

WHY THE BOTTOM LINE IS NOT THE BOTTOM LINE: JOHN PAUL II'S CONCEPT OF BUSINESS

JOHN F. COVERDALE[†]

Many observers have noted that American corporate law lacks a sound foundation. The participants in a symposium on the most recent attempt to systematize American corporate law, the American Law Institute's ambitious *Principles of Corporate Governance*,¹ criticized the Institute's efforts from many different perspectives, but agreed that "[t]he *Principles* lack a clear and coherent theory of the corporation."² Delaware corporate law has been faulted for being "incoherent, [and] lacking an animating principle."³ Professor Mitchell has described the question of "the nature and purpose of the corporation" as "the great unanswered question in corporate law."⁴

The lack of adequate principles for thinking about business is not confined to the issues of ownership and governance structure that are the province of corporate lawyers. The unanswered question about the nature of business extends far beyond the bounds of traditional corporate law. If we are to have an adequate legal framework for governing business, we cannot confine ourselves to questions about ownership and governance. We need to ask how we should structure business activity to

[†] Professor of Law, Seton Hall University School of Law. I gratefully acknowledge research assistance from Peter Knob and financial support from Seton Hall University School of Law Summer Research Program.

¹ AM. LAW INST., *PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS* (1992).

² Lawrence E. Mitchell, *Private Law, Public Interest?: The ALI Principles of Corporate Governance*, 61 GEO. WASH. L. REV. 871, 872 (1993).

³ Richard E. Kihlstrom & Michael L. Wachter, *Corporate Policy and the Coherence of Delaware Takeover Law*, 152 U. PA. L. REV. 523, 523 (2003).

⁴ Mitchell, *supra* note 2, at 875. See generally MARJORIE KELLY, *THE DIVINE RIGHT OF CAPITAL: DETHRONING THE CORPORATE ARISTOCRACY* 165 (2001) (noting that corporate American law lacks a "coherent underlying concept of the corporation").

reflect the proper role of work and economic activity in our personal and collective lives.

This article proposes that useful principles for answering that question can be found in the writings of John Paul II. He offers a thick vision of economic activity and business grounded on a philosophical and theological anthropology which avoids the pitfalls of both individualism and collectivism. That vision of economic activity and business provides a suitable foundation for thinking about the legal issues of the structure of business organizations, the relations between employers and employees, the goals of business, and business governance.

The purpose of this article is not to propose concrete legal reforms, but to introduce readers to John Paul II's vision of how economic activity and business fit into human life and into the effort to achieve human fulfillment. This question may seem far removed from day-to-day legal issues about employer-employee relations, the role of community interests in business decision-making, or the powers of directors. It is, in fact, far removed from them in the sense that careful legal and economic analysis is required to translate a vision of business activity as it relates to human fulfillment into workable legal principles. On the other hand, an adequate understanding of these great issues is the essential foundation for a satisfactory resolution of the technical issues. If form follows function, as Louis Sullivan, the father of modern American architecture, taught,⁵ we cannot hope to regulate businesses intelligently without an adequate grasp of their purpose and their role in human life. But our understanding of the purpose of business and its role in our lives must ultimately rest on a view of what it is to be human and to achieve human fulfillment.⁶

Although the principal focus of this article is John Paul II's thought, it begins with a lengthy summary and critique of current American legal thinking about business. The purpose of this critique is to suggest the need for the fresh insights which

⁵ See, e.g., DAVID VAN ZANTEN & CERVIN ROBERTSON, *SULLIVAN'S CITY: THE MEANING OF ORNAMENT FOR LOUIS SULLIVAN* (2000).

⁶ Cf. Susan J. Stabile, *Using Religion to Promote Corporate Responsibility*, 39 WAKE FOREST L. REV. 839, 866–67 (2004) (arguing that improvements in corporate law require rejecting the individualistic view of human nature reflected in law and economics and adopting a more communitarian view, which is supported by most religious traditions).

John Paul II offers. It would be impossible to present in brief compass even a skeletal outline of all the issues. Part I, therefore, focuses on the three principal strands in American legal thought regarding business organizations and, more particularly, corporations. Section A deals with the ownership model; Section B, the nexus of contract model; Section C, the stakeholder model. Part II, the heart of this article, synthesizes the thought of John Paul II. It is divided into five sections: Section A discusses John Paul II's thought on the value and dignity of human persons; Section B, community; Section C, work and workers; Section D, property and markets; and Section E, the role of profit and efficiency in business. Finally, I offer some broad conclusions.

I. THREE CURRENT MODELS OF BUSINESS

A. *The Ownership Model*

The classic model of business firms, and concretely of corporations, is that they are entities owned by their shareholders and, thus, should be managed to serve their shareholders' interests.⁷ This model reflects popular ways of thinking about businesses. It enjoyed widespread acceptance in the legal and academic community during the nineteenth and early twentieth centuries. During that time even large businesses were often the creations of engineer-entrepreneurs,

⁷ The classic citation is *Dodge v. Ford Motor Co.*, 170 N.W. 668, 684 (Mich. 1919), where the court states that "it is not within the lawful powers of a board of directors to shape . . . the affairs of a corporation" for the primary benefit of anyone other than the shareholders. While the court does not explicitly discuss the ownership model of corporations, that model underlies the opinion. As is often the case with widely held theories, many who hold the ownership model are not explicitly aware of holding any particular theory; it simply seems obvious that the shareholders own the business. See Richard A. Booth, *Who Owns a Corporation and Who Cares?*, 77 CHI.-KENT. L. REV. 147, 147 (2001) (noting that the theory that a corporation is the property of its shareholders is one of the theories that is "so widely accepted that we forget they are theories"). The ALI uses the ownership model at some points, for instance as a justification for restricting the right to bring derivative suits by shareholders. See AM. LAW INST., *supra* note 1, § 7.02. A contemporary modified version of the ownership model can be found in Margaret Blair's book. See *generally* MARGARET M. BLAIR, OWNERSHIP AND CONTROL: RETHINKING CORPORATE GOVERNANCE IN THE TWENTY-FIRST CENTURY 223–25 (1995) (seeing workers and other stakeholders, not only shareholders, as owners of businesses, but treating businesses as entities which someone "owns" in a meaningful sense).

and the physical capital contributed by the entrepreneurs often played a decisive role in the life of the business. In recent times, the leading proponent of this model is Milton Friedman, who used the idea of business ownership to justify shareholder wealth maximization as the appropriate goal of business managers.⁸

The concept of shareholders as owning businesses, while widely held, clashes with the realities of the business world in which employees and their ideas are often the core of the business. Because it reflects a monolithic view of ownership, it is also incompatible with contemporary legal concepts of property, which consider property as a group of rights that can be divided among multiple owners in diverse ways.⁹ For these reasons, as early as 1946, Peter Drucker dismissed the ownership model of business as a “crude old legal fiction.”¹⁰

In light of contemporary property theory, efforts to identify “the owners” of the business are of little value in determining how the business should be managed and whose interests it should serve:

It is old-fashioned, misleading and unproductive to identify a single “owner” of valued resources when control of those resources has been divided by law or contract among several interested parties. . . . [P]hrasing the problem as “identifying the owner” is fundamentally wrong. It is simply not the right question. To assume that we can know who property owners are, and to assume that once we have identified them their rights follow as a matter of course, is to assume what needs to be decided.¹¹

The rights society recognizes in owners of property reflect concepts of justice, which in turn rest on assessments of moral

⁸ See generally MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962) [hereinafter FRIEDMAN, CAPITALISM] (analyzing the nature of competitive capitalism as well as the link that exists between a society based on competitive capitalism and its citizens’ political and economic freedoms); Milton Friedman, *A Friedman Doctrine—The Social Responsibility of Business is to Increase its Profits*, N.Y. TIMES, Sept. 13, 1970 (Magazine), at 33, reprinted in ETHICAL THEORY AND BUSINESS 51 (Tom L. Beauchamp & Norman E. Bowie eds., 6th ed. 2001).

⁹ See, e.g., United States v. Craft, 535 U.S. 274, 279 (2002) (treating property as a bundle of rights).

¹⁰ PETER DRUCKER, CONCEPT OF THE CORPORATION 30 (1946), quoted in JAMES E. POST ET AL., REDEFINING THE CORPORATION: STAKEHOLDER MANAGEMENT AND ORGANIZATIONAL WEALTH 13 (2002).

¹¹ Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 637–38 (1988).

entitlements to derive benefits from an asset based on effort, sacrifice, contribution, or prior arrangement.¹² Undoubtedly, the shareholders who have contributed financial assets to a business have some moral claim on the benefits it produces, but so do many other people who have contributed to the formation and growth of the business. Treating the shareholders as “the owners” of the business obscures the fact that their claim “is only different in degree from that of other stakeholders . . . not different in kind.”¹³

The shareholders do not own the business in the manner in which they own a handkerchief or a piece of land.¹⁴ They only actually own their shares.¹⁵ That provides them with four rights: 1) to receive distributions of corporate income if the directors choose to authorize such distributions; 2) to receive fractional distributions of the corporate property if the corporation is dissolved; 3) to vote in the election of directors and on certain other occasions; and 4) to sell their securities to others. They do not own the physical assets of the business,¹⁶ much less the employees who, in many cases, are the source of most of the value of the business.¹⁷ Therefore, it is not helpful to think of a business primarily as an entity owned by shareholders.¹⁸

¹² See BLAIR, *supra* note 7, at 224–25.

¹³ ROBERT PHILLIPS, *STAKEHOLDER THEORY AND ORGANIZATIONAL ETHICS* 157 (2003).

¹⁴ See BLAIR, *supra* note 7, at 5 (“In large, publicly traded corporations, the normal rights that constitute ownership of real property have been unbundled and parceled out to numerous participants in the enterprise. . . . Thus taking ‘ownership’ as the starting point . . . from which certain rights or claims are supposed to follow, is quite problematic.”).

¹⁵ MICHEL AGLIETTA & ANTONIE REBERIOUX, *CORPORATE GOVERNANCE ADRIFT: A CRITIQUE OF SHAREHOLDER VALUE* 263–64 (2005); PHILLIPS, *supra* note 13, at 156.

¹⁶ To illustrate this concept, imagine an owner of 1000 shares of Dell stock attempting to enter a Dell assembly facility and claiming, when stopped at the gate by a guard, that he or she is the owner of the factory.

¹⁷ To take one example, Google’s market capitalization is in excess of \$100 billion. According to its Form 10-Q for the quarter ending December 31, 2006, the net book value of its property and equipment was less than \$3 billion, and the net book value of its intangible assets less than \$400 million. See Financial Release, Google, Google Announces Fourth Quarter and Fiscal Year 2006 Results (Jan. 31, 2007), <http://investor.google.com/releases/2006Q4.html>.

¹⁸ See Jeff Gates, *Reengineering Ownership for the Common Good*, in *RETHINKING THE PURPOSE OF BUSINESS* 264–82 (S.A. Cortright & Michael J. Naughton eds., 2002) (promoting the reengineering of the concept of property ownership); AGLIETTA & REBERIOUX, *supra* note 15, at 263; KELLY, *supra* note 4, at

B. The Nexus of Contract Model

Most contemporary legal academic thought conceives of a business firm as a nexus of contracts. The roots of the nexus of contract approach can be traced to an article published in 1937 by Ronald Coase in which he analyzed firms and markets as alternative forms of contracting.¹⁹ In markets, the price mechanism controls production by distributing factors of production to various functions. According to Coase, managers in firms distribute the factors of production by assigning tasks.²⁰ The choice between contracts involving markets that rely on the price mechanism and contracts involving firms that use hierarchical commands to assign factors of production depends on the relationship between the transaction costs of contracting *de novo* each time a factor is needed and the inefficiencies that arise from using authority structures.²¹ Where the transaction costs exceed the costs imposed by the inefficiencies of command structures, costs can be reduced by giving one party authority to set, within certain limits, the terms of the contract.²²

Coase's concept of transaction costs as the explanation of why firms exist lay dormant until the 1970s when Armen Alchian and Harold Demsetz employed it in their influential article, *Production, Information Costs, and Economic Organization*.²³ Although starting with Coase's focus on transaction costs, Alchian and Demsetz rejected Coase's model of the firm as characterized by authority.²⁴ They claimed that

41 (comparing the view that shareholders as "owners" are entitled to break up corporations, load them with debt, or shut them down leaving the employees to fend for themselves with the feudal view that the owner of the land owned the serfs who worked it).

¹⁹ See generally Ronald H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386 (1937) (analyzing the firm as an alternative form of contracting).

²⁰ See *id.* at 391.

²¹ See *id.* at 387–98 (explaining that firms are profitable because they decrease market costs by reducing the steps involved in repeat transactions, but that efficiency wanes as the size of a firm increases, and thus the goal of a firm is to seek an ideal balance between competing needs for both flexibility and organization).

²² See *id.* at 390–92 (indicating that by allowing some authority to direct resources and set general contract terms, certain market costs are saved).

²³ Armen A. Alchian & Harold Demsetz, *Production, Information Costs, and Economic Organization*, 62 *AM. ECON. REV.* 777, 783 (1972) ("Coase's penetrating insight is to make more of the fact that markets do not operate costlessly, and he relies on the cost of using markets to *form* contracts as his basic explanation for the existence of firms.").

²⁴ See *id.* at 777–78, 783–84 (opining that a firm has "no power of fiat, no

relations within firms are purely contractual, and that authority within firms is an illusion.²⁵

In their view, firms exist to reduce the costs of monitoring, made necessary by the fact that the contracts the parties enter are necessarily incomplete since the parties cannot foresee all eventualities. The way to reduce these costs is not to replace market-based contracts with authority structures, but to give to a monitor the right to: 1) claim the residual value once all other parties have been paid; 2) monitor the behavior of all other parties providing inputs; 3) be the central party, common to all contracts with input providers; 4) make and terminate the contracts with other input providers; and 5) sell rights one through four.²⁶ Not coincidentally, these are the rights of the owner of a privately held business.

This theory was taken a step further by Michael Jensen and W.H. Meckling, who argued that the firm is merely a fiction serving as a nexus for the various explicit and implicit contracts of which it is comprised.²⁷ From this perspective, “the personalization of the firm implied by asking questions such as ‘what should be the objective function of the firm’ . . . is seriously misleading. *The firm is not an individual.* . . . The ‘behavior’ of the firm is like the behavior of a market, i.e., the outcome of a complex equilibrium process.”²⁸

The economic theory of the firm as a nexus of contracts has undergone much evolution and exists in a multitude of different incarnations.²⁹ It was enthusiastically embraced by legal

authority”).

²⁵ According to Alchian and Demsetz, managers of firms have no more authority over their employees than customers have over their grocers. *See id.* at 777–78. If the grocer attempts to sell cookies when the customer wants bread, the customer will stop doing business with the grocer and go to another store. Similarly, an employee who fails to carry out the duties assigned by the manager will be fired. *Id.* at 777.

²⁶ Alchian & Demsetz, *supra* note 23, at 783.

²⁷ *See* Michael C. Jensen & W.H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305, 310 (1976). For a more recent elaboration of the theory, see MICHAEL C. JENSEN, A THEORY OF THE FIRM 87–135 (2000).

