The Most Important Problem in the World

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13 March 2019
https://medium.com/@jgg4553542/the-most-important-problem-in-the-world-ad22ade0ccfe

Is . . . ?

Climate change; millions of people displaced by war, crime and poverty; epidemic income insecurity draining the good-will and hope required for democracy to work; authoritarian fever rising in response; multitudes rejecting compassion in fear that the world they cherish is lost if "us" isn't protected from "them"; dirty water, toxic soil and urban air that sometimes can't be seen through let alone breathed.

Answer: none of the above.

The most important problem in the world is a reasonable sounding provision of the corporate law that governs most major U.S. companies.

That's a big claim. It's also slightly misleading. A better answer is that the above complex network of horribles all connect back to a common root that is nourished and guarded by the extraordinary power of corporate "persons" who are legally obligated to act like sociopaths.

The rule: corporate management and Boards of directors are obligated by law to make decisions that maximize the economic value of the company. Colloquially: when you invest your money in a company, the people who run that company are required to do their best to bring you the highest possible financial return on your investment rather than using your money to pursue any personal or social agenda.

Sociopath? Yes. The corporate entity is obligated to care only about itself and to define what is good as what makes it more money. Pretty close to a textbook case of antisocial personality disorder. And corporate persons are the most powerful people in our world.

The "maximize rule" does its damage in two ways. Corporate entities are direct actors in the world. A decision to build a factory in a place with weak environmental laws, low wages and poor worker protection matters. Preferring share buybacks to increased wages or lower prices matters. Lobbying for taxpayer subsidies that transfer wealth from poor to rich matters. They contribute to the problems listed in paragraph one in obvious ways. More damaging: the maximize rule infects real people with tragic faith in the magic of markets.

The tragedy isn't markets themselves. Markets have played a critical role in much of the progress humanity has made in the last four centuries. It isn't clear we could stamp out markets if we wanted to — black markets seem to arise even amidst the most oppressive efforts to snuff them. But if we could eliminate markets, we'd be crazy to do so. They are effective tools.

The tragedy is that markets have for a great many people taken on the power to transform selfishness into a virtue. If everyone acts in her rational self-interest, the market scripture goes, an invisible hand will cause the sum total of selfish acts to serve the common good. Faith in the invisible hand is the seed from which the maximize rule springs. The maximize rule in turn revises the faith. It defines "rational self-interest" as maximizing economic value. Technically, that applies only to corporate people. Practically, the maximize orthodoxy has infected real people so deeply we barely even recognize how much it guides our actions.

In rebellion at the idea that real people are ruled by the drive to maximize, you may be listing in your head your own selfless acts, or those of others that inspire you. Ask this of yourself: how do I feel about the people on my list of selfless altruists? I'll participate in my own thought experiment. I am repeatedly brought to the edge of tears by a story of a college softball game. In the bottom of the last inning, a young woman came to bat who in her college career had never hit a home run. There were two outs, one person on base and her team was down by one run. A homer would win the game. She hit the ball over the fence, but on her way around first base she fell. Her leg was so badly injured she couldn't make it all the way around to touch home plate. Under the rules, her home run wouldn't count. If her own teammates touched her to help, she'd be called out. The other team had won. But they didn't. The rules didn't prevent the opposing team from picking up their fallen adversary and carrying her from base to base so she could touch each one, score her home run and win the game. That's exactly what they did.

When I think of this story, I think of these young women as extraordinary. I don't think: "Of course. What else would someone do?" Newspaper coverage; cafeteria conversation; pillow talk; silent self-reassurance that the world isn't careening toward its end: almost universally, in all our voices, we treat acts like this (and others in more dire situations) as exceptional. This implies that the baseline choice would be to — in my example — take the win. To value others' well-being as we value our own is "supra-normal". One more step in the thought experiment: whatever noble act you recalled, did it bring up at least a little guilt? An internal reproach that you don't always act nobly yourself? If so, how did you react to the guilt? Have you ever thought of an act of compassion as naïve, or even irresponsible? How often have you heard someone sigh about how awfully we treat refugees and immigrants, finished by a phrase like "but if we let everyone in . . ."? Have you ever steeled yourself against your own compassion when a homeless person asked you for money by saying to yourself, ". . . if I give to everyone . . ."? Many — maybe all — of us believe that it has to be OK to prefer ourselves and our family-clan-tribe-nation's well-being to "others" because if we didn't believe it was OK, we'd either feel bad all the time or give away everything in a futile attempt to right the wrongs of the world.

