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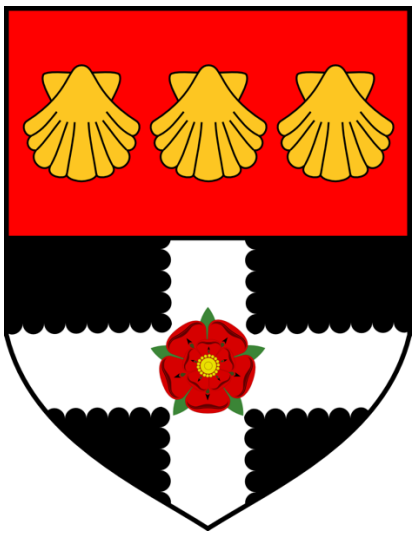

CORPORATE MORAL RESPONSIBILTY

Submission for the degree of PhD in Philosophy

J. David Hull

Department of Philosophy

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Declaration of Original Authorship

Declaration: I confirm this is my own work and the use of all material from other sources has been properly and fully acknowledged.

J. David Hull

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Abstract

This dissertation argues that corporate moral responsibility can be an element of functioning corporations and is a choice that society can make. Although many in the lay community would say that of course corporations should attend to moral questions, the philosophy of how this can be rightly said is controversial.

Section one (first three chapters) gives an account of the nature of functioning business corporations involving the readily observable facts about a corporation doing business, and a tripartite model of the corporation is presented. The tripartite model consists in 1) the legal entity that owns assets and liabilities, 2) a group of persons contracted to the legal entity and 3) a set of roles and relationships between the corporate associates and the legal entity. Additionally, an account of the main extant theories of the nature of corporations and their inability to account for the readily observable facts of corporations is argued. The conclusion is that the corporation, as a tripartite model, is best served by a theory that designates it as a real entity apart from but dependent on its employees. Chapter three answers the question, 'What type of real entity is a corporation?', using John Searle's theory of social ontology to show that corporations are institutional facts, a social entity.

The second part of the thesis argues that corporations have moral dispositions analogous to those held by natural persons and maintains that it is these that allow corporate entities to be capable of moral concern. A constitutive rule is introduced, 'moral company rule', that may be used as a guide for society to assess the extent of corporate moral responsibility. An account of the powers and responsibilities corporations would have if the moral company rule was followed is presented. Additionally, the dilemma for society, to insist on corporate moral responsibility or preserve the *status quo*, is explored.

The last chapter recapitulates the argument for corporate moral responsibility to illustrate the two aims of this thesis: first to give a clear understanding of the functioning business corporation as a real entity with a series of moral dispositions, and second to show that society has a choice to insist that these moral dispositions are used in business.

CHAPTER 1: The functioning corporation and responsibility

Corporation: An ingenious device for obtaining profit without individual responsibility.
Ambrose Pierce (1842-c.1914; American Writer)

1. Introduction

The subject of this thesis is the moral responsibilities of business corporations. In the following text, a *corporation* (the appellations, 'company' or 'firm' will be used interchangeably with 'corporation' where it may improve the prose) is taken to be a functioning business corporation. The term *corporation* is used here to describe an entity created by legal declaration and afforded a series of rights and responsibilities under the law, an incorporated entity. I use *business corporation* to distinguish my entity of interest from a member corporation[1] or business partnership.[2] I use *functioning* to indicate that the corporation is actively producing goods or providing services. I offer no arguments regarding the genesis of corporations my discussion is limited to companies in action, that is, functioning. I use *morally responsible* to mean responsibility for actions the commission or omission of which are appropriate occasions for praise or blame (see §1.5. and 4.1., 4.2.).

This chapter presents a model of the nature of the corporation when it is functioning at producing goods or services. I introduce a tripartite system of structural elements and argue that these three elements are necessary, readily observable, components of the corporation acting in the world. In addition, I lay groundwork for my approach to understanding corporate moral responsibility by establishing the nature of some of the readily observable features of corporations that a theory of their nature should be able to accommodate. In the penultimate section I specify the type of responsibility to be considered and illustrate this type of responsibility with positive and negative examples of corporate actions.

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[1] Member corporations were ecclesiastical entities predating business (sometimes called property) corporations, that were created to administer universities, cathedral chapters and so on. They had members, the priests, bishops etc. who elected leaders who served for life and could not be held accountable by the members (Ciepley, 2017: 40-41).

[2] A business partnership is two or more person running a business together and sharing the profits. All responsibilities of the business are held by the partners - losses, legal suits and so on. A business corporation may be a partner in its capacity as a 'legal person'. Partnerships have none of the advantages of incorporation (https://www.gov.uk/set-up-business-partnership accessed May 9th, 2021).

1.1. Corporations matter

Corporations, however we may describe them, certainly impact the world. Business corporations affect the lives of a significant proportion of human beings. From city dwellers in developed countries investing money, buying complex consumer goods and so on, to isolated hunter or agrarian Brazilian tribes losing habitat and land to logging corporations, the actions attributable to corporations are ubiquitous. In developed countries we interact with corporations daily when we buy, rent, or lease everyday goods (food, shelter, automobiles etc.), when we purchase insurance for our possessions, when we travel… the list is considerable. Each of these corporations is unique, just as we humans are each unique. When we say that Nike make trainers, we are identifying something specific. Adidas, New Balance, Puma and so on also make trainers and these products are distinct, both in how they look, the claims made for their performance, and in the way they are manufactured and marketed. Additionally, the consumer base for each is demonstrably different and these consumers are often very loyal to a specific corporation's offering.

However, the relationship between human society and 'the corporation' is complicated by the power imbalance between the individual citizen and corporations, particularly large corporations working internationally. As Peter French, a leading proponent of corporate moral responsibility, observes, "If anything is obvious in our world, however, it is that humans and corporate actors are not equal in morally important aspects and pretending they are is mere fantasy. A vast power asymmetry exists between humans and corporations that no ethical theory should whitewash." (French, 1995: 43). Dealing with this imbalance is complicated by the fact that, as I discuss later (§1.5.3), we cannot meet a corporation and we cannot see a corporation. We can only interact with its employees and see its tangible assets, employees, investors, offices and so on. Corporations are complex collectives exerting significant influence in society both positive and negative. Their moral responsibility or lack of moral responsibility for goods and harms is an important aspect of their place in society and our relationship with them. To understand the nature of corporate moral responsibility it is important to first understand the nature of the corporation – what is it?

1.2. Foundational elements of a functioning business corporation

My method of elucidating the nature of corporations takes as its foundation those features of corporations that are readily observable in the world by third parties – things about the corporation in action (doing business) that we can see for ourselves. This approach of

considering readily observable corporate features is consistent with John Searle's contention that, "You have to be able to think yourself into the institution [*corporation*] to understand it." (Searle 2005: 22, [*corporation*] my addition). Taking the readily observable features of corporations leads me to a description of corporations as quasi-biological entities consisting in a tripartite amalgam of, 1) the legal entity that owns assets and liabilities, 2) a group of persons contracted to the legal entity (corporate associates) and 3) a set of roles and relationships between the corporate associates and the legal entity. These relationships work in two ways – within-group (associate to associate) and between-group (legal entity to associates and associates to legal entity).[3] I describe each of these elements in turn below and argue that they are necessary features of a functioning corporation and constitute the basis of a distinctive corporate nature.

1.2.1. The legal fictional person

Once an application for incorporation is approved by a particular jurisdiction, the resulting corporation is a legally instituted entity with a set of legally enforceable privileges and responsibilities. For example, my wife's company, long before she 'activated' it by doing billable work, had regulatory documentation to provide each year. Incorporation characterises the corporation as a legal person (formally a legal fiction) that has become a real independent entity, in law. It is now considered by the law to be a fictional person – a *persona ficta* (Schane, 1986: 565). A legal fiction is, "A ruling or status in law based on hypothetical or inexistent facts" (Duhaime's Law Dictionary, 2019). Precedent for regarding the corporation as a legal entity (legal fictional person) reaches back many years and its relevance to corporations was clearly articulated by Chief Justice Marshall of the US Supreme Court in a landmark case of 1819, "[*a*] corporation is an artificial being, invisible, intangible and existing only in contemplation of law" (Trustees of Dartmouth College v. Woodward, 1819). The corporation does of course exist as, if it did not, there would be no litigation possible. However, it exists for Marshall and the court only as a *persona ficta* for legal purposes.

[3] I take these three elements from Manuel Velasquez's paper, 'Why corporations are not morally responsible for anything they do.' *Business & Professional Ethics Journal*, 1983, *2*(3); 11. However, while Velasquez analyses each element in terms of a denial of corporate moral responsibility, I will show (§4.2.) how they may be understood, as an entity, supportive of the concept of corporate moral responsibility.

The fictional person is subject to the law in a similar manner to a real person. It can be sued, it can sue others (persons or other corporations) and it can be prosecuted and sanctioned for breaches of the law (it can be a defendant in court, if guilty of an offence can be fined, forced to make changes to internal processes and procedures etc.). Similarly, it is recognised as having the same rights to property ownership as a person: for example, to own plant and machinery, buildings, intellectual property and so on.

Incorporation also grants a series of privileges to the legal entity that are not available to individuals. These include, 1) limited liability, by which those contracted to the corporation (its employees, shareholders and so on) are not personally liable for its debts – as the owner of assets and liabilities the corporate entity is responsible, 2) reductions in transaction costs – the basic costs of doing business, research, administration, price bargaining, contract generation and so on are reduced by bringing these necessary tasks together in a single entity, 3) improved access to finance as the potential base of shareholders is increased by limiting their liability and indeed the subsequent market in shares benefits both individual shareholders and the corporation and 4) asset lock-in, whereby all money provided by investors to the company is not retrievable, but become property of the corporation to use as it judges most beneficial (Ciepley, 2013: 225-229).

Asset lock-in is a crucial benefit of incorporation whereby anyone making an investment in a corporation, by buying shares for example, has made a permanent purchase (Ciepley, 2013: 226). Any assets which the corporation uses a shareholder's investment to purchase, belong to the corporation *qua* legal entity and cannot be realised by the investor – the owner is the corporation. The investor may of course pass on her investment to someone else by finding a buyer for her shares and corporations may buy-back[4] shares, but otherwise the invested money is locked-in to the corporation. Asset lock-in is beneficial as it improves the corporation's ability to get credit as there is limited risk of its financial assets being taken away by shareholders.[5]

[4] Companies may elect to sell shares back to investors at market price for a variety of financial reasons such as increasing the share price to make the company appear more valuable. https://www.investopedia.com/ask/answers/042015/why-would-company-buyback-its-own-shares.asp (accessed, January 6th, 2023)

[5] Shareholders and Directors can of course dissolve the company, or the company may become insolvent and be liquidated. These risks are in most cases very low compared for example to a legal partnership, where partners can realise their share of assets at any time.

Asset lock-in also permits the corporation to freely allocate the investment as it wishes with no threat of being required to hold liquid assets in case of a request from an investor to "get her money back". The lock-in facility allows the corporation to work towards a situation of allocational efficiency in how the corporation assigns their resources to projects – favouring those judged by the corporation as likely to be most profitable.

For an incorporated legal entity to ultimately become a *functioning* corporation it must have some useable assets. Usable assets may be simply the ownership of a patent for a new process or product or an idea for a product, service, or process in the minds of the persons requesting incorporation. Once incorporated the company can attract investment, contract associates and so on to make the product, service or process a reality in the market. An incorporated entity without assets is of course possible. So-called "shell companies" are commonplace in large business ventures. These are non-active corporations employed for a variety of financial devices or simply kept in reserve for activation in the future. They do not produce anything and so do not qualify as functioning business corporations as I use the term.

The status of corporation is accepted, indeed promoted by societies, in expectation of social benefits. We expect that the privileges afforded corporations will facilitate their ability to do business – provide goods or services that in turn will create wealth. Society anticipates that corporations will create jobs, deliver services cost-effectively, provide high quality/low-cost goods and generate tax revenue, to name but four social benefits. The privileges of incorporation have driven the growth in the number of corporations world-wide and these organisations have generated and continue to generate significant wealth. Their success has led John Searle to say, "I regard the invention of the limited liability corporation, like the invention of double-entry bookkeeping, universities, museums and money as one of the truly great advances in human civilization..." (Searle, 2005: 17). Searle makes a strong claim and I do not intend to defend it here as that is outside the scope of this thesis. However, in concert with Searle, I believe functioning corporations have been an important factor in the development of modern successful (in financial and social capital) societies. If not, that is, if society believed that incorporation did not bring benefits, it has the option of revoking corporate status and the laws that create it.

1.2.2. Corporate associates

As business corporations do not formally have members (unlike member corporations – see footnote #1), I use 'corporate associates' to describe the persons directly contracted to a corporation, even, on my account, an Uber driver contracted as a self-employed person to a booking agent. That is, I include those who work *within* the company, so excluding suppliers, contractors and so on who stand apart from it. Corporate associates animate the legal entity. A corporation can only act in the world via the people contracted with it – its employees. It is a readily observable feature of a corporation functioning in the world that these persons act together based on a series of agreements that are explicit (contracts of employment for example) and tacit (the informal relationships that bind the persons to act on a particular set of corporate objectives for example).

1.2.3. Relationships and relational contracts

The relationship element of a functioning corporation consists in a set of roles (for example specialised technical expertise, managers, directors and so on) required to do business, and the relationships between the holders of those roles and the legal entity. These relationships work in two ways – within-group (associate to associate) and between group (legal entity to associates and associates to legal entity).[6] In complex modern corporations these relationships are frequently governed by relational contracts (Macneil, 1977: 886-895). A basic understanding of the nature of relational contracts is important as they are most effective in situations where there exists agreed "we-intentions" (a we-intention exists in, "…cases where *I* am doing something only as part of *our* doing something." (Searle, 1995: 23-24, emphasis in original)).

A relational contract is trust-based rather than relying on specific expectations and constraints laid out in detail in the contract. The explicit terms of the contract may well be merely an overview of the expectations that govern the actions of the parties to it. For example, I joined a large American multinational company in 1988 and my contract (Terms of Employment) was less than two sides of A4 paper. The section on "Hours of Work" stated, "Hours of work

[6] There are additional relationships at play once a corporation is functioning - relationships with shareholders, suppliers, customers, and consumers and arguably society as a whole. However, these relationships presuppose the existence of the tripartite amalgam of elements that constitute a functioning corporation, and so are secondary to how it is constituted. Therefore, they are not discussed here.

will be subject to your specific responsibilities…". There was no description of what these responsibilities might be, beyond the job title of "Research Manager". The expectation was that I would work flexibly according to the changing needs of the organisation to meet its collective goals with which I was tacitly at least expected to agree by virtue of accepting employment. Consequently, under this contract, over the next 29 years I worked in basic research, applied clinical research, consumer marketing, professional marketing, licensing & acquisition, and corporate communications all by negotiation and agreement between my managers and me without any further contract.

A recent 'White paper' from the Haslam College of Business at University of Tennessee, Knoxville, (Frydlinger et al., 2019: 7) lays out clearly the principles guiding relational contract design. Briefly, they are: (1) focus on the relationship, not the deal, (2) establish a partnership instead of arms-length relationship (to lay a foundation of trust, transparency and compatibility between the parties), (3) embed social norms in the relationship (to formally agree to six guiding principles: reciprocity, autonomy, honesty, loyalty, equity, integrity), (4) avoid and mitigate risks by alignment of interests (to allow for continual alignment of interests (shared vision and strategic objectives for the partnership, specification of what joint success and value looks like)) and (5) create a fair and flexible framework (establish a governance framework for continuous relationship management and conflict resolution). These principles make clear the breadth, flexibility, and dynamic nature of relational contracts. Relational contracts also make clear a tacit acceptance of shared goals – each party must trust the other to act in accordance with the goals of the overall business venture, now and in the future.

Relational contracts are increasingly the norm in business because markets are not perfectly competitive, most corporate business ventures are long-term, and the future is difficult to predict (Frydlinger et al., 2019: 4-6). Contrast relational contracts with discrete contracts. A discrete contract is established to govern short-term transactions (Adelstein, 2013: 163). For example, I contract a builder to construct a new garage at my home. This is a discrete contract that governs what it will cost, what s/he will do, with what materials, over a specified time. On construction of the garage to my satisfaction, following payment and, if applicable, at the end of a defined warranty period, the contract ends, and we have no further relationship. A short-term simultaneous exchange of building a garage is not consistent with actual experience of many contracts in corporations. Discrete contracts certainly exist in

corporate activities – corporations may also want to have garages built. However, the functioning of the corporation is dependent on the more far-reaching and adaptable relational contract. As Richard Adelstein observes, "Successful firms are durable relational contracts that guide the interactions of sometimes very large numbers of people engaged in a particular kind of cooperative exercise…" (Adelstein, 2013: 163). The relational contract is the basis of most formal relationships that combine with the legal entity and the contracted persons to animate the corporation – to permit it to function.

1.2.4. Necessary & Sufficient

The tripartite model I have described, the legal entity/fictional person, a group of persons contracted to the legal entity and a set of roles and relationships between the corporate associates and the legal entity, are necessary for the reality of the functioning corporation as they each contribute capabilities, without which the corporation could not be functioning. In the absence of any single element of the model there is no unified body capable of producing goods or providing services.

First, the legal entity/fictional person. The legal entity/fictional person designation may be seen as another way of describing the status of being granted the various benefits of incorporation – ownership of assets, ability to sue and be sued, ability to lock-in assets and so on. It represents the environment within which the corporate associates act when doing business. At a fundamental level if there is no formal legal act of incorporation there is nothing that can be a corporation. The legal declaration establishes the reality of a legal person with the business facilitation characteristics described above. Without the process of creating a legal fiction there is no common link for the various contracts of corporate associates, no legal basis for the collective and so no corporation.

It can be argued that business can function without incorporation, without corporations. Many businesses do. However, and particularly in the case of complex endeavours, the absence of the benefits of incorporation make business more inefficient than it need be. For example, the lack of a common link for contracts means that there will be more contracts and they may need to be more complex, liability for debt rests with the owners, access to finance is more difficult (no shareholders providing "locked-in" investment) and so on. Therefore, while not a necessary element of doing business, the legal person is a necessary element of a corporation.

However, the legal person has no power to act in the world – it is a creation of law, a legally convenient fiction. By itself it cannot do business, for that (to become a functioning corporation) it needs persons to be contracted to it. It can of course exist without contracted persons, but it cannot act, and that brings us to the second element of the corporation, the group of persons contracted to the legal fiction. Once appropriate persons (those with the right skills, know-how and so on) become contracted to the legal person, that corporation is animated and gains the capability of acting in the world. The group of corporate associates will fulfil several different roles and will have widely differing powers and responsibilities (this is further discussed below). All will be contracted to the legal person, binding them to it and to its business goals/intentions. While this contractual process is indirect, in that some subset of the group will have the authority to sign contracts on behalf of the legal person, nevertheless the common contracting party is the legal person. Should anyone breach a contract such that legal action is taken, the named plaintiff will be the corporation, not its officers or legal representatives.

The corporate associates are a necessary element of the corporation as in the absence of appropriate persons (right skills, know-how and so on) the corporation cannot efficiently produce goods or services. The actions of a functioning corporation are the result of complex interactions between corporate associates within the formal company structure. These interactions are guided overall by contract, and, at a more quotidian level, a series of agreed corporate roles and relationships, the third necessary element of the corporation.

