Legal Personhood and the Firm: Avoiding Anthropomorphism and Equivocation

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Abstract: From the legal point of view, "person" is not co-extensive with "human being." Nor is it synonymous with "rational being" or "responsible subject." Much of the confusion surrounding the issue of the firm's legal personality is due to the tendency to address the matter with only these, all too often conflated, definitions of personhood in mind. On the contrary, when the term "person" is defined in line with its original meaning as "mask" worn in the legal drama, it is easy to see that it is only the capacity to attract legal relations that defines the legal person. This definition, that avoids the undesirable emotional associations and equivocations that often plague the debate, is important for a legally-grounded view of the firm.

Keywords: legal person, rational being, responsible subject, point of imputation, legally-grounded view of the firm

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1. Introduction

In order to become a fully operational firm in a modern market economy, an entrepreneur or an association of resource owners need to go through a relatively straightforward registration (or incorporation) procedure. This constitutive procedure creates a separate legal person (or legal entity) with the capacity for property, contract and litigation, without which firms would not be able to properly function.[1] The assignment of separate legal personality is a key aspect of law's institutional support for the firm.

Legal entity status is a necessary part of the explanation of the firm's enhanced transactional capabilities as compared to bilateral exchange. In effect, the legal system creates an efficiency-enhancing nexus for contracts that literally carries the organizational framework of the firm. By vesting ownership rights to the assets used in production in the legal entity law secures its continuity by locking-in the founders' committed capital, thereby allowing them to pledge

[1] The expressions 'legal person' and 'legal entity' are used synonymously in this paper, as are the expressions 'legal personality' and 'legal entity status'. The expressions 'registration' and 'incorporation' are used synonymously to designate the constitutive procedure by which the firm founders duly apply for and obtain the official recognition of the firm's existence by the legal system.

assets, raise finance and do business in the firm's own name (Hodgson, 2002; Blair, 2003; Gindis, 2009; Robé, 2011; Hansmann, 2013; Orts, 2013; Deakin *et al.*, forthcoming).

Strikingly, these institutional facts about the role of legal personality in the creation and operation of firms are all but absent in the theory of the firm literature. In part, this state of affairs is imputable to the general reluctance of economists to rely on legal concepts of the firm, and to sustained efforts to define the firm with little or no reference to law. Relatively little has changed since Masten (1988: 185) observed that 'economists have either downplayed or rejected outright the role of the law in defining the firm'.[2]

But the widespread lack of appreciation among theorists of the firm of the key economic advantages of legal entity status (Blair, 2004; Schanze, 2006; Iacobucci and Triantis, 2007; Kornhauser and MacLeod, 2013) can also be attributed to Jensen and Meckling's (1976) ambiguous discussion in the only classic of the genre to mention legal personality. Their dismissal of this 'legal fiction' that inevitably fuels nonsensical anthropomorphic talk of the firm's objectives and responsibilities has arguably had a lasting and damaging influence.

This article shows that these fears are unfounded once the meaning and functions of legal personality are properly understood. It is important to recognize that from the legal point of view 'person' is not co-extensive with 'human being'. Nor is it synonymous with 'rational being' or 'responsible subject'. Much of the

[2] With the notable exception of Williamson's (1991) legally-grounded discussion of discrete structural alternatives.

confusion surrounding the issue of the firm's legal personality is due to the tendency to address the matter with only these, frequently conflated, definitions of personhood in mind.

On the contrary, when the term 'person' is defined in line with its original meaning as 'mask' worn in the legal drama, it is easy to see that it is only the capacity to attract legal relations that defines the legal person. This definition severs the misleading link between the flesh-and-blood human being and the legal person, and opens the gates of the legal realm to firms and other candidates that would otherwise be excluded. Importantly, this definition avoids the undesirable emotional associations and equivocations that have all too often plagued the debate.

The rest of this paper is organized as follows. Section 2 presents Jensen and Meckling's treatment of legal personality and their associated discussion of misleading 'personalization'. Section 3 compares the underlying conception of personhood with other definitions to the found in the history of legal theory and philosophy. Building on this discussion, three views of legal personality are discussed in Section 4 that shows that the least problematic of the three is derived from the original meaning of personhood. Section 5 draws some conclusions for a legally-grounded view of the firm.

