256 (2002).
[33] See "the market value of the publicly traded corporation's shares is the principal measure of its shareholders' interests" and "this model offers greater efficiencies than the principal alternatives" HANSMANN & KRAAKMAN, 441, 449.
[34] AMERICAN LAW INSTITUTE, Principles of Corporate Governance: Analysis and Recommendations, Sec. 2.01 § 1 (1994).
[35] Id. at Sec 2.01, comment i, illustration 19.

Others are somewhat more careful in their endorsement of shareholder primacy, noticing that while they believe it to be the law in theory, its enforcement in practice is rather compromised by the "business judgment rule." That is, since it can be nearly impossible in practice to predict whether a particular business decision will lead to good outcomes or bad, the 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 this more sophisticated literature, the problem is often seen of one of making corporations *more* responsive to shareholders so that a corporation will do what it presumably *should* do (i.e., maximize profits). Borrowing from economic "principal-agent" theory, a voluminous literature has arisen concerning how to properly "incentivize" executives with salary and bonus packages.[36]

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.[37] Some statements on the "pro" side 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."[38]

B. The Arguments Against

No one denies that creating returns for shareholders is generally an important corporate goal. But the people who argue against shareholder primacy see 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, and that it has never (to any appreciable extent) *been* the law.[39] They point out that a mandate to maximize shareholder value is not based in statutory law, and only very rarely and in narrow cases applied in case law.

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[36] MICHAEL C. JENSEN & WILLIAM H. MECKLING, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Finan. Econ. 305-360 (1976).

[37] See quotes in GREENFIELD, 8. Interestingly, however, Friedman went on to state that executives operate within an ethical context: Their goal should "be to make as much money as possible *while conforming to the 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*, New York Times Sept. 13, 1970, at, emphasis added.)While clearly an endorsement of shareholder primacy, Friedman's view is hence not exactly the simple endorsement of profit-at-any-cost that it is often taken to be.

[38] HANSMANN & KRAAKMAN, 441. See also, "Shareholder primacy prevails today as the dominant view..." and "Today's mainstream assumes maximal returns to the firm as the only end..." in WILLIAM W. BRATTON & MICHAEL L. WACHTER, *Shareholder Primacy's Corporatist Origins: Adolf Berle and the Modern Corporation*, 34 Iowa J. Corp. L., 100,102 (2008).

[39] See "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" in EINER ELHAUGE, *Sacrificing Corporate Profits in the Public Interest,* 80 New York University Law Review 733-869, 738 (2005).

Contrary to popular belief, state laws that charter corporations do not mandate profit maximization.[40] Even in Delaware, where many corporations are chartered because of advantages in its codes, the corporate code states that corporations can be formed "to conduct or promote any lawful business or purpose."[41] Nor do firms choose to incorporate shareholder primacy as a goal in their own charters.[42] On the contrary, many seem eager to eager to express their dedication to a broader set of responsibilities.[43]

Those who dispute shareholder primacy point out that fiduciary duty is generally interpreted as the duty of officers to serve "the corporation"—vaguely defined, and inclusive of interests beyond shareholder financial interest. 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.[44] They point out the Principles of Corporate Governance of the American Law Institute, while recognizing the goal of shareholder gain, also allows consideration of ethical issues and diversion of some resources to uses that serve public ends.[45] A decision to keep 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 to be consistent with legal principles.[46]

Opponents point out that the often quoted lines from Dodge vs. Ford—a case from 1919—were merely judicial dicta, and argue that the decision on the case was actually about the duty of majority shareholders to not trample on the rights of minority shareholders, not about the social responsibility of business.[47] Equity-Linked Investors v. Adams is, likewise, evidence of 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 of workers, communities, the environment, and so on. 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."[48] They point out that, shortly before Revlon, the Delaware courts in Unocal[49] 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)."[50] They point to constituency statutes, adopted in a majority of states, that

