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Using Religion to Promote Corporate Responsibility

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Introduction

Discussions concerning the appropriate role of law in regulating business entities have historically been conducted in amoral terms. Even discussions of corporate social responsibility have, more often than not, been couched in morally neutral language.¹ This is not a fact unique to discussions of the regulation of business entities. We have tended to avoid overt reliance on morals and religion in our discussions of law and public policy, preferring to root our political and legal principles in rationalism.² This has been

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¹ This hesitance to speak in religious terms includes the fact that religious statements on corporate social responsibility receive much less attention among legal academics than one might expect. One does not find very many people reacting to the statements made by the U.S. Bishops on economic justice, which had a lot to say about the stakeholder debate. See U.S. Catholic Bishops, *Economic Justice for All*, Pastoral Letter on Catholic Social Teaching and the U.S. Economy (1986); Vincent M. DiLorenzo, *Legislative and Public Policy Debate: Should the Social Viewpoints of Religions Groups Play No Role?*, 1 MARGINS 489, 493-495 (2001) (discussing the Bishops' statements regarding corporate social responsibility and the failure of academics to make use of the statement). One article that does take up the Bishops' statement very directly criticizes it on public policy grounds, suggesting that each of the ways the Bishops' statement might be translated into public policy is flawed. See Stephen M. Bainbridge, *The Bishops and the Corporate Stakeholder Debate*, 4 VILL. J. OF L. & INV. MGMT 3 (2002).

² Richard Garnett has observed that "John Rawls became 'one of the most influential political philosophers of the 20th century' in no small part by making the case that public arguments must sound in 'public reason' alone." Richard W. Garnett, *Christian Witness, Moral Anthropology, and the Death Penalty*, 17 NOTRE DAME J. L. ETHICS & PUB. POL'Y 541, 546-47 (2003) (citations omitted). Following the death of John Rawls, one commentator wrote that "Professor Rawls' goal was to prove that the case for redistribution of wealth flowed from rational discourse, not sloppy moralizing or ideological froth." Michael M. Weinstein, *Bringing Logic To Bear on Liberal Dogma*, N.Y. TIMES, Dec. 1, 2002, at p. 5. See also James Ottavio Castagnera, *Groping Toward Utopia: Capitalism, Public Policy, and Rawls' Theory of Justice*, 11 J.

particularly true of legal academics, who have tended to resist taking religion seriously as a part of their discipline, accepting as a matter of “conventional wisdom” that religion should be kept out of their debates about law and politics.³

To be sure, this resistance is starting to wear down, at least in some quarters, as academics and others explore the question of the extent to which religious values may be brought to bear on public policy debates.⁴ One can even find conference discussions devoted to “Religious Values and Corporate Decision-Making.”⁵

Nonetheless, it remains that the questions of the nature of the corporation and of the role of law in regulating corporate entities have most typically been approached through a rationalist and secular lens. This has led to a prevailing view of corporations as private market-regulated entities with no (or limited) responsibility beyond that of

TRANSNAT'L L. & POL. 297 (2002) (applying Rawlsian framework to argue for providing greater help for the disadvantaged segments of society); Timothy L. Fort, *Religion in the Workplace: Mediating Religion's Good, Bad and Ugly Naturally*, 12 NOTRE DAME J. LAW, ETHICS & PUB. POL'Y 121, 131-133 (1998) (describing “strict exclusionist position”).

³ “It is probably fair to describe the conventional wisdom among legal academics as follows: religious convictions should be kept out of debates about law and politics – or, if that is too much to ask, religious believers should at least translate their beliefs into secular language when participating in those debates.” William J. Stuntz, *Christian Legal Theory*, 116 HARV. L. REV. 1707, 1711 (2003). See e.g., KENT GREENAWALT, RELIGIOUS CONVICTIONS AND POLITICAL CHOICE 91 (1988) (opining that “a liberal society should not rely on religious grounds to prohibit activities that either cause no secular harm or do not cause enough secular harm to warrant their prohibition”); Kent Greenawalt, *Religion and American Political Judgments*, 36 WAKE FOREST L. REV. 401, 411 (2001) (arguing for limited use of religious reasoning in public realm). But see MICHAEL PERRY, LOVE AND POWER: THE ROLE OF RELIGIONS AND MORALITY IN AMERICAN POLITICS (1991) (arguing for full participation by religion in politics).

⁴ See, e.g., MICHAEL W. MCCONNELL, ROBERT F. COCHRAN, JR., & ANGELA C. CARMELLA, CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT (2001). Entire symposia have been devoted to the question of what role religious beliefs should play in a pluralistic society. See e.g., *Symposium on Religion in the Public Square* 17 NOTRE DAME J. L. ETHICS & PUB. POL'Y (2003).

⁵ Fordham University School of Law held a conference with that title on February 23, 2004, devoted to discussion questions such as “What may be gained by bringing religious values to bear on corporate decisionmaking? What may be the concerns and pitfalls?”

maximizing the profit of shareholders and of corporate law as having a limited role in regulating corporate affairs.⁶

The consequences of this view of the corporation are not pretty. Although it may be technically correct to speak of corporations as privately-owned entities, large publicly held corporations, because of their size and power,⁷ have potential to do tremendous harm and create enormous impacts that extend far beyond their owners. In too many respects, those corporations have used that power abusively; one does not have to look hard to see examples of corporations causing harm to third parties with whom the corporation deals. Even beyond the well-publicized scandals that have been so pronounced in the last several years, we see corporations regularly:

- Treating employees as commodities or factors of production, trading off employee safety for profit⁸ or laying off massive numbers of employees even while executives are paid increasingly massive amounts of compensation,⁹ contributing to rising income inequality in the United States.¹⁰

⁶ See *infra* text accompanying notes 62-74.

⁷ The market capitalization of U.S. publicly held corporations is about \$15 trillion. Sec. Indus. Ass'n, 2002 Securities Industry Fact Book (2002), available at http://www.sia.com/research/pdf/2002Fact_Book.pdf.

⁸ See David Barstow, *Strong Criminal Penalties Sought for Violations That Kill Workers*, N.Y. TIMES, Apr. 28, 2004, at A13 (reporting results of NYT analysis of two decades of safety inspection data that the death of 2197 workers resulted from willful safety violations by employers); David Barstow, *U.S. Rarely Seeks Charges for Deaths in Workplace*, N.Y. TIMES, Dec. 22, 2003, at A1 (observing that between 1982 and 2002, OSHA investigated over a thousand cases where it concluded that “workers had died because of their employer’s ‘willful’ safety violations”); Dennis O’Connor, *By Their Fruits You Shall Know Them*, U.S. CATHOLIC, May 2004, at 12, 13 (discussing 1998 allegations that Chiquita “forced workers to apply pesticides and herbicides to crops without wearing protective clothing”).

⁹ Donald Coxe, *The Job “Loss” Recovery*, MACLEAN’S, Feb. 9, 2004, at 37; Richard J. Newman, *Big Worker Blues*, U.S. NEWS & WORLD REPORT, Feb. 9, 2004, at 36; Sarah Anderson et al., *Executive Excess 2003: CEOs Win, Workers and Taxpayers Lose (10th Annual CEO Compensation Survey)*, The Institute for Policy Studies and United for a Fair Economy (Aug. 26, 2003), available at <http://www.ufenet.org/press/2003/EE2003.pdf>. As one example of disparate treatment between executives and rank and file employees, in the weeks prior to the November 2001 Enron bankruptcy filing, rank and file employees and retirees who requested payments of deferred compensation amount owed to them were denied while a few dozen executives were paid out approximately \$32 million from deferred compensation plans. See Eric Berger, *The Fall of Enron*, HOUSTON CHRONICLE, Aug. 4, 2002, at p.A1. This is not

- Ignoring the impact of the communities within which the corporation does business, by engaging in activity damaging to the environment.¹¹
- Ignoring the effects of corporate activity on the broader global population, engaging in or permitting contracting parties to engage in human rights violations

unique. It is generally the case that “bankruptcies have been lucrative for a few employees—namely, corner office types who have reaped seven-figure retention bonuses,” while “lower-level employees are absorbing a larger than ever share of bankruptcy’s losses.” Kim Clark, *Bankrupt Lives*, U.S. NEWS & WORLD REPORT, Sept. 16, 2002, at p.52. See also Alex Berenson, *From Coffee to Jets, Perks for Executives Come Out in Court*, N.Y. TIMES, Feb. 22, 2004, at A1 (describing recent examples of excessive executive perks, including those of Tyco Corp.’s former chairman and CEO, Dennis Kozlowski and Hollinger International’s former chairman, Conrad M. Black).

As one commentator observed, “the vast majority of American executives see employees as costs to be cut – and they have been cutting vigorously in the last several years.” Wayne F. Cascio, *Corporate Restructuring and the No-Layoff Payoff*, 7 IRRA PERSPECTIVES ON WORK 4 (2003). Professor Marleen O’Connor, examining corporate behavior over the last two decades, has observed that corporations have restructured their social contract with workers, creating a new relationship under which “employees work longer hours, encounter more intensified workplace demands, less job security, and stagnating wages. See Marleen A. O’Connor, *Sustainable Corporate Governance and Flexible Labor Markets: Recognizing the Family as Corporate Stakeholder*, Paper Prepared for the International Institute for Corporate Accountability and Governance, May 9, 2002, at p.2.

¹⁰ KEVIN PHILLIPS, WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH xiii, 123 (Broadway Books, N.Y. 2002) (discussing growing gap between rich and poor and increased concentration of wealth by fewer and fewer persons); Paul Krugman, *For Richer: How the Permissive Capitalism of the Boom Destroyed American Equality*, N.Y. TIMES MAGAZINE, Oct. 20, 2002, at p.62, 64 (discussing contribution of explosive growth in executive compensation to rising income inequality in the U.S.).

¹¹ Examples of allegations and findings of environmental damage by U.S. corporations both in other countries and in the U.S. are numerous. Colonial Pipeline Co. will pay a \$34 million fine, the largest civil penalty in EPA history, for gross negligence contributing to several spills that released 1.45 million gallons of oil, *Pipeline Company to Pay \$34 Million for Spills*, N.Y. TIMES, Apr. 2, 2003, at A11. ChevronTexaco is currently facing suit in Ecuador for dumping massive amounts of toxic waste and oil while extracting oil from the Ecuadorean Amazon, resulting in environmental damage. See Juan Forero, *Texaco Goes on Trial on Ecuador Pollution Case*, N.Y. TIMES, Oct. 23, 2003, at W1. And no one has forgotten Union Carbide (now owned by Dow Chemical) and Bhopal. Within the United States, the EPA recently issued a citation against the 3M Corporation in Illinois for failing to adequately test and monitor pollutants known to cause central nervous system and other problems. See Press Release, *EPAA Cites 3M for Clean-Air Violations* (Sept. 2, 2003). Oil company Venoco recently agreed to payment of a penalty in connection with pollution violations adversely affecting a high school in Beverly Hills. See Martha Groves, *Los Angeles; Beverly Hills Oil Rig to Pay Fine; Venoco Agrees to \$10,000 Penalty for Pollution Violations at High School. The Company Also Will Install Monitoring Equipment*, LOS ANGELES TIMES, Oct. 21, 2003, at B3. A General Electric New Jersey site has recently been criticized as an imminent public health hazard because it contained levels of human toxin mercury that required the relocation of sixteen families and 20 businesses from the area. See Joann Castagna, *Corps and EPA Remediate New Jersey Site*, Sept. 8, 2003, available at www.nan.usace.army.mil/business/prjlinks/envt/pdf/090803.pdf.

or otherwise contributing to the widening inequality of income between the haves and have-nots in third-world nations.¹²

Nor, despite viewing themselves as concerned primarily with the well-being of their owners,¹³ do corporations adequately safeguard the interests of their own shareholders. We hear increasing accounts of:

- Wasting of corporate assets through various forms of compensation mechanisms and reimbursement of personal executive expenses.¹⁴

¹² For example, workers in Reebok factories in India were subject to numerous human rights violations, apparently with the awareness of Reebok. See Bernard D’Mello, *Reebok and the Global Footwear Sweatshop*, MONTHLY REVIEW, Feb. 2003, at 26. In Burma, Unocal worked with the military regime to install the Yadana pipeline project, despite knowledge of their human rights abuses. The military, which provided security for the project, committed human rights violations against local communities along the pipeline route, including rape, torture, forced labor, summary executions and displacement of communities. Seth Stern, *Business Targeted for Rights Abuse; Case Against Unocal Tests Whether Big Global Firms Can Be Sued for Aiding Regimes, such as Burma, Labeled as Human-Rights Violators*, THE CHRISTIAN SCIENCE MONITOR, Sep. 4, 2003, at 2. See also Claire Moore Dickseron, *Ozymandias as Community Project: Managerial/Corporate Social Responsibility and the Failure of Transparency*, 35 CONN. L. REV. 1035, 1048-51 (2003) (discussing Enron human rights abuses in India); Peter Ford, *Redefining Social Responsibility; Through a New Coalition, Apparel Companies Blow the Whistle on Their Own Suppliers*, THE CHRISTIAN SCIENCE MONITOR, Jun. 13, 2003, at 6; Kevin Carrel Footer, *Rejecting Bad Company; Some Shareholders are Forcing Firms to Weigh the Human Rights Consequences of Their Business Practices*, THE CHRISTIAN SCIENCE MONITOR, May 1, 2003, at 11 (offering examples of various human rights violations, although also highlighting some improvements); *infra* note 204 describing actions filed under the Alien Tort Claims Act in connection with the participation of U.S. companies in human rights abuses in other countries.

¹³ See *infra* notes 72-74 and accompanying text.

¹⁴ See Gary Strauss & Barbara Hansen, *Special Report: Bubble Hasn’t Burst Yet on CEO Salaries Despite the Times*, USA TODAY, Mar. 31, 2003, at 1B; Jerry Unseem et al., *Have They No Shame?*, FORTUNE, Apr. 28, 2003, at 56. In September 2002, Tyco International disclosed that it had “uncovered nearly \$100 million in fraudulent employee bonuses and conceded it picked up the tab for personal expenses including a \$6000 shower curtain and a \$2,200 wastebasket” for its former CEO’s apartment. *Tyco Report Details Extravagance, Fraud*, Reuters, Sept. 17, 2002, available at http://news.findlaw.com/scripts/printer_friendly.pl?manufacturingtycoinvestigationdc.htm. Around the same time, it was disclosed that GE spent \$7.5 million furnishing the apartment and other residences of its former CEO Jack Welch, and also picked up the tab for providing satellite TV at four homes, provided him with personal use of a Boeing 737, a car and driver and other amenities. *CEOs on the Ropes*, PITTSBURGH POST-GAZETTE, Sept. 15, 2002, at p.E16; Philip Kennicott, *Rich with Irony; When Golden CEO Jack Welch Stepped Down, It was Into the Mud*, WASHINGTON POST, Oct. 14, 2002, at C1. In 2000, Enron paid its top executives \$1.4 billion dollars, in a manner that “wiped out nearly all of its tax liabilities that year.” Albert Crenshaw, WASHINGTON POST, Feb. 16, 2003, at p.H02.

- Accounting, deception and other corporate improprieties that inflate executive compensation and personal gain, hiding from shareholders the true state of corporate affairs.¹⁵

Despite widespread corporate wrongdoing, thoughts about the law's ability to regulate corporate behavior are limited by a view of the corporation as a private entity owned by the persons who are its shareholders.¹⁶ The law and economics model, the dominant model for thinking about the regulation of corporations,¹⁷ and indeed, the role

¹⁵ Near the end of 2002, the No More Enron Coalition released a report detailing the cost of corporate scandals in various companies. Included as examples are Xerox Corporation – improperly reporting \$6.4 billion in revenue over 5 years, losing over \$3 billion in market value and paying its CEO a total of \$12.1 million in total 2001 compensation; Qwest Communications – inflation of revenue in 2000 and 2001, loss of \$32.5 billion in market value and payment to CEO of \$103.9 million in total compensation from 2001; and Adelphia - \$3 billion in questionable loans and transactions, loss of almost \$6.5 billion in market value and payment to CEO of \$2.7 million in total compensation in 2000. *See Report: Americans Hit by \$200 Billion Corporate Abuse Tax*, THE DAILY ENRON, available at <http://www.thedailyenron.com/documents/20021017081755-13274.asp>. For an extensive report of particularly egregious personal enrichment of management at the expense of employees and shareholders, see *In re Worldcom*, First Interim Report of Dick Thornburgh, Bankruptcy Court Examiner, Nov. 4, 2002, at 64-80. For a further discussion of Enron, see *infra* text accompanying notes 179-184.

¹⁶ Indeed, instead of a government acting to protect the other constituencies with whom the corporation deals, recent government activity seems designed solely to aid the “owners” of this “private” enterprise. Examples in the current Bush administration include relaxation of regulations designed to protect employee safety and health and the dividend tax cut. Regarding the former, *see, e.g.*, Greenhouse, Steven, *Rules? Repeal Heightens Workplace Safety Battles*, N.Y. TIMES, Mar. 12, 2001, at A12; Greenhouse, Steven, *Nursing Worker Safety Guidelines*, N.Y. TIMES, Mar. 14, 2003, at A22; Anderson, Nick, *GOP aims to roll back ergonomic rules*, THE DETROIT NEWS, Mar. 3, 2001, available at <http://www.detnews.com/2001/politics/0103/03/politics-194822.htm>. Regarding the latter, it is sobering to realize that “the cost of the Bush Administration’s dividend tax cut proposal is enough to provide comprehensive health care for all 9.2 million uninsured American children and Head Start for all the unserved eligible and disadvantaged preschool children in need of comprehensive services that prepare them for school and a productive future.” *Dividend Tax Cut Costly Enough to Pay for Children’s Comprehensive Health Care and Head Start*, Children’s Defense Fund Press Release, Jan. 7, 2003, available at <http://www.childrensdefense.org/release030107.php>.

¹⁷ *See* Melvin A. Eisenberg, *The Conception that a Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819 (1999); FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 92 (1991); Michael C. Jensen & William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structures*, 3 J. FIN. ECON. 305 (1976); *infra* note 62 and accompanying text.

of law in many other areas,¹⁸ helps promote a corporate environment in which such abuses occur.

There has been no shortage of challenges to the model of the corporation, and its limited notion of the role of law, that is produced by the law and economics worldview. Scholars have used various approaches to argue for a broader notion of corporate social responsibility and a larger role of law in regulating corporations, some of which attempt to work within the law and economics framework and others of which seek competing frameworks.¹⁹

What I want to suggest in this Article is an alternative basis for arguing for a broader notion of corporate responsibility and of the role of law in regulating corporations. The law and economics model is based on a particular view of the individual and a particular notion of the relation of the individual to others and to the world. I propose here an alternative view of the person and her relation to the world, one rooted in religion, in an effort to influence how academics and others think and talk about²⁰ the social obligations of corporations and to suggest a broader notion of the appropriate role of law in regulating corporate entities.²¹ In contrast to atomistic view of

¹⁸ See C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 PHIL. & PUB. AFF. 3, 4 (1975) (describing law and economics as an “all-pervasive approach to legal analysis”); MARGARET JANE RADIN, *CONTESTED COMMODITIES: THE TROUBLE WITH TRADE IN SEX, CHILDREN, BODY PARTS AND OTHER THINGS* ix (1996) (describing law and economics as a “prominent intellectual paradigm in law school teaching since the 1970s”).

¹⁹ See *infra* notes 229-232 and accompanying text. A number of symposia have been devoted to the subject of corporate social responsibility. See, e.g., *Socio-Economics and Corporate Law Symposium: New Corporate Social Responsibility*, 76 TULANE L. REV. 1187-1747 (2002); *2002 Symposium: Corporate Irresponsibility: America's Newest Export?*, 70 GEO. WASH. L. REV. 867 - 999 (Oct./Dec 2002).

²⁰ How we talk about corporations matters, since our language does not merely describe our reality, it helps create it. See Jeffrey Nesteruk, *Conceptions of the Corporation and the Prospects of Sustainable Peace*, 35 VANDERBILT J. OF TRANSNATIONAL L. 437, 439 (2002) (suggesting that how corporations are talked about matters because of the creative role of language in constructing realities).

²¹ Cognizant of Einstein’s warning that “[t]he problems that exist in the world today cannot be solved by the level of thinking that created them,” I am trying to change the level at which we discuss the problem of

the individual that inexorably produces a law and economics viewpoint, this religious perspective is one that sees the communion and interrelatedness of all beings.

Some will doubtless be unpersuaded by the view of the person I here espouse. For those people, it will be enough if the discussion at least succeeds in causing them to acknowledge that, whether or not we label them as such, our legal and political decisions are always based on moral and ethical judgments. For them it will be enough if I can persuade that there are different starting points that lead to very different notions of the ideal for regulation of businesses. None of them are value neutral and therefore we must consciously make choices.