2. Misleading "personalization"

Jensen and Meckling's (1976: 311) definition of the firm as a 'legal fiction which serves as a nexus for a set of contracting relationships among individuals', where

by ‘legal fiction’ is meant ‘the artificial construct under the law which allows certain organizations to be treated as individuals’ (Jensen and Meckling, 1976: 310, n.12), is the only appearance of the concept of legal personality among the classics of the theory of the firm literature. Indeed, it is the only acknowledgement that law’s assignment of legal personality is essential to the transaction-cost minimizing nature of the firm.

Coasean theories of the firm are variations on the idea that the contractual centralization of transactions, where several input owners make bilateral contracts with a central agent, is an efficiency-enhancing institutional arrangement. Explicitly or implicitly, in most theories of the firm the central agent is assumed to be a flesh-and-blood human being (e.g., entrepreneur, employer, owner) or a group of such human beings (e.g., owners, management). For Jensen and Meckling, by contrast, the central agent is a legal entity with the legally-endowed capacity to enter contractual relations with other parties.[3]

However, this rare acknowledgement came with a warning. As they explained elsewhere, the fact that transaction costs are reduced when ‘individuals and organizations – employees, investors, suppliers, customers – contract with each other in the name of a fictional entity’ called ‘the firm’ (Meckling and Jensen, 1983: 9) should not obscure the truth that, stripped to their essentials, firms and imilar organizations are ‘pure conceptual artifacts, even when they are assigned the legal status of individuals’ (Meckling, 1976: 548).

[3] Jensen and Meckling (1976: 311, n.14) noted in this respect ‘the important role [played by] the legal system and the law in … the organization of economic activity’.

On this view, one should always be careful about the legal treatment of firms as if they were individuals, and resist the tendency to think and talk about firms as if they were individuals. While 'ascribing human characteristics to the [firm] is often a useful linguistic expedient' that has 'venerable roots in both law and economics' (Meckling and Jensen, 1983: 10), it is vital not to take what is at best a metaphorical ascription or a shorthand form of expression for something more. As Jensen and Meckling (1976: 311, emphasis in original) famously put it:

> The personalization of the firm implied by asking questions such as 'what should be the objective function of the firm', or 'does the firm have a social responsibility' is seriously misleading. *The firm is not an individual*.

The anthropomorphic practice of 'personalization' obscures the fact that firms cannot be said to 'have objectives' or 'act' in any particular way. Only individuals have purposes, act or can act. From this perspective, since pure conceptual artifacts are not the kinds of things that have what it takes to qualify as actors, claims to the contrary amount to seriously misleading category mistakes.[4] These considerations, according to Jensen and Meckling, have important implications for both economics and legal practice.

The implication for economic theory is that the textbook personalization of the firm as a profit-maximizing entity must give way to a more realistic view of

[4] A category mistake can involve presenting a thing as being of a certain kind when in actual fact it belongs to another kind, or attributing a property to something that the thing it is attributed to logically cannot have.

the ‘behavior’ of the firm. Once attention is shifted away from the ‘black box’ of the textbook firm to the actions of individual participants, the behavior of the firm can be likened to that of the market, namely: ‘the outcome of a complex equilibrium process’ in which the ‘conflicting objectives of individuals … are brought into equilibrium within a framework of contractual relations’ (Jensen and Meckling, 1976: 311).[5]

More fundamentally, for Jensen and Meckling, given that firms do not qualify as actors law’s assignment of contractual capabilities to the legal fiction serving as a nexus for these contractual relations should never be taken to imply that firms can be referents of rights and duties. This would be the gravest type of personalization. Just as all rights are ‘human rights, i.e., rights which are possessed by individuals’ (Jensen and Meckling, 1976: 306, n.6), all duties always ultimately belong to individuals. By the same token, costs and benefits can only be borne by ‘“real” as distinct from artificial beings’ (Meckling and Jensen, 1983: 10).[6]

Overall, Jensen and Meckling’s treatment of legal personality is puzzling. The commendable acknowledgement that law’s assignment of separate legal personality is essential to the transaction-cost minimizing nature of the firm is largely overshadowed by the vigorous charges against personalization. They are clearly uncomfortable with the idea that the non-human central agent must be a

[5] They acknowledged, however, that treating the firm ‘as if it were a wealth-maximizing individual’ remained useful for competitive price theory and the overall explanation of the functioning of the market system (Meckling and Jensen, 1983: 10).

