Abstract:

In “Gender and Corporate Personhood: A Feminist Response to David Millon,” Terry A. O’Neill applies a feminist lens to David Millon’s article on corporate personhood. She first examines Millon’s view that the interminable debate about corporate personhood acts as a smokescreen to obscure the more critical question of the relationship between shareholders and other corporate constituencies. Reinforcing Millon’s contention that the competing aggregate and entity theories of corporate personhood are indeterminate on the subject, O’Neill agrees with Millon’s communitarian view of corporations as a web of contractual relations. She asserts that this view is consistent with and supports the feminist perspective that corporate participants are not merely self-interested profit maximizers, but are humans responding to the needs of others within and without the corporation.

Gender and Corporate Personhood: A Feminist Response to David Millon

Terry A. O’Neill

David Millon’s article on the seemingly endless debate over corporate “personhood” is a breath of fresh air. Cutting to the heart of the problem, he persuasively argues that what is at stake in this debate is a fundamental disagreement over “how relationships ought to be understood.” More specifically, the corporate personhood debate masks a more critical struggle over how the relationship among shareholders and other corporate constituencies should to be understood. Because the personhood question sidesteps the most important issues, Millon is more or less agnostic about whether the corporation is an entity akin to a “jural person,” or some sort of aggregate of individuals. He concludes that it matters a little, but not much. There are numerous more important questions. Are shareholders the constituency whose interests count the most? Does the

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2 *Id.* at 56

3 *Id.*
corporation exist primarily for their benefit, or does it also exist to benefit other stakeholders, such as employees, lenders, and local communities? How should corporate managers be held accountable for their decisions? Should they be permitted to take non-shareholder interests into account in their decision making? Should they be required to do so?

As Millon shows, the corporate personhood question is of limited help in answering these questions. Over the last century and a half, defenders of shareholder primacy first relied on an aggregate conception of the corporation, then switched to an entity view, and have now reverted to a new form of aggregate view. Each of these conceptions of the corporation turns out to be indeterminate, however, in that each can be used to support a diametrically opposing conclusion. Thus, over the decades, proponents of corporate social responsibility have alternately used the very same aggregate and entity conceptions of the corporation in arguing for the protection of all stakeholders’ interests.

Millon’s indeterminacy argument brings to the surface the ideological underpinnings of the corporate personhood debate. Even if everyone agrees that a corporation is an entity — in other words, a “jural person” — there would still be a struggle over questions about how persons, jural or natural, should treat one another. For example, a hard line anti-regulatory view holds that the corporate entity, no less than a natural person, has the right to single-mindedly maximize its own wealth, without regard to its impact on others. Critics of this view, on the other hand, call on the corporate entity to behave in a socially responsible manner, as a “good corporate citizen.”

The same indeterminacy is also seen in differing views of the corporate entity’s relationship with its employees. The conservative view has the corporation bargaining at arm’s length with employees, entitled to use whatever bargaining leverage it has to its own advantage. However, this view can be criticized on two levels. First, as Millon has argued elsewhere, the common law background rule of employment at will gives employers a significant bargaining advantage over employees. He suggests leveling the playing field by reversing the employment at will doctrine, giving employees the right not to be fired without cause. Second, as I have argued elsewhere, agency law also tilts the playing field toward employers by imposing fiduciary duties of care and loyalty on employees, but not vice-versa. The employees’ duty of loyalty restricts their ability to

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4 Id. at 56–57.
5 Id. at 48.
8 Terry A. O’Neill, Employees’ Duty of Loyalty and the Corporate Constituency Debate, 25 CONN. L. REV. 681, 707 (1993) (hereinafter O’Neill, Employees’ Loyalty). The asymmetry in fiduciary duties cannot be justified by arguments from contract law. See id. They are really holdovers of the
jump from one employer to a competing firm, whereas employers can replace employees without similar restrictions.\(^9\) I have therefore suggested that employers (including corporate entities) should owe a reciprocal duty of loyalty to their employees.\(^10\) Thus, mere agreement that the corporation is an entity does not produce agreement about how the corporate entity should treat its employees.