The human drive toward self-preference/preservation is much older than our corporate governance laws. But that drive is sometimes in conflict with the moral consciousness from which we derive our sense that humanity is more than a biological mechanism DNA-driven to propagate. Blessing the maximize rule as “right” for the created super-persons who rule our economic reality creates a loop back to our real selves. It helps us feel that acting in our personal self-interest leads to a collective outcome that is “right.” That’s a *faith*: it pushes outside of us responsibility for the structure of the world and it allows us to say that whatever markets create must be the best outcome possible. Professor Pangloss without the irony. It allows us to mute the dissonance between our self-interested drives and our moral judgments. Clanging at full volume, that dissonance could drive change. Muted, we wind up sleepwalking toward the list of horrors at the top of this essay.

We can fix the maximize rule to provide each “corporate person” with a conscience. To get rid of the super-sociopaths and solve the most important problem in the world, we should do the following:

Rule 1: Keep the maximize rule in place.

Rule 2: Every company should adopt a binding set of ethical rules, approved by stockholders and addressing the key ethical dimensions of corporate life: (i) relationships with employees; (ii) relationships with the communities in which they produce and sell; (iii) relationships with customers; (iv) effects on the environment; and (v) effects on future generations. The maximize rule has to be followed, but the Board is constrained to act consistently with the ethics rules.

Rule 3: Any shareholder could sue the Board of Directors for violating the ethical rules — just as any shareholder can today sue the Board of Directors for violating the maximize rule. If the shareholder suit is successful, the Court could order the Board to comply with the company’s ethical code.

This is likely to seem insane to senior corporate executives and Boards of Directors. To everyone else it’s likely to seem far too small a change to make a big difference. Read on. I’ll offer more detail that should convince the corporate types that they’ll still be able to do their jobs. I’m a former partner at a major New York law firm and I spent years advising management and Boards on their legal obligations and defending lawsuits brought by shareholders. My proposed fix comes from practical experience. For everyone else: the maximize rule operates like an engine. As is, it drives all the Paragraph One horribles at us with the same mad force it drives innovation and creates wealth. The idea is not to stop the engine. It’s to change direction so the engine drives away from the abyss instead of toward it.

A Note On Method

I will not offer evidence sufficient on its own to prove my assertions. Big problems are generally big because they arise from the whole complex mess and wonder of human relations. Causal analysis of any one problem is rarely possible without reducing the problem to a narrow caricature of the real thing.

Because uncertainty is unavoidable, it can't be a reason for inaction. Decisions about what the corporate law should require of legal "persons" are political decisions. Political decisions are always made on the basis of incomplete information and limited understanding of how those decisions will play out.

As you read this essay, test the examples and arguments against your own observations of the world. If they track, I submit that logic compels the conclusion that the risk of change is far less than the risk of doing nothing.

A Note on Terminology

There's no such thing as "the corporate law." In the U.S., the law governing the inner workings of a corporate entity is defined by the state in which the corporation is formally incorporated (for most large companies in the U.S,, that is Delaware). Federal law also applies in a variety of contexts. I will refer frequently to "corporate law" or "U.S. corporate law" as a general way of denoting the body of laws and regulations that affect companies in the United States. I will get more specific only when it's necessary to make the discussion clear. My intent is to provide just enough detail to be accurate and to omit technical matters that don't change the fundamental arguments.

My expertise is in U.S. law and that is what this essay will discuss. But the basic idea that powerful economic institutions generally act to maximize their economic wealth appears from experience to apply across all developed economies. The specifics of how to achieve the stated goal may be different in different places, but the substance is the same: power needs to be constrained by conscience.

Finally, the corporate law discussion in this essay is about "public" companies: those that sell shares of their stock on some exchange, and are as a result owned by a large number of stockholders and run by professional managers under the oversight of a Board of Directors. When I refer to "company" think public company with a Board of Directors, managers who are employees and lots of stockholders.

What's so bad about maximizing?