[6] Likewise, wrote Meckling and Jensen (1983: 10), contrary to proponents of corporate social responsibility firms ‘can no more be responsible than can a lump of coal’.

rights-and-duties bearing entity if it is to play its efficiency-enhancing role. This implication is trivialized and downplayed in their ambiguous discussion that suggests a strong and virtually inevitable link between fictitious legal personality and misleading personalization.[7]

Jensen and Meckling's definition of the firm as a legal fiction was not picked up in the theory of the firm literature, perhaps because it was perceived to be the reason for their controversial claim 'it makes little or no sense to try to distinguish those things which are 'inside' the firm … from those things that are 'outside' of it' (Jensen and Meckling, 1976: 311). Given the literature's focus on the boundaries of the firm, their definition became a convenient foil, and the concept of legal personality disappeared from the theoretical narrative as furtively as it had appeared.

However, the rejection of personalization, that Klein and Coffee (1988: 107) called the 'reification illusion', was picked up and amplified in the new literature on the economic analysis of corporate law (Hessen, 1979; Posner and Scott, 1980; Fischel, 1982; Klein, 1982; Butler, 1989; Easterbrook and Fischel, 1991). The invitation to debunk 'metaphysical entities in law' (Posner, 1990: 186), including the concept of corporate personality, was typical of the process that Kornhauser (1989: 1449) described as a 'revolution [that] swept the legal theory of the

[7] See Ireland (2015) on the 'schizophrenia' involved in simultaneously relying on but dismissing separate legal personality.

corporation'.[8]

In this literature, as Bratton (1989: 409) observed, Jensen and Meckling's definition of the firm as a legal fiction that serves as a nexus for a set of contracting relations was 'accorded … the weight of scientific truth', and 'received … as an ontological discovery' with significant conceptual and practical implications. For years, as a result, anyone interested in both the theory of the firm and the topic of legal personality would have found little else on the subject in the field of law and economics.

3. The meanings of personhood

A long tradition in modern economics holds that the real actor, and hence the appropriate unit of analysis, is the rational individual agent (Hayek, 1955; Buchanan and Tullock, 1962; Brunner and Meckling, 1977; Pejovich, 1990; Jensen and Meckling, 1994; Furubotn and Richter, 1998; Werin, 2003). As real beings, individuals are legal persons by virtue of their 'natural' capacity to attract rights and duties. Any extension of this capacity to non-humans, including both groups of individuals and inanimate things, is an artificial distortion of reality that bears the 'unnatural' flavor of anthropomorphism.

The notion of personhood underlying this position can be usefully compared

[8] The expression 'corporate personality' normally refers to the legal personality of corporate bodies such as associations, clubs, charities, business firms, trade unions, cooperatives or municipalities, and is often (misleadingly) called 'artificial personality' to mark the difference with the 'natural personality' of human beings.

with other definitions to be found in the long history of the legal and philosophical debate. Since persons are basic categories of what Smith (2004: 8ff) called law's 'ontological inventories', decisions concerning who or what counts as a 'person' from the legal point of view have profound implications. Just as the chemist will refer to the periodic table and see the world as ultimately divisible into basic natural kinds, by analogy the legal mind will refer to 'the persons that populate the legal world' (Vining, 1978: 143).

As a result, MacCormick (2007: 77) argued, it is difficult to gain 'an understanding of law and how it works' without some 'reflection on the idea of a person'. The distinction between 'persons' and 'things', or 'subjects' and 'objects', is indeed fundamental to the construction of law's periodic table. Since the earliest written codes of law in recorded history these legal categories have been indispensable building blocks of every system of law and political economy (Radin, 1982; Iwai, 1999; Davies and Naffine, 2001; Trahan, 2008).[9] Importantly for the Western legal tradition, they were central to Roman law.

The term 'person' derives from the Latin *persona* meaning 'actor's mask'. This is why the Roman lawyer found it suitable to denote the subject of civil rights and duties (Duff, 1938; Derham, 1958; Fuller, 1967; Stoljar, 1973; Hollis, 1985; Poole, 1996). A person, as Hallis (1930: xix) explained, 'was one who could be a party in a legal dispute, one who could, so to speak, act in a legal drama'.