This Article is divided into three main parts. Section I outlines my alternative religiously-based view of the individual and her relation to the world. Section II discusses how this view would change our notion of the corporation and the appropriate role of law in regulating corporate behavior. It does so by first exploring the implications of what I term a secular model of the individual for corporate regulation, and then by showing how the alternative model I describe in Section I would change the results of the secular model. Finally, Section III addresses the question whether there are reasons to

corporate regulation with the hope of transcending the current grounds of the debate. Right now, we tend to debate at the level of theory of the corporation, without spending much time on the views that underlie those theories. Critical legal theories have done a lot to explore the gender, class and race-based biases that have produced much of American law. *See, e.g.*, RICHARD DELGADO & JEAN STEFANCIE (Eds.), *CRITICAL RACE THEORY: THE CUTTING EDGE* (2d ed. 2000); KIMBERLY CRENSHAW ET AL (Eds.), *CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT* (1995); CATHERINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); Katherine T. Bartlett, *Feminist Legal Methods*, 103 *HARV. L. REV.* 829 (1990). This is consistent with the recognition by historians that there is no such thing as “objective” history that is not a product of the biases of those who choose which events to record and how to record them and the recognition in quantum physics and other sciences that all experiments are contaminated by the observer/experimenter. However, apart from recognition of these type of biases in favor of the identity of the “ruling class,” there is less explicit discussion of the broader underlying philosophical choices that underlie our notions of regulation.

hesitate to use religious ethical principles as a basis for thinking about corporate responsibility, concluding that there are not.

I. A Religious View of the Individual and Her Relation to the World

A. View of the Relation of Humans to Each Other

In stark contrast to the premise of individualism that, as I will explore in more detail in the next section, underlies the theories responsible for our present conception of corporations and the role of law in their regulation, religion gives us a richer notion of what it means to be human. In broad terms, the principle I want to explore here is one of the communion and interrelatedness of all beings, a view that finds its basis in the teachings of various religions, albeit phrased in different ways.²²

Fundamental to Judaism is a belief in the oneness of all beings with a transcendent being, and therefore of the interconnectedness of all life.²³ Jewish wisdom teaches that “[g]enuine divine existence engenders the existence of all of creation,” and that “there is nothing – not even the tiniest thing – that is not fastened to the links of this chain. ... Divine existence is indivisible. ... Down to the last link, everything is linked

²² This religious conception of oneness and interrelationship of all human beings also finds support in quantum field theory. Rather than viewing things of the physical world as composed of particles, quantum field theory views everything, including humans, as composed of waves. In simple lay terms, the waves that join to form the wave function that is a human being merge into larger waves, with the idea that the entire physical world is a large interconnected wave. See Victor J. Stenger, *Quantum Spirituality*, 18 FREE INQUIRY 57 (Winter 1997/1998) (describing quantum mechanics based on writings of Bohr, Heisenberg and Born). See also ERROL E. HARRIS, *FORMAL, TRANSCENDENTAL & DIALECTICAL THINKING: LOGIC AND REALITY* (1987) (arguing that the entire world is “dialectical;” not only human beings, but the entire physical and biological structure of the world exists in interrelationship).

²³ See, e.g., Ted Falcon, *Life at Its Highest*, REFORM JUDAISM, Summer 2003, at 11, 13, 15. Martin Buber speaks of the intersection between our relationship with each other and our relationship with God; when we stand in a relationship with God, we stand in a relationship that includes all others. See MARTIN BUBER, *I AND THOU* 123-24 (Walter Kaufman transl.) (Scribner 1970).

with everything else.”²⁴ Martin Buber described Hasidism as embracing “the whole of life as as a unity....all is one kingdom, one spirit, one reality”²⁵ and suggested that fulfillment is possible only in true community, in the “unity of the human community in the sight of God.”²⁶

Discussing the issue in historical terms, as one scholar describes it, “Hebrew consciousness... had a profound sense of unity in relation to God and with others. Through the covenant, their relation to the Holy gave them a sense of both holiness and wholeness, of the possession of an intelligence of truth and of a relation with others manifested in kinship. This inter-personal relationship is typical of family and tribe; it is still alive in traditional cultures.”²⁷

In Christian terms, human life is fulfilled in communion with others and with God.²⁸ The human person is “constituted by relation, first to God as Creator, and then to all human beings who make up the network (past, present, and future) within which the person exists.”²⁹ Humans are intimate and one with God and one finds expressions of

²⁴ DANIEL C. MATT, *THE ESSENTIAL KABBALAH, THE HEART OF JEWISH MYSTICISM* 26 (Harper San Francisco 1996). See also GERSHOM SCHOLEM, *ORIGINS OF THE KABBALAH* 438 (ed. By R J. Zwi Werblowsky) (Princeton 1962) (all existence proceeds from same source and is indivisible).

²⁵ Chaim Potok, *Foreword*, in MARTIN BUBER, *TALES OF THE HASIDIM* (1991) (quoting Buber’s *Hasidism and Modern Man*). See MARTIN BUBER, *HASIDISM* 145-58 (Philosophical Library, N.Y. 1948).

²⁶ Martin Buber, *Der Chaluz und seine Welt*, quoted in MAURICE S. FRIEDMAN, *MARTIN BUBER: THE LIFE OF DIALOGUE*, available at http://www.religion-online.org/cgi-bin/researchd.dll/showchapter?chapter_id=387.

²⁷ Hortensia Ferrand de Piazza, *Values in a Historical, Socio-Cultural Context*, in GEORGE F. MCLEAN & OLINTO PEGORARO (EDS), *THE SOCIAL CONTEXT AND VALUES PERSPECTIVES OF THE AMERICAS* (1989), available at http://www.crvp.org/book/Series05/v-1/chpater_iii.htm.

²⁸ See CATECHISM OF THE CATHOLIC CHURCH ¶ 45 (2d ed.1997) U.S. Catholic Bishops, *Economic Justice for All*, Pastoral Letter on Catholic Social Teaching and the U.S. Economy ¶ 30 (1986) (“The Sacred Scriptures offer guidance so that men and women may enter into full communion with God and with each other.”)

²⁹ FRANCIS MARTIN, *THE FEMINIST QUESTION* xvii (Wm. B. Eerdmans 1994) (calling this notion “relationalism” and contrasting it with “individualism,” defined as “considering the human being to be constituted and endowed with rights *prior* to any relationship”). See also Susan Pace Hamill, *An Argument*

that oneness that is our true nature in Christian scriptures, such as when Christ told his disciples, “I am in my Father and you are in me and I in you.”³⁰ One also finds such expressions in current Church proclamations³¹ and in the revelatory experience of persons of prayer.³² As we are one with God, so we are one with each other, since all share this relationship with God.³³ As St. Paul explained to the Romans, “we, though many, are one body in Christ and individually parts of one another.”³⁴ In speaking last year to pilgrims in St. Peter’s Square, Pope John Paul II explained that “God is not solitude but perfect communion. ... From God, who is communion, derives the vocation of the whole of humanity to form one great family.”³⁵ It is for this reason that, from a Christian perspective, there is no distinction between loving God and loving others.³⁶

for Tax Reform Based on Judeo-Christian Ethics, 54 ALA. L. REV. 1, 52 (2002) (noting the inseparable link between a proper relationship to God and a proper relationship to all other humans).

³⁰ John 14:20. *See also* John 15:1-7 (using image of the vine and vine branches to explain united relation of persons and Christ); John 17:21 (“That they all may be one, as You, Father, are in Me, and I in You; that they may also be one in Us”).

³¹ *See A Decade after Economic Justice for All: Continuing Principles, Changing Context, New Challenges*, A Pastoral Message of the National Conference of Catholic Bishops on the Tenth Anniversary of the Economic Pastoral (Nov. 1995) (“As a people of faith, we believe we are one family, not competing classes.”).

³² Many have described their contemplative experience of union with God and others. *See, e.g.*, TERESA OF AVILA, *INTERIOR CASTLE* 206-233 (Doubleday 1989); NEALE DONALD WALSCH, *COMMUNION WITH GOD* (2000). *See also* RONALD ROLHEISER, *THE SHATTERED LANTERN* 67 (rev. ed. 2001) (explaining how contemplation brings understanding of union with God and others); THOMAS KEATING, *INTIMACY WITH GOD* 123, 131 (1994) (discussing attainment of union through contemplation).

³³ Theologian Henri deLubac explains that “[t]he same mysterious participation in God which causes the soul to exist effects at one and the same time the unity of spirits among themselves.” HENRI DELUBAC, *CATHOLICISM: CHRIST AND THE COMMON DESTINY OF MAN* 29 (Ignatius Press 1988).

³⁴ Romans 12:5. St. Paul uses the image of the body to describe human relationship and the relationship of humans to Christ, explaining that we are Christ’s body and “individually parts of it.” 1 Corinthians 12:27, 12-27. The body is one, but it is composed of many parts, each of which is necessary for the health of the whole. There is “no division in the body” and “if [one] part suffers, all the parts suffer with it; if one part is honored, all the parts share its joy.” 1 Corinthians 12:25-26.

³⁵ *Trinity Explains Humanity’s Vocation to Be One Family, Says Pope*, June 15, 2003, available at <http://zenit.org> (ZE03051505). The poet and minister John Donne expressed the same notion quite eloquently in the 12th Century: “The church is catholic, universal, and so are all her actions; All that she does belongs to all. When she baptizes a child, that action concerns me, for that child is thereby connected to that head which is my head too, and ingrafted into that body, whereof I am a member....All mankind is of one author and is one volume...No man is an island, entire of itself; every man is a piece of the

Very similar views are found in Buddhist teaching. The Dalai Lama speaks of the interdependence of all beings as “a fundamental law of nature.”³⁷ He explains:

Not only higher forms of life but also many of the smallest insects are social beings who, without any religion, law or education, survive by mutual cooperation based on an innate recognition of their interconnectedness. The most subtle level of material phenomena is also governed by interdependence. All phenomena, from the planet we inhabit to the oceans, clouds, forests and flowers that surround us, arise in dependence upon subtle patterns of energy.³⁸

The Buddhist expression of this idea sees the belief in an individual self-existent person as the product of illusion. From a Buddhist standpoint, there is no self that exists other than in interdependence and part of the human goal is to dispel the illusion of dualism.³⁹

From a notion of communion or interrelationship flows a rejection of a mindset that views the individual’s needs and desires as more important than those of others. That includes not only a notion of not choosing self over other, but of choosing the good of others over the good of the self. Christianity teaches, “in humility consider others better than yourselves. Each of you should look not only to your own interests, but also

continent, a part of the main.” John Donne, *Meditation XVII*, in THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 1214-15 (M. H. Abrams ed., 3d ed., 1974). See also Richard W. Garnett, *Christian Witness, Moral Anthropology, and The Death Penalty*, 17 NOTRE DAME J. L. ETHICS & PUB. POL’Y 541, 557 (2003) (observing that “we are people who belong, who exist in, and are shaped by, relationships” who “live less in a state of self-sufficiency than in one of ‘reciprocal indebtedness’”).

³⁶ See MICHAEL J. HIMES, THE MYSTERY OF FAITH: AN INTRODUCTION TO CATHOLICISM 39-48 (2004) (discussing Christian belief that love of God and love of others is inseparable); *id.* at 25 (“intimate union with God and the unity of all of humanity are the same thing”).

³⁷ HIS HOLINESS THE DALAI LAMA, COMPASSION AND THE INDIVIDUAL (Wisdom Publications 1991), available at <http://www.lamayeshe.com/otherteachers/hhdl/compassion.shtml>.

³⁸ *Id.*

³⁹ See, e.g., Rita M. Gross, *Some Reflections About Community and Survival*, 23 BUDDHIST-CHRISTIAN STUDIES 3 (2003) (observing that from a Buddhist perspective, “people are not self-contained individuals” and that “individual” is itself a “spurious category” in that “what we think of as an individual is a composite of many parts and relationships”); ANNE KLEIN, KNOWLEDGE AND LIBERATION 151-152 (Ithica: Snow Lion Publications 1986) (explaining Buddhist concept of selflessness); LAMA YESHE AND LAMA ZOPA RINPOCHE, WISDOM ENERGY 107-108 (Boston: Wisdom Publications, 25th Anniversary edition 2000) (describing lack of independent self-existence).

to the interests of others.”⁴⁰ That is a hard teaching if one sees a division between self and other. However, it is a much easier teaching once one ceases to view the other as an other, once one recognizes that “[t]here is neither Jew nor Greek, there is neither slave nor free person, there is not male and female; for [we] are all one in Christ Jesus.”⁴¹ Then, what we now think of as altruism, an emotion or behavioral factor the true occurrence of which many are suspicious, is not really altruism at all, but an act to the benefit of the one communal body of which the actor is a part.

Buddhism similarly speaks of replacing a self-cherishing attitude with one of cherishing others over oneself.⁴² This is part of overcoming the delusion of a separate self, a delusion which causes one to put a priority on self-interest over the interest of others. This emphasis on cherishing others may explain the fact that we see in Asian cultures less emphasis on “rights in a society and more on duties by that society”⁴³ and a “world-view in which the group’s well-being is the standard by which decisions are made.”⁴⁴

Similar notions of interdependence and interrelationship are found in many other religions.⁴⁵ Thus, whether phrased as communion or oneness or interrelatedness,

⁴⁰ Philippians 2:3-4. Sometimes this is expressed in terms of our creation in God’s image. “When we deal with each other, we should do so with the sense of awe that arises in the presence of something holy and sacred. For that is what human beings are: we are created in the image of God.” U.S. Catholic Bishops, *Economic Justice for All*, Pastoral Letter on Catholic Social Teaching and the U.S. Economy ¶ 28 (1986) (quoting Genesis 1:27).

⁴¹ Galatians 3:28.

⁴² See His Holiness the Dalai Lama, *The Eight Verses of Thought Transformation* (1982), available at <http://www.lamayeshe.com/otherteachers/hhdl/8verses.shtml>.

⁴³ Michael Burns, *Lessons From the Third World: Spirituality as the Source of Commitment to Affirmative Action*, 14 VT. L. REV. 401, 441 (1990) (quoting N. Salgado, *Attitudes to Theories of Equality in The Religions and Cultural Traditions of Hinduism and Buddhism*, 1977).

⁴⁴ ALPHIE KOHN, *NO CONTEST: THE CASE AGAINST COMPETITION* 66 (1986).

⁴⁵ Regarding Hindu notions of interdependence and interrelatedness, see Alzak Amlani, *Exploring Cultures – Family Values in Interracial Couples*, INDIA CURRENTS, Aug. 9, 2002, available at

“[c]ommon to the spiritual traditions of humanity – be they Christian, Jewish, Buddhist, Hindu, Muslim, Native American or other lesser known – is a respect for the value of connection, cooperation, and compassion.”⁴⁶ At their essence, however the notions may be expressed, all religions support communal values. Spirituality itself, in whatever religious form it may manifest “points the way beyond ourselves to a deeper connection, both to others and to something sacred, immortal, and timeless...[motivating people] toward a sense of wholeness from which they are inspired to serve humanity.”⁴⁷

Spirituality points us to the truth of our unity with all things.

B. View of Relation of Humans to the World

Related to the notion of interrelatedness of all humans with its corresponding notion of the common good is the notion that all of the things of this world are here as

http://news.ncmonline.com/news/view_article.html?article_id=876 (talking about incorporation of family and community into a “we-self” identity); Sudhir K. Chopra, *Multinational Corporations in the Aftermath of Bhopal: The Need for a New Comprehensive Global Regime for Transnational Corporate Activity*, 29 VAL. U. L. REV. 235, 277 (1994). Regarding the Baha’i belief in a principle of oneness, see *Issues of Concern to the World’s Aboriginal People* (based on a submission by the Baha’i Community of Canada to the Royal Commission of Aboriginal People’s in Nov. 1993), available at <http://www.animana.org/tab1/12bahai-aboriginal.shtml> (“Baha’is see the principle of oneness of humanity as the pivotal social, economic, and political tenet of our age”); Floyd Lee, *Baha’i Community Observes Matryrdom of the Bab*, TOPEKA CAPITAL-JOURNAL (KANSAS), July 7, 2001).

⁴⁶ Michael Burns, *Lessons From the Third World: Spirituality as the Source of Commitment to Affirmative Action*, 14 VT. L. REV. 401, 438 (1990). See also E. Thomas Ryder, *God, Man, and Law: Of Rights and Responsibilities*, 22 N. ILL. U. L. REV. 113, 115-15 (2001) (discussing notion of responsibility and respect for others that runs through all world religions).

I am not here trying to suggest that there are not differences among the world’s religions or to deprive us of the richness of individual religious traditions. However, despite their differences, this view of the human person is one that is shared among the different religions.

⁴⁷ Lewis D. Solomon, *Reflections on the Future of Business Organizations*, 20 CARDOZO L. REV. 1213, 1221-22 (1999). See John Russell, *Gerald May on Unitive Experience: Oneness and Self-Identity in Spirituality*, 15 J. RELIGION AND PSYCHICAL RESEARCH 127, 128 (1992) (quoting May’s definition of spirituality as referring to “experience in which one feels at one with creation, deeply meaningful, and in pervasive union with all things” and observing that “through spirituality we experience meaning and oneness”); Martin Buber, *God and the Soul*, available at <http://radicalacademy.com/adiphiljewishessay5.htm> (all mysticism, regardless of particular religious tradition, shares an experience of unity).

gifts to the communal whole. These gifts of the world are meant to be shared and used as necessary.⁴⁸

The idea of “human accountability to a higher authority” for how we use the gifts given to us by God is central to the Jewish religion.⁴⁹ “A man is held responsible for everything he receives in this world, and his children are responsible too....The fact is nothing belongs to him, everything is the Lord’s and whatever he received he received only on credit.”⁵⁰

Christians speak in terms of each individual being a steward of the gift for all others.⁵¹ A “steward” is someone who is entrusted with some good or talent on behalf of other persons. Stewardship, one of the foundational principles of Catholic Social Thought, derives from an understanding that God is the source of everything; everything we have – our time, our talents, all that is in the world – is a gift from God and we have an obligation to manage those gifts for the benefit of all; we are accountable to God for

⁴⁸ See U.S. Catholic Bishops, *Economic Justice for All*, Pastoral Letter on Catholic Social Teaching and the U.S. Economy ¶ 57 (1986) (“the good of the earth were created by God for the benefit of every person without exception”).

This is in contrast to the notion of individual entitlement to goods based on a perception of individual merit that is discussed later in the text. See text accompanying notes 60-61. Under the view I articulate here, the dignity of the human person that is promoted by the notion of common good is a dignity that does not proceed from individual merit, but from God. “Human dignity comes from God, not from nationality, sex, economic status, or any human accomplishments.” U.S. Catholic Bishops, *Economic Justice for All*, Pastoral Letter on Catholic Social Teaching and the U.S. Economy ¶ 13 (1986).

⁴⁹ David Ehrenfeld & Philip J. Bentley, *Judaism and the Practice of Stewardship*, JUDAISM, Summer 1985, at p.301.

⁵⁰ *Id.* at 306 (quoting eleventh century Spanish rabbi, Jonah ibn Janah of Saragossa).

⁵¹ CATECHISM OF THE CATHOLIC CHURCH ¶ 952 (2d ed.1997) (describing Christians as “stewards of the Lord’s goods”); U.S. Catholic Bishops, *Economic Justice for All*, Pastoral Letter on Catholic Social Teaching and the U.S. Economy ¶ 32 (1986) (discussing call of women and men to be “faithful stewards” in caring for the gifts of the world). For a discussion of the Scriptural bases for the Christian expression of stewardship, see W. Wade Berryhill, *Creation, Liberation, and Property: Virtues and Values Toward a Theocentric Earth Ethic*, 16 REGENT U. L. REV. 1, 10-13 (2003-04).

how we use those gifts.⁵² The same notion of stewardship or trusteeship is found in Protestant forms of Christianity as well.⁵³

The Koran speaks similarly of our being appointed by God as stewards over the earth.⁵⁴ And, in Buddhist terms, the Dalai Lama speaks of the “universal altruism” and feeling of responsibility that is nonselective and applies equally to all that flows from a recognition of interconnectedness.⁵⁵

Thus, as with an understanding of oneness, this understanding of the things of the world as gift, and the concomitant recognition of being a steward is not limited to a single religion, but is a function of spirituality in broad terms. Stewardship “is a deeply spiritual yet essentially practical question of how we react to the gifts and resources over which we have some measure of control and influence.”⁵⁶

⁵² See *Gaudium et Spes* (Pastoral Constitution on the Church in the Modern World ¶ 69 (1965); Address of Pope John Paul II to the Diplomatic Corp., Jan. 13, 2003, available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2003/january/documents/hf_jp-ii_spe_20030113_diplomatic-corps_en.html. (“God who is the Creator and Father of all...has entrusted man with stewardship of the earth and with the duty of brotherly love”); John Paul II, *Centesimus Annus* (The Hundredth Year) ¶ 37-38 (1991) (natural resources are a gift from God and must be used in accord with God’s commandments).

⁵³ See Soma Hess, *The Protestant Ethic and Rockefeller Benevolence: The Religious Impulse in American Philanthropy*, 27 J. OF SOC. BEHAV. 419, 426-27 (1997) (describing Protestant belief that “the individual is only a trustee of God’s money and he is accountable to every penny he spends”).

