The Corporation as Scapegoat: The Perils of Corporate Personhood

Aka **Grand Theft Corporation**

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ABSTRACT

My essay examines the practice of attributing moral and legal responsibility to corporations and its potential for abuse. I examine three ways in which the idea of corporate moral and legal responsibility has been exploited to shield people in the corporation who commit wrongful acts from the consequences of their acts; to try to abridge the constitutional rights of natural persons; and to expropriate the shareholders of corporations. In the process, corporate moral and legal responsibility may obscure actual responsibility, and the idea of the personhood of the corporation may depersonalize shareholders and managers and strip them of their rights.

> “I will believe corporations are persons when the State of Texas executes one” -- Anonymous occupy protester.

> "When *I* use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."
> "The question is," said Alice, "whether you *can* make words mean so many different things."
> "The question is," said Humpty Dumpty, "which is to be master—that's all."

It is a truism that any act performed by the corporation is really an act performed by one of its managers or employees on its behalf. Nevertheless in our everyday speech we regularly attribute responsibility for those acts to the corporation itself. This practice may be unavoidable. As F. W. Maitland noted in 1900, calling a particular type of contractual relationship a “corporation” is “a mere labour-saving device like stenography or the mathematician’s symbols” (Hessen. 1979: 42). But despite the sound practical reasons for our linguistic and legal conventions, we should not blind ourselves to their dangers, some of which I propose to explore here. I examine three cases where I believe the anthropomorphization of the corporation has become a source of mischief or manipulation or abuse.

I am not the first person to make this argument about the dangers of treating the corporation as a moral agent. The issue is part of an ongoing debate among business ethicists about corporate moral agency. But Manny Velasquez’s (2003) warning deserves special mention because of the great care and lucidity with which he debunked the idea that corporations can be morally responsible for their acts and his vivid account of wrongdoing at Santa Clara-based National Semiconductor.

National Semiconductor designed and manufactured computer chips. In 1984, the Department of Defense charged that, over three years, the company had sold it some 26 million computer chips that has not been properly tested and then had falsified records to cover up the fraud. These potentially defective chips had been placed in aircraft guidance systems, nuclear weapons systems, guided missiles, and other critical systems. Potentially over one hundred employees participated in the cover-up. National Semiconductor agreed to pay $1.75 million in penalties, but it refused to turn over the names of any of the individuals who had been carried out the illegal actions.

In defense of this settlement, the company's CEO, Charles Sporck, relied on the argument that I criticize here. He stated that the responsibility for the wrongful actions belonged to the company, not to any individual executives or other employees: "We have repeatedly said that we accept responsibility as a company and we steadfastly continue to stand by that statement." A spokesman for the company said: "We will see [that company employees] are not harmed. We feel it's a company responsibility, [and this is] a matter of ethics" (Velasquez 2003: 534-5). This essay shows that, despite its veneer of academic respectability, this argument is nothing more than a subterfuge to protect the guilty from the legal consequences of their actions.

Corporations are complex structures. It is hard to determine which managers or employees bear the actual responsibility for an act of the corporation. It is also hard to predict how different constituents of the firm will be impacted by regulatory or legal actions against the firm. And it is hard for an outsider to discern the actual relationships, rights and duties of the parties or constituencies that make up the corporation. The practice of attributing moral or legal agency to the corporation has the great virtue of simplifying discourse about the corporation. But, like all simplification it distorts the truth. It makes the actual workings of the corporation

more opaque. Worse it creates overconfidence that we understand what is going on in the black box of the corporation and where moral and legal responsibility actually lies. As a result, as has been said about the London *Times*, the rarefied jurisprudence of the corporation or esoteric discourse about corporate ontology are an example of the upper classes talking to one another without being overheard. The resulting confusion creates temptations for insiders to exploit outsiders. The idea of corporate agency or responsibility, in skillful hands, can be used to deepen this confusion for profit or advantage

In this paper, I examine three ways in which the idea of corporate responsibility has been exploited in this way. First, I illustrate how it has been used to shield the people responsible for acts from the legal consequences of those acts. Second, I describe how it has been used to try to disguise the abridgment of constitutional rights. And, finally, I show how it can be used as part of a strategy for dispossessing or expropriating the shareholders of corporations.