[9] As Blackstone (1766: 16, emphasis in original) wrote, the fact that 'the objects of dominion or property are *things*, as contradistinguished from *persons*', cannot be disputed, and the classical aphorism attributed to Gaius, that law pertains to persons, things, and actions, remains central today.

Accordingly, legal persons were the actors that courts gave legal standing to as *dramatis personae*. Closely related to the notion of *persona* was the concept of *capacitas* that referred to 'a status conferred upon citizens for the purpose of enabling them to participate in the economic life of the polity' (Deakin, 2006: 318).

Not all human beings, however, had legal standing or the capacity to engage in the economic life of the polity. In early Roman civil law, for instance, a slave was a *res* (Watson, 1967), a thing that was owned rather than a *persona*, and therefore did not have the right to own property or initiate any legal actions. Although in later Roman law slaves acquired some limited rights, including the ability to have quasi-marital relationships (Johnston, 1999), it was clear that they were not persons in the then legally, socially and economically meaningful sense of possessing freedom, citizenship and family rights (Stein, 1999).

This conception of personhood as legal identity based on social status is not confined to the distant past but is central to any discussion of legal personality (Pound, 1959). Significantly, over the course of the nineteenth century, both the abolition of slavery (1833 in the British Empire and 1865 in the United States) and the abolition of coverture for married women (1880s in the United Kingdom and the United States) involved a process of acquisition of separate legal personality. Before their emancipation, these categories of human beings could not own property or be parties to contracts in their own right.[10]

[10] The legal personality of foreigners also had to be progressively defined in each jurisdiction (Mark, 2001).

The original accent on the social face that each member of society wears in a legal or public forum, that List and Pettit (2011: 171) call the 'performative conception of personhood', contrasts with the definition of the person as an 'individual substance of a rational nature' given in the sixth century by the theologian Boethius (cited in Marshall, 1950: 472).[11] In fact, as Groarke (2010: 299) observed, 'the most striking philosophical feature of the Boethian person is that the private and the public components of the person are separated from each other'.

A comparable position can be found in Locke's (1975 [1690]: 335-336) claim that 'person stands for … a thinking, intelligent being', and that 'consciousness makes personal identity' not only at any point in time but also over time.[12] Although Locke also argued that 'person … is a forensic term appropriating actions and their merit' that 'belongs only to intelligent agents capable of a law' (Locke, 1975 [1690]: 346), he was less concerned with the legal practices of ascribing actions and their merit to specific individuals than with the conditions under which these practices would make sense at all (Poole, 1996).

Distinguishing the 'metaphysical notion' of the person as a conscious, rational agent from the 'moral notion' of the person as an accountable agent

[11] This definition was endorsed by Aquinas in the thirteenth century, giving it 'almost authoritative standing' (List and Pettit, 2011: 171), precisely at the time of Innocent IV's famous definition of the corporation as a *persona ficta*. Innocent, in other words, was denying that the corporation could be a Boethian person.

[12] Like the Boethian person, Locke's person is an autonomous and private being, confined within a 'first-person world' (Davis, 2003: 6).

possessing rights and responsibilities, Dennett (1976) proceeded to examine the conditions under which the two notions overlap. Clearly, he pointed out, there are 'conditions that exempt human beings from personhood, or at least some very important elements of personhood' (Dennett, 1976: 175).

Infants, minors, the mentally disabled and those declared legally insane normally cannot be parties to contracts, make legally binding decisions by themselves or be held fully accountable for their actions (Honoré, 1999; Cane, 2002). Of course, this is not to deny that even when their actions cannot be imputed to them for these valid reasons, all human beings are 'persons' not only in common parlance (Teichman, 1985) but also in the broad Kantian sense of 'ends in themselves, i.e., as something that may not be used merely as means' (Kant, 2002 [1785]: 46).

4. From human beings and responsible subjects to points of imputation

This discussion reveals that there are three notions of personhood that need to be carefully considered in any examination of legal personality.[13] First, there is the ordinary language view that 'person' and 'human being' are interchangeable or co-extensive (Teichman, 1985). This belief is consistent with the broad Kantian sense, and is axiomatic in discussions of 'human rights' in which the fact that human beings are the 'natural' subjects of rights from birth onwards by the mere fact of being born human, irrespective of considerations regarding their mental or physical

[13] See Naffine's (2003) useful discussion of these three types.

state, is normally taken for granted (Ohlin, 2005).[14]

For proponents of this approach, whose periodic table contains all human beings (and possibly the unborn), the quality of personhood is not attributed by law to human beings (Beitz, 2009). On the contrary, as natural law theorists have long argued, positive law is subordinated to the law founded in human nature (Del Vecchio, 1920). Human beings, from this perspective, always have ontological, explanatory and moral priority (Finnis, 2000).