⁵⁴ *Stewardship Embraces Conservation*, USA TODAY, Feb. 28, 1990 (quoting from the Koran that “The world is green and beautiful and God has appointed you his stewards over it”).

The stewardship notion is widely used to promote a sense of responsibility toward future generations to conserve the natural resources of the earth. See *id.*; Barbara Amiel, *How Credible a Christian?; Christian Conservatives*, THE TIMES (LONDON), Oct. 14, 1988 (observing that Margaret Thatcher’s “conversion to green issues...seems motivated both by her chemistry degree and her sense of stewardship for future generations”); Robert A. Sirico, *The New Spirituality*, N.Y. TIMES MAG., Nov. 23, 1997).

⁵⁵ See HIS HOLINESS THE DALAI LAMA, *COMPASSION AND THE INDIVIDUAL* (Wisdom Publications 1991), available at <http://www.lamayeshe.com/otherteachers/hhdl/compassion.shtml>. “Without this sense of universal responsibility, a feeling of universal brotherhood and sisterhood, and an understanding and belief that we really are part of one big *human* family, we cannot hope to overcome the dangers to our very existence.” HIS HOLINESS THE DALAI LAMA, *A HUMAN APPROACH TO WORLD PEACE* (Wisdom Publications 1984), available at <http://www.lamayeshe.com/otherteachers/hhdl/humanapproach.shtml>.

⁵⁶ William Droel, *The Give and Take of Corporate Stewardship*, U.S. CATHOLIC, Jan. 1997, at p.12 (quoting position paper of Business Executives for Economic Justice).

II. How A Religious View Would Change Our View of Corporations

A. *Impact of Secular Model of the Individual and the Individual's Relation to the World*

Before I talk about how the religious views set forth in Section I would affect our view of the corporation, it is useful to describe the view of the corporation and corporate law that flows from an alternative model, that is, the prevailing secular model of the person and her relationship to the world. The political and economic notions that underlie the present prevailing notion of the appropriate role of law in regulating corporate entities and, indeed, our vision of the corporation itself, is rooted in a particular view of the individual and the individual's relation to the world that is very different from the vision I articulate in Section I.

What I am terming the secular model of the person is a view of individuals as self-existent and separate from others.⁵⁷ Under that model, the individual is not only viewed as independent and separate from others, but to the extent that the existence of God or some other Ultimate Reality is acknowledged, the individual is viewed as separate from that God/Ultimate Reality. Richard Garnett has observed that we have “embraced an account in which the person is and should be regarded as un-tethered, unsituated, and alone. He is ‘autonomous,’ not simply in the obvious sense that his choices are not determined or crudely reducible, but in that the only standards against which those choices can be evaluated and judged are those that he generates or endorses.”⁵⁸

⁵⁷ I sometimes refer to this view of nonunity or separateness as an *illusion* of nonunity or separateness, based on my personal acceptance of the truth of the ultimate oneness of all beings – with each other and with God. As I will suggest in Section B, replacing the illusion of nonunity with a recognition of the fundamental unity of beings leads to a very different political and legal ideology.

⁵⁸ Richard W. Garnett, *Christian Witness, Moral Anthropology, and The Death Penalty*, 17 NOTRE DAME J. L. ETHICS & PUB. POL'Y 541, 555 (2003) (also calling this notion a “superficially appealing, but in fact, untruthful, unreliable, and ultimately unworthy account of what it means to be human”).

This leads to a view of individuals as motivated solely or primarily by self-interest.⁵⁹ If the individual is perceived as separate and apart from others, the individual's concern will be the preservation and promotion of the self. It is this kind of view that led Adam Smith to observe, "It is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our own necessities but of their advantages."⁶⁰

Related to the view of the self as autonomous individual and as individual primarily concerned with self-preservation and self-promotion is a correspondingly different view of the relation of the self to the material things of this world than that described earlier. In simplest terms, the strong tendency promoted by a society that takes a self-existent separated view of individuals is to see the things around us as our

⁵⁹ Survey findings show that the majority of respondents believe other individuals to be primarily motivated by self-interest. See John G. Holmes, Dale T. Miller & Melvin J. Lerner, *Committing Altruism Under the Cloak of Self-Interest: The Exchange Fiction*, 38, J. OF EXPERIMENTAL SOC. PSYCHOLOGY 144, 144 (2002) (citing findings of Kohn and Wuthnow).

⁶⁰ ADAM SMITH, *THE WEALTH OF NATIONS* 22 (1776) (Oxford Classics Edition 1998).

That is not to suggest that under this model individuals have no concern for others. Hume explained concern as arising from humans' natural capacity for sympathy, which results in human concern extending beyond the immediate self. See DAVID HUME, *TREATISE OF HUMAN NATURE (OF MORALS)*. However, the sympathy produced by a view of autonomous individuals will never be a universal one. Individuals who see themselves as separate from others may associate themselves with groups on a familial or other basis and have concern for the other persons in that group. See ERROL E. HARRIS, *FORMAL, TRANSCENDENTAL & DIALECTICAL THINKING: LOGIC AND REALITY* 250-63 (1987) (arguing that human beings are primarily relational, and also suggesting that the entire physical and philosophical world is a series of complex interrelationships); Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 175 (1997) (noting that people have a natural relational model of cognition). Still, however, the other members of the group are viewed as others and distinctions are made between those who are important to the individual and "others" who are not. Because some are viewed as other than self (indeed, only if one views some as others), it is possible to get decisions like that of the U.S. Supreme Court in the Dred Scott case, which described African-Americans as "articles of merchandise." *Scott v. Sanford*, 60 U.S. 393 (1856). See Mark Garavaglia, *The Value of the Post-Modern Child: Property, Personhood or Purgatory?*, 80 U. DET. MERCY L. REV. 1, 18-19 (2002). As one author put it, the illusion "of separation from each other allows humans to do all manner of things to each other that they would never do to themselves." NEALE DONALD WALSH, *COMMUNION WITH GOD* 42 (Berkeley 2002). See *infra* text accompanying notes 93-95 and 236-237.

entitlement, rather than as gift. This makes sense in a world of individual motivation and achievement – individuals see themselves as “entitled” to the fruits of their individual achievement. As one commentator observed, “Ours is a culture of entitlement... We take things for granted, and our culture promotes individualism as a way of life.”⁶¹

The law and economics model, which has been a dominant mode for thinking about the corporation⁶² and the appropriate role of law in regulating the corporation, is a logical, natural byproduct of this secular view of the person in two respects. First, the secular view of the person discourages thinking of people in communal terms, viewing them solely as atomized, individualized beings. A system whose paramount goal is promoting individual autonomy inevitably desires to limit the intrusion of law into people’s private ordering of their affairs.⁶³ Thus, the leaning toward a system that preaches a limited role of regulation. Law here merely ensures procedural fairness,

⁶¹ Bob Zyskowski, *True Stewardship*, U.S. CATHOLIC (Mar. 2003), at p.12 (quoting Bishop Robert Morneau). See, Susan J. Stabile, *One for A, Two for B, and Four Hundred for C: The Widening Gap in Pay Between Executives and Rank and File Employees*, 36 U. MICH. J. L. REFORM 115, 155 (2002) (discussing executive view of entitlement to massively large amount of compensation).

⁶² See *supra* note 17. The law and economics movement continues to hold its place despite recognition on the part of many that fundamental assumptions on which the model rests have difficulties. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (criticizing the rational person factor of law and economics, and stating the theory often leads to flawed predictions); Melvin Aron Eisenberg, *The Limits of Cognition and the Limits of Contract*, 47 STAN. L. REV. 211, 213 (1995) (“In fact, however, empirical evidence shows that actors characteristically violate the standard rational-choice or expected-utility model, due to the limits of cognition.”); Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1055-56 (2000) (“There is simply too much credible experimental evidence that individuals frequently act in ways that are incompatible with the assumptions of rational choice theory. It follows that the analysis of the incentive effects of legal rules based on such implausible behavioral assumptions cannot possibly result in efficacious legal policy, at least not in all circumstances.”) Although no one discusses them in these terms, some of the difficulties with the underlying assumptions of law and economics theory may be explained by its reliance on an illusory view of the person.

⁶³ Denis Goulet, *Catholic Social Doctrine and the New Thinking in Economics*, 42 CROSS CURRENTS 504, 506 (1992/1993) (conventional economics is not objective, but “quite clearly espouses the virtues of individualism, of competition, of the pursuit of self-interest, and of unlimited material expansion”); Pope John Paul II, *Centesimus Annus* (The Hundredth Year) ¶ 8 (1991) (observing that the notion that the State should intervene only to ensure that people meet their contractual obligations is “inspired by a thoroughgoing individualism”).

creating a system of equal consideration of the needs and desires of individuals to pursue their individual conception of the good. An essential element in law and economics analysis is the claim that legal rules should maximize economic efficiency, a goal for the most part met by facilitating freedom of contract.⁶⁴ With that view, there is no basis on which to impose any additional obligation on the corporation other than those the corporation voluntarily accepts as a matter of contract.⁶⁵

Second, law and economics rests on a notion of rational self-interested actors and of behavior of those individuals that is premised solely on an economic determination of the individuals' own best interests.⁶⁶ The corporation is simply an aggregate of independent contractors,⁶⁷ each pursuing her own interests, with each individual presumed capable of looking out for that interest. The assumption is that everyone involved in the corporation is a voluntary player who, if she dislikes the terms of the game, can leave; the model assumes that shareholders learn about the corporation from publicly available information and can make intelligent decisions to buy or sell shares to further their economic interest (economic interest being the only interest shareholders are

⁶⁴ See Milton Friedman, *The Methodology of Positive Economics*, in PHILOSOPHY AND ECONOMIC THEORY 18, 32-33 (F. Hahn & M. Hollis eds., 1979).

⁶⁵ See, e.g., Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1273 (1982) (finding no basis for corporate social responsibility in contractual notion of corporation).

⁶⁶ See Ernst Fehr & Simon Gächter, *Fairness and Retaliation: The Economics of Reciprocity* 1 (CESifo, Working Paper No. 336, 2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=260736 (describing the view of "human beings as exclusively self-interested as a "long standing tradition in economics").

⁶⁷ The "nexus of contracts" conception of the corporation was first formulated by Michael Jensen and William Meckling in 1976, who conceptualized the corporation as a nexus of numerous contractual relationships. See Michael C. Jensen & William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structures*, 3 J. FIN. ECON. 305 (1976). For an in-depth analysis of the nexus of contract notion and its shortcomings, see Melvin A. Eisenberg, *The Conception That the Corporation is a Nexus of Contracts, and the Dual Nature of the Firm*, 24 J. CORP. L. 819 (1999).

assumed to have).⁶⁸ The same assumptions that are made of shareholders – voluntary participants, access to information, acting in economic interest, etc. – are made of other persons who have involvement in the corporation.

As Professor Lawrence Mitchell has observed, the values embodied in corporate law “are values primarily of individual autonomy and self-sufficiency. These values are manifested doctrinally through laws of contract and process, which encourage individuals in our society to seek their own ends without regard for those of others.”⁶⁹ The entire law and economics language of “externalities” is a language premised on self vs. other. We thus have a corporate law that views employees, customers, suppliers and the community within which the corporation operates as “others,” as outsiders to whom the corporation owes no obligation.

This law and economics standpoint leads to a very limited role of corporate law.

As Professor Greenfield characterizes the conventional law and economic view:

The dominant contemporary view of corporate law is contractarian, meaning that corporate constituencies are assumed to be best able to determine their mutual rights and obligations by way of voluntary arrangements. Corporate law should thus provide “off-the-rack” rules that are primarily enabling, rather than prescriptive, and that can be easily contracted around. Law should not dictate the details of the obligations among the parties because each party is assumed to know her own interests and to protect them best through bargaining and exchange. In this way, developments in corporate charters, and, indeed, in corporate

⁶⁸ See Kent Greenfield, *September 11 and the End of History for Corporate Law*, 76 TULANE L. REV. 1409, 1414 (2002) (shareholders get information from public sources and have the ability to sell in a fluid public market if they do not want to accept the risk/return ratio of their investment); Jack Hirshleifer, *The Expanding Domain of Economics*, 75 AM. ECON. REV. 53, 67 (1985).

⁶⁹ Lawrence E. Mitchell, *Trust, Contract, Process*, in PROGRESSIVE CORPORATE LAW 185, 186 (Lawrence E. Mitchell, ed. 1995). Professor Mitchell gives a fuller discussion of the problems that flow from corporate law’s embodiment of these values in his book, *Corporate Irresponsibility*. See LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA’S NEWEST EXPORT* (2001). See also Jeffrey Nesteruk, *Conceptions of the Corporation and the Prospects of Sustainable Peace*, 35 VANDERBILT J. OF TRANSNATIONAL L. 437, 448 (2002) (observing that the “culture connected with the nexus-of-contracts view of the corporation is an atomistic one.... [viewing] individuals as separate, autonomous beings entering into relationships of an external, contingent character”).

law, will trend toward efficiency, because inefficient arrangements will cause participants in those arrangements to change the terms of the bargain over time in order to avoid losses. Moreover, because people know and protect their own interests, terms of the corporate “contract” in charters and state incorporate statutes are correctly “priced” through an efficient capital market.⁷⁰

Under this model, government regulation is viewed as an intrusion on the legitimate operation of the business and the legitimate operations of the market. Thus, when some Democratic Senators argued for government aid to workers who lost retirement savings in the bankruptcies of companies like Enron and Worldcom, the immediate Republican response was that the government need not get involved because “the marketplace could redress the issue.”⁷¹ It may be open to question whether direct government aid was the best solution to that specific problem. What is not open to question is that there was (and is) nothing to suggest that the market would redress the problem.

The result then, is a corporate law that contributes to the corporate norm of promoting shareholder interests – specifically, shareholder profit – to the exclusion of other goals and the interests of other constituencies.⁷² The only object of any obligation or duty on the part of the corporation is the shareholder. This is not an inexorable result –

⁷⁰ Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as Regulatory Tool*, 35 U.C. DAVIS L. REV. 581, 584 (2002). For other discussions of the nexus of contracts view, see, e.g., Luein Arye Bebchuk, *The Debate on Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989); Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259 (1982).

⁷¹ Jeff Bliss, *Senate Democrats Push for Aid to Workers of Bankrupt Companies*, BLOOMBERG NEWS, Aug. 1, 2002 (quoting Republican Senator Judd Gregg).

⁷² See Adolph A. Berle, Jr., *For Whom Corporate Managers are Trustees: A Note*, 45 HARV. L. REV. 1365, 1367-69 (1932) (exclusive purpose of corporations is to make profits for shareholders); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423, 1424-25 (1993) (observing that corporate law remains committed to the norm of shareholder maximization); Milton Friedman, *The Social Responsibility of Business Is to Increase Its Profits*, N.Y. TIMES MAG., Sept. 13, 1970, at 32, 33 (corporation work for shareholders).

as other scholars have observed, there is nothing in the nexus of contracts notions that leads inexorably to a notion of shareholder primacy.⁷³ Nonetheless, the norm of shareholder primacy has become linked over time with the contractual view of the corporation and it is a norm that many corporate governance scholars accept as optimal.⁷⁴

B. Implications of Model Based on a Religious View of the Person

The religious view of the person and her relation to the world articulated in section I lead to an entirely different vision of how we measure our economic, political and legal systems than the view outlined in the foregoing discussion that flows from the secular view of the person. Martin Buber spoke of the need to break the “spell of separation.”⁷⁵ If instead of holding the illusion of nonunity or separateness of individuals we understand their interrelatedness, then rather than measuring institutions by what they produce or how they allow individuals to individually seek their own best self-interest, we would measure them by how they treat the most poor and vulnerable; by how they “enhance or threaten our life together as a community.”⁷⁶ The goal here is not expressed

⁷³ See Eisenberg, *supra* note 67, at 832-33; Margaret Blair & Lynn Stout, *A Team Production Theory of Corporate Law*, 85 VA L. REV. 247, 253-54 (1999).

⁷⁴ See, e.g., Henry Hansmann & Reineer Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439, 441 (2001) (arguing that shareholder value maximization “serves the interests of society as a whole”); Jeanne L. Schroeder, *Economic Rationality, Empathy, and Corporate Responsibility*, 70 GEO. WASH. L. REV. 857, 875 (2002) (observing that the “proposition that the corporation’s sole goal is profit maximization, and the conflation of profit maximization with shareholder value maximization” stems from the law and economics paradigm).

For a different explanation of the development of the shareholder primacy norm, see Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861 (2003) (arguing that shareholder primacy norm reflects the effect of the removal by legal scholars and political theorists of the interests of workers from the “core concerns of corporate law and theory”).

⁷⁵ MARTIN BUBER, *I AND THOU* 125 (Walter Kaufman transl.) (Scribner 1970).

⁷⁶ U.S. Catholic Bishops, *Economic Justice for All*, Pastoral Letter on Catholic Social Teaching and the U.S. Economy ¶ 14, 13, 8 (1986). As one author suggested, “[b]ecause we are relational beings, our very ‘self’ is dependent upon ethical responsibilities.” Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 175 (1997).

in individual terms, but in social terms, in terms of a “social commitment to the common good,”⁷⁷ a commitment that implies that there may be times when individual autonomy is subordinated for the good of the communal whole.

This section begins by making some observations about the impact of a changed model of the person on our political and economic systems before focusing on what implications the religious view of the person has on our view of the corporation and the role of law in its regulation.

1. Political Model

Replacing a view of individuals as self-existent and separate from others with a view of persons as fundamentally interdependent and unified has implications for political theory and our understanding of the role of government and its relationship to its citizens.

The law and economics model of the corporation flows naturally from classical liberalism,⁷⁸ a political system that itself flows naturally from a view of nonunity or separateness of individuals.⁷⁹ It is not difficult to understand why the secular view of the individual – with its emphasis on the individual and the individual’s self-interest and

⁷⁷ U.S. Catholic Bishops, *Economic Justice for All*, Pastoral Letter on Catholic Social Teaching and the U.S. Economy ¶ 14 (1986). See *A Decade after Economic Justice for All: Continuing Principles, Changing Context, New Challenges*, A Pastoral Message of the National Conference of Catholic Bishops on the Tenth Anniversary of the Economic Pastoral (Nov. 1995) (proclaiming the need to “strengthen our sense of community and our pursuit of the common good”). In *Gaudium et Spes*, the “common good” is described as “the sum of those conditions of social life by which individuals, families, and groups can achieve their own fulfillment in a relatively thorough and ready way.” VATICAN COUNCIL II, *Gaudium et Spes (Pastoral Constitution on the Church in the Modern World)* ¶ 74 (1965).

⁷⁸ I say classical liberalism because the social liberalism of Hobhouse and others discussed at text accompanying notes 85-90 would not produce a law and economics framework. The law and economics theorists proceed from (indeed, seem mired in) the laissez faire liberalism of the 19th century.

⁷⁹ JOHN GRAY, *LIBERALISM* 78 (U. Minnesota Press, 2d ed. 1995) (calling the “autonomous individual with his concern for liberty and privacy” one of the postulates of liberalism); C.B. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM* 1 (Oxford 1962) (observing that individualism is an “outstanding characteristic of the whole subsequent liberal tradition”).

entitlement, leads to broad acceptance of classical liberalism. At its most fundamental, classical liberalism, with its aim of promoting individual liberty,⁸⁰ is based on a notion of individuated self-existent beings.⁸¹ As expressed by John Stuart Mill, “[t]he only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it.”⁸² Thus, the entire goal of classical liberalism is expressed in terms of the good of oneself vs. that of others⁸³ and promotes the kind of primacy of freedom of contract and free market operations that generates a law and economics viewpoint.⁸⁴

⁸⁰ See Jeremy Waldron, *Theoretical Foundations of Liberalism*, 147 *PHILOSOPHICAL QUARTERLY* 127 (1987); W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 *NOTRE DAME L. REV.* 1, 31 (1989) (noting that the liberal political tradition puts a high premium on individual autonomy and promotes the view that individuals must be “free to govern themselves through their own exercise of understanding, deliberation, and rational choice”); Robert N. Bellah, *Community Properly Understood: A Defense of “Democratic Communitarianism,”* 6 *THE RESPONSIVE COMMUNITY* __ (1995/96) (observing that philosophical liberals “see society as based on a social contract establishing procedures of fairness, but otherwise leaving individuals free to serve their own interests”).

This secular notion of freedom is very different from a Christian understanding of freedom. In contrast to liberalism’s notion of unfettered freedom to do as one chooses (subject only to the limit to not harm others), a Christian notion of freedom is “rooted in truth – the truth about God and His relationship to human persons and the truth of moral obligations that begets personal responsibility for one’s actions.” Rev. James T. McHugh, S.T.D., *The Value of the Religiously Affiliated Law School*, 74 *ST. JOHN’S L. REV.* 577, 582 (2000).