There are thousands of books detailing the harm done by globalization, industrialization, urbanization, finance capital and the general hunger for profit. There are also thousands of books detailing the good done by all of those things. The most serious books about economics in the modern age recognize both the benefits and the harm and in simplified summary say:

- Trade and industry are responsible for a huge expansion of the resources available to human beings to live and pursue fulfillment

- The world has not yet reached a point where every person has enough resources to live and pursue fulfillment, so expanding those resources is a good thing
- The costs and benefits arising from trade and industry are unevenly distributed both between regions and countries and among individuals within regions and countries
- The uneven distribution results in hardship for a large number of people and a deep sense of insecurity among a much larger number of people
- The hardship and sense of insecurity have had historically and are having today important negative social and political consequences
- Both people and markets are bad at accounting for the future costs of current consumption; as a result, the harm being done to future generations is rarely well considered in current decisions (referred to as "present-bias")

The maximize rule in its current unbounded form is bad because it is the primary reason for the extreme inequality of distribution of benefits and gains and also of the present-bias. Those are the key economic elements that contribute to all the Paragraph One problems.

Religious differences, race hatred, historical grievance and other elements of faith and culture, of course, also contribute to our failings. But economics is central. Economics isn't the study of complex capital flows, exchange rates, graphs and curves. It is the word we use to describe the process by which humans transform natural resources into the stuff we need to live and pursue fulfillment. The stuff that comes from those actions is rarely (maybe never) sufficient for our fulfillment. In almost all cases some amount of that stuff is necessary. Food, shelter, clothing, art, sport, a place to meet with friends, a school for your children, books and magazines, a footpath carved into the woods and the shoes you wear to walk it, an altar to worship at: there are material — economic — elements to nearly everything we do.

The maximize rule is the *most important* problem for us to focus on because: (i) it defines our economic relations; (ii) economics effects everything; and (iii) it's fixable — changing it is a choice.

How the maximize rule hurts us is best shown by explaining how the rule works in the boardroom and makes its way into all of our heads.

Agency, clarity and seduction

Corporate governance laws are set up to solve what's called "the agency problem." Public companies are owned by large numbers of people. The identity of those owners changes frequently because people buy and sell the stock of the company. It isn't practical for the shareholders to get together as a group to vote on every major decision, let alone the day-to-day running of the company. They have to appoint "agents" to do that work. The "problem" is how to ensure the agents act on behalf of the owners and not in their own self-interests.

The basic system under which nearly all large U.S. public companies operate has four components. First are the company's "constitutive documents" — By-laws and Articles of Incorporation — that define how the particular company will be organized and run. These are absolutely binding — they are like the U.S. Constitution in that sense. They are also always pretty general and leave a lot of flexibility for action. Second, the stockholders elect a Board of Directors, to which is delegated the ultimate power of decision on nearly all decisions the company can take. Third, the Board chooses a Chief Executive Officer to run the company day-to-day. Finally, all of these actions take place within the context of the corporate law that applies to all companies.

The maximize rule is part of the corporate law. For purposes of solving the agency problem, defining the duty of the agents (the Board and CEO) simply, clearly and in a law that is binding on all corporations is incredibly useful. If I am an investor, I know that any public company in which I might choose to invest will be guided by the fundamental requirement that all decisions be taken to maximize the economic value of the firm.

Defining the ultimate corporate agenda in a law that is the same for all companies vastly reduces the meaningfulness of shareholder democracy. Shareholders elect the Board members at an annual meeting. But their vote doesn't effect the most important question: what is the job we are giving to the Board. Thinking about the corporation like a country, "sovereignty" isn't really with the shareholders. It's in the corporate law. That creates apathy. Why vote if the only thing you can change are the faces, not the agenda? In practice, shareholders nearly always elect by huge majorities the "slate" of directors proposed by the Board (usually, re-electing the current directors). Shareholders could, today, incorporate ethics limitations in the company's constitutive documents. But overcoming history and the problems of collective action is, as we all experience in our politics, incredibly hard.

