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PERSONS, PROPERTY, AND THE CORPORATION: A PROPOSAL FOR A NEW PARADIGM

Jeffrey Nesteruk*

INTRODUCTION

Fundamental to our legal system is the distinction between “persons” and “property.” The distinction, roughly put, is one between that which “acts” and that which is “acted upon.” The essentially active nature of the person is evident from the law’s conception of the person as the subject of rights and duties.¹ Rights and duties, after all, imply an active subject, one who may exercise privileges and fulfill obligations. Similarly, the notion of property² as an entity “acted upon” or essentially passive is also readily apparent. Central to the law’s definition of property is its susceptibility to ownership. The traditional notion of ownership entails control.³ As a controlled entity, property is acted upon by those who exercise control, i.e., its owners.⁴

The large, modern corporation⁵ does not fit neatly into this conceptual scheme.⁶ This is because the person/property dichotomy offers no conceptual framework for understanding property which has been artificially activated, that is, has become an actor. But that is precisely what occurs through the legal mechanism of incorporation. The corporation retains its status as

* Assistant Professor of Business, Law & Public Policy, Michigan State University.

1. “Duties and rights belong to persons. Persons are the subjects of rights and duties; and, as the subject of a right, a person is the object of the correlative duty, and conversely.” P. POLLOCK, *A FIRST BOOK OF JURISPRUDENCE* 113 (6th ed. 1929).

2. By the term “property,” I mean more precisely “things” or the subject of property. In law, “property” is not a “thing” although “things” are the subject of property. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *THE LAW OF PROPERTY* 1 (1984).

3. See P. POLLOCK, *supra* note 1, at 179 (describing ownership as the entirety of the powers of use and disposal afforded by law).

4. Thus, we commonly speak of the rights and duties which persons have regarding things. See, e.g., Honoré, *Ownership*, in *PROPERTY: CASES, CONCEPTS, CRITIQUES* 78 (L. Becker & K. Kipnis eds. 1984) (describing the standard incidents of ownership as those legal rights, duties and other incidents which apply to the person who has the greatest interest *in* a thing). For a discussion of the appropriate constitutional analysis of property rights, see Baker, *Property and Its Relation to Constitutionally Protected Liberty*, 134 U. PA. L. REV. 741 (1986) (discussing government regulation and constitutional protection of property rights, as well as the functions of property).

5. One difficulty in analyzing the nature of the corporation is the wide variety of enterprises and activities which operate under the corporate form. The focus here will be only on large, publicly-held, for-profit corporations.

6. For the historical background of the modern corporation, see Hovenkamp, *The Classical Corporation in American Legal Thought*, 76 GEO. L.J. 1593 (1988).

property, is owned by the shareholders, and in theory is controlled by its owners.⁷ However, the corporation also has an independent legal existence which permits it to act in many significant ways, such as entering into contracts, suing those who have wronged it, and even exercising its free speech rights in political referenda.⁸

7. There is, of course, a wide divergence between this theory of the corporation and the realities of the modern corporate world. Indeed, the shareholder's loss of significant aspects of control over the corporation is an important part of the argument advanced by this article. See *infra* text accompanying notes 61-80. The focus of my analysis is on individual shareholders rather than institutional holders of stock.

8. A landmark decision regarding corporate first amendment rights is *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). In *Bellotti*, the Supreme Court considered the issue of legislative restrictions on corporate speech. The Court found that corporations have protectable first amendment rights, particularly when the speech at issue concerned a matter of public concern. *Id.* at 776-77. The Court also rejected the argument that the first amendment protects corporate speech only if the subject of that speech is the corporation's business. *Id.* at 777. Because of its importance, the decision has attracted a large amount of commentary. See, e.g., Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646 (1982) (stating that *Bellotti* undermines individuals' ability to control their own destinies); Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235 (1981) (questioning the idea of corporate first amendment rights and discussing those rights in connection with individual shareholder rights); Hatano, *Should Corporations Exercise Their Freedom of Speech Rights?*, 22 AM. BUS. L.J. 165 (1984) (proposing a framework to guide corporations in exercising free speech rights); O'Kelley, *The Constitutional Rights of Corporations Revisited: Social and Political Expression and the Corporation after First National Bank v. Bellotti*, 67 GEO. L.J. 1347 (1979) (arguing that the *Bellotti* Court employed incorrect reasoning and proposing the Field and associational rationales); Patton & Bartlett, *Corporate "Persons" and Freedom of Speech: The Political Impact of Legal Mythology*, 1981 WIS. L. REV. 494 (the Supreme Court failed to recognize that when the state supports corporate speech, the state itself gains political power); Prentice, *Consolidated Edison and Bellotti: First Amendment Protection of Corporate Political Speech*, 16 TULSA L.J. 599 (1981) (extension of free speech rights to corporations is beneficial; commentators speculating on the negative impact of *Bellotti* are overreacting); Schneider, *Free Speech and Corporate Freedom: A Comment on First National Bank of Boston v. Bellotti*, 59 S. CAL. L. REV. 1227 (1986) (analysis of the *Bellotti* Court's reasoning and first amendment rights in general); Shaw, *Corporate Speech in the Marketplace of Ideas*, 7 J. CORP. L. 265 (1982) (*Bellotti* and similar cases threaten legislation designed to prevent the abuse of corporate political influence); Shaw, Hurd & Bader, *Corporate Political Speech and the First Amendment*, 9 OKLA. CITY U.L. REV. 271 (1984) (discussing corporate rights and the effect of corporate free speech on individual rights); Note, *Corporate Speech on Political Issues: The First Amendment in Conflict with Democratic Ideals?*, 1985 U. ILL. L. REV. 445 (analysis of theories behind protecting or limiting corporate speech).

I have previously sought to show how *Bellotti* implicates the fundamental question of the nature of the corporate person. See Nesteruk, *Bellotti and the Question of Corporate Moral Agency*, 1988 COLUM. BUS. L. REV. 683, 701 (reasoning that because an individual's speech is premised on the fact that the individual is a moral agent, it is distinguishable from corporate speech, which does not involve the same moral issue). For further discussions of *Bellotti* in the context of developing a theory of the nature of the corporate person, see M. DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR BUREAUCRATIC SOCIETY 102-13 (1986); Note, *Constitutional Rights of the Corporate Person*, 91 YALE L.J. 1641 (1982) (discussing *Bellotti* in the context of general corporate rights and attributes) [hereinafter Note, *Constitutional Rights*].

The anomalous nature of the corporation has given rise to much reflection and debate within legal circles. Central to such reflection and debate is the question: Is the corporation a person?⁹ The response to this question has ranged from terse judicial attempts to assume away the problem, to extended philosophical debate regarding the nature of a person.¹⁰

A classic example of the judicial response can be found in *Santa Clara Co. v. Southern Pacific Railroad*.¹¹ Faced with the question of whether a corporation is a person under the fourteenth amendment, Chief Justice Waite made the now famous pronouncement:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of the opinion that it does.¹²

Philosophers, on the other hand, have recently debated¹³ in extensive fashion the personhood status of the corporation through an exploration of the issue of corporate moral agency.¹⁴ In particular, philosopher Peter French has asserted that corporations should be accorded the same status as natural persons. French has theorized that moral persons are those that are subject

9. For a classic work on this question, see A. NEKAM, *THE PERSONALITY CONCEPTION OF THE LEGAL ENTITY* (1938).

10. For an account of the history of the personification of the American business corporation, see Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987).

11. 118 U.S. 394 (1886).

12. *Id.* at 396.