²⁸ Oliver Hart, *An Economist’s Perspective on the Theory of the Firm*, 89 COLUM. L. REV. 1757, 1764 (1989) (emphasis added) (quoting Jensen & Meckling, *supra* note 27, at 310).

²⁹ As early as 1988, one author could observe that “[a] single, detailed picture of the firm will not emerge from the school.” William W. Bratton, Jr., *The “Nexus of Contracts” Corporation: A Critical Appraisal*, 74 CORNELL L. REV. 407, 419 (1989).

academics of the law and economics school, particularly by the Chicago brand of law and economics,³⁰ and has come to dominate corporate legal scholarship.³¹

Few of the economists who developed the nexus of contract approach or the legal theorists who have built on their work have elaborated much on the underlying anthropological foundations of the theory. The contractarian world view rests, however, on highly individualistic normative assumptions.³² It “focuses on the individual as an autonomous being and is based on a particular vision of human liberty as freedom from external, unconsented-to restraint.”³³ The economic actors it envisions are rational wealth-maximizers.³⁴

Contractarians claim that the group interests which firms appear to embody are merely instrumental devices serving individual interests. Thus, they explain the cooperation that exists within firms as a way of increasing productivity.³⁵ They reject the contention that team spirit reflects an inherent orientation toward others or even the psychological rewards of participation. Instead they characterize it as merely a way of increasing payoffs for individuals.³⁶

Legal theorists who adopt the nexus of contract approach generally ignore altogether the rich economic literature that continues to build on Coase’s initial insight that markets and organizations are fundamentally different ways of structuring economic activity. For a useful introductory survey of this literature, see SYTSE DOUMA & HEIN SCHREUDER, *ECONOMIC APPROACHES TO ORGANIZATIONS* (3d ed. 2002).

³⁰ For the most important and influential statement of this theory, see FRANK H. EASTERBROOK & DANIEL F. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 34–35 (1991).

³¹ See William T. Allen, *Contracts and Communities in Corporation Law*, 50 WASH. & LEE L. REV. 1395, 1399 (1993) (indicating that the theory dominates corporate legal scholarship). Allen served as Chancellor of the Delaware Court of Chancery.

³² See Stabile, *supra* note 6, at 858 (stating that through the lens of law and economics, “[t]he corporation is simply an aggregate of independent contractors, each pursuing her own interests, with each individual presumed capable of looking out for that interest”).

³³ David Millon, *Communitarians, Contractarians, and the Crisis in Corporate Law*, 50 WASH. & LEE L. REV. 1373, 1382 (1993).

³⁴ Bratton, *supra* note 29, at 417; see also Eugene Fama, *Agency Problems and the Theory of the Firm*, 88 J. POL. ECON. 288, 289 (1980); Michael Jensen, *Organization Theory and Methodology*, 58 ACCT. REV. 319, 331 (1983).

³⁵ See Bratton, *supra* note 29, at 428–29.

³⁶ See *id.* (“Cooperation becomes a means to the end of productivity.”); see also Alchian & Demsetz, *supra* note 23, at 790–91 (stressing that the goal of cooperation is not a sense of loyalty, but reducing costs); Stephen M. Bainbridge, *The Bishops and the Corporate Stakeholder Debate*, 4 VILL. J.L. & INV. MGMT. 3, 14 (2002) (“The

Contractarians view as presumptively illegitimate all legal rules that interfere with the ability of individuals to structure their relationships with others and to define their duties toward them on the basis of freely given consent.³⁷ Broader goals and higher aspirations than accumulation of wealth need not be considered when thinking about firms. In the view of the contractarians, “[n]o other values exist in group economic life other than self-interested rationality.”³⁸

This is an extremely thin, impoverished view of human motivation and behavior.³⁹ Thin visions may be appropriate in certain circumstances. If, for instance, I am looking for a store from which to buy a package of chewing gum, the only relevant factors may be location and availability of the brand I prefer. If, however, I am trying to provide a foundation for legal rules that will regulate the operation of stores, I will need to know a great deal about the function of stores and their impact on their employees and on the communities they serve. If my goal is the still broader one of providing a foundation for legal rules that govern all businesses, the need for a thick vision is even more evident. The anthropology of John Paul II explored in Part II of this article offers the sort of thick view of what it is to be human and consequently of the nature and purpose of firms that can provide an adequate foundation for the legal regulation of business.

Describing the firm as a mere nexus of contracts does not directly answer the question of which of the many contracting parties should be given the right to monitor the behavior of the other parties and to appropriate the residual value of the firm.⁴⁰ Adherents to the nexus of contract view of firms argue that those rights should be given to the investors. Their argument runs in

economists’ contractual understanding of the firm is not communitarian in nature.”).

³⁷ See Allen, *supra* note 31, at 1395, 1401 (noting the difficulty advocates of the contractarian model have in imagining any alternative view).

³⁸ Bratton, *supra* note 29, at 429.

³⁹ See Daniel J.H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021, 1057 (1996) (opining that the corporate law shareholder “is an abstraction from the full human beings who ultimately own shares; in the process of abstraction, it becomes radically different from any human.”).

⁴⁰ See John R. Boatright, *Business Ethics and the Theory of the Firm*, 34 AM. BUS. L.J. 217, 222–23, 226–27 (1996) (discussing potential conflicts of interest as well as which party’s interests are best for all).

simplified terms as follows⁴¹: Team production is often more efficient than individual efforts, but brings with it moral hazards because it is difficult to know how much an individual team member has contributed to the productive process. The team member may, therefore, be tempted to shirk. To reduce the cost of shirking, team production requires a monitor whose task it is to ensure each team member makes his or her full contribution.

The monitor, however, may also be tempted to shirk. The cost of shirking by the monitor can be reduced if the monitor enters into contracts under which the monitor is the party that bears the residual risk and receives the residual gain. This occurs when the monitor pays all other input-providers the opportunity cost of the inputs they provide (i.e., what they could get if they sold their inputs to the next highest bidder), and the monitor receives whatever is left after all other input-providers have been paid. Under such a scheme, the monitor has an incentive to maximize the wealth produced because the monitor will receive everything over and above the opportunity cost of the other inputs.

The law and economics literature generally assumes that the residual risk of firms is borne by the owner-manager of small firms and by the shareholders of corporations.⁴² As risk takers, they should receive the residual value, and the firm should be managed to increase their wealth. In publicly-held corporations the shareholders do not in fact directly monitor operations; hierarchical decision-making and oversight by the board of directors are substitutes for such oversight. From this, contractarians conclude that boards of directors should represent the interests of the shareholders and require managers to maximize shareholder wealth.⁴³

Partisans of this theory claim that managing firms to maximize profits, and thereby shareholder wealth, “automatically” benefits not only shareholders but all corporate constituencies:

⁴¹ The summary of this argument is taken with small changes from BLAIR, *supra* note 7, at 228–29.

⁴² See, e.g., GREGORY K. DOW, GOVERNING THE FIRM: WORKERS’ CONTROL IN THEORY AND PRACTICE 115 (2003) (explaining that “[a] standard idea” is that residual claimants—those entitled to any profits remaining after all contractual payments are made—bear risk).

⁴³ See BLAIR, *supra* note 7, at 228–29.

In a market economy each party to a transaction is better off. A successful firm provides jobs for workers and goods and services for consumers. . . . Wealthy firms provide better working conditions and clean up their outfalls; high profits produce social wealth that strengthens the demand for cleanliness. . . . Firms that close plants in one area while relocating production elsewhere are accused of lacking a sense of responsibility to affected workers and communities. Yet such a statement ignores the greater benefits that workers and communities in the new locale enjoy. (They must be greater, or there would be no profit in the move.)⁴⁴

Legal academics often treat as dogmas, or at least as firmly established scientific truths, both the nexus of contract approach to firms and the residual risk justification of shareholder wealth maximization as the goal of firm management.⁴⁵ Yet, however

⁴⁴ EASTERBROOK & FISCHER, *supra* note 30, at 38–39. That new workers and communities—and not only the shareholders—will enjoy greater benefits seems to be an act of faith rather than the evident proposition as it is presented by the authors. Furthermore, as a major recent casebook notes:

When a solvent corporation pursues its regular business activities, the interests of its management, creditors, employees, and stockholders are largely congruent with the interests of its equity investors. Thus, it makes no difference whether managers think of themselves as furthering long-term shareholder interests or furthering a multiconstituency interest in long-term corporate welfare.

WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION 286 (2003). The authors elaborate on this point:

[T]here is today a broad normative consensus that shareholders alone are the parties to whom corporate managers should be accountable This is not to say that there is agreement that corporations should be run in the interests of shareholders alone—much less that the law should sanction that result. All thoughtful people believe that corporate enterprise should be organized and operated to serve the interests of society as a whole, and that the interests of shareholders deserve no greater weight in this social calculus than do the interests of any other members of society. The point is simply that now, as a consequence of both logic and experience, there is convergence on a consensus that the best means to this end (that is, the pursuit of aggregate social welfare) is to make corporate managers strongly accountable to shareholder interests and, at least in direct terms, only to those interests.

Id.

⁴⁵ See Allen, *supra* note 31, at 1401 (“For many corporation law scholars [the nexus of contract theory] is indisputably correct; its statement is seen as one of fact.”); Anant K. Sundaram & Andrew C. Inkpen, *The Corporate Objective Revisited*, 15 *ORG. SCI.* 350, 350 (2004) (“In the field of finance, the logic of shareholder value maximization is accepted as being so obvious that textbooks just assert it, rather than argue for it.”).

elegant the theories may be, and however useful they may prove in certain limited contexts, both are open to question.⁴⁶

It is possible to model some of the relationships that exist within a firm as if the firm were merely a legal fiction that brings together explicit and implicit contracts, but this is an extremely thin vision of what firms are.⁴⁷ Most people who have worked in a large firm can testify, not only to the existence of hierarchy and bureaucracy, but also to the fact that firms constitute overarching human communities within which many smaller communities exist. Such communities have distinctive cultures and pursue diverse goals, even within a given industry.⁴⁸ To ignore these facts in constructing a legal regime is to build on a very partial and incomplete view of reality.

To treat shareholders as the parties who bear the entire residual risk of a firm is also to ignore reality. Employees often develop firm-specific human capital, which cannot be transferred easily to another firm.⁴⁹ This is especially true in technology-intensive and service-oriented businesses, which are increasingly important in modern economies.⁵⁰ In such cases, the employees

⁴⁶ Harvard economist Oliver Hart writes:

An outsider to the field of economics would probably take it for granted that economists have a highly developed theory of the firm. After all, firms are the engines of growth of modern capitalistic economies, and so economists must surely have fairly sophisticated views of how they behave. In fact, little could be further from the truth. Most formal models of the firm are extremely rudimentary, capable only of portraying hypothetical firms that bear little relation to the complex organizations we see in the world. Furthermore, theories that attempt to incorporate real world features of corporations, partnerships and the like often lack precision and rigor, and have therefore failed, by and large, to be accepted by the theoretical mainstream.

Hart, *supra* note 28, at 1757.

⁴⁷ See Allen, *supra* note 31, at 1401 (opining that, from a realist perspective, the nexus of contracts approach “overlook[s] an essential part of the empirical reality of social interactions ‘within’ corporations” and that it is a “palpably impoverished” way of interpreting corporations).

⁴⁸ See, e.g., RICHARD S. GALLAGHER, *THE SOUL OF AN ORGANIZATION: UNDERSTANDING THE VALUES THAT DRIVE SUCCESSFUL CORPORATE CULTURES* (2003); ALFONS TROMPENAARS & PETER PRUD’HOMME, *MANAGING CHANGE ACROSS CORPORATE CULTURES* (2004). One of the great challenges in merging companies is the differences in corporate cultures. See IRENE RODGERS ET AL., *SUCCESSFUL MERGERS, ACQUISITIONS AND STRATEGIC ALLIANCES: HOW TO BRIDGE CORPORATE CULTURES* (2002).

⁴⁹ See BLAIR, *supra* note 7 at 289–91.

⁵⁰ See *id.* at 238.

have as much of a “stake” in the firm as do the shareholders.⁵¹ If anything, shareholders may be less exposed to firm-specific risk than other firm constituents. Investments in firms—at least in publicly held firms—are quite liquid, so that shareholders can divest themselves of their investments with relative ease.⁵² Furthermore, through diversification of their portfolios, shareholders can reduce firm-specific risk,⁵³ eliminating as much as eighty to ninety percent of it.⁵⁴

Employees are not the only group beside shareholders who put assets at risk in a firm. Suppliers may expand their capacity or locate their facilities in a particular location in order to service a customer. Customers may invest time and money in training people to use particular products provided by a specific firm. Local communities may expand their facilities to provide services to a firm and its employees. The investments of employees and other stakeholders are often at risk as much as the investments of shareholders.⁵⁵ If the criterion for deciding what party should have control of the firm and what party’s interests managers

⁵¹ See DRUCKER, *supra* note 10, at 16 (“Commitment to working within and among specific organizations, and development of situation-specific capabilities that serve organization purposes, involves investments comparable to—and possibly rarer and more valuable than—the financial investments of shareowners.”); PAUL MILGROM & JOHN ROBERTS, *ECONOMICS, ORGANIZATION AND MANAGEMENT* 351 (1992) (“With high levels of firm-specific human capital, the decisions taken by the firm place risks on employees’ human assets that are comparable to those borne by investors in physical capital. Protecting the value of this human capital then requires that employees’ interest figure into the firm’s decision-making.”).

⁵² See AGLIETTA & REBERIOUX, *supra* note 15, at 266.

⁵³ BURTON MALKIEL, *A RANDOM WALK DOWN WALL STREET* 313 (8th ed. 2003). The well-known Capital Asset Pricing Model predicts that the market will not reward investors for taking firm-specific risks. The significant factor in determining asset prices is not the specific risk of the firm, but its contribution to the risk of a market portfolio. *See id.* at 231–32. For a discussion of stock pricing formulas, see generally Fischer Black & Myron Scholes, *The Pricing of Options and Corporate Liabilities*, 81 J. POL. ECON. 637 (1973). Approximately half of all the shares of publicly traded American companies are owned by institutional investors, all of which own diversified portfolios. Greenwood, *supra* note 39, at 1066. In addition, many—probably most—individual investors own diversified portfolios that enable them to diversify away firm specific risk. To characterize shareholders as the principal or sole bearers of the residual risk of the firm is to ignore these realities.

⁵⁴ Peter V. Letsou, *Implications of Shareholder Diversification on Corporate Law and Organization: The Case of the Business Judgment Rule*, 77 CHI.-KENT. L. REV. 179, 206 (2001).

⁵⁵ See BLAIR, *supra* note 7 at 15; DOW, *supra* note 42, at 115 (asserting that creditors, suppliers, customers, and employees are all exposed to firm-specific risk).

should serve is capital at risk, employees and other stakeholders often have as good a claim as shareholders.

