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WHERE IS FELIX COHEN WHEN WE NEED HIM?: TRANSCENDENTAL NONSENSE AND THE MORAL RESPONSIBILITY OF CORPORATIONS

*John Hasnas**

INTRODUCTION

Felix Cohen began *Transcendental Nonsense and the Functional Approach*,¹ perhaps the most entertaining law review article ever written, by describing a heaven of legal concepts in which could be found “all the logical instruments needed to manipulate and transform . . . legal concepts and thus to create and to solve the most beautiful of legal problems.”² This heaven, which contained

a dialectic-hydraulic-interpretation press, which could press

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¹ Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

² *Id.* at 809.

an indefinite number of meanings out of any text or statute, an apparatus for constructing fictions, and a hair-splitting machine that could divide a single hair into 999,999 equal parts and, when operated by the most expert jurists, could split each of these parts again into 999,999 equal parts . . . [was] open to all properly qualified jurists, provided only they drank the Lethean draught which induced forgetfulness of terrestrial human affairs.³

This was the realm of transcendental nonsense in which legal questions were resolved by examining the relationships among abstract concepts divorced from any consideration of the practical consequences or ethical quality of the decision.

As his first illustration of transcendental nonsense, Cohen selected the law's treatment of corporations. He pointed out that in deciding whether a corporation incorporated in one state could be sued in the courts of another, one might expect courts to make "some factual inquiry into the practice of modern corporations in choosing their sovereigns and into the actual significance of the relationship between a corporation and the state of its incorporation,"⁴ to consider "the difficulties that injured plaintiffs may encounter if they have to bring suit against corporate defendants in the state of incorporation . . . [and] the possible hardship to corporations of having to defend actions in many states, considering the legal facilities available to corporate defendants,"⁵ and to decide the case "[o]n the basis of facts revealed by such an inquiry, and on the basis of certain political or ethical value judgments as to the propriety of putting financial burdens upon corporations"⁶ Yet, when the New York Court of Appeals was called upon to rule on this matter, "[i]nstead of addressing itself to such economic, sociological, political, or ethical questions . . . , the court addressed itself to the question, 'Where is a corporation?' Was this corporation really in Pennsylvania or in New York, or could it be in two places at

³ *Id.*

⁴ *Id.* at 810.

⁵ *Id.*

⁶ *Id.* (emphasis omitted).

once?”⁷

But how is such a question to be answered? As Cohen pointed out,

Clearly the question of where a corporation is, when it incorporates in one state and has agents transacting corporate business in another state, is not a question that can be answered by empirical observation. Nor is it a question that demands for its solution any analysis of political considerations or social ideals. It is, in fact, a question identical in metaphysical status with the question which scholastic theologians are supposed to have argued at great length, “How many angels can stand on the point of a needle?”⁸

Nevertheless, the court ruled that the corporation could be sued in New York because by maintaining an office there, the corporation had come into the state.⁹ The problem with this ruling is that

[n]obody has ever seen a corporation. What right have we to believe in corporations if we don’t believe in angels? To be sure, some of us have seen corporate funds, corporate transactions, etc. . . . But this does not give us the right to hypostatize, to “thingify,” the corporation, and to assume that it travels about from State to State as mortal men travel. Surely we are qualifying as inmates of . . . [the] heaven of legal concepts when we approach a legal problem in these essentially supernatural terms.¹⁰

Deciding cases by reifying the abstract concept of the corporation is a classic example of transcendental nonsense.

Cohen warned us against settling controversial legal questions on the basis of transcendental nonsense seventy-five years ago. In this Article, I argue that his warning is still timely, and is equally applicable to moral controversies—specifically, to the question of whether corporations can and should be held morally responsible for the actions of their agents. In Parts I and II, I review the philosophical literature on this question and suggest that it shares

⁷ *Id.* (emphasis omitted).

⁸ *Id.* (emphasis omitted).

⁹ *Id.* at 811.

¹⁰ *Id.*

many features of the transcendental decision-making that Cohen decried. In Part III, I apply a more practically-oriented method of analysis to the question—what Cohen might call the “functional approach”¹¹—and suggest that attributing moral responsibility to corporations as collective entities is either without practical significance or ethically pernicious.

I. THE PHILOSOPHICAL TREATMENT OF THE MORAL RESPONSIBILITY OF CORPORATIONS

How do philosophers attempt to determine whether it makes sense to ascribe moral responsibility to corporations? Most begin by asking straightforwardly whether a corporation is the type of thing that can bear moral responsibility.¹² This question launches a quest to compile a list of the characteristics something must possess to be a moral agent. Once the list has been populated, the nature of the corporation is examined to determine whether corporations possess each of the necessary characteristics. If they do, philosophers conclude that corporations are subject to moral blame (or praise) for their actions;¹³ if they do not, the contrary

¹¹ See *infra* Part III for a discussion of the “functional approach.”

¹² See, e.g., THOMAS DONALDSON, *CORPORATIONS AND MORALITY* ch. 2 (1982); PATRICIA H. WERHANE, *PERSONS, RIGHTS, AND CORPORATIONS* ch. 2 (1985); David Copp, *Collective Actions and Secondary Actions*, 16 AM. PHIL. Q. 177 (1979); Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207 (1979) [hereinafter French, *Corporation as a Moral Person*]; Kenneth E. Goodpaster & John B. Mathews, Jr., *Can a Corporation Have a Conscience?* 60 HARV. BUS. REV. 132 (1982); Virginia Held, *Can a Random Collection of Individuals Be Morally Responsible?*, 67 J. PHIL. 471 (1970); Michael Keeley, *Organizations as Non-persons*, 15 J. VALUE INQUIRY 149 (1979); John Ladd, *Morality and the Ideal of Rationality in Formal Organizations*, 54 MONIST 488 (1970) [hereinafter Ladd, *Morality*]; Larry May, *Vicarious Agency and Corporate Responsibility*, 43 PHIL. STUD. 69 (1983); David T. Ozar, *The Moral Responsibility of Corporations*, in *ETHICAL ISSUES IN BUSINESS*. 294 (Thomas Donaldson & Patricia H. Werhane eds., 1st ed. 1979); Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171 (2007); Michael J. Phillips, *Corporate Moral Personhood and Three Conceptions of the Corporation*, 2 BUS. ETHICS Q. 435, 453 (1992); Manuel Velasquez, *Debunking Corporate Moral Responsibility*, 13 BUS. ETHICS Q. 531 (2003) [hereinafter Velasquez, *Debunking Corporate*].