13. The philosophic debate is an ongoing and lively one. See, e.g., T. DONALDSON, *CORPORATIONS AND MORALITY* (1982) (analyzing proposals for corporate reform, including corporate democracy, internal legislation, and increased stockholder control); P. FRENCH, *COLLECTIVE AND CORPORATE RESPONSIBILITY* (1984) (defining the corporation as a moral person and developing principles of extended accountability of the corporation); Donaldson, *Personalizing Corporate Ontology: The French Way*, in SHAME, RESPONSIBILITY, AND THE CORPORATION 101 (H. Curtler ed. 1986) (discussing one author's inability to conceptualize the status of corporations and human beings); Goodpaster, *The Concept of Corporate Responsibility*, in JUST BUSINESS 306 (T. Regan ed. 1983) (arguing that society should expect the same moral attributes in organizations as it does individuals); Ladd, *Persons and Responsibility: Ethical Concepts and Impertinent Analogies*, in SHAME, RESPONSIBILITY, AND THE CORPORATION (H. Curtler ed. 1986); French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 210 (1979) (characterizing moral persons, including corporations, as the referents of responsibility ascriptions); Ladd, *Morality and the Ideal of Rationality in Formal Organizations*, 54 THE MONIST 488 (1970) (exploring the moral implications of the use of rationality in decisionmaking of formal organizations with regards to individuals).

14. The issue of corporate moral agency presents the question of whether the corporation is an entity capable of making moral choices, of choosing this action as right and that action as wrong. I have revealed in an earlier article the connections between the issue of corporate moral agency and the corporate social responsibility debate. See Nesteruk, *Corporations, Shareholders, and Moral Choice: A New Perspective on Corporate Social Responsibility* 58 U. CIN. L. REV. 451 (1990).

to a moral responsibility, which includes the concepts of accountability and intentional action.¹⁵ Since corporations manifest their intentions through their internal decisionmaking structures, French asserts that corporations should be held to the same moral standards as natural persons.¹⁶

What is absent from the debate over whether the corporation is a person¹⁷ is a reexamination of the very question itself. Therefore, I wish to take issue with that question in this Article.¹⁸ Inquiring as to whether or not a corporation is a person is an inadequate way of determining the law's approach to corporations.¹⁹ The question contains hidden implications and assumptions which significantly hinder the law's development in the corporate area.²⁰ I contend that we should think less about whether or not the corporation is a person,²¹ and more about what it is that we want the corporation to be.

This Article begins with the proposition that the law's recognition of the corporation as a person is not a simple descriptive statement but a normative premise.²² As such, it implies norms or standards regarding both the corporation's internal decisionmaking process and its proper relationship to the external community. In regard to the internal decisionmaking of the corporation, corporate personhood fosters the development of a particular decisionmaking structure, which is marked by an expansion of managerial discretion and a contraction of shareholder powers.²³ Beyond this impact upon the corporation's internal dynamics, the law's view of the corporation as a person tends to restrict our analytic framework for considering the corporation's relation to external groups. In particular, such a view discourages us from thinking of the corporation as an entity to which are ascribed duties, but not rights.²⁴

15. P. FRENCH, *supra* note 13, at 38. French has stated that he hoped "to provide the foundation of a theory that allows treatment of corporations as full fledged members of the moral community, of equal standing with the traditionally acknowledged residents: human beings." *Id.* at 32.

16. *Id.* at 39.

17. For a multidisciplinary examination of the corporation including the question of corporate personhood, see *CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY* (W. Samuels & A. Miller eds. 1987) [hereinafter *CORPORATIONS AND SOCIETY*].

18. "Better answers often await better questions." Coffee, *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1146 (1984).

19. A classic writer on the subject notes the word "person" must be used carefully, since, from a scientific point of view, it has several meanings and is associated with several emotional associations. See A. NEKAM, *supra* note 9, at 37.

20. See *infra* text accompanying notes 35-98 (discussing the elements of corporate personhood).

21. For a linguistic analysis of the law's characterization of the corporation as a person, see Shane, *The Corporation is a Person: The Language of a Legal Fiction*, 61 TUL. L. REV. 563, 592-609 (1987).

22. See *infra* text accompanying notes 27-34.

23. See *infra* text accompanying notes 35-80.

24. See *infra* text accompanying notes 81-98.

A new paradigm is needed for thinking about the corporation, one which transcends the person/property dichotomy of the present law. I propose a basic tripartite structure: person, property, and *organization*,²⁵ which will benefit the development of corporate law and policy.

The specific advantages of this new legal framework derive from its greater descriptive accuracy and new normative orientation.²⁶ The legal notions of both "person" and "property" simply fail to adequately describe the reality of today's corporation. The greater descriptive accuracy of the proposed paradigm brings squarely into view what has been obscured by the present law: the phenomenon of corporate power. Beyond its greater descriptive accuracy, this new legal framework adopts an equally new normative position. This new orientation will not permit the norms, values, and assumptions relating to individuals to be unthinkingly transferred to the analysis of the corporation.

I. DESCRIPTIVE STATEMENT VERSUS NORMATIVE PREMISE

The fact that the corporation does not fit neatly into the category of either person or property is significant. It indicates that the law's recognition of the corporation as a person²⁷ involves more than a descriptive statement. Corporations share qualities both of the traditional model for the legal person—a human being—and of property. Within this legal framework, simple descriptions cannot resolve the question of the corporation's status.

The law's recognition of the corporation as a person does more than merely describe the phenomenon; it implies norms and articulates standards.²⁸ Affirmation of corporate personhood is a descriptive matter only in a limited, superficial sense.²⁹ More fundamentally, it is a linguistic means of establishing normative premises. These premises provide a basis for legal reasoning and choice, and subsequently affect normative reformation of the economy.³⁰

The normative import of denominating the corporate entity as a person is not by itself surprising. Indeed, normative considerations come into play when the law declines to grant to certain categories of human beings the status of person. For certain purposes, some human beings such as minors and the mentally incompetent are not considered to be persons under the law.³¹

25. See *infra* text accompanying notes 99-108.

26. See *infra* text accompanying notes 109-36.

27. For a brief survey of when the law regards the corporation as a person and when it declines to make this characterization, see H. HENN & J. ALEXANDER, *LAW OF CORPORATIONS AND OTHER BUSINESS ENTERPRISES* 149-52 (1983).

28. For a work which emphasizes the normative implications of organizational theories, see M. KEELEY, *A SOCIAL-CONTRACT THEORY OF ORGANIZATIONS* (1988).

29. Samuels, *The Idea of the Corporation as a Person: On the Normative Significance of Judicial Language*, in *CORPORATIONS AND SOCIETY*, *supra* note 17, at 127.

30. *Id.*

31. James Coleman notes that even a "natural person" is a legal construct. Natural persons

What is important, however, is to recognize the consequences of adopting the notion of corporate personhood as a normative premise.³² Corporate personhood implies certain standards regarding: (1) the internal dynamics of the corporate decisionmaking process;³³ and, (2) the corporation's proper relationship to its external community.³⁴ These two issues will be considered in turn.

A. *The Corporation's Internal Decisionmaking Process*

Adopting corporate personhood as a normative premise has implications for the nature of the corporation's decisionmaking process.³⁵ For example, the law's adoption of this premise has fostered the development of a particular corporate decisionmaking structure,³⁶ one which is marked by an expansion of managerial³⁷ discretion and a contraction of shareholder powers.³⁸

are not by definition all physical individuals. A natural person is one who has certain rights and responsibilities. Some individuals, however, such as minors and the mentally incompetent are not natural persons in the legal sense because they are not afforded certain rights and responsibilities. J. COLEMAN, *POWER AND THE STRUCTURE OF SOCIETY* 14 n.1 (1974).

32. For an argument that different conceptions of the corporate person in specific historical contexts are not infinitely manipulatable but have particular effects on concrete developments of legal doctrine, see Horwitz, *Santa Clara Revisited: The Development of Corporate Theory in CORPORATIONS AND SOCIETY*, *supra* note 17, at 13-63.

33. See *infra* text accompanying notes 35-80.

34. See *infra* text accompanying notes 81-98.

35. Warren Samuels remarks, "Any answer to the question, What is the corporation? is itself functional in the evolution of the corporation. Thus answers are attractive and contrived because of their anticipated or desired consequences in that evolution." Samuels, *supra* note 29, at 115.