Shareholders do sometimes exercise oversight of the Board by bringing what is known as a "derivative action." The reason it's "derivative" is important. A director of a company owes her duties — fiduciary duties is the legal term — to the corporation itself, not to the individual shareholders. If Mary is a director of Apple, she owes her duties to Apple, not to the thousands of people who own stock in Apple. If Bob owns one share of Apple and he thinks Mary is not acting to maximize the economic value of Apple, Bob brings a lawsuit by — again, in legal terms — stepping into the shoes of the fictional legal person Apple and suing the Board for breaching their duty to Apple to maximize its value. The key point is that Bob can't bring a lawsuit because the Board did something that Bob personally doesn't like. Just because Bob owns stock and wants iPhones made in Indiana doesn't mean Bob can sue the Board for moving production overseas. Bob has to sue as if he were Apple the legal entity — the corporate person. And Apple's only concern is defined by law to be maximizing economic value.

Winning a derivative suit is difficult. Boards are protected by “the business judgment rule.” As long as the Board does its homework and learns the relevant facts about a situation, the Court can’t substitute its judgment for that of the Board. In practice, this results in a lot of deference to Board decisions.

But if a shareholder brings suit and wins, the Court can order the company to take specific actions and it can award money damages that in some circumstances must be paid by directors out of their own pockets. The maximize rule has teeth.

It also has value. Clarity of purpose is a formidable benefit. The Board knows its job and its performance can be measured in dollars and cents. Of course, the clarity comes at the cost of excluding consideration of everything else. This can produce serious conflict for the Board. Board members and company management don’t check their consciences at the Boardroom door. In my experience in corporate law, I found management and directors to be roughly as moral and caring as any other group of people I’ve come across. Most want to do their jobs well, take care of their families and contribute to making the world a better place. There are times when it’s obvious to everyone that the maximize rule is in direct conflict with the desire to make the world a better place.

That’s when the maximize rule shows its true power: the seduction that maximizing is not just a legal obligation, but the right thing to do.

One element of the seduction is that seeing the maximize rule as morally right reduces cognitive dissonance. If you sit on a Board, you have to follow the rule. If you don’t have a choice, you might as well decide that the only available option is the right thing to do anyway. You sleep better.

The next step in making corporate sociopathy feel virtuous is group solidarity. Boards are overwhelmingly composed of people who have been highly successful in business. They have made reputations, and usually a lot of money, operating under the existing corporate law structure, including the maximize rule. Most of us don’t want to think of the source of our success as a cancer on the world. Boards vote openly. Challenging the status quo is harder when it requires you to, in essence, challenge both your peers’ sense of self and your own.

The last leg in the seductive triangle is logical justification. Stockholders purchase stock in the company on the understanding that the Board will seek to maximize economic value. It’s a contract. A trust. To act otherwise would be to violate that trust. And violating that trust to serve my own interest — even if I deem it to be a moral interest rather than a financial one — is violating a trust for my personal benefit. That is fraud. It’s morally wrong.

All this makes the maximize rule powerfully attractive and corporate decisions nearly always follow the rule. It’s rare for a company to decide to keep a factory in Indiana if it would increase corporate profits to move production to Taiwan. When that sort of thing does happen (and it happens), the justification that will be offered by the company will not be fairness to workers or the local community. Those virtues will likely be part of the public relations strategy. Internally, the Board will lay out its analysis that in fact there are important economic benefits of keeping the factory in Indiana. The argument might be that a reputation for caring will improve the company's image and raise sales, or help to recruit highly talented employees. It might be tax breaks or political risk. It will be about money, not "the right thing to do."

Many embrace the maximize rule. The corporate role, they say, is to efficiently produce goods and services and provide a return on investment. By providing less expensive products, paying wages and generating investment returns, the corporate entity provides resources to consumers, workers and investors. Those real people can then do as they please with their money. For the corporate entity to decide for investors how their money should be spent is anti-democratic and arrogates to Boards and CEOs the power to decide for others what is right and what wrong. A full discussion of the economic and philosophic arguments for and against this reasoning is beyond the scope of this article. I limit my critique to the fact that the "limited corporate role" argument is wrong because it ignores reality. Corporate persons live among us and exert a powerful influence over how we see and interact with the world. The decision not to address morality and fairness at the corporate level infects real people and contributes to the self-centered actions of individuals and society at large.

The Seduction Is Viral

Corporations are much more than just legal fictions. They are members of our communities and important parts of our lives. The vast majority of us interact with multiple corporate people every day. The grocery store is one and most of the products you buy there are made by, packaged by or shipped in by others. The people who run the registers and answer your questions about produce work for a corporate person. Every time you use your phone or the internet . . . when you fill the car with gas . . . the car itself . . . your mortgage . . . etc. Even at your corner bar: odds are good the bartender didn't blow the glass bottles in the basement while distilling the liquor and crushing the grapes.