As if to illustrate the long-standing dispute between natural law and legal positivism, most if not all jurisdictions clearly distinguish between the human being and the 'responsible subject' (Naffine, 2004: 628). The actions of a person thus defined are guided by reason, and this implies, by virtue of what Frankfurt (1969: 829) called 'the principle of alternate possibilities', both moral and legal responsibility. The responsible subject is the 'ideal legal actor' (Naffine, 2009: 67) or the 'default legal person' (Blumenthal, 2007: 1138).

In fact, many actual legal rules concerning property, contract, standing, accountability, and so on, rely on this second view of the person, even though this more restrictive definition allows only a subset of human beings – those of a certain age and in sufficient possession of their faculties – to be fully admitted the

[14] The principle that 'everyone has the right to recognition everywhere as a person before the law', enshrined in Article 6 of the United Nations' Universal Declaration of Human Rights, is intended to ensure that every human being is treated as a subject rather than an object of law in every jurisdiction.

legal realm.[15] When personhood is equated with the responsible subject law's periodic table shrinks.

Much of the confusion surrounding the issue of the firm's legal personality is due to the tendency to address the matter with only these two, all too often conflated, definitions of personhood in mind. When the term 'person' is defined as either 'human being' or 'responsible subject', it is clear that the personality attributed by law to anything else is at best a fiction. This is essentially Jensen and Meckling's position. However, this inclination to frame the debate exclusively in terms of 'human-size persons' (Rovane, 1998: 136) has obscured the fact that there is a third and more useful possibility.

When the term 'person' is defined in line with its original meaning as 'mask' worn in the legal drama, it is easy to see that 'it is [only] the legally-endowed capacity to attract legal relations, and hence bear rights and duties, which defines the person' (Naffine, 2003: 366). From this perspective, legal persons are law's essential 'points of reference' (Kocourek, 1927: 57) or 'points of imputation' (Kelsen, 1945: 99) for rights and duties that arise in legal relations.

A distinctive characteristic of this definition is that it severs the links between the flesh-and-blood human being and the legal person. With the additional separation between the legal person and the ideal responsible subject, the concept of legal personality becomes 'wholly formal' (Tur, 1987: 121). As a result, legal persons may be 'of as many kinds as the law pleases' (Salmond, 1902: 344). This

[15] Human beings are not born with complete legal personality but gain it by degrees as they grow up 'by acquiring rights, powers, and duties, which gather cumulatively' (Tur, 1987: 123).

conception of the legal person expands law's periodic table by opening the gates of the legal realm to candidates that would otherwise be excluded.

Alongside firms of various types, this includes foundations, municipalities, states, regional organizations, and international organizations (Wolff, 1938; Aufricht, 1943; Frug, 1980; Tiunov, 1993; Paasivirta, 1997), as well as less obvious things such as idols, temples and ships (Duff, 1927; McDougal *et al*., 1960; Collier, 1992). Further extensions to trees, animals, species, artificial intelligences, computers and electronic agents have been proposed (Stone, 1972; Varner, 1987; Solum, 1992; Allen and Waddison, 1996; Wise, 2001; Teubner, 2006).

On this view, that helps 'describe with simplicity and accuracy all the relevant phenomena of the legal system' (Nékám, 1938: 70), there is no essential difference between the legal personality attributed under certain conditions to human beings and the legal personality attributed under different conditions to groups of human beings or organizations such as firms.[16] As Deakin (2012: 115-116) explained, 'it is no more a 'fiction' to assign legal personality to organisational structures than it is to grant it to natural persons'. In both cases, the capacity to attract rights and duties is not 'natural' if this term is taken to mean 'pre-legal'. The assignment of the capacity to hold rights and duties is one of the

[16] Who or what is regarded as a legal person, and the number and quality of the rights and duties thus recognized, will depend on the changing social and political evaluation of the given community.

constitutive roles of law.[17]

Like the legal realm itself, legal personality is always 'artificial', but this does not mean that it is 'fictitious' (Machen, 1911; Dewey, 1926; Fuller, 1967). Accordingly, as Koessler (1949: 449) put it, speculations about the reality or unreality of legal personality assigned by law to the firm 'have no more sense than speculations about the reality or unreality of the conception of property or of other established institutions of a legal nature'.