36. What should be emphasized from the start is that the argument which follows does not entail any exclusive causal claims. A number of factors, including economic conditions and considerations, have contributed and are contributing to the particular decisionmaking structure which has prevalence today. What I hope to show is simply the important conceptual connections which exist between the image of the corporate entity as a person and a certain relationship between management and shareholders.

37. Throughout this Article, references to management are meant to refer broadly to both corporate directors and corporate officers. For a work which argues that there has been a major shift in power specifically to corporate directors, see A. FLEISCHER, G. HAZARD & M. KLIPPER, *BOARD GAMES: THE CHANGING SHAPE OF CORPORATE POWER* (1988).

38. James Coleman described the increase in managerial control as an increase in the ability of the holders of usage rights and resources, the managers, to utilize these resources. The usage leads to ends which do not match the goals of the nominal owner of these rights, the shareholders. Because of their increased power as corporate actors, the managers and directors can act in a manner freed from the constraints placed by natural persons. J. COLEMAN, *THE ASYMMETRIC SOCIETY* 63 (1982).

An important countervailing trend which constrains corporate management is the increasingly active posture of institutional shareholders. For a description and analysis of the trend, see Lipton, *Corporate Governance in the Age of Finance Corporatism*, 136 U. PA. L. REV. 1, 7-9 (1987). While the ultimate significance of this trend may as yet be difficult to discern, it is important to note the nature of its effect upon management. For example, management is becoming increasingly distanced from that rich and wide-ranging spectrum of desires, norms, and perspectives which characterize the moral choices of individual shareholders in their everyday lives. It is being constrained by such human choices filtered through the narrow and formalized role of the investor in which the goal of profit predominates. Nesteruk, *supra* note 8, at 698.

1. *The Corporation Versus the Natural Person*

In order to reveal how viewing the corporate entity as a person promotes a certain relationship between management and shareholders, it is necessary to emphasize two ways in which the corporation differs from natural persons. This is because the development of the particular decisionmaking structure dominant in large, modern corporations has its roots in the manner in which the evolution of the corporation has served to compensate for these two differences.³⁹ The movement is toward a corporate form which more nearly approximates the character of the natural person.⁴⁰

The first fundamental way in which the corporation differs from the individual lies in the fact that the corporation can only act through agents.⁴¹ While natural persons can act without the mediation of another, the corporation always requires the efforts of its employees and others in order to perform its actions. Strictly speaking, for example, it is the corporation's president, not the corporation itself, who signs the bank loan papers needed to provide corporate funds.⁴²

The second major way in which the corporate entity and natural person differ relates to our notion of ownership.⁴³ Within our legal order, corpo-

39. Such a pattern of development lends support to the view that social and economic developments are at least in part a function of the pool of concepts or images available to a society. "The power of organizations to survive in a society," writes Kenneth Boulding, "depends largely upon the nature of the stock of images of that society. The General Motors Corporation, for instance, would be quite inconceivable in ancient Rome because the Romans did not possess the requisite set of images." K. BOULDING, *THE IMAGE* 57 (1956).

40. For an analysis of how the concept of corporate social responsibility causes the corporation to more nearly resemble a natural person, see Nesteruk, *supra* note 14, at 455-56.

Even those who attack the notion of corporate social responsibility appear to acknowledge the connections between such a notion and the more fundamental question of corporate personhood. Daniel Fischel, for example, discusses the moral aspects of corporate responsibility in the context of managers' duties. He discounts the notion that a corporation can have moral obligations, because the corporation is not a person, and is instead more similar to an inanimate object. Fischel, *The Corporate Governance Movement*, 35 *VAND. L. REV.* 1259, 1273 (1982). Fischel goes on to say that corporate responsibility should be analyzed in terms of contract law, as opposed to public policy. *Id.*

41. See, e.g., May, *Vicarious Agency and Corporate Responsibility*, 43 *PHIL. STUD.* 69, 70 (1983) (since corporations can only act vicariously, they should be given a unique status as agents); Velasquez, *Why Corporations are Not Morally Responsible for Anything They Do*, 2 *BUS. & PROF. ETHICS J.* 1, 7 (1983) (in corporate agency, human beings are the direct actors, but their acts are attributed to the corporation as its own).

42. The fact that corporations can only act through agents has been a part of the debate over the nature of the corporate entity. For an illustration of how it can be a crucial part of a proposal for a new model of the corporation, see Note, *Constitutional Rights*, *supra* note 8, at 1652-58.

43. For general discussions of our ideas of property and ownership as well as alternative perspectives, see, e.g., Burns, *Blackstone's Theory of the "Absolute" Rights of Property*, 54 *U. CIN. L. REV.* 67 (1985) (discussing Blackstone's theories on the law of nature and property rights); Butler, *Marxian Concepts of Ownership in Soviet Law*, 23 *COLUM. J. TRANSNAT'L L.* 281 (1985) (discussing ownership issues in socialist countries); Cribbet, *Concepts in Transition:*

rations may be owned but individuals may not.⁴⁴ Ownership, as we have traditionally conceived it, is incompatible with the dignity and status of natural persons.⁴⁵ Indeed, slavery or the ownership of one person by another was at the center of the Civil War. In contrast, throughout the corporation's modern development, its ownership by shareholders has been a widely accepted aspect of its structure.

2. *The Theoretical Model of the Corporation*

This awareness of the two ways in which corporations differ from individuals must be joined with an understanding of the theoretical model of the corporation.⁴⁶ Conceptually, there is a key difference between management and shareholders when it comes to the issue of control. The shareholders are the owners and controllers of the corporation.⁴⁷ They therefore, in theory, retain their autonomy. Management, however, again from a theoretical perspective, lacks this autonomy. Managers are fiduciaries and employees of the corporation and as such should serve its purposes.⁴⁸

This key conceptual difference between management and shareholders has significance for the law's recognition of the corporation as a person. With

The Search for a New Definition of Property, 1986 U. ILL. L. REV. 1 (discussing twentieth century developments in property law); Rose, *Possession as the Origin of Ownership*, 52 U. CHI. L. REV. 73 (1985) (discussing concepts of possession and ownership); Sax, *Some Thoughts on the Decline of Private Property*, 58 WASH. L. REV. 481 (1983) (discussing governmental limitations on development).

44. "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." U.S. CONST. amend. XIII, § 1.

45. This widely-held assumption is worthy of philosophic reflection. What precisely is the origin of this intuitive incompatibility? Implicit in the discussion which follows is the notion that the core of this incompatibility is the way in which our traditional conception of ownership entails control. See *infra* text accompanying notes 61-80. Such external control is inconsistent with the kind of autonomy appropriate to a human being. An interesting and important question is whether this autonomy is now being threatened by institutions other than slavery. See *infra* text accompanying notes 109-23. If so, we must consider whether our philosophic and legal analysis of slavery may be applied to these new forms of control.

46. There are, of course, significant variances between this model and actual corporate practices. But it is necessary to acknowledge this model in order to understand the interaction between a theoretical position such as corporate personhood and the practical development of the corporation.

47. See H. HENN & J. ALEXANDER, *supra* note 27, at 550-51 (the shareholders elect officers and directors who manage the corporation).

48. Harry Henn and John Alexander provide a good summary of management's position in this connection. In discussing the board of directors, they point out that although the shareholders elect and remove the directors, the directors are not the agents of the shareholders. Furthermore, the position of director is distinguishable from that of trustee. Their position is *sui generis*. Directors have a duty to the corporation; in a sense, they are fiduciaries. *Id.* at 563. While the position of corporate officers varies from that of board members, such officers are also fiduciaries of the corporation. In contrast, officers, as regards to their power to bind the corporation, are agents of the corporation. They are thus subject to the fiduciary duties found in agency law. *Id.* at 586.

regard to shareholders, the notion of corporate personhood requires a reconsideration of the shareholder's status as owner. Because ownership is incompatible with the dignity and status of persons, shareholder ownership must be redefined in such a way as to be consistent with the status of the corporation as a person. As will be shown below, this has occurred through an alteration of the extent and character of shareholder control.⁴⁹ Essentially, the shareholder's powers are contracted.