Contractarians do not deny that workers and other stakeholders often have firm specific assets at risk. They assert, however, that, unlike shareholders, workers and other stakeholders are able to protect themselves against those risks through the terms of their contracts.⁵⁶ Whatever risk they bear is compensated for by the contractual payments they receive and, thus, there is no need to take it into account in managing the firm.⁵⁷

The contracts of workers and other stakeholders are clearly different from those of shareholders. They specify what reward the workers and other stakeholders will receive for the inputs they provide to the firm, whereas shareholders have no right to a specific return on their investment and are entitled only to the residual after all other claims have been satisfied. In the real world, however, in which workers and other stakeholders have limited information and limited bargaining power, they are rarely able to negotiate the contracts which economic theory suggests would compensate them for all risk.⁵⁸ The risk-bearing justification for shareholder-wealth-maximization as the goal of firms is, therefore, unsatisfying.

C. *The Stakeholder Model*

In contrast to shareholder-centered models of business, stakeholder theory requires managers to take into account the interests of all those who have a stake in the business.⁵⁹ In the two decades since the 1984 publication of Freeman's *Strategic Management: A Stakeholder Approach*,⁶⁰ management theorists and business ethicists have developed a broad array of

⁵⁶ See Ian B. Lee, *Efficiency and Ethics in the Debate About Shareholder Primacy*, 31 DEL. J. CORP. L. 533, 538 n.8 (2006).

⁵⁷ See *id.* n.7 ("Market forces determine the overall balance of advantage in the arrangements between shareholders and non-shareholders.").

⁵⁸ See generally Eric Posner, *Economic Analysis of Contract Law After Three Decades: Success or Failure?*, 112 YALE L.J. 829, 859 (2003) (discussing the reasons for the divergence between the types of contracts predicted by economic theory and those observed in the real world).

⁵⁹ See R. EDWARD FREEMAN, *STRATEGIC MANAGEMENT: A STAKEHOLDER APPROACH* 24–25 (1984) (outlining and illustrating the stakeholder approach).

⁶⁰ *Id.*

stakeholder theories. These theories operate at three levels: descriptive, instrumental, and normative.⁶¹

At the descriptive level, stakeholder theories present the idea of a business as “an organization engaged in mobilizing resources for productive uses in order to create wealth and other benefits (and not to intentionally destroy wealth, increase risk, or cause harm) for its multiple constituents, or stakeholders.”⁶² This implies that “corporate performance should be [and is] appraised from multiple perspectives. The interests of shareowners are, of course, among these, but they are not always primary and never exclusive.”⁶³

A major challenge for stakeholder theory is defining who should be considered a stakeholder. Freeman defines stakeholders very broadly to include all those who are affected by or affect a particular business.⁶⁴ Freeman even includes competitors, political groups, trade associations, and activist groups among stakeholders.⁶⁵ Although managers should keep an eye on all of the individuals and groups who might in any way impact a business, including competitors and activists, it is not helpful to lump them all together under the heading of stakeholders. A more useful definition limits stakeholders of a business to “the individuals and constituencies that contribute, either voluntarily or involuntarily, to its wealth-creating capacity and activities, and that are therefore its potential beneficiaries and/or risk bearers.”⁶⁶ Obviously, not even all those who fall within this narrower definition of stakeholders are equally important to a business. Empirical research shows that managers focus primarily on shareholders, customers, and employees.⁶⁷

⁶¹ See Thomas Donaldson & Lee E. Preston, *The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications*, 20 ACAD. MGMT. REV. 65, 66–67 (1995).

⁶² POST ET AL., *supra* note 10, at 17 (emphasis omitted); see also Donaldson & Preston, *supra* note 61, at 66 (defining a “corporation as a constellation of cooperative and competitive interests possessing intrinsic value.”).

⁶³ POST ET AL., *supra* note 10, at 17.

⁶⁴ See FREEMAN, *supra* note 59, at 52 (“[Stakeholders are] groups and individuals who can affect, or are affected by, the achievement of an organization’s mission.”).

⁶⁵ See *id.* at 55 fig.3.1.

⁶⁶ POST ET AL., *supra* note 10, at 19 (emphasis omitted).

⁶⁷ See Donaldson & Preston, *supra* note 61, at 75 (supporting the claim that a majority of managers “regard[] it as unethical management behavior to focus solely

There is ample evidence to support the view that business managers not only should, but do, in fact, strive to create wealth and other benefits for a range of stakeholders, especially customers and employees as well as shareholders. In the mid-1960s, well before the term “stakeholder management”⁶⁸ became popular, a survey of upper level managers revealed that an overwhelming majority focused on the interests of employees, customers, and shareholders.⁶⁹ Since then, numerous studies have confirmed that upper level managers strive to satisfy an array of interested parties and are not guided solely by the desire to increase shareholder profit.⁷⁰ The failure of the various shareholder-wealth-maximization theories that dominate the legal literature to account for or even acknowledge the actual practice of businesses is a striking weakness of those theories.

In addition to describing actual practice, much stakeholder theory is instrumental. It purports to offer a way to improve business management and ultimately increase profitability.⁷¹ Indeed, as originally proposed by Freeman, stakeholder theory is largely instrumental. Freeman argues that managers should take into account the interests of various stakeholders, not as a matter of corporate social responsibility or business ethics, but because “corporate survival depends in part on there being some ‘fit’ between the values of the corporation and its managers, the expectations of stakeholders in the firm and the societal issues which will determine the ability of the firm to sell its products.”⁷²

There is considerable evidence that serving the interests of employees and customers, as well as broader constituencies like the local community and the environment, is an effective way of

on the interest of shareowners and not on the interest of employees and customers”). For a description of each group’s unique role in shaping management practice, see Jeanne M. Logsdon & Patsy G. Lewellyn, *Expanding Accountability to Stakeholders: Trends and Predictions*, 105 BUS. & SOC’Y REV. 419, 421–23 (2000).

⁶⁸ See, e.g., FREEMAN, *supra* note 59, at 53 (explaining the phrase as “the necessity for an organization to manage the relationships with its specific stakeholder groups in an action-oriented way”).

⁶⁹ See Donaldson & Preston, *supra* note 61, at 75.

⁷⁰ See *id.* (documenting the range of interests that managers actually take into account).

⁷¹ See *id.* at 77 (“[T]he simple hypothesis [is] that corporations whose managers adopt stakeholder principles and practices will perform better financially than those that do not.”).

⁷² FREEMAN, *supra* note 59, at 107.

increasing profitability.⁷³ A recent metastudy analyzed eighty-three studies of the relationship between financial success and management's commitment to the interests of a broad range of stakeholders. More than half of the eighty-three studies showed that taking into account the interests of stakeholders correlated with positive financial performance.⁷⁴ Moreover, although a significant number of studies demonstrated mixed results, or no relationship at all, only a handful showed a negative correlation.⁷⁵ The authors conclude that:

[T]he empirical evidence on this matter is somewhat unreliable and the results mixed. However . . . there is very little evidence of a *negative* association between social and financial performance. . . . [T]he empirical studies do not prove that corporations can "do well by doing good," but neither do they disprove that view, and there is no substantial evidence that corporations can "do well by doing harm."⁷⁶

Although some stakeholder theorists go beyond the descriptive and instrumental to enter the normative arena, management theorists (as opposed to business ethicists) often fail to explore the normative bases for their positions.⁷⁷ A bewildering variety of justifications for the rights of shareholders is offered by those who make explicit the grounds for believing that, as an ethical matter, business should be managed in light of the interests of all stakeholders.⁷⁸ Among the grounds proffered

⁷³ See POST ET AL., *supra* note 10, at 26–28 (summarizing research conducted on this topic).

⁷⁴ See *id.* at 27 (citing JOSHUA D. MARGOLIS & JAMES P. WALSH, PEOPLE AND PROFITS? THE SEARCH FOR A LINK BETWEEN A COMPANY'S SOCIAL AND FINANCIAL PERFORMANCE (2001)).

⁷⁵ See *id.* (indicating that only nineteen studies showed no relationship).

⁷⁶ *Id.* at 28 (citation omitted); see also ANN SVENDSEN, THE STAKEHOLDER STRATEGY: PROFITING FROM COLLABORATIVE BUSINESS RELATIONSHIPS 18–19 (1998) (summarizing evidence that care for stakeholders increases profits).

⁷⁷ See, e.g., THOMAS DONALDSON, THE ETHICS OF INTERNATIONAL BUSINESS 45 (1989) (noting that a lack of normative foundations is a serious weakness of much stakeholder theory); PHILLIPS, *supra* note 13, at 8 (noting that much current thinking on stakeholder theory pays little attention to the normative aspect).

⁷⁸ The issue here is the basis for special obligations to stakeholders as such, over and above what the business owes to all human beings based on general ethical principles. Obligations to stakeholders are in addition to obligations owed to those who are not stakeholders. To say a competitor, for instance, is not a stakeholder is not to deny that businesses have an obligation to avoid killing competitors for market advantage. See PHILLIPS, *supra* note 13, at 124–25.

are the common good,⁷⁹ Kantian deontology,⁸⁰ property rights theory,⁸¹ feminist theory,⁸² social contracts theory,⁸³ fairness,⁸⁴ and communitarianism.⁸⁵

In my view, stakeholder theory is much more satisfactory at the descriptive, instrumental, and normative levels than either the ownership or nexus of contracts model with their focus on shareholder wealth maximization. Partisans of those theories, however, criticize stakeholder theory on grounds that it fails to provide any clear guidance to managers or to courts as to the legitimate goals of businesses, and therefore will lead to vastly increased agency costs as managers take advantage of the situation to pursue their own interests.⁸⁶

This criticism ignores the fact that even under current law, managers do not single-mindedly seek to maximize shareholder wealth.⁸⁷ In fact, the apparently clear guidance given by the shareholder wealth maximization norm is largely specious. To say that shareholder wealth should be maximized is to propose a goal, but it does not dictate how to achieve that goal. It does not, therefore, provide any sharply focused prescription of what actions management should take and what actions it should avoid. Under the business judgment rule, directors have extraordinarily wide scope in deciding how to pursue the goal. In Delaware, for instance,

⁷⁹ See Antonio Argandoña, *The Stakeholder Theory and the Common Good*, 17 J. BUS. ETHICS 1093, 1093 (1998).

⁸⁰ See William M. Evan & R. Edward Freeman, *A Stakeholder Theory of the Modern Corporation: Kantian Capitalism*, in *ETHICAL ISSUES IN BUSINESS* 166–71 (Thomas Donaldson & Patricia H. Werhane eds., 4th ed. 1993) (exemplifying the resort to Kantian philosophy in explaining firm behavior).

⁸¹ See Donaldson & Preston, *supra* note 61, at 65.

⁸² See Andrew Wicks, Daniel Gilbert & R. Edward Freeman, *A Feminist Reinterpretation of the Stakeholder Concept*, 4 BUS. ETHICS Q. 475 (1994).

⁸³ See THOMAS DONALDSON & THOMAS W. DUNFEE, *TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS* (1999).

⁸⁴ See Robert Phillips, *Stakeholder Theory and a Principle of Fairness*, 7 BUS. ETHICS Q. 51, 52 (1997) (“I believe a superior . . . model of stakeholder relations can be found in . . . an obligation based on . . . ‘fairness.’”); PHILLIPS, *supra* note 13.

⁸⁵ See Amitai Etzioni, *A Communitarian Note on Stakeholder Theory*, 8 BUS. ETHICS Q. 679, 679 (1998) (discussing stakeholder theory in the context of communitarianism).

⁸⁶ See Bainbridge, *supra* note 36, at 6.

⁸⁷ See *id.* at 10 (“[C]orporate decision-makers have a moral obligation to balance a decision’s impact on stakeholders against its economic impact on shareholders.”).

the presumption established by the business judgment rule is all but impossible to overcome, at least in cases where directors lack any apparent conflict of interest. In that context, shareholder-plaintiffs are required to show either that the substance of the challenged business decision was so egregious that “no reasonable business person would have made the decision,” or that the board was grossly negligent in informing itself of all material information reasonably available to it before acting.⁸⁸

Thus, the shareholder-wealth-maximization norm does not, in practice, provide anything like the clear guidance its proponents claim justifies it.

Neither does the shareholder-wealth-maximization norm actually prevent corporate directors and officers from using their positions to benefit themselves rather than shareholders. Even ignoring Enron, WorldCom, and similar scandals, recent experience makes clear that managers subject to the shareholder-wealth-maximization norm have plenty of room to feather their own nests. Between 1990 and 2003, CEO pay rose 315%,⁸⁹ while corporate profits rose by 144%.⁹⁰ In 2005 alone, total CEO compensation at the Fortune 500 companies rose by an average of 54%,⁹¹ while the S&P 500 Index rose just 5.6%.⁹² Between 1993 and 2005, Lee Raymond, chairman of the board and CEO of Exxon, received total compensation of \$686 million, or \$144,573 per day.⁹³ While Exxon has been highly profitable, super-sized compensation is not necessarily a reward for outstanding performance. According to *Forbes* magazine, in 2005, none of the ten most highly compensated CEOs ranked higher than 29th out of 500 in efficiency (measured by total return on equity over a six-year period).⁹⁴ The second most

⁸⁸ Letsou, *supra* note 54, at 179–80 (citation omitted).

⁸⁹ UNITED FOR A FAIR ECON., CEO PAY CHARTS: CEO PAY, STOCK PRICES, CORPORATE PROFITS, WORKER PAY, AND INFLATION, 1990–2003, http://www.faireconomy.org/research/CEO_Pay_charts.html.

⁹⁰ *Id.*

⁹¹ Scott DeCarlo, *Special Report: CEO Compensation*, FORBES.COM, Apr. 21, 2005, <http://www.forbes.com/2005/04/20/05ceoland.html>.

⁹² See Yahoo! Finance, S&P 500 Index: Historical Prices, <http://finance.yahoo.com/q/hp?s=%5EGSPC&a=00&b=1&c=2005&d=00&e=1&f=2006&g=m> (last visited Jan. 23, 2007).

⁹³ Jad Mouawad, *For Leading Exxon to its Riches, \$144,573 a Day*, N.Y. TIMES, Apr. 15, 2006, at A1.

⁹⁴ See DeCarlo, *supra* note 91 (referencing the efficiency of the highest paid

highly compensated, Barry Diller of IAC/Interactive Corp., whose total compensation was \$156 million, ranked 178th in efficiency.⁹⁵ During 2005, the price of IAC/Interactive's stock rose by just 2%.⁹⁶ The shareholder-wealth-maximization norm as a tool for controlling agency costs is strikingly ineffective.

None of this is to deny that controlling agency costs is important. Perhaps because stakeholder theory has been developed mostly by management theorists and business ethicists rather than lawyers, little attention has been paid to its implications for corporate governance and mechanisms of corporate accountability. Even on the basic question of whether a stakeholder conception of business should be reflected in fundamental changes to structures of corporate governance—for example, worker representation on the board—there is no consensus.⁹⁷ There is no reason to think, however, that the wealth-maximization-norm is the only way to achieve management accountability.⁹⁸ The field of estate administration confirms that fiduciaries who owe obligations to multiple constituencies, some of whom have conflicting interests, can be held accountable under the law.⁹⁹

The principal weakness of stakeholder theory—one I contend could be remedied by John Paul II's understanding of what it means to be a human person and his concept of business as a community of persons—is its lack of an adequate normative foundation, which stems ultimately from the lack of an adequate concept of what it means to be a human person. As the former dean of the Haas School of Business at the University of California Berkley writes, stakeholder theory suffers from the fact that our society

does not have a strong philosophical foundation to explain collaborative behavior. That is, while we have libertarian

CEOs).

