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THE MORALITY OF CORPORATE PERSONS

The 2010 decision in *Citizens United v. Federal Election Commission* (in which the US Supreme Court attributed First Amendment rights to for-profit corporations seeking to voice support for political campaigns by contributing money) made many Americans aware for the first time that corporations are persons under US law. And, for many of these Americans, not only the decision to allow corporations to fund Political Action Committees but this legal fact of corporate personhood in and of itself was an outrage. Corporations are not persons, participants in the Occupy Wall Street and related movements declared in 2011; they should not have the legal protections that human beings have.¹ Business leaders and legal scholars largely dismissed the concerns of the masses.² Of course corporations are persons under the law, they countered, but don't worry about it because it's just a legal mechanism for granting contract rights, which businesses need to have in order to operate at all; no one is saying corporations are really the legal equivalent of flesh and blood people.

For very different reasons, then, both camps would likely contest the title of this essay. The first group would object, because it suggests that corporations might be persons just as human beings are and, furthermore, that business corporations—institutions whose sole reason for existing is to seek profit through exploitation of workers and natural resources—might indeed be moral. The second group would object, because the title articulates what is arguably a category mistake. For, corporations are not *moral* entities but rather financial entities whose primary obligation is to produce returns for their investors, the stockholders, and this, like any other contract they enter into, is a *legal* obligation; corporations have no moral obligations at all.

While I acknowledge that both sets of objections are reasonable to an important degree—in that corporations are not like human beings in many relevant ways and their status as legal persons can pose a threat to actual people *and* in that the legal status of personhood need not be construed as a moral status and may be necessary for businesses under current contract law—in this essay I have chosen to assume that corporate persons do exist and to explore the question of what the moral status of such persons might be. Might moral and corporate personhood coincide in some ways? Might corporate persons also be moral persons? Might moral persons sometimes be corporate persons?

To answer any of these questions, we need to understand how corporate personhood came to be. The bulk of this essay consists of a genealogy of that phenomenon. The concept of moral personhood being more familiar, a much shorter account of its emergence is presented in part 2. As these genealogies show, moral personhood and legal personhood (including corporate personhood) are not really separable concepts; on the contrary, they are so closely related as to be mutually reinforcing.³ It is unlikely, therefore, that modern moral personhood can ever be extricated from legal personhood. We might do well to embrace the tensions inherent in their conjoint existence and refuse to let either one of them govern our political, ethical, and cultural practices, including our conceptions of ourselves. In fact, I will conclude, it is even possible that stirring the mixture more vigorously might yield conceptions of human agency beyond the individual and the aggregate, conceptions that might allow for political action that could effectively counter the power of large, for-profit corporations.

Part 1: A Genealogy of Corporate Personhood.

The genealogy of corporate personhood is either very long or very short, depending on one's angle of vision and the definition that one uses. In its fully developed, modern institutional form (exemplified in enormously powerful for-profit transnational corporations such as Microsoft and General Electric), it dates back only to the nineteenth century and appears there as a new entity with little relation to predecessors. In its conceptual outline and legal use, however, it may have ancestors as far back as the Roman Republic.

Personae were legal entities in Rome. Specifically, they were bearers of property and related legal rights. Most human beings were not *personae*. And some *personae* were composed of groups of people who owned property and held a set of legal rights and obligations in common. A "corporate" *persona* might be a club or a group of men with shared (sometimes hereditary) religious functions or it could be something like a governmental agency with some municipal responsibility or, in some rare cases, it could be an industry such as a mining operation (Radin 1925, 120-21). Such an institution was often referred to as a *collegium* or *universitas* (Patterson 1983).

For Romans it likely felt quite natural to refer to these corporate entities as *personae*, since for them *persona* was not a synonym for *human being*. The legal term had been taken from the Roman theatre, where it first designated the masks that actors wore on stage. That word quite easily slid from naming the mask to naming the role represented by the mask and even sometimes the actor in the role. Plays had only three actors (no matter how many roles there were), so no more than three characters appeared on stage at once, designated as first, second, and third *personae*.

The term was used in other contexts too, where, once again, it was not the equivalent of “individual human being.” In *De Officiis*, Cicero used the term *persona* in his analysis of social roles and what we would call “character” or “personality” traits. Everyone has a rational *persona*, he says, which distinguishes human beings from “brute creatures.” Additionally, each of us has an individual *persona* that distinguishes us from each other (Cicero 1991, 42). This latter seems to involve basic bodily and mental dispositions that might be referred to colloquially as one’s “temper” or “nature.” A well-lived life involves expression of the common *persona*, the rational, but also the expression of the particular *persona*. Cicero also attributes two other types of *personae* to human individuals. One type includes that which one takes on in consequence of chance occurrences or contingent circumstances, and these may be multiple and shifting. The other includes those which we acquire as the result of our decisions. In Cicero’s analysis, then, one’s *personae* are simply the various ways one appears either in public or to and in contrast with others. The connection with theatrical role is clear.

Stoic grammarians took over this nomenclature in their analyses of pronouns and verbs. The first speaker is the first person, the one to whom he speaks is the second person, and the third one about whom the two speak together is the third person: I, you, he, she, or they. Appearance at court followed the same logic. The one bringing suit was the first person; the one charged by the first was the second person. Thus did *personae* enter the law. Over time the word came to be used to designate those who could speak at court, who had legal standing. These were of course free adult male property owners. Non-Romans, slaves, women, children, and the poor were not persons. Moreover, personhood came in degrees so that many free adult males of propertied families did not have the full legal standing of the *persona par excellence*, the *paterfamilias* (Sandars 1941, xxxiv).