¹³ See, e.g., DONALDSON, *supra* note 12; WERHANE, *supra* note 12; French,

conclusion is drawn.¹⁴

The seminal work in this regard is Peter French's *The Corporation as a Moral Person*.¹⁵ There, French identified two necessary conditions for moral responsibility: (1) causation—that a subject be capable of acting so as to be the cause of an event—and (2) intentionality—that “the action in question was intended by the subject or that the event was the direct result of an intentional act of the subject.”¹⁶ French then argued that because all corporations have institutional decision-making procedures—what he labeled corporate internal decision (CID) structures¹⁷—corporations can both cause events and act intentionally. These CID structures “accomplish[] a subordination and synthesis of the intentions and acts of various biological persons into a corporate decision.”¹⁸ Thus, “[a] functioning CID Structure *incorporates* acts of biological persons.”¹⁹ When a corporation takes an action pursuant to its CID structure, “it is proper to describe it as having been done for corporate reasons, as having been caused by a corporate desire coupled with a corporate belief and so, in other words, as corporate intentional.”²⁰ For French, this was sufficient to show not only that corporations are proper subjects of moral responsibility, but also that they are “full-fledged moral persons and have whatever privileges, rights and duties as are, in the normal course of affairs, accorded to moral persons.”²¹

French's argument was immediately attacked on the grounds

Corporation as a Moral Person, *supra* note 12, Goodpaster & Mathews, *supra* note 12; Ozar, *supra* note 12; Pettit, *supra* note 12; Phillips, *supra* note 12.

¹⁴ See, e.g., Keeley, *supra* note 12; Ladd, *Morality*, *supra* note 12; May, *supra* note 12; Velasquez, *Debunking Corporate*, *supra* note 12.

¹⁵ French, *Corporation as a Moral Person*, *supra* note 12.

¹⁶ *Id.* at 211.

¹⁷ *Id.*

¹⁸ *Id.* at 212.

¹⁹ *Id.*

²⁰ *Id.* at 213.

²¹ *Id.* at 207. David Ozar advanced a similar argument in favor of corporate moral responsibility. Ozar too claimed that the formal and informal rules of the organization “determine that some activities associated with the group are to count as actions of the group as a single entity.” Ozar, *supra* note 12, at 296. Because groups can therefore act in their own right, Ozar concluded that they may be held morally responsible for such actions. *Id.* at 297.

that its premises were too weak to establish its conclusion—specifically, that being an intentional causal agent is not sufficient for moral personhood. For example, Thomas Donaldson pointed out that both a cat about to attack a mouse and a computer alphabetizing a list of names can be said to act intentionally, yet neither thereby qualifies as a moral person.²² Patricia Werhane similarly argued that French’s argument could not establish corporate moral personhood because “although [corporations] indeed have some of the characteristics of persons, they lack the autonomy necessary to perform primary actions, one of the conditions necessary to be ascribed full personhood.”²³ In addition, Donaldson contended that there were good reasons to believe that corporations cannot be moral persons. As French recognized, his argument implied that corporations “have whatever privileges, rights and duties as are, in the normal course of affairs, accorded to moral persons.”²⁴ But Donaldson claimed that this is either undesirable—do we really want corporations to have the right to vote?—or impossible—what could it mean to say that corporations have the right to worship as they please or to pursue happiness?²⁵

Despite their criticism of French’s argument on this ground, both Donaldson and Werhane argued that corporations can be held morally responsible. This is because full moral personhood is not necessary for moral responsibility—although all moral persons are morally responsible, subjects that do not satisfy all the requirements of moral personhood can nevertheless be morally responsible agents. To demonstrate this, both Donaldson and Werhane supplied their own set of necessary conditions for moral agency. According to Donaldson, to qualify as a moral agent, a corporation need only “embody a *process of moral decision-making*.”²⁶ This gives rise to two necessary conditions: (1) “[t]he capacity to use moral reasons in decision-making,” and (2) “[t]he capacity of the decision-making process to control not only overt

²² See DONALDSON, *supra* note 12, at 22.

²³ WERHANE, *supra* note 12, at 57.

²⁴ French, *Corporation as a Moral Person*, *supra* note 12, at 207.

²⁵ See DONALDSON, *supra* note 12, at 22–23.

²⁶ *Id.* at 30.

corporate acts, but also the structure of policies and rules.”²⁷

Donaldson claimed that many, if not most, corporations meet these two requirements. While admitting that corporations “are unable to think as humans,” he argued that corporations can be morally accountable in the sense that “with the proper internal structure, corporations, like humans, can be liable to give an account of their behavior where the account stipulates which moral *reasons* prompted their behavior.”²⁸ Further, there is no reason why a corporation’s internal decision procedures cannot be applied self-referentially so that it is the corporation itself that controls the creation and “maintenance of the corporation’s decision-making machinery.”²⁹ Hence, although not moral persons, corporations can nevertheless be morally responsible agents.

Werhane suggested a different set of necessary conditions for moral agency: (1) the capacity to act, and (2) the ability to form intentions.³⁰ Werhane contended that corporations have the capacity to act because they can undertake secondary actions—actions taken by individual corporate agents who are authorized to act on behalf of the corporation by the corporate charter and by-laws as interpreted and amended by the board of directors, corporate management, and market forces.³¹ These are true corporate actions because they “cannot be redescribed in terms of the actions of constituents.”³² Further, Werhane agreed with French that the corporate structure incorporates the intentions of individual human beings. Thus,

a corporate intentional system combines the sum of the decision-making procedures carried out by boards of directors, stockholders at annual meetings, management, foremen, and other employees, with the advice of outside agents such as lawyers, accountants, and public relations persons, which together form collective “corporate” “intentions” that are exhibited in “corporate decision-

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ WERHANE, *supra* note 12, at 57–59.

³¹ *Id.* at 52–56.