The concept of corporate personhood entails something quite different in connection with the role of management. Unlike individuals, corporations can act only through agents. Thus, in order to approximate the free volition of an individual, the corporation requires agents entrusted with a broad range of discretion. In the actual development of the corporation described below, this has meant a change in the nature of managerial choice.⁵⁰ The core of this change is a broadening of management's discretion.

B. Some Key Developments in Shareholder and Management Roles

The broadening of management's discretion and the contraction of shareholder powers may be seen by reviewing aspects of the historical development of the corporation. What follows are some selected legal developments which characterize the modern shareholder/management relationship.⁵¹ These developments demonstrate how the corporation has moved towards a form which more nearly approximates the nature and status of a natural person.⁵²

With regard to management's role, there has been an *increase* in management's control of the corporation.⁵³ This increase in managerial autonomy allows the corporation a range of choice analogous to the free will of an individual.

Two significant developments in modern corporate law mark the increase in management's control. First, the nature of the restriction on management's decisionmaking has shifted. The law has moved from a rigid "ultra vires"

49. See *infra* text accompanying notes 62-80.

50. See *infra* text accompanying notes 51-58.

51. A discussion of the historical development of the legal roles of management and shareholders may be found in J. HURST, *THE LEGITIMACY OF THE BUSINESS CORPORATION IN THE UNITED STATES 1780-1970*, at 85-111 (1970).

52. A similar discussion of the broadening of management's discretion may be found in Nesteruk, *supra* note 8, at 692-93.

53. See, e.g., Mason, *The Apogetics of Managerialism*, 31 J. Bus. 1 (1958). The author explains that control of the corporation has moved out of the hands of the owners. Several attributes mark corporate management: high specialization, competence in the field, and motivations which are substantially different from those of the owner-capitalist. In addition, the area of discretionary function and limitations under which modern day managers operate are different from earlier corporate owners. *Id.* at 1. For a discussion of the question of whether the increase in management control has affected corporate policies, see P. BLUMBERG, *THE MEGACORPORATION IN AMERICAN SOCIETY: THE SCOPE OF CORPORATE POWER* 147-50 (1975).

conception⁵⁴ of management responsibility to the more flexible notion of the business judgment rule.⁵⁵ Under the older ultra vires conception, management's discretion was strictly circumscribed by a rigid adherence to the corporation's charter of incorporation. Now, with the advent and general adoption of the business judgment rule, the discretion of management is quite broad, restricted only by the generalized duties of loyalty, good faith, and due care.⁵⁶

The second development concerns the goals which inform the decision-making of management. Formerly, the dominant notion was that management's fiduciary duty ran solely to the best interests of the shareholders. This notion has been largely replaced by the view that management is a fiduciary of the corporation as a whole, and as such must respond to a broader constituency including employees, customers, government agencies, and the public at large.⁵⁷ Recent statutes, for example, explicitly allow directors and officers to consider the effects of corporate action on groups other than shareholders.⁵⁸

Both of these legal developments give corporate choices a character which more closely resembles the volition of an individual. This is because the more flexible framework of the business judgment rule coupled with the more inclusive fiduciary duty to the corporation itself broadens the ends or

54. The concept of ultra vires basically means that a corporation cannot act outside the purposes for which it was formed. H. HENN & J. ALEXANDER, *supra* note 27, at 478. For a summary of the ultra vires doctrine, noting its diminishing importance, see *id.* at 477-84. For a discussion of the current state of the ultra vires doctrine and some specific criticisms of the doctrine, see Schaeftler, *Ultra Vires-Ultra Useless: The Myth of State Interest in the Ultra Vires Acts of Business Corporations*, 9 J. CORP. L. 81 (1983). It has been argued that the ultra vires doctrine still has a use within the context of corporate takeovers. See Comment, *Amalgamated Sugar: The Auspicious Return of the Ultra Vires Doctrine*, 49 OHIO ST. L.J. 841 (1988).

55. The business judgment rule states that a corporate manager is not liable for an action that is within the powers of the corporation and management's authority, and is carried out with due care and according to applicable fiduciary duties. H. HENN & J. ALEXANDER, *supra* note 27, at 661. For a brief overview of some legal and policy issues surrounding the business judgment rule, see Manning, *The Business Judgment Rule in Overview*, 45 OHIO ST. L.J. 615 (1984).

56. For a brief description of the shift from the ultra vires doctrine to the business judgment rule, see L. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 453-54 (1973).

57. A critical debate over the nature of management's fiduciary duty occurred between A.A. Berle, Jr. and E. Merrick Dodd, Jr. in the 1930s. Berle defended the thesis that all powers of corporations must be exercised only for the benefit of the shareholders. See Berle, *Corporate Powers as Powers in Trust*, 44 HARV. L. REV. 1049 (1931). Dodd contended that management has a broader constituency and purpose than making profit for shareholders. See Dodd, *For Whom are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932). By 1954 Berle was willing to concede to Dodd's contention that corporate powers are held in trust not solely for the shareholders but for the entire community. A. BERLE, *THE 20TH CENTURY CAPITALIST REVOLUTION* 169 (1954).

58. See, e.g., 15 PA. CONS. STAT. ANN. § 1721(c) (Purdon Pamphlet 1989) (corporate directors "may" consider the effects of their actions upon employees, customers, suppliers, and the local community).

goals which management must evaluate in its decisionmaking. As an individual is confronted with competing ends or goals in making moral choices,⁵⁹ so management often faces conflicting demands in its decisions regarding the direction of the corporation.⁶⁰

While managerial discretion has expanded, shareholder powers have been contracted. This contraction consists of an alteration of the extent and character of shareholder control. Basically, this means that the nature of ownership has changed with the development of the large, modern corporation.⁶¹

This change may be characterized as a disaggregation of the traditional concept of ownership which may be divided into three stages: traditional ownership, corporate ownership, and beneficiary ownership.

1. *Traditional Ownership*

As traditionally conceived, ownership entails control.⁶² As owner of my car, I control its use. I may take it shopping, get it washed, or even lend it to a friend. This form of ownership may exist in small, closely-held corporations.⁶³ When the shareholders of such corporations make the day-to-day business decisions,⁶⁴ they are *owners* in the traditional sense of the term.

59. The essence of a moral choice is a decision involving competing ends or goals. See Nesteruk, *supra* note 14, at 464.

60. See Mason, *supra* note 53, at 3 (quoting the Chairman of Standard Oil on the need to "conduct the affairs of the enterprise in such a way as to maintain an equitable and working balance among the various directly interested groups—stockholders, employees, customers, and the public at large").

William Smithberg, Chair and Chief Executive Officer of the Quaker Oats Company, recently commented:

Obviously, we must answer to the shareholders—many of them institutions. I also have responsibilities to our . . . employees—many of whom are also shareholders—to the communities in which they work, and to trade customers and the customers who buy our products.

As managers, our job is to balance the responsibilities to all these constituencies and treat them fairly.

William Smithburg, Address given at the Third Annual Benefit Breakfast of The Center for Ethics and Corporate Policy (Nov. 16, 1988) (transcript available in the DePaul Law Review office).

61. I first put forth the following analysis of the changing nature of ownership in the corporate setting in Nesteruk, *supra* note 14, at 462-66.

62. In a private property system, the individual whose name is attached to the object has the final decision over the use of that object. He determines who will use the object and in what manner. See Waldron, *What is Private Property?*, 5 OXFORD J. LEGAL STUD. 313, 327 (1985).

63. For a basic description of a closely-held corporation, see H. HENN & J. ALEXANDER, *supra* note 27, at 694-97.

64. Harry Henn and John Alexander note that one of the distinguishing features of a closely-held corporation is that its shareholders directly take part in the affairs and management of the business. *Id.* at 696.