As Millon notes, however, the neoclassical economic analysis, which dominates corporate governance law, insists that the entity theory of the corporation is wrong, and that a new version of the old aggregate theory is correct. Under the neoclassical view, that is, the corporation is a “nexus of contracts,” a sort of marketplace where individuals enter into contractual relationships, the totality of which constitute the corporation.\(^11\) Millon accepts this new aggregate view of the corporation — accepts it, that is, in the sense that he does not find it particularly worthwhile to reject it.\(^12\) So he grants that the corporation is a web of contractual relationships. Even so, as he points out, we still face an ideological struggle over the rules and norms by which their association should be operated.

From a right-leaning perspective, although a corporation has numerous constituencies, the shareholders should have a privileged status among them. This belief in shareholder primacy is currently grounded in contract rights, albeit in years past it was grounded in property rights.\(^13\) Whatever its grounding, shareholder primacy demands that the corporate managers owe their allegiance strictly to the shareholders. This means that decisions such as downsizing a workforce, or locating plants where environmental protections are lax, should be made without regard for how non-shareholder constituencies might be affected. If the shareholders profit, the policies are presumptively good.

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\(^9\) See O’Neill, supra note 8 at 709–10.

\(^10\) Id. at 714–15. The employer’s fiduciary duty would not be the same as a termination-for-cause rule. It would not flatly prohibit a corporation from downsizing the workforce or relocating a plant. However, it would require the corporation to be candid, and to accomplish its goals in the least harmful manner. See id.


\(^12\) Millon, supra note 1, at 57.

\(^13\) Id. at 50.
Dramatically different conclusions flow from a left-leaning perspective. This view treats the corporate web-of-contractual-relations more as a community for mutual gain than as a market place where “self-seeking individuals come together in order to seek private advantage.” On this view, shareholders should not be privileged over other corporate stakeholders. Rather, everyone should be able to thrive within the corporate community. This means that profits for shareholders, albeit one aim of corporate management, should not be the only aim. Managers should take other stakeholders’ interests into account as well. For example, as Marleen O’Connor has argued, managers should honor “implicit contracts” on which employees have legitimately come to rely, even if this means reduced shareholder profit in the short term. A major implication of this view is that the directors should have broad discretion to manage holistically for all stakeholders, more or less free from interference by shareholders or any other corporate constituency.

Advocates of shareholder primacy have sharply attacked calls for broad directorial discretion. First, they assert that shareholders deserve their privileged status, and need to be able to challenge directors whenever the latter fail to maximize shareholder gain. In addition, they argue that directorial discretion only encourages directors to line their own pockets, at the expense of nonshareholders as well as shareholders. They warn that directors would be able to justify any decision, no matter how self-serving, by claiming that it benefits some stakeholder group, even if other groups’ interests are compromised in the process. In other words, directors would have free reign to serve their own interests without being held accountable to anyone.

Progressive advocates of corporate stakeholder interests downplay the risk that directors will inevitably run amok unless held to strict standards of accountability to shareholders. Lawrence Mitchell, for example, has argued that, in general, it is appropriate to trust corporate directors to act in good faith, taking all stakeholder interests into account. Mitchell has pointed out, for one thing, that shareholders will still enjoy a

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14 Id. at 54.
positive return on their investment.\textsuperscript{20} For another thing, Mitchell has argued that the obsession with holding managers strictly accountable to shareholders is actually counterproductive. It treats managers as if they are moral infants, incapable of living up to higher expectations. This ultimately encourages selfish, irresponsible behavior on their part. According to Mitchell, giving corporate boards of directors discretionary power lets them develop as morally mature decision making bodies. Furthermore, higher levels of moral maturity at the corporate helm is worth the risk that some managers may not rise to the occasion.\textsuperscript{21}

Margaret Blair and Lynn Stout suggest another reason to give managers broad discretion to act for all stakeholders’ benefit. They assert that the salient feature of the corporate form of enterprise is that it facilitates “team production.”\textsuperscript{22} That is, all of the stakeholders agree that they will do better by pooling their resources to produce goods or services as a team. Each team member contributes something of value to the production process: financing from shareholders and lenders, labor from employees, materials from suppliers, infrastructure from local communities, and so on. The key problem with team production, however, is figuring out how to distribute the group’s profits in a way that fairly reflects the contribution of each team member. Blair and Stout argue that the most efficient solution to this problem is for the team members to appoint an “independent hierarch” — i.e., a board of directors — to make distributional decisions.\textsuperscript{23} This solution is, obviously, undermined if any and all team members can challenge the board’s decisions whenever they are dissatisfied with their distributional share. Therefore, the board needs wide discretion in setting corporate policies, especially when making judgment calls about who gets what share of the wealth produced by the corporate team.\textsuperscript{24}