I.

How corporate legal responsibility creates a responsibility deficit

In the United States, for over a century, corporations have been subject to criminal as well as civil liability for the wrongful actions of natural persons they employ. In a recent study of prosecutions of corporations, Brandon Garrett (2014) notes that "few foreign countries have anything like the broad standard for corporate criminal liability that the United States has long had in federal courts."

> Corporate criminal liability is a form of American Exceptionalism. Most countries in Europe and the world lack corporate criminal liability generally and only recently have enacted a handful of specific corporate crime statutes. Foreign countries impose civil regulatory fines and individuals may be prosecuted, but firms rarely face prosecution. (Garrett 2011: 1777-8).

Another case of American exceptionalism is the discretion enjoyed by Federal prosecutors. They "possess extraordinarily wide discretion as compared to their counterparts around the globe" (Garrett, 2011: 1778).

Many business ethicists applaud the trend for corporations (*qua* corporations) to be held liable for the actions of their employees. They are also attracted to the related idea of corporate "moral" agency and responsibility, though perhaps mostly for pragmatic reasons. Sometimes, because of the complexity of the corporation, it is difficult to pin down who in the corporation actually made and/or carried out illegal and unethical decisions. Therefore, to use Patricia Werhane's (1989: 821) phrase the corporation may be let off the "moral hook." Part of the appeal of the idea that corporations can be morally responsible as distinct from its managers and employees then arises from a perceived *responsibility deficit* when no responsibility can be assigned to individual members of the corporation (Ronnegard 2013: 95).

The US practice of holding corporations criminally and civilly liable for wrongdoings of their managers or employees provides a natural experiment for assessing whether corporate responsibility cures -- or aggravates – this responsibility deficit. In this section, I argue that this innovation, holding corporations morally and legally responsible, rather than achieving its goal of holding corporate officials accountable for their misdeeds by giving prosecutors more

weapons or tools for law enforcement, has inadvertently had the perverse result of making them less accountable. The prosecution of the corporation has become an alternative to the prosecution of individual wrongdoers rather than a means of strengthening or supplementing it. Effectively, the practice of holding corporations liable for the wrongdoing of their executives has created a scapegoat which diverts legal responsibility from the executives, managers and employees who have committed wrongful acts. As Velasquez (2003: 15) warned: "if we accept the view that moral responsibility … rests with the corporation, we will be satisfied with blaming and punishing only the corporate entity."

Over the past two decades or longer, there has been a shift in the focus of Department of Justice and the Securities & Exchange Commission way from prosecuting managers to prosecuting companies and other institutions.[1] As US District Judge Jed S. Rakoff (2014) says, "It is true that prosecutors have brought criminal charges against companies for well over a hundred years, but until relatively recently, such prosecutions were the exception, and prosecutions of companies without simultaneous prosecutions of their managerial agents were even rarer." He told the Wall Street Journal that when he was a prosecutor in the 1970s companies were almost never charged (Rothfeld 2014). "It was considered a failure if you thought a crime was committed not to be able to prove it against the individual." He said the

[1] "Between 2001 and 2012, no individuals were charged in 65% of 255 cases in which the Justice Department reached deferred-prosecution agreements or nonprosecution agreements, which allow firms to avoid criminal convictions, according to an analysis of data by Brandon Garrett, a University of Virginia law professor, in his coming book "Too Big to Jail: How Prosecutors Compromise with Corporations." At the same time, no employees were charged in 75% of 125 cases in which public companies were charged and convicted or reached plea agreements over that period, Prof. Garrett found" (Rothfeld 2014).

deterrence of crime achieved by charging companies "doesn't remotely compare" with putting people in jail."

This trend to prosecuting companies passed largely unremarked until, in September 2009, the same Judge Rakoff created a sensation by refusing to rubber stamp a settlement reached between the Securities and Exchange Commission and Bank of America. The SEC had charged Bank of America with defrauding its shareholders. According to the SEC, when Bank of America took over Merrill Lynch and Washington Mutual, its proxy statement said that it would bar Merrill from paying discretionary year-end bonuses. Nonetheless, in violation of this promise, Bank of America had permitted Merrill to pay up to $5.8 billion in bonuses. After negotiations, the SEC announced a settlement with Bank of America under which Bank of America paid a $33 million civil penalty, and no officer or employee paid anything or was otherwise disciplined (Coffee 2009).