³² *Id.* at 56.

making,” corporate “action,” and organizational goals.³³

Thus, although corporations are not moral persons, they, “like persons, are and should be, held morally responsible for actions within their control”³⁴

French himself was sufficiently influenced by objections such as Donaldson’s and Werhane’s to abandon his claim that corporations were moral persons.³⁵ In his subsequent work, French tempered his position by recognizing that to be morally responsible, one need only be a moral “actor.”³⁶ Then, in keeping with the usual philosophical approach, he proposed a set of necessary conditions an entity must satisfy to be a moral actor. These are: (1) “the ability to act intentionally,”—i.e., have “purposes, plans, goals, and interests that motivate some of its behavior”;³⁷ (2) “the ability to make rational decisions and to consider rational arguments regarding their intentions”;³⁸ and (3) “the facility to respond to events and ethical criticism by altering intentions and patterns of behavior that are harmful (or offensive) to others or detrimental to their own interests.”³⁹ French then adapted his earlier argument to show that because corporations possessed CID structures, they satisfied each of these conditions.⁴⁰

Another example of the conventional approach to the question of corporate moral responsibility is supplied by Philip Pettit. In his article, *Responsibility Incorporated*,⁴¹ Pettit supplies three necessary conditions for moral responsibility: (1) value relevance—the subject “is an autonomous agent and faces a value relevant choice involving the possibility of doing something good or bad or right or wrong”;⁴² (2) value judgment—the subject “has

³³ *Id.*

³⁴ *Id.* at 59.

³⁵ See PETER A. FRENCH, CORPORATE ETHICS 10 (1995).

³⁶ *See id.*

³⁷ *Id.*

³⁸ *Id.* at 12.

³⁹ *Id.*

⁴⁰ *Id.* at 15 (“It is the corporation’s CID structure that allows it to be an independent rational actor on the social scene, and that converts various human behaviors and actions into corporate intentional action.”).

⁴¹ See generally Pettit, *supra* note 12.

⁴² *Id.* at 175.

the understanding and access to evidence required for being able to make judgments about the relative value of such options”;⁴³ and (3) value sensitivity—the subject “has the control necessary for being able to choose between options on the basis of judgments about their value.”⁴⁴

Pettit argues that corporations satisfy the first condition because they can (1) qualify as agents, and (2) act autonomously. Corporations qualify as agents “when members act on the shared intention that together they should realize the conditions that ensure agency,”⁴⁵ which they do by acting in accordance with a constitution “whereby the members of a group might each be assigned roles in the generation of an action-suited body of desire and belief and in the performance of the actions that it supports.”⁴⁶ Further, corporations can act autonomously because the corporation’s judgment cannot be reduced to the judgment of the individuals who comprise it. Thus, “[a]utonomy is intuitively guaranteed by the fact that on one or more issues the judgment of the group will have to be functionally independent of the corresponding member judgments, so that its intentional attitudes as a whole are most saliently unified by being, precisely, the attitudes of the group.”⁴⁷

Pettit claims that corporations satisfy the second and third conditions as well. They can form value judgments “over a certain proposition when the proposition is presented for consideration and the group takes whatever steps are prescribed in the constitution for endorsing it.”⁴⁸ Thus, they are “able to form a judgment over any proposition that members are capable of presenting for consideration and of adjudicating by means of a vote or something of the kind.”⁴⁹ Further, they are value sensitive because they

may control in a reason-sensitive way for the performance of a certain action by some members, maybe these or

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.* at 179.

⁴⁶ *Id.*

⁴⁷ *Id.* at 184.

⁴⁸ *Id.* at 186.

⁴⁹ *Id.* at 187.

maybe those. [They] will do this, by maintaining a constitution for the formation and enactment of [their] attitudes, arranging things so that some individual or individuals are identified as the agents to perform a required task, and other individuals are identified as agents to ensure that should the performers fail, there will be others to take their place as backups.⁵⁰

Once the philosophical advocates of corporate moral responsibility have identified the necessary conditions for moral responsibility, the debate shifts to whether corporations can satisfy them. Critics argue that they cannot. For example, Manuel Velasquez attacked French's initial causation requirement on the ground that corporations lack the ability to act. He argued that

moral responsibility for an act . . . can be attributed only to that agent who originated the act in his own body, that is, in the movements of a body over which he has direct control. In corporate agency, action does not originate in a body belonging to the corporation to whom the act is attributed, but in bodies belonging to those human beings whose direct movements constituted or brought about the act that is then attributed to the corporation. Consequently, whether considered as a fictional legal entity or as a real organization, corporations do not originate acts in the manner required by attributions of moral responsibility—namely, by directly moving one's own body.⁵¹

More typically, however, the debate centers on the question of whether corporations can form intentions, which almost all advocates of corporate moral responsibility list as a necessary condition. For example, Michael Keeley responded to French's original argument by claiming that corporations cannot be moral persons because "organizations have no intentions or goals at all."⁵² Keeley contended that although an organization's CID structure "may serve to identify organizational behavior, [it does]

⁵⁰ *Id.* at 192.

⁵¹ Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, 2 BUS. & PROF. ETHICS J. 1, 7 (1983) [hereinafter Velasquez, *Why Corporations*].

⁵² Keeley, *supra* note 12, at 149.

not ordinarily establish the organizational *intent* of that behavior or that it has any real organizational intent at all.”⁵³ Indeed, although French’s appeal to CID structures can show that corporations can act “in the sense of *producing* an effect, it is a large leap to the claim that it can act in the sense of *intending* an effect.”⁵⁴

Similarly, John Ladd argued that as formal organizations, corporations are capable of only “means-end” rationality.⁵⁵ He recognized that given a predetermined goal, corporations can make empirical judgments about the best means to achieve it, but contended that corporations have no mechanism by which they can process or evaluate normative propositions. Consequently, corporations cannot produce *moral* intentions—intentions to act rightly or wrongly in a moral sense. Thus, “for logical reasons, it is improper to expect organizational conduct to conform to the ordinary principles of morality,”⁵⁶ and hence, corporations cannot be moral agents.⁵⁷

Other philosophers pressed similar objections. John Danley accused the advocates of corporate moral responsibility of equivocating on the meaning of “intention” to stretch it to apply to corporations,⁵⁸ arguing that when used in the appropriate sense “[i]ndividuals within the corporation can intend, lust, have malice, afterthought, and so forth, but the corporation cannot.”⁵⁹ In the same vein, Manuel Velasquez argued that corporations do not possess the integration of body and mind required for intentional action because

an act is intentional only if it is the carrying out of an intention formed in the mind of the agent whose bodily movements bring about the act The underlying reason

⁵³ *Id.* at 151.