[40] Id. at 738.
[41] LYNN A. STOUT, *Why We Should Stop Teaching Dodge V. Ford*, 3 Va. L. & Bus. Rev., 169 (2008)
[42] LYNN A. STOUT, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 75 Southern California Law Review 1189-, 1207 (2002).
[43] FAIRFAX; CLAUDIO LODERER, et al., *Shareholder Value: Principles, Declarations, and Actions*, 39 Finan. Manage. 5-32 (2010); AMARTYA SEN, *The Profit Motive*, Lloyds Bank Rev. 1-20 (1983).
[44] Self-dealing refers to a manager making decisions that serve his or her own personal advantage, rather than benefiting of the corporation—for example, misappropriating funds or hiring unqualified relatives.
[45] AMERICAN LAW INSTITUTE, Sec. 2.01. See also discussion in ELHAUGE.
[46] AMERICAN LAW INSTITUTE, Sec 2.01, comment i, illustration 20.
[47] STOUT, *Why We Should Stop Teaching Dodge V. Ford*; D. GORDON SMITH, *The Shareholder Primacy Norm*, 23 The Journal of Corporate Law 277-323 (1998).
[48] STOUT, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 1204. See also FAIRFAX.
[49] Unocal Corp. V. Mesa Petroleum Co.,, A.2d 493, (Del. 1985)
[50] Quoted in STOUT, *Why We Should Stop Teaching Dodge V. Ford*, 170.

explicitly give mangers the discretion to consider the interests of non-shareholder groups.[51] They emphasize that the "business judgment rule" gives directors and managers considerable leeway, in practice, in their decisions. A court will usually accept any business purpose expressed by managers at face value—or may even make up such a justification itself, should the managers fail to give one.[52]

They argue that, while hostile takeovers make the headlines, they are relatively rare in practice.[53] They point out specific cases of long-running firms that have shamelessly pursued goals other than profit maximization.[54] They argue that, in fact, the idea that there is one, identifiable "shareholder interest" to be pursued is, in fact, 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…"[55] Some use some more sophisticated arguments from economics—from options theory, contracting, and bargaining—to create logical arguments for a stakeholder view.[56]

Some literature on the "con" side claims that the dispute has been definitively settled: "the shareholder primacy argument has increasingly become a straw person among academics," writes Eric Talley in his essay "On the Demise of Shareholder Primacy."[57] He summarizes contemporary corporate laws as "'Don't jerk around any constituency too badly, and you'll be ok.'" [58]

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[51] ELHAUGE.

[52] See ERIC TALLEY, *On the Demise of Shareholder Primacy (or, Murder on the James Trains Express),* 75 Southern California Law Review 1211-1216, 1212-1213 (2002); ELHAUGE, 738. For the courts' invention of profit-related reasons, see the discussion of Shlenky v. Wrigley in STOUT, *Why We Should Stop Teaching Dodge V. Ford,* .

[53] For example, "one need not presume…that the specter of an acquisition constitutes a defining characteristic of a firm's identity" in TALLEY, 1212.

[54] E.g., "[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," p. 976 in MATTHEW T. BODIE, *Aol Time Warner and the False God of Shareholder Primacy*, 31 Iowa J. Corp. L. (2006). See also the discussion of differences between the goals behind book publishing resulting from changes in ownership and management at Random House in ANDRÉ SCHIFFRIN, The Business of Books: How the International Conglomerates Took over Publishing and Changed the Way We Read (Verso 2001).

[55] STOUT, *Why We Should Stop Teaching Dodge V. Ford*, 174. For another view on shareholder diversity, see WILLIAM BRATTON, *Supersize Pay, Incentive Compatibility and the Volatile Model of the Shareholder, 1 Va. L. & Bus. Rev. 55 (2006).* 1 Va. L. & Bus. Rev. (2006).

[56] TALLEY, 1214. See, for example, the efficiency arguments in the "Team Production" model of Margaret Blair and Lynn A. Stout, discussed by Stout in STOUT, *Bad and Not-So-Bad Arguments for Shareholder Primacy*, 1195-1199.

[57] TALLEY, 1214.

[58] Id. at 1214.

C. An Analysis

Those arguing the "pro" side, while they may grant that the "con" arguers have some valid points and that there are some exceptions to profit maximization, generally dismiss these as the (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, while relying to a very large degree on a particular, narrow body of economic theorizing. The profit maximization doctrine appears to operate far more strongly at the level of *theory or ideology,* than at the level of the actual practice of business management and corporate law. It seems, in short, to be a case of transcendental nonsense.[59]

To see how thoroughly the (faulty) Chicago-style, perfect-free-markets-and-efficiency argument has permeated this literature, consider again the case of the Walt Disney Company Derivative Litigation.[60] The case is, in fact, the classic sort of shareholder derivative suit that many imagine to be effective in enforcing profit maximization. Former Disney president Michael Ovitz had been granted a severance pay in an amount that the court acknowledged was "breathtaking." [61] A group of shareholders subsequently sued, alleging that when the CEO and board approved his pay and severance packages, they breached their fiduciary duty. The rhetoric of the decision makes it clear that this court believes 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—that executives who fail to do what the shareholders think they should be doing 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 for failures that arise from faithful management must come from the *markets*, through the actions of shareholders and the *free flow* of capital" and *not* from the courts.[62] Concluding that the decision-makers' actions, while falling "significantly short of the best practices of idea corporate governance," did not constitute gross negligence, the court invoked the business judgment rule.[63] Enforcement of "best practices," it said, should be left up to the free market.[64,65]