In a stinging rebuke to the SEC, Judge Rakoff rejected the settlement and sent it back to be amended. He declared that he could not certify that the settlement was fair and reasonable or in the public interest. He said the parties' submissions to the Court "leave the distinct impression that the proposed [settlement agreement] was a contrivance designed to provide the S.E.C. with the facade of enforcement and the management of the Bank with a quick resolution of an embarrassing inquiry – all at the expense of the sole alleged victims, the shareholders" (Rakoff 2009: 8).

It is worth reviewing Rakoff's objections to the practice of bringing actions solely against the corporation. He was particularly scathing in his comments on the settlement's treatment of shareholders who, after all, were the supposed victims of Bank of America's behavior. The settlement, he declared, was effectively a "proposal to have the victims of the violation pay an

additional penalty for their own victimization.”. He said that the settlement was “not fair, first and foremost, because it does not comport with the most elementary notions of justice and morality, in that it proposes that the shareholders who were the victims of the Bank’s alleged misconduct now pay the penalty for that misconduct. The S.E.C. admits that the corporate penalties it here proposes will be “indirectly borne by [the] shareholders…” (Rakoff 2009)

The agency defended the settlement against the charge that it was unfair to shareholders. This was justified, the SEC said, because “[a] corporate penalty ... sends a strong signal to shareholders that unsatisfactory corporate conduct has occurred and allows shareholders to better assess the quality and performance of management.” Rakoff subjected this defense of the settlement to withering scorn: The “notion that Bank of America shareholders, having been lied to blatantly in connection with the multi-billion-dollar purchase of a huge, nearly-bankrupt company, need to lose another $33 million of their money in order to ‘better assess the quality and performance of management’ is absurd,” he said.

Rakoff also criticized the SEC’s decision not to prosecute the individual managers and executives who made the decisions in question. He noted that the settlement “would effectively close the case without the S.E.C. adequately accounting for why, in contravention of its own policy … it did not pursue charges against either Bank management or the lawyers who allegedly were responsible for the false and misleading proxy statements”. Rakoff questioned the propriety of allowing “the very management that is accused of having lied to its shareholders to determine how much of those victims’ money should be used to make the case against the management go away”. He complained that, under the settlement, “the parties were proposing that the management of Bank of America – having allegedly hidden from the Bank’s shareholders that as much as $5.8 billion of their money would be given as bonuses to the executives of Merrill who

had run that company nearly into bankruptcy – would now settle the legal consequences of their lying by paying the S.E.C. $33 million more of their shareholders' money (Rakoff 2009).

Another critic of the settlement, Professor Coffee (2009) was even blunter: He labeled the whole process a "de facto sale of indulgences" and said SEC enforcement practices "invite corporate executives to purchase immunity for themselves with their shareholders' money."

Rakoff's peroration begs to be quoted in full:

> Finally, in any case like this that touches on the transparency of financial markets whose gyrations have so depressed our economy and debilitated our lives, there is an overriding public interest in knowing the truth. In much of the world, propaganda reigns, and truth is confined to secretive, fearful whispers. Even in our nation, apologists for suppressing or obscuring the truth may always be found. But the S.E.C., of all agencies, has a duty, inherent in its statutory mission, to see that the truth emerges; and if fails to do so, this Court must not, in the name of deference or convenience, grant judicial enforcement to the agency's contrivances (Rakoff 2009)[2]

[2] Over one year later, on 28 November 2011, Judge Rakoff rejected a similar settlement, or "contrivance," as he called it. The SEC had proposed a $75 million settlement with Citigroup for failing to inform its shareholders of more than $40 billion of subprime mortgage investments. This time, the SEC pierced the corporate veil and went after two former officers of Citigroup. The former o0fficers settled. Gary Crittenden, who made $32 million in 2007-8 agreed to pay $100,000 and another former officer agreed to a fine of $80,000. Rakoff noted that the settlement "leaves the defrauded investors substantially short-changed." As Aaron Ross Sorkin wrote, "On its face, the settlement looked like a victory for the good guys. The S.E.C. was finally holding Wall Street responsible for misleading shareholders." "But take a step back and ask this question: Who is paying that $75 million fine?" Sorkin supplied the answer: "The answer is Citigroup's shareholders — the same people who were arguably defrauded by its failure to disclose its exposure to subprime mortgages in the first place." In June 2014, the Court of Appeals for the Second Circuit in New York slapped Judge Rakoff's wrist saying he had "abused" his discretion (Protess & Goldstein, 2014), but Rakoff had made his point.