The roles and relationships manifest what Peter French called the Corporate Internal Decision Structure (CIDS) (French, 1995: 27-30) and the relational nature of the corporate associate's employment contracts. These are the formal structures of the company – the organisation chart detailing responsibilities and hierarchical relationships, the processes (often proprietary to a given corporation) of product development, manufacturing and marketing, the procedures followed in interactions with external persons, other companies and so on.

Importantly, these structures will also include the decision-making processes to be followed, particularly at the higher levels of the hierarchy – directors, senior executives, and corporate officers for example. It is via these processes that the corporation formulates and agrees its corporate strategies and communicates them to the group of associates responsible for

implementation. Without some such structure it is difficult to imagine how a company could form goals (to make x% more profit next year, for example) or intentions (to be the leader in UK widget production by 2025, for example). Additionally, without a communication process and structure these goals and intentions cannot be made real to the corporate associates and ultimately be transformed into goals/intentions that they share and act to bring about. Therefore, roles and relationships, normally unique to a particular corporation and constitutive of the character and culture of a particular organisation[7] (see §4.3.1), are integral to and necessary for the company of persons to act in a unified manner.

In summary, the combination of (1) legal fiction and its assets, (2) groups of associates and (3) the relationships between (1) and (2), and those between associates, are necessary elements of a functioning business corporation, coming together to form the parts of a tripartite body capable of acting in the world in line with its goals and intentions. Together they make possible the readily observable collective acts attributable to corporations. Persons outside the corporation distinguish the collective activity as collective and may describe what they see as, for example, *they,* "are making automobiles", "providing medical care", as part of *their* belonging to an automobile manufacturer, healthcare company and so on.

The act of incorporation is sufficient to create a corporation, but by itself, the incorporated legal fiction, has no ability to act in the world. To be a functioning corporation, an actor in the world, a legal fiction with assets, groups of associates and the relationships between both are necessary. No single element or other characteristic is sufficient to create a *functioning* corporation.

[7] Corporate character is the nature of the corporate entity as recognised and observed externally. A 'fly-on-the-wall' observing the processes and procedures of any two corporations (even if engaged in the same type of business venture) will readily see the different decision structures, routines of production, external interactions and so on. Seen from the outside it can look as though the corporate associates are 'of one mind' and they may even be physically identifiable as corporate associates. For example, many retail companies insist on uniforms for their 'consumer-facing' employees. Corporate culture is what is experienced within the organisation by its associates. It often manifests externally in a loyalty to the organisation and its products. It is the understanding of associates that, "this is how we do business".

1.3. Readily observable features of a Functioning Business Corporation

The amalgam of legal entity, corporate associates, and the relationships between them, itself consists in a series of readily observable features of functioning corporations. I follow David Gindis (2009: 36-40) in holding that functioning corporations successfully meet a series of tests for existence. These tests all refer to features of the corporation that are readily observable by third parties and so are, on my view, vital to any description of the nature of the corporation. According to Gindis, there are four key features of corporate reality: 1) corporate identity, 2) unity, 3) persistence in time and 4) causal power. I believe there are three additional features of functioning corporations that any theory of the nature of corporations must be able to accommodate 5) corporate culture/character, 6) consistency with the experience of corporate associates and the relational contracts that govern their actions and, 7) remainders of responsibility. The above seven features are real in that corporate associates observe them, experience them, and readily report them as part of their understanding of what it like to be 'in' a corporation. Additionally, we as external observers can readily identify their presence.

1.3.1. Corporate identity

Once functioning, corporations assume individual identities. They are recognisably different from each other in their approach to doing business, even if they are involved in producing similar goods or providing similar services. Gindis describes five elements that form a recognisable corporate identity as "*ontological glue*" (Gindis, 2009: 40): a) institutional glue – legal status, contracts, constitutive rules etc., b) organisational glue – structures, processes, Corporate Internal Decision Structures etc., c) motivational glue – the means to ensure loyalty and common goals, d) cognitive glue – shared beliefs and representations and e) capabilities glue – the complementarity between the human assets and their knowledge/knowhow and the non-biological aspect of the corporation (the legal entity).

That these elements are features of 'identity' is supported by the fact that they do not have to be actualised in the same way for each corporation. As noted above, no two functioning corporations are the same, even if they are engaged in providing similar goods or services. There are features of each "ontological glue" that differ across corporations. For example, Reckitt Benckiser and GlaxoSmithKline compete worldwide in the non-prescription medicines market with similar products in many of the same markets. However, each has clearly (readily observable) different organisational structures based on specific contracts

etc., motivational strategies, internal beliefs, and capabilities. These differences create the distinct nature of each and are consistent with corporate identity.

1.3.2. Unity

The distinctness of an entity consists in its unity as an independent structure – it has a specific constitution where constitution is a relationship of unity (Baker, 2004: 101-102). That is, the entity as a whole is not identical with the sum of its parts; rather it is a unity in a sense that aggregates (whether piles of sand, mobs and so on) are not. Lynne Rudder Baker puts this clearly when she says that "constitution" is, "…a relation that accounts for the appearance of genuinely new kinds of things with new kinds of causal powers." (Baker, 2004: 102). It is that which binds corporate associates together and forms the organisation that acts in the world.

1.3.3. Persistence in time

It is inevitable that there will be mundane changes in the human composition of a corporation over time through resignation, dismissal, routine personnel increase and decrease driven by economic and business exigencies, and ultimately, associate retirement and death. Corporate associates change; however, the non-human, legally established corporate entity does not (unless dissolved and reincorporated for a different objective). It passes through time as originally established. Persistence of a corporate entity over time is therefore built into the articles of incorporation and we see it in the persistence of corporations such as Lloyds of London (insurance provider since 1686), JP Morgan (banking since 1799), Unilever (homecare product provider since 1885), Citroën (automobile manufacturer since 1919) and so on. The non-biological aspect of the corporation can survive indefinitely.

The corporation is therefore independent of its associates in that it survives even when all its original human associates are no longer contracted to it, or even alive. It is notable that while the associates change regularly, much of the knowledge accumulated by the corporation remains to be used by others. There is, "…collective knowledge and capabilities are typically 'sticky', that is retained through progressive change in firm membership…" (Gindis, 2009:

39). These capabilities, and knowledge are signature elements of the unitary nature of the corporation indicative of its ability to survive as a recognisable entity.[8]

1.3.4. Causal power

While interchangeable, the human elements of the corporation are vital to Gindis' final existence criterion – causal power. To have and to exercise causal power (to produce or to provide services) is the reason that companies are established. A functioning corporation has, by virtue of its human associates and its features of identity – the power to produce goods or services – that is what it is for. Corporations achieve collectively significant action in the world that could not be achieved by individuals. Certainly, for example, a skilled shoemaker could produce a trainer, but not to the scale, not at the price, and not with the regular changes to performance that characterise corporate producers such as Nike, Adidas and so on. It is the collective corporate activities (causal powers) that make these and many other companies so profitable, powerful, and influential.

1.4. Additional features

As indicated above, I maintain that any theory of the nature of a corporation must meet three additional criteria. On my view, a theory of the corporation has: 5) to be consistent with the experience of corporate associates and the relational contracts that govern their actions, 6) to accommodate corporate culture/character, and 7) to account for remainders of responsibility. I expand on each below.

1.4.1. Consistency with experience and relational contracts

Corporate associates clearly identify with the organisation in which they work ("this is how *we* do business/behave at the XYZ company"). This personal identification is consistent with

[8] Theoretically, one might ask, what would be the case if all the humans associated with a corporation were replaced simultaneously? It is difficult to imagine this in the case of a large organisation. In fact, most have policies on how many persons in a line of management or with specific expertise may travel together on a scheduled flight (in my experience there is no such policy on these same people meeting together in a hotel or conference centre, which in many parts of the world may present a greater risk than a plane crash). However, replacement of an entire workforce may be a possibility in a small organisation following a disaster. In this event, the written processes for running the corporation would survive along with the assets and legal entity, but the tacit knowledge of the individuals would be lost. The corporation could be 'revived' by others but would likely be less efficient than before for a period as the new persons gained expertise.

the notion of the internal corporate experience being driven by relational contracts (contracts of mutual trust, see §1.2.3). Corporate associates demonstrate feelings close to kinship with their company in many ways, but arguably the most obvious is in their loyalty to the company and what it stands for. Loyalty cannot be enforced, but the nature of relational contracts with trust between parties as a key element, lays a foundation for loyalty that, if the corporation keeps its side of the 'bargain', usually fosters close identification of employees with corporate goals and culture (see below on corporate loyalty).

Corporate associates demonstrate their closeness with the organisation to a greater or lesser extent, often in correlation with where they reside in the hierarchy. At the top end senior executives tend to be what Peter French has called, "affine" employees (French, 1979: 134-140). These are individuals who identify so closely with the intentions of the corporation that they are willing to sacrifice significant portions of their life in pursuit of its goals. These are the people and the attitudes highlighted by contemporary business gurus such as Sheryl Sandberg, who ask employees to "lean in" and give their all to the corporate venture.[9] At the other end of the continuum are those with limited influence and power in the organisation. These employees tend to simply "work here for a paycheque" and express their affinity by acceptance of the corporate intentions and working to the best of their ability at whatever their role entails (a person looking for another job might be an exception). A strong corporate culture encourages corporate affinity. When I worked at Rockefeller University (Corporate Motto: *Pro bono humani generis*) we had a lady who washed the laboratory glassware – pretty much the least privileged member of the department. Mabel would tell anyone who asked that she loved her job because it was an essential part of the "amazing work" (her words) that the scientists were doing.

Most corporate associates are somewhere in between. They will go some way to "leaning in" by working long hours, making sacrifices (weekend work, not using full vacation entitlements and so on) and buying the company products preferentially, because, as they will

[9] When Sandberg's book was on the best-seller list it was taught in the corporate world. I attended one of these sessions and was impressed by the stratification of acceptance in the organisation I worked for. Many of those in the room were scandalised at the level of expectation, some were moderately accepting, and the two senior persons (a man and woman) articulated a desire to 'be like Sheryl'. Sheryl Sandberg, 2013. *Lean In: Women, Work, and the Will to Lead*, Ebury Publishing.

tell you, “We make the best … you can buy”.[10] This loyalty is often described as “part of the corporate culture”.[11]

1.4.2. Corporate culture/character

Corporate culture is a somewhat slippery concept, yet those working for or with a corporation will frequently talk about their experiences in these terms. Corporate culture is established and sustained by the relational contracts and the Corporate Internal Decision Structures that animate the organisation. It sets the rules for how business is done and how internal and external interactions are managed. I have been involved in several situations where companies have been acquired by the corporation for which I worked. In each case, the objective business case for merging the two companies was clear to both sides but the process of integrating the acquired party was fraught. The differences between both the nature of the two sets of relational contracts and the two different Corporate Internal Decision Structures caused substantial friction. Both sets of corporate associates were loyal to their organisations and saw little reason for change and adaptation. Integration does eventually occur (to a greater or lesser extent), usually driven by a power dynamic – the acquiring company (or largest company in a merger) is ultimately the more powerful. However, in my experience, some corporate associates from the acquired organisation (or less powerful merger party) can hold grudges for many years. When a merger or acquisition occurs, there is a new organisation that requires a new set of relational contracts to facilitate the integration of the new or amended Corporate Internal Decision Structures. Consequently, following a successful merger or acquisition the “host” company is also changed. Empirical evidence (Christensen et al., 2011) suggests that 70-90% of mergers and acquisitions fail to meet their objectives – cost savings were not realised, production consolidation never materialised and

[10] I have overheard numerous discussions of this kind. A person expresses a desire to buy an alternative product and they induce consternation in other associates. This is not an instrumental response - purchase of one more or one less tube of toothpaste or whatever will not matter to the corporation. It is, though, a matter of loyalty and pride to the associates.

[11] There will always be exceptions to this - persons who have no loyalty to the organisation but are simply there to get paid or persons disillusioned by corporate life but not motivated to leave. In my experience the power of corporate culture is such that these individuals represent ‘noise’ in the system and unless they become disruptive, are tolerated so long as they perform to an agreed standard.

so on. It seems reasonable to suggest that these failures reflect, at least in part, the difficulties inherent in aligning real corporate cultures.[12]

In addition to corporate culture, there is a corporate character, also developed by a company's relational contracts and Corporate Internal Decision Structures. The character of a company is the nature of the organisation as recognised and observed externally. An observer will readily see the different decision structures, routines of production, external interactions and so on. Many retail companies insist on uniforms for their 'consumer-facing' employees. The IBM company is frequently cited as having had a particularly strict dress code for employees throughout its early history. Even where little or no direct consumer interaction is part of the job, corporations may have internal mores that become readily identifiable externally. Employees of the Procter & Gamble company were for many years called "Proctoids" because of the uniformity of behaviour they learned and displayed both internally and externally in the business world.[13] It is not without reason that some companies are colloquially described as "difficult to work with", "brutal negotiators", "open (or not) to change" and so on.

A possible objection to including these reported experiences of company associates (corporate culture) and external observers (corporate character) as a criterion for identity is that it is an example of the fallacy of reification. Reification involves treating a social kind as a natural kind (Machery, 2014: 89). I deal with reification in more detail later (§2.4) and here only address it with respect to the criterion of corporate culture/character experience.

To someone in a functioning corporation there is clearly a collective, that is what it means to be "in" the organisation – stuff is happening that would not happen in the absence of the corporation. This "stuff" (the activities required to do business) is part of the reality of the collective. Clearly the experience of these collective activities could lead a corporate associate to believe that there was indeed a *natural entity* that is the corporation desiring and mandating the activities. However, this belief seems unlikely as the associates are directly aware of/impacted by the reality of the collective activities and the actions of their superiors in the hierarchy, rather than a thing – the company directing their work. Also, and perhaps

[12] Exceptions may include failed vanity acquisitions such as Royal Bank of Scotland's acquisition of ABN Amro in 2007. It was the acquisition as an act of corporate hubris that led to Royal Bank of Scotland's demise, not any issues with corporate culture adaptations.
[13] https://www.urbandictionary.com/define.php?term=Proctoid (accessed, July 15th, 2019).

more importantly, I am unclear to what extent it would matter to the experience of the associates if they did indeed fallaciously believe the corporation was a natural kind. That belief would simply be wrong, and it is not obvious what difference such a wrong belief might have on an individual's work or the functioning of the company.

Similarly, an external observer of corporate culture and particularly corporate character could conclude that the corporation was a natural kind. We are attributing human traits – culture and character – to a collective. Again, considering corporations as a natural kind is simply wrong – a fallacy – but as is the case for corporate associates it would have no bearing on the reality of the collective culture or character. A theory of the nature of corporations should avoid reification. I answer this charge as it applies to my preferred theory in §2.4. and argue that insisting that a theory of the corporation must account for the internal and external experiences of the entity is not undermined by a charge of reification.

1.4.3. Remainders of responsibility

Remainders of responsibility emerge when individual responsibility for an act has been accounted for and yet an intuition remains that there was fault on the part of the collective organisation that remains to be accounted for. Basing the concept of the functioning corporation as a quasi-biological entity dependent on a set of relational contracts entails accepting that individuals in the corporate environment are operating to achieve the goals of the company, not necessarily goals of their own (apart from "making a living", being able to do useful work, and so on). They are working in accordance with the relational contracts and so their individuality is to some extent subordinate to the organisation, its contracts, and Corporate Internal Decision Structures. The idea of the "complex organisation failing in complex ways"[14] allows for some corporate acts being separate from those of specific individuals in the sense that there may be a series of actions in a complex process that combine to cause harm. Many persons are required to make a business act, and it is not always clear or determinable whose (if anyone's) individual action resulted in harm. The nature and strength of the relational contracts and the Corporate Internal Decision Structures where strong responsibility-based processes and procedures exist will mitigate against (non-

[14] This statement was part of the conclusions of the 'Columbia Accident Investigation Board' who investigated the crash of the space-shuttle Columbia on February 1st, 2003. One of their conclusions was, "…complex systems almost always fail in complex ways, and … it would be wrong to reduce the complexities and weaknesses associated with these systems to some simple explanation" (Columbia Accident Investigation Board Report, 2003: 6).

deliberate) wrong actions. Weak contracts and Corporate Internal Decision Structures will increase that risk. These are not the sole actions of individuals but are also determined by the organisation's processes and procedures and so, on my view, it (the functioning corporation) also has a responsibility when things go wrong. The recent Volkswagen (VW) emissions case illustrates this.

Around 2006/2007 the VW corporation stated its intention to overtake Toyota as the world's largest car-manufacturer. This corporate intention became a corporate goal, communicated to employees, suppliers, the media and so on. As part of the strategy to achieve this goal, the decision structure at Volkswagen became explicitly tolerant of rule-breaking by employees, likely as a strategy to improve and speed up its innovation (Carter et al., 2018: 36-37). It is reasonable to suppose that as the aim was to get VW to a leadership position in the market, this was intended as a mechanism to reduce bureaucracy and facilitate innovative design and manufacturing. One concrete tactic in support of their strategy to increase sales was to decide to stop using Mercedes-Benz and Bosch manufactured emissions technology in VW cars. VW chose instead to design its own technology.

One result of the combination of the new corporate goal/intention and loosening of corporate discipline was the deliberate design, manufacture and fitting by VW employees, of emissions technology that could subvert emissions testing protocols. This made VW cars appear to be more fuel-efficient than comparable competitor vehicles. The intervention VW made in the emissions control system (reducing or stopping emissions control under certain conditions) reduced the amount of engine power diverted to the emission control system so increasing fuel efficiency. Increased fuel efficiency was likely thought to be a significant marketplace advantage. But what VW was doing was of course also illegal and since its discovery, VW has paid fines, lost corporate prestige in the market and some executives are currently still in the courts.

I believe there are questions to be answered before appropriate responsibility can be attributed in this case. I leave aside from consideration the manufacturing plant employees who simply assemble the parts they are given. However, at the level of executive decision-making and subsequent technology design phase, the questions include, at least, the following. Did employees designing the technology realise how it would be used? Was cheating emissions testing part of the design brief? If deliberately and transparently

requested by management, then what role was played by the corporate intention of market leadership and the loosening of corporate discipline? Some of these questions are still being investigated and this thesis is not the place to suggest answers. However, I maintain that to hold employees *wholly* responsible is to ignore the part played by the corporate intentions and culture.[15] There is a remainder of responsibility, possibly linked to the role of the market-leadership intention/goal and the corporate encouragement of a culture of rule-breaking.

At some level the implementation of the so-called "cheat" devices was an intentional act authorised by the corporation. It was a moral as well as legal harm in that there was an intention to deceive, at least the regulatory authorities but likely also consumers, as VW's cars could be marketed as having superior fuel performance to competitors, and so advertised to the consumer based on false published details of emissions. To apportion blame solely to the employees who developed the idea, produced the device, and implemented its use is to leave as a remainder of responsibility the corporate culture that permitted or perhaps even encouraged the act of deceit.

In summary, based on the principle of recognising and accounting for readily observable features of functioning corporations, the above features are necessary criteria that any successful theory of the nature of the corporation must be able to meet. In the next chapter I outline some of the most popular theories used to characterise corporations. Additionally, I will argue that only the concept of a real entity (the corporation existing as a real thing in the world) can account for all the observable features.