The corporations' values are reflected in our daily experience. When I buy something from Amazon, Amazon's goal is not to increase my joy in life. Amazon's goal is to make money. Amazon may think that making sure my purchases increase my joy in life is a good way of getting me to buy more, but its goal is the purchase not my happiness. The Amazon interface and all their customer service people do their work with the maximize rule — consciously or not — at the heart of their actions. The same is true of every interaction we have with a corporate person. My employer may offer great health benefits, have a supportive corporate culture and pay very well. Its goal is to make money and it offers those things in service of its goal. Even if that isn't said out loud — even if it's explicitly denied — it's a fact. And we all know it. Somewhere inside, we know that the corporate entity is concerned with itself. We mirror that self-concern in our interactions with corporate people. We get the best deal we can for ourselves. The exercise of self-interest in our economic lives makes it stronger everywhere. Most of us push back against selfishness in some parts of our lives. But the pressure of the ritual of self-regarding exchange is constant. We are always exposed.

Exposure leads to penetration because of a basic fact of human nature: people need life to make sense. To seek sense in the world, we invented religion, philosophy and science. To soothe our failure to find sense, we invented alcohol, drugs, recreational consumerism, reality TV, videogames . . . distraction and addiction. The maximize rule is a neat, powerful and dangerous addiction masquerading as an answer.

The need for the world to make sense is sometimes described in philosophy and religion as "the problem of evil." Good things happen to bad people. Bad things happen to good people. Whatever you think of President Trump, it's hard to argue he lived a morally exemplary life prior to his election to the White House. And yet, he has lived a life of luxury and is now the most powerful person in the world. Every one of us knows at least one very good person who struggles with poverty or has suffered a senseless tragedy. This shouldn't be.

The history of Western culture wrestling with the problem of evil goes back at least to Job. One of the most enduring answers is that the way in which everything fits together is a mystery beyond our understanding. It all does make sense, we just can't see it. Trusting that mystery is essentially what faith is all about.

Faith in the mystery — in a benevolent Fate — has become much harder over the last few centuries. There are many reasons, but the most powerful is access to information. We see and know more than we used to and our collective memory of horror has simply filled up past ignoring. The examples of injustice in the world we inhabit are so numerous and heavy that just trusting the mystery is too big a lift. Neither science nor philosophy offers up an answer to the final "why" question that sits at the heart of the desire for a world that makes sense. Institutional failure — of churches, governments, classes, ideologies, etc. — have also made trust more difficult. There's a void, or at least a gap. Given how hard the sense of random injustice hits, there is a wound.

The maximize rule enters at the broken place. The invisible hand at the heart of the rule is a form of Providence — the belief that things will come out right in the end — with a veneer of math. In fairness to Adam Smith, neither he nor any serious economist after him would agree with my characterization of the invisible hand as a source of mystification justifying evil in the world. It is, technically, a shorthand description of a mathematical relation by which a series of individual acts aggregates into a larger effect. It doesn't attempt to define good or bad. Unfortunately, ideas are not adopted into the wider culture with all of their nuance intact. I'm also not sure that economists don't want to attribute at least a little magic to markets. You don't name something the invisible hand if you don't want some mystery to attend its workings.

It's an attractive mystery. It says that if you do what is best for you, the invisible hand will mix your action with everyone else's and the general societal good will be served. It's guilt-free (or at least reduced-guilt) selfishness.

Faith in the invisible hand doesn't require you to be a moron. It doesn't mean you don't acknowledge the pain and suffering in the world, or even that you don't acknowledge that markets themselves result in unfairness. The market version of theodicy is that markets produce the best outcome available, given the world as it is. The underlying idea behind this is old and developed as an attempt to reconcile the existence of evil with faith that God is both infinitely powerful and infinitely good (theodicy is the name for the intellectual pursuit of that reconciliation). Essentially, the argument boils down to: (i) The world is complicated and everything is connected to everything else. (ii) There is evil in the world, but it is the least amount of evil there could possibly be. (iii) If you changed something to get rid of some evil, even more evil would arise somewhere else — or a whole bunch of good would be wiped out — so the net result of any change would be a worse world. (iv) We don't understand all the connections in the world well enough to explain how and why any change would result in more evil.