[59] FELIX S. COHEN, *Transcendental Nonsense and the Functional Approach,* 35 Columbia Law Review 809-849 (1935).
[60] In Re the Walt Disney Company Derivative Litigation, 6,7.
[61] Id. at 6.
[62] Id. at 7, emphasis added.
[63] Id. at 3.
[64] Another facet of the case illustrates the influence of Chicago economics, as well. 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 (146. Fischer Black and Myron Scholes both spent time in the University of Chicago economics department and, while they received a Nobel award for their work, it has since become quite controversial. Scholes's own investment company (LTCM) required a bailout from the Fed, and some suggest that popularity of the model contributed to the subprime crisis. (For one critique, see PABLO TRIANA, Lecturing Birds on Flying: Can Mathematical Theories Destroy the Financial Markets? (John Wiley & Sons 2009)).
[65] The ALI, in contrast, points out several weaknesses in relying on markets to enforce good management:

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

The influence of Chicago-style thinking, however, 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.[66] While theoretical arguments based on efficiency can be interesting, it should be kept 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 for why the legal system *should* endorse some particular goal or structure. But—some economists' elevation of efficiency to a *summum bonum* to the contrary—in this normative case it also needs to be kept in mind there are number of other worthy goals for corporate behavior besides efficiency. [67] These may include justice; fairness; commitment; aiding the needy, future generations, or the environment; practicalities of implementation, and so on. 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 a professors' pressing need for a simple answer to the question of what corporations do,"[68] and that by using something propounded by Ph.D. economists it "lends an attractive patina of scientific rigor" to the study of corporations.[69] This latter point brings us to the topic of economics and its status as a "science."

> 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. AMERICAN LAW INSTITUTE, 77.

The ALI gives these as reasons why oversight by a board of directors and its committees is important.

[66] STOUT, *Bad and Not-So-Bad Arguments for Shareholder Primacy*; JILL E. FISCH, *Measuring Efficiency in Corporate Law: The Role of Shareholder Primacy*, 31 Journal of Corporation Law (2006); ELHAUGE.

[67] For more on this, see IAN B. LEE, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 Delaware Journal of Corporate Law (2006).

[68] STOUT, *Why We Should Stop Teaching Dodge V. Ford*, 175.

[69] LYNN A. STOUT, New Thinking on 'Shareholder Primacy' (2005).

IV. The Invention and Persistence of an Ideology

While the idea that businesses make profits has probably been around as long as business has existed, the belief that firms must *maximize* profits originated in the discipline of economics. While 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 into the actual workings of firms, the real story is quite different. Profit maximization is, in reality, a theoretical invention, rooted deeply 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 sets these developments within a larger historical and social context.

A. The Roots of "Profit Maximization"

One can think of the historical development of this idea 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. Adam Smith, the Scottish philosopher and author of *The Wealth of Nations* (1776), is widely considered to be 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, by the invisible hand of the market system, to serve the social good. 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.”[70] The “wheels," he continued, can be made to move in harmony when one attends to “the connexions and dependencies of its several parts.”[71] The idea of the economy-as-machine had also appeared a few years earlier, in 1763, in the work of François Quesnay and the Marquis de Mirabeau, and was carried forward in a search for "laws" of economics that would be similar to the "laws" of Newtonian physics in the somewhat later work of classical economists Thomas Robert Malthus and Karl Marx.[72]

Sixty years later, a second stage in development of profit maximization theory was 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.[73] Mill did not deny that, empirically-speaking, people care

[70] ADAM SMITH, An Inquiry into the Nature and Causes of the Wealth of Nations 182 § X (C.J. Bullock ed., P.F. Collier & Son 1776[2001]).
[71] Id. at 185-6.
[72] ABHIJIT VINAYAK BANJEREE, *Inside the Machine: Toward a New Development Economics*, March/April Boston Review (2007).
[73] JOHN STUART MILL, *On the Definition of Political Economy; and on the Method of Philosophical Investigation in That Science*, London and Westminster Review 1-29 (1836).

about each other, are emotional, and are embedded in society. 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. Political Economy and geometry, he claimed, both "must necessarily reason…from assumptions, not from facts."[74] 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. Ethics would deal with conscience, duty, and other feelings relevant to a person's dealings with other people. Social economy would study life in society. 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 the comparative efficacy of means for obtaining that end"[75]—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 need to be complemented by the other sciences and experience.[76] But it was the elegance of his stripped-down agent, not these caveats, that has been carried forward in economic thought.