⁸¹ See Jean Bethke Elshtain, *Catholic Social Thought, the City, and Liberal America*, in R. BRUCE DOUGLAS & DAVID HOLLENBACH, (ED.) *CATHOLICISM AND LIBERALISM: CONTRIBUTIONS TO AMERICAN PUBLIC PHILOSOPHY* 151, 154 (Cambridge U. Press 1994) (suggesting that liberalism “posits the self as given prior to any social order – ahistorical, unsituated, bearer of abstract rights, and untrammled chooser in whose choices lie his freedom and autonomy”); Anthony J. Fejfar, *Corporate Voluntarism: Panacea or Plague? A Question of Horizon*, 17 *DEL. J. CORP. L.* 829, 876-77 (1992) (noting that the “starting point of the liberal rationalist world view is the isolated individual, set apart from society,” an individual that is “essentially disinterested in other persons”); STEPHEN MULFALL & ADAM SWIFT, *LIBERALS AND COMMUNITARIANS* 41, 45, 46-47 (Oxford: Blackwell 1992) (describing Sandel’s criticism of Rawls’ view of the human being as one of asocial individualism that assigns “absolute moral priority to the subject over its ends”). Mulfall and Swift explore various aspects of the communitarian critique of liberalism, including its “conception of the person as antecedently individuated or unencumbered.” *Id.* At 158

⁸² JOHN STUART MILL, *ON LIBERTY AND OTHER WRITINGS* 16 (1989); BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 3-1 (forthcoming)].

⁸³ Government, from a classical liberalist perspective, does not exist to promote its own values or vision of the good. Liberalism, with its narrative of individual choice and free enterprise has no discourse of ethics. Instead, the state is impartial. Rather than endorse any particular value or vision, government exists to allow individuals to pursue their individual notions of the good, to prevent unwarranted intrusions on an individual’s ability to pursue her goals. Law is expressed in social contract terms. Laws are the product of autonomous individuals coming together to make an agreement to form a government that will allow them

The religious view of the person I have articulated makes it impossible to rest in a model of classical liberalism, with its emphasis on promotion of individual autonomy, at least where that emphasis interferes with the public good. A recognition of communion of beings suggests a set of values that is different and broader than merely allowing individuals the freedom to pursue their individual self-interest. It suggests that something beyond individual autonomy be the fundamental basis of our legal and political system.

More consistent with a view of the person as fundamentally interdependent and unified is the form of social liberalism (or liberal socialism) espoused by theorists such as Leonard Hobhouse,⁸⁵ who rejected both laissez faire liberalism and doctrinaire socialism. Rather than viewing persons as self-existent and separate and society as merely an aggregate of self-interested individuals, Hobhouse viewed humans as essentially relational and society as an organism made up of interdependent parts.⁸⁶ Because of the fundamental primacy of the relationship between the individual and the community, the

to pursue their individual notions of the good. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT ¶ 89, 123-124, p. 343, 368-69 (Cambridge U. Press 1960).

⁸⁴ See HAROLD J. LASKI, THE RISE OF EUROPEAN LIBERALISM 256 (New Brunswick Transaction Publishers 1997) (originally published 1936) (noting that in its formative years, “liberal ideology maximized the splendour of freedom of contract – by which, in grim truth, it meant absence of any effective check on capitalist enterprise – and refused, in any profound or coherent way, to consider the state as a potential source of good”). Laski also explains classical liberalism as being based on a notion of individual merit and entitlement. See *id.* at 259.

⁸⁵ See L.T. HOBHOUSE, LIBERALISM (Oxford 1964) (first published 1911).

John Gray uses the term “New Liberals” to describe persons such as Hobhouse, Bosanquet and T.H. Green, who reject individual autonomy as the starting point, recognizing instead that humans are “*au fond* social beings,” whose identities are shaped by context. JOHN GRAY, ENDGAMES: QUESTIONS IN LATE MODERN POLITICAL THOUGHT 78-79 (Cambridge: Polity Press 1997) (describing as the reality, “flesh-and-blood men and women, whose identities and choices are only possible because they articulate (and thereby often alter) common forms of social life. They are expressions of continuity in society, in the absence of which the lives of individuals lose meaning and become impoverished.”).

⁸⁶ Hobhouse, *supra* note 85, at 67 (suggesting that, far from being autonomous, “the life of the individual would be something utterly different if he could be separated from society. A great deal of him would not exist at all.”).

rights and duties of individuals are “defined by the common good.”⁸⁷ For Hobhouse, the organic conception of society implied the need to promote the full development of all members of the community; that the “social ideal” consisted of an ethical harmony that could be achieved “partly by discipline, partly by the improvement of the conditions of lives.”⁸⁸ It is this that led Hobhouse to accept a government responsibility to provide people with the “conditions upon which mind and character may develop themselves,”⁸⁹ such as a living wage.⁹⁰

Also consistent with the religious view of the person would be something akin to communitarian theory rather than that of classical liberalism.⁹¹ Communitarianism more directly shifts the focus from the individual to the community, from individual liberty to communal needs, and therefore, replaces a neutrality toward conceptions of the good with a notion of common good defined not in individual terms but in communal terms.⁹² I say something akin to communitarianism because there is a difference between community – which, however, the community is defined, still has a concept of others who are not part

⁸⁷ *Id.* at 68.

⁸⁸ *Id.* at 69. See GRAY, *supra* note 85, at 83 (discussing need to reform “liberal capitalist institutions...to make them friendlier to vital human needs” and fact that state has a role in accomplishing this aim).

⁸⁹ Hobhouse, *supra* note 85, at 83.

⁹⁰ *Id.* John Gray calls Hobhouse’s a “new revisionist liberalism, in which ideals of distributive justice and social harmony supplant the older conception of a system of natural liberals.” GRAY, *supra* note 79, at 32.

⁹¹ Communitarianism has been described as proceeding from a notion of people as social by nature rather than by choice, thus seeing the need for community as “a constitutive dimension of the person.” Oliver F. Williams, 12 J. BUS. ETHICS 919 (Dec. 1993). Because communities are seen to have existence and rights, the emphasis is on community obligations and responsibilities toward the common good as a balance to concerns about individual autonomy. In communitarian thought, individual interests may at times be subordinated to the common good, meaning the common good is more than simply the sum of the interests of the individuals making up the community. See, e.g., AMITAI ETZIONI, THE NEW GOLDEN RULE 74-75 (BasicBooks 1996) (discussing rise and basic features of communitarian movement); AMITAI ETZIONI, THE SPIRIT OF COMMUNITY 15, 25-26 (Crown 1993).

⁹² See Robert N. Bellah, *Community Properly Understood: A Defense of “Democratic Communitarianism,”* 6 THE RESPONSIVE COMMUNITY 49 (1995/96) (contrasting communitarian goal of reaching some consensus about values and goals with the liberal skepticism of efforts to reach common agreement about the good).

of the community, and therefore has the possibility to encourage intolerance and division between the community and those others⁹³ – and communion of all beings, which sees no one as an other.⁹⁴ One commentator termed this a “relational society which calls us beyond selfishness to community – to the common good.”⁹⁵

It may be that our notion of individual autonomy is too ingrained to be completely removed as the basis for our political and legal systems, but at a minimum a notion of communion justifies imposing meaningful limits on that autonomy for the benefit of the whole,⁹⁶ whether we express it in social liberalism or communitarian terms. Whichever of those notions one adopts, a law and economics model will not be the result.

⁹³ As one scholar observed, affective communities are “characterized by notions of group membership, personal loyalty, emotional connection, and a tendency to exclude others.” Alemante G. Selassie, *Ethnic Federalism: Its Promise and Pitfalls for Africa*, 28 YALE J. INT. L. 51, 58 (2003). What I am trying to describe is a notion of community, of communion of beings, that excludes no one. See also David Hollenbach, S.J., *Virtue, the Common Good, and Democracy*, in AMITAI ETZIONI (ED.), *NEW COMMUNITARIAN THINKING: PERSONS, VIRTUES, INSTITUTIONS, AND COMMUNITIES* 143, 149 (1995) (observing that a “wider solidarity is essential if communitarian values are to avoid becoming a source of increased conflict in a world already riven by narrowness of vision,” stressing the need for “a sense of the national and the global common good”).

⁹⁴ Thus, for example, the Dalai Lama speaks of “universal brotherhood and sisterhood” that recognizes the interdependence and interconnectedness of all beings. HIS HOLINESS THE DALAI LAMA, *A HUMAN APPROACH TO WORLD PEACE* (Wisdom Publications 1984), available at <http://www.lamayeshe.com/otherteachers/hhdl/humanapproach.shtml>.

The narrower communitarian notion is not inconsistent with pre-Christian Roman and Jewish notions, which distinguished between members of their community and foreigners. To the Jews, non-Jews as well as sinners were not viewed as part of the relevant community. To Romans, only Romans were part of the relevant community. Christ’s teachings abandon that particularism in favor of a “universalism that embraces the world and humanity.” HANNA WOLFF, *JESUS THE THERAPIST* 127, 126-27 (Meyer Stone Books 1987).

That distinction is important in a global world. In a non-global world of different, independent governments, communitarianism might be enough to get where we need to be, because one can define “community” wide enough to include all who are governed by a particular government unit. But in a global world, we need a concept that embraces the communion of all because laws are no longer geographically limited.

⁹⁵ Kathy Thornton, *Economic Justice Is Rooted in Our Faith*, NETWORK, p.7 (May/June 2003).

⁹⁶ Even Jeremy Bentham, who viewed all law as “negative” in the sense that it imposed a restriction on the natural state of liberty, saw that law had a positive role to play in achieving the well-being of the community. See Jeremy Bentham, *Truth versus Ashurst or Law As It is Contrasted With What It is Said to Be*, in JOHN BOWRING, 5 *THE WORKS OF JEREMY BENTHAM* 236 (Russell and Russell 1962) (“Bad as the law is, and badly as it is made, it is the tie that holds society together. Were it ten times as bad, if possible, it would still be better than none: obey it we must, or everything we hold dear would be at an end.”); D.J.

Thus, what I am suggesting here is not wholesale abandonment of individual autonomy, but rather a return to the sense of communion we have lost, a rebalancing that introduces “a more ‘communitarian’ dimension of our political life to balance the excesses generated by the dominant politics of individualism.”⁹⁷ Promotion of individual autonomy under this view is not the preeminent goal when promoting that autonomy conflicts with broader communal goals.⁹⁸ As Berta Hernandez-Truyol has observed in a different context, liberal individualistic visions are not irreconcilable with communitarian traditions; instead the two are “interdependent dimensions of human existence – coexisting, overlapping modalities.”⁹⁹ And when the communal goals in question are

MANNING, *THE MIND OF JEREMY BENTHAM* 45-46 (Monographs in Politics, Longmans 1968) (discussing Bentham belief in the necessity of law). Amitai Etzioni speaks of “the good society” as “one that nourishes both social virtues and individual rights” and that “requires a carefully maintained equilibrium of order and autonomy.” AMITAI ETZIONI, *THE NEW GOLDEN RULE* 4 (BasicBooks 1996). See also E. Thomas Ryder, *God, Man and Law: Of Rights and Responsibilities*, 22 N. ILL. U. L. REV. 113, 116-117 (2001) (discussing danger of excessive focus on rights without acknowledging underlying responsibilities).

⁹⁷ MARCUS J. BORG, *MEETING JESUS AGAIN FOR THE FIRST TIME* 60 (Harper San Francisco, 1994) (arguing for a “politics of compassion not only within the church but as a paradigm for shaping the political order” and suggesting that using a politics of compassion would make the issue of community the primary paradigm for thinking about politics). See MACPHERSON, *supra* note 79, at 3 (discussing need “to get back to what seemed the desirable values of individualism while discarding its excesses”); Philip Selznick, *Social Justice: A Communitarian Perspective*, 6 THE RESPONSIVE COMMUNITY 15 (Fall 1996) (describing communitarian link between personal and collective responsibility). Whatever notion of limits may have once existed, over the last several decades the focus has become exclusively on individual autonomy, to the exclusion of any emphasis on responsibility. See E. Thomas Ryder, *God, Man, and Law: Of Rights and Responsibilities*, 22 N. ILL. U. L. REV. 113, 116 (2001) (noting the “current fashion” to focus exclusively in individual rights without acknowledging responsibilities).

⁹⁸ See F. A. HAYAK, *THE ROAD TO SERFDOM* 21, 133-34 (U. Chicago Press 1944) (arguing that liberalism does not mean complete laissez faire and that there is a role for the government in meeting basic individual needs in a liberal state); BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 3-3-3-12 (forthcoming) (discussing different aspects of liberty, the tensions among them and the fact that liberal democracies mediate the tensions differently); Oliver F. Williams, *Catholic Social Teaching: A Communitarian Democratic Capitalism for the New World Order*, 12 J. BUS. ETHICS 919 (1993) (discussing as one feature of Catholic social teaching the notion that rights are not absolute, but rather must be viewed in the “context of their role of promoting and protecting human dignity in community). Conflict will inevitable arise, since the common good is something more than simply each individual maximizing her own good.

⁹⁹ Berta Esperanza Hernandez-Truyol, *Out of the Shadows; Traversing the Imaginary of Sameness, Difference, and Relationalism – A Human Rights Proposal*, 17 WIS. WOMEN’S L.J. 111, 146 (2002) (noting that it is more “useful and constructive to move away from dichotomizing rights or paradigms and towards a complementary approach”).

goals of communion of all beings, the less concern there ought be about abandonment of an exaggerated concern for individual autonomy.¹⁰⁰

2. Economic Model

A view of communion of beings also has an impact on our view of an ideal economic system. Start by considering the two poles of free market capitalism and communism.

In a capitalist system, the means of production are in the hands of a few and the many hire themselves out to work for those few.¹⁰¹ It is a system based on private property and contract, with no claim of any obligation on anyone's part toward any other person.¹⁰² Individuals within the system interact with one other through a free market in which they exchange goods and services, each in a manner designed to facilitate her own self-interest. The idea is that the free market allows each person to maximize her well-being (with the hope that this maximizes the well-being of all) and the role of the government is to simply supply legal means for protecting property and contract rights and to allow the free market to function.¹⁰³ The "direct and intimate" connection between classical liberalism and capitalism is immediately apparent.¹⁰⁴

¹⁰⁰ As expressed in a different context by Roberto Unger, "The more these shared ends express the nature of humanity rather than simply the preferences of particular individuals and groups, the more would one's acceptance of them become an affirmation of one's own nature; the less would it have to represent the abandonment of individuality in favor of assent and recognition. Thus, it would be possible to view others as complementary rather than opposing wills; furtherance of their ends would mean the advancement of one's own. The conflict between the demands of individuality and of sociability would disappear." ROBERTO UNGER, *KNOWLEDGE AND POLITICS* 220 (New York: Free Press 1975).

¹⁰¹ Pope Pius XI characterized capitalism simply as "that economic system, wherein, generally, some provide capital while others provide labor for a joint economic activity." Pope Pius XI, *Quadragesimo Anno* (After Forth Years) 100 (May 15, 1931). In that same encyclical, he argued that market competition is not a sufficient regulating force. *Id.*

¹⁰² See generally OLIVER E. WILLIAMSON, *THE ECONOMIC INSTITUTIONS OF CAPITALISM* (1985).

¹⁰³ See ADAM SMITH, *THE WEALTH OF NATIONS* 300-01, 408 (1776) (Oxford World Classic edition 1998).

¹⁰⁴ BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 3-21 (forthcoming).

At the other pole is communism, with its absence of notions of property ownership and of social class. In an ideal communist system, private property is replaced with “common utilization of all instruments of production and . . . communal ownership of goods.”¹⁰⁵ Contract is not the fundamental basis of the exchange of goods. Rather than individual facilitation of self-interest, the communist view promotes a view of “from each according to his ability, and to each according to his need.”

Capitalism is not inherently problematic, even from a standpoint of communion of beings.¹⁰⁶ Unrestrained capitalism, however, is at odds with a view of persons as interdependent and ultimately one. That is, a capitalism unrestrained by any political regulation and control means spectacular gains for some, inevitably at the expense of others.

At some level, concerns about capitalism (at least as it is currently conceived) might tempt one toward a communistic system, in that if all in the world “belong[s] wholly to God” and is given to us as a kind of ownership in common,¹⁰⁷ there is a basis to argue in favor of doing away with concepts of private ownership of property. Communism is arguably a more natural system to embrace if one accepts the communion of all beings and rejects the notion of separateness and independence. Indeed, the early Christian communities held “all things in common,” and distributed their possessions

¹⁰⁵ FREDERICK ENGELS, *THE PRINCIPLES OF COMMUNISM*, principle 14 (1847).

¹⁰⁶ For example, Pope John Paul II suggests that Catholic tradition “is not directed against the market, but demands that the market be appropriately controlled by the forces of society and by the state to assure that the basic needs of the whole society are satisfied.” Pope John Paul II, *Centesimus Annus* (The Hundredth Year) 35 (May 15, 1991). Interestingly, Weber argued that the origin of the spirit of modern capitalism is to be found in Christian (specifically Calvinist) asceticism. See MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* (Scribner’s Press 1958). Having said that, one can make an argument that capitalism is harder to reconcile with a view of all things as gift rather than entitlement, since the notion of individual merit is at the core of capitalism.

¹⁰⁷ See Peter Judson Richards, “*The Law Written in Their Hearts*”? *Rutherford and Locke on Nature, Government and Resistance*, 18 *J. L. & RELIGION* 151, 162-63 (2002) (discussing Locke views of property).

“among all according to each one’s need.”¹⁰⁸ However appealing the thought might be in theory, we have ample experience with the problems of implementing communism as a political reality.¹⁰⁹

The choice, however, is not between unrestrained capitalism and communism. Even without adopting a communist form of government, the vision of the person I have articulated leads to a notion of limits on capitalism, limits on the unrestrained operation of markets. As expressed by the Catholic Church, regulating the economy solely by the law of the market “fails social justice, for ‘there are many human needs which cannot be satisfied by the market.’”¹¹⁰ In simple terms, I am talking about exporting into our larger economic framework an “ethics of the home community,” which emphasizes “cooperation [over] competition, sharing of resources unrelated to who has more or less earning power, and extra effort on behalf of the less productive, such as the young, the ill and the aged.”¹¹¹ This is a view that sees the market as not merely our means of producing goods and services, but rather as a vehicle for promoting the development of all peoples.

This sense of common good was one shared widely by the self-made capitalist millionaires of the late nineteenth and early twentieth century. “The literature on

¹⁰⁸ Acts of the Apostles 2:44-45. See *id.*, 4:32-34 (noting there were no needy persons, because all was shared and distributed according to need). There is virtually no difference between these Christian expressions and the communist expression of “from each according to his ability, and to each according to his need.”

¹⁰⁹ The difficulties lead to the view of communism as an “evil empire,” or as a “perversion of human society.” James Ottavio Castagnera, *Groping Toward Utopia: Capitalism, Public Policy, and Rawls’ Theory of Justice*, 11 J. TRANSNAT’L L. & POL’Y 297, 287 (2002).

¹¹⁰ CATECHISM OF THE CATHOLIC CHURCH ¶ 2425 (quoting *Centesimus Annus*). See Oliver F. Williams, *Catholic Social Teaching: A Communitarian Democratic Capitalism for the New World Order*, 12 J. BUS. ETHICS 919 (1993) (describing *Centesimus Annus* as offering “a vision of a new communitarian democratic capitalism that is a humane and ethical alternative to the present state of affairs”).

American philanthropy...is replete with evidence that illustrates the deep sense of social responsibility felt by self-made millionaires. They considered themselves to be God's trustees, and thus resisted the temptation to indulge in their own wealth. Instead, they preserved it, enlarged it, and put it to work for the common good."¹¹² Their Protestant faith instilled in them a sense of responsibility flowing from the belief that it was God who was the source of their wealth.¹¹³

However, that sense of responsibility has become weakened over time. "At some point in recent American history, greed has been redefined. Back when it was one of the deadly sins, it meant an excessive amount of money; now it merely means money ill-

¹¹¹ Thomas L. Shaffer, *Lawyers and the Biblical Prophets*, 17 NOTRE DAME J. L. ETHICS & PUB. POL'Y 521-525 (2003) (quoting Judith Martin, *Miss Manners*).

¹¹² Soma Hewa, *Rockefeller Philanthropy and the "Flexner Report" on Medical Education in the United States*, 22 INT'L J. OF SOCIOLOGY AND SOCIAL POLICY 1 (2002). Peter Cooper put his sense of stewardship this way: "I do not recognize myself as the owner in fee of one dollar of the wealth which has come into my hands. I am simply responsible for the management of an estate which belongs to humanity." *Id.* (quoting Cooper). Andrew Carnegie once described the duty of a man of wealth as "to consider all surplus revenues which come to him simply as trust funds, which he is called upon to administer and strictly bound as a matter of duty to administer in the manner which, in his judgment, is best calculated to produce the most beneficial results for the community – the man of wealth thus becoming the mere agent and trustee for his poorer brethren." Andrew Carnegie, *Wealth*, 148 NORTH AMER. REVIEW, June 1889, available at <http://alpha.furman.edu/~benson/docs/carnegie.htm>.