The key takeaway of this case is captured by Rakoff's words – "façade of enforcement", "contrivance(s)," "propaganda" – all versus the *truth*. The SEC pretended to prosecute the malefactors and the malefactors pretended to pay a penalty.[3] The whole transaction reeked of fraud. This fraud was possible only because pf public confusion about who would actually bear the cost of the penalty.

It is true that the S.E.C, was understaffed. It had a vast caseload. An angry public was baying for bankers' blood. The agency knew that lawsuits against individuals would be hard-fought and would tie up resources. If the S.E.C. were to just pursue cases against individuals, according to a former chairman of the S.E.C., Harvey Pitt, "they will be getting far less settlements, which means they will have to litigate more cases, which means they will bring less cases" (Sorkin 2010). It is easy to sympathize with the S.E.C., but impossible to excuse its behavior. The SEC chose to provide the pretense of enforcement rather than the real thing.

Of course, the fact that the SEC and the Bank of America were play-acting didn't mean that no one was harmed. As Rakoff (2014) pointed out, "from a moral standpoint, punishing a company and its many innocent employees and shareholders for the crimes committed by some unprosecuted individuals seems contrary to elementary notions of moral responsibility." This is an open secret. Thirty-five years earlier, Professor Coffee (1981:406) had pointed out that: "Axiomatically, when corporations do not bear the ultimate cost of the fine; put simply, when the

[3] I call them "malefactors", but the truth is that we will never know wherher they acted illegally. That is another price we pay for the SEC's practice of giving a get out of jail free card to top executives. With a lot of justice, the *Wall Street Journal* (2015) has called many of these prosecutions "Washington shakedowns." The editorial page has argued that the settlements were extorted from banks anxious to avoid "unpleasant publicity and a juror pool angry about bank bailouts."

corporation catches cold, someone else sneezes." "Only the most obtuse judge can fail to understand that such penalties will ultimately fall on innocent parties." (Id.). Velasquez (2003: 12) said that "in fact it is not possible to impose blame or punishment upon an organizational structure without having that blame or punishment fall on the shoulders of the corporation's members." More recently Hasnas (2014: 17) has written that "Any punishment directed toward a corporation necessarily passes through its nominal facade to fall on some set of human beings." This point is obvious to us, but it is much less apparent to a normally rationally ignorant public "in one of its periodical fits of morality" (Macaulay 1831:547).

It is not just the shareholders who were harmed. Another innocent bystander that was hurt by this transaction is the rule of law. It seems reasonable to speculate that the punishment meted out by the SEC to Bank of America will have little deterrent effect because the decision makers were not punished. That is Rakoff's (2014) view: "Although it is supposedly justified because it prevents future crimes, I suggest that the future deterrent value of successfully prosecuting individuals far outweighs the prophylactic benefits of imposing internal compliance measures that are often little more than window-dressing," (Though his target here is primarily a related practice of deferred prosecutions). Nor is it likely that the punishment will be sufficient to induce shareholders to rein management in.[4] The last word in this section belongs to Rakoff (2014): "Just going after the company is also both technically and morally suspect. It is technically suspect because, under the law, you should not indict or threaten to indict a company unless you

[4] "Imposing liability on principals who cannot monitor their agents is unlikely to reduce accident costs and, as Sykes … notes, may actually decrease safety by lowering the expected liability of agents for their own negligence..… As Arlen and Carney … note, vicarious liability may have little deterrent effect when top managers charged with supervising the firm act on their own behalf in committing misconduct" (Kraakman 2000:672).

can prove beyond a reasonable doubt that some managerial agent of the company committed the alleged crime; and if you can prove that, why not indict the manager?"

II.