1.5. Responsibilities

1.5.1. When corporations act

The actions attributable to the collectives that are corporations, however we might understand their nature, have in common with humans the fact that their consequences may be good, bad or something in between. As with persons, it may in some cases be simple to identify right and wrong corporate actions. Similarly, as with persons corporate actions may be difficult to

[15] There may of course be degrees of responsibility. For example, the person who knowingly contravened policies and procedures would likely shoulder full responsibility while the person acting within the policies and procedures and still causing harm has the right to mitigation. The case of directors is more difficult as they are key elements of whatever decision-making process is in place.

judge as wholly right or wrong depending on the situation. There are many examples of wrong corporate actions where harm is caused to others. Several of these examples are explored later in the thesis. Here I describe one example where individual action (or inaction in this case) coupled with poor corporate culture caused the deaths of 193 people.

On March 6th, 1987, the "roll on-roll off" ferry "Herald of Free Enterprise" left Zeebrugge, Belgium bound for Dover, England with her bow doors unsecured, possibly open. The ship took in water, capsized, and finally beached on a sand bank. The report into the disaster found that the immediate cause was negligence by the assistant boatswain, asleep in his cabin when he should have been closing the bow-door; however, significant blame was also attributed to his supervisors and a general culture of poor communication in the ferry company P&O European Ferries. The official report into the disaster stated that, "From top to bottom the body corporate was infected with the disease of sloppiness." (Sheen, 1987: 14).

Legal responsibility in the case was believed to be so strong that the company (P&O European Ferries (Dover) Ltd) along with seven employees were charged with corporate manslaughter. However, the case subsequently collapsed (JOC.com, 1990). Given Mr. Justice Sheen's comments in his report, there seems to be a moral case to be answered as well as the legal case on the basis that the ship's crew and the company's harbour personnel were arguably operating in an environment (culture) that was negligent with respect to others. I return to the importance of corporate culture to moral responsibility in chapter 4.

Corporations also perform good acts – ones that benefit others and accord with others' rights. These actions are less well documented in the media and generally receive less attention than wrong actions.[16] Good corporate acts tend to be either direct intervention for good or involve business decisions indicative of good intent.[17] I present here an example of each. Direct

[16] Why this may be the case is beyond the scope of this thesis, but it seems reasonable to suggest that the power asymmetry between corporations and individuals is part of the explanation (French, 1995: 43).

[17] Both types of good actions are frequently (always?) announced by companies as being ultimately, 'good for business'. In the Johnson & Johnson example described below, the Company Chairman is on record as saying that the company's response was, "…a moral imperative, as well as good business…" (French, 1979, pp.142-143). While statements of this type may be judged necessary to convince investors that the company is not misusing resources, such statements dilute the impact of the action in the eyes of society. Again,

intervention may be illustrated by the Procter & Gamble/Centers for Disease Control (P&G/CDC) clean water campaign. The product, a simple powder-based water purification system, was developed by P&G's scientists in collaboration with the US government agency, CDC. It is currently being sold to non-governmental organizations (NGOs) at $0.035 per sachet (enough to clean 10 litres of water) in many developing countries where water quality is poor. The official CDC website makes clear that, "Procter & Gamble sells the P&G™ sachets at cost, makes no profits on P&G™ sales, and donates programmatic funding to some projects."[18]

Decisions with good intent may also be illustrated by the case of the actions of the Johnson & Johnson company to a Tylenol tampering incident in 1982. The adulteration of paracetamol (called acetaminophen in the US) tablets with cyanide which resulted in seven deaths was external to the company and not a failure of their quality assurance systems. However, considering the effects on humans, the internal decision structure decided to act against the company's short-term interests (there was a 20% drop in the company's net worth) by removing the product from the shelves and *not* replacing with a newly branded version of the same drug which some reports alleged was suggested by their advertising agency. Instead, Johnson & Johnson reformulated the painkiller into caplets (more difficult to adulterate) and promoted it as highest quality Tylenol in new tamper-proof packaging. A contemporaneous article in the Washington Post (October 11th, 1982) declared, "…Johnson & Johnson has effectively demonstrated how a major business ought to handle a disaster." [19]

1.5.2. Responsibility types

The type of responsibility relevant to this thesis is moral responsibility. Can a corporation *qua* corporate entity sensibly be *blamed* for an injurious act or *praised* for a good act? I am not aware of any scholar who would deny that the corporation bears *legal* responsibility for acts committed on their behalf. Corporations are persons in law so are undeniably *legally* responsible for their actions; they also have greater ability to make financial restitution for harms than individuals so are often held legally responsible for the wrong actions of

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exploration of this is beyond my scope, but I would suggest that with the current emphasis on corporate social responsibility these statements are not necessary.

[18] https://www.cdc.gov/safewater/flocculant-filtration.html (accessed, August 17th, 2021).

[19] https://www.washingtonpost.com/archive/business/1982/10/11/tylenols-maker-shows-how-to-respond-to-crisis/bc8df898-3fcf-443f-bc2f-e6fbd639a5a3/ (accessed, January 6th, 2023).

employees to ensure appropriate financial restitution. Leaving aside legal responsibility, we can consider three main categories of responsibility (Velasquez, 1983: 2-3).

First is the aretaic sense of 'responsible'. When applied to persons, aretaic responsibility is an assessment of moral character. We may, for example, describe someone as a responsible person where we mean they have proved themselves to be trustworthy, reliable, truthful, and so on. I discuss this further in terms of corporate character disposition in section 4.3.

The second category of responsibility is where we have an expectation of behaviour – there is an obligation to behave in such-and such a manner. Statements of the type, "Companies have a responsibility to avoid misrepresenting the performance of their products" or "Corporations have a responsibility to treat employee welfare with concern" belong to the expectation category. These are forward-looking statements in that they express expectations that we have of the actor(s).

The third category is backward-looking responsibility and has had most attention paid to it in the literature on corporate moral responsibility. The consequences of an action in the past may be attributed to a particular actor. Statements of the type, "Five-year-old Julianne is responsible for breaking the window" or "Company Y is responsible for the oil spill" belong in the backward-looking category.

Backward-looking responsibility may be causal, as when a downpour of rain may be responsible for a flood. Sometimes, 'a' or 'the' cause of a particular event is identifiable. A second type of backward responsibility is that of liability to make right a wrong even in cases where we were not the cause of the wrong. For example, Julianne's parents are generally recognised as being liable for the cost of the repairs to the broken window (but not causally responsible; that was Julianne regardless of her ability to understand). Julianne is considered too young to be responsible in the fullest sense. Resolution of these cases tend to be decided based on justice and ability to make recompense and our relationship to the offending actor. The third type of backward responsibility is where an actor may be shown to have *intentionally* caused the wrong. When this type of responsibility is applied to persons, statements such as, "Stalin was responsible for the deaths of thousands during his 1936-38 political purge" or "Peter Sutcliffe was responsible for the murder of thirteen women in the late 1970s", are examples.

There is another side to the responsibility for intentional actions – positive acts. "Morwenna was responsible for saving the child from drowning" is also intentional and a good act. Positive acts by corporations receives little attention in the literature on corporate responsibility which I consider unfortunate. I argue in chapter 6 for recognition and praise from society for acts intentionally resulting in goods committed by corporations. However, as most philosophical debate has been on responsibility for harmful acts, that is where this thesis mainly focusses.

I follow Manuel Velasquez (1983: 2) in describing responsibility for intentional acts as moral responsibility.[20] An intentional act differs in kind to the other types. An intentional act cannot be committed by a natural cause. Neither can intentional responsibility be transferred to another as in the case of responsibility as liability. An intentional act is that of the responsible actor alone – the intention to commit the act was theirs alone. The question is whether intentional responsibility may be/ought to be attributable to collectives such as corporations.

1.5.3. Complexity of responsibility attribution

As outlined above, I am concerned with intentional acts that cause harm, committed in the presence of knowledge that harm may be caused by actors free to choose to do otherwise. In the case of harms associated with the actions of corporations the actions may often be the result of a series of smaller actions committed by many corporate associates over an extended period. The 2010 British Petroleum, Deepwater Horizon case, which resulted in deaths, injuries, and environmental harm, illustrates this. On investigation, the company was found to have reduced spending and attention to safety procedures over many years, which cumulatively created the environment where such a disaster became increasingly likely. The report on the disaster identified a series of issues including, "The immediate causes of the Macondo well blowout can be traced to a series of identifiable mistakes made by BP, Halliburton, and Transocean that reveal such systematic failures in risk management that they place in doubt the safety culture of the entire industry." (National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling, 2011: vii).

[20] Unintentional acts and unintended consequences are also incidents of moral responsibility. I focus here on intentional acts as their provenance is generally the easiest to determine. My arguments will also be relevant to unintended acts and unintended consequences of actions.

The complexity of corporate actions frequently makes the attribution of direct responsibility difficult to determine and 'remainders of responsibility' may persist. There is an intuition that in these cases, "…the wrongdoing in a corporate offense may be greater than its parts: We are keen to see the individual perpetrators of the crime brought to justice, but our indignation frequently extends beyond them. It is this surplus outrage – this remainder – that likely prompts calls for criminal action against the corporation itself." (Sepinwall, 2010: 4). The remainder of 'outrage' is as true for moral responsibility as it is for legal responsibility. For example, the Volkswagen emissions case discussed earlier also illustrates the intuition that there can be more responsibility for an action than that held by the individuals in a corporation.

Attribution of moral responsibility is therefore more difficult when considering collectives such as corporations than when considering responsibility for individual acts. Aside from the complexity of corporate actions, an additional important reason for the difficulty of attribution of responsibility is that there is no *physical object* that is a corporation in the way that there is an object, say a factory, that is owned by a corporation, neither is there a person who **is** the corporation. Indeed, it is a fact of law that corporations are fictitious persons (see §1.2.1). A legal person in the context of a group agent is an association of persons that has become a legal entity. This association permits corporations to act, providing goods and services. The Nike company makes sportswear, Aviva provides insurance, and so on. However, all of these actions are the acts of human persons associated with particular corporations. Excluding the case of shell corporations (see §1.2.1.) and suchlike, for any functioning corporation we can meet the CEO, the Directors, the workers and albeit with some effort, the major shareholders of that corporation,[21] but not the corporation itself.

It has been pointed out to me that there are situations where we can 'meet the organisation'.[22] Consider a small unincorporated village rugby club. It would be relatively easy to meet the players, non-playing members and coaches at the village pub. I believe that in this case I would be meeting the club. However, the village club is closer in construction to a member corporation (footnote #1) than a business corporation.

[21] Unless of course, as is frequently the case, they are corporations themselves.
[22] Thanks to Luke Elson, University of Reading.

Incorporation introduces something new – the legal person – the creature of law that may own property, assume liabilities etc. separately and distinctly from any human actors associated with it. It is not possible to meet a legal person. Meeting all the persons associated with a business corporation is not meeting the corporation. For example, my wife is CEO of a UK corporation that offers consultation services to the pharmaceutical industry. It has two additional Directors, me and our daughter, and currently no direct employees. If we three (the Directors of Wenstar Enterprises) meet you for dinner you could, in a weak sense, argue that you have met the company. However, unless the Directors legally dissolve Wenstar, the Directors have no rights to the assets held in (by) Wenstar. I cannot legally use a company cheque or credit card to pay for the dinner, unless the event has a business benefit to Wenstar. Unlike the case of the rugby club, here there is something else present – the owner of Wenstar's assets, the corporation – that you have not met.

Wenstar, like all functioning business corporations, consists in a tripartite amalgam of the legal fiction, the contracted persons, and the relationships between them. The way in which we understand the nature of this amalgam will determine whether it is appropriate to hold it morally responsible.

1.6. Conclusion

In this chapter I have committed to an approach of understanding the nature of functioning corporations based on the readily observable features of corporations in action. I presented a model of the nature of the functioning corporation as an amalgam of three necessary elements that are readily observable components of the corporation acting in the world – a tripartite model. I argued that this model has seven key constituent features that any successful theory of the corporation should be able to accommodate, and I clarified the types of responsibility with which this thesis is concerned. I turn now to the extant theories of the corporation and analyse how well they can accommodate the readily observable features of corporations conceived as a tripartite amalgam of the legal entity, corporate associates, and the relationships between them.

CHAPTER 2. Functioning Business Corporations as Real Entities

"The Discworld [*Corporation*] is as unreal as it is possible to be while still being just real enough to exist."
Pratchett, T., 1995. *Moving Pictures.* Corgi Edition, Transworld Publishers Ltd. p. 9.

2. Introduction

I argued in chapter 1 for a tripartite model of the functioning business corporation – an amalgam of legal entity, corporate associates, and the relationships between them. This model is founded on the existence of some real features of a corporation ('real' in the sense that we can readily observe them and their consequences (corporate actions)). The tripartite model can now be cashed out in more detail. My guiding principle here is that if we wish to understand the nature of something we must begin by laying out the features of it that are readily available for us to see and experience. In the case of a corporation, we need to cash out the nature and interrelationships between the three elements of the tripartite model. In the presence of a description of these observable features we can then begin to theorise about how they combine (or not) and then we can try to formulate a theory which best characterises the nature of the thing.

My analysis is in three parts. First, I describe the four most discussed theories of the nature of corporations. Second, I address how well these theories account for the observable features of functioning corporations described in chapter one. Third, this analysis leads me to characterise the corporation as a real entity in the world that has an existence distinct from, but dependent on, that of the individuals that animate it.

2.1. Theories of the corporation

Legal scholars, attempting to understand the changing nature of incorporation, have done significant work on the nature of corporations. Incorporation originally consisted in concessions granted by sovereign states, usually to facilitate some act of public good. Today, incorporation is seen as the result of individual entrepreneurial activities within the exigencies of a free market leading to the concept of free incorporation (Millon, 1990: 206-211).[23] The history of the change of incorporation is outside the scope of this thesis, except to

[23] Free incorporation is the ability of persons to use the legal system to establish corporations versus the old notion of incorporation as a grant from the state. The grant system was discredited by claims of corruption, political manipulation etc. in the nineteenth century as the desire of incorporation grew in the face of significant economic innovation and growth.

say that the particular conception of the corporation employed by lawyers and the courts has considerable bearing on how companies are treated under the law and by regulatory authorities, hence the legal interest. The various theories in the literature may be considered under four general headings, Legal Entity theory, Aggregation theory, Nexus of Contracts theory and Real Entity theory.

In this thesis, I consider determining the nature of the corporation to be an exploration of how we should conceive of the modern functioning business corporation based on what is readily observable about corporations and the activities attributed to them. I take this approach because I believe the ability of corporations to be morally (as opposed to legally, about which there is little debate) responsible for harms and goods, is grounded in the question, "Is the corporation the kind of thing that *can* take moral responsibility?". A first step to answering this question is to consider some of the most influential concepts of what business corporations are and assess how well they can account for what we observe and experience of corporations and their associated actions. I consider the four most influential theories as two groups. First, what I will call the Legalistic theories and second, the Real Entity theory, a defence of which is the subject of the remainder of this thesis.

2.1.2. The Legalistic theories of the corporation

As the modern corporation developed and grew in activity and influence in society, the law had to develop and adapt to effectively adjudicate in cases brought by or against corporate collectives. Legal systems that were developed to regulate individual actions now had to have, in addition, a foundation for deliberating on collective actions. Over time, legal thinking generated three important conceptions of what the nature of the corporation may be when considered in a legal environment. These are Legal Entity theory, Aggregation theory and Nexus of Contracts theory, which as a group I call the Legalistic theories. I consider in turn, the nature of each and some objections to them. The legal literature contains many specific objections to each of these theories. Here, I outline only some of the most discussed

(Schane, 1986: 567-568). However, as the state establishes and ensures the integrity of the legal system on which incorporation depends, the legal articles of incorporation remain state created and regulated.

examples as my concern is *not* with corporate *legal* responsibility, but rather with the possibility of corporate *moral* responsibility.[24]

2.1.3. Legal Entity theory

Also known as Concession theory [25], the Legal Entity theory is grounded on the concept of legal fiction – the fictional person. Once a person or persons meet the legal and financial conditions for incorporation, a new corporation exists as a matter of law. This new corporation (even before it is animated and becomes a functioning corporation (see §1.2.)) has privileges and responsibilities in law. To permit this attribution of privilege and responsibility there is a long history of the law accepting that corporations can be (and indeed in law are) treated as if they were persons but only in the sense of a legal fiction, a legal convention.

The Legal Entity theory holds that corporations are simply the structures mandated by law and regulation on incorporation. Legal Entity theory claims that the corporation *is* the legal person. It is merely the legal entity that is created by the legal system within the society where business is to be conducted. Legal Entity theory admits of no metaphysical reality that is a corporation. The legal ruling by Chief Justice Marshall, that corporations are "invisible and intangible", is the Legal Entity theory in action (Trustees of Dartmouth College V. Woodward, 1819).

According to Legal Entity theory it is the legal person designation that permits corporations to act. The fictional persons are party to contracts, own assets, and liabilities and so on, *as if* they were persons. Proponents of Legal Entity theory argue, I think uncontroversally, that the corporate entity *per se* is not an actor in the world, only the humans contracted to it can utilise the assets of the corporation. Thus, "…the word *person* is being used to describe not

[24] See for example Stout (2016: 22-23) on Legal Entity theory, Stout (2016: 23) and Eisenberg (1999:830-836) on Aggregation theory; Bainbridge (2002: 1-34) on Nexus of Contracts theory.

[25] Use of 'concession' in this context reflects the historical fact that incorporation was originally a grant of privilege by the state to perform particular activities judged socially beneficial. The notion of the fictional person was introduced to permit the courts to exercise jurisdiction on these state-created corporations. While states continue to be involved in incorporation this is now usually indirect, via the state legitimated legal system, and is in most jurisdictions a simple matter of filing the right papers, paying fees and so on (Millon, 1990: 216).

an organism, but rather an institution that, acting through its board of directors, can exercise many of the legal rights that natural persons enjoy…*"* (Stout, 2016: 23, emphasis in original). The corporation (created to facilitate the business intentions of those who sought incorporation) is not the kind of thing that moves around in the world making products or providing services. This is what people do in alignment with the intentions of the various contracts they have with the corporation.

A significant objection to Legal Entity theory is based on its central claim that corporations are merely fictions created by the law. Outside the ambit of legal responsibility, embracing the theory that corporations are only the fictional person, the Legal Entity theory asks us to imagine that the actions attributed to corporations are those of something that has no reality. As noted above, the corporation has been described *in law* as invisible and intangible. However, as Lynn Stout observes, "…gravity is real (if invisible) and political states are real (if intangible) …" (Stout, 2016: 22). The corporation would seem to be more than an invisible intangible institution. As we view corporations and the actions attributable to them as collectives, we see not just a legal fiction but also organisations which act in the world via those contracted to it. These acts are facilitated by legal entity status as a necessary element of a corporation, but the legal entity is not itself the functioning corporation.

Despite this objection, in legal terms characterising the corporation as only the legal fiction works well as it permits courts to hold corporations to account for legally sanctionable wrongs and to impose compensatory penalties (Velasquez, 1983: 14). Additionally, the Legal Entity theory permits identification and sanctioning of individual corporate associates for legally relevant wrongdoing. It is ultimately persons who act on behalf of corporations, and these individuals have individual legal responsibilities for which they may be called to account while doing business.