⁵⁴ *Id.* at 152.

⁵⁵ See Ladd, *Morality*, *supra* note 12, at 497–98.

⁵⁶ *Id.* at 499.

⁵⁷ Ladd subsequently argued directly against French’s position in John Ladd, *Corporate Mythology and Individual Responsibility*, 2 INT’L. J. APPLIED PHIL. 1 (1984).

⁵⁸ John R. Danley, *Corporate Moral Agency: The Case for Anthropological Bigotry*, in BUSINESS ETHICS: READINGS AND CASES IN CORPORATE MORALITY 202, 204 (W. Michael Hoffman & Jennifer Mills Moore eds., 2d ed. 1990).

⁵⁹ *Id.* at 203.

for corporate policies and procedures being unable to generate intentional action is that the concept of intentional action . . . is rooted in the concept of an agent with a certain mental and bodily unity that corporations do not have.⁶⁰

French responded to such objections by noting that the skeptics assume that intention requires the presence of human desires and beliefs, which, indeed, corporations cannot possess.⁶¹ French argued that this is incorrect—that intention requires only the ability to plan. Plans may flow from desires and beliefs in the case of individuals, but such desires and beliefs are not necessary for plans, and therefore are not necessary for intention. He argued that

[to] intend to do something is to plan to do it My intention seems to have little to do with my current desires and beliefs. In fact, desires and beliefs are, at most, only tangentially involved. My plans and my commitments to those plans are at the heart of my intentions.⁶²

And because corporations' CID structures produce corporate plans, corporations can act intentionally.

Corporate plans might differ from those that motivate the human persons who occupy corporate positions and whose bodily movements are necessary for the corporation to act. Using its CID Structure, however, the concerted behavior of those humans can be described as corporate actions done

⁶⁰ Velasquez, *Why Corporations*, *supra* note 51, at 8.

⁶¹ Indeed, French concedes that his earlier work embodies the same assumption, which he now recognizes to be incorrect.

At the base of my earlier view was the widely-held position that intentionality should be understood in terms of a desire/belief complex. That position is flawed; indeed, it is downright wrong Corporations cannot, in any normal sense, desire and believe. In my earlier accounts I redescribed desires and beliefs into corporate policy in order to match the model. Many objected that I had overly formalized the notions of desire and belief to fit the Corporate Internal Decision (CID) Structure approach I had created. With them I am now prepared to say that if intention is no more than desires and beliefs, then corporations will fail to make it as intentional actors.

Peter A. French, *Integrity, Intentions, and Corporations*, 34 AM. BUS. L.J. 141, 148–49 (1996).

⁶² *Id.* at 148.

with a corporate intention, to execute a corporate plan or as part of such a plan.⁶³

The change of focus from desires and beliefs to plans did not convince many of the skeptics that corporations can truly have intentions. For example, Manuel Velasquez continued to argue that

[t]he problem with French's claim . . . is that there is nothing about procedures and policies that can enable them to transform a metaphorical intention into a real one. Procedures and policies, however simple or complex, cannot create group mental states nor group minds in any literal sense . . . Human intentions, beliefs, and desires are mental; that is, they are essentially, by definition, the sort of things that can be present to, and in, our conscious minds: the sorts of things that we can be conscious of. This means that if an organization has such intentions, beliefs, and desires, it must have a conscious mind, a mind with a unified consciousness that encompasses within a single field of awareness all of its nonpathological intentions, plans, beliefs, and desires . . . The corporation as such does not have such a unified consciousness.⁶⁴

Other advocates of corporate moral responsibility have recently taken up the gauntlet on this question. For example, Denis Arnold argues that there is no good reason to identify intention with individual human consciousness as Velasquez does.⁶⁵ Arnold argues that intentions may be properly understood as plans or "commitments to future action,"⁶⁶ and when they are, there can be shared intentions. Shared intentions consist in the mutual intentions of individual parties to engage in a joint activity, the meshing sub-plans of the intentions, and the common knowledge of the parties of the first two conditions.⁶⁷ Arnold then argues that corporate intentions are the shared intentions of the individuals who comprise the corporation as integrated by the corporation's

⁶³ *Id.* at 152.

⁶⁴ Velasquez, *Debunking Corporate*, *supra* note 12, at 546–50.

⁶⁵ Denis G. Arnold, *Corporate Moral Agency*, 30 *MIDWEST STUD. IN PHIL.* 279, 284 (2006).

⁶⁶ *Id.*

⁶⁷ *See id.* at 286.

CID structure.

As with shared intentions, corporate intentions are neither a set of individual mental states, nor the mental state of some superagent. Corporate intentions are states of affairs consisting of both the intersecting attitudes of the class of agents comprising the corporation and the internal decision structure of the organization. The CID structure serves as the frame upon which the attitudes of board members, executives, managers, and employees are interwoven to form corporate intentions.⁶⁸

Hence, corporations can satisfy the intentionality requirement for corporate moral responsibility.

And so it goes. At the time of this writing, the philosophical debate about whether corporations can meet the necessary conditions for moral responsibility is ongoing.⁶⁹

II. TRANSCENDENTAL NONSENSE

How could there be anything objectionable about this approach to the question of corporate moral responsibility? What could be more logical than first identifying the conditions necessary for moral responsibility and then attempting to determine whether corporations meet them? What's wrong with this method of analysis?

Might I suggest that the problem lies in the nature of the question the analysis is designed to answer—to wit, whether a corporation is the type of thing that can bear moral responsibility. Notice that this question contains an assumption—that a corporation is a thing. In this respect, the question has the same character as the notorious query: do you still beat your spouse? Any attempt to answer it implicitly accepts the embedded assumption. It is, however, far from obvious that corporations are things in the sense relevant to the ascription of moral responsibility. Assuming that they are is precisely the type of

⁶⁸ *Id.* at 291.