2. Corporate Ownership

When the focus is on the large, publicly-held corporation, the relationship between the shareholder and the corporate enterprise is no longer one of traditional ownership. As Berle and Means revealed, there is a separation of control from ownership.⁶⁵ Due to widely-scattered stock ownership⁶⁶ and proxy voting,⁶⁷ management—not the shareholders—may effectively control the internal corporate decisionmaking process.⁶⁸ Consequently, the position of the shareholder shifts from that of owner to that of mere *investor*.⁶⁹ With this development, the relationship between management and shareholders becomes more abstract, formalized, and unidimensional. This “distancing” between management and shareholders⁷⁰ depersonalizes the shareholder’s relation to the corporation.⁷¹ Furthermore, the scope of a shareholder’s interaction with the corporation shifts from a range of critical perspectives to a single demand: profit.⁷²

65. The owners lose control to those managing the corporation, and who hold the economic power. The owners serve only to supply the means by which the managers can exercise that power. A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 116 (rev. ed. 1967). Herbert Hovenkamp connects the separation of ownership from control with the law’s recognition of the corporation as a person for certain constitutional purposes. See Hovenkamp, *supra* note 6, at 1641.

66. See A. BERLE & G. MEANS, *supra* note 65, at 47-65 (giving statistics on the dispersion of stock ownership of many companies).

67. The central importance of the proxy machinery has been noted by a number of commentators. See, e.g., J. HURST, *supra* note 51, at 94-95 (the proxy mechanism has become a way in which management obtains easy access to the stockholder voting majority); R. NADER, M. GREEN & J. SELIGMAN, *TAMING THE GIANT CORPORATION* 80 (1976) (the proxy election provides a legal means for consolidating power into the hands of the corporation’s chief executive). For a good overview of the regulatory framework and institutional background of the proxy system, see Comment, *Shareholder Democracy: A Description and Critical Analysis of the Proxy System*, 60 N.C.L. REV. 145, 145-54 (1981). The author presents a review of criticisms and makes recommendations regarding the proxy system’s relation to shareholder participation in the corporate electoral process. *Id.* at 159-64.

68. See, e.g., Rostow, *To Whom and for What Ends is Corporate Management Responsible?*, in *THE CORPORATION IN MODERN SOCIETY* 53 (E. Mason ed. 1960) (corporate decision-making is shaped by factors such as widely scattered stock, investment trusts, and institutional investors who consistently vote for the same managers).

69. See P. BLUMBERG, *supra* note 53, at 11 (discussing shift in roles from owner to investor in corporate equity securities).

70. See Wolfe, *The Modern Corporation and the Failure of Social Theory*, in *BUSINESS LAW, KEY ISSUES AND CONCEPTS* 41 (T. Dunfee & D. Reitzel eds. 1978) (commenting upon the isolation of corporate decisionmakers from shareholders as well as the market and production process).

71. This depersonalization of the shareholder’s relation to the corporation can be expressed in a number of ways. One quality that has been lost is the spiritual value of property ownership associated with stock. Stock no longer brings satisfaction as a direct extension of the owner’s personality but serves only to generate income. A. BERLE & G. MEANS, *supra* note 65, at 64-65.

72. See Hetherington, *Fact and Legal Theory: Shareholders, Managers, and Corporate Social Responsibility*, 21 STAN. L. REV. 248, 271 (1969) (noting that for the investor the “beginning and end of his interest in the enterprise is capital appreciation and income”).

3. *Beneficiary Ownership*

Despite the separation of control from ownership documented by Berle and Means, there remains an active aspect to the shareholder's relation with the corporation.⁷³ To be sure, an investor lacks direct control of the corporation's internal decisionmaking process, but the investor nonetheless exercises an external, indirect control of the corporation through the stock market. While the investor's legal right to vote in board elections and on extraordinary matters has little practical effect, his or her economic choice of whether to buy or sell the corporation's stock can have a significant impact on the decisionmaking of management.⁷⁴

In recent years, however, even the investor's indirect control through the marketplace has diminished. This is because of the trend away from direct individual ownership of stock and toward indirect ownership through participation in such entities as mutual funds and pension plans.⁷⁵ This trend interposes the decisionmaking of large institutional actors such as banks between the individual shareholder and the corporate enterprise.⁷⁶ In some instances, this indirect stock ownership of individuals is involuntary as in the case of a mandatory pension plan.⁷⁷ But even if the individual is allowed some degree of choice regarding his or her original participation, the day-to-day decisions to buy or sell the stock of particular companies are largely left to professional financial managers or others.⁷⁸ Thus, to a significant

73. Berle and Means themselves noted a new forum for shareholder activity. The result of the stockholder's loss of power within the corporation is his reliance upon an agency outside the corporation itself—the public market. The stockholder relies upon the public market for appraisal of his securities' value and realization of profits. A. BERLE & G. MEANS, *supra* note 65, at 247.

74. For a discussion of the influence of share price and the market on management's decisionmaking, see Werner, *Management, Stock Market and Corporate Reform: Berle and Means Reconsidered*, 77 COLUM. L. REV. 388, 402-04 (1977).

75. Pension plans hold an enormous amount of stock in American companies. Both public and corporate pensions as shareholders have grown in importance in the last few decades. In fact, one author has estimated that pensions will hold enough common stock to "own" the majority of American companies by 1990. Bavaria, *Forward to CORPORATE SOCIAL RESPONSIBILITY: CONTEMPORARY VIEWPOINTS* at ix (S. Ontiveros ed. 1986).

76. Martin Lipton argues we have reached a stage of corporate development which is dominated by the institutional investor and professional money manager. See Lipton, *supra* note 38, at 5-6.

77. At my own educational institution, for instance, a professor's participation in the TIAA-CREF pension plan is generally mandatory once the professor reaches the age of thirty-five and has twenty-four full-time equivalent service months of continuous service. TEACHER'S INSURANCE AND ANNUITY ASSOCIATION COLLEGE RETIREMENT EQUITIES FUND, MICHIGAN STATE UNIVERSITY'S TIAA-CREF RETIREMENT ANNUITY PROGRAM 1988-1989, at 4-5 (available from Michigan State University). The equity portion of the plan involves participation in the stock market. *Id.* at 12-13.

78. In many pension trusts, several professionals are involved in management decisions. An actuary determines the annual contributions, and a bank or trust company serves as trustee. In addition, an investment consultant often renders advice and manages the assets. The employer

degree, the individual has lost even the investor's choice of whether to buy or sell the stock of individual companies. The shareholder's role then shifts from that of investor to that of the *beneficiary* of the investing of others.

The common thread running through this disaggregation of ownership is the shareholder's progressive loss of control over the corporation.⁷⁹ This loss involves the diminishing significance of both the shareholder's vote in corporate elections and the shareholder's investment decisions in the market. What the transformation amounts to is a redefinition of ownership, such that ownership no longer entails certain significant elements of control. Such ownership without control is consistent with the notion of the corporation as a person. It gives to the corporation a level of autonomy which approximates that appropriate to the dignity and status of a person.⁸⁰

C. *The Corporation's Relation to its External Community*

The law's recognition of the corporation as a person fosters a particular model for the internal corporate decisionmaking process. But beyond this impact on the corporation's internal dynamics, the normative premise of corporate personhood tends to restrict our analytical framework for considering the corporation's relation to its external community.⁸¹ It does so because it encourages a kind of thinking about the corporation which presupposes a necessary relation between rights and duties.⁸² All that is necessary to bring this presupposition into light, is to focus on contemporary theorizing about the corporation.

The restriction corporate personhood places on considering the proper relationship of the corporation to other segments of society has its roots in the law's conception of personhood. A person, from the law's standpoint,

may retain some control by selecting or approving of investments recommended by the investment manager. Under a multi-employer trust fund plan, a joint union-employee trusteeship administers the plan. A. MUNNELL, *THE ECONOMICS OF PRIVATE PENSIONS* 92-93 (1982).