¹¹³ Soma Hewa, *Rockefeller Philanthropy and the "Flexner Report" on Medical Education in the United States*, 22 INT'L J. OF SOCIOLOGY AND SOCIAL POLICY 1 (2002); see Soma Hess, *The Protestant Ethic and Rockefeller Benevolence: The Religious Impulse in American Philanthropy*, 27 J. OF SOC. BEHAV. 419, 426-27 (1997) (describing individual as trustee of God's money and thus accountable to God). John D. Rockefeller once stated that "the power to make money is a gift from God...to be developed and used to the best of our ability for the good of mankind." Paul Johnson, *God's Gift to American Industry*, WASH. POST, June 7, 1988, at X1. (quoted in Constance A. Bagley & Karen L. Page, *The Devil Made Me Do It: Replacing Corporate Directors' Veil of Secrecy with the Mantle of Stewardship*, 36 SAN DIEGO L. REV. 897, 898 n.2 (1999)). See also RON CHERNOW, *TITAN: THE LIFE OF JOHN D. ROCKEFELLER, SR.* 55, 153 (NY Random House 1998) (observing that Rockefeller adhered to "the doctrine of stewardship – the notion of the wealthy man as a mere instrument of God, a temporary trustee of his money who devoted it to good causes").

I don't mean to suggest that the sense of stewardship of the Rockefellers, Carnegies, et al. led them to run their companies in ways consistent with those I propose here. Rockefeller, although motivated strongly by his Baptist roots, also had no remorse about bankrupting other companies to advance his own aims. See CHERNOW, *supra* at 153 (noting Rockefeller's defense to the charge that he destroyed competition, suggesting he saw himself as acting heroically in doing so)

gotten.”¹¹⁴ Thus, we see skyrocketing salaries, because CEOs set their own pay, subject only to an “outrage constraint.”¹¹⁵ There is no self-imposed notion of limit and no external control save that of bad publicity.¹¹⁶ Max Weber attributed this to the replacement of the religious with the secular. In his view, the disappearance of the religious aspect of the Protestant ethic resulted in material goods gaining “an increasing and finally an inexorable power over the lives of men.”¹¹⁷ He argued that while capitalism involved a pursuit of profit, it was not the same as “unlimited greed for gain.”¹¹⁸

The sense of responsibility that has been lost must be recaptured. What is desirable is achievement of a broader acceptance of the notion of “welfare capitalism,” expressed by one scholar as a “realization that the new wealth had to be widely

¹¹⁴ Philip Kennicott, *Rich with Irony: When Golden CEO Jack Welch Stepped Down, It Was Into the Mud*, WASHINGTON POST, Oct. 14, 2002, at C1.

¹¹⁵ Kevin J. Murphy, *Explaining Executive Compensation: Managerial Power Versus the Perceived Cost of Stock Options*, 69 U. CHI. L. REV. 847, 857 (2002); (arguing that “outrage constraint in America is so high that it offers no control for CEO pay); Mark J. Roe, *Can Culture Constrain the Economic Model of Corporate Law?*, U. CHI. L. REV. 1251 (2002) (discussing arguments of outrage constraint being the only cap on CEO salaries, and limits on that constraint’s effectiveness).

¹¹⁶ See Lucian Bebchuk, Jesse Fried & David Walker, *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751, 756 (2002) (suggesting that only limit on executive compensation is that directors would be reluctant to approve, and executives would be hesitant to seek, compensation arrangements that might be viewed by observers as “outrageous”); Holman W. Jenkins Jr., *Business World: Outrageous CEO Pay Revisited*, WALL ST. J., Oct. 2, 2002, at A17 (discussing Bebchuk, Fried and Walker argument that there is no effective institutional check on CEO’s and that CEO’s dictate pay subject only to “outrage constraint”).

Without such a notion of limit, liberalism becomes nothing more than the liberation of “some – those with economic power – to dominate others – those without.” BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 6-4 (forthcoming)

¹¹⁷ MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 181 (Scribner Library Edition; 1958). See Sarah Forbes Orwig, *Business Ethics and the Protestant Spirit: How Norman Vincent Peale Shaped the Religious Values of American Business Leaders*, 38 J. BUS. ETHICS 81 (June 2002) (noting Weber’s belief that “the religious aspects of the original Protestant Ethics has disappeared over time...[and] the other-worldly emphasis identified as the foundation of capitalism slowly gave way to a this-worldly emphasis.”); MAX WEBER, 2 ECONOMY AND SOCIETY, (eds) Guenther Roth & Claus Wittich 975 (Bedminster Press 1968) (discussing fact that in modern bureaucracies individuals function without regard to other persons).

distributed to assure social stability.”¹¹⁹ This means an embrace of a notion of stewardship.

3. Model of the Corporation and Regulation of the Corporation

A change in our underlying view of the person has an obvious impact on our view of the corporation and of the appropriate role of law in regulating the business enterprises that operate within that system. The recognition of the communion of all beings, and the concomitant acceptance of a more social liberalism and a more restrained capitalism, leads to a more public conception of the corporation and an expanded view of both the obligations of the corporation and what constitutes appropriate regulation of corporations.

I suggested earlier that the system premised on individual autonomy leads to a view that a corporation owes no obligations except those it accepts by contract and that any socially responsible corporate behavior is a matter of voluntarism. The secular view of the person, and all that flows from it, promotes a view of the corporation as a private profitmaking entity, owned by shareholders, organized for the purpose of maximizing

¹¹⁸ MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 17 (Scribner Library Edition; 1958).

¹¹⁹ C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 KAN. L. REV. 77, 92 (2002). See *supra* note 106 (expressing Pope John Paul II’s views regarding limitations on market); CATECHISM OF THE CATHOLIC CHURCH ¶ 2426 (2d ed. 1997) (noting the economy “is not meant solely to multiply goods produced and increase profit or power; it is ordered first of all to the service of persons, of the whole man, and of the entire human community”).

In narrow terms, welfare capitalism refers to the view that the corporate employer has an obligation to provide security to workers. The main idea of welfare capitalism in the workplace is the notion that employers should recognize the value of employees, provide for their needs beyond what was required by market competition. Sanford Jacoby’s book examining welfare capitalism gives examples of three companies who successfully engaged in such practices, showing them to be a viable approach for business. SANDFORD M. JACOBY, *MODERN MANORS: WELFARE CAPITALISM SINCE THE NEW DEAL* (Princeton U. Press 1997). Jacoby argues that “welfare capitalism was a good fit for a distinctive American environment composed of large firms, weak unions, and small government.” *Id.* at 4. See also O’Connor, *supra* note 9, at 6 (discussing why welfare capitalism developed in such a pronounced fashion in the U.S.). Although the motive for welfare capitalism may not have been an altruistic one, clearly the provision of various benefits provided by employers contributed to a sense of security by employees.

profits for those shareholder-owners.¹²⁰ This notion, which views the economic gain of owners as the only or the highest goal, promotes a “Darwinism of the marketplace.”¹²¹ So long as corporations comply with the law (the limited law that is justified to ensure orderly and efficient operation of the markets) and so long as it is transparent, no more can be demanded of it as a matter of policy.¹²²

However, once the starting point of the debate is not promotion of individual autonomy and maximization of individual wealth, but attainment of the common good, we have a different notion of acceptable and ethical corporate behavior. It is then easier to argue that all of the constituents of the corporation have a legitimate claim to the corporation and that the corporation owes some obligation to the various constituencies.¹²³ It is also easier to accept that “we also need to consider non-economic factors in judging how our system of corporate governance performs.”¹²⁴ Thus, we have a firmer basis for a claim of corporate social responsibility and an argument for a system

¹²⁰ See *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919) (observing that a “business corporation is organized and carried on primarily for the profit of its stockholders. The powers of the directors are to be employed for that end.”); Adolf A. Berle, Jr., *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049, 1049 (1931). See also Curtis Moore, *The Impracticality and Immorality of Cost-Benefit Analysis in Setting Health-Related Standards*, 11 TUL. ENVTL. L.J. 187, 210-211 (1998) (“It is commonly accepted that corporations exist for the sole purpose of making a profit.”).

¹²¹ Philip Kennicott, *Rich with Irony: When Golden CEO Jack Welch Stepped Down, It Was Into the Mud*, WASHINGTON POST, Oct. 14, 2002, at C1 (describing Jack Welch as taking the old idea of Darwinism of the marketplace to new heights and defending it as a necessary policy). Kennicott describes Welch’s strategy as “a mixture of survival of the fittest and intellectual blitzkrieg.” *Id.*

¹²² It is interesting that the Report of the ABA on Corporate Responsibility, although defining “corporate responsibility” to “embrace[] ethical behavior beyond that demanded by minimum legal requirements,” has virtually noting in its recommended policies of corporate governance that go much beyond ensuring compliance with law. American Bar Association, *Report of the American Bar Association Task Force on Corporate Responsibility*, Mar. 31, 2003, at p.4, 31-33.

¹²³ Thus, the Catechism of the Catholic Church explains that “[t]hose responsible for business enterprises are responsible to society for the economic and ecological effects of their operations. They have an obligation to consider the good of persons and not only the increase of profits.” CATECHISM OF THE CATHOLIC CHURCH ¶ 2432 (2d ed. 1997).

¹²⁴ O’Connor, *supra* note 9, at 16 (discussing concept of sustainable economic development and notion that economic growth must be balanced with social and ecological concerns).

of corporate law that promotes an obligation of corporate officers and directors to take into account the interests of not just shareholders, but all corporate constituents.¹²⁵

We might conceive of the responsibilities of a corporation based on the model of the person I have articulated to include a number of elements, some of which are elements that might also be justified under a law and economics view and others of which could not be. These would include, among others:

- An obligation to pay workers a just wage, by which we should understand a wage that takes into account the needs (including cost of living) and contributions of the worker, and not viewing as acceptable paying a lower than living wage merely because the market will bear it. This means also taking steps to assure that workers have the means to save for retirement and have access to affordable health care coverage.¹²⁶
- An obligation to not discriminate among workers based on factors that are not job-related.
- Adoption of workplace policies that support the well-being of employees as workers, family members and members of society, including programs providing for continual worker training, establishing on-site day care facilities or otherwise making provision for working parents, providing information to

¹²⁵ This is not an attempt to turn profit making corporations into non-profit corporations. As the discussion in section B.2. *supra* suggests, I am not advocating the overthrow of capitalism. Rather, I am suggesting that even in a corporation organized for profit it is legitimate to impose limits that protect nonshareholder constituencies.

¹²⁶ Almost half of the workforce has no pension and significant numbers of workers lack any health insurance coverage. See JOINT COMM. ON TAXATION, PRESENT LAW AND BACKGROUND RELATING TO EMPLOYER-SPONSORED DEFINED BENEFIT PLANS (JCX-71-02, 2002), at 28 (finding that only 56% of full-time private-sector employees are covered by an employer-sponsored pension plan); KEVIN PHILLIPS, WEALTH AND DEMOCRACY: A POLITICAL HISTORY OF THE AMERICAN RICH 123 (Broadway Books, N.Y. 2002) (observing that “only 26 percent of employees in the bottom 10 percent had health insurance provided by their companies”).

workers and the means for workers to be involved in corporate decision-making. This means not just affording workers a means to have a small economic stake in the corporation through stock grants and purchase programs, but allowing them to have a real sense of responsibility and ability to have a say – a real stake in the corporation.

- A responsibility for the environmental and other deleterious effects of their business operations, including the promotion of strict environmental and safety standards.
- Adopting an “involved strategy” to corporate philanthropy, taking responsibility for the outcome of endeavors contributed to rather than simply “throwing money at causes.”¹²⁷
- An obligation to turn excessive profits back into productive activities that benefit a wide range of persons, including taking steps to improve the economic well-being of the community in which the corporate operates by promoting local economic development and educational programs.
- A responsibility to ensure that companies abroad with whom the corporation does business are not engaging in human rights and other abuses.¹²⁸
- An obligation to treat all corporate constituents fairly, honestly and justly, and reflecting that obligation in a code of ethics taken seriously by the corporation

¹²⁷ See William Droel, *The Give and Take of Corporate Stewardship*, 61 U.S. CATHOLIC 12 (Jan. 1997).

¹²⁸ Amnesty International has been engaged in efforts along these lines. Their objective has been to encourage companies to both “respect human rights in their own operations” and to “use [their] influence to promote respect for human rights.” Amnesty International, *Human Rights Principles for Companies*, AI Index: ACT 70/001/1998, Jan. 1, 1998, available at <http://web.amnesty.org/library/print/ENGACT700011998>. In April 2004, the UN Commission on Human Rights, over strong objection by the United States, adopted a resolution on the UN Human Rights Norms

as a guide to behavior and not just a statement of aspirations. This means seeing the interests of not only stockholders, but of all corporate stakeholders – workers, suppliers, customers, creditors, the community within which the corporation operates – as being relevant in making corporate decisions and of feeling accountable to each of those stakeholder groups.¹²⁹ Among other things, this obligation would include a notion of reasonable limits on compensation paid to executives, since excess compensation to executives deprives other constituencies of alternative uses of corporate funds.

Not surprisingly given their outflow from the model of the person I have articulated, many of these elements are aspects of the ethical principles of Catholic Social Teaching.¹³⁰ Beginning with Pope Leo XIII's 1891 encyclical, *Rerum Novarum*,¹³¹ Catholic teaching has decried excessive individualism and greed, and emphasized the dignity of each worker, the workplace as a community of mutuality and collaboration, the

for Business, which addresses the responsibilities of businesses regarding human rights. See U.S. Newswire, Apr. 20, 2004, 2004 WL 57651840.

¹²⁹ The stakeholder perspective has been advanced by a number of scholars. See, e.g., William W. Bratton, *The Economic Structure of the Post-Contractual Corporation*, 87 NW. U. L. REV. 180, 208-15 (1992); Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 NOTRE DAME L. REV. 173, 184-86 (1997); Ronald M. Green, *Shareholders as Stakeholders: Changing Metaphors of Corporate Governance*, 50 WASH. & LEE L. REV. 1409, 1418 (1993). In one sense, what I argue for in his Article offers a different basis upon which to justify a stakeholder theory, one that argues for the broadest possible view of who are the stakeholders of a corporation.

¹³⁰ I say not surprisingly because community is the “central moral focus” of Catholic Social Teaching. Shaffer, *supra* note 111, at 526; *id.* at 528-29 (discussing Catholic Social Thought concept of “solidarity,” which views person as in a network of relations, and suggesting that solidarity “is about commitment to the common good”).

¹³¹ Pope Leo XIII, *Rerum Novarum* (On the Condition of Labor) (May 15, 1891). *Rerum Novarum* is the seminal work on modern Catholic Social thought. Pope John Paul II, in praising Pope Leo XIII on the centenary of his death, noted that *Rerum Novarum* “marked the beginning of the modern social doctrine of the Church.” *Pope Honors Memory of Leo XIII*, ZENIT (DAILY DISPATCH), July 20, 2003, available at zenit.org (ZE030720).

notion of the common good, the collective obligation of stewardship of resources,¹³² solidarity with the poor and the marginalized, and the notions of limits on the operation of the market when it does not operate for the social good.¹³³ As recently summarized by Pope John Paul II, Catholic social teaching speaks for the “promotion of human rights, for the protection of the family, for the development of authentically democratic and participatory political institutions, for an economy at the service of man, for a new international order that guarantees justice and peace, and for a responsible attitude toward creation.”¹³⁴ In *Centesimus Annus*,¹³⁵ which sets forth a Catholic vision of a just economic order, the Pope described business as a “society of persons” rather than a “society of capital goods”¹³⁶ and puts the market in a subsidiary role, recognizing that “there are collective and qualitative needs which cannot be satisfied by market mechanisms.”¹³⁷ The Catechism of the Catholic Church explicitly recognizes that

¹³² One author has suggested that the stewardship principle “is at the heart of recurrent calls for corporate responsibility...The interests of employees, customers, communities, and other stakeholders, as well as the long-run prosperity of the enterprise must be faithfully and responsibly considered. This calls for an expanded conception of fiduciary responsibility – an ethos of stewardship.” Philip Selznick, *Social Justice: A Communitarian Perspective*, 6 THE RESPONSIVE COMMUNITY __ (Fall 1996).

¹³³ These principles have been developed in a number of papal encyclicals, supplemented in this country by several statements by the U.S. Catholic Bishops. Some of these documents include: Pope John Paul II, *Centesimus Annus* (The Hundredth Year) (May 15, 1991); Pope John Paul II, *Sollicitudo Rei Socialis* (On Social Concern) (Dec. 30, 1987); Pope John Paul II, *Laborem Exercens* (On Human Work) (Sept. 14, 1981); Synod of Bishops, *Justitia in Mundo* (Justice in the World) (1971); Pope Paul VI, *Octogesima Adveniens* (A Call to Action) (May 14, 1971); Pope Paul VI, *Populorum Progressio* (On the Development of Peoples) (March 26, 1967); *Gaudium et Spes*, Pastoral Constitution on the Church in the Modern World (1965); Pope John XXIII, *Pacem in Terris* (Peace on Earth) (Apr. 11, 1963), Pope John XXIII, *Mater et Magistra* (Christianity and Social Progress) (May 15, 1961); Pope Pius XI, *Quadragesimo Anno* (After Forty Years) (May 15, 1931); U.S. Catholic Bishops, *A Decade after Economic Justice for All: Continuing Principles, Changing Context, New Challenges*, A Pastoral Message of the National Conference of Catholic Bishops on the Tenth Anniversary of the Economic Pastoral (Nov. 1995); U.S. Catholic Bishops, *Economic Justice for All*, Pastoral Letter on Catholic Social Teaching and the U.S. Economy (1986).

¹³⁴ Message of John Paul II to the Members of the *Centesimus Annus Pro Pontifice* Foundation, July 5, 2003.

¹³⁵ Pope John Paul II, *Centesimus Annus* (The Hundredth Year) (1991).

¹³⁶ *Id.* at ¶43.

¹³⁷ *Id.* at ¶40.

“[t]hose responsible for business enterprises are responsible to society for the economic and ecological effects of their operations. They have an obligation to consider the good of persons and not only the increase of profits.”¹³⁸

Many of these suggestions also flow naturally from both Jewish law¹³⁹ and from a Buddhist world view. Regarding the latter, for example, some would credit many of the changes to Ford Motor Company instituted by Bill Ford when he took the helm at that company to his study and embrace of Buddhism.¹⁴⁰ These changes include the filing by Ford of “citizenship reports” and the company’s pulling out (the first auto company to do so) from the Global Climate Coalition, a group that lobbies against environmental initiatives.

While the corporate responsibilities outlined above may sound radical to someone steeped in a law and economics/classical liberalism viewpoint, the truth is that they are far from radical. First, not only are they consistent with the Hobbesian social liberalism described earlier, but they are also consistent with the development of the common law from the nineteenth to the twentieth century in other areas, notably torts and contracts. In his book, *The Ideal Element in Law*, Roscoe Pound traces the development of a “humanitarian ideal,” which shifts the emphasis from liberty to humanity, “from leaving men free to help themselves as they can, to aiding them by the institutions of civilized society to obtain a maximum satisfaction of their claims or desires or reasonable expectations in civilized society compatible with satisfaction of the whole scheme of such

¹³⁸ CATECHISM OF THE CATHOLIC CHURCH ¶ 2432 (2d ed.1997).

¹³⁹ See, e.g., Deuteronomy 24:14-15 (speaking about obligation to not exploit workers); Leviticus 19:9-10 (speaking about obligation to make provision for society’s poor).

¹⁴⁰ See Martha Sherrill, *The Buddha of Detroit*, N.Y. TIMES MAGAZINE, Nov. 26, 2000, at 112 .

expectations with the minimum of friction and waste.”¹⁴¹ He begins by tracking the progression in tort law from its nineteenth century emphasis on individual autonomy, responsibility and will, which produced a fault theory of liability, through theories of reparation and finally to products liability, with its humanitarian idea of placing burdens and losses on those best able to bear them – i.e., those who benefit from the selling of a product.¹⁴² He sees the same idea at play in the progression in contract law from a view of absolute obligation of contract to the development of judicial and legislative doctrines such as unconscionability and adhesion contracts that relieve individuals from the burden of their promises where doing so promotes the humanitarian ideal.¹⁴³

When one examines the development of tort and contract law as Pound does, one sees the law and economics conception of corporations and corporate law as an aberration, as a holdover of classical liberal thought and nineteenth century legal doctrine. Law in many other areas has moved beyond that and we have not been loath to impose social obligations on individuals and institutions. We should have no hesitance to do the same in the corporate law context.

Second, many of the elements of corporate responsibility described above also accord with people’s sense of fairness and notions about how people should treat one another. For example, results of a poll taken in June 2002 reveal that people have stronger feelings of anger over “Enron executives selling their stock at a profit, while employee pensions lost value” and “CEOs taking big bonuses and lavish perks, as their companies were failing and stockholders lost money” than over either “The Catholic

¹⁴¹ ROSCOE POUND, *THE IDEAL ELEMENT IN LAW* 323, 321-347 (Indianapolis: Liberty Fund 2002).

¹⁴² *See id.* at 323-340.

¹⁴³ *See id.* at 340-347.