Even as Mill wrote, the stage was being set for the third stage in the development of "profit maximization": the discovery of a way of drawing an even 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. He modeled a monopolist as having a mathematical revenue function and a mathematical cost function, both of which increase with quantity of output it sells. 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.[77] Cournot's work, however, lay ignored for decades. It was later in the 1800s, in the period of time 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. 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, the dominant school to this day.

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 do arise when metaphors become atrophied—when they are so much a part of our thinking that we forget that they are simply tools, not literal

[74] Id. at 16.
[75] Id. at 12.
[76] Id. at 21, 24.
[77] INGRID HAHNE RIMA, Development of Economic Analysis 218 (Irwin Fourth ed. 1986).

representations.[78] The idea that firms not only *make* profit, they must *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.[79]

Table 1: Splitting the World: Western Philosophy

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

Rationality, autonomy, and math, for example, all have masculine cultural associations and have come to be associated with science and with power in the realms of market and state. Emotion, dependence, and qualitative analysis, on the other hand, have all been commonly seen as more feminine, and associated with the humanities or family life. This was institutionalized into notions of science during its Enlightenment-era origins, when, for example, the scientific enterprise was described as attempting to "raise a masculine Philosophy … whereby the Mind of Man my be ennobled with the knowledge of Solid Truths."[80]

It is critically important to note here that the point being made is about *how we think*, not about differences between men and women. Feminists often make a distinction

[78] 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

in ALFRED MARSHALL, *Mechanical and Biological Analogies in Economics in* Memorials of Alfred Marshall 314, (A.C. Pigou ed., 1956). His followers, however, have not been so cautious.

[79] EVELYN FOX KELLER, Reflections on Gender and Science (Yale University Press 1985); SANDRA HARDING, The Science Question in Feminism (Cornell University Press 1986); SUSAN BORDO, *The Cartesian Masculinization of Thought*, 11 Signs: Journal of Women in Culture and Society 439-456 (1986); BRIAN EASLEA, Witch Hunting, Magic and the New Philosophy: An Introduction to Debates of the Scientific Revolution, 1450-1750 (Humanities Press 1980).

[80] Henry Oldenburg, an early Secretary of the British Royal Society, quoted in KELLER, 52.

between "sex" and "gender," wherein "sex" is used to refer to biological differences between males and females, while "gender" refers to cultural beliefs constructed on the base of (preponderant) sexual dimorphism.[81] So 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.

Note, then, that the notion of "economic man," initiated by Mill, is doubly gendered—and doubly biased. First, in leaving out all aspects of human life having to do with bodies, emotion, dependence, or other-interest, it highlights only culturally masculine-associated notions of humanity, while blocking out consideration of feminine-associated ones. Not only are the occupations of feeding, cleaning, and nursing bodies (traditionally assigned to women) made invisible, but *everyone's* experiences of social life in general, and of dependency in childhood, illness, and old age in particular, are denied. "Economic man," in contrast to real humans, neither ever 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, 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 draws on 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.[82]

To sum up, classical and neoclassical economists did not discover a cold and heartless economic reality, and choose assumptions of self-interest and maximization because they best fit what they saw. 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 of late 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 we see the gendered association of economics with all things cold and antisocial has persisted. Within the feminist academic community, for example, 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 presumed profit-maximization, efficiency, reason-oriented status quo situation in

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[81] 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.
[82] KELLER; SUSAN BORDO, The Flight to Objectivity (State University of New York Press 1987). See also JULIE A. NELSON, Feminism, Objectivity and Economics (Routledge 1996).

corporate law with a more "feminist" (or, more accurately, stereotypically "feminine") orientation towards an "ethic of care," that includes emotion and abandons efficiency.[83] Sociologist Arlie Hochschild, in *The Commercialization of Intimate Life* (2003), 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," she writes uncritically, "female homemakers formed a moral brake on capitalism."[84]

Another example comes from an older piece on the topic of this symposium: the 1960 law review article "Love and the Business Corporation" by Bert S. Prunty. His rhetoric explicitly associates profit interests in corporate law with masculinity, and 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*."[85]