79. For another analysis of the shareholder's progressive loss of control, see Clark, *The Four Stages of Capitalism: Reflections on Investment Management Treatises*, 94 HARV. L. REV. 561 (1981). Robert Charles Clark points to economic causes of the developments he describes. He explains that with the increased efficiency of role specialization, there is greater concentration of discretionary power. Likewise, an increase in participation in capital income indicates an overall increase in wealth. *Id.* at 568.

80. There remain, however, crucial differences between the corporate entity and a natural person. See Nesteruk, *supra* note 8, at 696-99.

81. The corporation's relation to its external community is also intertwined with language choices generally. James Boyd White, for instance, discusses the use of the languages of economics and of citizenship in relation to the corporation, as found in the ALI's proposed Principles of Corporate Governance. White, *How Should We Talk About Corporations? The Languages of Economics and of Citizenship*, 94 YALE L.J. 1416 (1985). White takes the position that using both economic and philanthropic terms creates a false opposition between corporate goals, and in fact limits corporations to those goals. *Id.* at 1417.

82. Gregory Mark notes the connection between corporate personhood and corporate rights. See Mark, *supra* note 10, at 1443.

is the subject of rights and duties.⁸³ It is important to note here the dual attribution: rights *and* duties. Integral to the law's definition of a person⁸⁴ is a necessary connection between the ascription of rights and the ascription of duties.⁸⁵

Whether or not this view of rights and duties makes sense in the context of individuals, it should not be unthinkingly carried over to reflections upon the corporate entity.⁸⁶ Yet this often occurs because a theorist takes as his or her starting point the question of whether the corporation is a person.⁸⁷ A good example may be found in Michael Keeley's social contract theory of organizations.⁸⁸ Keeley argues for a view of corporations and other organizations which denies to such entities the status of a person.⁸⁹ He sees organizations as merely complexes of contracts among individuals.⁹⁰

83. See P. POLLOCK, *supra* note 1, at 113 (attributing rights and duties to persons).

84. For a traditional discussion from a jurisprudential viewpoint of the various kinds of legal persons, see J. GRAY, *THE NATURE AND SOURCES OF THE LAW* 27-64 (1921). For a specific discussion of corporations, see *id.* at 49-58.

According to Gray, a corporation which is a legal person contains three elements: (1) a group of human beings who are acting together to promote certain interests; (2) an organized system of operations; and, (3) legal recognition and protection by the state. *Id.* at 50. For Gray, whether the law recognizes the corporation as a real person or whether this is merely a legal fiction is irrelevant. *Id.* at 51-55. Under either theory, the corporation has rights and duties. Its duties include protection of the rights of other persons, including the individual members of the corporation. *Id.* at 55. Gray discussed corporate rights as the wills of individual members attributed to the corporation. *Id.* at 51.

85. Rights and duties have a correlative nature. In order to have a right, there must be a duty. On the other hand, one can have a duty without a corresponding right. *Id.* at 8. In order for a duty to give rise to a right, it must require one to act or forbear. *Id.* In other words, a duty that requires only an inward state of mind does not give rise to rights. *Id.*

86. One corporate theorist who does not unthinkingly transfer notions appropriate to natural persons to the analysis of the corporate entity is Christopher Stone. See, e.g., C. STONE, *WHERE THE LAW ENDS: THE SOCIAL CONTROL OF CORPORATE BEHAVIOR* 111-18 (1975) (analogizing to the factors of human responsibility in formulating a theory of corporate responsibility); Stone, *Corporate Regulation: The Place of Social Responsibility*, in *CORRIGIBLE CORPORATIONS & UNRULY LAW* 13-38 (B. Fisse & P. French eds. 1985).

87. Many of the difficulties which have arisen result from the two central meanings which may be given to the term "person" in legal discussions. The problem was noted early on by Alexander Nekam, who explained that in legal writings, the word "person" has at least two different meanings. It can mean the human being as we understand it, including the physical, psychological, and metaphysical qualities normally ascribed to humans. On the other hand, the term "person" also has the technical meaning of the legal entity, a clearly defined concept. A. NEKAM, *supra* note 9, at 49.

88. See M. KEELEY, *supra* note 28, at 32.

89. Central to Michael Keeley's view is the position that, under the social contract model, organizations do not have independent personal ends or welfare. Only individuals are capable of preferring one state of affairs to another. Welfare-entailing properties, including goals, needs, and interests, are not the properties of organizations. *Id.*

90. *Id.* at 12 (arguing that organizations can be viewed as a set of agreements to resolve diverse individual interests).

Keeley concludes his theory⁹¹ by arguing that views contrary to the social contract model "give away too much in the way of corporate rights and gain too little in the way of corporate responsibility."⁹² In so framing the issue, however, Keeley reveals the limits of his analytic framework. Keeley assumes the ascription of rights and the ascription of duties necessarily entail each other. Keeley's assumption has its roots in our legal system's conception of "person." From the law's standpoint, a person *is* an entity recognized as having both rights and duties.⁹³ Accepting this definition as a given, Keeley merely focuses his inquiry on whether or not organizations are persons. But a more fundamental question might be asked: Does the ascription of duties necessarily entail the ascription of rights?

An alternative approach would not assume a necessary connection between rights and duties in the analysis of organizations.⁹⁴ Unlike human beings, organizations are artificial creations, dependent in many cases (i.e. business corporations) on the state for their very existence.⁹⁵ Neither ethics nor logic require that the imposition of duties upon such artificial entities be accompanied by a bestowal of rights.⁹⁶ We are free to structure organizations in any way which best serves society's needs.⁹⁷ This means going beyond the question of whether or not organizations are persons. In the end, the law needs to construct new legal categories which contemplate both the reality of organizations as well as society's demands upon them.⁹⁸

II. A PROPOSAL FOR A NEW PARADIGM

What have been shown are the consequences which result from approaching corporate law and policy from the perspective of the question of corporate personhood. In analyzing the corporation within this framework, two consequences in particular should be emphasized. First, such an approach may

91. For a review of the Keeley position, see Nesteruk, Book Review, 38 U. KAN. L. REV. 101 (reviewing M. KEELEY, *A SOCIAL-CONTRACT THEORY OF ORGANIZATIONS* (1988)).

92. M. KEELEY, *supra* note 28, at 245.

93. BLACK'S LAW DICTIONARY 1300 (rev. 4th ed. 1968). "Persons are the subject of rights and duties; and, as a subject of a right, the person is the object of the correlative duty, and conversely." *Id.*

The fifth edition of Black's defines "person" as a human being, and then lists various legal persons, such as corporations. BLACK'S LAW DICTIONARY 1028-29 (5th ed. 1979). The word "persona" in the fifth edition retains the language of rights and duties. *Id.*

94. *See infra* text accompanying notes 125-32 (discussing rights and duties as they apply to humans and corporations).

95. Chief Justice Marshall eloquently described the artificial nature of the corporation. "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law." *Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 636 (1819).

96. *See infra* text accompanying notes 129-31 (discussing rights and duties as attributed to human beings).

97. For one analysis of the rise of corporate actors in our society and some suggestions for needed policy changes, see J. COLEMAN, *supra* note 38.