The outrage that many Americans feel at the thought of corporate personhood had no place in Rome, because personhood simply did not mean then and there what it has come to mean for us. Nor was the designation a problem in the Middle Ages. On the contrary, it was a useful legal device for handling the property of cathedrals and monasteries whose members, having taken holy orders, were property-less and “civilly dead” (Radin 1932, 648). No individual in a monastery was a person before the law, but the monastery itself was and could therefore own its buildings and grounds and enter into contracts to buy and sell land and goods. Since Latin remained the common language of the Western Church and of European scholars through the seventeenth century, this legal use of the term *persona* was still current at the time of the English Civil War and the birth of social contract theory. Hobbes, for example, speaks of the personhood of churches, hospitals, and bridges in *Leviathan*, Part I, Chapter 16 (Hobbes 1958, 134). And for Locke, *person* is, fundamentally, a legal concept or, as he puts it in *Essay Concerning Human Understanding* Book II, Chapter XXVII, “a forensic term” (Locke 1997, 312).

Despite this long legal history, when joint stock companies began to emerge at the turn of the seventeenth century, it was not clear how the law would evolve to accommodate them. Historians identify the East India Company, chartered by Queen Elizabeth I in 1600, as the first of its kind.⁴ It was, by charter, a monopoly, just as chartered guilds were. But unlike a guild of craftsmen or merchants, the East India Company had hundreds of investors for which it rapidly made fabulous amounts of money, most notably for the Queen herself. Within a few decades, most of Parliament would be shareholders. By the mid-eighteenth century, American colonists would be accusing them of legislating for the colonies with the good of the by then far less profitable East India Company foremost in mind. (Those ships in Boston harbor whose cargo was dumped into the sea on a December night in 1773 belonged to none other than the East India

Company.) The first time an English court contended with corporate existence was in 1612, but the case involved not a for-profit corporation but, rather, an eleemosynary institution known as Sutton's Hospital. The famous and influential jurist Sir Edward Coke, attempting to make sense of corporate existence at court, did not find the resources he needed in English common law, so he turned to Roman law—canon law to be more specific—and the doctrine of *persona ficta* (Hallis 1978, xl-xlii). This 13th century doctrine, usually attributed to the legal scholar Sinibaldo Fieschi, Pope Innocent IV,⁵ distinguishes between that which God made, persons with souls, and that which man made, persons without souls, namely, corporations.⁶ Corporations were persons, but they were different in kind from human legal persons and could therefore be treated differently under the law.

This doctrine was taken over into American law very early. Chief Justice John Marshall's statement in his *Trustees of Dartmouth College* opinion articulates the doctrine: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it either expressly or as incidental to its very existence" (*Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819)).⁷ Thus, where corporations were concerned, American law followed English law and took its heading from canon law and the Latin language wherein corporations were *personae*, persons.

Despite this early legal acceptance of the idea of corporate personhood, Americans were generally skeptical of the institutions. Large for-profit corporations signified systematic political corruption and royal favor—the example here being the notorious East India Company as well as the corporations that had run many of the original colonies. Americans aspired to keep their young country free of such vile things. Thomas Jefferson wrote, "I hope that we shall crush in its

birth the aristocracy of our monied corporations, which dare already challenge our government to a trial of strength, and bid defiance to the laws of our country” (Jefferson 1904-05). James Madison took only a slightly less hostile position, remarking that “incorporated Companies with proper limitations and guards, may in particular cases, be useful; but they are at best a necessary evil only” (Madison 1900, vol. 9, 567).⁸ The federal government was given no express right to charter corporations, which, as far as the founders could foresee, meant that no corporation in the US would operate beyond a small geographical region and none would ever grow to the size and have the political influence of the East India Company.⁹

Technological developments changed the situation radically, however. At the very time that Chief Justice Marshall wrote his 1819 opinion articulating the doctrine of *persona ficta*, across the Atlantic George Stephenson was giving James Watts’ steam engine commercial life in the first locomotives. In 1825, using a locomotive from Stephenson Works, the Stockton and Darling Railway went into operation near Newcastle, England. Three years later, on July 4, 1828, ground was broken for the first railroad in the US, the Baltimore and Ohio Railway. Railroads obviously provided public benefits, a prerequisite for incorporation at that time. But because they were extremely capital intensive and usually required multiple investors and because, by their very nature, they tended to span geographical regions and cross state lines, these large concentrations of capital eventually came to pose the threat that Jefferson and Madison had warned of. For the most part, it would be in cases involving railroads that modern corporate persons would be shaped in nineteenth-century American law. The nature of their business and the practices they instituted would eventually undermine both *persona ficta* and a closely related doctrine known as *ultra vires*.

From the new nation's beginning, corporate charters were granted by state legislatures for capital-intensive ventures deemed to be in the public interest, such as mines and mills, and charters could be revoked if the public interest was violated.¹⁰ Charters were supposedly granted as a matter of public trust. But there was money to be made, a lot of money. Therefore, despite the founders' warnings and precautions—as will come as no surprise to modern Americans, jaded by the current state of national and state politics—political corruption ensued. Many entrepreneurs charged state legislatures with favoritism, granting charters to friends and patrons while refusing them to would-be competitors, and no doubt some of these charges were justified. During the Jacksonian Era, states responded removing the power to incorporate from legislatures and relocating it in special state corporation commissions, bureaucratic agencies that simply processed applications and collected incorporation fees. Thus the process of incorporation was supposedly democratized.

At the time, no doubt, this new arrangement seemed to pose no problems for the traditional doctrine of *persona ficta*. Corporations were still creatures of the state, still deemed to operate in the public interest, and still constrained by the mission specified in their charters. A corporation simply *was* what its charter said it was. Activity beyond the chartered mission, activity *ultra vires*—literally “beyond the powers”—was logically impossible for the corporate person itself. The corporate person was nothing other than the corporate activity authorized by the state. The personhood of the corporation really was just a legal fiction, a way of representing (“personating” in Hobbes' terms) business operations conducted by a group of people. But theoretical trouble was brewing.