⁹⁵ Forbes.com, Bary Diller, CEO of IAC/InterActiveCorp (IACI), <http://www.forbes.com/static/pvp2005/LIRMHED.html> (last visited Feb. 9, 2007).

⁹⁶ *Id.*

⁹⁷ See PHILLIPS, *supra* note 13, at 31–32.

⁹⁸ See BLAIR, *supra* note 7, at 225–26; Donaldson & Preston, *supra* note 61, at 87 (responding to the reluctance to shift from a shareholder- to stakeholder-centered corporate norm).

⁹⁹ See, e.g., JESSE DUKEMINIER ET AL., WILLS, TRUSTS, AND ESTATES 798–802 (7th ed. 2005) (referencing a case where such a fiduciary was held liable for a breach of his duty of care).

philosophies rationalizing the positive effects of individual initiatives and collectivist philosophies positing the social gains of shared efforts and rewards, we do not have a clear-cut logical system laying out the costs and benefits of behavior motivated simultaneously by personal desires and an awareness of external obligations.¹⁰⁰

With rare exceptions,¹⁰¹ stakeholder theories reflect an explicit or implicit individualism. They see stakeholders as individuals who *have* something at stake in the business, rather than persons who *are* members of a community.¹⁰² They treat all goods as allocable—such that giving more to *A* means giving less to *B*—and ignore the existence of communities of higher goods which are not allocated but participated—such that *A*'s having more does not diminish what is available to *B*. This results in a conception of stakeholders as opposing groups that have to be managed,¹⁰³ rather than as persons who collaborate with each other. In reality, firms are made up of persons who collaborate with each other despite significant elements of intra-firm competition.

II. JOHN PAUL II'S VISION OF BUSINESSES AS COMMUNITIES OF PERSONS

John Paul II's vision of businesses shares important elements with some of the stakeholder models, but rests on a different vision of what it is to be human and of what the goals of all human activity, including business activity, should be. John Paul II's vision is primarily normative, but at the same time rooted in reality.

When he looks at businesses, John Paul II does not see legal fictions that serve to interconnect a series of contracts. Neither does he see businesses as devices whose primary purpose is

¹⁰⁰ Raymond E. Miles, *Foreword* to WILLIAM HALAL, *THE NEW MANAGEMENT: DEMOCRACY AND ENTERPRISE ARE TRANSFORMING ORGANIZATIONS*, at x (1996).

¹⁰¹ See, e.g., Etzioni, *supra* note 85, at 679 (“[W]hile they clearly have significantly divergent interests . . . and values, [those involved in a corporation] also have some significant shared goals.”).

¹⁰² See HELEN J. ALFORD & MICHAEL J. NAUGHTON, *MANAGING AS IF FAITH MATTERED: CHRISTIAN SOCIAL PRINCIPLES IN THE MODERN ORGANIZATION* 57–58 (2001) (discussing the shortcomings of stakeholder models as accepting only individualistic conceptions of the person).

¹⁰³ See, e.g., MICHAEL A. HILT ET AL., *STRATEGIC MANAGEMENT: COMPETITIVENESS AND GLOBALIZATION* 26–31 (1999) (giving examples of the need to manage opposing groups of stakeholders).

enriching their owners. For John Paul II, a business is a “community of persons.”¹⁰⁴ More specifically, it is a “community of work,”¹⁰⁵ made up primarily of people who “work with each other.”¹⁰⁶

These descriptions might seem to leave no room for investors. John Paul II does, however, recognize that capital is essential to a business, and that those who supply capital are vital components of the business, although he rejects the concept of business as “a ‘society of capital goods.’”¹⁰⁷ He sees a business as “a ‘society of persons’ in which people participate in different ways and with specific responsibilities, whether they supply the necessary capital for the company’s activities or take part in such activities through their labour.”¹⁰⁸ The assets investors provide make work possible and productive, and the investors are, therefore, an essential part of the business, but in John Paul II’s view capital is at the service of work, not vice versa.¹⁰⁹

John Paul II is far from being alone in conceptualizing business in communitarian terms.¹¹⁰ His vision of businesses as

¹⁰⁴ JOHN PAUL II, ENCYCLICAL LETTER *CENTESIMUS ANNUS* ¶ 35 (1991) [hereinafter *CENTESIMUS ANNUS*] (emphasis omitted); see also Pope John Paul II, Address to Christian Union of Business Executives ¶ 3 (Mar. 7, 1997) [hereinafter Address to Christian Union of Business Executives], available at http://www.vatican.va/holy_father/john_paul_ii/speeches/1997/march/documents/hf_jp-ii_spe_19970307_impreditori-dirigenti_en.html (stating that businesses are communities of men); Pope John Paul II, Address to Business and Trade-Union Leaders on the Ethical Dimension of the Global Economy ¶ 2 (May 2, 2000), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2000/apr-jun/documents/hf_jp-ii_spe_20000502_workers-audience_en.html (discussing man’s participation in business understood as a community).

¹⁰⁵ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 32.

¹⁰⁶ *Id.* (emphasis omitted); see also Address to Christian Union of Business Executives, *supra* note 104, ¶ 3 (stating that a business is a community of people who “work with others and for others”).

¹⁰⁷ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 43.

¹⁰⁸ *Id.*

¹⁰⁹ JOHN PAUL II, ENCYCLICAL LETTER *LABOREM EXERCENS* ¶ 23 (1981) [hereinafter *LABOREM EXERCENS*].

¹¹⁰ See, e.g., Charles Handy, *The Citizen Corporation*, HARV. BUS. REV., Sept.–Oct. 1997, at 28 (“A public corporation should now be regarded not as a piece of property but as a community—although a community created by common purpose rather than by common place. . . . The core members of communities are more properly regarded as citizens rather than as employees or ‘human resources’—citizens with responsibilities as well as rights.”); David Millon, *Communitarianism in Corporate Law: Foundations and Law Reform Strategies*, in PROGRESSIVE CORPORATE LAW 1 (Lawrence E. Mitchell ed., 1995) (discussing the “sociological and moral phenomenon of the corporation as community”); David Millon, *Default Rules*,

communities of persons who work, however, rests on a highly articulated and original theory of the meaning of person, community, and work. To appreciate his approach to business, we need to examine each of these topics as well as his concepts of property and markets.

A. *The Value and Dignity of Persons*¹¹¹

Persons, their value, and their dignity are central to John Paul II's thought.¹¹² He asserts over and over again that "man is the only creature on earth that God willed for itself."¹¹³ In John Paul II's vision, every human being is endowed with immense dignity and worth because each person is created in "the image and likeness" of God.¹¹⁴ He views the concept of persons made in the image and likeness of God as the "basis of all Christian anthropology."¹¹⁵ Jesus, he says, "fully reveals man to man."¹¹⁶

Wealth Distribution, and Corporate Law Reform: Employment at Will Versus Job Security, 146 U. PA. L. REV. 975, 981–82 (1998) (pointing out that the "corporation-as-community model" suggests that "the web of ongoing relationships constituting productive activities involves significant elements of interdependence and cooperation that cannot be captured fully by reference solely to a set of bilateral contracts"); Robert C. Solomon, *Competition, Care, and Compassion: Toward a Nonchauvinist View of the Corporation*, in *WOMEN'S STUDIES AND BUSINESS ETHICS* 151 (Andrea Larson & R. Edward Freeman eds., 1997) (arguing that, from a feminist perspective, a corporation should be viewed as "a community, a group of people working together for (more or less) shared goals and with an (again more or less) shared culture. . . . [I]t is first and foremost a group of people who stand with each other in a variety of personal and professional relationships.").

¹¹¹ I have explored some of the ideas contained in this section, and section B, in John F. Coverdale, *The Legacy of John Paul II to Lawyers*, 36 SETON HALL L. REV. 1, 3–10 (2005) (discussing the value and dignity of persons).

¹¹² See 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, 65 (2003) (discussing the development of Pope John Paul II's thought before he became pope).

¹¹³ See JOHN PAUL II, ENCYCLICAL LETTER *REDEMPTOR HOMINIS* ¶ 13 (1979) [hereinafter *REDEMPTOR HOMINIS*] (quoting SECOND VATICAN ECUMENICAL COUNCIL, PASTORAL CONSTITUTION *GAUDIUM ET SPES* ¶ 24 (1965) [hereinafter *GAUDIUM ET SPES*]).

¹¹⁴ JOHN PAUL II, APOSTOLIC LETTER *MULIERIS DIGNITATEM* ¶ 6 (1988) [hereinafter *MULIERIS DIGNITATEM*] (quoting *Genesis* 1:27).

¹¹⁵ *Id.* (emphasis omitted).

¹¹⁶ Letter from John Paul II to Artists ¶ 14 (Apr. 4, 1999) (quoting *GAUDIUM ET SPES*, *supra* note 113, ¶ 22), available at http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii_let_23041999_artists_en.html; see also *REDEMPTOR HOMINIS*, *supra* note 113, ¶ 8; John Paul II, APOSTOLIC LETTER *TERTIO MILLENIO ADVENIENTE* ¶ 4 (1994).

Although John Paul II's theory of what it means to be human acquires its full richness and depth in a specifically Christian context, it rests not only on religious faith but also on penetrating observations of human nature and behavior. It offers many insights that speak to those who do not share John Paul II's religious convictions.¹¹⁷

John Paul II identifies the basis for human dignity in the fact that human beings have "a rational and free nature";¹¹⁸ an intellect and a will that give them the capacity to know the truth, and embrace it freely.¹¹⁹ Their likeness to God and dignity derive from being persons "capable of self-determination and self-possession."¹²⁰ A human being has dignity—and is an image of God—because it is "capable of existing and acting 'for itself,' that is, capable of a certain *autoteleology*, which means capable not only of determining its own ends but also of becoming an end for itself."¹²¹

John Paul II considers the "*capacity for community with other persons*"¹²² another source of human dignity: "Being a person in the image and likeness of God . . . also involves existing in a relationship, in relation to the other 'I.'"¹²³ Like the belief that man is made in the image and likeness of God, John Paul II's stress on the human capacity for community as a source of dignity has theological as well as philosophical foundations. From a theological perspective, John Paul II sees human ability to relate to others as a reflection of the inner reality of God,¹²⁴ who Catholics believe is not a solitary, isolated being, but a trinity of three persons—Father, Son, and Holy Spirit.¹²⁵

¹¹⁷ See generally Charles Taylor, *A Catholic Modernity?*, in *A CATHOLIC MODERNITY?*, at 13–37 (James L. Heft ed., 1999) (discussing Catholic humanism and the relations between it and secular humanism).

¹¹⁸ KAROL WOJTYLA, *PERSONS AND COMMUNITY: SELECTED ESSAYS* 317 (Theresa Sandok trans., 1993) [hereinafter *PERSONS AND COMMUNITY*]. "Intellect and freedom are essential and irrevocable properties of the person. Herein also lies the whole natural basis of the dignity of the person." *Id.* at 318.

¹¹⁹ Grounding human dignity on the fact that men and women are free, knowing subjects has deep roots in Catholic thought. See, e.g., ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* I, Q. 93.

¹²⁰ See *PERSONS AND COMMUNITY*, *supra* note 118, at 317.

¹²¹ *Id.*

¹²² *Id.* at 318.

¹²³ *MULIERIS DIGNITATEM*, *supra* note 114, ¶ 7.

¹²⁴ See *id.*

¹²⁵ See *CATECHISM OF THE CATHOLIC CHURCH* ¶¶ 232–56 (2d ed. 1997) (summarizing Catholic teaching on God as Trinity of persons).

Furthermore, John Paul II contends that human dignity rests not only on our ability to relate to other human beings, but also, and especially, on our ability to enter into a personal relationship with God.¹²⁶ From a philosophical perspective, John Paul II's assertion of human dignity based on the capacity for entering into a mutual relationship with another "I" echoes some of the principal themes of twentieth century thought, particularly Martin Buber's in-depth exploration of the reality of interpersonal relations and their consequences.¹²⁷

B. Community: Persons as Social

Although John Paul II stresses the primacy of persons and rejects Marxism and other forms of collectivism, he is far from embracing the individualism,¹²⁸ embraced by American conservatism,¹²⁹ that sees "freedom as the ultimate goal and the individual as the ultimate entity in society."¹³⁰

¹²⁶ Pope John Paul II, Message to the Pontifical Academy of Sciences on Evolution ¶ 5 (Oct. 22, 1996), available at <http://www.ewtn.com/library/papaldoc/JP961022.htm> ("St. Thomas observed that man's resemblance to God resides especially in his speculative intellect, because his relationship with the object of his knowledge is like God's relationship with his creation. But even beyond that, man is called to enter into a loving relationship with God himself, a relationship which will find its full expression at the end of time, in eternity." (citation omitted)).

¹²⁷ See generally MARTIN BUBER, I AND THOU (Ronald Gregor Smith trans., 2d ed. 1958) (describing how human existence may be defined by the way in which we engage in dialogue with each other, with the world, and with God). There are many English editions. One of the more recent is the 1996 Touchstone edition. MARTIN BUBER, I AND THOU (Walter Kaufman trans., 1996). In his book, *Crossing the Threshold of Hope*, John Paul II recognized his indebtedness to Buber. See JOHN PAUL II, CROSSING THE THRESHOLD OF HOPE 36 (1994) (noting Buber's impact on religious philosophy by commenting that "[t]he *philosophers of dialogue*, such as Martin Buber . . . have contributed greatly to [religious] experience").

¹²⁸ See, e.g., ROBERT N. BELLAH ET AL., HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE 14 2-63 (1985) (discussing individualism's origins, ambiguities, limits, and risks in modern life).

¹²⁹ One example of this individualism, albeit an extreme one, is the "objectivist philosophy" of Ayn Rand, whose novel *Atlas Shrugged* was listed second after the Bible in a 1991 survey conducted for the Library of Congress and the Book of the Month Club in which respondents were asked to name a book that had changed their lives. See Esther B. Fein, *Book Notes*, N.Y. TIMES, Nov. 20, 1991, at C26. In Rand's view, the ultimate moral value for each individual is his or her own well-being, and selfishness, understood as "concern with one's own interests," should be considered a virtue. See AYN RAND, VIRTUE OF SELFISHNESS, at vii (1964).

¹³⁰ Daniel Rush Finn, *The Economic Personalism of John Paul II: Neither Right Nor Left*, J. MARKETS & MORALITY, Spring 1999, at 74, 79 (quoting FRIEDMAN, CAPITALISM, *supra* note 8, at 5). In an essay first published in 1961, the future John

Freedom's primacy in individualistic thought derives from a perception of the individual as a self-contained being whose goal in life advances via untrammelled autonomy—making decisions without regard to standards other than one's own preferences. John Paul II did not see the individual as self-contained. His fully-realized human being is not an atomistic, isolated individual, but rather a member of disparate communities—ranging in size, from family to country, and even to the entire world.