98. For one exciting approach in this direction, see M. DAN-COHEN, *supra* note 8.

entail the unwitting adoption of a particular model of corporate decision-making, one which involves a broadening of management's discretion and a contraction of shareholder powers.⁹⁹ Even if such a model is to be favored as a matter of public policy, its adoption should be based on an independent and critical analysis, not an unconsidered implication of the theory of corporate personhood. Second, approaching the issue of the corporation's proper relation to its external community in terms of the question of corporate personhood restricts our ability to think creatively and productively about the problem. This is because the question of corporate personhood fails to contemplate the possibility of ascribing duties to corporations, but not rights.¹⁰⁰

What is required is a new paradigm¹⁰¹ for thinking about the corporation, one which transcends the person/property dichotomy of the present law.¹⁰² What I propose is a basic tripartite structure: person, property, and *organization*.¹⁰³ This new legal paradigm would offer advantages for the development of both corporate law and policy.¹⁰⁴ Overall, it will begin to refocus the debate in an important manner: away from concern over whether corporations are persons and toward a more creative reflection upon what it is that we want corporations to be.¹⁰⁵ The specific advantages of this proposed legal framework are both its greater descriptive accuracy and its new nor-

99. See *supra* text accompanying notes 35-80 (discussing roles in corporate decisionmaking).

100. See *supra* text accompanying notes 81-97 (discussing the corporation's relationship to the external community).

101. For the classic and enormously insightful study of the role of paradigms in scientific development, see T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1962). Professor Wolfe agrees that Thomas Kuhn's conception of "paradigms" is applicable to our policy sciences today. Wolfe proposes that the paradigms of individualism in society and the methodology used to analyze our economy are irrelevant to the current group-dominated society. Wolfe, *Power in the American Economy: A Review and Commentary*, 27 *AM. BUS. L.J.* 131, 151-52 (1989).

102. According to Thomas Kuhn, paradigms tend to maintain their status. Once a scientific theory has achieved the designation of a paradigm, it will be replaced only when an alternative paradigm is available. T. KUHN, *supra* note 101, at 77.

103. To avoid confusion here, I should make clear that the category of organization which I propose would also include collectives other than the corporation. For present purposes, however, I focus simply on the corporation.

104. Thomas Kuhn emphasizes how a new paradigm changes the inquiry in its subject area. Paradigms are based on both nature and science. They provide the pertinent scientific community with methods and solutions to resolve issues in that area. Because of this, development of a new paradigm often requires a redefinition of the underlying science. T. KUHN, *supra* note 101, at 102.

105. The importance of this refocusing lies in the manner in which it emphasizes and reaffirms the need for individuals to make choices regarding the structure and character of corporations. Mere reflection upon the question of corporate personhood too easily leads to an orientation which regards the corporate entity as primarily an independent external reality. But the form which modern corporations take should be the result of conscious human choices, both on the individual and collective level.

mative orientation.¹⁰⁶ The proposed paradigm is more descriptively accurate in that it does not require ignoring or distorting the character of the large corporation so that it may comport with more traditional legal concepts. Neither the notions of "person" nor "property" adequately describe the reality of today's corporation.¹⁰⁷ The new normative orientation of the proposed paradigm arises from the manner in which it facilitates a consideration of the corporation free from association with the traditional notion of a natural person.¹⁰⁸ This new approach will not allow the norms, values, and assumptions relating to individuals to be unthinkingly transferred to an analysis of the corporation. These two advantages are discussed more fully below.

A. *Descriptive Accuracy*

Descriptive accuracy is a prerequisite to sound thinking about the corporation. Concepts which are ill-fitted to the reality of a phenomenon distort our perception of that phenomenon and hide or obscure a number of its important attributes.¹⁰⁹ A particular virtue of this new framework is its potential for bringing squarely into view what has been obscured by the traditional person/property paradigm: the phenomenon of corporate power.¹¹⁰ To see why this is so, it is necessary to consider the nature of power itself. This may be accomplished by drawing upon the work of John Kenneth Galbraith.¹¹¹

According to Galbraith, the sources of power are three: personality, property, and organization.¹¹² These three sources of power correlate with

106. Michael Keeley notes this dual aspect of organizational theory. Organizational theory is made up of two aspects: the empirical, or how a phenomena can be explained; and the normative, or what needs to be explained. M. KEELEY, *supra* note 28, at 10.

107. Describing the corporation in terms of the person/property paradigm leads to anomalous results. Thomas Kuhn notes, "Anomaly appears only against the background provided by the paradigm." T. KUHN, *supra* note 101, at 65. It is the anomaly which leads to the emergence of a new paradigm.

108. A further intriguing possibility is that the law also requires a new model for our understanding of natural persons. Although the idea can not be fully explored here, it may be that the law's conceptualization of the corporation as a person is in part rooted in a diminished or distorted view of the nature of human beings. For a fruitful inquiry challenging some central and prevalent assumptions about individuals, see A. ETZIONI, *THE MORAL DIMENSION: TOWARD A NEW ECONOMICS* (1988) (discussing the prevailing neoclassical paradigm used to understand individuals and exploring an emerging deontological paradigm).

109. This includes concepts which form our social policy tools of law and economics. See Wolfe, *supra* note 101, at 133 (arguing that law and economics incorrectly view both people and large corporations as "individuals").

110. According to Art Wolfe, power is associated with institutional size. The size of a company gives rise to certain perceptions, beliefs, and patterns of thought and behavior. Large institutions, particularly the business corporation, give rise to these beliefs and behavior, which ultimately shape our environment to suit the institutions' needs. *Id.* at 132.

111. J. GALBRAITH, *THE ANATOMY OF POWER* (1983).

112. *Id.* at 6-8.

the three central concepts of the proposed paradigm. Because the law's traditional scheme forced a choice between either "person" or "property," the organizational character of the corporation was effaced. Along with this distortion of the corporate character, an important aspect of corporate power was obscured. That aspect is the power which arises from the corporation's status as an organization.

The obscuration of the organizational nature of corporate power is of great significance, because a mark of our social development is the growing prominence of the organization as a source of power. Since the preeminent sources of power have shifted away from personality and property and toward the organization,¹¹³ the law's traditional scheme of person versus property fails to capture the modern matrix of power. Such a failure can only hinder proper analysis and inhibit the law's development.

In particular, the traditional scheme fails to make explicit the manner in which the organization can be used to overcome the inherent limitations which flow from personality as a source of power. For example, there are time limitations upon the length of a human life, but not upon the duration of a corporate existence. Galbraith notes this as an important aspect of the modern corporation. In contrast, personality as a source of power is subject to the limits of the human life span. Accordingly, various entities have overcome the weakness of this source of power through organizational power. These entities include the church, the chartered company, and now the corporation.¹¹⁴

Beyond the growing importance of organizational power in our lives, it is necessary to consider the different instruments of power which are available. There are, says Galbraith, three fundamental instruments of power: condign power, compensatory power, and conditioned power.¹¹⁵ Condign power and compensatory power are respectively the powers to punish and reward. An example of condign power available to the corporation is its ability to fire an employee. The corporation's compensatory power is shown by the awarding of a raise to a worker. Conditioned power, on the other hand, constitutes a more subtle and less perceptible form of influence.¹¹⁶ Conditioned power goes beyond merely channeling an individual's desires toward a corporate purpose through external punishments and rewards. Rather, it is the ability to influence the very nature of a person's desires; it is the power to effect the formation and thus alter the intrinsic character of individual preferences.¹¹⁷ A prominent example of conditioned power is the ability of the

113. The most recent significant movement in the dynamics of power is the development of the organization as a source of power. At the same time, there has been a decline in the comparative roles of personality and property. *Id.* at 131.

114. *Id.* at 104-05.

115. *Id.* at 4-6.