A number of factors intensified theoretical and therefore jurisprudential tensions, but here I will mention only two, one a result of bureaucratic practice and one a result of public reaction to

material harms to human beings. First, state corporation commissions sought to streamline their processes by developing application forms that effectively standardized many aspects of corporate structure. They required applicants to name a specified set of corporate officers, and in doing so dictated a governing hierarchy that all corporations would have. They also dictated voting rules that imposed one-share-one-vote and majority rule,¹¹ something even Alexander Hamilton, champion of the First National Bank of America, had opposed¹² (Lipartito and Sicilia 2004, 18). Unincorporated businesses had much more freedom to decide for themselves how decision-making authority would be distributed. Many operated as partnerships in which all partners had to agree on a course of action—governance by consensus—or by one-man-one-vote. But with the new vote-per-share rule, corporate actions could no longer clearly be reducible to the conjoint actions of owners. Shareholders could find themselves out-voted, and businesses could set a course of action contrary to a shareholder’s will.

At first jurists held to the idea that a shareholder who could not accept a course of corporate action could simply sell his shares. That being the case, if a shareholder remained, he (or conceivably she) tacitly agreed to the action. Reality was a bit different. In small companies, shareholders were often simply unable to sell out at a reasonable price; their very livelihood depended on maintaining their stake in the business. In very large companies, another factor was quickly coming into play: the rise of the professional manager. Day-to-day decisions were increasingly entrusted to managers, and shareholders often were unaware of decisions managers made. Over several decades, shareholders would be figured not so much as owners as, rather, investors (Horwitz 1985, 207), creditors (Nyombi 2014, 97), dividend-recipients who placed constraints on growth through reinvestment (Coleman 1974, 49),¹³ or mere suppliers of inputs (Ripkin 2009, 160).

Whatever the corporation was, it was not simply the “personation” of a group of shareholders. Shareholders may have been a necessary initiating force in establishing a corporation, but once established it became something apart from that group of people.

Meanwhile, corporations were growing larger and more powerful, and their activities were increasingly beyond the control of the states that chartered them. One reason was that as they expanded—and this was especially true of railroad companies—they crossed state lines. But the states’ rush to profit from incorporation fees played a big role in the loss of public control. States competed with each other to get companies to charter with them, so they began to relax corporate restrictions (Horwitz 1985, 195).¹⁴ By 1896, incorporation fees allowed New Jersey to be virtually debt-free while imposing no statewide taxes; other states wanted to do likewise (Yablon 2007, 324). For the next several decades, state competition for incorporation fees continued, resulting in extensive new power for corporations in most US states and, as a consequence, serious loss of governmental control over corporate activities.¹⁵ This loss of control made the doctrine of *persona ficta* less and less plausible. Corporations no longer seemed like artificial entities created and controlled by the state.

Through the last decades of the nineteenth century, large corporations themselves had begun to challenge the limits of both *ultra vires* and *persona ficta*. Their attorneys pushed courts for latitude against the states that chartered them, often vigorously asserting the personhood of corporations under the Fourteenth Amendment as means to argue for extension of legal rights.¹⁶ The goal was simply to eliminate the legal distinction between natural and artificial persons in property rights, as attorney John Norton Pomeroy argued on behalf of the railroad in *San Mateo v. Southern Pacific Railroad* in 1882 and as Justice Stephen Field opined in his ruling in that case (see Horwitz 1985, 177-78; 116 U.S. 138, 1882). Pomeroy and Field held that because

corporate property is ultimately the property of natural persons, the artificial person of the corporation should have all property rights that natural persons do.¹⁷ They did not assert the reality of corporate personhood over and above the aggregate of shareholders,¹⁸ let alone posit a corporate mind, but the effect of the gradual trend toward erasure of the natural-artificial distinction was to give the corporation more of a legal presence as an entity unto itself.

This increasingly substantial entity posed some very real threats to flesh and blood people. Industrial accidents and injuries resulting from companies' negligence or even indirectly from the very activity of profit-seeking could and did hurt consumers and employees and now and then resulted in someone's death. But the doctrine of *ultra vires* made it impossible to hold corporations—as opposed to individual employees or owners—liable. A corporation was by definition incapable of doing anything not specified in its charter, which obviously meant it was incapable of breaking any law. If an agent of the corporation overstepped the bounds of charter, he—not the corporation—was the guilty party. If a worker installed a piece of equipment incorrectly and people were subsequently hurt, it was the worker's fault, not the corporation's. If a company failed to deliver on a contract, it was the fault of the employees charged with securing the goods and making the delivery, not the corporation. But, as Ernst Freund pointed out in 1897, in many cases where people or their financial interests were harmed, the individual employees immediately responsible for the harm did not benefit much, if at all, from their actions; instead, the corporation benefitted by making more money, growing larger, and attracting more capital. For example, if a railroad company bought and operated a steamboat or underwrote expenses for a music festival as a destination for passengers, there was a violation of the law, but the guilty party was not the corporation *per se*; rather, it was the agent of the corporation who made the decision and (mis)appropriated corporate funds (Freund 1897, 64). Nevertheless, it was the

stockholders and managers who actually benefitted from the unlawful action. Even if none of them ordered the action or even knew of it, employees undoubtedly felt pressure from them to drive up profits. Individuals who acted illegally were certainly guilty, but were they the only guilty parties? Injured parties bringing civil suit wanted to go after the profiteers who not only seemed to them to be partially responsible but also had much deeper pockets to dive into for restitution. Courts found themselves confronted with a serious problem, and several began to articulate reasons for holding corporations themselves liable for misdeeds. In 1909 in the case of *People v. Rochester Railway & Light Co.*, the New York Court of Appeals considered the possibility that a corporation could be guilty of second-degree manslaughter for negligence in installation of a machine (88 N.E. 22, N.Y. 1909). The Court found for the corporation, but Judge Hiscock noted that under other circumstances, he might find a corporation guilty of a crime, as long as it did not involve “personal, malicious intent.” Corporations themselves might well be liable then, but, if they were in fact devoid of emotion or intent, they could not be vicious (see Lipton 2010, 1931-32). The Supreme Court agreed. That same year, 1909, the Court upheld criminal liability against a corporation in *New York Central & Hudson River Railroad Co. v. United States* (212 U.S. 481, 494, 1909) for paying rebates to corporate patrons in violation of the Elkins Act. Thus, the Court endorsed the idea of criminal liability, but the question of *mens rea* remained open.