Church’s handling of pedophile priests” or “The FBI Response to intelligence information that might have provided advanced warning of the September 11th attack.”¹⁴⁴ Moreover, many people believe “that there is a maximum level of income that any person, regardless of the importance of his or her contribution, is worth,”¹⁴⁵ a view confirmed by research findings that many Americans favor a system that has a more restricted range of income than exists today.¹⁴⁶ Given that, perhaps it is not surprising that another survey finds that 61% of people surveyed believe that additional government regulation of corporations is necessary to protect the public.¹⁴⁷

C. Some Thoughts About Implementing a Changed Notion of Corporate Responsibility

Having identified a set of corporate responsibilities that flow from the model of the person I have articulated, the question arises what changes in the law best promote the notion of corporate responsibility and obligation described above. Implicit in my phrasing of the question is the notion that the law has a role here. Notwithstanding claims by some that the law is inefficient and that we should rely on self-regulation,¹⁴⁸ and notwithstanding the desirability that new norms be internalized so that socially responsible behavior occurs without force, the law has a role in helping to change the

¹⁴⁴ See National Public Radio Frequency Questionnaire, June 18-24, 2002 (73% very angry over executive sales and 71% over CEO bonuses, vs. 57% very angry over Catholic Church and 41% over FBI response).

¹⁴⁵ JAMES R. KLUEGEL & ELIOT R. SMITH, BELIEFS ABOUT INEQUALITY: AMERICA’S VIEW OF WHAT IS AND WHAT OUGHT TO BE 121 (1986).

¹⁴⁶ *Id.* at 121-22.

¹⁴⁷ *Democracy Corps: Just 27% Rate the Economy as Excellent or Good*, THE HOTLINE, Aug. 1, 2002 (reporting results of July 22-24, 2002 survey conducted by Greenberg Quinlan Rosner Research).

¹⁴⁸ The law and economics model is largely one of self-regulation. See *supra* note 70 and accompanying text.

norms under which corporations operate.¹⁴⁹ Right now, corporate social responsibility is viewed as a voluntary and altruistic act;¹⁵⁰ corporations may choose to behave in a socially responsible manner, but they are under no compulsion to do so¹⁵¹ and many do not.¹⁵² It may be that ultimately we succeed in creating a culture in which we can do away with law, but we clearly are not yet there.¹⁵³ Therefore, although I am not unmindful of the concerns raised by Stephen Bainbridge and others that the law not “pose an unwarranted threat to economic liberty,”¹⁵⁴ I believe there is a role for law in helping

¹⁴⁹ I do not mean to suggest that there is not an important role for non-legal strategies, such as media campaigns and other efforts to organize socially responsible programs. My focus, here, however, is on the role of the law.

¹⁵⁰ Clearly there are examples of corporations voluntarily acting in a socially responsible manner. For example, Starbucks is noted for both investing in communities where its employees and customers live and for making investments that benefit coffee producers and their families and communities, in an effort “to promote a sustainable model for the worldwide production and trade of high-quality coffee.” See Starbucks Corporate Social Responsibility, http://starbucks.co.uk/en-US/_Social+Responsibility; Carla Tishler, *Heartfelt Motivation, Bottom-Line Accountability*, HARVARD BUSINESS SCHOOL WORKING KNOWLEDGE, May 6, 2002, available at <http://www.hbsworkingknowledge.hbs.edu/item.jhtml?id=2922&t=globalization>. For example, it has collaborated with a number of farms to improve local water systems and other projects, both by paying an additional premium on top of the purchase price of coffee (which premium is matched by the farms) and by raising and contributing other funds toward social development projects. See Starbucks Corporate Social Responsibility Fiscal 2002 Annual Report, at 10; http://starbucks.co.uk/en-US/_Social+Responsibility/_Social+Responsibilities/Social+Development+Projects.htm (describing Starbucks Social Development Projects). See also, Lewis D. Solomon, *On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicly Held Corporations – A Critical Assessment*, in LAWRENCE E. MITCHELL (ED.), *PROGRESSIVE CORPORATE LAW* 281, 285-303 (1995) (discussing the Body Shop and Ben & Jerry’s Homemade, Inc. as examples of corporations implementing a “humanomics approach” to business).

¹⁵¹ For example, although the American Law Institute’s proposed principles and goals for guiding corporate action recognize that “the corporation is a social as well as an economic institution,” the principles are largely framed in aspirational and voluntary terms. American Law Institute, 1 *Principles of Corporate Governance: Analysis and Recommendations* §2.01 (1994). Thus, for example, the principles say that corporations “may” take ethical considerations into account and “may” devote resources to public welfare and other purposes even if corporate profit and shareholder gain are not enhanced by those actions. *Id.* at 2.01(b)(2), (3).

¹⁵² See *supra* notes 8-15.

¹⁵³ See MARJORIE KELLY, *THE DIVINE RIGHT OF CAPITAL: DETHRONING THE CORPORATE ARISTOCRACY* 147-49 (2001) (discussing problems of voluntary solutions and the failure of those promoting corporate reform to recognize the necessity of legal changes to effectuate reform).

¹⁵⁴ Stephen M. Bainbridge, *The Bishops and the Corporate Stakeholder Debate*, UCLA School of Law Research Paper No. 02-10 (2002), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=308604; see MICHAEL NOVAK, *TOWARD A THEOLOGY OF THE CORPORATION* 45 (rev. ed. 1990).

to achieve greater corporate social responsibility with the aim of changing underlying norms.¹⁵⁵

Moreover, the notion of imposing obligations on corporations as a matter of law creates no theoretical difficulties. Once we recognize that corporations have social responsibilities, the fact that they are creatures of the law, possessing only those rights given to them by the law, means that the law is justified in acting to promote the social good.¹⁵⁶

If one accepts that the law should be used as a tool to help promote a sense of corporate responsibility, it will be necessary to determine now it ought to go about doing so. That question (which is beyond the scope of this Article, the primary aim of which is to focus on how we talk and think about the nature of corporations and their obligations) involves consideration of factors such as the role of tax system (ranging from the basic progressivity of the income tax system to how we tax investment income to the taxation of corporations); the role of corporate and securities laws (in the former, use of concepts such as fiduciary duties and in the latter expanded disclosure obligations); the role of legally mandated codes of corporate conduct that have aims broader than transparency and mere compliance with legal standards;¹⁵⁷ the comparative merits of mandates vs. incentives; how to deal with outliers; and how to preserve positive incentives.¹⁵⁸

¹⁵⁵ While I may not necessarily agree with where Professor Bainbridge would draw the line, I don't disagree with the notion that the law must strive for a "nuanced balancing of freedom and virtue." Stephen M. Bainbridge, *Catholic Social Thought and the Corporation*, UCLA Research Paper Series, Research Paper No. 03-20, Oct. 2003, at p.6, available at <http://ssrn.com/abstract=461100>.

¹⁵⁶ See *supra* notes 229-231 and accompanying text.

¹⁵⁷ The Sarbanes-Oxley Act does not require that corporations adopt codes of ethics. It merely requires public corporations to disclose whether or not they have a code of ethics for senior financial officers and, if not, disclose why not. See Sarbanes-Oxley Act § 406 (to be codified at 15 U.S.C. § 7264). In a similar vein, the NYSE proposed provisions requiring listed companies to "adopt and disclose a code of business conduct and ethics for directors, officers, and employees," include as topics to be covered mainly those dealing with technical compliance with law. NYSE CORPORATE ACCOUNTABILITY AND LISTING

However, I do want to say a few things about the impact of the changed notion of the individual on the law's ability to operate effectively.

1. Need to Acknowledge Non-Neutrality of Model of the Corporation

Some of the difficulties in talking about corporate social responsibility and the legal regulation of corporations become easier once the underlying views are aired. Currently, the underlying view of the person and the political and economic reality that underlie our views of the corporation go largely unarticulated, meaning they are not part of the debate. Instead, the underlying premises of the law and economics model are accepted as part of the background, which creates problems since many of the conclusions flow ineluctably once the premises are accepted. Thus, those opposed to the regulatory results of a law and economics view are relegated to criticizing particular assumptions used in the model (e.g., justifying legal regulation on the basis of market failure),¹⁵⁹ arguing that particular types of regulation better promote the efficiency aims

STANDARDS COMMITTEE, RECOMMENDATIONS SUBMITTED FOR SEC APPROVAL, at 20 (2002). It is true that one of the provisions requires that listed corporations “proactively promote ethical behavior” by encouraging discussions of “ethically ambiguous courses of action” between employees and their superiors, but it is not clear what makes behavior ethically ambiguous.

¹⁵⁸ See, e.g., David A. Weisbach, *Should Legal Rules Be Used to Redistribute Income?*, 70 U. CHI. L. REV. 439 (2003) (discussing differences in distortion of incentives created by different means of redistributing income). In the context of executive compensation, for example, we need to reward executives in a manner that encourages high performance in pursuit of larger corporate interests while discouraging self-interested behavior. I have elsewhere argued that incentive compensation as currently structured does not do a good job in maximizing performance by corporate managers. See Susan J. Stabile, *Motivating Executives: Does Performance-Based Compensation Positively Affect Managerial Performance?*, 2 U. PA. J. LAB. & EMPL. L. 227 (1999).

¹⁵⁹ See, e.g., Constance A. Bagley & Karen L. Page, *The Devil Made Me Do It: Replacing Corporate Directors' Veil of Secrecy with the Mantle of Stewardship*, 36 SAN DIEGO L. REV. 897, 903-911 (1999) (criticizing assumptions underlying law and economics model and also arguing for replacing profit maximization view with a doctrine of stewardship).

of the law and economics model,¹⁶⁰ or making what are viewed as “soft” public policy type arguments.¹⁶¹

More importantly, the failure to point out the value-laden nature of the assumptions underlying the law and economics model opens opponents to criticism that they are injecting values into what ought to be a value-neutral system.¹⁶² If the underlying bases of the law and economics model is articulated at all, they are expressed as neutral, although neutral they are not.¹⁶³

Thus, for example, although efficiency sounds like a neutral concept, it is important to understand that certain accepted notions of efficiency at least implicitly embody judgments that are anything but neutral. For example, a distribution of resources satisfies Kaldor-Hicks efficiency so long as there is an increase in net social wealth – so

¹⁶⁰ See, e.g., Constance A. Bagley & Karen L. Paige, *The Devil Made Me Do It: Replacing Corporate Directors' Veil of Secrecy With the Mantle of Stewardship*, 36 SAN DIEGO L. REV. 897 (1999) (arguing for a model of stewardship based on fact that exclusive focus on shareholder value is inefficient); Thomas W. Dunfee, *Corporate Governance in a Market with Morality*, 62 LAW & CONTEMPORARY PROBLEMS 129 (1999) (arguing that existence of marketplace morality means that managers must consider other stakeholder interests in order to maximize shareholder return).

¹⁶¹ See e.g., Stephen M. Bainbridge, *Book Review: Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 865 (May 1997); Stephen M. Bainbridge, *In Defense of the Shareholder Wealth Maximization Norm: A Reply to Professor Green*, 50 WASH. & LEE L. REV. 1423 (Fall 1993). See also Gregory Mitchell, *Why Law and Economics' Perfect Rationality Should Not Be Traded for Behavioral Law and Economics' Equal Incompetence*, 91 GEO. L.J. 67 (November 2002).

¹⁶² See Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512 (1980) (noting the economist argument that economic analyses should be entirely value-neutral). Even the language of the discussion suggests the belief that those who oppose economic principles are pitting value-laden positions against neutral ones. Thus, for example, one commentator notes that the “trick for society is to impound the wisdom of the Contractarians and gain the benefits of enhanced economic efficiency while, at the same time, to soften the hard edges of capitalism by injecting widely held values of society.” Rutherford B. Campbell, Jr., *Corporate Fiduciary Principles for the Post-Contractarian Era*, 23 FLA. ST. U. L. REV. 561, 576-77 (1996) (also noting that the “failure of the law and economics movement to accomplish, or, indeed, even to attempt this task is at the heart of the reason society rejects Contractarian views regarding corporate fiduciary duties”).

¹⁶³ The same is true of classical liberalism, which purports to be neutral at least insofar as it argues for a neutral state that allows individuals to determine their own conception of the good. See, e.g., Jeremy Waldron, *Legislation and Moral Neutrality*, in JEREMY WALDRON, LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991 (Cambridge U. Press 1993). However, the effect of that supposed neutrality is to create a decided bias against non-individualist or community conceptions of the good life.

long as the gains of the winners as a whole exceed the losses of the losers as a whole.¹⁶⁴ Implicit in that is a judgment that it is acceptable for businesses or societies to accept allocations in which some people are worse off. That judgment may or may not be better than a particular alternative judgment; it assuredly, however, is not neutral.

Similarly, the law and economics model treats all values in economic terms. In the corporate context, providers and employees are not persons, they are “suppliers,” “vendors,” “factors of production,” and all is spoken of in terms of business transactions.¹⁶⁵ It therefore has no basis for valuing the well-being of those persons other than in economic terms,¹⁶⁶ meaning it has no basis upon which to provide protection to vulnerable parties, and, as the Kaldor-Hicks view of efficiency suggests, no desire to do so. The decision that the only values worth pursuing are economic ones is similarly not a neutral one.¹⁶⁷ The pretense that it is and that therefore those who seek to impose greater corporate social responsibility are injecting values into a neutral system distorts the terms of the debate over legal reform.

2. Consequences of Unbridled Individualism

¹⁶⁴ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 13-14 (4th ed. 1992) (defining efficiency); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 91-94 (defending the Kaldor-Hicks notion of efficiency); Bainbridge, *supra* note 1, at 11-16 (comparing different notions of efficiency). One contrast is John Rawls’ “difference principle,” the idea that “unless there is a distribution that makes both persons better off...an equal distribution is to be preferred.” JOHN RAWLS, *A THEORY OF JUSTICE* 76 (Harvard U. Press 1971).

¹⁶⁵ See Bainbridge, *supra* note 1, at 13-14 (noting that when economists look at corporations, rather than a community of shared interests, they see “inputs whose team labor produces outputs” and directors as “coordinating the activities of the other inputs”); William W. Bratton, Jr., *The New Economic Theory of the Firm: Critical Perspectives from History*, 41 *STAN. L. REV.* 1471 (1989).

¹⁶⁶ See Moore, *supra* note 120, at 211 (“Money is the language that corporations speak and it is the yardstick by which they measure value.”).

¹⁶⁷ See Rev. John J. Coughlin, O.F.M., *Pope John Paul II and the Dignity of the Human Being*, 27 *HARV. J. L. & PUB. POL’Y* 65, 74, 77 (2003) (observing that “every system of law reflects certain assumptions about what it means to be human” and that the market economy is based on an “image of the human person whose primary fulfillment is as a consumer of an ever greater array of material goods”).

At the same time that the view of the person as atomistic and individuated and the political system it produces argues for a smaller role of the law in regulating corporations, it also has the effect of increasing the need for regulation. Individuals determine what courses of action are acceptable by social consensus and norms¹⁶⁸ and by the ideology that produces them.¹⁶⁹ In general terms, treating people as though they are self-interested and individuated encourages them to act in that way; an individualist political and capitalist culture based on a believed norm of self-interest creates that norm, inducing people to behave in self-interested ways.¹⁷⁰ Thus, for example, the rise of individualistic values is an important factor that has contributed to a decline in membership in voluntary community organizations.¹⁷¹

We can see the operation of this dynamic in many different areas by looking at the effect of external reward and punishment systems on individuals' determinations of how to behave.¹⁷² Extrinsic motivators often exert an adverse influence on intrinsic

¹⁶⁸ See Kenneth D. Butterfield, Linda Klebe Trevine & Gary R. Weaver, *Moral Awareness in Business Organizations Influences of Issue-Related and Social Context Factors*, 53 HUMAN RELATIONS 990, 999, 1001 (2000); James R. Rest, *The Major Components of Morality*, in MORALITY, MORAL BEHAVIOR, AND MORAL DEVELOPMENT 30-31 (William M. Kurtines & Jacob Gewirtz eds., 1984); Eletta Sangrey Callahan et al, *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AMERICAN BUSINESS LAW JOURNAL 177, 185 (Fall 2002) (citing research suggesting that "individuals tend to adopt the moral norms of those with whom they work").

¹⁶⁹ See George W. Watcon, John M. Shepard & Carroll U. Stephens, *Fairness and Ideology*, 38 BUSINESS & SOCIETY 83 (Mar. 1999) (empirically demonstrating fact that communitarian vs. individualist ideologies influence people's judgment of fairness in corporate downsizing).

¹⁷⁰ See George W. Dent, Jr., *Secularism and the Supreme Court*, 1999 B.Y.U. L. REV. 1, 33 (1999) (liberalism "becomes a self-fulfilling prophecy; a social order that is designed to work on the presumption that people are self-interested tends to produce that kind of people") (quoting Stanley Hauerwas); Dale Miller, *The Norm of Self-Interest*, 54 AMERICAN PSYCHOLOGIST 1 (1999) (finding that the assumption of self-interest has a confirming effect, causing people to act as though they are more self-interested than they are).

¹⁷¹ Dent, *supra* note 170, at 33-34 (noting role of religion in civic activism and decline of such activism based on growth of secular materialism); Robert Putman, *Bowling Together in The United State of America*, 13 AMERICAN PROSPECT 20 (Feb. 11, 2002).

¹⁷² See Lynne L. Dallas, *A Preliminary Inquiry Into the Responsibility of Corporations and Their Officers and Directors for Corporate Climate: The Psychology of Enron's Demise* 13 (2003) (forthcoming) (discussing impact of reward on behavior of individuals in corporate setting).

motivation. Thus, for example, a child with “love of learning,” can have that love permanently destroyed by providing external “rewards” for good performance of educational tasks¹⁷³ and rewarding altruistic behavior reduces the intrinsic motivation to behave altruistically.¹⁷⁴

More directly, corporate players reared within a system of individual entitlement and promotion of self are not taught to value things apart from riches and material gain – specifically their own riches and gain.¹⁷⁵ In fact “only in an ethical climate based on an egoistic decision-making criterion would people most likely act in ways to promote their own exclusive self-interest regardless of law, rules, or the impact their decisions have on others.”¹⁷⁶ If that is the goal, then fraud and other misdeeds can be expected to occur

¹⁷³ ALFIE KOHN, PUNISHED BY REWARDS: THE TROUBLE WITH GOLD STARS, INCENTIVE PLANS, A’S, PRAISE AND OTHER BRIBES 40 (1993); Kelly J. Skaggs et al., *The Use of Concurrent Schedules to Evaluate the Effects of Extrinsic Rewards on “Intrinsic Motivation”*: A Replication, 12 J. ORGANIZATIONAL BEHAV. MGMT 45, 46 (1992).

¹⁷⁴ Adrian Vermeule, *Hume’s Second-Best Constitutionalism*, 70 U. CHI. L. REV. 421 (2003); Ernst Fehr & Bettina Rockenbach, *Detrimental Effects of Sanctions on Human Altruism*, 422 NATURE 137 (Mar. 2003) (noting that self-interest approach is dangerous because overlooks negative impact of sanctions on human altruism).

¹⁷⁵ The issue is whether one views oneself as a “free agent” or an “institutional type,” to borrow the comparison used by economist James Tobin. The context in which he was speaking was the academic one, but the same principle holds in the corporate context where free agents worry about obtaining “quick, easy money rather than ensuring their companies’ long-term prospects.” Daniel Altman, *How to Tie Pay to Goals, Instead of the Stock Price*, N.Y. TIMES, Sept. 8, 2002, at §3, p.4. See also Eletta Sangrey Callahan et al., *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AMER. B. L.J. 177, 185 (Fall 2002) (observing that “when corporate leaders form communities within their firms that will foster moral virtue,” wrongdoing is less likely).

Even when corporate managers take an institutional perspective, it is limited to a concern with the interests of shareholders, leading to behavior that harms other corporate constituents. Kent Greenfield & Peter C. Kostant, *An Experimental Test of Fairness Under Agency and Profit-Maximization Constraints (With Notes on Implications for Corporate Governance)*, 71 GEO. WASH. L. REV. 983 (2003) (finding that shareholder profit maximization norm provides incentive for managers to act unfairly to non-shareholder constituents); Peter C. Kostant, *Team Production and the Progressive Corporate Law Agenda*, 35 U.C. DAVIS L. REV. 667, 670 (2002) (observing that the shareholder wealth maximization norm “undercuts incentives for corporations to consider legal and ethical issues”).

¹⁷⁶ James C. Wimbush & Jon M. Shepard, *Toward an Understanding of Ethical Climate: Its Relationship to Ethical Behavior and Supervisory Influence*, 13 J. BUS. ETHICS 637, 641 (1994) (also noting that absent institutional encouragement of ethical behavior, employees are led to feel that “anything goes as long as the organization’s desired level of productivity is achieved”).

with regularity, especially during economic downturns when “above board tactics” are less likely to guarantee success.¹⁷⁷ Moreover, adopting a framework that describes the basic corporate relationship in contractual terms “both assumes and legitimates the adoption of a purely self interested preference function by both parties.”¹⁷⁸

Enron provides a compelling example of the truth of this. Whatever else one says about it, Enron – with all of its sham financial transactions and accounting, self-dealing, and misrepresentations and nondisclosures to the public and its employees – was a product of individualism run amok,¹⁷⁹ of what C.B. MacPherson would describe as “possessive individualism.”¹⁸⁰ As Professor Faith Kahn has observed, the ideology among Enron’s executives was “super-aggressively (if opportunistically or ‘pseudo’) pro-market capitalist, radically individualist, antigovernment (even quasi anarchistic), and messianic only in its commitment to the pursuit of corporate power and of immediate profit.”¹⁸¹ Executives displayed a willingness to use deceit to obtain their objectives. Employees viewed it as their job to “take advantage of the law to make as much money

¹⁷⁷ Dinesh D’Souza suggests that capitalism inspires vice and temptation, provoking depravity among those who have and seek more. See DINESH D’SOUZA, *THE VIRTUE OF PROSPERITY*.