2.1.4. Aggregation theory

Aggregation theory accepts the concept of a legal fiction in relation to legal responsibilities and in common with Legal Entity theory holds that a *functioning* corporation is not an independently existing entity. By Aggregation theory, once corporations are functioning, they are viewed as being 'composed' of individual natural persons (Millon, 1990: 213-214; Stout, 2016: 23). It is these persons who are the sole cause of all actions committed in the name of the corporation. In Aggregation theory there is no entity that is the corporation but rather

simply the aggregate of persons with specific, jointly agreed business objectives. Historically, application of Aggregation theory permitted companies to claim legal protections on the basis that if a piece of legislation applied to persons it also applied to unified groups of persons. For example, in an 1882 case a US court ruled that, "To deprive the corporation of its property, or to burden it, *is, in fact, to deprive the corporators of their property or lessen its value*…[*T*]he courts will look through the ideal entity and name of the corporation to the persons who compose it…" (emphasis mine).[26] This thinking was also used in the US Supreme Court's ruling in 1886 that the fourteenth amendment of the US constitution could be applied to some corporations as well as individual citizens.[27]

However, Aggregation theory suffers from a question of degree and an inability to adequately deal with the perpetual life of corporations. Exactly which persons constitute the aggregate? We may consider the aggregate to be only those contracted to the corporation, but this will include many suppliers to the organisation as well. Do we include the shareholders, who while they arguably are not owners, certainly can control aspects of corporate activities?[28] It is also difficult to pin down the composition of the aggregate as a constant over time. Employees, shareholders, suppliers and so on come and go constantly. The aggregate may therefore be the original associates (however defined) or the composition of associates at a point in time. If we accept that the aggregate is time dependent then in what sense, by Aggregation theory, can it be said to persist over time as corporations do (§1.3.3.)?

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[26] The Railroad Tax Cases, 13 F. 722, 747-748 (C.C.D. Cal. 1882)

[27] Santa Clara County v. Southern Pacific R.R., 118 U.S. 349, 386 (1886). The fourteenth amendment states 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.'.

[28] The owner of assets (all types) in a corporation is the legal entity. As shareholders have a considerable interest in the successful functioning of a corporation they are traditionally described as the owners of the corporation. This is an arguable tradition. Many, and I include myself, hold that all the shareholder owns is his/her share certificates, which are not certificates of corporate ownership. The shareholder can sell their shares to a willing buyer, but that is all. This question of shareholder ownership continues to be unresolved, and it is outside the scope of this thesis to explore it further. For more information see for example, Ciepley, 2017: 44-46 and Georgescu, P. (https://www.forbes.com/sites/petergeorgescu/2021/07/21/the-shareholders-are-not-the-owners-of-a-corporation/?sh=9e368ae1e0a1 accessed, May 19th 2023)

As with Legal Entity theory, despite objections, Aggregation theory is useful in legal deliberation. In the recent 'Hobby Lobby' case (*Burwell v. Hobby Lobby Stores Inc.,* 573 U.S. 682 (2014)) the United States Supreme Court ruling was in line with the Aggregation theory conception of the corporation.[29] The court stated in a majority decision that, "…a corporation is simply a form of organisation used by human beings to achieve desired ends." (*Burwell v. Hobby Lobby Stores Inc.,* 573 U.S. 2768 (2014)). Aggregation theory in this case permitted the majority ruling that the religious beliefs of the shareholders of a 'closely held' (for example, a company with limited shareholders such as one run by a family) could be granted rights of freedom of religion (Stout, 2016: 23).

2.1.5. Nexus of Contracts theory

The Nexus of Contacts theory described by Michael Jensen and William Meckling (1976: 305-360) holds that the corporation does not exist independently of the legal structure that created it or of the individuals and contracts in which it consists. Jensen & Meckling state that, "…*most organisations are simply* legal fictions which serve as a nexus of contracting relationships among individuals." (Jensen & Meckling, 1976: 310, emphasis in original). Thus, according to Nexus of Contracts theory, the corporation is merely the interface at which contracts, or better stated reciprocal agreements (Eisenberg, 1999: 822), associated with the business of a corporation come together (Bainbridge, 2002: 10, Figure 1). The corporation is solely the sum of its component parts and so is a creature only of contract law, described by Grant Hayden & Matthew Bodie (2010: 1130) as "corporation as contract". Thus, Nexus of Contracts theory denies independent existence to the corporation and reduces its nature to its component parts, the contracts between the parties with an interest in it and its objectives. The corporation is simply the connection (nexus) between these contractual agreements.

The Nexus of Contracts theory, if accepted, means that there is no entity that is a corporation. Rather, when we use the term corporation we are pointing to a series of related reciprocal

[29] Known colloquially as the 'Hobby Lobby' case the question was whether a company could opt out of paying healthcare insurance that included cover for contraception if contraception violated the religious beliefs of the shareholders - in this case a particular family. The court ruled that privately held for-profit corporations could be exempt from a regulation that its owners religiously object to, if there is a less restrictive means of furthering the law's interest, according to the provisions of the Religious Freedom Restoration Act (RFRA). Note: This ruling **only** applied to privately held corporations and is a controversial ruling.

arrangements, entered freely by persons with a view to conducting a particular business venture in line with the expectations of directors and shareholders.[30]

In summary, the Legal Entity theory holds that the corporation is *just* the legal entity. As the legal entity is a convenient legal fiction, no real entity exists by the theory. The Aggregation theory holds that the corporation, once functioning, is the aggregation of the persons contracting with it. There is nothing that is independent of the contracting persons. And finally, the Nexus of Contacts theory characterises the corporation as a point of convergence for the contracts involved in its activation by stakeholders. The Legalist theories while valuable for the law do not meet the criteria for corporate identity.

2.1.6. Legalistic theories do not account for readily observable features of corporations

My concern with the Legalistic theories is that 1) they each consider only one element of functioning corporations and 2) they do not account for the readily observable features of functioning corporations. The Legalistic theories are reductionist – reducing the corporation to a single component part – the legal entity, an aggregation of persons or a set of contracts. These theories have clear utility in manging legal deliberation, where it is clear what is being judged, but is deficient in characterising the nature of the complex organisations that are modern corporations.

In chapter 1, I argued that there are three necessary elements of a functioning corporation – the legal fiction, the corporate associates and the contracts and agreements between them. If this is right then the fact that each of Legal Entity theory, Aggregation theory, and Nexus of Contracts theory privileges individual elements of the functioning corporation renders each of them deficient as account of the corporation as it is experienced in the world. Legal Entity theory holds that the legal entity is the corporation. Aggregation theory holds that it is the corporate associates that are the corporation. And Nexus of Contracts theory claims that it is the contracts and agreements between associates that form the corporation. Therefore, while

[30] I use the term 'arrangements' here with deliberation and in line with Melvin Eisenberg's use (Eisenberg, 1999: 822-823). Although more commonly known as Nexus of Contracts, this theory is not accurately framed in such terms. In legal terms a contract is a legally enforceable promise and in common language a contract is an agreement; neither is sufficient to describe the inter-relationships that constitute a corporation. The corporation as conceived of by Nexus of Contracts theory is best described as a *nexus of reciprocal arrangements* between parties, where arrangements include expectations and behaviour.

the Legalistic theories clearly have their place in legal theory and practice, as explanations of the nature of corporations they do not work. In the words of Melvin Eisenberg regarding Nexus of Contracts theory, they "…conflict with reality as it is normally understood." (Eisenberg, 1999: 822). As I will show later Real Entity theory on the other hand readily accommodates all three elements in a single unitary body.

Legal Entity theory characterises the corporation as merely the legal fictional entity created on incorporation, so it has no identity beyond its status as a legal fiction. Aggregation theory focuses on the association of persons as the nature of the corporation and says little about the relevance of their experience in the corporation. It may be possible to accommodate Gindis' 'glues' (Gindis, 2009: 40) as features of the 'corporate aggregate'. However, it is unclear that any such accommodation is an intention of Aggregation theory. Rather, Aggregation theory appears to be a reductionist approach to characterising that which may be held legally responsible. Nexus of Contracts theory is crystal clear that the corporation *qua* corporate entity does not exist except as a focal point where the various contracts to which it is a party converge.

If all that is necessary to characterise a corporation are the contracts to which it is a party then we are bound to discount the legal entity itself, which is certainly a reality in the legal sense. Even if this could be accepted, there is an issue of boundaries – what is the limit of the corporation's nature? (Stout, 2016: 25). Consider a manufacturer who sells a batch of widgets to a wholesaler, who in turn sells them in smaller batches to retailers, who then sell them in yet smaller batches to consumers. If contacts are what characterises a corporation, then it is possible to conceive of all these purchase contracts as elements of the corporation that manufactured the widgets. This seems absurd.

The Legalistic theories' denial of the reality of corporate entities makes any attribution of moral responsibility difficult. They deny the existence of any irreducible aspect of the corporate entity to which blame may be attributed.

I will not explore these arguments in more detail here as my concern is not with the theories' efficacy in legal terms but rather with what answer they might provide to the question "Is a corporation the kind of thing that can take moral responsibility?". If either one of these theories provided complete descriptions of the corporation, then the answer would be that the corporation is *not* the kind of thing that can take moral responsibility. However, the emphasis

of each on single elements of the corporation makes them insufficient as complete descriptions of functioning corporations – they fail to account for readily observable features of functioning corporations.

In summary, the Legalistic theories, Legal Entity, Aggregation and Nexus of Contracts, do not explicitly deny the existence of the readily observable features of corporations discussed above. These theories do however deny that these features are necessary to enable legal responsibility; they simply do not need it for a case of corporate law breaking. None of the Legalistic theories admit the existence of a real entity (the entity in Legal Entity theory is, by definition, not real but fictional) that *is* the corporation. To understand how or whether, corporations may be held morally responsible, we need a theory that embraces the reality of corporations by meeting the seven criteria outlined in §1.3. A theory that embraces the observable reality of corporations by meeting the seven criteria is the fourth common theory of the corporation – Real Entity theory.

2.2. Real Entity theory

Unlike the Legalistic theories, Real Entity theory maintains there is something that is a corporation, related to but importantly distinct from, the individuals associated with it. Arguments in favour of the corporation as a real entity trace back to the work of Otto von Gierke in the late 1800s (Gierke, 1900). Gierke's view was organicist (the corporation as a living entity), postulating that a company, "…is no fiction, no symbol…no collective name for individuals, but a real living person, with body and members and a will of its own. Itself can will, itself can act…It is a group person with a group will." (Gierke, 1990: xxvi). While Gierke's position has long been abandoned by philosophers, there have since been many variations on the real entity theme (Gindis, 2009: 32-36). I believe the persistence of the real entity concept reflects an intuition born of the experience of persons working for and with corporations of features which we can readily observe and experience about corporations.

Real Entity theory allows the corporation metaphysical reality – there is something the acts of which supervene on the acts of the individuals that comprise it. Modern scholars have tried to characterise this feature of a corporation in a manner that does not require postulating a mysterious *vis vitalis* or Gierkeian anthropomorphism. Instead, investigating readily observable features of the structure of corporations and the means of information flow within corporations has been fruitful (List & Pettit, 2011: 7-11, French, 1979: 211, 1995: 27-30).

Proponents of Real Entity theory claim that features of functioning corporations that are readily observable establish the reality and nature of the entity. These features (there may be others but the following strike me as vital to the distinction of a real entity as they are readily observable by any third party) include, first, the overall structure of corporations, and second, the way information flows within them.

2.2.1. Corporate Structure

An understanding of the structure of functioning corporations permits Real Entity theory to hold that corporations are entities with agency. Agency has been described as having three necessary conditions: 1) the presence of representational states that depict how things are in the world, 2) motivational states that define how the agent wishes things to be, and 3) the capacity to rationally process the information on the two states so as to be able to intervene and bring about a desired state of affairs (List & Pettit, 2011: 20).[31] What is sufficient for agency remains an open debate.

List & Pettit's understanding of a representational state is something "that plays the role of depicting the world" (List & Pettit, 2011: 21). In the case of a corporation depicting the world of its business, this may be for example a report on the current state of the market for specific products or services. Motivational states are understood as those that 'motivate' action. Having depicted the market for a proposed product or service the company may then engage in an analysis of a proposed business venture in that market that lays out the strengths, weaknesses, opportunities, and threats involved on the proposed venture (commonly called a SWOT analysis).[32] If the analysis is positive, (company strengths in the market and opportunities for gain outweigh weaknesses in the company and threats from competition) the analysis has the capacity to motivate the corporation to act on the proposal. The corporation can act to change the world (defined here as the market under consideration) in

[31] The standard conception of agency consists in the agent being able to act intentionally on the basis of mental states and events (*Stanford Encyclopedia of Philosophy*, 2019. https://plato.stanford.edu/entries/agency/ (accessed, August 31st, 2021)). This conception is descriptive of human agency. I argue later that agency in the sense of corporate action is also expressed in actions that carry out intentions (Chapter 4) and the mental state requirement is met by the mental states of the corporate associates (§ 2.4. and 4.3.1.).

[32] For a more detailed explanation see for example, https://www.investopedia.com/terms/s/swot.asp (accessed, October 13th, 2021).

line with corporate intentions. List & Pettit make no claims as to the nature of these intentional states beyond that they be, "…configurations of the agent…that play the appropriate functional role." (List & Pettit, 2011: 21). The internal structure of a corporation (the skills of the people it employs, and the relationships between those people and skills) is designed to function in just this manner. Whether it is deciding to enter a new market, to change a production process for cost reduction, downsize the company to improve productivity, and so on, a functioning corporation routinely displays the type of functional agency outlined by List & Pettit, which is in turn dependent on an efficient flow of information.

The structure of corporations is also such that decisions can be made that are those of the corporation *qua* corporate entity and not necessarily those of all the corporate associates (whether particular associates do or do not have decision-making authority). List & Pettit claim that individual *corporate decisions* are possible using the concept of judgement aggregation functions (List & Pettit, 2011: 42-58). Aggregation functions are described as, "…ways of merging, or 'aggregating', the intentional attitudes of several individuals into attitudes held by the group as a whole." (List & Pettit, 2011: 42). The judgements of individuals on a particular question are merged so that an agreed group (or corporate) judgement is derived. The concept allows for the above observation (shown by example below) that the corporate judgement/decision may not be that of all the corporate associates nor all of those partaking in decision-making.

An aggregation function is the mechanism used to arrive at a single decision on a question considered by several participants (decision makers). List and Pettit describe a variety of possible strategies and argue that premise-based and sequential priority procedures are well suited to permit groups to form rational decisions that "collectivize reason" (List & Pettit, 2011: 58). Premise-based decision procedures are those where each member of a decision-making group is required to vote on each of the premises relevant to the decision to be taken. If a majority vote emerges either for all the premises or for most of them (deciding which procedure is used may be the subject of a separate voting process) then the group decides to implement the decision. Conversely if majority votes are against (using whichever process was decided in advance), then the decision is rejected.

For example, consider a decision to purchase new production equipment. Three premises may be imagined here: 1) the current equipment is insufficient for the company's future production needs, 2) the new equipment will improve productivity sufficiently, 3) the productivity improvement will outweigh the cost of the new equipment in a reasonable (defined) period. Two sets of outcomes can be imagined: (a) if yes to all or yes to two of three then proceed, and (b) if no to two or more premises, then do not proceed. In the event of (a) the company would begin the process of purchasing, installing, qualifying equipment, qualifying operators, and integrating the new equipment into the production process – a series of corporate actions result from the decision made. Note that by premise-based decision making, a decision to proceed or not may be made on the understanding that not all the decision-makers voted in favour of all the premises. So, the decision-making group has aggregated its knowledge (the group may be imagined to be representatives from Marketing, Production, Engineering, Purchasing and so on) on the subject and arrived at a decision based on the aggregate (by majority or partial majority) of votes that now forms the corporate intention.

Sequential priority procedures assign priority to the premises and vote in order. By this method, each premise is dependent on the result of the previous one. Therefore, if we assume priority in the above example, then premise 2) can only be considered if premise 1) is agreed and so on. Therefore, the attitudes of the group to each premise in turn influences their attitudes to the subsequent ones. As with the premise-based approach, the final decision is that of the company and does not have to be that of all the members on each of the premises.

Procedures of these types (there are others but the result with respect to a group decision has the same result) allow the group (acting for the corporation) to arrive at a decision on a question that is reason-based and collectively agreed. Importantly, the group decision supervenes on the individual decisions.

Lars Moen (Moen, 2023: 3-6) claims that it is a condition for the success of these procedures that votes are cast sincerely. The vote cast is really the preferred option of the voter based only on the information provided. He claims that in the real world, votes are frequently cast for strategic reasons, that is the person voting has a reason to prefer a particular outcome and votes in opposition to his/her actual beliefs on some premise(s) to ensure his/her desired outcome. The group eventually decides on the outcome preferred by the strategic voter and so

is not deciding as a group agent, but rather based on an individual or individuals' preferences. Moen's objection is strong at the micro-level (simple decisions taken by a small group), but I think loses traction when complex decisions are being made by large numbers of people, often over long periods. It is more usual in complex decision-making for there to be a discussion/assessment period during which propositions and reasons for adopting them are presented to various persons of specific expertise for analysis and an (aggregate) decision with which the group can acquiesce is made based on an evaluation, by others, of their judgements. Analysing this socially complex process is outside the scope of my work. It is also worth remembering that frequently a bad outcome is the result of a series of connected decisions taken over time; rarely is it the result of a single choice. I do not explore this further here (for one possible solution see List & Pettit, 2011: 113-114, 124-128).

2.2.2. Corporate information flow

The interactions of the corporate associates with each other and with the corporate entity in the form of its operating principles is what animates the functioning company by making explicit expectations of corporate actions and managing the flow of information around the company that is necessary to enable these actions. The structured interactions (that may include decision-making processes such as those described above) take place within the constraints of the Corporate Internal Decision Structure (CIDS)) (§1.2.4). The CIDS is the element of a corporation that allows it to deliberate, decide and communicate. The CIDS includes everything a corporation needs to make decisions and act in the world. Actions of persons guided by a policy of some sort (CIDS for example) distinguish them from an aggregate of persons (a mob for example) who spontaneously gather for an event and then disperse. When persons act via a Corporate Internal Decision Structure, these persons are agents acting for the corporation – to fulfil its intentions, not necessarily their intentions.

A personal example can illustrate the inconsistency between personal and corporate intentions. I worked for a corporation that had 120-day payment terms in all their contracts with suppliers – the company contracted to pay for goods and services within 120 days following receipt. As part of my job, I was party to many contracts with these terms. In my private life I pay for goods and services on receipt, or on receipt of an invoice. My upbringing in a small business environment taught me the problems that lengthy payment times cause small operations. I resented presenting 120-day term contracts to suppliers, especially individual contractors, or small businesses. I and others did lobby for shorter

payment terms on these contracts within the corporation. This lobby was successful in a few cases of individual contractors. To be clear I do not make a point that the corporation was doing anything wrong. Contracts are open to negotiation, and no-one is bound to agree to terms they consider unreasonable. However, for a small business to get a corporate contract is financially and reputationally beneficial and so many will agree to terms that make it more difficult to run their business to get the 'kudos' and in the hope of additional contracts. My point here is that in these situations my desires and intentions were subordinate to the Corporate Internal Decision Structure of the company. I acquiesced because I judged doing so an acceptable if uncomfortable compromise within my relational contract with the corporation. However, I believe that the 120-day contracts were the corporation acting through me and I was conflicted but ultimately sanguine about that fact – it was within the terms and spirit of my relational contract and did not require me to act wrongly.

The subordination of some individual desires and intentions by the Corporate Internal Decision Structure has another consequence – it can account for the impression of 'corporate culture' that is experienced by corporate associates and corporate consumers alike (see §4.2.1. for detailed discussion). Seen from the outside it can look as though the corporate associates are 'of one mind'.