John Paul II views each person as an “unrepeatable reality” with a personal history that is uniquely his own.¹³¹ He stresses, however, that each person writes that history “through numerous bonds, contacts, situations, and social structures linking him with other men, beginning to do so from the first moment of his existence on earth, from the moment of his conception and birth. . . . [He lives] in the sphere of society and very diverse contexts.”¹³² This could be mistaken for a rather trite statement of the obvious fact that every human being needs help in meeting his needs and in developing his potential, as even the most resolute individualist admits. To the contrary, it is a profound assertion that others are not limited to serving as resources for the achievement of the individual's goals. According to John Paul II, we do not need others primarily so that we may receive from them, but rather that we may give to them, because persons reach their full development only by giving themselves to others:

[M]an . . . cannot “fully find himself except through a sincere gift of self.” This might appear to be a contradiction, but in fact it is not. Instead it is the magnificent paradox of human

Paul II succinctly laid out his opposition to both individualism and totalitarianism:

[P]ersons may easily place their own individual good above the common good of the collectivity, attempting to subordinate the collectivity to themselves and use it for their individual good. This is the error of individualism, which gave rise to liberalism in modern history and to capitalism in economics. On the other hand, society, in aiming at the alleged good of the whole, may attempt to subordinate persons to itself in such a way that the true good of persons is excluded and they themselves fall prey to the collectivity. This is the error of totalitarianism, which in modern times has borne the worst possible fruit.

KAROL WOJTYLA, *Personalizm Tomistyczny* (Thomistic Personalism), in PERSONS AND COMMUNITY, *supra* note 118, at 174.

¹³¹ REDEMPTOR HOMINIS, *supra* note 113, ¶ 14.

¹³² *Id.*

existence: an existence called to serve the truth in love. Love causes man to find fulfillment through the sincere gift of self.¹³³

In John Paul II's view, the ability to enter into personal relationships with others is an essential characteristic of persons. "[T]o be a person," he says, "means to be capable of participation."¹³⁴ Reaching out to others, entering into I/Thou relationships with them, is an essential part of human flourishing. "[Man's] existing and acting together with other human beings enables him to achieve his own development, that is, the intrinsic development of the person."¹³⁵

Although he is fully aware of the human capacity for selfishness and lack of concern for others,¹³⁶ John Paul II is convinced that human beings remain at the deepest level not self-centered but "other-centered—oriented outward toward the other. Another way of saying this is that humans have the

¹³³ Letter from John Paul II to Families ¶ 11 (Feb. 2, 1994) [hereinafter Letter to Families] (quoting *GAUDIUM ET SPES*, *supra* note 113, ¶ 24), available at http://www.vatican.va/holy_father/john_paul_ii/letters/documents/hf_jp-ii LET_02021994_families_en.html. The concept that human beings find their ultimate fulfillment not by taking things for themselves, but by making a loving gift of themselves to others is directly rooted in Christian revelation and concretely in the doctrine of the Trinity. See, e.g., *MULIERIS DIGNITATEM*, *supra* note 114, ¶ 18 ("[T]his description, indeed this definition of the person [as finding fulfillment in the sincere gift of self], corresponds to the fundamental biblical truth about the creation of the human being—man and woman—in the image and likeness of God."). Catholic theology sees in the Trinity three divine persons who each completely possess the divine being, which is also fully possessed by each of the other divine persons. Further, the divine persons are defined precisely by their relationship to each other. See *CATECHISM OF THE CATHOLIC CHURCH*, *supra* note 125, ¶¶ 232–56 (describing the relationship between the Father, the Son, and the Holy Spirit). The idea that persons find fulfillment in giving themselves to another is a concept of personhood that can appeal to those who do not accept its religious foundation because, as John Paul II noted, it reflects the "truth about man which is confirmed by the every experience of humanity." Letter to Families, *supra*, ¶ 6.

¹³⁴ KAROL WOJTYLA, *THE ACTING PERSON* 275 (Andrzej Potocki trans., 1979).

¹³⁵ *Id.*

¹³⁶ John Paul II's personal experience of the Nazi occupation of Poland and the brutally repressive Communist regime that followed it left no room for a Pollyannaish view of human nature. See, e.g., Pope John Paul II, Address to Faithful of the Church of Turin ¶ 4 (May 24, 1998), available at http://www.vatican.va/holy_father/john_paul_ii/travels/documents/hf_jp-ii SPE_24051998_sindone_en.html (recalling the images of human suffering reflected in "the millions of people who die of hunger, of the horrors committed in the many wars that soak nations in blood, of the brutal exploitation of women and children, of the millions of human beings who live in hardship and humiliation on the edges of great cities, especially in developing countries . . . [and] those who do not enjoy basic civil rights, the victims of torture and terrorism, the slaves of criminal organizations.").

capacity to love—that mysterious ability to desire the good for others, to give of themselves for others, and to go out of themselves to seek union of mind and heart with others.”¹³⁷

Experience confirms that all men and women are capable of turning in on themselves and treating others as mere instruments for the satisfaction of their needs or whims. But experience also bears out John Paul II’s contention that a focus on self, far from being a manifestation of human flourishing, prevents human beings from reaching their full potential and the happiness that comes with it.¹³⁸ We know from personal experience that we are capable of overcoming the inclination to selfishness and of giving generously of ourselves to others. Examples of selfless behavior are undoubtedly encountered more frequently among family members and close friends than in business settings, and those that are found outside of families generally do not go as deep, but the reality of a human capacity for selflessness extends beyond the family.

Human capacity for transcending self suggests to John Paul II that the world of business relationships is not irremediably destined to be dominated exclusively by an individualist pursuit of self-interest. However common such businesses may be, they are morally aberrant and incompatible with the deepest human aspirations. They make it difficult or impossible to establish among those who comprise them the

¹³⁷ Kristina Johannes, *Protecting the Human Environment: Alienation as Social Critique*, RELIGION & LIBERTY, Apr. 2003, at 6, 6. This understanding of human beings as essentially social has deep roots in Catholic thought. In fact, Thomas Aquinas asserts that “it is natural to all men to love each other.” ST. THOMAS AQUINAS, SUMMA CONTRA GENTILES, bk. III, pt. II, at 128 (Vernon J. Bourke trans., Univ. of Notre Dame Press 1975) (1956). Hobbes’ more pessimistic view of human nature summed up in the famous phrase “homo homini lupus est” [man is a wolf to his fellow man] stands in sharp contrast to the traditional Catholic understanding of human nature (even after original sin), and reflects the pessimism of many Protestant Reformers who were convinced human nature was totally corrupted by original sin. See Dennis R. Kuhns, *Atonement and Violence*, QUODLIBET J., Oct.–Dec. 2003, <http://www.quodlibet.net/kuhns-atonement.shtml>.

¹³⁸ See *CENTESIMUS ANNUS*, *supra* note 104, ¶ 41 (discussing the consequences of one’s alienation from others). For a secular approach to this view, see MARTIN E.P. SELIGMAN, *AUTHENTIC HAPPINESS: USING THE NEW POSITIVE PSYCHOLOGY TO REALIZE YOUR POTENTIAL FOR LASTING FULFILLMENT* (2004) (arguing that what the author calls “Meaningful Life” consists in using one’s strengths in the service of something much larger than self). See generally GREGG EASTERBROOK, *THE PROGRESS PARADOX* (2003) (observing that prosperity has not brought greater happiness and arguing in favor of finding meaning in service of greater ideals).

solidarity which should characterize any authentically human undertaking.¹³⁹ Businesses dominated by self-interest are, to use John Paul II's term, "alienated,"¹⁴⁰ not in the Marxist sense, but in the sense that they involve "a reversal of means and ends,"¹⁴¹ treating human beings—who should always be treated as ends in themselves—as mere means.

C. *Work and Workers*¹⁴²

John Paul II's concept of work is closely tied to his concept of person. His special conception of work is evinced by his statement that "only man works."¹⁴³ Machines and animals may produce useful products, but neither works in the proper sense.¹⁴⁴ In his most important treatise on work, the 1981 encyclical *Laborem Exercens*, John Paul II pays relatively little attention to what he calls "work in an objective sense"¹⁴⁵: the productive physical and mental activities we most frequently think of as work. Instead, his focus is on what he calls "[w]ork in the [s]ubjective [s]ense," and "[m]an as the [s]ubject of [w]ork."¹⁴⁶

By "work in the subjective sense,"¹⁴⁷ he does not mean activities that produce external results, but rather activities insofar as they are human actions. That is to say, "work in the subjective sense"¹⁴⁸ is comprised of actions performed by a free subject endowed with dignity because of its intellect and will.¹⁴⁹ The most important thing about those actions is that they both

¹³⁹ See *CENTESIMUS ANNUS*, *supra* note 104, ¶ 41.

¹⁴⁰ *Id.*

¹⁴¹ *Id.* On John Paul II's distinctive use of the concept of alienation, see Johannes, *supra* note 137, at 6–7, and Damon Linker, *John Paul II, Intellectual*, 103 *POLY REV.* 3, 12–13 (2000). For an approach (in my view unconvincing) to John Paul II's use of alienation that sees it as closely related to the Marxist use of the term, see GREGORY BAUM, *THE PRIORITY OF LABOR: A COMMENTARY ON LABOREM EXERCENS: ENCYCLICAL LETTER OF POPE JOHN PAUL II* (1982).

¹⁴² The material in this section expands on ideas explored in an earlier article by this author. See Coverdale, *supra* note 111, at 33–35 (discussing John Paul II's approach to work and workers).

¹⁴³ *LABOREM EXERCENS*, *supra* note 109, Introduction.

¹⁴⁴ *LABOREM EXERCENS*, *supra* note 109, ¶ 5 ("[E]ven in the age of ever more mechanized 'work', the proper subject of work continues to be man.").

¹⁴⁵ *Id.* (emphasis omitted).

¹⁴⁶ *Id.* ¶ 6.

¹⁴⁷ *Id.* (emphasis omitted).

¹⁴⁸ *Id.* (emphasis omitted).

¹⁴⁹ See *id.* (describing a person as a conscious and free subject who decides about himself).

proceed from such a subject and in some way express and modify it. Machines can produce goods and services, but only men and women “work” in the full and proper sense of the term precisely because they are persons “capable of acting in a planned and rational way, capable of deciding about [themselves], and with a tendency to self-realization.”¹⁵⁰ For this reason, “[a]s a person, man is . . . the subject of work,”¹⁵¹ and work “concerns not only the economy but also, and especially, personal values.”¹⁵²

John Paul II acknowledged that the economic value of work is a function of the goods and services it produces, but he maintained that “[t]he sources of the dignity of work are to be sought primarily in the subjective dimension, not in the objective one.”¹⁵³ Work is valuable in the deepest sense not because of what it produces but because “the one who carries it out is a person, a conscious and free subject, that is to say a subject that decides about himself.”¹⁵⁴

John Paul II finds in Jesus Christ, who dedicated most of his life to manual labor, confirmation of his conviction that “the basis for determining the value of human work is not primarily the kind of work being done but the fact that the one who is doing it

¹⁵⁰ *Id.*

¹⁵¹ *Id.* (emphasis omitted).

¹⁵² *Id.* ¶ 15. In the related context of the relations between capital and labor in the process of production, John Paul II has no doubts about the priority of work: “[L]abour is always a primary efficient cause, while capital, the whole collection of means of production, remains a mere instrument or instrumental cause.” *Id.* ¶ 12 (emphasis omitted). Capital should be thought of as subordinate to labor, and “at the service of work.” *Id.* (emphasis omitted). Capital—however sophisticated and technologically advanced—is only a “workbench.” *Id.* ¶ 13. Its worth and value have their roots in the service it renders to work. Furthermore, work precedes the workbench that is capital and partially responsible for its existence. Capital is in fact the result of two inheritances:

[T]he inheritance of what is given to the whole of humanity in the resources of nature, and the inheritance of what others have already developed on the basis of those resources, primarily by developing technology, that is to say, by producing a whole collection of increasingly perfect instruments for work. In working, man also “enters into the labour of others.”

Id. (quoting *John* 4:38).

¹⁵³ *Id.* ¶ 6.

¹⁵⁴ *Id.* We might be inclined to think of this as the ethical value of work, but John Paul II refers not to the conformity of the actions to ethical norms but to the value and dignity they have because the person performing those actions “fulfills himself” in them. PERSONS AND COMMUNITY, *supra* note 118, at 265. He calls this “personalistic value,” and distinguishes it from ethical values. *Id.*

is a person.”¹⁵⁵ Just as all men and women share equally the dignity and worth that emanates from their condition as persons despite the many differences that exist between them,¹⁵⁶ so too do all types of work have a dignity and worth that derives not from the economic, artistic, or cultural value of what is produced but from the fact that they are the actions of a human person.

Since the industrial revolution, we have grown accustomed to thinking of work as a factor at the service of capital. We consider it natural to think of those who own capital as hiring and firing workers as needed to make their capital profitable. Workers—and not only manual workers—are frequently treated as mere “instrument[s] of production,”¹⁵⁷ rather than as “the true purpose of the whole process of production.”¹⁵⁸ The verbal expressions of this ideology are no longer as crass as they were in the early nineteenth century—in fact, it is fashionable to claim that “[p]eople are our [g]reatest [a]sset”¹⁵⁹—but American businesses continue to attempt to solve their problems, or simply to improve their profitability, by shedding workers.¹⁶⁰

John Paul II argues that the mental constructs that underlie these practices reverse the proper order of the elements.¹⁶¹ Rather than thinking of work at the service of capital, we should consider capital “subordinate to human labour,”¹⁶² and “at the

¹⁵⁵ *LABOREM EXERCENS*, *supra* note 109, ¶6.

¹⁵⁶ See *supra* notes 114, 118–21 and accompanying text (discussing human dignity).

¹⁵⁷ See *LABOREM EXERCENS*, *supra* note 109, ¶ 7 (emphasis omitted).

¹⁵⁸ *Id.*

¹⁵⁹ *E.g.*, Careers at Pfizer, <http://www.pfizer.co.uk/template4.asp?pageid=3> (last visited Jan. 23, 2007).

¹⁶⁰ See LOUIS UCHITELLE, *THE DISPOSABLE AMERICAN: LAYOFFS AND THEIR CONSEQUENCES* (2006) (documenting the move away from a culture of permanent employment to a culture of mass layoffs in the name of efficiency). According to the Bureau of Labor Statistics, despite a relatively robust economy, from January through March 2006 there were 3268 layoffs that involved fifty or more workers. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, *MASS LAYOFF STATISTICS*, http://data.bls.gov/PDQ/servlet/SurveyOutputServlet?data_tool=latest_numbers&series_id=mlsms00nn0119003 (last visited Sept. 24, 2006). Over 338,000 people filed initial unemployment claims as a result of such layoffs. *Id.* In March 2006, following its \$67 billion acquisition of BellSouth, AT&T announced its plan to cut 10,000 jobs. *AT&T Merger to Claim 10,000 Jobs*, BBC NEWS, Mar. 7, 2006, <http://news.bbc.co.uk/2/hi/business/4781596.stm>.