¹⁷⁸ Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735 (2001). See also Michael Bommer et al, *A Behavioral Model of Ethical and Unethical Decision-Making*, 6 J. BUS. ETHICS 265, 268 (1987) (observing that “managerial decisions will correspond more closely to the humanistic, religious, cultural, and societal values of the society-at-large only when these values are made part of the job environment”); Chris Moon & Clive Bonny, *Attitudes and Approaches*, BUS. ETHICS 22, 29-30 (Chris Moon & Clive Bonny eds., 2001) (reporting study finding less employee theft in stores with codes of ethics and organizational values than in those without).

¹⁷⁹ Enron was described by some employees as “less a company than a collection of mercenaries.” David Streitfeld & Lee Romney, *Enron’s Run Tripped by Arrogance, Greed; Profile: A Lack of Discipline and a Drive to Bend the Rules Were Key Factors in the Meltdown*, L.A. TIMES, Jan. 27, 2002, at A1.

¹⁸⁰ See MACPHERSON, *supra* note 79 at 263.

¹⁸¹ Faith Stevelman Kahn, *Bombing Markets, Subverting the Rule of Law: Enron, Financial Fraud, and September 11, 2001*, 76 TULANE L. REV. 1579, 1599 (2002).

as we can.”¹⁸² They were encouraged “to push the edge of every rule, even without their supervisors’ knowledge.”¹⁸³ Everything about the incentive structure at the company discouraged teamwork and cooperation and encouraged pursuit of individual self-interest, without any concern for the collective good.¹⁸⁴ Among other things, the fact that employees were asked to judge each others’ performances, “knowing their own promotions and survivals hung in the balance,” meant that employees adopted an “every man for himself” attitude.¹⁸⁵

3. Effect of Changing the Underlying Notion of the Person

What happens when we change our underlying notion of the person and her relation to the world? What is the effect of replacing an individualist orientation with a transpersonal orientation? As one author suggested, individuals with “an orientation of

¹⁸² Streitfeld & Romney, *supra* note 179.

¹⁸³ *Id.* See Nancy B. Rapoport, *Enron, Titanic, and the Perfect Storm*, 71 *FORDHAM L. REV.* 1373, 1386 (2003) (observing that the “structure of Enron itself encouraged a constant pushing of the outside of the envelope”).

¹⁸⁴ See Joshua Chaffin & Stephen Fidler, *Enron Revealed to Be Rotten to the Core*, *FIN. TIMES* (London) Apr. 9, 2002, at 30; John A. Byrne et al, *The Environment Was Ripe for Abuse*, *BUS. WK.*, Feb. 25, 2002, Streitfeld and Romney, *supra* note 179; Bethany McLean et al., *Why Enron Went Bust*, *FORTUNE*, Dec. 24, 2001, at 62; Rapoport, *supra* note 183, at 1386 (observing that the company’s review and compensation structure discouraged cooperation and encouraged backstabbing); Marleen O’Connor, *The Enron Board: The Perils of Groupthink*, 71 *U. CINN. L. REV.* 1233, 1252-55 (2003) (describing “gladiator” culture at Enron, where employees were out to get each other to advance themselves and how that encourages ethical violations).

¹⁸⁵ Rapoport, *supra* note 183, at 1386-87 (also discussing fact that incentive compensation structure rewarded only individual achievements, not achievement of group goals). Professor Rapoport suggests that the influence of the culture at Enron was difficult for any individual to overcome. “When the leaders are engaging in self-dealing and side deals, and the supervisors of those leaders are also engaging in side deals, and the gatekeepers are approving those side deals, what should the rank and file be thinking? Given the magnitude of the potentially illegal profits made by CFO Andrew Fastow and CEO Jeffrey Skilling, and the sense of entitlement that Enron encouraged, it must have taken significant strength of character to resist getting on the gravy train.” *Id.* at 1379-80.

service to a world based on the unity of all humanity...identify with others and respond effortlessly, compassionately, and selflessly in any given situation.”¹⁸⁶

Applied to the corporate context, “[a] manager who ‘sees that her person is affected by just relations with employees learns to inculcate responsibility just as a parent’s identity is developed by being responsible for a child who has (at least sometimes) less power. Managers learn that their ‘selves’ are tied up with those who are lower on the corporate hierarchy.”¹⁸⁷ With that kind of view, instead of laying off workers to create a positive reaction on Wall Street, an employer might say, as did Henry Ford in 1914,

“If we are obliged to lay men off for want of sufficient work at any season we purport to so plan our year’s work that the lay-off shall be in the harvest time, July, August, and September, not in the Winter. We hope in such cases to induce our men to respond to the calls of the farmers for harvest hands, and not to lie idle and dissipate their savings. We shall make it our business to get in touch with the farmers and to induce our employees to answer calls for harvest help.”¹⁸⁸

Ford’s statement was made in the context of an announcement that the company would be sharing profits with employees and establishing a minimum wage for workers. Another company executive explained that the program recognized that “social justice begins at home,” and that employees “helped us to produce this great institution and are

¹⁸⁶ Lewis D. Salomon, *Reflections on the Future of Business Organizations*, 20 *CARDOZO L. REV.* 1213, 1223 (1999); Lewis D. Solomon, *Perspectives on Human Nature and Their Implications for Business Organizations*, 23 *FORDHAM L. J.* 221, 228-34 (1996).

¹⁸⁷ Timothy L. Fort, *The Corporation as Mediating Institution: An Efficacious Synthesis of Stakeholder Theory and Corporate Constituency Statutes*, 73 *NOTRE DAME L. REV.* 173, 176 (1997).

¹⁸⁸ [Ford] *Gives \$100,000 to 26,000 Employees*, *N.Y. TIMES*, Jan. 6, 1914, p.1, available at <http://www.nytimes.com/learning/general/onthisday/big/0105.html>. Ford expressed as his ambition the desire “to employ still more men, to spread the benefits of this industrial system to the greatest possible number, to help them build up their lives and homes.” *Dodge v. Ford Motor Co.*, 170 *N.W.* 668, 683 (Mich. 1919).

helping to maintain it.”¹⁸⁹ Thus, just as the view of individual as self-existent and independent both makes regulation more difficult to justify even as it increases the need for regulation, a view of individuals as one and the corresponding view of all as gift not only makes it easier to justify regulation, but also may lessen the need for it.

Or, consider the potential effect of a shift from viewing the things of the world as entitlement to viewing them as gift. In addition to changing our view of the role of government, more widespread acceptance of such a view would also have a direct effect the primary behavior of players within the corporation. “Knowing that one has benefited richly, there is a need to put something back, to add to the stream from which we have dipped our vital nourishment.”¹⁹⁰

Obviously, this changed view of the person will also have impact outside of the area of corporate regulation. Our views about the federal estate tax are one good example. When we have a view based on individual merit/achievement, it is easy to argue against taxing inherited wealth. But if success is viewed as the product of something more than individual achievement, the notion is easier to accept. In a book about the estate tax published in 2003, William H. Gates, Sr. (father of Bill Gates) and Chuck Collins argue in favor of the estate tax on the grounds that the rich would not have become so without the benefit of the society in which they live.¹⁹¹ “Ask how well they would have done if they had been born in Nigeria,” observed Gates.¹⁹² Reflected in

¹⁸⁹ See *id.* See also Joseph P. Sullivan & Thomas F. McMahon, C.S.V., *Faith that Mandates Justice: A Case Study*, 28 CHI. STUD. 17 (1989) (describing one company’s response to necessary downsizing, based on its management’s Catholic understanding of the dignity of all human beings).

¹⁹⁰ Thomas C. Rieke, *What’s a Steward to Do?*, THE CLERGY JOURNAL 23 (Jan. 2001).

¹⁹¹ WILLIAM H. GATES, SR. & CHUCK COLLINS, *WEALTH AND OUR COMMONWEALTH: WHY AMERICA SHOULD TAX ACCUMULATED FORTUNES* (2003).

¹⁹² Kristi Heim, *Gates’ Dad: Wealthy Should Pay Up*, CONTRA COSTA TIMES, Feb. 5, 2003, at § C, p.1.

Gates' arguments is a notion that the individual that succeeds is part of a larger entity that contributes to that success. An individual or a business succeeds not purely through the individual's effort, but because of a "whole infrastructure of financial markets, court systems and other institutions that make it possible to start a business, succeed and generate a huge fortune."¹⁹³

Absent changing the underlying view of the person, it will be much harder both to accept an alternative model of regulation and for that model to be effective. That is to say, it seems intuitively obvious that the success of whatever political, economic or legal system is envisioned depends on a consonance between the system and the underlying view of the person. One cannot force an external overlay that is different from the underlying belief system, even if that underlying belief system is unexpressed; to expect a widespread embrace of stewardship and responsibility without adopting a communal/interdependent view of the person is unrealistic. Unless one explicitly addresses/identifies the underlying worldview and adopts an underlying worldview that is consistent with the change, then any change is externally imposed only and cannot work to change people's hearts and mind, and thus their behavior.

It is easy to see that certain legal approaches to corporate regulation depend for their effectiveness on a changed view of the individual and the individual's relation to the world. Consider the example of securities regulation, which adopts disclosure – with its goal of transparency – as its primary mode of regulating corporations.¹⁹⁴ The goal of transparency makes sense only if we assume that someone cares about what is being

¹⁹³ *Id.*

¹⁹⁴ See Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (discussing the overarching goal of corporate governance as achieving transparency).

disclosed. For disclosure to be effective, it is self-evident that the subject of disclosure must be something that touches enough people for the disclosure to have any effect. For example, reports of corporate accounting scandals that cause large shareholder losses resulted in a huge public outcry¹⁹⁵ whereas there is mild if any public reaction to reports of corporations engaging in racial discrimination in their employment practices¹⁹⁶ or in human rights abuses abroad.¹⁹⁷ Corporate accounting scandals are viewed as something that affects or could affect all individuals, hence it is viewed as a concern for all. Issues such as discriminating against a particular race (of which one is not a member) or commission of human rights abroad (i.e., not in my backyard), at least for the majority of the population, are viewed as things that happen to someone else, to an “other.” Enormous public outcry occurs only in the case of things that are viewed as directly affecting (or at least potentially affecting) a large enough body of individuals to cry loud enough to be heard.¹⁹⁸

This reality says something about the likely effectiveness of proposals for more social and environmental accountability in corporate disclosure documents.¹⁹⁹ The big question is: who will care? Are there enough people who will view such issues as

¹⁹⁵ For instance, the public’s reaction to the Enron scandal led, within a short period of time, to the passage of the Sarbanes-Oxley Act. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.A. (West Supp. 2003).

¹⁹⁶ For example, consider the relatively short life span of the public reaction to reports of racial discrimination in companies like Cracker Barrel or Denny’s.

¹⁹⁷ See Dickerson, *supra* note 12 at 1065 (discussing lack of media and public interest of disclosure of corporate human rights abuses).

¹⁹⁸ This is true not just in terms of corporate matters. For all that September 11 was a national tragedy, it was a different kind of personal tragedy for those who lost family members in the collapse of the towers.

¹⁹⁹ See e.g., David Hess, *Social Reporting: A Reflexive Law Approach to Corporate Social Responsiveness*, 25 J. CORP. L. 41 (1999) (suggesting that public disclosure of corporate social behavior will institutionalize responsible decision-making); Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197 (1999) (arguing for greater social disclosure).

affecting them that the disclosure will have any impact? Absent some change in the underlying view of person, the answer is likely to be no.²⁰⁰

Earlier I suggested that the secular view of the person increases the need to external regulation of behavior at the same time that it leads to a view that the law should have a very limited role. The religious view of the person both makes it easier to justify using law to promote the common good and, ultimately, by helping to change underlying norms may reduce the need to rely on the law.

D. Globalization and the Changed View of the Individual

Before ending, let me make some observations relevant to the world within which corporations now operate. Perhaps one of the most frequently used words to describe the current reality is “globalization.”

Globalization for the most part has meant the global spread of unrestrained capitalism. More specifically, the shareholder value maximization norm has been “carried forth to the world as America’s greatest gift to the global economy since mass production itself.”²⁰¹ As a practical reality, this has translated into larger and more powerful multinational corporations with increasing power to impose their will on a broader range of persons, which almost inevitably means more for the haves and even

²⁰⁰ See Dickerson, *supra* note 12 (discussing failure of disclosure to address non-financial corporate abuses).

I don’t want to overstate the case here. There is some evidence of occasional public and consumer concern over things that do not directly affect the persons individually. For example, at least in some circles, there has been widespread dissatisfaction with Nike over working conditions in non-U.S. factories producing the company’s products. See *New Nike Panel to Tackle Company’s Factory Issues*, BUSINESS, Sept. 11, 2001, at C2. See also John Files, *N.B.A.: Roundup; Labor Group Criticizes League*, N.Y. TIMES, May 11, 2001, at p.D6. But concern over such issues is serendipitous. Because individuals view others as others, although they may sometimes care about those others, there is no consistency or predictability in their reactions. Therefore, there is no reliable way of assuring that such interests will be addressed.

²⁰¹ William W. Bratton, *Never Trust a Corporation*, 70 GEO. WASH. L. REV. 867, 867 (2002).

less for the have nots.²⁰² Globalization has translated into trade policies by the governments of the industrialized nations that artificially protect their own producers at the expense of those of developing nations.²⁰³ Even worse, globalization sometimes also includes U.S. corporations profiting from human rights abuses committed by foreign government entities.²⁰⁴ These aspects of globalization, or what has been termed

²⁰² See EDWARD LUTTWAK, *TURBO CAPITALISM: WINNERS AND LOSERS IN THE GLOBAL ECONOMY* 5 (1999) (discussing how spread of “turbo-capitalism” from the U.S. to other countries has permitted the architects and beneficiaries of change to enrich themselves at an unprecedented rate, on an unprecedented scale”).

As businesses become more extended, they outstrip the ability of governmental institutions to effectively regulate; just as a business who doesn’t like the laws of one American state could always move to another American state, businesses who don’t like the laws of one country can move to another country. See O’Connor, *supra* note 9, at 2 (observing that “the nation state’s ability to regulate is severely hampered in the global economy because corporations engage in regulatory arbitrage in a world without boundaries” and that unions cannot stop the flight of companies to countries with cheaper labor); Eric W. Orts, *The Legitimacy of Multinational Corporations*, in *PROGRESSIVE CORPORATE LAW* 250 (Lawrence E. Mitchell ed. 1995) (discussing concept of regulatory arbitrage as “[m]ultinational flexibility [which] allows firms...to shift operations among countries to take advantage of differing legal requirements, for example, lower labor costs due to absence of minimum wage laws or unions, more flexible antitrust or tax law, or weaker environmental law”).

None of this is to suggest that no one in developing countries has benefited from globalization. Certainly some workers have obtained jobs they would not have had. But that there has been some benefit does not mitigate the damages that have been done to developing nations.

²⁰³ See Mary Durran, *In World Trade, Cotton Fields Aren’t Level; Global Trade Meeting Fails African Farmers*, NATIONAL CATHOLIC REPORTER, Oct. 10, 2003, at ___ (discussing \$3 billion in subsidies paid to American cotton farmers, resulting in their ability to flood the world market with inexpensive cotton, preventing “West African farmers from competing even in their own domestic market.”).

²⁰⁴ A number of lawsuits have been filed under the Alien Torts Claim Act (the “ATCA”) seeking corporate liability for participation in international human rights violations. See, e.g., *Bowota v. Chevron*, No. C99-2506 (N.D. Cal., fourth amended complaint filed Aug. 30, 2002) (alleging Chevron participation to and assistance in Nigerian military raids in connection with demonstrations on Chevron oil rigs); *Doe v. Unocal*, 110 F. Supp. 2d 1294 (C.D. Cal. 2000), *aff’d in part, rev’d in part*, 2002 WL 31063976 (9th Cir. Sept. 18, 2002), rehearing en banc granted, vacated by 2003 WL 359787 (9th Cir. Feb. 14, 2003) (alleging that defendants, through Burmese military and police forces engaged in forced relocation of villages and knowingly used forced labor); *Doe v. Exxon Mobil Corp.*, No. 01-CV01357 (2001) (alleging Exxon Mobil assistance of human rights abuses committed by Indonesian military in northern Sumatra); *Estate of Rogriguez v. Drummond Co.*, No. CV-02-0665-W (N.D. Ala. 2002) (alleging defendant corporation hired paramilitary security forces to silence union leaders and that those so employed engaged in murder, torture and unlawful detention). This use of the ATCA is controversial, to say the least. See Jenny B. Davis, *Old Law Bares Its Teeth: Alien Tort Claims Act Bites International Firms*, ABA J., Oct. 2003, at 20.

“economic imperialism,”²⁰⁵ are consistent with what I have described as the secular model of the person.

Globalization, however, has an aspect that is more consistent with the religious view of the person I have articulated. By that I mean the recognition of worldwide interdependence, or a more expanded notion of who we define as members of our community as cultures and ideas spread freely throughout the world. In terms of the religious view of the person, globalization means that when we say we are all one, we mean all members of the human community, not just the community composed of persons in the United States. In that sense, globalization is positive, because it acknowledges both the need for global solutions to problems²⁰⁶ and access to worldwide resources to address those problems.

Thus, “to prevent the globalization of the economy from producing the harmful results of an uncontrolled expansion of private or group interests,” it is necessary that the progressive globalization of the economy be increasingly met with a “global culture of solidarity attentive to the needs of the weakest.”²⁰⁷ How we think about global solutions is very much a function of our underlying view of the person. If we adopt a secular model that sees only self-existent individuals, we adopt the language of law and economics, which is not likely to get one far in addressing the negative aspects of

²⁰⁵ Douglas M. Branson, *The Social Responsibility of Large Multinational Corporations*, 16 *TRANSNAT'L LAW* 121, 132-33 (2002) (calling “detrimental globalization” an economic imperialism that “uses globalization as a bulldozer to crush resistance for the achievement of [the goals of eradication of all borders so that the same products and services dominate all markets] by the multinational corporations, which are the progenitors of economic imperialism”).

²⁰⁶ This is most obviously seen in areas of environment and health. See Lovin, *supra* note 213, at 8 (observing that environment management and disease control require “effective and enforceable international rules”).

²⁰⁷ Pope John Paul II, *Address of John Paul II to the Members of the Vatican Foundation “Centesimus Annus – Pro Pontifice”*, May 9, 1998, ¶ 2.

globalization.²⁰⁸ However, if we adopt the religious view that sees all as related – recognizing not just individual rights and autonomy and not even the interests of a particular community (country)²⁰⁹ but of all humankind – then we can focus on the best interests of the world as a whole.

III. Why We Should Not Hesitate to Use A Religious View of the Person as a Basis for Thinking about Corporate Responsibility

Religions and ethical discourse in the public policy arena is rejected by many, perhaps out of fear of overstepping constitutional bounds of separation of church and state²¹⁰ or due to a deeper discomfort with bringing religious and moral values, which tend to be viewed as personal and nonuniversal,²¹¹ into public policy debate.²¹² As one scholar observed, “[a]lthough religion may be uniquely convincing and motivating for

²⁰⁸ A law and economics approach might justify some limited regulation in a global world. One could for example, suggest that just as externalities of the behavior of actors within a state justifies some forms of federal regulation, externalities of the behavior of national actors justifies international regulation.

²⁰⁹ This raises another related illusion that flows from illusion of separateness: the illusion of the importance of nationalism. The communion of beings I discuss here as the religious view of the person is universal. However, as I have suggested, when the person is viewed as separate from others, that results in the artificial creation of groups of people one sees oneself in relation with based on family or other ties. Nationalism is one of those groupings.

²¹⁰ Vincent DiLorenzo has suggested that this concern may be part (but only part) of the explanation for the fact that legal academics “almost completely ignore the viewpoints of religious groups and leaders in their writings.” Vincent DiLorenzo, *Legislative and Public Policy Debate: Should the Social Viewpoints of Religions Groups Play No Role?*, 1 MARGINS, 489, 498 (2001). Professor DiLorenzo studied all articles written between September 1995 and August 2000 that discussed “corporate social responsibility” to see how many, if any, incorporated religion. Only three out of forty-four articles even mentioned religion, and only one of those was written by a legal practitioner and discussed religion as a justification for corporate action. *Id.* at 490-91. Professor DiLorenzo observes that the legal community overlooks, or purposely ignores, the role religion may play in corporate obligations. *Id.* He also points out that those few articles that in some way deal with religion often site only *secular* sources (the few that exist) rather than religious sources. *Id.*

²¹¹ See Timothy L. Fort, *Religious Belief, Corporate Leadership and Business Ethics*, 33 AMER. BUS. L. J. 451 (setting forth position of religion exclusionists that religious language is inherently not sharable and that it “prohibits dialogue because at least one of the interlocutors privileges a position on nondialogical, faithrooted, nonrational grounds”).