Silencing Speech by Indirection

We have just seen how corporate managers can avoid their personal legal liability by shifting it to the corporation. In this section, we will see how the legal rights of natural persons can be restricted by imputing them to a corporation. The example I discuss here is the Fifth Amendment bar on Congress restricting freedom of speech. In the well-known *Citizens United* case, the Supreme Court ruled by 5-4 that corporations could not be prevented by law from engaging in election-related speech, e.g., expressing views in a Presidential or Congressional race.[5]

Citizens United is and was a conservative lobbying group that is organized as a corporation. In the 1998 Presidential election, the group wanted to air a film critical of then Sen. Hillary Clinton and to promote the film on broadcast and cable television. *Hillary* was released in theaters and on DVD, but Citizens United wanted to increase distribution by making it available through video-on-demand. The Federal Election Commission (FEC) sued Citizens United on the grounds that its actions violated the McCain-Feingold (BCRA) Act's prohibition on electioneering by corporations and labor unions. An electioneering communication is defined

[5] *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). The decision did not affect limits on contributions from the corporate treasury to candidates for political office.

as “any broadcast, cable, or satellite communication” that “refers to a clearly identified candidate for Federal office” and is made within 30 days of a primary or 60 days of a general election. The law makes it a felony for all corporations—including nonprofit advocacy corporations—to engage in such electioneering on pain of criminal sanctions (Kennedy 2010).

In the mind of much of the public, the issue at stake in *Citizens United* became defined as whether corporations are entitled to the same rights as natural persons. Populist rage was stoked by the obvious absurdity of the equation of corporations with natural persons. But neither the First Amendment nor the majority opinion mentions “persons” (Sepinwall 2014). Nor did the Court’s decision in any way depend on the corporation being seen as a person. Rather it turned on the language of the First Amendment. The Free Speech clause does not grant persons or even citizens a right to free speech. It simply bars Congress (and by extension the states) from abridging anyone’s freedom of speech.[6] Indeed, as Justice Stevens (id.) admitted for the minority, “Recognizing the weakness of a speaker-based critique of *Austin*,[7] the Court places primary emphasis not on the corporation’s right to electioneer, but rather on the listener’s interest in hearing what every possible speaker may have to say.”

Although Stevens evidently grasped this point, he did nothing to disabuse the public of this error. Instead, he devoted much of his dissent to ridiculing the pretensions of the corporation to personhood. In his 90-page dissent, part of which he read from the bench to emphasize his displeasure, he implied that the majority opinion depended on the “conceit that corporations must

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[6] “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”

[7] Austin was overruled by *Citizens United*. See *Austin* v. *Michigan Chamber of Commerce*, 494 U. S. 652 (1990).

be treated identically to natural persons in the political sphere" even though the majority reached its decision without relying on any such assumption. He complained that "The fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it."

Stevens faced a twofold task. He had to explain why corporate electioneering was (1) "likely to impair compelling governmental interests," and (2) "why restrictions on that electioneering are less likely to encroach upon First Amendment freedoms." The first prong required that he show that corporate speech menaces our democracy. Stevens argues that corporate electioneering would corrupt our politics and would compel shareholders to fund corporate speech with which they disagreed. The second prong required that he disparage the likely constitutional harms from restricting corporate speech. Both goals required that Stevens turn up the volume of his anti-corporate rhetoric.

In order to meet the second prong – i.e., to justify his claim that the harm to the Constitution would be minor -- Stevens had to differentiate corporations from natural persons. Thus he pointed out that:

- "the speakers in question [corporations] are not real people…"
- [corporations] have no consciences, no beliefs, no feelings, no thoughts, no desires.
- [corporations] are not themselves members of "We the People" by whom and for whom our Constitution was established.
- Corporate speech, however, is derivative speech, speech by proxy.
- [Advocacy by corporations] bears "little or no correlation" to the ideas of natural persons or to any broader notion of the public good.

The heart of Stevens' argument was that the restrictions on electioneering did not raise any constitutional concerns because they only impacted artificial persons. The restrictions, he said: "impose only a limited burden on First Amendment freedoms … because they leave untouched the speech of natural persons."