The modern, invisible hand, version of the "best world possible" theory is that markets produce the most efficient outcome possible. Yes, some people suffer. But if we interfere with the market, the outcome will be worse and more people will suffer (or fewer will receive benefits). This theory has a pretty big set of problems (it ignores distribution effects and differing utilities for wealth, assumes *a priori* that wealth maximization is a good thing and relies on the demonstrably false assumption that people act rationally), but its limitations have not prevented it from being the most widely accepted faith in the developed world. Whether or not markets really do maximize economic wealth doesn't matter to my argument. The invisible hand is damaging even if it is efficient because it helps us feel good about being selfish, leading to more selfishness in the world which leads us back to Paragraph One.

The experimental support for the argument that the maximize rule has infected real people through contact with corporate people is in your answers to the questions about how you think about altruism.

Three further examples:

Example One: Tens of millions of Americans believe that both strong border controls and limiting the number of immigrants to the U.S. are important. Objections to immigration vary, but all can be boiled down to the idea that immigration threatens aspects of what "we" have: job security, wage levels, culture, physical safety. We keep people out because we think our lives will be better if we do. And yet very few people would argue that the immigrants themselves are better off if we exclude them from the U.S. To the extent someone advocating strict immigration policies makes a moral argument beyond "taking care of our own" (which is not really a moral argument) it's that if we let too many of "them" in, the stress on the country will destroy the very things that make it great and harm everyone. This is the "best world possible" argument applied to human suffering.

Example Two: A large percentage of parents who can afford to do so send their kids to private schools, hire tutors, involve their kids in extra-curricular activities and find whatever ways are available to give their kids advantages in life. In rough terms, children from wealthy families are more than twice as likely to attend private high schools as the national average. And Ivy League universities commonly have classes in which as many students are from the top 5% of the income distribution as from the bottom 50%. My experience is that the desire to give your kids all you can is independent of political progressivity. I'm sure that the Deerfield and Groton parking lots had plenty of "Feel the Berne" bumper-stickers in 2016. Preference for your own children obviously predates the maximize rule. But the fact that something has been around a long time doesn't require its continuation. Finland, for example, has opted for an educational model that effectively eliminates this sort of preference for the children of the rich. While it's noteworthy that Finland is ranked among the best education systems in the world (and the U.S. is not), that's not the point of the example. The point is that even where our own children are involved, it's possible to choose a much broader "we". The fact that we haven't done so in the U.S. is a matter of choice. We are disadvantaging poor children through reliance on the "rightness" of the maximize rule and our faith in the invisible hand. ("We can't afford it," means that if we paid more in taxes to fund better public education the negative effects on the economy would outweigh the benefits of improved schools: i.e., the net effect would be to make society worse off.)

Example Three: A little less than half of voters chose for President in 2016 a man for whom "America First" is the driving value structure of our relations with the rest of the world. That is a statement of intent to act to maximize our own national self-interest. Our concern for others will be instrumental. This is a bald assertion of the maximize rule accepted, chanted and celebrated by millions of people.

Strengthening the Moral Immune System

We owe to others the same dignity we ask for ourselves. This is the heart of morality in the modern West.

Selfishness is a disease attacking the moral heart. It didn't start with the public corporation. Close your eyes and throw a dart at history and nine times out of ten it will stick in a place and time rife with oppression and redolent of greed, both justified by fear and the demonization of whatever "other" is close at hand. The human story had horrors long before the East India Company set up shop.

Changing the maximize rule won't cure the disease. I'm not sure anything can and I'm not sure the world would be better if selfishness were entirely gone. (I would like to try it out for a while.) But changing the maximize rule will reduce the virulence of selfishness by strengthening humanity's moral immune system: conscience.

We could create corporate conscience directly through a legal requirement that all corporations account for the public good in their decision-making. To be meaningful in practice, this would require that we define specifically the "public good." Experience makes me dubious we could accomplish that in a way that does more good than harm. More importantly, *giving* corporate conscience is less valuable than obligating each corporate person to *create* its own conscience.

The first act required by the proposed reform (see above) is the drafting and adoption of an ethical code that addresses the key areas in which the corporation interacts with the world. This entails two steps. First, the management and Board will have to draft the code. The people charged with acting for the corporation will have to discuss how the corporation should act and will have to account in that discussion for how the corporation's actions affect others. They will have to make a conscience.