Importantly, the Corporate Internal Decision Structure concept frees us from any requirement to consider a corporation to be a person.[33] The Corporate Internal Decision Structure is part of the non-biological aspect of the entity, those following the requirements of such a decision process, the biological aspect. The functioning corporation is in this sense a quasi-biological entity of some kind, both independent of its associates and dependent upon them. Just what kind of entity is the subject of chapter 3.

In summary, Real Entity theory presents a picture of the corporation as an entity comprised of persons but distinct from them. List & Pettit's work shows the specific nature of how companies engage in decision-making and subsequently act on its decisions, and Peter French's work describes the internal mechanisms that drive corporate decisions into action.

[33] In line with List & Pettit and others (see for example, Hess, 2013) I do not argue for corporate personhood, although some scholars do make a case for corporate personhood (see for example, French, 1979, Greenfield, 2018).

As with the Legalistic theories discussed above, Real Entity theory has been used by legal practitioners in deciding questions of legal responsibility. There is nothing about Real Entity theory that disables the prosecution of individual corporate associates for illegal acts performed in a corporate context. The British Petroleum oil spill case in the United States (§1.5.3.) illustrates that corporations *qua* corporate entities may be successfully prosecuted.[34] However, conceiving of the corporation as a real entity possessing some measure of agency allows, in addition, the consideration of the possibility of corporate moral responsibility. An entity that has communicable aims and objectives (Pettit, 2017: 22-26) based on reasons, and that acts on those reasons may be considered suitable for moral agency. I expand on corporate reasons and communication in §4.4., but first I want to consolidate the power of the Real Entity theory by considering how well it accommodates the seven readily observable features of functioning corporations outlined previously, as these features are not well accommodated by the Legalistic theories. I submit that these are criteria that must be met for any theory of the nature of corporations to be successful.

2.3. Real Entity theory and the conditions for existence

In section 1.3. I described seven readily observable features of corporate reality that I maintain any theory of the nature of the corporation must be able to accommodate – identity, unity, persistence in time, causal power, internal experience and relational contracts, corporate culture/character, and remainders of responsibility. I show below that a Real Entity theory of the corporation successfully accommodates these criteria indicating that the theory of corporations as real entities in the world is a reasonable theory.

Identity (that which characterises the distinct nature of a corporation) may be established via the features observable in a corporation that are missing from a mere association of persons, an aggregate of persons, and so on. Corporate identity has been described as five elements,

[34] Since 2007 the UK has had a Corporate Manslaughter and Corporate Homicide Act that states, "(1) An organisation… is guilty of an offence if the way in which its activities are managed or organised - (a) causes a person's death, and (b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased. (2) The organisations to which this section applies are - (a) a corporation; (b) a department or other body listed in…; (c) a police force; (d) a partnership, or a trade union or employers' association, that is an employer." https://www.legislation.gov.uk/ukpga/2007/19/section/1 (accessed, October 13th, 2021).

called ontological glue by David Gindis (Gindis, 2009: 40, §1.2.1.).[35] These elements of identity are readily observable internally by corporate associates (motivational, cognitive and capabilities glue) or externally by analysts, consumers, suppliers and so on interacting with a corporation (institutional, organisational glue). Together these elements go a long way to describing the functioning of a corporation as it provides goods or services. Real Entity theory implicitly demands corporate identity, something about the entity that is distinct to it as an individual reality. If a corporation did not have a recognisable identity, it would be something other than an entity – an aggregate perhaps. This requirement for identity is implicit for example in Leibniz's claim that, "what is not truly *a* being is not truly a *being*", (Leibniz, 1902 [1687]: 191, emphasis in original). Identity also implies unity, the next of Gindis' tests for existence.

The unity element (or *test for existence* in Gindis' terms) – an entity is not identical with the sum of its parts – is passed by the concept of a corporate entity via its relational contracts.[36] These bind the corporate associates, without whom no causal power is possible (see below), to a single contracting entity. All contracts are signed by authorised persons on behalf of the corporation, so associates are entering into reciprocal agreements with the same, single party – the incorporated legal structure, not individual corporate officers. These contracts unify the corporate associates with the contracting agent in pursuit of the goals of the corporation *qua* corporate entity. The contracts are now part of an entity, the intentions of which supervene on their individual intentions.

This 'unity by relational contract' provides the corporation with considerable flexibility to determine how the organisation functions. For example, an employer may request shift changes with which, if judged reasonable within the relational contract, the employee would be expected to comply. Of course, s/he may not wish to comply with the change and then either a negotiation within the terms of the relational contract, or in a worst-case scenario resignation or dismissal may ensue.

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[35] 1) Institutional glue - legal status, contracts, constitutive rules etc., 2) organisational glue - structures, processes, Corporate Internal Decision Structure etc., 3) motivational glue - the means to ensure loyalty and common goals, 4) cognitive glue - shared beliefs and representations, 5) capabilities glue - the complementarity between the human assets (knowledge/knowhow) and the non-biological aspect of the corporation (the legal entity).
[36] The nature of relational contracts is described in §1.2.3.

Resignation or dismissal would represent a breakdown in the individual employee's recognition and acceptance of the group intentions of the corporation. It would not represent a breakdown in the unity of the corporation itself. Within the boundaries of the relational contract everyone has a set of intentions that are derived from the collective (group) intentionality. The associates, of course, retain their non-corporate intentions, but while working on the collective endeavour their group intentions and actions are paramount and unity of the corporate entity mandates this.

The fluidity of corporate associates (new persons are hired, others resign, retire, or are dismissed) is a quotidian feature of corporations and despite these changes the corporation itself persists as a recognisable entity. Thus, the corporation conceived as a real entity readily accounts for Gindis' persistence in time feature of existence. That specific individuals or groups of corporate associates are not necessary for the corporation to persist is indicative of the power of the structure and processes of information flow that characterise functioning corporations. These processes and procedures are independent of individuals. So long as the persons contracted have the right sets of skills to perform the tasks necessary to animate the corporation, who these persons are is irrelevant. I noted earlier the persistence of several companies (§1.2.3.). None of the original corporate associates of Lloyds of London, JP Morgan, Unilever, or Citroën are alive today, yet the companies are well known and continue to provide goods and services. This persistence of a recognisable entity is wholly consistent with a conception of the corporation as a reality independent of its constituents.

Gindis' final test for existence is causal power, the ability to make changes in the world. Corporations clearly have causal power, and they express it in a consistent, structured manner, sometimes over very long periods of time. The principal types of effects caused by corporations tend to be specific to them, a Citroën car is recognisably Citroën, even if we know or care little about automobiles – if only because it is clearly stamped as such during production and has been since the company began car production.

Aggregates may also have causal power. For example, a group may form to watch a city's New Year firework display. The group will have a collective intention to see and enjoy the display. They will show their pleasure with exclamations of delight and so on, and the group may also show displeasure if the display fails to deliver on their expectations. The outcome of this 'failure' may take the form of altercations within the group or even the group moving

'as one' to cause damage to the surroundings. However, these are usually short-lived actions, and the group will disperse quickly – it is only a short-lived entity.

As with the persistence in time criterion for reality, the causal power of the corporation lies in its structures and means of information accumulation, retention, and flow within the company. The Citroën corporation will not manufacture automobiles today in the same manner as it did in 1919. But, in such a well-established company it would be very unusual if there was not a discernible line of continuity in the culture and character of the organisation traceable back to its origins. The distinctive double chevron brand mark is one readily observable example. These features of causal power support the concept of the corporation as a real entity that possesses a particular ability – in Citroën's case, the ability to design and manufacture cars.

Individual corporations exercise causal power in a focused manner (for example, specialising in a particular type of product or service), according to established processes and procedures, and in a manner that distinguishes one company from another.[37] A Citroën car is recognisably distinct from a Renault even though both are simply means of transport with much in common - both have four wheels, seats, engines, transmissions and so on. The companies design and produce their products to be readily observably different. A theory of the nature of corporations that can identify the Citroën and Renault companies as independent, real entities is well placed to account for these differences.

In addition to Gindis' tests for existence I proposed three further aspects of corporations that a successful theory of their nature ought to be able to accommodate. A successful theory must be consistent with experience and relational contracts, accommodate corporate culture/character and be able to account for remainders of responsibility. As with Gindis' tests, any examination of a functioning corporation will readily identify these aspects of its nature – they are readily observable by third parties.

[37] The nature of a corporation's business may change with time. Many companies evolve over time to engage in different businesses. For example, the Apple corporation began as a desktop computer developer and manufacturer, then became known for tablet computers and today is a principally a telephone manufacturer. However, at any point during this evolution it had a core business that was identifiable as such.

In section 1.4.1. I described the experience of corporate associates in a company in terms of their understanding of and performance in accordance with their relational contracts. I used Peter French's concept of corporate affinity (French, 1979: 134-140) to describe the extent to which associates identify with, demonstrate their allegiance to and sacrifice their time for the collective endeavour of the corporation. Real Entity theory holds that people feel and act in line with French's affinity, because the individuals are now part of the collective and view it as something with a recognisable identity that is recognisably specific to each company. This affinity is exemplified by the commonly heard statement, "This is how **we** do business at Unilever, Citroën, Glaxo…" or from a third-party perspective, "This is how Unilever, Citroën, Glaxo… does business.". 'This' in these statements indicates an approach to business that is characteristic of the particular organisation. The concept of the corporation as a real entity is therefore consistent with how corporate associates express their experience of working in a particular organisation and, the place of relational contracts in that experience; associates are contracted loosely to perform tasks in a manner directed by the corporate aims consistent with their unique culture and character.

The concept of the corporation as a real entity readily accommodates the recognisable culture and character of companies. As the 'This' above is readily observable externally, it is also a measure of the character of the organisation – how its approach to business is perceived.[38] I also noted that cultures are characteristic of organisations and difficult to reconcile in the event of two organisations combining in a merger or following an acquisition. If we accept the corporation as a real entity, we might expect it to have these features. It is reasonable to imagine that a particular functioning entity will function in a particular fashion and that way of functioning would be a clear indication of a culture and character of the entity.

The final feature of corporations that I proposed to be necessary to a successful theory of the corporation is the ability to account for remainders of responsibility, both legal and moral. Remainders occur when there appears to be some responsibility 'left over', not accounted for,

[38] The nature of corporate culture is a general concept that describes the overall approach to business of the organisation. Within any company there will be interdepartmental conflicts, individuals who 'game' the system for personal gain, and so on. However, the Corporate Internal Decision Structures will be developed with a view to minimising the impact of these and promoting a specific manner doing business. There will always be rogue events such as the country General Manager who takes or gives bribes to better her results, but in a well-structured organisation this will frequently be identified quickly.

after individual responsibilities for a corporate action have been catalogued. Conceiving of the corporation as a real entity (and as I will argue in chapter 5 a morally responsible entity) that is tripartite (legal entity, associates, and their relationships) leaves open the possibility of a division of responsibility between the corporate entity and the corporate associates. Both may be seen as having specific responsibilities or responsibility types. The individual is responsible for following corporate procedures and reporting deficiencies if/as they appear. The corporation is responsible for enforcing its processes and procedures, not placing obstacles in the way of persons in their work (not reducing funding and monitoring of safety procedures for example), ensuring its processes and procedures are fit for purpose and so on. These higher-level actions are appropriate subjects of company responsibility and the concept of the company as a real entity readily facilitates the identification of appropriate processes and procedures as distinctly corporate responsibilities.

In summary, I have argued that the concept of corporations as real entities accounts for David Gindis' tests for existence and can accommodate my additional three readily observable features of functioning corporations. The question now becomes what type of entity is a corporation? I deal with the nature of the corporate entity in chapters 3 and 4. But first, it is important to address some key objections to the application of Real Entity theory in the consideration of the nature of corporations.

2.4. Some objections to Real Entity theory

Real Entity theory, if accepted, allows that the corporation *qua* corporate entity could be held responsible for moral as well as legal wrongs. That groups are morally responsible versus the individuals that comprise them is a matter of considerable debate and some object to corporations as real entities by focusing on the consequences of its adoption to the attribution of moral responsibility. Additionally, some object to the whole idea of morality having a role in the marketplace (Rönnegard, 2015: 192-204), which if accepted means that it is irrelevant how we conceive of the nature of corporations as moral choices are not theirs to make. I deal in more detail with this objection in §5.1.

The objection based on individual versus collective responsibility comes principally from those who favour methodological individualism as the analytical tool best suited to understanding collectives in society. Briefly, methodological individualism claims that social phenomena should be explained by describing how the phenomena are formed from the

actions of individuals. These actions are in turn explained via the intentional states motivating the individuals. Advocates of methodological individualism resist the notion that collective entities can be held as causal explanations or are distinct from the individuals associated with them. According to methodological individualism all the actions of a corporation and the consequences thereof are attributable to individuals.

The individualist denies any idea of a 'group mind' in analysing the actions of collectives. I agree with the rejection of group minds. I will argue later that the corporate entity is a more subtle combination of interactions than such a concept would allow and requires no mysterious concepts.

Yet I do not agree with the notion that all actions of corporations can be reliably traced to individuals, at least in any meaningful sense. If we exclude incidences of planned wrongdoing by individuals or small groups, the origin of corporate wrongdoing is frequently the result of a series of small changes in complex processes, which individually are potentially innocuous, that together cause an incident (Columbia Accident Investigation Board Report, 2003: 6). Consider, 1) the number of individuals that are often associated with corporate tasks, 2) the concomitant complexity of Corporate Internal Decision Structures, 3) the multifaceted nature of tasks, and 4) the temporal extension of tasks undertaken by a series of individuals and teams. These considerations argue for a more nuanced understanding of corporate ontology. The British Petroleum, Deepwater Horizon case (§1.5.3) was in large part facilitated by small deficiencies in safety procedures. The individual is important but so is the company's planning, monitoring, and funding over a significant period. While the event that caused the spill was singular, its causes were the result of a complex series of small decisions governed by the corporate aims, processes, that do not usually stand in isolation in cases of corporate wrongdoing. Similarly, the Volkswagen emissions case (§1.4.3.) illustrates the role for group-based policies in the commission of a wrong.

Significant objections to Real Entity theory are presented by Manuel Velasquez (1983, 2003) and David Rönnegard (2015). Their challenges are part of their shared project of denying that corporations can have moral responsibilities. Simply put, Velasquez and Rönnegard maintain that if there is no agent to be held responsible then there is no responsibility to be had. With this I agree; however, I do not agree that corporations cannot be the agent held morally responsible. I address the question of corporate moral responsibility *per se* in chapter 4; here

I respond to Velasquez and Rönnegard only on their rejection of the notion of the corporation as an entity distinct from its associates.

Rönnegard takes the individualist approach to understanding moral responsibility in collectives. He states, "…I am not saying that no one is morally responsible for events that happen in business; rather I argue that if anyone is responsible then it is one or more members who are the proper moral agents." (Rönnegard, 2015: 7). He denies any metaphysical reality to corporations *qua* entities distinct from their associates, on the basis that, 1) corporations lack autonomy[39], 2) corporations cannot form intentions and 3) corporations cannot act independently of their associates (Rönnegard, 2015: 57-59).

To be autonomous the corporation must be able to choose an intentional action independently (Rönnegard, 2015: 57). In §2.2.1. I described List & Pettit's justification for corporate autonomy based on the decision mechanisms and French's concept of the Corporate Internal Decision Structure. Rönnegard argues that the Corporate Internal Decision Structure is insufficient as procedures cannot be in any sense aware of making choices; only those who established the procedure and those who follow it can have awareness. Additionally, as any decision made will have to be accepted by the humans using the procedure and ultimately enacted by corporate associates it is they and not the corporation who accept and enact. Decision mechanisms and Corporate Internal Decision Structures are "…created by humans for humans…" (Rönnegard, 2015: 57) so any act mandated by them that is intended was intended by the humans using that system. Therefore, natural persons are (morally) responsible for the intended or unintended consequences of the decisions. Causal responsibility may be attributable to the corporate structures, but Rönnegard states that "If anyone is morally responsible for an event then it must be at least one [*human*] member." (Rönnegard, 2015: 58, [*human*] mine).

Humans are indeed very often aware of what they are doing when they engage with a corporate decision mechanism, though they will never be able to foresee or intend every consequence. However, in the corporate context it is reasonable to suggest that company

[39] In his work, Rönnegard takes autonomy to be, "…that an agent possesses the autonomy to choose its own intentional course of action." (Rönnegard, 2015: 44). A corporation *qua* real corporate entity would, if autonomous, be able to decide to act in its interests regardless of the interests of the corporate associates who animate it.

associates are also aware that they are playing a part in a collective endeavour and that the outcome may not reflect their individual preferences. If it is my preference to reject the purchase of new production equipment and yet the final decision of the group is that it should be purchased, it is the collective that has decided and absent a procedure that permits a CEO or other corporate executive to over-ride that decision the equipment will be purchased. Humans certainly created the procedure, but this was done to facilitate collective decision-making and so I maintain the decision is that of the collective and responsibility lies with the company. I did not support the decision and so the intention to purchase was not that of all the humans involved. In this sense a 'company decision' will be enacted and should there be an issue with the decision (the new equipment is so difficult to maintain that an accident occurs for example) then on my view, some measure of responsibility is corporate.

Rönnegard challenges the idea that corporations form intentions based on his objection to autonomy. If a corporation is unable to reflect, deliberate and ultimately choose its own intentions then the intentions must be those of the human actors. Here he appeals to the nature of intentions as mental states – you and I are consciously aware of our intentions in a way that corporations are not aware of theirs. Christian List (a proponent of Real Entity theory) concludes, "…what is it like to be a group agent? … the answer may well be: (close to) nothing." (List, 2018: 22). I agree, I do not propose a mysterious phenomenal consciousness for corporations. However, in chapter 6 I will argue that the corporate entity uses the mental states of its associates to form intentions – that is how the corporate entity is constructed. We typically have far greater access to our own mental states, and we use them because of that access. The corporation has a measure of access to the mental states of its associates and that is what it uses (Silver, K., 2022: 11-12). Again, that decisions and actions based on them may not be those of all the decision-makers or those of the persons enacting them indicates that, in the case of actions mandated by a company, the intention is that of the company.

Lastly, Rönnegard focuses on the fact that corporations act in the world only via their associates – corporations cannot act independently. As such companies are not fit candidates for moral responsibility even if we accept real entity status. As this is an argument specifically against corporate moral responsibility rather than the status of a corporation as real entity, I leave discussion of it until chapter 3.

Manuel Velasquez's approach to rejecting the concept of corporations as real entities challenges three aspects of the concept: first the idea of a collective that has characteristics which are not attributable to its members is a real distinct entity. Second, the relevance of the 'persistence in time' feature of corporations. Third, the concept of group agency (Velasquez, 2003: 531-562).

To ground his first objection, Velasquez lays out clearly what he calls the 'collectivist argument' (Velasquez, 2003: 539):

(1) If X has properties that cannot be attributed to its individual members, then X is a real individual entity distinct from its members.
(2) But corporate organizations have properties that cannot be attributed to their members.
(3) So the corporate organization is a real individual entity distinct from its members.

Velasquez challenges the first premise which he argues is an example of the fallacy of division. "The *fallacy of division* occurs when someone argues that something which is true of the whole, must also necessarily be true of each or some parts of the whole."[40] Velasquez writes, "It may be true...that a pile of sand is big but wrong to infer that each grain in the pile is big." (Velasquez, 2003: 540). He states that it is not a surprise that there are group characteristics that are not shared by members of the group. However, what is not the case on Velasquez's view is that the difference between the group and individuals implies, "…positing ghostly group entities." (Velasquez, 2003: 540). It is merely a consequence of collectives of persons. It seems therefore that Velasquez accepts the argument (see §2.2.2.) that individual corporate associates may not share the totality of corporate intentions but claims that this has no bearing on the nature of the corporation *qua* corporate entity.