But this claim is clearly false. Notwithstanding Stevens' denials, natural persons *were* impacted by the law. Of course, corporations are legal fictions, and in themselves they don't merit constitutional protections, but corporations are also a means by which natural persons may exercise their speech. The McCain-Feingold Act made such speech a felony. It was left to Justice Scalia to rebut Stevens' claim that what was at stake was merely corporate speech. In his concurrence, he wrote that "activities are not stripped of First Amendment protections simply because they are carried out under the banner of an artificial legal entity…. [T]he individual person's right to speak includes the right to speak in association with other individual persons."

Stevens got the causation reversed. The corporation has never enjoyed constitutional protection by virtue of its legal personhood or, least of all, because of any supposed resemblance to natural persons. Rather the corporation has for limited purposes been deemed a fictitious person because that is an efficient way of protecting the constitutional (and other) interests of the natural persons comprising it. Thus, corporate personhood was just a red herring. The proper question before the Court was whether McCain-Feingold unconstitutionally trammeled the free speech rights of natural persons who had associated in corporate form.

This point was appreciated from the outset. The courts that invented corporate personhood always firmly anchored the practice in the understanding that the corporation was an association of individuals. As Sepinwall (2014) reminds us, in the foundational *Santa Clara Railroad* case of 1883 said that a corporation was nothing other than an association of individuals, who "do not,

because of such association, lose their rights to protection, and equality of protection…. So, therefore, whenever a provision of the constitution or of a law guaranties to persons protection in their property, or affords to them the means for its protection, or prohibits injurious legislation affecting it, the benefits of the provision or law are extended to corporations; not to the name under which different persons are united, but to the individuals composing the union."

As Robert Hessen (1979:46) has pointed out, "anyone who proposes to deny or destroy the rights of a corporation is really attacking individual rights." I may have misread Stevens' motives. But even if they were not exactly as I have speculated, *Citizens United* illustrates how the concept of legal personality might be abused. Short of consigning the jurisprudence of corporate personality to oblivion (my own preference), the obvious antidote would be for the courts to pierce the corporate veil whenever the constitutional rights of the members of the corporation may be at stake.

III.

Grand Theft Corporation

My final example is how the entity theory of the corporation has been used to try to oust shareholders from what some see as their privileged position in the corporation. Many progressive scholars see corporations as potential instruments for great good in society. But this potential is under-exploited because managers are severely constrained by their duties to shareholders. So if corporations are to address pressing social needs, they must first be liberated

from their shareholders. The entity theory of the corporation is seen as one promising tool for effecting this backdoor socialization of the corporation. [8]

The pioneer in this use of the entity theory of the corporation for this purpose is Merrick Dodd. Dodd's (1932) essay in his famous debate with Adolph Berle has served as a template for subsequent versions. According to David Millon (1990: 217-8), Dodd "demonstrated how the natural entity idea could provide a theoretical basis for corporate social responsibility."

> Dodd's article presented a solution that depended on an entity theory of the corporation. If management's role was to act solely as agent of the shareholders, failure to promote shareholder interests over other competing interests would violate management's fiduciary responsibility. If, however, management were the agent of a corporate entity distinct from the shareholder aggregation and that entity were obliged to be a "good citizen," then management, acting for the corporation, would enjoy the power to discharge the corporation's citizenship responsibilities, even in situations in which the shareholders might object. Dodd thus concluded that management was trustee for the corporation, not for its shareholders.

[8] Exponents of versions of the argument that I sketch here include Dodd (1932), Phillips (1994), Blair & Stout (1999), Elhauge (2005), Avi-Yonah (2005), Lan & Heracleous (2010), and Stout (2012). Avi-Yonah provides a succinct statement of the argument: "The basic argument is that under the real view, which is historically the dominant view of the corporation, CSR is normatively acceptable even when it does not contribute to the long-run welfare of the shareholders." It is ironic that the legal historian, Morton Horwitz, has argued that the real entity theory of the corporation was a major factor in *legitimizing* big business in the late 19th and early 20th centuries. (Millon 1990).

Schematically, the key moves in the strategy can be recapitulated as follows:

1. The first step is to drive a wedge between the corporation and its shareholders by attributing to the corporation an identity of its own separate from its shareholders. Thus, for example, Lan & Heracleous (2010: 294-5) argue that "the principal is not the shareholders but, rather, the corporation [in its own right]."