¹⁶¹ See *LABOREM EXERCENS*, *supra* note 109, ¶ 17 (stating that it is not profit but the worker that should guide the focus of economics).

¹⁶² *Id.* ¶ 12.

service of work.”¹⁶³ Capital, however sophisticated and technologically advanced, is only a “workbench.”¹⁶⁴ Like the most primitive wooden carpenter’s workbench, all capital derives its worth and value from the service that it renders to work.

The subjective value of work leads directly to the conclusion that work is not “a special kind of ‘merchandise,’ or . . . an impersonal ‘force’ needed for production”;¹⁶⁵ it is not a commodity to be bought and sold in the market at whatever price the law of supply and demand sets and under whatever conditions to which the parties agree.¹⁶⁶ To do so would be to treat man “as an instrument of production, whereas he—he alone, independently of the work he does—ought to be treated as the effective subject of work and its true maker and creator”;¹⁶⁷ that is, as “the true purpose of the whole process of production.”¹⁶⁸

Ignoring the subjective value of work and treating it as just one more factor in the productive process, “considering human labour solely according to its economic purpose,”¹⁶⁹ involves a “practical materialism.”¹⁷⁰ This attitude, which at least implicitly underlies the theory that maximizing profits is the goal of business, reflects “a conviction of the primacy and superiority of the material, and directly or indirectly places the spiritual and the personal (man’s activity, moral values and such matters) in a position of subordination to material reality.”¹⁷¹ Rather than being treated as “instrument[s] of production”¹⁷² who are valued

¹⁶³ *Id.* (emphasis omitted).

¹⁶⁴ *See id.*

¹⁶⁵ *Id.* ¶ 7.

¹⁶⁶ *See id.* (noting that it is an error to treat man as an instrument and not as a maker). We have progressed well beyond the *Lochner* conviction that the Constitution prohibits virtually all government intervention in the field of labor contracts. *See Lochner v. New York*, 198 U.S. 45, 64 (1905). Nonetheless, persons entering contracts to provide personal services still enjoy far less protection than parties to other kinds of contracts. They are rarely able, for instance, to successfully invoke doctrines like detrimental reliance, promissory estoppel, and implied or quasi-contract to protect their investment in firm-specific capital. *See* Scott E. Masten, *A Legal Basis for the Firm*, in *THE NATURE OF THE FIRM: ORIGINS, EVOLUTION, AND DEVELOPMENT* 196, 206 (Oliver E. Williamson & Sidney G. Winter eds., 1991).

¹⁶⁷ *LABOREM EXERCENS*, *supra* note 109, ¶ 7 (emphasis omitted).

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* ¶ 13.

¹⁷⁰ *Id.* (emphasis omitted).

¹⁷¹ *Id.*

¹⁷² *Id.* ¶ 7 (emphasis omitted).

only in so far as they contribute to profitability, workers of all sorts—from executives, through mid-level managers, to unskilled laborers—should be considered “the effective subject[s] of work and its true maker[s] and creator[s].”¹⁷³

A similar undervaluing of the subjective dimension of work occurs whenever work is viewed as a necessary evil, something we are driven to only by necessity. By contrast, because of its subjective value,

work is a good thing for man. . . . It is not only good in the sense that it is useful or something to enjoy; it is also good as being something worthy, that is to say, something that corresponds to man’s dignity, that expresses this dignity and increases it. . . . Work is a good thing for man—a good thing for his humanity—because through work man not only transforms nature, adapting it to his own needs, but he also achieves fulfillment as a human being and indeed, in a sense, becomes “more a human being.”¹⁷⁴

Work, of course, does not always lead to human fulfillment. In part, the ability to achieve fulfillment depends on the character and attitude of the individual performing the work. Even under ideal conditions, some people work half-heartedly and find no fulfillment in their work. Nonetheless, some ways of structuring work are more conducive than others to human fulfillment in work. John Paul II considers it essential to create a social order of work, which will

enable man to become, in work, “more a human being” and not be degraded by it not only because of the wearing out of his physical strength (which, at least up to a certain point, is inevitable), but especially through damage to the dignity and subjectivity that are proper to him.¹⁷⁵

John Paul II does not provide a list of the elements that an appropriate social order of work would entail, but it is not difficult to glean from his writings what some of them would be. “Man fulfills himself by using his intelligence and freedom.”¹⁷⁶ Therefore, structuring businesses in ways that enable workers to become more human in work requires focusing on their human characteristics as persons: their ability to plan, their capacity for

¹⁷³ *Id.*

¹⁷⁴ *Id.* ¶ 9 (emphasis omitted).

¹⁷⁵ *Id.*

¹⁷⁶ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 43.

self-determination, their tendency to auto-realization, and their need to form communities with others.¹⁷⁷ All of this requires a work environment characterized by “collaboration, communion and relationships marked by respect and mutual esteem, [and] by cooperation and solidarity.”¹⁷⁸ The freedom, self determination, and participation characteristic of persons¹⁷⁹ require management styles that involve workers at all levels in decision-making and give them as much autonomy and control over decisions that affect their work as is compatible with the demands of efficiency.¹⁸⁰

Changes in the legal regime could certainly effect change in this area, especially at the highest levels of corporate governance. It would be possible, for instance, to require that employees have a voice on boards of directors. The most important example of such legislation is the German Co-Determination Act of 1976 that gives workers 50% of the seats on the boards of the largest companies.¹⁸¹ It is beyond the scope of this article to weigh the pluses and minuses of worker representation on boards of directors in general, or the merits of the German approach in particular, although recent economic analysis has indicated that it has positive economic effects.¹⁸² Suffice it to say here that

¹⁷⁷ See *LABOREM EXERCENS*, *supra* note 109, ¶ 6 (“Man has to subdue the earth and dominate it, because as the ‘image of God’ he is a person, that is to say, a subjective being capable of acting in a planned and rational way, capable of deciding about himself, and with a tendency to self-realization. As a person, man is therefore the subject of work. As a person he works, he performs various actions belonging to the work process; independently of their objective content, these actions must all serve to realize his humanity, to fulfill the calling to be a person that is his by reason of his very humanity.”).

¹⁷⁸ Letter from Pope John Paul II to the Diocese of Rome on the Gospel of Work ¶ 6 (Dec. 8, 1998), available at http://www.vatican.va/holy_father/john_paul_ii/letters/1998/documents/hf_jp-ii_let_19981207_workers_en.html.

¹⁷⁹ See *supra* notes 118–23, 134–35 and accompanying text.

¹⁸⁰ John Paul II stresses that if “existing and acting together with other human beings” is to lead to human flourishing, it cannot be merely mechanical; to be fulfilling, a person must be free in performing an action. WOJTYLA, *supra* note 134, at 275.

¹⁸¹ See DIETRICH HOFFMAN, *THE GERMAN CO-DETERMINATION ACT 1976* (Mitbestimmungsgesetz 1976), at 27–28 (1976); Herbert Wiedemann, *Codetermination by Workers in German Enterprises*, 28 AM. J. COMP. L. 79, 79 (1980).

¹⁸² See Felix R. Fitzroy & Kornelius Kraft, *Co-Determination, Efficiency, and Productivity* 19 (Inst. for the Study of Labor (IZA), Paper No. 1442, 2004) (indicating that co-determination had a “statistically significant positive effect” after 1976), available at <http://ideas.repec.org/p/iza/izadps/dp1442.html#download>.

worker participation in corporate governance reflects the values of freedom, autonomy, and participation John Paul II sees as essential if work is to play an appropriate role in our lives. A legal regime based on this vision would include mechanisms for giving workers at all levels a say in the decisions that affect their lives, while respecting the demands of efficiency.

For purposes of giving people greater scope for exercising their freedom and autonomy and developing genuine communities of participation on a day-to-day basis, worker representation on boards of directors may be less important than issues of job design and management styles at the lower levels of businesses. These are also complex issues on which there is abundant literature.¹⁸³ Neither John Paul II nor Catholic Social Thought more generally provides specific prescriptions, but the principle of subsidiarity provides some guidance.

Subsidiarity prescribes that in any organization or set of organizations, higher levels should not exercise functions that can be effectively carried out at lower levels.¹⁸⁴ It goes beyond this to require higher levels to provide the aid (“subsidy”) lower levels may need to carry out a particular function. Higher level organizations should perform functions directly only in cases where the lower level cannot do so even with appropriate assistance.¹⁸⁵

Although often framed in Catholic Social Thought as a free-standing principle in its own right,¹⁸⁶ subsidiarity is rooted in the concepts of persons as self-determining agents and of the intrinsically social character of human beings. Application of the principle of subsidiarity creates spaces in which free decisions can be made and in which people can create communities that express their social nature. In terms of job design and

¹⁸³ See, e.g., Tove H. Hammer, Steven C. Currall & Robert N. Stern, *Worker Representation on Boards of Directors: A Study of Competing Roles*, 44 INDUS. & LAB. REL. REV. 661 (1991).

¹⁸⁴ See Jared Bayer, *Re-Balancing State and Federal Power: Toward a Political Principle of Subsidiarity in the United States*, 53 AM. U. L. REV. 1421, 1445–48 (2004).

¹⁸⁵ See *CENTESIMUS ANNUS*, *supra* note 104, ¶ 48 (discussing applications of the principle in the area of economic life); PIUS XI, ENCYCLICAL LETTER *QUADRAGESIMO ANNO* ¶¶ 79–80 (1931) [hereinafter *QUADRAGESIMO ANNO*] (formulating the principle in general terms).

¹⁸⁶ See, e.g., *QUADRAGESIMO ANNO*, *supra* note 185, ¶¶ 79–80 (labeling it a “grave evil” to “assign to a greater and higher association what lesser organizations can do”).

management style, this suggests allowing as wide a scope of autonomy as possible to the people at every level of a business, starting with the lowest levels.

*D. Property and Markets*¹⁸⁷

John Paul II affirms the value of private property. Like earlier Popes, he sees it as an important component of human dignity and autonomy, as “an extension of human freedom.”¹⁸⁸

A person who is deprived of something he can call “his own,” and of the possibility of earning a living through his own initiative, comes to depend on the social machine and on those who control it. This makes it much more difficult for him to recognize his dignity as a person, and hinders progress towards the building up of an authentic human community.¹⁸⁹

John Paul II is much more enthusiastic about markets than his predecessors. He recognizes that “the free market is the most efficient instrument for utilizing resources and effectively responding to needs.”¹⁹⁰ In addition, he values free markets because “they give central place to the person’s desires and preferences, which, in a contract, meet the desires and preferences of another person.”¹⁹¹ Thus, they respect the freedom and autonomy of persons and permit them to express their tastes and preferences.¹⁹²

Despite the practical and theoretical significance he accords to private property and free markets, John Paul II does not consider either property or markets the primordial principle of social and economic organization. Rather, he finds the

¹⁸⁷ Some of the material in this section first appeared in Coverdale, *supra* note 111, at 40–43 (discussing John Paul II on private property).

¹⁸⁸ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 30.

¹⁸⁹ *Id.* ¶ 13.

¹⁹⁰ *Id.* ¶ 34 (emphasis omitted).

¹⁹¹ *Id.* ¶ 40.

¹⁹² At least in mature consumer societies, the abundance of choices offered by markets is not an unmixed blessing. People often have difficulty choosing between large numbers of options, and may be less happy and satisfied than if they had fewer choices. BARRY SCHWARTZ, *THE PARADOX OF CHOICE: WHY MORE IS LESS* 3 (2004). John Paul II frequently addresses this concern in his critique of consumerism. See, e.g., *CENTESIMUS ANNUS*, *supra* note 104, ¶ 36; Raymond J. De Souza, *John Paul II and the Problem of Consumerism*, RELIGION & LIBERTY, SEPT.–OCT. 1999, at 8, available at http://www.acton.org/publicat/randl/pdf/r1_v09n5.pdf (explaining why Pope John Paul II sees such danger in consumerism).

“characteristic principle of Christian social doctrine”¹⁹³ and the “cornerstone of the Church’s social teaching”¹⁹⁴ in “the universal destination of the earth’s goods,”¹⁹⁵ i.e., in the fact that “the goods of this world are originally meant for all.”¹⁹⁶ “God gave the earth to the whole human race,” he says, “for the sustenance of all its members, without excluding or favouring anyone.”¹⁹⁷ The principle that the goods of the earth—including not only natural resources but also the products of science and technology¹⁹⁸—are meant to serve all men and women comes before the principle of private property and provides its meaning.¹⁹⁹

John Paul II does not consider recognition of rights to private property as incompatible with the universal destination of the goods of the earth. On the contrary, he justifies private property as a way of putting the goods of the earth at the service of all. In part, this is a question of property being widely distributed so that each person has sufficient property of his or her own. But it also affects the content and use of property rights.

John Paul II does not see property as an unlimited right. Ownership of property does not bring with it the right to use an item exclusively for the owner’s benefit. “In making use of the exterior things we lawfully possess, we ought to regard them not just as our own but also as common, in the sense that they can profit not only the owners but others too.”²⁰⁰ Owners have “the

¹⁹³ JOHN PAUL II, ENCYCLICAL LETTER *SOLLICITUDO REI SOCIALIS* ¶ 42 (1987) [hereinafter *SOLLICITUDO REI SOCIALIS*].

¹⁹⁴ Pope John Paul II, Angelus Address ¶ 2 (July 8, 2001), available at http://www.vatican.va/holy_father/john_paul_ii/angelus/2001/documents/hf_jp-ii_ang_20010708_en.html.

¹⁹⁵ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 6 (emphasis omitted).

¹⁹⁶ *SOLLICITUDO REI SOCIALIS*, *supra* note 193, ¶ 42.

¹⁹⁷ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 31.

¹⁹⁸ See Pope John Paul II, Message for the Celebration of the World Day of Peace ¶ 7 (Jan. 1, 2005), available at http://www.vatican.va/holy_father/john_paul_ii/messages/peace/documents/hf_jp-ii_mes_20041216_xxxviii-world-day-for-peace_en.html (“[T]he *new goods* derived from progress in science and technology . . . in application of the principle of the universal destination of the earth’s goods, need to be *put at the service of humanity’s basic needs*.”).

¹⁹⁹ Pope John Paul II, Message for Lent (June 29, 1991), available at http://www.vatican.va/holy_father/john_paul_ii/messages/len/documents/hf_jp-ii_mes_29021992_lent-1992_en.html (“[The] universal destination of goods . . . comes before all particular forms of private property and . . . should give them their true meaning.”).