It was not long before theorists began to argue that corporations do have intentions and can have *mens rea*. In 1916 Harold Laski urged acceptance of the idea that the corporation has a mind distinct to the minds of its members and that it “must bear the responsibility for its actions” (Laski 1916, 415, 413). If corporations were equivalent to natural persons, real apart from both the law that chartered them and the stockholders that initially bankrolled them, not only should

they have the rights of persons but they should also bear the responsibilities. Of course, many jurists balked at the idea that a corporation could have a mind of any sort. But even in the midst of the controversy, one thing was clear: Neither *ultra vires* nor its foundation *persona ficta* was adequate to contend with the real power and reach of corporate entities.

These corporate entities made themselves felt not only in the courts and daily life but in politics. Huge concentrations of capital—common by the end of the nineteenth century in railroads, life insurance, sugar, tobacco, petroleum, and of course banking—could exert a great deal of economic and political pressure. Popular animosity toward corporations (never completely absent since the Revolution) was rekindled, resulting in passage of the Sherman Anti-Trust Act in 1890, among other measures. It seemed only federal authorities could reign in huge corporations operating across state and even national boundaries (Lamoreaux 2009, 48). But corporations had the wealth to influence federal policy as well; their campaign contributions reached a new high during the presidential election of 1896 as businesses sought to elect William McKinley over William Jennings Bryan. This high level of corporate political expenditure continued through the next two presidential elections (Lipton 2010, 1921), contributing to the eruption of in the Great Wall Street Scandal in 1905.¹⁹ Not only were individual people harmed by unchecked corporate power, but democratic institutions appeared to be in jeopardy as well.

In the midst of this legal confusion, the Real Entity Theory emerged. It was imported from Germany in the last years of the nineteenth century into English jurisprudence by William Maitland and into American jurisprudence by Ernst Freund.²⁰ According to this theory, the corporation was not actually a creature of the state; it had a personhood that the law did not create but simply recognized. And it not only had an existence but it also had a will and agency beyond the aggregate of its shareholders. Furthermore, the corporate person's will could be

enacted by managers even in the absence of guidance from shareholders, indeed even against their wishes at times; managerial interests, as *opposed* to shareholder interests, undoubtedly drove some of the judicial movement toward the Real Entity Theory (Bratton 1989, 1511).

The popular press and political speeches discussed corporate existence and power from the 1870s into the 1890s (Hartmann 2010, 113), setting the stage for the theory's American debut. But the debate in jurisprudential literature did not really heat up until after the new theory was introduced. With social, political, legal pressures mounting, jurists were forced to concede that neither *persona ficta* nor *ultra vires* fit the facts. Legal literature from the first four decades of the twentieth century is replete with articles on corporate personhood; this debate was very lively and sometimes acerbic. By 1930 Frederick Hallis declared that: "the Fiction Theory is worse than useless" (1978, 243); "the conception of corporate personality supplied by the orthodox Fiction Theory has broken down completely in its attempt to give legal form to the facts of corporate life, and it is the theory which must be abandoned" (1978, xxxiii). Corporations had some kind of life of their own distinct from individuals who owned or worked in them (Laski 1916, 407, 413-15) and the law that established them, and they were logically capable of acting in ways that exceeded their charters.²¹ The question was what kind of life did they have?

Theorists fussed over the matter for over three decades more, but the question has never been definitively settled. Neither more traditionalist artificial entity positions nor vaguely Hegelian real entity positions were able to establish themselves. Instead, a sort of stalemate was reached, and jurists and citizens turned to other issues in the context of worldwide depression and then world war. The issue of the nature of corporate existence dropped from sight in the late 1930s and was omitted from legal textbooks by 1976 (Mark 1989, 1441; Bratton 1989, 1508-09). With

no agreed-upon doctrine to guide them, courts behaved more or less erratically, even into the 1980s (Lipton 2010, 1917; Mitchell 1946, 96; Mark 1987, 1442).²²

Through those decades, however, corporations did acquire certain Constitutional rights. In 1906 in *Hale v. Henkel* the Court held that a corporation has protection from unreasonable search and seizure (Fourth Amendment) but not from self-incrimination (Fifth Amendment). That same year, in *Northwestern National Life Insurance v. Riggs*, Justice Harlan stated that the word *liberty* in the Fourteenth Amendment does not apply to an insurance company; rather, *liberty* there means “the liberty of natural, not artificial persons” (quoted in Miller 2011, 917). In 1923 in *Meyer v. Nebraska*, the Court said corporations have contract rights that protect its property but no “*intangible or liberty interests*”; therefore, such rights as free speech, privacy, personal security, and privileges the common law recognizes as essential to the pursuit of happiness are not appropriate for corporations (Miller 2011, 917). In 1950 in *United States v. Morton Salt Co.*, the Court accorded businesses less Fourth Amendment protection than human beings, and in 1972 it said, in *United States v. Biswell*, that firearms dealers could be searched without a warrant because of the government’s interest in regulating gun ownership (Miller 2011, 919). However, although the Court distinguished between individual and corporate persons in these cases, it blurred its own distinction in several others during some of the same decades. For example, in 1952 in *United States v. Martin Linen Supply Co.*, it accorded protection from double jeopardy for corporations, citing the embarrassment, anxiety, and person strain that the possibility of multiple prosecutions places on defendants (Miller 2011, 926-27); obviously this decision was utterly inconsistent with *Hale v. Henkel* (see Blumberg 1990, 59-60). And in 1978 two cases extended Constitutional rights to corporations as to human beings. In *Marshall v. Barlow’s, Inc.*, the Court said corporations other than liquor and firearms dealers are protected