Velasquez also challenges the importance of the 'persistence in time' feature of corporations by again invoking the fallacy of division (Velasquez, 2003: 541). He concedes that corporations do indeed persist in time despite a continual turnover of corporate associates but argues that this, "…does not *by itself* imply that the corporate organisation is a real individual entity distinct from its members." (Velasquez, 2003: 541, emphasis mine). I can agree that 'by itself' the fact that corporations persist in time does not justify real entity status. However, as with Velasquez's argument on attributable properties described above, my

[40] https://fallacyinlogic.com/fallacy-of-division/ (accessed, October 26th, 2021)

position is that persistence in time is not a sufficient feature of a real entity, but rather one of at least seven features that a theory of the corporation must account for.

In §2.2.1. I outlined List & Pettit's concept of agency for collectives (List & Pettit, 2011: 21). Essentially, List & Pettit propose a functional approach whereby the structures of a corporation are, "…configurations of the agent…that play the appropriate functional role." (List & Pettit, 2011: 21) where that functional role is the representations of the world as the company 'sees' it and representations of the world as the company wish it to be. The concept of functional agency is not accepted universally. Velasquez, for example, maintains that intentionality of this kind is merely 'as-if', that is companies' actions may be described *as if* they were based on the intention(s) of the collective (Velasquez, 2003: 546-548). He allows that the intentions may be the intentions of a group within the company but argues that these intentions are not attributable to the whole as an entity. For Velasquez if a corporate intention cannot be directly attributed to an individual or group of individual corporate associates then the attribution is of the 'as-if' type (Velasquez, 2003: 548).

To recapitulate, my justification for invoking and preferring use of the Real Entity theory to characterise the nature of functioning corporations is based on the principle that any successful theory must account for a series of at least seven readily observable features of corporations in action. Velasquez challenges three of these features as not in themselves sufficient to characterise a corporation as a real entity. I agree. However, I have argued that when taken together with the other four readily observable features of corporation they are indicative of some form of real entity that is distinct, in some measure, from their associated persons.

In closing this chapter, I have an additional objection to briefly address – the risk of reification; "…when a social entity is taken to be a natural one." (Machery, 2014: 89). I have more to say about social entities in chapters 3 and 4, and so here it is sufficient to say that to reify a corporation is to attribute to it reality as a natural kind, an attribution to which it is not entitled. Natural entities are those that exist independently of humans – rocks, oceans, atoms, plants and so on. A functioning corporation is dependent on humans for its existence and so is not a natural kind.

That said, in everyday communication we frequently commit the fallacy of reification perhaps as a communicative shorthand. Additionally, the loyalty of corporate associates may tend to a position of unconscious reification – "I work for company XYZ, and it takes good care of me". Similarly, the statement, "Nike made my shoes" can be understood as either, the social entity that we recognise as the Nike corporation made my shoes, or a thing that is Nike (in the manner of a thing that is a rock) made my shoes. I defend later the idea of corporations as social entities and so on my view we do here have a justifiable conception of Nike. The idea that Nike is a thing, a natural kind (things such as the elements, an oak tree, cows and so on) is fallacious, but nonetheless communicatively useful. As will become clear in chapters 3 and 4; the type of real entity that I propose to be best suited to characterising the corporation can describe the corporate entity as real without treating it as a natural kind and so side-steps the reification objection.

2.5. Conclusion

The Legal Fiction, Aggregation and Nexus of Contracts theories cannot account for readily observable features of corporations; neither can these theories adequately account for remainders of responsibility associated with corporate acts. This leaves the Real Entity theory as a favourable alternative. Real Entity theory postulates that when a corporation is activated by persons and their relationships there comes into existence an entity the decisions of which are those of a group, not (necessarily) those of all the individuals in the group. This entity can have properties of agency that are specific to it. Additionally, Real Entity theory takes account of the readily observable features of functioning corporations. The question then becomes what type of entity a corporation is?

CHAPTER 3: Functioning Business Corporations as Social (Institutional) Facts

"The entity known…as *the firm* is taken as a real institution. As such, the firm exists apart from the individuals who compose its decision-making organization, but it *does not function* apart from them. Thus, the entity is not a fiction; it is a fact." (Strauss, 1944: 112, emphasis in original)

3. Introduction

In chapter two I argued that a conception of the corporation as a real entity, a tripartite amalgam of the legal entity, corporate associates, and their relationships, was justified by its ability to account for a series of readily observable features of functioning corporations. Chapter two may be summarised as a defence of three premises:

(1) Incorporation creates fictional persons[41] – corporations
(2) The combination of a corporate (fictional) legal person, those humans contracted to it and their relationships creates a quasi-biological organisation – a functioning business corporation
(3) Readily observable features of functioning business corporations qualify them as real entities

I ended the chapter by posing the question: what type of entity is a corporation? I address the type of entity that is a corporation in this chapter with a defence of two further premises, leading to a conclusion that corporate entities are well described as institutional (social) entities:

(4) Functioning business corporations are institutional facts, founded on readily observable features[42]
(5) Institutional facts are real, social entities in the world

Therefore, functioning business corporations are real social entities.

The entity that is a corporation (Premise (3)) is not an entity in the manner of everyday things such as buildings, persons, books and so on. As discussed in §1.3.3., one cannot point to

[41] When a corporation is established by law, the entity (in law) that comes into existence is considered by the law to be a person subject to legislation governing corporations. It can be sued, it can sue, it can own property (buildings, plant and machinery, patents, knowhow) as if it were a person.
[42] This is a specific technical use of the word "fact" that is explained in full below.

something that *is* a corporation, and while one can meet corporate associates, directors, shareholders and so on, one cannot meet a corporation. My defence of premises (4) and (5) rests on the concept of the corporation as an institutional fact, following the social ontology theory of John Searle (Searle, 1995, 2010).

In choosing Searle's theory I admit to an arbitrary choice. There is another notable alternative theory of social facts (things that cannot exist without humans) championed by Raimo Tuomela (Tuomela & Balzer, 1998, Tuomela, 2003). Tuomela calls his theory the 'Collective Acceptance Theory'. Collective Acceptance Theory characterises social facts using three concepts, 1) the performative character of social notions (individual behaviour based on social norms), 2) their reflexive character (ability of humans to adapt to social norms – socialisation) and 3) collective availability or 'forgroupness' of social items (an element of the group acceptance of the assertion of something in a given context) (Tuomela, 2003: 124). The Collective Acceptance Theory along with Searle's social ontology claims to be a universal theory of social facts. In common with Searle, Tuomela accepts the synthetic nature of social facts saying that 'Many social and collective properties and notions are collectively man-made' (Tuomela, 2003: 123). Additionally, Collective Acceptance Theory also acknowledges the centrality of 'we-intentions', the 'forgroupness' of social items. I suspect that both theories can characterise the nature of corporate entities, and indeed other institutional facts and so as above I confess to an arbitrary decision to follow Searle.

Consequently, this chapter deals at length with Searle's account as its applicability to business corporations is the foundation of my subsequent argument on corporate moral responsibility. I begin with a description and defence of Searle's theory of Institutions and Institutional Facts. Next, I apply Searle's account to functioning business corporations to establish that business corporations are well described as Institutional Facts (Premise (4)). I show that a description of corporations as institutional facts is supported by readily observable features of functioning corporations acting in accordance with the predictions associated with status as Institutional Facts acting as real entities (Premise 5). I conclude the chapter by addressing some of the objections raised to Searle's social ontology.

3.1. The General Theory of Institutions and Institutional Facts

John Searle's "General Theory of Institutions and Institutional Facts" is intended to provide a universal approach to the ontology of human institutional facts – a social ontology (Searle,

2010: 90-92). Searle describes institutional facts as, "…facts that exist only within human institutions." (Searle, 2010: 10), where a human institution may be described as an entity that exists only because persons recognise it as such. Institutions (for example, governments, universities and so on) are social constructs in that they exist only because humans create them, recognise them as such and contribute to their persistence. Contrast with a 'brute fact' (Searle, 1995: 2) something that does not owe its existence to humans - a rock, or planet for example. Exactly how social entities depend on our existence, that is, exactly how we humans give them reality, is the subject of Searle's work (Searle, 1995, 2010). I will first describe his concept in broad terms and then analyse each element with reference to 1) a signature institution (an army) and 2) corporations, in the sections following.

Searle tells us that social entities such as money, governments and corporations owe their existence to our ability as humans to assign, by collective agreement (we recognise the assignment to be the case), status functions (new functions not possible because of physical structure (Searle 2010: 7)) to objects and concepts. These status functions in turn confer what Searle calls deontic powers (rights, duties, obligations, authorisations etc.) (Searle 2010: 8-9) to the objects or concepts that enable them as social entities, and/or humans associated with them, to perform new, often complex social tasks. He compresses my somewhat clumsy description into a simple formula, "X counts as Y in context C", which he describes as a constitutive rule (see below, §3.1.2.). In this formula/constitutive rule, X is an object, Y is the symbolic status afforded the object by collective intentionality that permits X to perform a function endorsed by the group, and C is the specific context within which X will be recognised as Y (Searle, 1995: 28).[43] For example, as I write, we recognise the Conservative Party (X) as the UK government (Y) in the context of our democratic system (C) and we recognise the Labour Party (X) as the UK government's official opposition (Y) in the context of our democratic system (C). Each has a set of powers that are associated with the status of, on the one hand government and on the other, parliamentary opposition to the government.

Searle's constitutive rule allows X to *be* Y, that is, to have a new function (based on a new status). The recognition that X becomes (*is now*) Y is what Searle calls an institutional fact.

[43] X may also be a declaration (spoken or written) that a new status Y exists. In this case the object (or brute fact) is the group of persons making and recognising as real the consequences of the declaration - the new status. (Searle, 2010: 108-109).

Something new about X that is recognised not just by the group involved but by 'everyone' (I say more about the nature of recognition below §3.1.3.).

Importantly, it is the acquisition of functionality (the ability to do something new) that transforms the social fact X into a social actor (for example, on election the Conservative Party was afforded the function of governing the UK), so becoming an institutional fact is to become a social actor. There are many examples of the transformation to social actor. Searle's favourite example is that of fiat money where we recognise that a particularly marked piece of polymer film X counts as £10 worth of money, Y (a tool for buying, selling etc., to a specific value) in the context C, that of the UK. By Searle's X counts as Y in context C, a piece of polymer film becomes a social reality capable of being used for many types of exchange.

Searle considers all institutions to be constructed in a similar manner and there are many illustrations of this at work. Consider for example the institution of law enforcement in the UK. The police force is an institution with significant powers that only exists because humans created it. The police force is comprised of ordinary citizens (the X term) who are recognised (by qualifying to hold a warrant card[44]) as Y, persons authorised to use force and restrict the freedom of fellow citizens (new function and powers) in the context C of upholding the laws of the land. In the case of a police force, recognition and consent are vital because of the significant new powers a serving police officer is granted as part of the institution. Institutional recognition in the case of UK policing is often referred to as 'policing by consent'; that is, with the consent of the citizenry. The 'policing by consent' idea is enshrined in a set of nine principles issued to police forces in 1829 and still in force today.[45] Principle number two makes clear the recognition and consent aspects of the institution - police force: "To recognise always that the power of the police to fulfil their functions and duties is dependent on public approval of their *existence, actions and behaviour* and on their ability to secure and maintain public respect." (emphasis mine). The consent for policing is

[44] A UK (and some Commonwealth countries) specific term meaning an official proof of identification and importantly also authority - the authority to detain or arrest for example. https://www.definitions.net/definition/warrant+card (accessed, February 9th, 2022).
[45] See the complete set of principles at https://www.gov.uk/government/publications/policing-by-consent/definition-of-policing-by-consent (accessed February 2nd, 2022).

an example of *general* (or common) recognition by society at large.[46] As is made clear in the UK Home Office description of "policing by consent", the consent given is "…the common consent of the public, as opposed to the power of the state. It does not mean the consent of an individual."

In each example an institution (money, police force and so on) exists only because groups of humans recognise it as existing. In this chapter I will argue that the corporation is an institutional fact, similarly, based on our recognition of its existence/reality characterised by a series of readily observable facts about corporations.

3.1.2. Constitutive Rules

Within what Searle's calls a constitutive rule ("X counts as Y in context C") are several important concepts which require explanation, and which have come under scrutiny by others - collective intentionality, status functions and deontic powers. I address these concepts in the following sections with reference to how they play out in an understanding of the nature of two social institutional facts, an army and the business corporation. But first, it is important to understand the nature of constitutive rules themselves, upon which the concept of institutional facts rests.

The Y term in the constitutive rule "X counts as Y in context C", assigns a new *status* to the object X that can be 'constituted' by collective recognition of its reality (Searle, 1995: 43-51, 2010: 96-97). A simple example is the use of a small rock to prop open my study door. Rocks do not possess a doorstop function by virtue of 'what rocks are'. Rather, by placing the rock by my door, I impose the doorstop function on a specific rock. Once in place against my open door, the rock will be recognised by anyone seeing it as a doorstop.

Searle traces his concept of constitutive rules to terminology introduced by John Rawls in his paper, "Two concepts of rules" (Rawls, 1955). Rawls set out to explore, "…the distinction between justifying a practice and justifying a particular action falling under it…" (Rawls, 1955: 3). Searle adapted Rawls' line of thinking to mark a distinction between two types of

[46] If public consent was withdrawn, the institution that we call the police force would (unless disbanded) still exist, but it could no longer be described as "police force". It would be a different institution, perhaps even a vigilante organisation in an extreme case.

rules – regulative rules that regulate an existing activity, and constitutive rules that constitute new activities and in turn regulate the activities that the rules created (Searle, 2018: 51).

For example, the fact that we drive on the left side of public roads, lanes, tracks and so on in the UK is a regulative rule. The convention regulates an existing activity – driving. The action, 'driving', does not rely on the presence of the rule. For example, many years ago while growing up on a farm I regularly drove tractors and other agricultural machines in fields and of course had no left/right constraint on where I drove.

By contrast a game of chess is regulated by the rules of chess, but chess, the game, cannot exist without the rules. The rules of chess regulate the game brought into being by the constitutive rule that we recognise the specific moves open to pieces on a particular board, and the objective and rules governing situations such as 'check' and 'check-mate'. That a bishop can move diagonally is a regulative rule, embedded in the set of rules that constitute the game. If these rules are not followed, then a game of chess is not being played (Searle, 2018: 51-52). [47]

An important feature of constitutive rules is that their validity is justified by their recognition as a rule. As described above, the UK police force is an institution comprised of ordinary citizens (the X term) who are recognised as persons authorised to use force and restrict the freedom of fellow citizens (new function and powers) in the context of upholding the law. As noted above, recognition and consent are vital because of the significant new powers a serving police officer is granted as part of the institution. If the police force were to be recognised as corrupt for example, then recognition of the authority of officers would be significantly compromised.

Searle further claims that constitutive rules of the type "X counts as Y in context C" create new realities. These are ontologically intersubjective (requiring human recognition) but when we talk about them, we are talking about readily observable features of Y. For example, the game that is chess, my £10 note and so on, all exist objectively (are readily observed) in the

[47] For the moves open to pieces to be constitutive rules would require that they were doing something not possible by their physical nature. The pieces in chess are designed to be particular pieces (shape dictates this), regulated in how they move. One could dictate that a bishop could move in a straight line, rooks could move diagonally and so on. This type of thing can be what we call 'house rules' however, the game played would no longer be playing the game officially recognised as chess.

world. Additionally (see below) new powers are created by these ontologically intersubjective entities – a game of chess may be played; I can make purchases with my £10 note. These new realities, chess, my £10 pound, are in different ways recognised as actors (possess causal powers) in the world.

To be an actor in the world is to have the power to act in a particular manner. Searle (1995: 104-106) postulates a general rule that follows from the "X counts as Y in context C" formula. The acceptance of X as Y confers, by consent, some power on X to act in particular ways. The statement (S does A) is the propositional content of power-related status functions. S refers to an individual or group and A is the action S can perform.

Searle summarises the logic of the power relationship as "We accept (S has power (S does A))" (Searle, 1995: 104). This type of power relationship may be seen in a real example – the issuing of a driving licence by the UK Driver and Vehicle Licensing Agency (DVLA) as follows. We (society) accept (the DVLA creates (S is enabled (S legitimately drives a car on public roads))). Society accepts the power of the DVLA, a collective entity, to enable/permit a qualified person to drive on the public roads.

Arguably issue of a driver's licence could also be achieved by means of a set of contracts/agreements between 1) persons working at the UK Home Office, 2) persons with the expertise to assess competence in driving, 3) persons with competence in ensuring relevant criteria of expertise are met, and 4) the individuals applying for licences to drive. In the individual contract pathway, the applicant would presumably be required to contract (in some sense) with each of the persons with expertise, complete any number of forms, provide multiple proofs (possibly to each expert person) of identity, competence and so on, to be able to eventually get a licence. This somewhat cumbersome path is circumvented by the recognition that a collective agent, (DVLA), has a status function (ability to authorise driving permits) which confers on it a series of deontic powers (to efficiently, relative to the alternative, follow the various steps outlined above). Recognising the reality and power of collective agents allows the applicant to make a single request to a single collective agent and so has the virtue of simplicity. In the case of understanding the nature of corporations, simplicity is also a feature. The recognition of the functioning corporation as an Institutional Fact affords it a considerable ability to simplify how it does business by bringing together

into a single organisation a wide variety of functions such as procurement, sales, research & development, contracting and so on.

Searle argues that "…social *objects*, such as governments, money and universities, are in fact just placeholders for patterns of *activities.*" (Searle, 1995: 57, emphasis in original). The simplification of the process for getting a driving licence via the recognition of an institutional fact demonstrates how patterns of activity may be brought together in social objects/actors. The DVLA is recognised as being empowered to do all that is necessary and sufficient to authorise a person to drive on public roads.

3.1.3. Collective Intentionality

Constitutive rules only work if there exists a collective assignment of function to something – a recognition of its capacity to act in a particular manner. In the case of a monarch for example, the 'function(s)' are attributed to a person, but it may also be to an object (the polymer film that is my £10 note) or to an abstract entity brought into existence by declaration (examples include, armies, corporations and so on). This type of recognition may be described as an act of collective recognition. In the case of institutional facts there is also collective intentionality – the shared intentions of those within the institution.

Collective intentionality is a so-called 'we-intention', a situation, "…where *I* am doing something only as part of *our* doing something." (Searle 1995: 23, emphasis in original). Searle claims that a social fact may be defined as, "…any fact involving collective intention" (Searle, 1995: 26): that is, something that exists only because we (humans) intend it to exist and recognise it once instantiated. Team sports are examples of collective intentionality that readily demonstrate the difference between an I-intention (that of an individual) and a we-intention (that of a group). My individual intention to 'mark' a particular player in a basketball game is only relevant to the collective intentionality to prevent opponents from scoring and ensure my team wins the game. I have that intention in my mind only as an aspect of the intention of the team ('we', 'us') to play and win the game. The we-intention is not the I-intention; neither can it be reduced to I-intentions. The various I-intentions of the team members are theirs and theirs alone. If the team were a disparate group of people gathered to play a game of basketball for fun, then their I-intentions may on occasions direct their play. However, if the team is playing as an established team with a shared goal (we-

intention) such as "winning the game by means of an agreed strategy" then the team members are permitting their I-intentions to be trumped by the we-intention of the agreed strategy.