²⁰⁰ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 30 (quoting *GAUDIUM ET SPES*, *supra* note 113, ¶ 69).

responsibility not to hinder others from having their own part of God's gift; indeed, [they] must cooperate with others so that together all can dominate the earth."²⁰¹

John Paul II expresses the effect of the universal destination of goods on property rights with the metaphor of a "social mortgage"²⁰² on all property. Because it is subject to a social mortgage, the right to property is not "absolute and untouchable."²⁰³ It is "*subordinated to the right to common use*, to the fact that goods are meant for everyone."²⁰⁴ All private property "has an intrinsically social function, based upon and justified precisely by the principle of the universal destination of goods."²⁰⁵

In this light, "[o]wnership of the means of production . . . is just and legitimate [only] if it serves useful work."²⁰⁶ John Paul II explicitly rejects the "programme of *capitalism* practised by liberalism and by the political systems inspired by it."²⁰⁷ "[T]he exclusive right to private ownership of the means of production . . . [is not] an untouchable 'dogma' of economic life."²⁰⁸ "[T]he only legitimate title to . . . [possession of the means of production] is *that they should serve labour*, and thus, by serving labour, that they should make possible the achievement of . . . the universal destination of goods and the right to common use of them."²⁰⁹

Just as John Paul II sees private property as a right subject to limitations and at the service of the universal destination of the goods of the earth, his acceptance of free markets is limited and conditional. He readily concedes their utility for meeting

²⁰¹ *Id.* ¶ 31.

²⁰² Pope John Paul II, Message to the Jubilee 2000 Debt Campaign ¶ 4 (Sept. 23, 1999) [hereinafter Message to the Jubilee 2000 Debt Campaign], available at http://www.vatican.va/holy_father/john_paul_ii/speeches/1999/september/documents/hf_jp-ii_mes_23091999_jubilee-2000-debt-campaign_en.html; Pope John Paul II, Opening Address at the Puebla Conference pt. III, ¶ 4 (Jan. 28, 1979), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/1979/january/documents/hf_jp-ii_spe_19790128_messico-puebla-ecumen-meeting_it.html (translated from Italian by the author); *SOLLICITUDO REI SOCIALIS*, *supra* note 193, ¶ 42.

²⁰³ *LABOREM EXERCENS*, *supra* note 109, ¶ 14.

²⁰⁴ *Id.*

²⁰⁵ *SOLLICITUDO REI SOCIALIS*, *supra* note 193, ¶ 42.

²⁰⁶ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 43.

²⁰⁷ *LABOREM EXERCENS*, *supra* note 109, ¶ 14.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

needs that are “‘solvent,’”²¹⁰ i.e., that are “‘endowed with purchasing power,’”²¹¹ and for utilizing those resources that are “‘marketable,’”²¹² i.e., capable of obtaining a satisfactory price. He points out, however, that many vital human needs are not endowed with purchasing power and would therefore go unmet if we were to rely exclusively on market mechanisms. “[T]here are many human needs which find no place on the market.”²¹³ If markets cannot meet such needs, other mechanisms must be found to meet them; the rationality of the market is not the ultimate criterion of justice. Society should try to regulate markets in such a way as to maximize the efficiency they can produce while ensuring that the needs of all its members, including the weakest, are met.²¹⁴

John Paul II’s views that the ownership of productive property is justified primarily by the service it renders to work and that market outcomes should not be the sole or ultimate criterion of social policy are opposed to the view that ownership of stock brings with it the right to have the company managed solely for the benefit of the shareholders. John Paul II’s view of property and the market suggests that the law should require companies to be managed for goals broader than shareholder wealth maximization.²¹⁵ This does not mean, however, that profit does not have a legitimate role to play in business.

²¹⁰ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 34.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.* ¶ 35 (commenting that “the market [should] be appropriately controlled by the forces of society and by the State, so as to guarantee that the basic needs of the whole of society are satisfied”). There is no doubt that John Paul II appreciated the virtues of markets to a much higher degree than his predecessors but conservative American commentators like Michael Novak, Stephen Bainbridge, and Richard John Neuhaus vastly exaggerate John Paul II’s enthusiasm for markets and American style capitalism. *See, e.g.*, RICHARD JOHN NEUHAUS, *DOING WELL & DOING GOOD: THE CHALLENGE TO THE CHRISTIAN CAPITALIST* 57, 69–70 (1992); MICHAEL NOVAK, *THE CATHOLIC ETHIC AND THE SPIRIT OF CAPITALISM* 125–32 (1993); Bainbridge, *supra* note 36, at 10.

²¹⁵ Clive Beed and Cara Beed argue that John Paul II’s theory of property calls for worker ownership of the businesses in which they work. They point to ESOPS as well as collectives like the famous Mondragón collective in Spain as ways of achieving this goal. *See* Clive Beed & Cara Beed, *Work Ownership Implications of Recent Papal Social Thought*, 60 *REV. SOC. ECON.* 47, 56–59, 63–69 (2002). Certainly worker ownership of businesses is congruent with John Paul II’s thought, but it does not seem to be required in every case.

E. The Role of Profit and Efficiency

Because of the dignity and worth of every human person, John Paul II refuses to raise profit to the level of the ultimate goal of businesses.²¹⁶ John Paul II recognizes profit as a legitimate business goal²¹⁷ and understands that businesses must be concerned with making a profit, since profit is an essential part of business, without which no business would long survive. He insists, nonetheless, that “the purpose of a business firm is not simply to make a profit.”²¹⁸ “[T]o pursue goals aimed at maximizing profit would be decidedly narrow,”²¹⁹ and an

²¹⁶ See *CENTESIMUS ANNUS*, *supra* note 104, ¶ 35 (commenting that human and moral factors besides profit must also be considered). Of course, the value of persons also leads him to reject Marxism and other forms of totalitarianism, which subordinate persons to the goals of the larger society. In John Paul II’s view:

[T]he fundamental error of socialism is anthropological in nature. Socialism considers the individual person simply as an element, a molecule within the social organism, so that the good of the individual is completely subordinated to the functioning of the socio-economic mechanism. Socialism likewise maintains that the good of the individual can be realized without reference to his free choice, to the unique and exclusive responsibility which he exercises in the face of good or evil. Man is thus reduced to a series of social relationships, and the concept of the person as the autonomous subject of moral decision disappears, the very subject whose decisions build the social order.

Id. ¶ 13.

²¹⁷ See *id.* ¶ 35; Pope John Paul II, Message to the Participants in the Conference on “The Business Executive: Social Responsibility and Globalization” ¶¶ 2–3 (Mar. 3, 2004) [hereinafter Message on Social Responsibility and Globalization], available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2004/march/documents/hf_jp-ii_spe_20040305_martino_en.html (recognizing that while profit is a goal, it is not the only goal of business).

²¹⁸ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 35; see also Message on Social Responsibility and Globalization, *supra* note 217, ¶ 3 (“[T]he pursuit of profit is not the sole end of [business] activity . . .”).

²¹⁹ Pope John Paul II, Address to the Directors of the Banking Group Capitalia (Sept. 17, 2004), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2004/september/documents/hf_jp-ii_spe_20040917_capitalia_en.html. John Paul II echoed the views of Leo XIII in the first of the social encyclicals by noting that Leo XIII criticized approaches “determined solely by efficiency, with a view to increasing profits.” *CENTESIMUS ANNUS*, *supra* note 104, ¶ 4. Not only does John Paul II not accept profit maximization as the overriding goal of existing businesses, he insists that the owners of capital have an ethical obligation to consider broader needs when choosing where to make new investments. “[T]he decision to invest in one place rather than another, in one productive sector rather than another, is always a moral and cultural choice.” *Id.* ¶ 36. In choosing where to invest, “[r]espect for the human person and his fundamental right to lead a worthy life must prevail over interests of accumulating benefits or maintaining privileged positions.” Pope John Paul II, Address to the Ambassador of Columbia ¶ 3 (Nov. 7, 1998), available

“excessive search for profit”²²⁰ would be an aberration. Profits are “an indication that a business is functioning well[,]”²²¹ but a business, no matter how profitable, cannot be considered a success if its people are “humiliated and their dignity offended.”²²² From a positive point of view, John Paul II sees finding “[t]he correct relationship between profit and solidarity”²²³ as one of the major challenges of those who direct businesses.

John Paul II’s rejection of profit maximization as the goal of business is not based on a naïve leftist or socialist agenda, but on a philosophy and a theology which sees human flourishing as the goal to be attained, and profit as merely a means toward achieving that goal.²²⁴ John Paul II does not directly address the question of whether—as many law and economics theorists would maintain—single-minded pursuit of owners’ profit will eventually bring economic benefits to all participants in the economy. Even if that premise could be demonstrated, however, he would still assert that making profit the primary goal of the human activity that is running a business inverts the order of ends and means.²²⁵

at http://www.vatican.va/holy_father/john_paul_ii/speeches/1998/november/documents/hf_jp-ii_spe_19981107_ambassador-colombia_en.html.

²²⁰ Address to Christian Union of Business Executives, *supra* note 104, ¶ 2; *accord* Message to the Jubilee 2000 Debt Campaign, *supra* note 202, ¶ 4 (“The law of profit alone cannot be applied to that which is essential for the fight against hunger, disease and poverty.”).

²²¹ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 35.

²²² *Id.*

²²³ Address to Christian Union of Business Executives, *supra* note 104, ¶ 4 (urging executives to harmonize “the development of the worker’s ability . . . with the rational production of goods and services.”); *see also* Message on Social Responsibility and Globalization, *supra* note 217, ¶ 2 (commenting that business leaders need to “combine the legitimate pursuit of profit with a deeper concern for the spread of solidarity.”).

²²⁴ *See* Mark A. Sargent, *Competing Visions of the Corporation in Catholic Social Thought*, 1 J. CATH. SOC. THOUGHT 561, 565 (2004) (discussing profits as a means for attaining the common good).

²²⁵ Supporting this idea, John Paul II states:

The attainment of the worker’s rights cannot however be doomed to be merely a result of economic systems which on a larger or smaller scale are guided chiefly by the criterion of maximum profit. On the contrary, it is respect for the objective rights of the worker—every kind of worker: manual or intellectual, industrial or agricultural, etc.—that must constitute *the adequate and fundamental criterion* for shaping the whole economy . . .

LABOREM EXERCENS, *supra* note 109, ¶ 17

A profit may be made developing “new and higher forms of satisfying human needs,”²²⁶ but it may also be made by stimulating “artificial new needs which hinder the formation of a mature personality.”²²⁷ Prostitution, child pornography, and sales of heroin to minors may be profitable and the businesses engaged in them may be highly efficient. Society, however, should hardly celebrate their success. Yet a theory of business which measures a business’ success exclusively by the profits it generates is in no position to distinguish between profitable businesses that contribute to human flourishing and those that undermine it.²²⁸

The problem is not confined to businesses engaged in producing products that are socially deleterious. Businesses engaged in more legitimate activities may also have a negative impact on human flourishing, for instance because of how they treat their employees. John Paul II insists that a business, no matter how profitable, cannot be considered a success if its people are “humiliated and their dignity offended.”²²⁹ This occurs in sweatshops and in other obvious “forms of exploitation, especially to the disadvantage of the most vulnerable workers, of immigrants and of those on the margins of society.”²³⁰ The problem is not, however, confined to those on the margins of society. As lawyers, we should consider the modern profit-driven large law firm which pays its associates handsomely, but subjects them to a work regime which leaves no time for family, friends, or for the other elements of human fulfillment.

The law and economics defense of profitability as the goal of corporations rests on the assertion that the single-minded focus on profitability will lead to increased efficiency in the production

²²⁶ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 36.

²²⁷ *Id.*

²²⁸ For some time now, economists have been aware that the total amount of goods and services produced is not an adequate measure of well-being. *See, e.g.*, Hans Werner Holub, *Some Critical Reflections on Measures of Net Economic Welfare*, 29 *REV. INCOME & WEALTH* 317, 318 (1983) (“[Household] consumption . . . is only a very limited part of total welfare.”). This insight has found its way into introductory economic texts. *See, e.g.*, PAUL A. SAMUELSON & WILLIAM D. NORDHAUS, *ECONOMICS* 405 (16th ed. 1998). More recently, it has made it into the popular press. *See, e.g.*, *Grossly Distorted Picture: It’s High Time that Economists Looked at More Than Just GDP*, *ECONOMIST*, Feb. 11, 2006 (“GDP . . . was never intended to be the definitive yardstick of economic welfare.”).

²²⁹ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 35.

²³⁰ *Id.* ¶ 15.

of goods and services.²³¹ John Paul II is certainly aware that goods and services are essential to human well-being.²³² Consequently, he accepts that every form of economic organization must be judged on its efficiency in producing goods and services.²³³ Nonetheless, efficiency is, in his view, far from being the final criterion in judging systems of economic organization. He has criticized “the cult of an often soulless efficiency”²³⁴ and has spoken of the problems that arise “when society is organized solely according to the criteria of efficiency and productivity.”²³⁵

Efficiency, understood by proponents of shareholder wealth maximization as increased total output from the same inputs,²³⁶ cannot be the sole criterion in judging a social and economic system.²³⁷ John Paul II points out that we must be concerned not

²³¹ See *supra* text accompanying notes 87–96 (criticizing this view and discussing the efficiency scores of some of the highest paid corporate officers).

²³² Regarding the goods that are necessary for survival, John Paul II has repeatedly lamented “the overwhelming tragedy of hunger throughout the world.” Pope John Paul II, Address to the General Audience ¶ 1 (Nov. 13, 1996) [hereinafter Address to the General Audience], available at <http://www.ewtn.com/library/papaldoc/JP961113.htm>. He has called for efforts to wipe out “the tragic scandal of hunger.” *Id.* Over and above what is needed for survival, John Paul II sees some level of well-being as indispensable to living with dignity and developing one’s human potential. He is painfully aware that the lack of necessary goods can easily prevent people from “succeed[ing] in realizing their basic human vocation.” *SOLLICITUDO REI SOCIALIS*, *supra* note 193, ¶ 28. He insists that all men and women have a right to the “things necessary for one’s personal development.” *CENTESIMUS ANNUS*, *supra* note 104, ¶ 6.

²³³ He recognizes, for instance, that the “inefficiency of the economic system” played a major role in the downfall of the Marxist regimes of Eastern Europe. *CENTESIMUS ANNUS*, *supra* note 104, ¶ 23–24.

²³⁴ Pope John Paul II, Address to the Participants in the Colloquium on Capitalism and Ethics ¶ 2 (Jan. 14, 1992), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/1992/january/documents/hf_jp-ii_spe_19920114_capitalism-ethics_en.html.

²³⁵ Pope John Paul II, Message for the XXX World Communications Day ¶ 4 (May 19, 1996), available at http://www.vatican.va/holy_father/john_paul_ii/messages/communications/documents/hf_jp-ii_mes_24011996_world-communications-day_en.html.

²³⁶ This definition of efficiency is often referred to as Hicks-Kaldor efficiency. Under this criterion, a project is efficient if gainers from the project could, in principle, compensate the losers, whether they in fact do so or not. See, e.g., John Gowdy, *Toward a New Welfare Economics for Sustainability*, 53 *ECOLOGICAL ECON.* 211, 213 (2005) (describing the Kaldor-Hicks compensation test).