2. Once the corporation is accepted as an entity in its own right, it is a short step to the conclusion that the corporation can have goals or purpose that are unrelated to the interests of the shareholders. Blair & Stout (1999: 300) say: "American law views the corporation as an entity with interests of its own and not just a proxy for shareholder interests."

3. The possibility of conflict between the interests of the shareholders and the corporation, in turn, raises the question of to whom management's loyalties lie. If it is successfully argued that management's fiduciary duties run to *the corporation* rather than its shareholders, then the door is open for management to disregard the interests of shareholders and/or to "balance" them with other priorities. In Delaware, the directors must act "in the honest belief that the action taken was in the best interests of the company." [9] Some scholars have seized on this formulation to suggest that because management's duties are owed to the corporation, they are not owed to the shareholders.

[9] Van Gorkom, 488 A.2d at 872 (quoting Aronson v. Lewis, 473 A.2d 805, 812 (Del. 1984).

4. However, without more, it is quickly apparent that if corporate officers and directors are accountable to no-one but this spectral entity, then they are accountable only to themselves. Our legal tradition abhors such a vacuum. As Iwai (2013; see also 1999: 622) points out "any contract between managers and the corporation would necessarily degenerate, at least in part, into managers' contract with themselves." This is plainly an untenable state of affairs, so it inevitably gives rise to demands that managers of corporations be made accountable.

5. Now, with shareholders safely out of the way, corporations are up for grabs, and the way is clear for progressives to substitute their own beneficiaries or priorities. As Avi-Yonah (2005: 142) says, "under the real entity theory, since the corporation is regarded as a person just like individuals, it is permitted to act philanthropically just like individuals are, and should in fact be praised to the extent it does so."

6. By these steps, property in the corporation has successfully been redistributed from the shareholders to stakeholders or to society: The expropriators have been expropriated.

So far, of course, this logic hasn't carried the day, but there are a many days left. It remains one of the arguments of choice for those who would free management from the thrall of the doctrine of shareholder primacy.

Without space for a fuller critique of this argument, I think it is still worth pointing out its main flaws. The premise of this argument is that it is meaningful to conceive of the corporation as an autonomous entity independent of its shareholders – or apparently anyone else. One

problem is that this premise is based on a fundamental misunderstanding of the function of entity status in our law. Entity status means that a corporation can sue (and be sued) as a unit, in its own name, instead of having to specify the name of every shareholder, and it can hold legal title to property despite changes in the composition of its shareholders (Hessen 1979:16). Entity status is not a privilege – for one thing, it makes it easier it easier for the corporation to be sued. It is a labor-saving device (Maitland in Hessen 1979: 42). In the common law, only a person could be sued. But with the advent of limited liability, that became problematic, since the persons who owned the corporation might enjoy limited liability and so could not be sued for the debts of the corporation. To solve this problem, the courts created the fiction of the corporation as a *person*. No doubt the practice of treating corporations as persons spared Congress from having to engage in a wholesale rewrite of the statute books as well. In short, the convention evolved to benefit shareholders and the parties they transact with by reducing transaction costs. It was never intended to expropriate shareholders.

But, of course, this objection fails to reckon with the ingenuity of attorneys and law professors. In the hands of progressive legal scholars the concept of the corporate entity has been stretched to the point where any link with its original purpose has broken. No longer is the corporate person simply a convenient fiction. It is a "real entity" (Avi-Yonah 2005). It is capable of having interests of its own, quite apart from – and even at odds with – its shareholders (Blair & Stout 1999). It can have its own "purpose" (Stout 2012). It is a "principal" in its own right (Lan & Heracleous 2010). Much of this belongs in the realm of what Felix Cohen called "transcendental nonsense" (See Hasnas 2010).

Corporations are incapable of conceiving goals or purposes. If it makes any sense to refer to a corporation's purpose at all, it is only as a shorthand for the corporation's shareholders and/or

management, depending on the circumstances. But that is not the sense these scholars intend. The best defense that that can be made of this claim is that, on a stakeholder view, the term corporation can be said to comprise or encompass a range of stakeholders, not just shareholders, so that – assuming that the corporate purpose is determined by consensus – the purpose found by a court may not coincide precisely with the interest of any particular stakeholder. In that sense the "purpose" might be deemed to be an emergent property. But that argument fails because it presumes what it is has the burden of proving – namely that the corporation does not owe a fiduciary duty of loyalty exclusively to its shareholders.