The criticality of we-intentions to institutional facts may be illustrated by the case of a selfish team member. The selfish player may for example always place themselves in an advantageous spot to get the ball in contravention of the game strategy agreed by the coach and team. As the I-intention here is clearly not part of the we-intention and as the context is the game and the objective is to win the game not to grandstand a particular player, the selfish player may not last long as a team member.[48] His actions (based on I-intentions) are not aspects of the necessary (to win the game) we-intention. Functioning corporations also have I-, and we-intentions. Those associated with a corporate entity have a series of we-intentions clustered around the business objectives of the organisation – there is a collective intention to pursue the business in hand. Many members will of course have I-intentions that are not directly part of the we-intentions (to make a living, to have an interesting job and so on) but generally these will be consistent with their participation in the corporation's actions and goals. When that ceases to be the case – an I-intention is inconsistent with the we-intentions (joining a company to sabotage animal tests for example) – then disciplinary action and/or dismissal is likely.

At this point I want briefly to turn to the recognition element of Searle's constitutive rule ("We recognise that X counts as Y in context C"). The recognition Searle invokes here is collective. He maintains that an institutional fact requires there to be a collective recognition of the fact. He cites the example of simple commercial transactions where money changes hands in exchange for some item. Such an exchange cannot take place without both parties recognising the institutional facts inherent in the concepts of money and commerce (Searle, 2010: 56-57). Collective recognition is a critical collective intention, a we-intention.

It is important to make clear that recognition does not entail acceptance or agreement. For example, a monarchy is an example of an institutional fact, existing and acting in the world based on human recognition. However, it is perfectly reasonable for a political republican to recognise the reality and authority of the institution of monarchy while not agreeing with it as

[48] There is a perverse alternative here wherein the maverick's actions assist the team in winning despite his focus on I-intentions versus the we-intentions of the team. I believe this to be a rare situation and likely not sustainable over a series of games and so do not explore it here.

a form of government.[49] In politically free societies the republican is allowed to argue and work to change the system of government, at least by peaceful political means, while fulfilling their responsibilities to the existing state apparatus.[50]

3.1.4. Institutional reality

I am neutral on the universality of Searle's theory of social ontology. However, it seems right to explore whether recognised examples of institutional facts (created by the constitutive rule, "X counts as Y in context C") meet the tests for existence on which I based my account of Real Entity theory as a successful theory of the nature of corporations.

In §1.3. I outlined four tests for existence (all readily observable features) proposed by David Gindis (2009) and argued that 1) corporations display all four features and 2) accommodating these features was a necessary element of a successful theory of the nature of corporations.[51] Gindis' tests for existence were identity, unity, persistence in time and causal power. It is obviously impossible to address how these features relate to every extant institution, and so I will focus on one – an army – and apply the tests to it. Armies qualify as social (institutional) facts as they would not exist without humans creating, sustaining, and acknowledging them. For simplicity, my analysis is specific to the British Army because, as I note below, the instantiation of the identity of the armies of different countries differs while the institutions remain similar.

First, institutional identity, which was described as consisting in five elements or "ontological glues" (Gindis, 2009: 36-40): institutional, organisational, motivational, cognitive and capability (see §1.3. for details). A national army has a clear legal status in its country ("institutional glue"). It is enshrined in law, precedent, and tradition as the armed force for

[49] Therefore, it is possible to recognise the authority of an entity without agreeing that the entity *should* have this authority. Recognising the authority of an entity without agreeing that the entity should have this authority can mean that one recognises that the entity will be obeyed on particular matters, while thinking that it is regrettable that the entity will be obeyed on the matters.

[50] Clearly there are always going to be possible conflicts in this situation. A republican may baulk at taking an oath to the monarch or to be conscripted to fight on the monarch's behalf for example. However, in most quotidian affairs s/he will be able to recognise the system and work within it.

[51] In §1.4. I included three additional tests as relevant to a successful theory of the nature of corporations: structure, information flow and consistency with experience as culture/character. These may also be true of institutions in general while not being necessary to establish their existence.

protection of the state.[52] Soldiers are legally authorised to harm and indeed kill others on behalf of the state and, so long as the relevant regulations on conflict are obeyed, soldiers are held blameless for actions for which others in society would be prosecuted.

There is a well-defined structure ("organisational glue") that supports armed forces. A panoply of ranks with associated responsibilities and privileges exists (private, corporal, sergeant and so on). For example, for members of all ranks there is a strict obligation to show respect to higher ranking soldiers (the exchanging of salutes for example). Additionally, soldiers of all ranks must obey the orders of superiors (disobeying legal orders from a superior is an offence in military law). It is also the case that the fighting force of an army is supported by complex internal organisations for administrative and logistical functions.

The recognition of an army as an institution affords it the power to ensure loyalty and common goals ('motivational glue'). In the British Army loyalty is to the monarch, the country and importantly to individual sections of the army – the regiments. The regimental system, originally designed to recruit, equip, and train soldiers, is also used to bond soldiers from diverse backgrounds together with what might be called a 'sub-institution' that is 'local' and personal for each soldier. Regiments generally consist of just 650 soldiers and loyalty to the regiment is a significant element of military life.[53] Bringing dishonour to the regiment (by displaying disloyalty, engaging in criminal activity and so on) is considered a significant offence in military law.

Armies display many shared beliefs and representations of their existence ("cognitive glue"). Each army, indeed, each regiment, has a distinctive uniform, traditions that are specific to the army and/or regiment and so on. These are rigidly observed and are represented in insignia, regimental flags, particular ceremonial events and so on. Armies use the various elements of cognitive glue to reinforce their identity, the loyalty of soldiers and to demonstrate their cultural norms to others.

The "capabilities glue" of a national army is their ability to mobilise and prosecute a conflict, provide support in peacekeeping operations often in collaboration with other national forces,

[52] This may be contrasted with armed forces the institutional glue of which is not the law. Well-structured terrorist organisations may well meet the existence tests, but they will have as their institutional glue a desire to reorder a society in some manner - overthrow a government for example.
[53] See https://www.nam.ac.uk/explore/regimental-system (accessed, February 9th, 2022).

and in some situations provide non-aggressive support to societies in the event of natural disasters or short-term failures of social systems. How well particular armies carry out these roles is a measure of their effectiveness. The various specialist capabilities of the army are often located in specific regiments – the parachute regiment for example, or army corps – Royal Marine Commando Corps, Royal Army Medical Corps for example.[54]

In summary, national armies readily pass the first of Gindis' tests for existence – the identity test. All the features that establish the identity of the army as an institution are readily observable to third parties. Additionally, the observed identities of armies differ (as they do with corporations). The procedures, culture, and representations of the identity of the British Army are different to those of the Unites States Army for example, even though operationally both share many of the same features (regiments, uniform distinctions, military history and so on). Each is distinct in its unity as an army of a particular nation state.

Distinctiveness is illustrative of Gindis' second test for existence – unity – that is, having a "characteristic constitutive structure" (Gindis, 2009: 37). The challenges of cooperation on the battlefield in operations involving allied formations of several national armies attest to the independence of identity. Each army has its own procedures in which their soldiers are trained rigorously. When it is necessary to agree and implement changes to unite and fight successfully beside another army, significant retraining may be required. The unity of the new structure will depend on the success of the training. Establishing unity will have some aspects of the difficulties experienced following the merger of two corporations (§1.4.2.).

Institutional persistence in time is a signature characteristic of national armies and is frequently linked to the national 'story' – historical and social features that bind together the members of nation states. The soldiers change over time but the army, its traditions and structural procedures persist in a form readily observable as a unique institution.

The final test is evidence of causal power. In the case of an army the ability to engage an enemy and fight successfully is the prime objective of the institution. In the case of my example, the British Army, causal power is well documented in national and international history. In recent history, the successful Falklands operation in 1982 is testament to the

[54] An army corps is significantly larger than a regiment and is designed as a combat force. The term has been adapted to describe special formations of troops or specialist expertise.

causal power of the British Army (in collaboration with the Navy and Air Force) even when extended some 6,000 miles from home.[55]

In summary, the example of the British Army, a recognised social (institutional) fact (created by the constitutive rule, "X counts as Y in context C") meets the four key tests for existence on which I based my account of real entity theory as a successful theory of the nature of corporations.[56] I have argued that Institutional Facts are real entities in the world (Premise 5), so it seems right to apply Searle's theory of social ontology to functioning business corporations in support of Premise 4 – Functioning Business Corporations are Institutional Facts, founded on readily observable features.

3.2. Application of Searle's social ontology to corporations

Functioning corporations qualify for analysis as institutional facts in that they could not exist without the existence of human beings (see §3.2.). Functioning corporations are members of the class of social entities that includes such things as governments, money, monarchs, armies and so on. My application of Searle's theory to corporations goes in two related steps. First, the legal entity, (X) created on incorporation, counts as a corporate entity (corporation) (Y) within context (C), the prevailing legal rules. When the now instituted 'legal person' is combined with corporate associates and the relationships that enable it to produce goods or provide services, it becomes the tripartite entity (see §1.2.), a functioning corporation, that may be recognised as existing as a social entity.

Recognising the company as a social entity is the basis of my premise #4 (§3.) – functioning business corporations are institutional facts, founded on readily observable features. Applying Searle's constitutive rule, I conceive corporations in the following terms:

We recognise that when people perform in accordance with incorporation created by appropriate legal rules (X), we will think of them and treat them as a unitary body called a

[55] See https://www.britannica.com/event/Falkland-Islands-War (accessed, February 10th, 2022)

[56] Armies also meet my additional three criteria. They display significant internal expertise in warfare, strong culture and character (each ideally but not necessarily). And where responsibility for a bad action is shown, armies can as an institution account for remainders of responsibility.

corporation (Y), so that they can perform more effectively in producing goods or providing services (C).[57]

Understanding corporations in this way is consistent with that of the corporation as an amalgam of 1) the legal entity, 2) the corporate associates, and 3) the relationships between 1) and 2). The legal entity is brought into being by the 'appropriate legal rules (X)'. The corporate associates are those persons who are contracted to the corporation and who 'perform in accordance with incorporation'. The relationships between associates and the relationships between the associates and the corporation permit both elements to act together 'as a unitary body called a corporation (Y)'.

Therefore, the entity that meets the tests for existence may now be conceived as an institutional fact with new status functions and deontic powers. Once these functions and powers are recognised and activated the institution becomes a real social entity (Premise #5, §3.).

3.2.1. Corporate Status Functions

Status functions are "…the collective intentional imposition of function on entities that cannot perform those functions without that imposition." (Searle, 1995: 41). By way of example, as I write, members of the UK Labour Party recognise that Sir Keir Starmer is leader of the Party – Starmer (X) is (counts as) leader of the Labour Party (Y) in (C) the context of success in the party's appointment process. Starmer has a new status (party leader) that exists for as long as the members recognise him to be so. Starmer is now empowered to do a variety of things that are not open to other members of the party or to Starmer himself before being accorded the new status function.

Arguably, corporations as institutional facts, and indeed the leadership of the UK Labour party, are not obviously impositions, certainly not in the sense of imposing the role of doorstop onto a rock by placing at the base of my door and so creating a new status function for it. I take Searle's use of 'imposition' to be more in line with conferring in the case of the party leadership and empowering in the case of corporations. In the case of corporations, status as a unitary body (tripartite amalgam of 1) legal entity, 2) associates, and 3)

[57] Adapted from Adelstein, R., (2010).

relationships between 1) and 2)) empowers the corporation to do business effectively. The recognition of the tripartite entity as a real, institutional, entity in the world allows it to activate and utilise a series of new powers. These are discussed later, but first I want to deal with a particular objection to Searle's theory.

In chapter one, I argued that while we can 'meet and greet' those persons associated with a corporation we cannot meet the corporation itself. The associated persons have powers conferred on them because of their association with the corporation. However, associates are merely one element of the corporation. This observation highlights one of the most important objections to Searle's theory. If there is no *object* to place as X in the constitutive rule, then how can there be a Y term that is real?

The case of corporations therefore presents a difficulty for Searle's social ontology. The conceptual statement, '*We recognise that when people perform in accordance with incorporation created by appropriate legal rules (X), we will think of them and treat them as a unitary body called a corporation (Y), so that they can perform more effectively in producing goods or providing services (C)'* is consistent with the tripartite model (chapter 1). However, the X term is not a thing in the sense that many of my previous examples are – it is not a person capable of being a political party leader, not a piece of polymer film capable of being money and so on. In the case of the corporation there is no existing *object* to be afforded a new status, only a legal procedure that when activated constitutes a *declaration* of the existence of a corporation along with a group of people contracted to it. There is no thing in the world that can become a functioning corporation; so, Y's becoming X, that is, being identical with X but with a new status function, is problematic.

This problem was originally raised by Barry Smith, who coined the term "Freestanding Y terms" (Smith, 2003: 24-25) to describe a situation where the referents are not physical. Free-standing indicates that the Y term has indeed no *physical* referent, standing alone once recognised. Smith called freestanding Y terms a significant problem for Searle (Smith, 2003: 23) and claimed that in these cases there is no embodiment of the Y status function in a thing X but only a representation in the form of writing – the documentation of incorporation for example. On Smith's account these writings instantiate only in the sense that writing on a page instantiates a poem or novel, or strokes of paint instantiates a painting, "Such a theory is

analogous to an ontology of works of art…for example *paintings* and *sculptures* (the lump of bronze *counts* as a statue) …" (Smith, 2003: 30, emphasis in original).

Smith's objection is not a denial of Searle's theory but rather a claim against its universality – the existence of free-standing Y terms suggests that Searle offers only a partial account of social reality. In response Searle shifted his universality claim for the "X counts as Y" constitutive rule and suggested that it is one of several ways in which we can express the nature of institutional reality. He now offers the formula, "We (or I) make it the case that a Y status function exists in C" (Searle, 2010: 101). I stand neutral on the universality of Searle's ontology but hold firm to the viability of his social ontology to the specific question of the nature of corporations. The ease with which we can see for ourselves the new status functions and deontic powers associated with functioning corporations supports my confidence in the viability of Searle's ontology.

Status functions are functions imposed on people or objects that they could not perform, "…solely in virtue of their physical structure." (Searle, 2010: 7). Nothing about a piece of material stuff makes it a unit of exchange unless and until we recognise it as such. Similarly, there is nothing about the physical structure of a corporation (the legal fiction, its contracted associates, and relationships) that makes it a functioning corporation. That status is the result of the actions of the associates within the rules of incorporation.

For example, once appropriate authorisations are made, certain individuals can communicate on behalf of, indeed in the case of the more senior associates communicate as if they *were*, the corporation. For example, as I write, when Satya Nadella writes or speaks in his capacity as CEO of Microsoft, we are hearing the 'voice' of the entity that is the Microsoft corporation. Nadella's formal statements delivered as CEO will reflect the intentions of the corporation on the issues he is addressing (corporate communication/conversability is described in §4.4.).

Also, the unitary body that we recognise as a corporation has the legal privileges and responsibilities associated with incorporation once the legal entity is created. These become active, become status *functions* once associates are contracted and begin to use them to establish a functioning business. Therefore, limited liability, the ability to sue and be sued, and so on are the main status functions attributed to the unitary body. The associates can now

raise finance, make purchases and investments, and perform all the tasks necessary to make the corporation function as a provider of goods or services. These are new powers, deontic powers in Searle's terminology, attributed to the corporate entity that make it a functioning corporation.

3.2.2. Corporate Deontic Powers

To be a 'status function' as opposed to a 'function' is to authorise an entity to act in new ways, not previously associated with it. Searle calls the powers associated with status functions, deontic powers. He cites rights, duties, obligations, authorisations etc. as examples of the kinds of powers that humans grant to things (Searle, 2010: 8-9). To be more explicit, things such as corporations, leaders of the UK Labour party, £10 notes are all things that may perform in certain ways only because of the collective recognition of their ability to so do, based on their new status as a Y function in the constitutive rule, "X counts as Y". These various things become part of an institutional world governed by rules that make explicit the granted powers. Humans created the institutional world by speech acts – performative utterances or declarations (Searle, 1995: 34, 2010: 12-13). These may be actual vocal acts of the type, "I declare this symposium to be in session" or written acts of the type used to establish a corporation such that if the necessary (according to the incorporation laws of a particular jurisdiction) legal documents are completed and fees paid, a corporation is created. These declarations along with the collective recognition of their authority to confer deontic powers are at the heart of Searle's project. Human communication techniques, speech, and writing, have the authority, in the presence of common recognition, to instantiate new institutional facts, new entities such as corporations (Searle, 2010: 97-100).

Recognising the status of corporations as institutional facts (unitary bodies capable of acting in the world) affords them new deontic powers – rights, duties, obligations and so on (Searle, 2010: 9). These powers fall into two categories, positive powers (enabling the entity to do something it could not without its new status) and negative powers (requirements, obligations and/or duties that its new status imposes on it). Positive powers permit the entity to behave in a manner not previously open to it. In the case of negative powers, the entity can now be compelled to do things that it might otherwise not do (Searle, 1995: 100).

Examples of positive powers include all the benefits of incorporation, designed to facilitate business that were described previously (§1.2.). The efficacy of these positive deontic powers

is likely the basis for Searle's claim that, "…the invention of [*institutional facts such as*] the limited liability corporation…[*is*] one of the truly great advances in human civilization..." (Searle, 2005: 17, italics my insertion, see also §1.2.1.).

Examples of negative corporate deontic powers include legal requirements on, for example, avoidance of bribery, transparent financial reporting, regular auditing and so on. In some industries there are also regulatory requirements that are the responsibility of the corporation. The pharmaceutical industry for example has complex rules governing manufacturing, sales techniques and advertising that are usually overseen and enforced by national regulatory agencies, which in turn are authorised to use the law to enforce the regulations.

In conclusion, I conceive of corporations as social facts such that once a particular corporation is licensed and activated by people and relationships to do business, it exists, both legally and in the social milieu. How the first corporations came to be accepted as social facts is not addressed in this thesis.[58] Stephen Turner makes the case that Searle's social ontology only works for something that is. It cannot generate money; money must be there for the 'X counts and Y in context C' rule to work (Turner: 219-220). My thesis is concerned about functioning companies and so I do not discuss Turner's objection further. In addition, I argue not for the universality of Searle's proposals about social ontology but only for their applicability to developing a conceptual understanding of the nature of corporate reality

3.3. Objections to Searle's Theory of Institutional Facts

For Searle's concept to accurately describe the ontology of corporations, no claim beyond its applicability to functioning corporate entities is necessary. I describe here some of the main challenges to the various elements of the theory of institutional facts. I argue that none are fatal to using social ontology to characterise the nature of companies.

First the question of regulative and constitutive rules. Searle claims that rules may be classified as regulating existing actions (regulative) or constituting new actions (constitutive). David-Hillel Ruben challenged Searle's use of regulative and constitutive distinction claiming that the distinction ought to be between types of action descriptions, not types of rules. He says, "Just as actions are intentional or non-intentional, basic or non-basic, only

[58] For a critique of the ability of Searle's social ontology to explain the creation of institutional facts see Turner, S.P. Review: Searle's Social Reality. *History and Theory*, 1999, 38: 219-221.

relative to a description, so too actions are not rule-involving or non-rule involving *per se*, but only relative to a description. The distinction…marks no difference in rules, but only between types of action descriptions." (Ruben, 1997: 444). He argues that Searle's distinction is one of action descriptions (what the 'Y' does in 'X counts as Y in context C') that are or are not rule-involving *per se*. Actions, he argues, are rule-involving (or not) relative to a description of the action performed in accordance (or not) with a rule (for example a rock as a door stop, whose action keeps the door open). Ruben allows that action descriptions that imply a rule is consistent with Searle's notion of constitutive rules. However, Searle's regulative rule is defined by the action taken – so a monarch ruling is a regulative rule which defined the rule, the monarch ruling. Ruben's position is that "…some action descriptions are rule-involving and some are not." (Ruben, 1997:444).