from warrantless administrative searches—in particular that the Occupational Safety Administration cannot conduct an inspection without a warrant based on evidence creating suspicion of violation. This was justified based on a corporation’s “reasonable expectation of privacy,” just as one has in one’s own home (Miller 2011, 926). And in the case of *First National Bank of Boston v. Bellotti*, the Court invalidated (by 5-4) a Massachusetts law prohibiting corporations from contributing to political campaigns “for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation” (US Supreme Court 1978, <http://caselaw.findlaw.com/us-supreme-court/435/765.html>). They did so on the basis of the First Amendment right to free speech. Justice Powell, writing for the majority, stated, “There is no support in the First or Fourteenth Amendment, or in this Court's decisions, for the proposition that such speech loses the protection otherwise afforded it by the First Amendment simply because its source is a corporation that cannot prove, to a court's satisfaction, a material effect on its business.” The Court had ruled that money is speech two years earlier in *Buckley v. Valeo* 424 U.S. 1, 1976. According to Jeffrey Clements, these rulings were part of a concerted campaign beginning in 1971 when Powell served as attorney for the United States Chamber of Commerce and wrote a memo to his client entitled “Attack on American Free Enterprise System.” In it he outlined a plan to organize corporations to fund a drive for political power. Clements writes that “Powell emphasized the need for a sustained, multiyear corporate campaign to use an ‘activist-minded Supreme Court’ to shape ‘social, economic, and political change’ to the advantage of corporations” (Clements 2012, 18). President Nixon appointed Powell to the Court the next January. Through the 1970s many large corporations poured money into the Chamber’s National Chamber Litigation Center and other legal foundations that began

filing briefs in case after case supporting corporate persons and corporate speakers (Clements 2012, 23-24). Plaintiffs in *Bellotti* included a number of internationally-traded corporations.

Whether rightly or wrongly—depending on which jurist one reads—*Bellotti* became the precedent for subsequent corporate political contribution and free speech cases, including *Citizens United v. Federal Election Commission* in 2010.²³ It is now the case, writes David Ciepley, that “[n]o other national jurisdiction endows its corporations with as many of the rights of citizens as the United States” (2013, 221).

Given this apparent propensity for the Court to interpret the Constitution in ways that give corporations the rights of citizenship (frequently now attributing to them human emotions and, in 2013 in *Hobby Lobby*, constitutionally protected religious beliefs), some legal theorists have begun to wonder whether corporations might claim Second Amendment rights (see e.g. Miller 2011) and what that might mean: private police forces and militias? The right to stand corporate ground? It seems that, even without an articulated theoretical account or rationale, corporate persons are real entities at least in the sense that they are an extremely powerful and effective force in our world.

Part II: A Genealogy of Moral Personhood.

Person, as Part I noted, comes from the Latin and entered the English language through theology and jurisprudence. Before its time, individual people were not persons, as we can still see in Middle English. Fourteenth century English, while deeply influenced by Latin and French, still regularly employed an older word for human individual, namely, *wight*, from *wiht* in Anglo-Saxon, a word that apparently meant something more like *active living creatures* and in any case that had little or nothing to do with legal recognition or material proprietorship.²⁴ The notion that

human individuals are persons, actors responsible for their actions as “owners,” can be traced, as can corporate personhood, to seventeenth century England.

Through that tumultuous century, the word *person* led a life of referential ambiguity. At times it referred to any human individual. But it also had a more restricted meaning, one that was more in line with the legal meaning, property-owner. “God is no respecter of persons!” radical pamphleteers, quoting a passage from the King James Bible²⁵, warned landowners (Winstanley 1649, 125; see also 4, 7); for, person or not (that is, proprietor or not), everyone is valuable in the eyes of the divine. Later translations of the Bible would assert simply that God is impartial, but the older wording is telling. Respecting persons in 17th century England meant making distinctions between people; in a class stratified society it meant recognizing in word and gesture the superiority of aristocratic proprietors and the educated clergy.²⁶ Insofar as such people were legal persons in ways that commoners were not, the political meaning of the phrase leaps to the fore.

In the second edition, Book II Chapter XXVII, of Locke’s *Essay Concerning Human Understanding*, we catch what is arguably the first glimpse of modern personhood. There Locke writes, “Wherever a man finds what he calls *himself*, there I think another may say it is the *same person*. It is a forensic term appropriating actions and their merit; and so belongs to intelligent agents capable of a law, and happiness and misery” (Locke 1997, 312). A modern person is not merely a human individual or a legally-recognized rights-bearer; a modern person is an intelligent agent, one who can deliberate before making a decision and taking action—an action that, as a result, is based upon that prior deliberation; a person is a conscious actor persisting through time, making choices, and producing material effects that it recognizes as being in some

sense its own.²⁷ Locke's person is not just perhaps a legal owner of land; Locke's person is an owner of actions. It owns its body and all of that body's deliberate effects.

Locke's person is, therefore, fundamentally and essentially accountable. It can be called to account for what it has done, and it can give an account of itself, both to itself and to others. Hence, like Roman personhood, modern personhood is emphatically not coextensive with human being, for much that is human is not accountable (consider: taste, sexual attraction, phobias, dreams, the experience of being struck by a thought). Locke is perfectly aware of this excess to accountability, so he distinguishes the person from both the body through which it acts and by whose labor it appropriates what it owns *and* from the finite soul that gives it immortality. He acknowledges that human lives have dimensions that exceed personhood then, but none of that matters in morality or law. These are essentially forensic realms, domains in which we find and value reasoned deliberation, free choice and action, and, therefore, justice—that is, judgment, reward, and punishment. A person is, first and foremost, what is to be judged—by itself, by its fellows, by the courts, and ultimately by God.

Locke carved out a new conceptual terrain along the borders of several different pieces of 17th-century conceptual territory. His notion of person was strange to his contemporaries, many of whom believed he was denying the existence of the soul. He was not, but his analysis did render souls irrelevant for all practical purposes; souls don't come before courts of law or even clerical confessors. Furthermore, on Judgment Day, when bodies are raised from their graves and reunited with their respective souls, their persons will reawaken—they will become conscious again of their actions through time—and it is the persons (not the souls) on whom God will pass judgment. On that “great day, wherein all secrets of all hearts shall be laid open,” Locke

declares, “no one shall be made to answer for what he knows nothing of; but shall receive his doom, his conscience accusing or excusing him” (II.xxvii. 22).