It is also hard to know what sense to make of Lan & Heracleous' assertion that the corporation is its own principal. By definition, there can be no principal without an agent, and vice versa. So which is which in the case of the corporation? Presumably only a schizophrenic can simultaneously be both principal and agent. But Lan & Heracleous's corporation is apparently a unitary actor. It would make as much (or as little) sense to talk of the corporation owning itself. Plainly, in law, a corporation may own another corporation, but to own itself, without any ultimate natural owners, also falls into the category of transcendental nonsense. It is the equivalent of claiming that an object can be suspended from itself in space.

To see why the claim that the corporation can own itself is absurd, we can use a thought experiment applying elementary principles of contract law. The assets of a corporation have been financed by promoters and shareholders and lenders. The lenders have contracts that typically provide for interest payments and repayment terms. But what consideration do shareholders receive in exchange for financing the corporation? The natural way to answer that question is by inquiring into the mutual understandings of the shareholders and the corporation (i.e., its agents or management) when they made their contracts – both express and implicit – with the

corporation. It is a safe generalization that the parties understood that the corporation would be managed in the interests of the shareholders. We know that from, among others, Lynn Stout (2012a: 98). She notes that, "even though law does not dictate shareholder primacy, as a practical matter today's public companies pay far more attention to shareholder value than American companies did two or three decades ago." If this is right, I think the progressive scholars' attempt to use the concept of entity status to drive a wedge between the corporation and its shareholders fails not only as a matter of law, but as a matter of ethics too, because its effect would be defeat the settled expectations of the parties and to confiscate the property of shareholders.

Conclusion: Perils of Entity Thinking

Lasciate ogni speranza, voi ch'entrate

In my discussion, I have carefully avoided entering into the debate over the metaphysical or ontological status of the corporation or other collective actors. That way lies madness. Instead, I have tried to show, by means of a *reductio*, that the practice of treating corporations as real entities can lead to absurd results and/or results that violate our intuitions of justice.

I have argued that the anthropomorphization of the corporation is an open invitation to abuses. In Part I, I showed how the US practice of subjecting corporations to criminal as well as civil liability for the wrongful actions of natural persons who act in their name has insulated the actual wrongdoers from the legal responsibility for their acts. The "corporation" has, in effect, come to function as a scapegoat that bears the liability in their place. Rather than cure a supposed "responsibility deficit," the practice of imputing liability to the artificial person of the

corporation has reduced accountability. In Part II, I described how the Supreme Court came within a single vote of curtailing the free speech rights of natural persons by inventing a specious distinction between corporate speech and the speech of individuals and arguing that the McCain-Feingold Act only limited corporate speech. In the Third Part, I explored how progressive legal scholars have used the real entity theory of the corporation to try to drive a wedge between corporations and their shareholders and so deprive shareholders of their property rights over the corporation. In short, I have shown how the anthropomorphization of the corporation has been used by insiders to camouflage actual moral and legal responsibility and to use indirection to deprive outsiders of their legal rights and property**.**

The root of these abuses is the concept of legal personhood/the real entity theory of the corporation. Traditionally, the concept of legal personhood has been applied circumspectly and only in a narrow range of situations. Its use has generally been accompanied by warnings that the concept is a legal fiction and that the corporation is at best a crude proxy for the "real parties in interest," and that when in doubt we should pierce the corporate veil. But, as we have grown more habituated to the usage, we have shed that caution, those signposts have been defaced, the entity idea has cast a spell on many of us, and some people have developed a vested interest in perpetuating confusion about the idea of corporate personhood. So the concept has taken on a life of its own.

Before they go out and commit more metaphorical excesses, fans of the "real" entity theory of the corporation need to bring their fevers down by dipping into the cool bath of Robert Hessen's classic treatment of the subject. Hessen (1979: 41) writes that "[a] group or association is only a concept … used to classify different types of relationships between individuals. Whether the concept is a marriage, a partnership, a team, a crowd, a choir, a corps de ballet, or a

corporation, one fact remains constant; the concept denotes the relationship between individuals and has no referent apart from it." As a consequence, the "rights of any organization or association, including corporations, are the rights it derives from the individuals who create and sustain it" (id.).

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