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."[86] Stimuli that correspond to an existing schema can be more rapidly processed than stimuli that must be individually sorted out and assimilated piece by piece. Among the ways of clustering, categorization according to associations with masculinity or femininity is one notable case.[87] For example, in one type of experiment, subjects are asked to push a particular keyboard button when a stimulus flashed on a screen matches certain condition. These find that combinations that are consistent with an association of "male" with "strong," or "female" with "weak," for example, which are common in the dominant American culture, tend to be on average more quickly processed than ones that combine "female" with "strong."[88] Moreover, research on "cognitive fluency" suggests that what we find *easy*, we are also more likely to think of as *true*.[89] While, as academics, we of course like to think of ourselves as more sophisticated than this, and more eager to delve into the complexities of things, it may be worthwhile reflecting on the extent to which common gender dualisms and the desire for quick and simple answers may be behind our

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[83] BUDZYNSKI.
[84] ARLIE RUSSELL HOCHSCHILD, The Commercialization of Intimate Life 8 (University of California Press 2003).
[85] JR. BERT S. PRUNTY, *Love and the Business Corporation*, 46 Virginia Law Review 467-476, 467, 475 (1960).
[86] STEVEN B. MOST, et al., *Auditory Stroop Reveals Implicit Gender Associations in Adults and Children*, 43 Journal of Experimental Social Psychology 287-294, 288 (2007).
[87] KRISTINE M. KNUTSON, et al., *Neural Correlates of Automatic Beliefs About Gender and Race*, 28 Human Brain Mapping 915-930 (2007); SANDRA LIPSITZ. BEM, *Gender Schema Theory: A Cognitive Account of Sex Typing*, 88 Psychological Review 354-364 (1981); BRIAN NOSEK, et al., *"Gender-Science IAT"*, Project Implicit. (2007), at https://implicit.harvard.edu/implicit/.
[88] KNUTSON, et al.
[89] DRAKE BENNETT, *Easy=True: How 'Cognitive Fluency' Shapes What We Believe, How We Invest, and Who Will Become a Supermodel*, Boston Globe January 31, 2010.

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 (gifts, assistance),[90] close relationships used in cold ways (abuse), emotions manipulated in markets (advertising), and rationality used at home (smooth household functioning takes thought). Most academics will acknowledge that our own motivations for work include both extrinsic ones (we need to support ourselves and our families) and intrinsic ones (e.g. intellectual stimulation). So simple dualisms such as male/female, money/love, and reason/emotion cannot be the whole story. Being able to think in ways *contrary* to existing schema is often interpreted as a sign of mental agility, in the psychological research. And not having blinders on us when we look at commercial life may open our eyes to richer realities and future possibilities.

VI. 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, which runs by its own "laws," 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, for example, takes as a starting point the social embeddedness of economic life.[91] A large business literature exists concerning the creation of value—for workers, consumers, communities and others, not just shareholders—within corporate institutions.[92] 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. A good deal of business relationships are governed by contracts that are not explicit, cold and distant—for good psychological reasons related to motivation and trust, as well as foundational problems of uncertainty and the lack of information.[93] A number of scholars of business contracts

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[90] VIVIANA A. ZELIZER, The Purchase of Intimacy (Princeton University Press 2005); VIVIANA A. ZELIZER, The Social Meaning of Money (Basic Books 1994).
[91] MARIANNE A. FERBER & JULIE A. NELSON, Beyond Economic Man: Feminist Theory and Economics (University of Chicago Press 1993); HODGSON; JOHN B. DAVIS & WILFRED DOLFSMA, *Social Economics: An Introduction and a View of the Field*, *in* The Elgar Companion to Social Economics, (John B. Davis & Wilfred Dolfsma eds., 2008).
[92] E.g., JAMES C. COLLINS & JERRY I. PORRAS, Built to Last (Harper Business 1994); FREEMAN,
[93] ERNST FEHR & ARMIN FALK, *Psychological Foundations of Incentives*, 46 Europ. Econ. Rev. 687-724, 594-595 (2002).

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.[94] Market relationships, while often envisioned as impersonal and "arm's length," may in fact include a considerable dose of more personal factors of reputation, trust, or collusion. Much scholarship in economic sociology and the social study of finance bring out these points.[95] 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, then, 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."[96]

Within the social science literature—and particularly areas of it influenced by Marxist thought or dealing with globalization—"commodification" (or, more rarely, "commoditization") generally means the commercialization of something not formerly bought and sold. The connotation is negative: It is assumed that placing a money price on something drains it of its intrinsic value and uniqueness, causing a loss to society of authentic values.