Some secrets of some hearts will never be laid open for human judges, so human justice will never be as perfect as the justice of Almighty God. But the same general principles apply in human courts of law and in moral judgment. We blame people and punish them not for what they did but for what they chose to do and what they are conscious of having done, not (ideally) for what they did against their choice or what they have absolutely no recollection of doing. Doings not chosen and beyond recollection are not part of one’s person. And human beings without the ability to choose or recollect are not even subject to punishment, because there is no one to punish; such beings have no person. Here Locke mentions infants, lunatics, and idiots—people so lacking in linguistic and cognitive ability that they literally cannot keep track of themselves.

For Locke, then, moral goodness consists in taking morally good actions, and the only sort of being capable of taking actions that can be judged as morally good is a person. Locke thus combined several different strands of meaning into his concept of personhood. The Roman conception of person as property-owner and bearer of responsibilities and rights is obvious here. But the generalization of ownership and responsibility to encompass anyone who can deliberate, make choices, and then keep track of actions as his or her own was not part of the Roman conception at all. It resonates with William Sherlock’s account of the Holy Trinity—where the persons of the deity are distinguished by way of independent self-awarenesses (Sherlock 1690)—and with the everyday use of *person* as the singular form of *people*, any individual human being.

Theological controversy over Locke’s claims soon died away, and his concept of moral personhood prevailed in European and then American thought. Protestant Christians embraced individual personal responsibility as opposed to collective or social responsibility for economic

and political as well as spiritual life. Locke's person is not exactly the sort of person that human individuals experience themselves to be today; modern moral personhood has been shaped by a variety of forces since its emergence in the late seventeenth century. But, as this brief genealogy demonstrates, the sort of personhood that existed prior to Locke's work is decidedly distinct to the prevailing incarnation of personhood in the modern Western world.

Part III. Conclusion.

The genealogy of both corporate and moral personhood that I have put forth suggests something like Max Radin's characterization of one side in the jurisprudential debate over corporate personhood nearly a century ago, namely, that corporate persons are "...no more 'fictitious' than so-called 'real' and 'natural' persons, who equally depend on deliberate human contrivance, and the play of imagination, for their right to be called 'persons'" (Radin 1932, 645).²⁸ Moral personhood, not only as a concept but as a form of subjectivity, emerges in history and society. Moral persons, like legal persons, are not born; they are made. Furthermore, historically, moral personhood was modeled on legal personhood, and down to the present day it enables the subjection of a living individual to legal as well as moral judgment. Despite the hopes of anti-corporate protestors, we cannot really distinguish moral personhood from the legal concepts that also enable corporate personhood.

If we cannot extricate them from one another, we must either embrace them both—to some critical extent—or dismantle them both. In the mid-nineteenth century Friedrich Nietzsche believed the time had come to raise the question of the value of truth. I believe the time has come to raise a perhaps less fundamental but basically similar question: What is the value of personhood? Not only is personhood a conceptual tool in a suite of dividing practices; it is also a

discipline to which we submit ourselves and each other. To put my question in Nietzschean terms, how does that concept, subjectivity, and discipline enhance lives, and how does it oppose or undermine lives? Might there be ways for people to live well together without it?²⁹

On the assumption that these will not be dismantled any time soon, our best immediate option might be to explore whatever potential might lie in emphasizing the similarities between human beings and corporations; for, doing so might open our thinking toward the possibilities of corporate—that is, shared collective—responsibility and action beyond the legal forms now in existence.

Before the law, both human individuals and corporate persons are held to have mentality—most importantly for purposes of judgment to have intentions. In 1945 the Fourth Circuit Court found Old Monastery Company guilty of conspiring to violate the Emergency Price Control Act of 1942 (*Old Monastery Co. v. United States*, 147 F.2d 399 (4th Cir. 1945; see Uliano 2015, 62). By doing so, the court imputed intention to the corporation; it did not simply violate a law, but it formed an intention to violate the law. Subsequently there have been numerous cases in which courts attributed mental states to corporate entities. Some courts locate these states in the mind of one or more human agents of the corporation. Other courts have located them not in a single human mind but in the collective knowledge of various corporate decision-makers taken together. Still others have located them in the corporate “character” or “ethos” (see Abril & Morales-Olazábal 2006). A promising doctrine and set of procedures has been put forward over the last decade (provoked in part by the World Com and Enron scandals at the beginning of this century) focusing analysis on corporate decision-making processes, which can involve many people who never have direct contact with one another. In this analysis, corporate intentions are effects or results of material processes, not primarily of individual minds.

When we balk at the idea that corporations have mental states, we often do so I believe because we imagine that minds are not bodies or material processes. But if we let go of that assumption, we can consider human beings, insofar as we form intentions and act, not as pure mentality but as material systems opening onto larger systems—multiple intertwined ecosystems and social systems. Human intentionality can be understood as a performative phase of inter-systemic operation in which a more or less individuated human system can be said to prepare an action. Sometimes we observe this phase, and sometimes we merely infer it from the action based on our familiarity with human systems—or, we might say, with human bodies. A human intention need not be understood as a unit of thought internal to a mind; certainly it isn't a *sui generis* product of a sovereign self. It forms in time and takes place in the material world, and there are usually signs of its emergence that are available to others. If we take human materiality seriously, we can't so easily assert a radical difference between individual and corporate intention. True, the processes for forming individual versus corporate intentions are different, because the materiality of the two kinds of entity are different. Nevertheless, both humans and corporations are material, temporal systems that prepare to take action. In corporations, these preparations usually involve the conscious deliberations of many individuals, but the emergent intention and action need not belong to any one of those individuals; indeed, no human being need ever have formed that intention for it to exist as a product of corporate processes.³⁰ In humans, likewise, the process of intention formation involves complex series of biological, psychological, social, and environmental events. In neither kind of entity is there a sovereign deliberator in charge.