²³⁷ See Susan J. Stabile, *Using Religion to Promote Corporate Responsibility*, 39 *WAKE FOREST L. REV.* 839, 882 (2004) (discussing the moral and normative judgments implicit in an appeal to efficiency as the ultimate criterion for judging economic activity).

only with the total amount of goods produced, but also with their distribution.²³⁸ A system that produces a large amount of goods and services, but in which a few wealthy people receive most of the benefits while the majority of the population lives in poverty, is not a just system.²³⁹ John Paul II does not call for absolute equality of income or wealth, but he does believe that human dignity and solidarity require that the goods of the earth be employed to meet the needs of all. He finds “[o]ne of the greatest injustices in the contemporary world”²⁴⁰ in “the poor distribution of the goods and services originally intended for all.”²⁴¹ He describes as a “scandal . . . the coexistence of persons who lack the basic essentials with others who have a superabundance.”²⁴² He urges his listeners to work to overcome “inequality, oppression and selfishness,”²⁴³ and classifies inequality between social groups as a “social sin[]”²⁴⁴ in the same category as “the drug trade, the recycling of illicit funds, corruption at every level, the terror of violence, the arms race, racial discrimination . . . and the irrational destruction of nature.”²⁴⁵

Short of situations where some persons lack the essentials for survival or for minimal human dignity, John Paul II does not specify the point at which social and economic inequality become objectionable. I personally believe he would have found the increasing disparities in both wealth and income in the United States objectionable,²⁴⁶ but that is obviously a matter of

²³⁸ See Pope John Paul II, Address of John Paul II to the Bishops of Brazil from the South Regions III and IV on Their “Ad Limina” Visit ¶ 4 (Nov. 26, 2002), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/november/documents/hf_jp-ii_spe_20021126_brazil-sul-iii-iv_en.html (criticizing “unequal distribution of income that is reaching high levels”).

²³⁹ See Pope John Paul II, Angelus Address ¶ 2 (Sept. 26, 2004), available at http://www.vatican.va/holy_father/john_paul_ii/angelus/2004/documents/hf_jp-ii_ang_20040926_en.html (discussing the “imbalance between wealth and poverty” (emphasis omitted)).

²⁴⁰ *SOLLICITUDO REI SOCIALIS*, *supra* note 193, ¶ 28.

²⁴¹ *Id.*

²⁴² Address to the General Audience, *supra* note 232, ¶ 1.

²⁴³ Pope John Paul II, Address to Young People at Plovdiv Cathedral ¶ 2 (May 26, 2002), available at http://www.vatican.va/holy_father/john_paul_ii/speeches/2002/may/documents/hf_jp-ii_spe_20020526_youth-bulgaria_en.html.

²⁴⁴ JOHN PAUL II, POST-SYNODAL APOSTOLIC EXHORTATION *ECCLESIA IN AMERICA* ¶ 56 (1999).

²⁴⁵ *Id.*

²⁴⁶ According to IRS statistics for the year 2004 (the last year for which this data is available): the top 1% of taxpayers reported 19% of all income; the top 5% of taxpayers reported 33% of all income; and by contrast, the bottom 50% of taxpayers

speculation. What is clear is that he did not believe that everything that efficiently increased wealth could be considered a success no matter how that wealth was distributed.

On a deeper level, John Paul II rejected economic efficiency as the ultimate criterion in judging a business—or any other human activity—because economic goods, although essential to human flourishing, are merely instrumental. Human fulfillment is not primarily a matter of “having” more things, but of “being” a more fully developed human person.²⁴⁷ To achieve the goal of being a fully developed human, we may need to have more things, but the ultimate goal is not “to spend life in enjoyment as an end in itself.”²⁴⁸ Rather, it is a life oriented toward “truth, beauty, goodness and communion with others for the sake of common growth.”²⁴⁹

CONCLUSION

The ultimate goal of all human activity, including economic activities, should be to contribute to the full human flourishing of those involved. How that will be accomplished will vary, of course, with the activity. A school’s way of accomplishing this will be very different from that of a hospital, which will in turn be different from that of a clothing manufacturer. The school will do so in the first place through the education it imparts; the hospital will do so through the health care services it provides; and the clothing manufacturer will do so through the clothes that it makes and sells. Each can be judged on the quality of the goods and services it provides and on how efficiently it uses

reported only 14% of all income. GERALD PRANTE, SUMMARY OF LATEST FEDERAL INDIVIDUAL INCOME TAX DATA tbl.1 (2006), <http://www.taxfoundation.org/files/ff66.pdf>. In 2003, the top 1% of households owned 57.5% of corporate wealth. David Cay Johnston, *Corporate Wealth Share Rises for Top-Income Americans*, N.Y. TIMES, Jan. 29, 2006, at 22.

In 1965, the average American CEO earned twenty-four times what an average production worker earned. ECON. POL’Y INST., STATE OF WORKING AMERICA: CEO PAY (2004–05), http://www.epinet.org/books/swa2004/news/swafacts_ceopay.pdf. In 2004, the average CEO pay was 431 times that of the average production worker. SARAH ANDERSON ET AL., EXECUTIVE EXCESS 2005: DEFENSE CONTRACTORS GET MORE BUCKS FOR THE BANG 1 (2005), <http://www.faireconomy.org/press/2005/EE2005.pdf>.

²⁴⁷ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 36.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

resources to produce them. Profitability is an important measure of success in these areas.

In the final analysis, however, the inherent dignity and worth of persons means that all human institutions should have as their ultimate goal the full development of each of the persons who comprise it. Each institution has its own goals, which may be very limited, but that goal should be pursued in a way that contributes in some fashion to the human flourishing of the people who comprise the institution and of the people it affects. “[T]he origin, the subject and the purpose of all social institutions is and should be the human person. . . .”²⁵⁰

Put in more technical terms, all human institutions, including businesses, should aim not only to achieve their particular goals, whatever they may be, but to contribute to the common good. The common good is not simply the aggregate of the goods of all the members of the society. Rather, “[i]t is the sum of all those social conditions which allow the human dignity of all to be respected, and their basic needs to be met, while giving men and women the freedom to assume responsibility for their own lives.”²⁵¹

The pursuit of the common good in all its fullness is the goal of political communities, but it cannot be attained unless a multitude of smaller communities, including businesses, make their own contributions. They can do so by pursuing their own proper goals in a way that promotes “all the goods necessary for integral human development in the organization, in such way as to respect the proper ordering of those goods.”²⁵²

²⁵⁰ JOHN PAUL II, ENCYCLICAL LETTER *VERITATIS SPLENDOR* ¶ 97 (1993) (quoting *GAUDIUM ET SPES*, *supra* note 113, ¶ 25).

²⁵¹ CATHOLIC BISHOP CONFERENCE OF ENG. & WALES, VOTE FOR THE COMMON GOOD ¶ 9 (2001), <http://www.catholic-ew.org.uk/resource/vcg/vcg.doc>. This concept stands in sharp contrast to large strands of American liberal thought which reject altogether the idea of common good and substitute in its place “the preservation of the maximum possible individual choice according to one’s private conception of the good.” Louis Dupre, *The Common Good and the Open Society*, in *CATHOLICISM AND LIBERALISM* 172, 183 (R. Bruce Douglass & David Hollenbach eds., 1994).

²⁵² ALFORD & NAUGHTON, *supra* note 102, at 45 (emphasis omitted). Although they do not frame the question in terms of the common good, partisans of shareholder wealth maximization as the only legitimate goal of business reject the notion that businesses should strive to contribute to the common good other than by enriching the stockholders. Broader social concerns, they say, are the domain of government. If society wants to pursue other goals, for example fair wages or a clean environment, it should regulate business, not expect businesses to voluntarily undertake them. See *supra* notes 41–58 and accompanying text (discussing the

More concretely, in this vision, businesses should be concerned not only with making a profit, but with a wide range of broader goals. These would include providing their workers with wages which are adequate to allow them to live with dignity, meet their family obligations, and develop their talents;²⁵³

nexus of contract theory of the corporation). Given the cost and slowness of regulation, this seems a dubious proposition even considered purely in terms of efficiency. See, e.g., THOMAS FRIEDMAN, *THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY FIRST CENTURY* 297–301 (2005) (pointing out that large corporations are often better positioned than government to regulate effectively and discussing recent international undertakings by American businesses such as McDonalds, IBM, HP, Dell, and Wal-Mart to implement socially and ecologically sound practices). More important for purposes of this paper, it reflects an atomistic individualism that conceives of persons and institutions as pursuing purely personal goals and of the government as the only institution charged with accomplishing larger social goals. By contrast, John Paul II, and Catholic Social Thought more generally, start from a vision of society as made up of a myriad of institutions, each of which has a role to play in contributing to the common good. This leads to the principle of subsidiarity, which sees government as having ultimate responsibility for the common good, but envisions many smaller organizations as contributing to it and government as helping them in their efforts and taking direct responsibility only when smaller organizations are unable to achieve the goal. See *supra* notes 183–86 and accompanying text (discussing “subsidiarity”). For a somewhat similar vision of society from a non-religious perspective, see MICHAEL J. SANDEL, *DEMOCRACY’S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY* 211–27 (1996) and MICHAEL J. SANDEL, *LIBERALISM AND THE LIMITS OF JUSTICE* 100–03 (2d ed. 1998).

²⁵³ Catholic Social Thought has long stressed the obligation to pay a “living wage” or a “family wage” sufficient to support a worker and his or her family. See *LABOREM EXERCENS*, *supra* note 109, ¶ 19; *GAUDIUM ET SPES*, *supra* note 113, ¶ 67; *QUADRAGESIMO ANNO*, *supra* note 185, ¶ 71; LEO XIII, *ENCYCLICAL LETTER RERUM NOVARUM* ¶ 45 (1891). One of the most important early American exponents of Catholic Social Thought, John A. Ryan, published an entire book on the subject at the beginning of the twentieth century. See JOHN A. RYAN, *A LIVING WAGE* (rev. & abr. ed. 1920) (discussing how a living wage would be the best formulated plan to improve social and working conditions of people). The concept of a living wage lies behind the movement in favor of minimum wages. See generally WILLIS J. NORDLUND, *THE QUEST FOR A LIVING WAGE: THE HISTORY OF THE FEDERAL MINIMUM WAGE PROGRAM* (1997) (documenting the history of the minimum wage program in the United States).

In recent years, in the face of federal failure to increase the minimum wage, the movement for a living wage has become an important grass roots phenomenon in many local communities and some states. See Jon Gertner, *What Is a Living Wage?*, *N.Y. TIMES*, Jan. 15, 2006 (Magazine), at 38 (documenting individual efforts to raise the minimum wage). Additionally, minimum wage activists have phrased their arguments primarily in moral terms. See *id.* Although they rarely cite Catholic Social Thought, the positions they take are very similar to its classic formulations.

The most common criticism of the concept of a living wage is that it is impractical and will end up hurting the poor by causing jobs to dry up. See generally JIM SAXTON, *JOINT ECONOMIC COMMITTEE REPORT: THE CASE AGAINST A HIGHER MINIMUM WAGE* (1996), <http://www.house.gov/jec/cost-gov/regs/minimum/>

treating their employees with the respect owed to their dignity as human beings;²⁵⁴ providing jobs and working environments in which people can develop their talents and relate to others in truly human ways;²⁵⁵ producing quality goods and services that meet real needs of the community;²⁵⁶ and protecting and improving the natural environment and using resources in responsible ways.²⁵⁷

In addition to these elements that Catholic Social Thought has long stressed, John Paul II places special emphasis on the building of an authentic community.²⁵⁸ Because, as we have seen, he believes that persons achieve their fulfillment only through participation in communities, he says: “[T]he purpose of a business firm . . . is to be found in its very existence as a *community of persons* who in various ways are endeavouring to satisfy their basic needs, and who form a particular group at the service of the whole of society.”²⁵⁹

The needs John Paul II refers to include economic and material ones,²⁶⁰ but go well beyond that. Human needs are not

against/against.htm. Recent economic research has cast serious doubt on this accepted wisdom; cf. David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania: Reply*, 90 AM. ECON. REV. 1397, 1406–13 (2000) (refuting evidence from a different study that demonstrated an increase in minimum wage lessened job availability); David Card & Alan B. Krueger, *Minimum Wages and Employment: A Case Study of the Fast-Food Industry in New Jersey and Pennsylvania*, 84 AM. ECON. REV. 772, 778–89 (1994) (examining the impact of wage increases in fast food restaurants in New Jersey and Pennsylvania); Louis Uchitelle, *A Pay Raise’s Impact*, N.Y. TIMES, Jan 12, 1995, at D1 (reporting that economic studies show that increases in the minimum wage have had little effect on employment); Jeff Chapman, *Employment and the Minimum Wage: Evidence from Recent State Labor Market Trends* 10–13 (Econ. Policy Inst., Paper No. 150, 2004) (providing evidence to measure minimum wage’s impact on the workforce).

²⁵⁴ See *LABOREM EXERCENS*, *supra* note 109, ¶ 9 (explaining how work should provide dignity to man).

²⁵⁵ See *CENTESIMUS ANNUS*, *supra* note 104, ¶ 15 (extolling environmental improvements that would better workers’ lives).

²⁵⁶ *Id.* ¶ 36.

²⁵⁷ See *id.* ¶ 37 (imploring man to recognize his responsibility to protect the environment).

²⁵⁸ See *id.* ¶ 35 (describing businesses as “at the service of the whole” community).

²⁵⁹ *Id.*

²⁶⁰ John Paul II recognizes that people could not “realiz[e] their basic human vocation [if] they [were] deprived of essential goods.” *SOLLICITUDO REI SOCIALIS*, *supra* note 193, ¶ 28. He is also acutely aware that many people throughout the world in fact lack the minimum goods required to live out their human dignity. See

merely “material and instinctive,”²⁶¹ but also “interior and spiritual.”²⁶² Those who work in a business should “together . . . help one another to mature as human beings”²⁶³ Maturing as a human being involves not merely the accumulation of more goods, but “the quest for truth, beauty, goodness and communion with others for the sake of common growth.”²⁶⁴

It may seem wildly unrealistic to introduce concepts like the quest for truth and beauty and communion with others into a discussion of business organizations. Yet, it would be tragic to exclude them from consideration when we think about the goals of the organizations that dominate the majority of the waking hours of most people. To dismiss these higher human goals as irrelevant to the world of business is to condemn most people to never achieving them, or at best to drive a wedge between the pursuit of fulfillment and the largest single component of most people’s lives other than, perhaps, sleep.

None of this is to say that businesses should focus exclusively on the higher human good while ignoring profitability and efficiency. A business which consistently fails to make an adequate profit is a business doomed to extinction, no matter how well it treats its employees or contributes in other ways to human flourishing. A business, therefore, will not always be able to choose the course that would be preferable if profit were not a concern. Instead, it will often be necessary to balance profitability and efficiency against other factors demanded by the orientation of the business as a community of persons toward the full human good of all those who make up the community.

It is certainly not easy to translate the ideas set forth in this paper into concrete proposals for legal reform. To do so will require the collaboration of many people with a strong grasp of both economics and the reality of business as well as of legal technique. The first step on any journey, however, is to know the destination. In this, John Paul II is an excellent guide.

id.; JOHN PAUL II, APOSTOLIC EXHORTATION *ECCLESIA IN AFRICA* ¶ 40 (1995) (noting the existence of widespread poverty in Africa).

²⁶¹ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 36.

²⁶² *Id.*

²⁶³ Address to Christian Union of Business Executives, *supra* note 104, ¶ 3.

²⁶⁴ *CENTESIMUS ANNUS*, *supra* note 104, ¶ 36.