²¹² This has been going on since the Enlightenment, when science and reason started to replace Church teachings as leading sources of authority. That shift invited a conclusion that morality was inconsistent with reason. See BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 3-13-3-15 (forthcoming).

individuals, it becomes, for legal purposes, simply another individual preference, which persons are free to pursue as they like within the framework law provides.”²¹³ Thus religions and ethical discourse is viewed as injecting individual values into something that purports to be value-neutral. Even many of those willing to accept that legal decisions ought to be based on morality, prefer to rely on “secular sources of moral knowledge, ...deeply suspicious about moral knowledge based on religious convictions.”²¹⁴

As debates in other areas of the law suggest, I am not alone in thinking that we can move to a richer system by expressly accepting certain religious-based principles.²¹⁵ The truth is, as Justice Douglas once observed, “[w]e are a religious people.”²¹⁶ To suggest otherwise is simply pretense. A March 2003 poll jointly conducted by the Gallup Organization and the Center for Research on Religion & Urban Civil Society finds that for 72% of people, their faith gives meaning and purpose to their lives, and 60% say their faith is involved in every aspect of their lives.²¹⁷

²¹³ Robin W. Lovin, *Church and State in an Age of Globalization*, 52 DEPAUL L. REV. 1, 3 (2002). It is perhaps for that reason that law schools today “have systematically – theologically! – discounted, discouraged and disapproved of the invocation of the religions tradition as important, or even interesting.” Thomas Shaffer, *The Tension Between Law in America and the Religious Tradition*, in THE WEIGHTIER MATTERS OF THE LAW: ESSAYS ON LAW AND RELIGION 315, 327 (1988).

²¹⁴ Wendell L. Griffen, *The Case for Religious Values in Judicial Decision-Making*, 81 MARQUETTE L. REV. 513, 517 (1998).

²¹⁵ See Garavaglia, *supra* note 60, at 1 (2002) (exploring the “inherent weakness in modern secular economic/legal theory to provide adequate foundations for prohibiting the sale of children” and arguing that such a foundation requires “recapturing the notion that human beings are created in the image of God”); Larry Cata Backer, *Religion as the Language of Discourse of Same Sex Marriages*, 30 CAP. U. L. REV. 221 (2002) (arguing that the “road to the legitimization of same sex marriage lies through the work of emerging communities of faith and their religions discourse).

²¹⁶ *Zorach v. Clauson*, 343 U.S. 306, 313 (1952) (“[w]e are a religious people whose institutions presuppose a Supreme Being”). See Marshall, *supra* note 228 at 15 (presenting evidence supporting the conclusion that “[t]he deep religiosity of the American people is borne out statistically”).

²¹⁷ See CRRUCS/Gallup Spiritual State of the Union: Spirituality and Faith Undergird and Motivate Americans to a Surprising Degree, Mar. 4, 2003, *available at* http://www.crrucs.com/9_popup/galluppress.html; Adelle M. Banks, *Americans Link Faith to Daily Life*;

Whether or not we want to acknowledge it, our law has always had a religious basis. Despite his own hostility to organized religion, Thomas Jefferson once opined that “no nation has ever existed or been governed without religion. Nor can be.”²¹⁸ George Washington viewed religion and morality as the most indispensable of those “dispositions and habits which lead to political prosperity”²¹⁹ and one of his first acts as President was to sign a bill “stipulating that for a territory to become a State, the ‘schools and the means of education’ in that territory must encourage the ‘religion, morality and knowledge’ that was ‘necessary to good government and the happiness of mankind.’”²²⁰ Moreover, the law has always had something of a prophetic role, acting in the face of the apathy of the masses on issues such as civil rights.²²¹

More directly, there are two reasons I do not find suspicion about the introduction of religious arguments into public debate a persuasive reason to refrain from proceeding

Poll Finds, TIMES UNION, Mar. 9, 2003, at A4; Kimberly Roots, *New Index Tracks Spiritual State of Nation*, 3 RESEARCH NEWS & OPPORTUNITIES IN SCIENCE AND TECHNOLOGY 1 (May 2003).

I acknowledge that there is a danger when we introduce religion as a basis for decision-making that raw majoritarianism runs over the views of the minority who do not buy into the religious viewpoint. At some level, this is always the danger in democracies, whatever the basis for decision-making. I get comfort in the case of the religious view I espouse here that it is fundamental to so many world religions.

²¹⁸ JAMES HUTSON, RELIGION AND THE FOUNDING OF THE AMERICAN REPUBLIC 96 (1998). Jefferson further believed that “[t]he Christian religion is the best religion that has been given to man and I, as Chief Magistrate of this nation, am bound to give it the sanction of my example.” *Id.* See also David Barton, *The Image and the Reality: Thomas Jefferson and the First Amendment*, 17 NOTRE DAME J. L. ETHICS & PUB. POL’Y 399 (2003) (discussion Jefferson’s views of religion and the distortion by the Supreme Court and others of his views).

²¹⁹ Barton, *supra* note 218, at 428 (quoting from Washington’s Farewell Address).

²²⁰ *Id.* at 427 (quoting from the Northwest Ordinance).

²²¹ See Robert F. Blomquist, *Law and Spirituality: Some First Thoughts on an Emerging Relation*, 71 UMKC L. REV. 583, 597-599, 604-605 (2003) (discussing relation between spirituality and affirmative action). See also Hester L. Milligan, *The Influence of Religion and Morality Legislation on the Interpretation of Second-Parent Adoption Statutes: Are the California Courts Establishing a Religion?*, 39 CA. W. L. REV. 137, 146 (2002) (observing that America was “founded on a specific set of Judeo-Christian beliefs” that most Americans, including judges, still believe in, with judges ruling in accordance with those beliefs).

from the religious view of the person and her relation to the world and others that I set forth herein as a way of thinking about corporations.

First, the religious view of the person I espouse here is not those of a single religion, but rather is common to many religions, and thus different from the types of religious arguments that tend to create political divisiveness.²²² I am not here attempting to claim that the belief system of any one particular religion should hold sway. Indeed, as the Dalai Lama once suggested, the notion of connectedness of all human beings “does not involve the religiosity we normally associate with conventional religious practice. It is not only for people who believe in religion, but is for everyone regardless of race, religions, or political affiliation. It is for anyone who considers himself or herself, above all, a member of the human family and who sees things from this larger and longer perspective.”²²³ Similarly, the notion of stewardship is one that “bind[s] religions throughout the world.”²²⁴ Thus, although there are clearly dangers of the government and religion being one, or of a state sponsored religion, those dangers do not flow from acknowledging certain truths about the person simply because they are religiously-based.²²⁵

²²² This is very different from an employer telling a worker he would go to hell for living with a girlfriend in violation of Christian beliefs or an employer requiring employees to attend a particular religion’s devotional services during work. *See, e.g.,* EEOC v. Townley Engineering & Mrg. Co., 859 F.2d 610, 612 (9th Cir. 1988); Metlebeke v. Bureau of Labor & Industries, 852 P.2d 859 (Or. Ct. App. 1993), *aff’d*, 903 P.2d 351 (Or. 1995). Outside of the corporate/employment context, what I am talking about here is also different from using Judeo-Christian religious standards to uphold laws disapproving of homosexual conduct as the Supreme Court did in its decision in *Bowers v. Hardwick*, 478 U.S. 186 (1986) (refusing to invalidate anti-sodomy laws based on religious views concerning homosexuality).

²²³ *See* HIS HOLINESS THE DALAI LAMA, A HUMAN APPROACH TO WORLD PEACE (Wisdom Publications 1984), *available at* <http://www.lamayeshe.com/otherteachers/hhdl/humanapproach.shtml>.

²²⁴ Berryhill, *supra* note 51, at 5.

²²⁵ As one scholar observed, “[t]he choices are not limited to making religion the sole authority or reducing it to a private preference,” i.e., making it irrelevant. *See* Lovin, *supra* note 213, at 7.

Second, reliance on religious principles in this context does not inject individual values into something that is non-neutral. Although many behave as though our legal and political systems are divorced from any underlying theological and ethical worldview,²²⁶ viewing the set of principles from which we derive our notions of regulation as flowing from a neutral or rational source, this supposed neutrality is a fiction. “Every political theory promotes a particular kind of person even if it denies doing so.”²²⁷

As the earlier discussion has suggested, our discourse about corporations, and the political and economic vision from which that discourse flows, is clearly rooted in morally non-neutral principles that are simply not expressed, perhaps because they have become so deeply ingrained over time that they are simply part of the backdrop from which we operate. As I suggested earlier, our decisions are based on a view of the individual and of a particular notion of the relation of the individual to others and to the world. That view generates a political theory out of which our specific regulatory decisions and our general views about the proper role of regulation flow. Thus, my suggested way of viewing the individual and her relation to the world does not replace neutral premises with non-neutral premises; it merely substitutes a different underlying theological and ethical worldview for the one that presently exists.²²⁸

²²⁶ This sort of behavior is not unique to our consideration of our legal and political systems. The early 1900s saw a quest for “historical truth,” and many people think of history as representing some objective truth, ignoring the fact that all historical accounts are the product of the underlying worldview and biases of the writer of the history. This is not dissimilar from the search for “historical truth” that we see in so many areas, ranging from efforts to seek separate historical truth from myth regarding Jefferson and his relation to slaves, various wars fought throughout history, Russian history, etc. This search, while perhaps noble in its aim, ignores the reality that all history is constructed by its authors and therefore all recordings of history inevitably involve biases of the author.

²²⁷ Steven H. Shiffrin, *Liberalism and the Establishment Clause*, 78 CHI.-KENT L. REV. 717, 722 (2003).

²²⁸ See R. Bruce Douglas, *Liberalism After the Good Times: The “End of History” in Historical Perspective*, in R. BRUCE DOUGLAS & DAVID HOLLENBACH, (ED.) CATHOLICISM AND LIBERALISM: CONTRIBUTIONS TO AMERICAN PUBLIC PHILOSOPHY 100, 118 (Cambridge U. Press 1994) (suggesting that

Having said that, it is legitimate to raise the question whether it is possible to achieve a broader notion of corporate responsibility and a larger role for law in regulating corporate entities without religion. Obviously others have tried to do so. Scholars have argued for corporate responsibility on a number of different bases,²²⁹ for example, justifying in pragmatic terms restricting autonomy for the sake of community²³⁰ or arguing that the fact that corporations are creations of society, possessing only the rights given to them by law, is sufficient basis to justify greater regulation of them.²³¹

liberalism is not neutral, but is a “relentless invitation to self-absorption” that presupposes that human desires are limited to those of this life).

Although some might respond that the present worldview, although nonneutral, is at least not explicitly religious, even that conclusion is debatable. There is always a danger of secularism working “as if it is the chosen ideology.” William P. Marshall, *The Limits of Secularism: Public Religious Expression in Moments of National Crisis and Tragedy*, 78 NOTRE DAME L. REV. 11, 28 (2002) (suggesting that although secularism is an instrumental model, maintaining secularism “as the preeminent worldview would create its own establishment”). What I have termed the secular view is based on a particular model of a person that rests on some underlying theological or philosophical notion.

²²⁹ See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 2247 (1999) (using a team production model to broaden the notion of groups to whom a corporation owes responsibilities); ROBERT A. DAHL, *AFTER THE REVOLUTION?: AUTHORITY IN A GOOD SOCIETY* 80-87, 100, 102 (Rev. ed. 1990) (corporations are social enterprises existing to serve public purposes); Robert A. Dahl, *A Prelude to Corporate Reform*, 1 BUS. & SOC’Y REV. 17 (1972); Vincent DiLorenzo, *Equal Employment Opportunity: Corporate Social Responsibility in the New Millennium*, 71 COLO. L. REV. 51, 53-58 (2000) (discussing justifications for imposing social obligations on corporations); E. Merrick Dodd Jr., *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145, 1148 (1932) (stating that the corporation was “an economic institution which has a social service as well as a profit-making function”); Kent Greenfield, *Using Behavioral Economics to Show the Power and Efficiency of Corporate Law as a Regulatory Tool*, 35 U.C. DAVIS L. REV. 581 (2002) (using insights from behavioral law and economics to argue for using corporate law as a regulatory tool to achieve preferred policy outcomes). Lawrence Mitchell has described the modern corporation as a “significant social and, to some extent, political institution as well,” possessing “awesome collective power.” Lawrence E. Mitchell, Preface, *PROGRESSIVE CORPORATE LAW* xiii (Lawrence E. Mitchell, ed. 1995). Thus, he argues for treating them as “public institutions[s] with public obligations.” *Id.*

²³⁰ See Mitchell, *supra* note 69, at 186.

²³¹ See David Millon, *Theories of the Corporation*, 1990 DUKE L. J. 201, 206 (1990) (corporation is created by operation of law, although it is often granted rights of a natural person); Susan J. Stabile, *Freedom to Choose Unwisely: Congress’ Misguided Decision to Leave 401(k) Plan Participants to Their Own Devices*, 11 CORN. J. L. & PUB. POL’Y 361, 396 (2002) (justifying government regulation of 401(k) plans based on notion that corporations have no rights except those given to them by the law); Steven M. H. Wallman, *Team Production in Business Organizations: Understanding the Purpose of a Corporation: An Introduction*, 24 IOWA J. CORP. L. 807 (1999) (“The courts recognized the integral public-interest purpose of early corporations as part of a regulatory quid pro quo exacted for grant of the entity status which only the law could give.”).

Similarly, one can question whether we can get to that broader notion of corporate responsibility based simply on communitarian principles or other theories of distributive justice.²³²

The value of the religious perspective of the person, an advantage not shared by these other approaches, is that it gets to the root, giving it a greater likelihood of success.²³³ Some commentators have suggested that “corporate social responsibility is a problem that never goes away,” because corporations are inherently untrustworthy.²³⁴ If we attempt to deal with it simply by attempting to change conduct without changing underlying notions that produce that conduct, I agree that the problem will always be with us. However, addressing, and attempting to change, the core view of the individual

²³² Much of the progressive law movement is grounded in communitarian principles. See David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in LAWRENCE E. MITCHELL (ED.), *PROGRESSIVE CORPORATE LAW* 1 (1995). See also Eletta Sangrey Callahan et al, *Integrating Trends in Whistleblowing and Corporate Governance: Promoting Organizational Effectiveness, Societal Responsibility, and Employee Empowerment*, 40 AMER. B. L. J. 177, 179-80 (Fall 2002) (observing that communitarians see corporations as independent entities, “capable of both good and harm and, thus, having responsibilities beyond those owed to shareholders); *Right vs. Wrong: The Bottom Line on Ethics*, ACROSS THE BOARD, July-August 2003, at 59 (quoting Amatai Etzioni and communitarian perspective that, although profit maximization is the main goal of a corporation, it should not be the only goal and that corporate self-interest must be balanced against other obligations).

²³³ “There is a growing sense that religions may be an indispensable force for the upholding of human dignity and moral order.” Wilfred M. McClay, *Two Concepts of Secularism*, 24 THE WILSON QUARTERLY 54 (Summer 2002). See Timothy L. Fort, *Religion in the Workplace: Mediating Religion’s Good, Bad and Ugly Naturally*, 12 NOTRE DAME J. LAW ETHICS & PUB. POL’Y 121, 153 (1998) (suggesting that in order to produce ethical behavior “it is necessary to engage an affective spirit,” religion is important and that codes of corporate conduct or business ethics must interface with a person’s experience to be effective). For a non-religiously based attempt to change individuals’ underlying preferences as a means of attaining greater director responsibility, see, Michael B. Dorff, *Softening Pharaoh’s Heart: Harnessing Altruistic Theory and Behavioral Law and Economics to Rein in Executive Salaries*, 51 BUFF. L. REV. 811 (2003) (exploring use of altruism to shape preferences of corporate decision makers to improve corporate governance).

²³⁴ See Bratton, *supra* note 201, at 867-88 (discussing and agreeing with views expressed in Larry Mitchell’s book, *Corporate Irresponsibility: America’s Newest Export*). See also C.A. Harwell Wells, *The Cycles of Corporate Social Responsibility: An Historical Retrospective for the Twenty-First Century*, 51 U. KAN. L. REV. 77, 78 (2002) (observing that the problem with debates about corporate social responsibility is that “they rarely seem to go anywhere. Viewed in historical perspective, it is clear that each new round of debate on corporate social responsibility largely recapitulates the earlier debate in slightly altered form.”).

and her relation to the world attacks the problem at a different level and aims to create an environment where other changes may flow more naturally.²³⁵

Moreover, because the religious view of the person I have espoused is universal and based on a notion of interrelatedness of *all* persons, it avoids the danger of encouraging divisions between various corporate constituencies. Rather than encouraging attachment to particular societies or groups,²³⁶ the religious approach encourages a universal sense of obligation to all of humankind. It thus leads to the broadest possible view of the corporation's constituents and avoids merely shifting which constituent group gets preference.²³⁷

Conclusion

The prevailing view about the appropriate role of the law in regulating corporations is not neutral. Rather, it is an inevitable byproduct of a secular view of the individual and the individual's relation to the world and to others.

However, the secular view of the person is not the only choice. There are alternative views of the person to one that almost inexorably gives rise to the political and economic system that produces a law and economics model of corporate regulation.

²³⁵ See *supra* text accompanying notes 186-193.

²³⁶ See *supra* text accompanying note 94 (noting that communitarianism retains a distinction between those within and those without the relevant community). Even many of the relational feminists espousing an "ethic of care" speak in terms of "caring for others to whom we are connected in some way," ROBIN WEST, *CARING FOR JUSTICE* 9 (1997), suggesting there are persons outside of the scope of care. See Hilde L. Nelson, *Against Caring*, 3 J. CLINICAL ETHICS 8, 8, 11 (1992) (suggesting that the scope of the ethic of care is too limited to be an answer to social justice concerns). The religious view of the person justifies an ethic of care that extends to all persons.

²³⁷ Thus, the religious view avoids the criticism aimed by Jeanne Schroeder of Larry Mitchell's suggestion of an ethic of care, i.e. that such a system "will inevitably favor family and friends over strangers, and favor those they recognize as like themselves over those they see as different." Schroeder, *supra* note 74, at 880-882.

These alternative underlying views would lead to a very different notion of the appropriate role of the law.

The religious view of the person and her relation to the world that I articulate in this Article results in a very different way of conceiving of corporations and of the role of law in regulating corporate entities. The fact that the religious view is rooted in the world's major religions make it an attractive model, and it is a model that permits a better mediation of public and private interests than does the secular model of the person. Moreover, even if this secular model of the person is not the only way one can justify imposing a broader set of obligations on corporations and a broader role of law in regulating corporations,²³⁸ it is one that goes to the deepest core of what animates the opposing view. Thus, a change in the underlying view of the person not only justifies a greater role of the law, but also makes it more likely that legal efforts will succeed, and, indeed, may ultimately eliminate the need for the law to force more socially responsible behavior by corporations.

Even for those who are unwilling to accept the view of the person and the relation of the person to the world that I set forth in this Article, at a minimum I hope that I have suggested the need to broaden the terms of the debate over the appropriate role of law in regulating corporations by looking at the underpinnings of the political and legal system within which we operate. The decisions we make about our political system in general or about how to regulate corporations in particular are not neutral, but, rather, they embody

²³⁸ This religious view of the person may not be the only way to argue against the prevailing notion of the corporation that is produced by the secular model of the person. There are others, some rooted in theology and others have non-theological bases. For an example of an argument based on an alternative theological perspective, see Garavaglia, *supra* note 60 (arguing for “recapturing the notion that human beings are created in the image of God” as a means to secure legal protection for the personhood of all human beings). Alternatives not based on theology are discussed at notes 229-231 and accompanying text.

underlying values and beliefs. The failure to identify and explore those values and beliefs restricts our ability to have meaningful discussion.

I address here only the impact of adopting a religious view of the person on our views of the nature of the corporation and of the appropriate role of law in regulating corporations. However, it should be clear that adopting a religious view of the person has ramifications far beyond the area of corporate regulation. It takes little imagination to see how adoption of such a perspective of the person might change our views in areas as diverse as criminal law, welfare reform and race relations.²³⁹ Hopefully the focus on a changed view of the person in this one area will foster similar discussions in other areas of the law.

²³⁹ For a discussion of how adopting a Catholic communitarian perspective would affect our views of welfare reform, see Vincent D. Rougeau, *A Crisis of Caring: A Catholic Critique of American Welfare Reform*, 27 HARV. J. L. & PUB. POL'Y 101 (2003). See also Anthony E. Cook, *The Death of God in American Pragmatism and Realism: Resurrecting the Value of Love in Contemporary Jurisprudence*, 82 GEO. L. J. 1431 (1994) (discussing how the religious commands of love and human interdependence would affect discussions about race).