What matters, ethically and legally, is whether an intention-forming system is capable of interrupting and revising its intentions or re-forming some aspects of its intention-forming

processes over time. I would argue that both humans and corporations are capable of doing these things under the right circumstances—in other words, given certain systemic mechanisms in response to stimulation from other systems to which they are open.

My final point, then, is this: Human beings can and do form collective entities with intentions and capacities to act that exceed them as both individuals and aggregates. Such entities can become significant political forces—witness for-profit corporations. Over the past century we have seen for-profit corporate entities overwhelm the power of many governments—which have at times themselves been understood as corporate entities—and reshape the world. Most governments today cannot effectively withstand corporate forces and, in any case, most are not very responsive to people’s material needs. We need entities that can, and those entities will themselves have to be corporate, collectives that surpass in strength and knowledge the aggregated individuals who compose them. Our predecessors, collectively, imagined multinational for-profit enterprises into existence. We must now imagine into existence corporate bodies to counter them. While the world might be much better off without the concept of corporate personhood—and, I have suggested, moral personhood as well—the concepts of corporate action and responsibility are crucial and must be elaborated upon in any viable pursuit of environmental or social justice. We need an ethical materialism that moves us beyond the forensic morality of mind and body. Perhaps perversely, the peculiar phenomenon of corporate personhood may provide us a point of departure.

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¹ Jeffrey Clements is representative of this general rejection of corporate personhood with his 2012 book entitled *Corporations Are Not People: Why They Have More Rights Than You Do and What You Can Do About It*. See Clements 2012.

² Tamara Piety provides an extensive and very useful bibliography of such scholarly dismissals. See Piety 2015, 362, footnotes 6-9.

³ David Ciepley makes a further distinction, between legal personhood and Constitutional personhood. States, not the federal government, charter corporations and thus grant them legal personhood, but states do not have the authority to confer on corporations Constitutional rights, according to Ciepley 2013, 240. For the purposes of this essay, I will conflate legal and Constitutional personhood, although the distinction is an interesting one and might be fruitful.

⁴ Ciepley identifies both the English and the Dutch East India Companies as the first two publicly traded limited liability corporations. They came into existence at about the same time. See Ciepley 2013, 238.

⁵ I usually attributed because at least one scholar has suggested that Innocent was not the actual author. See Conard 1976, 417, footnote 5. What difference this makes, I don't know, but I like to be thorough, just in case it turns out that it does matter upon further investigation.

⁶ The Pope articulated this view when deciding not to excommunicate a monastery but only its members.

⁷ This was a commonplace in the US well before Marshall articulated it. We see it in Alexander Hamilton's opinion in the debate over chartering a national bank in 1791: "To erect a corporation, is to substitute a legal or artificial for a natural person, and where a number are concerned, to give them individuality. To that legal or artificial person, once created, the common law of every State, of itself, annexes all those incidents and attributes which are represented as a prostration of the main pillars of their jurisprudence." See Hamilton online at http://avalon.law.yale.edu/18th_century/bank-ah.asp.

⁸ The passage continues: "Monopolies and perpetuities are objects of just abhorrence. The former [corporations] are unjust to the existing, the latter [monopolies] usurpations on the right of future generations" (Madison 1900, 567).

⁹ The federal government quickly claimed such a power when it formed a national bank corporation in 1791.

Jefferson and Madison held that the Constitution, in the Tenth Amendment, prohibited the federal government from granting a charter to any entity, including a national bank. Hamilton argued that it did not, because the right was implicit in the federal government's duty to protect and enact its sovereignty, for which a national bank was needed. Hamilton prevailed. However, the charter was granted not in perpetuity but only for twenty years, ending in 1811.

¹⁰ The Supreme Court did not consider whether a corporation might operate across state lines until 1839 (*Bank of Augusta v. Earle*) (Mark 1987, 1456).

¹¹ Which made sense for large companies but less so for small and medium-sized ones, as Lamoreaux points out (2009, 30-31).

¹² Hamilton’s voting scheme for the bank can be found in Dunlavy 2004, 74-75. He wanted to apportion votes according to the number of shares held, but not on a one-to-one basis. He wrote: “A vote for each share renders a combination of a few principal stockholders, to monopolize the power and benefits of the bank, too easy” (quoted in Dunlavy 2004, 75).

¹³ Coleman is especially interesting on this point. He writes, “But these corporate actors are, in their actions, motivated toward purposes of their own—very often purely growth—for which membership benefits are viewed merely as a constraint. For example, some economists now [1974] conceive of the rate of return of capital—the owner’s benefits—as merely one of the constraints, like wages, that those agents who control a corporation must take into account, rather than as a corporate goal” (Coleman 1974, 49).

¹⁴ New Jersey’s law allowed companies to own stock in other companies and to incorporate for any lawful business purpose, not just those deemed to be in the public interest (Horwitz 1985, 195).

¹⁵ Coleman notes that states started allowing proxy voting of shares, issuance of stock without giving new holders voting rights, holding of shareholder meetings in remote locations that many could not get to, and holding stock in other corporations. See Coleman 1974, 45-46.

¹⁶ The Fourteenth Amendment declares that “No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” Corporations wanted to claim the same due process and equal protection rights as natural persons had against states. They wanted to prohibit differential imposition of property taxes (for one thing) across the two categories of personhood.

¹⁷ Their view is sometimes said to be the forerunner of the contemporary “aggregate theory” of the corporation. On this view, corporations are simply enormous networks of contracts between and among people—shareholders, managers, and employees—and their rights can be reduced to the rights of those who invest their assets in the company. Although versions of this theory seem to dominant academic business literature, it is not clear to me that contemporary versions really descend from this nineteenth century view. Nor is it clear that either the nineteenth century or the twenty-first century theory is internally coherent. For a critique see Ciepley 2013, 324-232.