Second, the shareholders will need to vote on the code. This will require the Board to explain the values embodied in the code and provide guidance and examples as to how the code is expected to work in practice. Shareholders will respond to the draft, voice opinions and in some instances demand changes. It will require a more active democracy among shareholders because it will require that they discuss and agree upon a more complete accounting for the manner in which their company affects the world. This is not only the creation of a conscience for the corporation. For the individual shareholders involved, it is exercise for the ethical muscles. Being a more moral shareholder will add energy to moral life in general.

Could it really work?

Yes.

There are two big concerns about adding lawsuit-enforceable ethical constraints to business decisions. One is that management would be paralyzed by litigation. Judges would become *de facto* CEOs. The other is that companies will adopt ethical rules that are so weak and vague that they don't create meaningful constraints. That would result in a false sense that companies are acting responsibly and blunt other efforts to pursue social justice.

The concerns are serious and they are linked. But they are not two sides of a coin. Coin flips are binary: you get heads or tails. The linkage between these two concerns is the reason neither is likely to make the proposed ethics rules unworkable. There are three forces that will push against the extremes and toward a practical equilibrium that will in fact be better for both corporate America and human America.

The Business Judgment Rule has history and it works. The ethics rules will work within an existing system that is highly deferential to management. Courts have — many, many times — made clear that it is not appropriate for the Court to take on a role that usurps corporate management. To overcome the Business Judgment Rule in the context of an ethics case, a plaintiff would need to show "bad faith" in legal terms. That's hard. It will deter frivolous lawsuits. Not all. But many. And it will allow management to get on with business while lawyers sort out the silly stuff. That's pretty much what happens now.

Serious claims will still have teeth. Today, derivative actions are often dismissed quickly as insubstantial. But sometimes, they're not. Directors take those seriously and, *a priori* as they consider difficult decisions directors get advice on what their duties require. The same would happen with ethics rules. And that process would drive the Board to want clear rules. Clarity on ethical obligations will be as valuable to Boards as is the clarity that the maximize rule provides. Vagueness will cause litigation. It always does. That's why lawyers work hard to write clear contracts (I know that's not how they read to anyone who isn't a lawyer, but trust me on this). The Board will want a clear roadmap of what is permissible and what prohibited.

Strong ethics rules will benefit everyone. The benefit of strong ethics rules to communities, consumers, the environment and posterity are obvious. They require explicit consideration of a broader concept of well-being than just economics. Socially concerned citizens will push for strong rules by buying shares and engaging the tools of shareholder democracy and derivative litigation. There is evidence that a lot of shareholders will join in trying to make their companies better citizens. In 1995, investment vehicles limited to "socially responsible investing" had roughly $700 billion under management. In 2018 the comparable figure was $12 trillion. People care, even where their money is concerned.

It's a mistake to see the benefits as one-sided. There are a number of ways in which strong ethics rules are good for companies and Boards. The most obvious is that directors are people. Some will of course argue the limited corporate role and want to avoid ethics altogether. Most won't. Directors will not want to engage in a required process of ethics formation that is transparently a sham. If they're going to do the work, most will want to really do the work. Directors also understand and feel the moral conflict of many of their decisions. Very few feel good about closing a factory and putting people out of work, even if they believe it's good economics. Ethics rules will allow directors to balance with economics a broader set of concerns. This offers the opportunity to reduce cognitive dissonance. It will be harder. That's OK. Being one of 15 or so people ultimately responsible for the actions of a company that employs thousands of people, operates in scores of communities and engages in billions of dollars in commerce *should be hard.*

Another important benefit to companies is that it will likely reduce other forms of protest against corporate actions. Today, people use many types of litigation, protest, lobbying, political grandstanding even boycotts as tools to influence the company. Binding ethics rules wouldn't eliminate all that. But it would almost surely reduce its frequency and potency. Frequency because many social concerns would be incorporated into the corporate decision making process to begin with. Process would reduce conflict. Potency of other forms of anti-corporate action would decrease because there would be a defined form of protest (an ethics derivative suit) and because the prior consideration of social concerns by the company would make it harder to portray the company as unfeeling and unreasonable — it wouldn't be.