⁶⁹ *See, e.g., id.* at 279. Indeed, the author has recently reviewed for publication an article exploring two distinct versions of shared intentionality that may serve as bases for the attribution of moral responsibility to corporations.

“thingification” of the corporation that Felix Cohen warned us against 75 years ago.⁷⁰

The problem with the conventional philosophical arguments for corporate moral responsibility may have nothing to do with the absence of any particular characteristic associated with moral agency, but with the underlying assumption that corporations are the type of things upon which such characteristics may be predicated. When considering moral agency, it makes perfect sense to ask whether an insane person, or a child, or an animal, or a computer, or an alien can be morally responsible because in each case there is an actual thing to ask about. Given the existence of a thing to which it is reasonable to ascribe predicates, one may intelligibly ask whether that thing has the characteristics necessary for moral responsibility. But a corporation, like the White House, Congress, the New York Knicks, and Germany, is not a thing. These terms are all abstract collective nouns. They refer to complex networks of (constantly changing) human beings who are related to each other through certain formal and informal arrangements. Although there is a sense in which each of these terms refers to something real, none of them refers to a thing that has a physical existence in the world. In this context, the White House does not refer to the physical building within which the President resides.

Abstract collective nouns are vitally important to our ability to communicate effectively. They perform a crucial role in facilitating discourse by allowing us to refer to complex human arrangements with the convenience of a single term. Hence, we are perfectly well understood when we say things like the White House is monitoring the oil spill in the Gulf of Mexico, Congress is unable to restrain its profligate spending, and the Knicks play lousy defense. Similarly, we often speak as though we are ascribing responsibility to such abstract entities. Thus, we say things like the White House is morally responsible for the abuse of detainees in the war on terror, or Congress for the budget deficit, or Nazi Germany for the Holocaust, or corporations for the wrongdoing of their employees. There is nothing wrong with speaking this way as long as we keep in mind that in doing so we

⁷⁰ Cohen, *supra* note 1, at 811.

are speaking metaphorically. We are using a linguistic shorthand for the unwieldy proposition that some set of difficult to identify members of an indefinite group of people who are related to each other in both formal and informal ways have acted so as to produce morally improper results.

Problems arise, however, when we forget that we are speaking metaphorically. Once we forget that abstract collective nouns function merely as linguistic placeholders to facilitate communication, we begin to think that the abstract collections they represent are entities that exist in their own right, and to which properties and characteristics may be ascribed. We are then tempted to decide questions such as whether the White House is morally responsible for the abuse of detainees, or Congress for the budget deficit, or Nazi Germany for the Holocaust, or corporations for the wrongdoing of their employees by asking whether these entities can act, or form intentions, or are autonomous, or exhibit value sensitivity. When we succumb to this temptation, we end up making ascriptions of moral responsibility purely on the basis of the relationships among abstract concepts divorced from any consideration of either the practical consequences or the ethical appropriateness of the ascriptions. Such behavior is a classic example of Cohen's transcendental nonsense.

III. A FUNCTIONAL APPROACH?

Felix Cohen sought to remedy the transcendental nonsense of his day with what he called "the functional approach." I have suggested that the contemporary philosophical debate over the moral responsibility of corporations consists predominantly of transcendental nonsense.⁷¹ Can this be remedied with a

⁷¹ A small number of philosophers have addressed the question in terms of its practical significance. For example, John Danley argues that ascribing moral responsibility to corporations is merely "a prelude to many further permissible or obligatory moves" such as being required to pay compensation or be subject to punishment, and that any consideration of the question was "incomplete without incorporating the role it plays in relation to these other moral moves. It is this which is lacking from the previous discussion of 'intend.'" John R. Danley, *Corporate Moral Agency: The Case for Anthropological Bigotry*, in *BUSINESS ETHICS* 202, 205 (W. Michael Hoffman & Jennifer Mills Moore eds.,

contemporary incarnation of Cohen's functional approach?

Cohen's functional approach was designed to analyze and morally evaluate controversial legal questions on the basis of their practical effects. Accordingly, Cohen identified two of the functional approach's main purposes as "the eradication of meaningless concepts"⁷² and "the abatement of meaningless questions."⁷³ With regard to the first purpose, Cohen asserted that "functionalism represents an assault upon all dogmas and devices that cannot be translated into terms of actual experience."⁷⁴ Noting that "[o]ur legal system is filled with supernatural concepts, that is to say, concepts which cannot be defined in terms of experience, and from which all sorts of empirical decisions are supposed to flow,"⁷⁵ Cohen declared that "[a]gainst these unverifiable concepts [the functional approach] presents an ultimatum. Any word that cannot pay up in the currency of fact, upon demand, is to be declared bankrupt, and we are to have no further dealings with it."⁷⁶ With regard to the second purpose, Cohen asserted that "[i]t is a consequence of the functional attack upon unverifiable concepts that many of the traditional problems of science, law, and philosophy are revealed as pseudo-problems devoid of meaning."⁷⁷ Thus, questions such as "Where is a corporation?" are in fact meaningless, and can serve only as invitations to equally

2d ed. 1990). Similarly, Manuel Velasquez points out that "the concept of moral responsibility is conceptually connected to the concepts of blame and punishment" such that ascribing moral responsibility to a corporation entails "claiming that there are some people in the corporation who should be blamed and punished." Velasquez, *Why Corporations*, *supra* note 51, at 10–13. In addition, Christopher McMahon explicitly considers the practical consequences of attributing moral personhood to corporations to demonstrate that "there are moral reasons for denying them the moral status that personhood usually brings with it." Christopher McMahon, *The Ontological and Moral Status of Organizations*, 5 *BUS. ETHICS. Q.* 541, 547 (1995). Had the philosophical community taken more notice of these arguments, the present article would be unnecessary.

⁷² Cohen, *supra* note 1, at 822.

⁷³ *Id.* at 823.

⁷⁴ *Id.* at 822.

⁷⁵ *Id.* at 823.