Millon, albeit a leading critic of shareholder primacy, is nonetheless considerably skeptical about broad directorial discretion. To Millon, the pressing question is not so much about directors and their freedom of action, but rather about the actual, material welfare of beleaguered stakeholders. His concern is well founded. The last twenty years have witnessed a remarkable transfer of wealth to shareholders from other constituencies, as merger waves, globalization, and the rise of the institutional investor pressured managers to squeeze out ever higher profits at the expense of employees, lenders, suppliers, and local communities.\textsuperscript{25} What good does it do to give managers broad discretion while maintaining an unequal playing field that privileges the interests of

\textsuperscript{20} See id. at 594.

\textsuperscript{21} Id. at 537.

\textsuperscript{22} Margaret M. Blair and Lynn A. Stout, A Team Production Theory of Corporate Law, 85 Va. L. Rev. 247 (1999).

\textsuperscript{23} See id. at 289.

\textsuperscript{24} See id. at 291–292.

shareholders over everyone else, if the managers only use their broad discretion to pay lip service to the idea of stakeholder management? In other words, unlike his conservative counterparts, who fear independent directors channeling wealth away from shareholders, Millon is concerned that the opposite will continue to happen.\(^{26}\)

Millon therefore takes the communitarian view of the corporation-as-a-web-of-contractual-relations in a different direction. He stresses that the community of corporate stakeholders is one “in which such values as trust and respect for others determine the success of the venture and therefore are a necessary part of intra–corporate relations.”\(^{27}\) For Millon, the communitarian view also requires rejecting the neoclassical premise “that people are entitled only to what they can bargain and pay for.”\(^{28}\) He elaborates:

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\text{[C]ritics of shareholder primacy observe a community of participants who may or may not be capable of obtaining an acceptable standard of living through their own devices. They find themselves bound together in a common venture and therefore depend on each other’s efforts for its success. This commonality of interest can give rise to obligations or burdens that reduce some peoples’ shares of the joint product in order to confer on others more than could be obtained through the exercise of bargaining leverage alone. However selfishly motivated individual participants might be, they in effect agree to temper their own claims once they enter into a community founded on cooperation.}\(^{29}\)
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In other words, sometimes people are entitled to things because they need them, even if they have not bargained and paid for them. Moreover, sometimes a person can owe something to others, not because he as agreed to pay it, but simply because the others, with whom he stands in a particular kind of relationship, need it.

I am substantially sympathetic with Millon’s perspective. In particular, it resonates with a feminist approach to corporate governance which I have begun to explore in the last few years.\(^{30}\) This feminist approach maintains that corporate participants are not merely self-interested profit maximizers, although of course personal gain is one reason why people work together. Another reason, usually ignored (sometimes strenuously denied) by the neoclassical economic tradition, is that in certain kinds of relationships, human beings respond to the needs of others simply because the

\(^{26}\) See Millon, supra note 1, at 53–56.

\(^{27}\) See id. at 54.

\(^{28}\) See id. at 55.

\(^{29}\) See id at 55–56. (emphasis added).

need exists. The mother-child relationship is one paradigmatic example of this phenomenon, but it is by no means the only one. More broadly, a feminist approach maintains that in any relationship marked by longevity and vulnerability — for example, in partnerships and close corporations, and in employment relationships as well — we routinely observe people responding to one another’s needs.

Feminist scholars point out that the capacity to respond to the needs of others is a core aspect of being human. A feminist understanding of corporate law thus recognizes that this aspect of human nature operates in corporate relations as well as in intimate, personal relations. This does not imply, however, that the urge to compete for one’s own advantage, and the right to autonomously pursue one’s own vision of the good life, are not also core human values which are very much at work in corporate relationships. That is, a feminist approach rejects the simplistic assumption, driven by Cartesian dualistic reasoning, that relationships must be either competitive or co-operative. Not only is such an assumption contradicted by ordinary, everyday experience, it also systematically disadvantages women.