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. 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

[94] IAN. MACNEIL, Contracts: Instruments for Social Co-Operation (F. B. Rothman 1968); STEWART MACAULAY, *Relational Contracts Floating on a Sea of Custom? Thoughts About the Ideas of Ian Macneil and Lisa Bernstein*, 94 Northwestern University Law Review 775-804 (2000); GILLIAN K. HADFIELD, *An Expressive Theory of Contract: Form Feminist Dilemmas to a Reconceptualization of Rational Choice in Contract Law*, 146 Univ. of Pennsylvania Law Review 1235-1285 (1998).

[95] MARIEKE DE GOEDE, *Resocializing and Repoliticising Financial Markets: Contours of Social Studies of Finance*, 6 Economic Sociology: European Electronic Newsletter (2005); NEIL J. SMELSER & RICHARD SWEDBERG, The Handbook of Economic Sociology (Princeton University Press and Russell Sage Foundation 2nd ed. 2005); KIERAN HEALY & MARION FOURCADE, *Moral Views of Market Society*, 33 Annual Review of Sociology 285–311 (2007).

[96] A Google search for definitions of these terms will bring up all the examples given below, e.g. http://www.marxisteconomics.com/index.php?id=48, http://www.genderandhealth.ca/en/modules/globalization/globalization_glossary.jsp http://financial-dictionary.thefreedictionary.com/commodification, http://www.merriam-webster.com/dictionary/commoditize.

are recognizably different from each other along dimensions of quality, brand name, reputability of the supplier, relationship between the supplier and purchaser, and so on. 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 the product they sell will resist letting it becoming a widely-supplied, undistinguishable commodity. On the other hand, buyers of a good may often want the standardization—and often, also, lower prices from increased competition—that a degree of commoditization can bring. For goods and services that are commodities, in this sense, a buyer may simply look for the lowest price, since all other factors are held constant.

Where things get confused, it seems, 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, of course, from the more fundamental conviction that the economy is an a-social machine, and that businesses have no choice but to treat everything strictly according to their market values and contributions to profit maximization. This essay 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, for example, 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. [97] Even some types of goods normally called "commodities" may be treated in a non-commoditized way: 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 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. A number of

[97] 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 that treat faculty as interchangeable and expendable and students primarily as tuition-paying "consumers."

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.[98] Others have contrasted "commodified" financial instruments to more traditional long-term banking relationships[99]—a shift which contributed, in good part, to the explosion of standardized securities of dubious worth that created the current financial crisis.

One could argue that the run-up in CEO salaries is partly due to managerial services being "commoditized" by way of adoption of neoclassical theories of "economic man." Not being able to believe that any executive would have sufficient incentive to manage an 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." 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.[100] But if executives are opportunistic enough to 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. And a number have, 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 voting each other big bonuses based on meeting routine goals. Others who are less opportunistic have resisted the call.

Commentators often use terms like "market values" or "business interests" to point mean dehumanizing, social-meaning-depleting values of profit maximization at all costs. 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—and ourselves and the world—a extreme disservice if we impute to all businesses and markets only the "love-less" characteristics and motivations invented by the neoclassical model of economics.

[98] See, for example, protests against "the notion of media businesses as commodities" in PETER OSNOS, News & Commentary, *Buyers and Sellers*, http://www.tcf.org/list.asp?type=NC&pubid=1449 (Nov. 28, 2006) and the description of the Simmons mattress company case in JULIE CRESWELL, *Profits for Buyout Firms as Company Debt Soared*, New York Times October 5, 2009.

[99] See, for example, the discussion of "commodified" financial transactions as compared to long-term banking relations in RAGHURAM G. RAJAN, *Has Finance Made the World Riskier?*, 12 Europ. Finan. Manage. 499-533, 504 (2006).

[100] In marketed 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. ANTHONY HEYES, *The Economics of Vocation or 'Why Is a Badly Paid Nurse a Good Nurse'?*, 24 J. Health Econ. 561-569 (2005) argues 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. See NANCY FOLBRE & JULIE A. NELSON, *Why a Well-Paid Nurse Is a Better Nurse*, 24 Nursing Economics 127-130 (2006) for a critique.

VII. Conclusion

The sort of commoditization which is to be feared, then, is not the simple entry of prices, money, or market relations into realms of significant human and social meaning. Commercial relations, in fact, 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, then, 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 may believe we are defending. Not only do we perpetuate a myth, we promote a dangerously self-fulfilling prophecy.

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

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