Adopting this view does not imply that the attribution of legal personality to any inanimate thing, living creature or association of human beings is wholly unproblematic, as is clear from the unresolved dispute concerning animal rights (Sunstein and Nussbaum, 2004; Kurki, 2015) or the currently intense American debate regarding the constitutional rights of business corporations (Ripken, 2011; Adelstein, 2014). But by creating the conditions in which a discussion of these issues is possible without the equivocations that often plague the debate, many misunderstandings can surely be avoided. It is important to understand, as Dewey (1926: 656) explained, that

> what 'person' signifies in popular speech, or in psychology, or in philosophy or morals, [is] as irrelevant, to employ an exaggerated simile, as it would be to argue that because a wine is called 'dry', it has the properties of dry solids; or that, because it does not have those properties, wine cannot

[17] See Gindis (2009), Lawson (2014) and Deakin *et al.* (forthcoming) for a more detailed discussion of law's constitutive role.

> possibly be ‘dry’. Obviously, ‘dry’ as applied to a particular wine has the kind of meaning, and only the kind of meaning, which it has when applied to the class of beverages in general. Why should not the same sort of thing hold of the use of ‘person’ in law?

The fear of falling prey to the reification illusion or committing a fatal category mistake disappears when the term ‘person’ is purged from its meanings derived from ordinary language or psychology or morals. Under these conditions, a discussion of the functional role and economic value of law’s assignment of legal personality becomes possible.

5. Concluding comments

When the law treats the firm as a ‘person’ nothing more than the fact that the firm *has* (not *is*) a point of imputation for rights and duties that arise in legal relations should be implied. The point of imputation is the legal entity in which ownership rights over assets used in production are vested, in whose name contracts are made, and thanks to which the firm has standing in court. The constitutive legal procedure that creates this efficiency-enhancing central contractual agent, entirely distinct from all of the human beings involved, is truly what Spulber (2009: 152) described as a ‘foundational shift’.

The assignment of legal entity status transforms what is fundamentally a specialized economic undertaking into something that can act as a unit in the legal scheme, and it is this unified capacity for property, contract and litigation that

carries the organizational framework of the firm (Schanze, 2006; Deakin, 2015). In modern market economies, this holds for all observed types of firm (entrepreneurial or managerial, capitalist or cooperative, nonhuman asset-intensive or human asset-intensive). Debates about what drives the distribution of types do not alter this institutional fact.

For all types of firm the value of operating as a legal entity lies in the separation that it introduces between the assets locked-in to guarantee the firm's contractual commitments, and the human beings involved (Hansmann and Kraakman, 2000; Rock, 2006; Blair, 2012; Deakin *et al.*, forthcoming).[18] As compared to bilateral exchange, the firm's enhanced transactional capabilities stem from the fact that its commitments can indefinitely survive changes in its membership. Armed with this credible commitment the firm's founders can pledge assets, raise finance and do business in the firm's own name, such that some even thrive.

It is important to recognize that without the device of legal personality firms would be unable to own assets, contract with one another, merge, and act in other market-like ways. Most of the firm's activities would accordingly be difficult to sustain, if possible at all. The inclusion of legal personality in the theory of the firm narrative is therefore unavoidable (Gindis and Hodgson, 2015), and further developments of the legally-grounded view of the firm, that Orts (2013) calls the 'institutional theory of the firm', are warranted.

[18] The degree of separation will depend on the type of legal entity.

Contrary to the widespread view among economists that legal concepts of the firm are not only trivial but also likely to misdirect attention away from the economic forces at work, this article has shown than the advancement of our understanding of firms and markets requires significantly greater engagement with fundamental legal concepts. It is precisely the lack of such an engagement that explains the lasting influence of Jensen and Meckling's ambiguous discussion of personalization. The clarification of the legal concept of personhood proposed in this article is necessary if the tendency to downplay or ignore the role of law in constituting the firm is to be reversed.

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