Bifurcating competitiveness from co-operation disadvantages women in our workplaces, and our own homes. Deeply gendered, this either-or proposition presents self-interested competitiveness as hard-nosed, rational, and masculine, while presenting empathy and responsiveness as soft, emotional, and feminine. The obvious message is that it is impermissible for women to be competitive, autonomously to assert and pursue our own interests, and especially impermissible to do so within our families and intimate relationships. Simultaneously, on the other hand, men are encouraged to act in their own self-interest, certainly in commercial relations, but also within their families and intimate relationships. Indeed, men are often culturally sanctioned for expressing any “soft” or “emotional” capacity to respond to others’ needs. In short, the neoclassical adherence to an ancient public/private divide is not only descriptively wrong, but also normatively troubling because of the material disadvantages for women and emotional disadvantages for men that it entails.

Millon’s view of the corporation as a community characterized by interpersonal trust and respect for others seems to me to resonate with this feminist analysis. It goes beyond the neoclassical myth that a corporation is nothing more than a marketplace


33 See West, supra note 31; at 6–8; JULIE A. NELSON, FEMINISM, OBJECTIVITY & ECONOMICS (1996); OUT OF THE MARGIN (Edith Kuiper & Jolande Sap eds., 1995); BEYOND ECONOMIC MAN: FEMINIST THEORY AND ECONOMICS (Marianne A. Ferber & Julie A. Nelson eds., 1993).

34 A growing body of feminist economics literature critiques this dualistic reasoning. See, e.g., GILLIAN HEWITSON, FEMINIST ECONOMICS (1999).

35 Id..
where insensitive, irresponsible players dicker for immediate personal advantage. The more accurate, and more just, conception of the corporation is that it is a site where participants express both competitiveness and co-operation in their relations with other stakeholders. It is important to affirm, as Millon does, that all corporate stakeholders have a right to assert their own interests. Equally important, we need to acknowledge that, at some point, any given stakeholder may have an affirmative obligation to put his own advantage to one side, in response to another stakeholder’s need.

The question remains, of course, how to determine when competitiveness or cooperation is called for. Millon suggests that we look to material outcomes, in combination with a sense of personal responsibility, for some guidance.\(^{36}\) For example, if a corporation’s directors pursue a policy that harms a particular constituency group, that group should be entitled to be made whole. Obviously, their compensation must come from other corporate participants’ share of the corporation’s wealth. However, Millon also suggests that, rather than take compensation entirely out of shareholder profits, it might be fairer to place the burden (or at least part of it) on the directors personally whose actions directly caused the loss.\(^ {37}\)

Another way of clarifying what it would mean for stakeholders to balance their pursuit of self-advancement with responsibility for their colleagues’ welfare is to increase a corporation’s social transparency. Shareholders already benefit from financial transparency, thanks to federal disclosure laws. Such transparency allows shareholders to compare corporate performances, and to move in and out of investments according to their own criteria, whatever that may be. Analogously, stakeholders would benefit from reliable, regular reports on corporations’ social performance. Social transparency would allow stakeholders to compare corporations in a more meaningful way. By looking at both financial and social criteria, stakeholders could make better informed choices about whether to stay with a particular corporation or leave. In other words, enhanced transparency would afford all stakeholders a clearer sense of whether a corporation is providing the best situation available to them. In turn, transparency would also allow us to observe and assess the ways in which stakeholders sort through the struggle for advancement and the solidarity with friends and colleagues that make up the pushes and pulls of everyday corporate life.

Millon is surely right to say that the “controversy over the rights of corporate shareholders in relation to nonshareholders . . . is no closer to resolution today than it ever has been.”\(^{38}\) Moreover, he is surely right that we must engage the real underlying questions — How responsive should stakeholders be to each other? How selfish should they be allowed to be? Which, if any, are entitled to a privileged status? — even though they are the most difficult.

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\(^{36}\) See Millon, supra note 1, at 56–57.

\(^{37}\) See id. at 57.

\(^{38}\) See id. at 58.