⁷⁶ *Id.*

⁷⁷ *Id.*

meaningless displays of conceptual acrobatics.”⁷⁸

Although Cohen was advocating a functional approach to jurisprudence, there is no reason why such an approach would not be equally applicable to philosophical questions such as whether moral responsibility may be ascribed to corporations. Cohen himself was aware that “the problem of eliminating supernatural terms and meaningless questions and redefining concepts and problems in terms of verifiable realities is not a problem peculiar to law.”⁷⁹ If terms such as “Due Process, Police Power, and similar word-charms of constitutional law”⁸⁰ are supernatural concepts, it is reasonable to believe that terms such as “corporate action” and “corporate intent” may be as well. And if “Where is a corporation?” is a meaningless question, a good case can be made that so are questions such as “What does a corporation intend?” or “Do corporations act autonomously?” or “Are corporations value sensitive?” Such questions can only be answered by demonstrating that one abstract concept either can or cannot be predicated onto another; an activity which, on the basis of the philosophical debate described in Part I, certainly seems to invite impressive “displays of conceptual acrobatics.”⁸¹

Applying Cohen’s functional approach to the question of the moral responsibility of corporations would require us to ask what the practical consequences of ascribing such responsibility to corporations would be and whether the resulting situation would be just. Thus, we would begin our inquiry by asking what the point of holding corporations morally responsible is in the first place—that is, what difference does assigning moral responsibility to corporations make in the world? Once this has been determined, we would then have to evaluate whether we would be ethically justified in thus altering the state of the world. Interestingly, a close attention to these questions reveals that ascribing moral responsibility to corporations is ethically justified only when it is practically meaningless.

Consider Cohen’s first question. What is the point of holding

⁷⁸ *Id.* at 824.

⁷⁹ *Id.* at 822.

⁸⁰ *Id.* at 823.

⁸¹ *Id.* at 824.

corporations morally responsible? What is the practical effect of doing so? The obvious answer is that doing so authorizes the infliction of punishment on the corporation as a collective entity.⁸² If this were not the case, it is not clear why anyone other than philosophers bent on resolving a difficult semantic issue would care whether corporations can bear moral responsibility. Unless assigning moral responsibility to corporations makes them liable to punishment, there is no practical difference between a world with corporate moral responsibility and a world without it.

There is, of course, nothing wrong with ascribing moral responsibility to corporations when doing so does not authorize the imposition of punishment upon them. In such a case, the ascription of corporate moral responsibility would merely express a moral judgment about the institutional arrangements within the corporation.

It is commonplace today to recognize that corporations have an ethical culture or “ethos.”⁸³ A corporation’s ethos—which arises from the combination of the organization’s internal structural features and the observable behavior of its senior officers and leaders—affects the conduct of the corporation’s employees. Corporations with a good corporate ethos tend to encourage ethical conduct by their employees. Corporations with a poor corporate ethos, at best, fail to encourage ethical conduct, and at worst, incentivize irresponsible or dishonest conduct. Thus, a strong commitment to the maintenance of high ethical standards by senior corporate leaders, coupled with rewards for employees who live up to those standards, can significantly decrease the likelihood of unethical conduct within the firm. In contrast, an organization whose senior officials are seen to cut ethical corners makes it more likely that lower-level employees will do so as well. Similarly, a corporation with a clearly demarcated avenue by which employees

⁸² It would also authorize the distribution of rewards to corporations. Moral responsibility implies that one is liable to both moral blame and moral praise. However, in the present context, the focus is usually on whether corporations may be held liable for wrongdoing rather than a proper recipient of reward. Hence, for purposes of concision, I will speak strictly in terms of liability for wrongdoing in the remainder of this article.

⁸³ See Pamela Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1121–27 (1991).

can report their ethical concerns will have more ability to prevent employee wrongdoing than one beset by “organizational blocks,” such as a strict line of command or diffuse decision-making authority, that make it more difficult for employees to ensure that they are behaving properly themselves and to report on the unethical behavior of others.⁸⁴

When a poor corporate ethos is a causal factor in producing unethical action by the firm’s employees, it is natural to assign blame to the corporation. For example, several commentators cite Enron’s “rank and yank” compensation system as a significant element in a corporate ethos that encouraged unethical conduct by Enron’s traders.⁸⁵ Under this system, the traders were ranked against each other on the basis of how much money they brought in, with the top performers receiving large bonuses and those ranked in the bottom 10–15 percent being fired. By elevating financial performance above all other considerations, this compensation system encouraged the traders to ignore ethical and legal constraints in pursuit of revenue. Under these circumstances, it is perfectly intelligible to say that by thus establishing and maintaining a poor corporate ethos, Enron was morally responsible for the unethical actions of its traders.

There is nothing objectionable about attributing moral responsibility to corporations in this sense, as long as one is not claiming that the corporation is thereby subject to punishment as a collective entity. But there are also no practical consequences of doing so. This is simply another example of the semantic convenience provided by the use of abstract collective nouns. Saying that corporations are morally responsible for the effects of their corporate ethos is merely linguistic shorthand for the more cumbersome statements that the organizational structure of corporations affects the behavior of its individual employees and that managers have a moral obligation to maintain an ethical

⁸⁴ See James A. Waters, *Catch 20.5: Corporate Morality as an Organizational Phenomenon*, in CONTEMPORARY MORAL CONTROVERSIES IN BUSINESS. 160 (A. Pablo Iannone ed., 1989).

⁸⁵ See, e.g., Geraldine Szott Moohr, *Of Bad Apples and Bad Trees: Considering Fault-based Liability for the Complicit Corporation*, 44 AM. CRIM. L. REV. 1343, 1352 (2007); Milton C. Regan, Jr., *Moral Intuitions and Organizational Culture*, 51 ST. LOUIS U. L.J. 941, 942 (2007).

corporate culture. Any such assertion of moral responsibility is fully translatable into assertions about human psychology and the ethical obligations of individuals. There is no harm in speaking in this way, but doing so makes no practical difference in the world. It does not instruct or authorize human beings to behave differently than they would if the more cumbersome phrasing were employed. When used in this way, the ascription of moral responsibility to corporations is ethically unobjectionable, but practically meaningless.