116. For a more extensive discussion of conditioned power, see *id.* at 24-37.

117. Those submitting to conditioned power prefer to accept authority and submit to the will of others. *Id.* at 24.

corporation to alter consumer preferences through a sophisticated advertising campaign.¹¹⁸

Each of these three instruments of power has a natural affiliation with one of the three sources of power. The instrument of power particularly associated with the organization is conditioned power, as developed from social conditioning.¹¹⁹ Thus, with the increasing influence of organizational power, there is an increasing use of conditioned power. Not surprisingly, the movement in society is away from condign physical enforcement and compensatory pecuniary reward, toward a reliance on the use of conditioned power.¹²⁰

The increased use of conditioned power again points to the need for a new legal paradigm. Part of what is distinctive about conditioned power is the subtle and imperceptible form of its influence. This by itself suggests the need for a legal framework which serves to bring into view the dynamics of such power. However, the object of conditioned power is of greater importance here. By definition, conditioned power seeks to alter our desires. In doing so, it strikes at the core of much of our legal system in that, unlike systems drawn primarily from natural law or idealist traditions, the predominant theory of our legal order is rooted in individual preferences.¹²¹ Our announced aim is to facilitate and accommodate human desires.¹²² As large, modern corporations become increasingly adept at altering such desires, we face the paradox of a creature of the law becoming its creator. Only with a legal paradigm which enables us to see the phenomena before us clearly, can we hope to respond effectively to such a paradox.¹²³

B. Normative Orientation

As greater descriptive accuracy will allow us to reveal more fully the phenomenon of corporate power, so a new normative orientation will enable us to fashion appropriate legal strategies regarding such power. The prior

118. I have previously explored how the structure of the market may affect the formation of shareholder preferences. See Nesteruk, *supra* note 14, at 462.

119. J. GALBRAITH, *supra* note 111, at 61.

120. *Id.* at 23.

121. A central tenet of our jurisprudence is that general values and legal goals are to be derived from prevailing wants and interests. See Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought—A Synthesis and Critique of Our Dominant General Theory About Law and its Use*, 66 CORNELL L. REV. 861, 875-80 (1981).

122. Roscoe Pound spoke of the end of the law in the following way: "We mean such an adjustment of relations and ordering of conduct as will make the goods of existence, the means of satisfying human claims to have things and to do things, go round as far as possible with the least friction and waste." R. POUND, *SOCIAL CONTROL THROUGH LAW* 65 (1942).

123. The belief in the importance of one's individual worth can distort our perception of society as a whole. This distortion is apparent in the failure to recognize that collective social action is different from individual action. This perception of the importance of individualism is furthered by the fact that large corporations are using the language of individualism to justify their actions. See Wolfe, *supra* note 101, at 155.

analysis of the corporate person question suggests a review in two key respects. First, there is a need to consider alternatives to the current model of internal corporate decisionmaking.¹²⁴ Second, the assumed necessary connection between rights and duties should be reevaluated.¹²⁵

The new normative orientation of the proposed legal paradigm will foster the active consideration of alternative corporate decisionmaking models. The model which emphasizes the expansion of managerial discretion and the contraction of shareholder powers has its roots in the notion of the corporation as person. Reconceptualizing the corporation as an organization allows for an unhindered exploration of alternatives.

The current model of corporate decisionmaking has been subject to much criticism. Calls for reform range from a more active, monitoring board of directors,¹²⁶ to tapping the power of institutional shareholders.¹²⁷ The immediate point here is not to advocate one reform proposal over another. Rather, it is to assert that the proposed tripartite legal framework with its separate category of organization allows for a new normative perspective. Such a perspective makes possible an independent review of alternative decisionmaking models free from the norms, values, and assumptions we associate with the concept of a natural person. The starting point for such evaluation thus shifts from the metaphysical question of corporate personhood to the phenomenon of corporate power.

The proposed paradigm also facilitates the reevaluation of the assumed necessary connection between the ascription of rights and duties. Freed from the assumptions embedded in the legal definition of a person, the issue may be considered in a new light. One may now ask whether the nature of the corporate entity calls for such a connection at all.¹²⁸

The necessary connection between rights and duties makes sense only if the subjects which one contemplates are human beings within a community of human beings. Within such a setting, the interconnection can be defended on both ethical and logical grounds. Its ethical justification lies in the natural status of individuals as free, moral agents.¹²⁹ The ascription of duties without

124. See *supra* text accompanying notes 51-80 (discussing factors affecting corporate decisionmaking).

125. See *supra* text accompanying notes 81-86 (discussing the corporation's relationship with the community).

126. A number of possibilities in this direction are reviewed by Christian Meier-Schatz in a look at corporate governance problems from a transnational perspective. In particular, the author discusses management monitoring systems. See Meier-Schatz, *Corporate Governance and Legal Rules: A Transnational Look at Concepts and Problems of Internal Management Control*, 13 J. CORP. L. 431 (1988).

127. See Lipton, *supra* note 38 at 52-69 (discussing changes in derivative action procedure and principles of shareholder democracy in corporate governance).

128. For a short but insightful discussion of the status of organizations and organizational rights, see McDonald, *The Personless Paradigm*, 37 U. TORONTO L.J. 212 (1987).

129. For a discussion of evidence for the view that moral commitments effect the behavior of individuals, see A. ETZIONI, *supra* note 108, at 51-66. The author provides evidence that people's acts are at times motivated by altruism, as opposed to self-interest. *Id.*

rights would violate this status in that it constitutes a prescription for slavery.¹³⁰ There is also an important logical aspect to the connection of rights and duties. Rights and duties have a correlative nature; that is, the right of one implies the duty of another.¹³¹ Given the premise of equality in a community of only human beings, all persons must therefore have rights and duties if any one person is to possess them.

Corporations, however, lack the natural status of the individual as a free, moral agent.¹³² As the corporation is an artificial entity,¹³³ its character is subject to the choices we collectively make as a society. Since the corporation's status as a free, moral agent may not be assumed, neither can the interconnection of rights and duties which flows from such status. Moreover, in a community of corporate and individual actors, there need no longer be the premise of equality among community members. Thus, rights and duties can exist without all laying claim to them.

What this analysis provides is a theoretical justification for taking a new approach toward corporations. The law's ascription of duties to the corporate entity need not entail the ascription of rights. While such a stance would be objectionable if applied to individuals, it appears quite appropriate in the case of corporations.

The potential of this new theoretical position may be illustrated by making brief reference to the landmark case of *First National Bank of Boston v. Bellotti*.¹³⁴ In *Bellotti*, the Supreme Court considered the issue of corporate first amendment rights in the context of a political referendum. Focusing not on the corporate speaker, but rather on corporate speech,¹³⁵ the Court held in favor of corporate first amendment rights.¹³⁶ What the new theoretical position suggested herein would do is create a framework for a critique of *Bellotti's* result. One could now argue that we may impose legal duties on the corporation without granting to the corporation the corresponding constitutional right to participate in the political debate which is the source of such duties. This is because the assumed connection between such a constitutional right to participate in the creation of laws and the responsibility to obey them does not exist in the case of corporations.

130. See J. GRAY, *supra* note 84, at 27 ("One who has rights but not duties, or who has duties but no rights, is, I suppose, a person. An instance which would commonly be given of the former is the King of England; of the latter, a slave.").

131. See P. POLLOCK, *supra* note 1, at 61-65 (discussing the correlation between rights and duties).

132. For a discussion of corporate moral agency in a legal context, see Nesteruk, *supra* note 8, at 687-99.

133. Accepting the artificial nature of the corporation need not include an emphasis on the corporation's status as a state-created entity. A corporation is artificial in that it is a human creation subject to human choices.

134. 435 U.S. 765 (1978). For an introduction to the scholarly literature on *Bellotti*, see *supra* note 8.

135. See Nesteruk, *supra* note 8, at 686 (discussing corporate speech and moral issues).

136. *Bellotti*, 435 U.S. at 795.

III. CONCLUSION

The large, modern corporation does not fit neatly into the conceptional framework of the present law. What I have proposed is a new paradigm: person, property, and organization. This new paradigm possesses greater descriptive accuracy than that which exists under the present law. Its particular virtue is the manner in which it brings into view the phenomenon of corporate power. Beyond its greater descriptive power, the proposed paradigm adopts a new normative orientation for the law. This new orientation will prevent the norms, values, and assumptions relating to natural persons from being unthinkingly transferred to the analysis of the corporation. Such a normative stance will foster a more creative reflection regarding the corporation. Moreover, it will make possible an unhindered exploration of alternatives regarding both the corporation's internal decisionmaking process and its relation to the external community.