¹⁸ Horwitz has been accused repeatedly of claiming that the Real Entity Theory was actually in play in *Santa Clara*, but he really does not say that (see 1985, 178). For criticisms of Horwitz, see Lipton 2010, 1942, and Dunlavy 2009, 70-71.

¹⁹ For details about the Great Wall Street Scandal of 1905, see Beard 20

²⁰ The most prominent of the German Real Entity theorists was Otto von Gierke. Over the course of his career he published a four-volume work entitled *Das deutsche Genossenschaftsrecht*, Volume 3 of which appeared in 1881 under the title of *Die Staats- und Korporationslehre des Alterthums und des Mittelalters und ihre Aufnahme in Deutschland*. It was section 11 of this volume, pages 500-640, that Maitland translated into English and published in 1900 as *Political Theories of the Middle Age*. Freund, who read German, introduced some of Gierke’s ideas into lectures he gave in Chicago several years before that English publication, and he mentions Gierke’s work at least twice in *The Legal Nature of Corporations* published in 1987. See Freund 1897, 24 and 55.

²¹ The legal landscape was complicated considerably in the 1920s when the so-called “M-form” or multidimensional form of corporate structure emerged. This new structure enabled firms to manage national and international operations and provide diverse products efficiently (Galambos 2009, 153)—something nineteenth-century theorists had thought was impossible. So corporations grew even bigger, richer, and more politically powerful.

²² Radin mentions a particularly interesting set of cases in which courts found that corporations, unlike their shareholders, were not raced. In *People’s Pleasure Park v. Rohleder* (1908), a court held that a corporation was not a Negro although all its members were. This allowed the corporation to lease a park whose deed prohibited leasing to Negroes. In *People v. Awa* (1865), a court declared that the state of California is not white. See Radin 1932, 660-61.

²³ According to Lipton, “Justice Kennedy’s claim to unequivocal historical authority is unsupported” (2010, 1961). He argues that *Citizens United* was neither historically nor doctrinally mandated (2010, 1963). Justice Kennedy, writing for the majority, argues the opposite, obviously.

²⁴ *Wight* appears frequently in Chaucer, and as we see in the Monk’s Tale at 2263 through 2270, its full range of meaning does not coincide with any word in modern English. Commentator and editor John H. Fisher translates the word as *person* or *living creature* or alternatively as *active* or *nimble* (Fisher’s glossary in Chaucer 1977, 1040).

²⁵ We see this in the 1611 edition of the King James translation of the Bible. Consider the Acts of the Apostles 10:34-35: “Then Peter opened his mouth and said, Of a truth I perceive that God is no respecter of persons: but in every nation he that feareth him, and worketh righteousness, is accepted with him.” Here Peter is preaching in the house of the Gentile Cornelius to a non-Jewish gathering. He is emphasizing that God does not favor any one nation

over any other. The phrase in question is a translation from the Greek προσωποληπτής [prosopoleptes], which comes from προσωπολεμσία [prosopolemsia], commonly translated subsequently as *partiality*.²⁵ God shows no partiality; regardless of nationality, all are equal before God. In the English of the seventeenth and eighteenth centuries (the phrase is retained in the 1769 King James translation), recognition of equality precludes recognition of persons, for personhood is an elevated status. No one is to be set above others. All are equal, and anyone who asserts otherwise offends against God, as is stated in the Epistle of James, 2:9: “But if ye have respect to persons, ye commit sin, and are convinced of the law as transgressors.”²⁵ English speakers across social classes knew that personhood was a status that not all people enjoyed, and by the 1640s that status was under attack.

²⁶ It is interesting to note that in the 17th century the word *person* was pronounced the same way as the word *parson*. God was also no respecter of parsons.

²⁷ The fact that Locke mentions the capacity for happiness and misery is not a rhetorical flourish. Happiness is not fleeting pleasure but sustained enjoyment; misery is not fleeting pain but sustained suffering. The temporality of happiness and suffering, as opposed to mere pleasure and pain, are consistent with the person’s agency and ongoing sense of self.

²⁸ Radin continues his description of this view: “A ‘person’ or a ‘personality,’ it is declared, is not a human being nor anything given in nature, but a group of rights and capacities, or at any rate a group of legal relations, and this group owes its existence entirely to recognition of it by the legal and institutional organization of the community. The ‘personality’ of the ordinary man would, in this view, be exhaustively described in the list of rights and capacities which come into practical being only, we may remember, when the individual performs certain specified acts in a certain specified way. In the same way, a different group of rights and capacities exists when one or more of a number of specified individuals act in a determined way, and to this grouping or complex of relations, the name of ‘corporate personality’ is attached. One kind of personality is exactly of the same order as the other” (Radin 1932, 645).

²⁹ As a means of addressing the needs of refugees and stateless people for legal protections at least since 1977 if not since World War II (Samuel Moyn makes a good case for the later date—see Moyn 2010), activists and theorists have promoted human rights as the rights of persons regardless of citizenship status. The problem with this strategy, Roberto Esposito insists, is that the category of person has always been used to create and hold open gaps between human beings in general, on the one hand, and legitimate bearers of rights, on the other. (Esposito credits Hannah Arendt with seeing this problem early on.) It was, from its legal beginnings, a mechanism—Esposito uses Foucault’s word *dispositif*—used to mark off some human beings as legally protected and others as unprotected or as without certain rights (Esposito 2012, 9). That is what personhood is *for*; the logic of personhood requires that someone be excluded.

³⁰ Drawing on Organizational Theory, Suzanne Ripkin writes, “Organizations produce and affect real behavior that would not otherwise exist without the organization” (Ripkin 2009, 131). Research suggests that organizations will take greater risks than will the individuals that make them up (132) and that an organizational ethos is likely to persist even after the entire set of individuals making it up have been replaced (134). Organizations shape the people within them, affecting their ethical standards, desires, and self-conceptions.