In contrast, when moral responsibility carries with it liability to punishment, ascribing moral responsibility to corporations is rife with practical consequences. The Arthur Andersen accounting firm survived the individual guilty plea of David Duncan, the leader of its Enron “engagement team,” on a charge of obstruction of justice, but was destroyed when indicted for the same offense in its corporate capacity, resulting in the loss of over 85,000 jobs worldwide.⁸⁶ Indeed, it is primarily because of the practical consequences of being able to inflict punishment on corporations that the advocates of corporate moral responsibility advance their position. Such advocates frequently argue that the threat of corporate punishment can encourage corporations to take steps to prevent wrongdoing by its agents,⁸⁷ and that the imposition of corporate punishment can express public disapproval of any such wrongdoing that does occur. In addition, imposing punishment on corporations clearly has a negative impact on the financial

⁸⁶ See Elizabeth K. Ainslie, *Indicting Corporations Revisited: Lessons of the Arthur Andersen Prosecution*, 43 AM. CRIM. L. REV. 107, 109 (2006).

⁸⁷ It is worth noting that this claim is not obviously correct. In the absence of corporate moral responsibility, corporations are nevertheless civilly liable for the wrongs of their employees. Any intentional wrongdoing or reckless conduct by corporate employees that harm the interests of third parties subjects the corporation to potentially massive compensatory and punitive damage awards. It is not obvious that the threat of the relatively small criminal penalties that would be added if corporations could be held morally responsible as well would add any noticeable deterrent effect. This article assumes that the threat of corporate punishment can produce increased efforts at corporate self-policing. This will certainly be the case with regard to regulatory violations or other infractions that do not directly harm third parties where the threat of civil liability is not present; and because of the damaging effect criminal charges can have on a corporation’s reputation, it may well be the case generally.

condition of several of the corporation's stakeholder groups. Hence, to the extent that the attribution of moral responsibility to corporations renders them liable to punishment, it has significant practical consequences.

But this is precisely where the argument for corporate moral responsibility founders. For under the functional approach, after identifying the difference assigning moral responsibility to corporations would make in the world, we must pass on to Cohen's second question and ask whether thus changing the world is ethically justified. And when we do, we find that imposing punishment on corporate entities is inherently unjust.

In the first place, it is impossible to punish a corporation. At some point in every academic article on corporate responsibility, the author trots out the old saw that a corporation has "no soul to be damned, and no body to be kicked."⁸⁸ The present Article has reached that point. This oft-quoted phrase is merely an ancient recognition of Cohen's observation that a corporation is not a thing. It is impossible to punish a corporation because there is nothing—no thing—there to absorb the punishment. Any punishment directed toward a corporation necessarily passes through its mythical facade to fall on some set of human beings.

Further, any punishment directed toward a corporation is necessarily financial in nature. Not only can't corporations be kicked, they can't be incarcerated. They may be fined, which constitutes the direct application of a financial penalty. They may have licenses revoked or otherwise have their freedom to transact business restricted, but such measures merely constitute the indirect application of a financial penalty—they are punitive only to the extent that they reduce the corporation's profitability. They may be liquidated, which can be thought of as a corporate death sentence. But since corporations are not literally living things, any "execution" is entirely metaphorical. Liquidation is to be feared only because of the financial losses that result from it.

Who pays when any such punitive financial loss is imposed upon a corporation? To the extent that the loss can be passed along

⁸⁸ See John C. Coffee, *No Soul to Damn: No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 (1981).

through increases in the price of the corporation's products, it is the consumers who pay. To the extent that the corporation can assimilate the loss by reducing labor costs, it is the employees who pay. And to the extent that the corporation is unable to pass along the loss to either of these groups, it is the owners of the corporation, the shareholders, who pay.

The characteristic that all of these stakeholder groups share is that their members are innocent of personal wrongdoing. Consumers obviously play no role in any wrongdoing by corporate agents. The employees who lose their jobs due to corporate retrenchment may have had nothing whatever to do with the wrongdoing and been completely unaware of it. And given that the defining characteristic of the modern corporation is the separation of ownership and control, the shareholders likely had no knowledge of or control over the behavior of the employees who engaged in the wrongdoing. Corporate punishment necessarily falls indiscriminately on the innocent as well as or in place of the guilty. Corporate punishment is inherently vicarious collective punishment.

Little argument should be required to establish that such punishment is unjust. The thing that distinguishes punishment from the naked infliction of harm is that punishment is *deserved*. Punishment is punishment only when it is imposed in response to some fault on the part of the party being subjected to it. Unless this is the case, "punishment" is nothing more than coercion. That is why, on the international level, collective punishment is considered a human rights violation⁸⁹ and is banned as a war crime by the Geneva convention.⁹⁰ Although the wrong of imposing financial collective punishment on a corporation's stakeholders may be an order of magnitude less severe than that of the war crimes addressed by the Geneva Convention, the two wrongs are indistinguishable in principle.

⁸⁹ See American Convention on Human Rights, art. 5(3) Pact of San José, July 18, 1978, 1144 UNTS 123 ("Punishment shall not be extended to any person other than the criminal."); African Charter on Human and Peoples' Rights, art. 7, Oct. 21, 1986, OAU Doc. CAB/LEG/67/3 Rev. 5 ("Punishment is personal and can be imposed only on the offender.").

⁹⁰ See Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, art. 33(1), 1949, 75 UNTS 287.

A handful of the employees at Arthur Andersen engaged in conduct that the government believed constituted obstruction of justice. Each of these employees was subject to indictment, conviction, and punishment for the offense as an individual. By indicting the firm for their conduct, the government destroyed the company; costing 85,000 employees in 390 offices around the world their jobs.⁹¹ Almost all of these employees were personally innocent of wrongdoing.⁹² It is difficult to see how assigning moral responsibility to corporations can be ethically justified if the practical consequence of doing so is that secretaries in France get fired for the conduct of executives in Texas.

Enron is the poster child for corporate corruption. If any corporation could be deserving of punishment, it would have to be Enron. Yet no effort was ever made to punish Enron as a corporate entity. Why? The obvious answer is that it would be patently unjust to impose punishment on Enron's shareholders who constituted the bulk of the innocent victims of the crimes committed by Enron's employees.