The broadest, and perhaps most important, benefit to the corporation is that ethics rules would be a mechanism to address with finer tools human concerns about the effects of capitalism. Anger about the Paragraph One problems is already directed at corporations and at capitalism in general. Eventually, that anger will be expressed. Politics is a blunt tool. Revolution is a sledgehammer. Neither is likely to lead to solutions. Google's role in making things better is different than General Motors', which is different than the role of a giant hospital system, or Exxon. Individualized ethics rules allow responses that are specific to a company and address big problems at a concrete level — one decision at a time. Each company can be a partner in making the world better as well as richer.

The law seeks out a workable equilibrium. In the application of any set of laws, there are many technical choices that effect how the laws work in practice. The words won't mean much to non-lawyers — what is the burden of proof; does the burden shift after a *prima facie* showing; what level of specificity is required for a complaint to survive a motion to dismiss; what are the discovery limits . . . — but they make an enormous difference in what happens in court and, as a result, how people and companies act in response to a law.

Over time, all those technical elements adjust. Generally, those adjustments result in an equilibrium that is functional. It doesn't satisfy everyone. In fact, it usually dissatisfies everyone in some ways. But it works. In those instances where it doesn't, the law gets changed. It's an iterative process and it takes time.

Damage can be done as the equilibrium is found. We would need to be careful of that risk. But in this particular case, much of the work of finding the equilibrium is already done. The Business Judgment Rule has been around a long time and the current law would be a safe starting point to work out the kinks of the added ethics rules.

Will it really help?

Yes.

America has a long history of people banding together and agreeing to limit their own pursuit of self-interest: our Constitutional democracy. The Pre-Amble to the Constitution sets out the object (what government is supposed to maximize): "establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The Bill of Rights is the national binding code of ethics. We agree we can't pursue the object by infringing on a minority's freedom of speech, or religion, or right to bear arms, etc. — even if that minority is a minority of one.

We have, of course, failed many times to live up to our founding ideals. Given the size of the ambition, we're bound to. But a lot of good has been done with the tools created by the Bill of Rights. By any reasonable measure, our laws are far more just than they were 100 years ago.

Less so the economy. But the history is grounds for hope. Think of each corporate person as a political entity in itself: a sub-Leviathan. The new rules would require an exercise in democracy very similar to the formation of the national Constitution: (i) keep the maximize rule as the fundamental object of the corporate entity; (ii) require each company Board to propose a code of ethics addressing all the key areas in which the company interacts with the world; (iii) require shareholders to debate that code, propose alternatives and changes and ultimately adopt a binding ethics code for the company; (iv) require the company to maximize economic value only in a manner consistent with the ethics code; and (v) make the code enforceable by any shareholder through the courts by way of a derivative action.

The result would be that each corporate person — thousands of separate islands of social power — would reflect and be bound by the beliefs of its shareholders as to the behavior that will make it a responsible member of society. The aggregate of all that social power turned in more positive directions will make the world a better place.

And it will happen because of a radical expansion in popular control of power. Power in modern society is exercised by more than just government. Corporate decisions have tremendous influence on how we live our lives. The distribution of power away from the state and into a large number of private hands is a good thing. It protects us from tyranny. This is a fundamental article of faith of modern conservatism and it's right. However, the number of private hands exercising corporate power is shrinking. And the power is exercised for the sole purpose of maximizing profit, which hurts a lot of people and creates the conditions for many of the Paragraph One horribles. This is a fundamental article of faith of modern liberalism and it, too, is right.

The fix I propose leaves the private islands of power private. The only interference by government would be to require that the shareholders explicitly state what kind of person they want their corporation to be. The act of corporate conscience formation would be an exercise of democracy through which the principals (shareholders) give clearer and more comprehensive direction to their agents (the Board and management) about how their money is to be used. There would be hundreds of little democratic movements contributing to the creation of a wider economic conscience in society. The world in which we live would be more responsive to our collective will.

That would be a good thing. Talking together about what we value more than money; coming to a decision about how we ensure our common enterprises reflect our conscience: this is creating community. The real root of the Paragraph One problems is fear. We are afraid of losing some part of our world we just can't afford to lose. Community, at its best, is humans reaching out to others for a hand in being brave. Brave enough to do more than owe to others the respect we ask for ourselves — brave enough to give it.