Advocates of corporate moral responsibility frequently argue that the ability to visit punishment on corporations as collective entities can deter wrongdoing. Fear of corporate punishment can motivate managers to institute compliance programs and make efforts to maintain a good corporate ethos that can reduce wrongdoing by employees. I have no doubt that this is correct. The threat of collective punishment is indeed an effective way to motivate people to suppress undesirable conduct by others. That is almost always its purpose. Collective punishment can deter. The problem is not that collective punishment is not effective. It's that it is not just.

Deterrence can be a legitimate purpose of punishment. There is nothing ethically objectionable about imposing punishment on a *wrongdoer* to discourage others from behaving in a similar way. By associating punishment with transgression, we hope to cause

⁹¹ See Ainslie, *supra* note 86, at 109.

⁹² In fact, *all* of Andersen's employees were innocent of criminal wrongdoing because the Supreme Court overturned Andersen's conviction on the ground that the government had not proven the consciousness of wrongdoing required by the crime. See *generally* Arthur Andersen LLP v. United States, 544 U.S. 696 (2005).

others to refrain from transgressing for fear of a similar sanction. But this form of deterrence is distinct in kind from the form that consists of threatening to punish those who are innocent of wrongdoing to pressure them into suppressing the undesirable conduct of their fellow citizens.

The world would be a better place if we could more effectively deter crimes committed by teenagers. And we undoubtedly could do so by threatening to punish the teenagers' parents for their children's offenses. We do not do so because we recognize that such punishment is no different in principle from the more venal and obviously unacceptable practice of the Nazis, who sought to deter acts of resistance by punishing innocent members of the communities in which such acts occurred. Threatening the innocent stakeholders of a corporation with punishment for the wrongdoing of culpable employees in order to force corporate managers to engage in more intensive self-policing is not ethically distinct from threatening to punish the innocent members of a family or a community for the wrongdoing of their relatives or fellow community members.

Advocates of corporate moral responsibility also frequently argue that inflicting punishment on corporations can be a useful means of expressing society's disapproval of the conduct committed by its employees in its name, and thus serves the "expressive function of punishment."⁹³ As with the claim regarding deterrence, I do not doubt that this is true. But my objection remains the same. Although it may be an effective way of expressing disapproval, it is not a just way of doing so.

An essential characteristic of punishment that distinguishes it from other penalties may indeed be that "punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishing authority himself or of those 'in whose name' the punishment is inflicted."⁹⁴ There is nothing ethically objectionable about visiting punishment on a *wrongdoer* in order to express disapproval of his or her conduct. But this is

⁹³ See generally Joel Feinberg, *The Expressive Function of Punishment*, 49 *MONIST* 397 (1965).

⁹⁴ *Id.* at 400.

different in kind from punishing those who are innocent of wrongdoing in order to express resentment and indignation toward the conduct of others with whom they are somehow associated.

History repeatedly teaches the evil of punishing on the basis of guilt by association. The investigations of the House Un-American Activities Committee and the blacklist of the 1950s illustrate the injustice of condemning people because they are associated with others who may be engaged in unacceptable conduct. Riots directed against African-American communities in the segregated South were extraordinarily effective means of expressing the larger community's condemnation of the crimes committed by the individual members of those communities. Collective punishment is undoubtedly an effective means of expressing society's condemnation of individual wrongdoing. But it is not a just one.

Corporate punishment is vicarious collective punishment. Collective punishment is inherently unjust. Hence, to the extent that assigning moral responsibility to corporations authorizes corporate punishment, corporate moral responsibility is unjust. And it cannot be redeemed by demonstrating that it is effective at increasing corporate self-policing or at denouncing wrongdoing. For collective punishment involves punishing the innocent to attain a desired societal end, and as such is incompatible with the Kantian insight that lies at the heart of any liberal society—that individuals may not be used merely as means to the ends of others or of society as a whole. When the practical significance of corporate moral responsibility is to pass the harm associated with corporate punishment through to the corporation's stakeholders whether they deserve it or not, corporate moral responsibility is ethically pernicious and must be eschewed.

CONCLUSION

In 1935, Felix Cohen pointed out the absurdity of attempting to determine the state in which a corporation was subject to lawsuit by answering the abstract, empirically meaningless question: Where is a corporation? Seventy-five years later, philosophers are attempting to determine whether corporations should be subject to punishment as collective entities by answering abstract, empirically meaningless questions such as: Do corporations act

autonomously or have intentions or demonstrate value sensitivity? Although these may be fascinating philosophical questions, their answers require no consideration of either the practical consequences of imposing punishment on corporations or the ethical acceptability of doing so. By thus attempting to derive an empirically significant conclusion purely from the examination of the relationships among abstract concepts, the contemporary philosophical debate over corporate moral responsibility constitutes a 21st century example of Cohen's transcendental nonsense.

In this Article, I have suggested that the proper response to questions about the intentions, autonomy, or value sensitivity of corporations is: Who cares? Looked at in terms of its practical significance, the attribution of moral responsibility to corporations allows for only two possibilities. Corporate moral responsibility either authorizes corporate punishment or it does not.

If it does not, then corporate moral responsibility is merely a linguistically useful device for directing attention to the psychological effects an organization's structure can have on the behavior of the individuals who comprise it and the corresponding obligation of corporate managers to attempt to maintain a positive corporate ethos. In this case, corporate moral responsibility is ethically unobjectionable, but practically meaningless.

However, if corporate moral responsibility does authorize corporate punishment, then it authorizes a form of vicarious collective punishment that inflicts evil on those who are personally innocent of wrongdoing in order to achieve a desired societal goal. In this case, corporate moral responsibility has great practical significance, but is ethically pernicious. For no matter how worthy the societal goal, fundamental ethical principles place some means of achieving them, such as punishing the innocent, off limits.

We fail to recognize this only because our ability to see a "thing" that is not there—the corporation—obscures our vision of the things that are there—individual human beings each of whom possesses a fundamental moral entitlement not to be used merely as means to the ends of others. This is the danger of the "thingification" of abstract concepts that Felix Cohen warned us about seventy-five years ago. It is also the reason that the most important question among those that have been examined in this

Article is the one contained in its title.