Searle responds (Searle, 1997: 455-456) by accepting that Ruben has shown the inability of the test of rule entailing descriptions to distinguish constitutive and regulative rules – actions according to regulative or constitutive rules may be described as rule-entailing or not rule-entailing rather than as two different types of rules. However, Searle argues that the distinction is not the problem, but rather the test is. He challenges the notion, "…that actions are either not rule-involving or non-rule-involving per se…only relative to a description" (Ruben, 1997: 444). Searle argues that if an action description is true, then there is a fact associated with the act that is being described, and that fact is not relative to a description. It exists as a part of the action not relative to our description of it. Searle maintains that the distinction between rules that create new forms of activity and those that do not is intuitively powerful and remains intact, "…[it] is a distinction between those rules which create the possibility of new forms of activity and those rules which regulate pre-existing forms of activity." (Searle, 1997: 455).

Raimo Tuomela has also contested Searle's categorisation of regulative and constitutive rules. He asks whether social practices such as gardening or having a conversation have rule sets that can be categorised within these rules (Tuomela, 1997: 152). As he later accepts Searle's categories for the purposes of his paper it is unclear what he intends. I am tempted to think that conversation does have several regulative rules which suggest they are governed by regulative rules.[59] He also challenges the universality of systems of constitutive rules

[59] For example, the recognition of Transition Relevant Points, the places in a conversation when a response or interruption is socially acceptable.

(Tuomela, 1997: 152-153). However, since, for this discussion, I am neutral on any claim for universality, I do not expand on this.

Key to the success of Searle's notion of constitutive rules is their recognition by the appropriate group(s) of people. In his 1995 book, *The Construction of Social Reality*, Searle claimed that acceptance was necessary. However, the idea of acceptance has been challenged by the observation that one can accept in many ways, some of which do not imply approval/agreement – lethargy for example. I may not approve or even accept a particular political or social system (true for example of many peaceful, law-abiding Irish Nationalists in Northern Ireland) but am not motivated to work to change it. However, I recognise the prevailing system by my adherence to laws and customs. Stephen Turner posits five approaches that people may have to their following of the law without overt coercion, "A) they know the law explicitly and accept it explicitly…B) they accept it in the sense appropriate to Searle's notion…even if they didn't think explicitly about it…C) they behave as though they accepted it, but can't articulate very much about their beliefs…D) that they do so most of the time, and not precisely as the law exists…but close enough not to get into legal trouble…but what they can articulate typically doesn't match up…with what other people can articulate…E) that they have behavioural regularities consistent with the law, but can't articulate a thing about them other than self-observations about their regular conduct…" (Turner, 1999: 221).

In his later book, *Making the Social World* (Searle, 2010: 8), Searle acknowledges the force of the objection and shifts to claiming that it is *recognition* that X counts as Y that is required to instantiate the rule – "We recognise that X counts…". Recognition here does not entail acceptance (complete agreement with the state of affairs), but rather a tacit acknowledgement that a state of affairs exists: for example, the law-abiding Irish Nationalists in Northern Ireland, and the republican living in a monarchy. I also used the example of leader of a political party as a status function. Once a leader is instated, all the members of the party do not have to accept her/his appointment, in the sense that they can have a preferred alternative candidate and can be active in trying to change the prevailing situation. However, while working to change the leader the party members continue to recognise his/her status and the powers dependent on that status.

Searle's description of the construction of 'we-intentions' and the subsequent actions performed by groups has been challenged, notably by Jennifer Hornsby (Hornsby, 1997: 429-

434). Hornsby asks whether Searle's we-intentions and their non-reducibility to component I-intentions (Searle, 1995: 26) means that his description of social facts as things based on collective intentionality is a denial of methodological individualism (MI) (see for a definition, §2.4.). Hornsby asks if the actions resulting from a we-intention are in fact both the mental states of individuals and the actions themselves and so become a collective or group action apart from the individuals. She says, "…once the *fulfilment* of 'we-intentions' is in the picture, what collective intentionality introduces are not only contents of individual people's heads…but things which show up, as it were, in action. That which engages in co-operative behaviour, when its members each derivatively have an appropriate intention, seems to be irreducibly social. It seems to be constituted (partly) from people's taking themselves to belong to it – from its members each being able to speak of it using 'we'." (Hornsby, 1997: 430, emphasis in original).

The 'it' here is a collective in the sense of an entity separate from yet composed of its members. Hornsby suggests that an acceptance of 'collectives' challenges Searle's claim that his theory is grounded in the brute facts of physics, "We live in a world made up entirely of physical particles in fields of force. Some…are organised into systems. Some of these systems are living…and some of these…have evolved consciousness. With consciousness comes intentionality, the capacity to represent objects and states of affairs in the world to itself." (Searle, 1995: 7).

Searle is clear that Hornsby's claim is not the case. He maintains that the we-intention itself is a matter of individual mental states that exist alongside the individual I-intention states and that social groups arise from the intentions of individuals. He says, "On my definition a social collective consists in the fact that the participants think it is a collective. Individual brains give rise to we-intentions, and the collective is created by the existence of the we-intentions *in the brains of its members*." (Searle, 1997: 450, emphasis mine). Thus, in Searle's view his concept of social facts is consistent with Methodological Individualism – there is no mysterious entity (that is a collective) required to create social facts, only the we-intentions instantiated in individual brains.

Lastly, it has been objected (Tuomela, 1997: 436, 2003: 152) that Searle is unclear as to what a status function is. Tuomela suggests that "…sometimes it does not amount to much more than 'having a use'". In response Searle describes his understanding of function as a

common-sense approach whereby for example a chair clearly has an obvious primary function (something to sit upon) while a rock has no function unless one uses it as, for example a doorstop, in which case a function has been assigned to it (Searle, 1997: 452). Searle's approach seems plausible and consistent with the "X counts as Y" formula. It is unclear to me exactly what Tuomela was trying to say. A function is to my mind having a use.

Tuomela also questioned the normativity of status functions conferring powers citing the example of honorifics. Searle originally (1995: 101-102) suggested that indeed honorifics were examples of statuses that conferred no powers. However, in response to challenge by Tuomela and others (for example Smith & Searle, 2003) Searle notes in later work that honorifics, such as knighthoods in UK, honorary degrees and so on, are expected to be associated with, at a minimum, some measure of respect, and thus honorifics do offer powers by virtue of the respect associated with them (Searle, 2010: 24). Again, I believe that Searle (2010) successfully defuses the objection, albeit by positing very weak powers for honorifics.

3.4. Conclusion

I have argued that functioning business corporations are social (institutional) facts (Premise 4, §3.) and that this is a successful description of the real entity that is a business corporation as a real entity (From Premise 3, §3.). Using the example of the British Army I argued for the reality of Institutional Facts (Premise 5, §3.) in the world. I further argued that in the case of corporations, the reality that their status as Institutional Facts confers is supported by how they act when established and function (Premise 5, §3.).

Applying the concept of Institutional Facts, I conceive of corporations as social entities which, by the collective intentions and endeavours of their associates, can act in the world as distinct entities with collective intentions to efficiently produce goods and provide services. I will argue in the next chapter that the corporation, conceived of as an institutional fact, *is* the kind of thing that can have moral responsibilities.

CHAPTER 4: Moral Dispositions and Functioning Business Corporations

"If one has a good disposition, what other virtue is needed?"
Chankya (Indian teacher, 375-283 BCE)

4. Introduction

In chapter three I argued that the nature of a functioning corporation is well described as an institutional fact. If this is accepted, then a corporation is a social reality brought into being by social recognition. So, corporations exist as entities created and sustained by natural humans to do business in an efficient manner to create wealth. This chapter provides an answer to the further question, is a corporation conceived as an institutional fact the kind of thing that can have moral responsibilities?

4.1. Attribution of moral responsibility

In §1.5. I specified the type of responsibility I am concerned with as responsibility for actions such that a corporation *qua* corporate entity can be *blamed* for an injurious act or *praised* for a good act – moral responsibility.

Mentally competent adult humans are recognised as being uncontroversally capable of moral responsibility. A lot of work on corporate moral actions take the attributes of human moral agents as necessary elements of corporate moral agents (see for example, Silver, D., 2005: 286-289). I will discuss the most cited reasons for those who deny corporate moral responsibility on the basis that corporations do not have the necessary human attributes – sentience, rationality, and agency.[60]

The perpetrator of a wrong act has typically the capacity to feel guilt, remorse and so on as a personal reaction to the act itself or after their actions are sanctioned by others. Similarly, the perpetrator of a right act can feel pleasure, joy and so on in response to the belief that their action was right or in response to praise for their action. And an observer or recipient of bad treatment might feel anger, blame, indignation, resentment, disappointment, and so on in

[60] They are the most cited issues with corporate moral responsibility; they are perhaps not the signature features of moral agents - perhaps only one, rationality, is signature. A fish is sentient (it can feel pleasure and pain, though probably not remorse and guilt) and I feel morally obligated to keep my pond fish fed and their water clear. Many animals act with intention - they hunt in packs for example.

response to what was done or done to them. These feelings (reactive attitudes[61]) are justifiable based on the right or wrong action. The corporation is not believed to be capable of having feeling, and thus is incapable judged by those denying corporate moral responsibility of relating to reactive attitudes (see List, 2018: 22).

Possession of rationality is necessary to enable an actor to understand reasons for (and against) their choice of actions and appreciate the likely consequences. Agency, the ability to act with intent, is a necessary element of many cases where a decision to act rightly or wrongly is made. It is not sufficient. For example, consider a company which provides a product that did benefit the consumer. However, the company were sloppy in their quality assurance and in fact the product did harm. The company intended to provide a beneficial product, but in fact due to their procedures the product caused harm. For that harm the company would have a responsibility. Opponents of corporate moral agency claim that corporations, do not have agency but of course the corporate associates do so they are to be blamed for a wrong action (Rönnegard 2015: 59).

4.2. Moral responsibilities and corporations

It remains an unsettled question as to whether it is possible to attribute the above-described attributes to corporations in the same way as we do to people. Corporations are not people;[62] however, the actions of corporations are those of the persons contracted to it, the corporate associates. These actions are governed by the we-intentions of the collective that are formed by the associates. The exercise of corporate we-intentions instantiates a corporate culture that, I argue below from the work of David Silver, is analogous to human moral character. Business corporations can, and do, rationally choose how to act, because the part of the corporation that decides to act and subsequently carries out the chosen actions is its human associates, each of which is a moral agent in his/her own right.

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[61] Reactive attitudes, a term coined by Peter Strawson (Strawson, 1962), are the attitudes we have towards others on the basis of their actions or perceived qualities. Here we are particularly concerned with reactive attitudes elicited by acts judged to be judged right or wrong. The reactive attitudes are, "a family of attitudes which includes blame, resentment, gratitude, indignation and appreciation." (Silver, 2005: 279).

[62] Although some argue that corporations are persons (see for example, Greenfield, 2018), I have elected to sidestep the question of corporate personhood and focus on the readily observable features of function corporations in constructing my arguments.

Additionally, I will show that corporations are able to communicate the reasons for their chosen actions. Taken together I will argue that these features of corporations qualify them for the attribution of moral responsibilities and so companies may reasonably be blamed and praised, as appropriate, for their choices of actions. I will also argue that our employing the concept of moral disposition as justification for the attribution of moral responsibility to corporations does *not* commit us to holding that corporate entities have sentience, rationality, and agency in the forms manifested in persons.

4.2.1. Corporate culture

In chapter one (§1.4.2.) I described the nature of corporate culture in terms of Corporate Internal Decision Structures[63] determining the approach to business taken by individual corporations and illustrated the power of culture with reference to the difficulty in aligning two cultures in the event of a corporate merger or takeover. Additionally, I argued that the character of a corporation is visible to third parties by observing how the company interacts with those external to the corporation.[64] Here I expand on the nature of corporate culture and character and introduce the idea that corporate culture governs corporate actions.

The relationships that animate a corporation are social in nature. The idea of social relationships leads us to the concept of culture. Sets of social relationships are regulated by collectively recognised norms, which can sit anywhere along a continuum from reprehensible to exemplary, with most being somewhere in between. In the case of a corporation, the norms

[63] It has been pointed out to me (Brad Hooker) that it would be possible for two companies to have the same structures that give the CEO the right information. And yet the CEO of one is choosing only the right thing to do, but company two has a CEO who is short-term profit focusing without any concern for others. The structure is the same but each with different cultures. My concern with this objection is the role of the CEO. If indeed she gets the right advice and ignores it, she will quickly have executive flight and have trouble hiring executives. It is way off the narrative of this thesis, but the CEO generally has less power (at least in large companies) that is generally assumed.

[64] The third-party recognition is of course dependent on the information given to the third party. It is worth noting that with Enron (see § 7.6) that it was judge to be the 22nd of the 100 best companies to work for in the United States, in 2000, despite the ensuing scandal in 2001 (https://www.bizjournals.com/houston/stories/2000/12/18/daily12.html accessed, May 5th 2023). In the advent of fraud this judgment was flawed. That constraint works for our human reactions to people. Harold Shipman was a respected GP until it was found he had killed 250 of his patients (https://www.bizjournals.com/houston/stories/2000/12/18/daily12.html (accessed, May 5th 2023).

associated with its relationships and how business is done are the foundation of the culture of that organisation.

By way of illustration, I will briefly discuss an example of a poor culture of concern for others and an example of a good culture of concern. Close to the 'reprehensible' end of the culture continuum, Turing Pharmaceuticals stands out. In August 2015, Turing Pharmaceuticals (now called Vyera) acquired Daraprim, a widely used anti-malarial and anti-parasitic drug. Shortly after acquisition Turing raised the price of a dose of the drug in the U.S. market from $13.50 to $750. As there was no generic version of Daraprim (non-branded version of the active ingredient) Turing were the only source of the drug. It was widely reported that following the price increase the drug was too expensive for many clinical uses, so patients suffered because of Turing's actions.

Purchasing old well-established drugs and increasing the price was company policy. The CEO of Turing, Martin Shkreli is on record as saying of the price increase, "I did it for my shareholders' benefit because that's my job. The political risk is being shamed, and shame isn't dilutive to earnings per share."[65] When the price increase was exposed to the public Turing came under significant censure by medical organisations, the media and the public, and under considerable pressure to reverse the increase. However, the company did not make any significant price changes beyond introducing bulk-buy discounts. The US had no price control regulations in place, so the pricing strategy was entirely legal. As Shkreli, speaking on behalf of Turing, saw public shame as a risk worth taking, Turing continued to sell Daraprim at $750 per dose, indicating a corporate culture of profit without regard for wider social consequences/concern for others.

On the other hand, there are examples of corporate cultures that do pay attention to the greater good. For example, the reaction of the Johnson & Johnson company to the Tylenol tampering incident in 1982 described in §1.5.1. Johnson & Johnson's chairman, James Burke, stated that the response was, "…a moral imperative, as well as good business…" (French, 1979: 142-143). Tylenol did indeed rapidly regain market leadership, so it was a good medium-term business decision. The actions of the corporation were widely reported

[65] The Guardian (2016) https://www.theguardian.com/business/2016/oct/28/martin-shkreli-daraprim-hiv-drug-price-hike-interview (accessed, November 29th, 2020).

and praised in the media[66] suggesting that the business benefits were also at least in part because consumers regarded the actions of the company as indicative of a culture of ethical responsibility that could be trusted. It was reported that prior to the tampering incident, Tylenol's market share was around 33%. Just 90 days after the launch of the new version market share was around 48%.[67] Additionally, consumer trust in the brand was found to be three-fold greater after the crisis was resolved.

Evidence from corporate employees tends to support the view that culture governs corporate actions. As said above, those working for or with a corporation will frequently talk about their experiences in terms of a culture, often expressed as a way of operating that is the corporate norm – "this is how we do business at XYZ".[68] The corporate culture, the governing principles of the company, is established and sustained by the relational contracts and the procedures and processes that animate the culture.[69]

4.3. Moral dispositions

Pinning down the nature of a particular corporate culture can appear difficult. We, as outsiders, are not privy to the internal workings of a company. However, we are not privy to the minds of other persons either. In morally assessing an individual, we consider the nature of their actions over time. Judging the actions of an individual, we might form an opinion about their character, the set of dispositions that shape how the individual thinks and acts in given situations. David Silver argues that companies also have a set of dispositions (analogous to those of natural persons) wherein the governing principle is their culture, that is, their approach to business dealings (Silver, D., 2005: 284).

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[66] For example, The Washington Post (October 11th, 1982) reported, "Johnson & Johnson has effectively demonstrated how a major business ought to handle a disaster."

[67] https://www.biznews.com/thought-leaders/2013/11/15/five-key-lessons-from-tylenol-crisis (accessed, February 11th, 2022).

[68] In small to medium size organisations this will refer to the overall corporate culture. In very large organisations operating across geographical boundaries there may also be local corporate cultures. These will be aligned with the overall culture but may be more immediately relevant to local employees.

[69] A relational contract is a one whose effect is based upon a relationship of trust between the parties to which it pertains. The explicit terms of the contract are just an outline as there are implicit terms and understandings which determine the behaviour of the parties. See for more detail, §1.2.3. and Frydlinger et al., 2019.

Silver takes moral disposition to be key to the rightness of holding reactive attitudes towards corporations. I noted above that we morally assess persons based on their character. For example, people around someone might notice that she is honest in her dealings with others. Silver claims that corporate culture is analogous to individual character (Silver, D., 2005: 284). It governs how those working for the company think about and ultimately act towards people and other things of value (animals, the environment for example). Thus, a corporate culture is partly constituted by dispositions to act in a certain manner.

With corporate culture/dispositions in mind, Silver developed what he termed moral disposition theory, originally as an additional approach to dealing with determinism and the rational warrant of reactive attitudes. If true, a radical determinism (a view that all events in the world are determined by previously existing causes) may undermine the case for responsibility of our actions.[70] Briefly, if our actions are determined by events in the past, and not chosen then we cannot be fully responsible (other changes in the world determine our actions) and so may not reasonably be blamed or praised for our actions.[71] Those accepting that actions are always determined by past events may argue that reactive attitudes (and indeed moral responsibility overall) challenge the idea that moral responsibility is independent of any pragmatic or utilitarian considerations (Silver, D., 2005: 283).

One way that the radical determinist can challenge moral responsibility is by denying a popular justification for attributing moral responsibility - the ultimate originator thesis (Silver, D., 2005: 283). The ultimate originator thesis claims that reactive attitudes (and so attribution of moral responsibility) are warranted if and only if the actions to be praised or sanctioned are those actions that the actor solely originated – she intended, in the presence of reasons to act, as she did. The fact that she is the ultimate originator of the action(s) (she chose freely to act in this way) makes her actions ethically relevant and her moral standing of concern (Silver, D., 2005: 283). Radical determinism precludes the idea that anyone can be an ultimate originator and claims that actions are governed not by choice but by a

[70] https://www.britannica.com/topic/determinism (accessed, May 5th, 2023)
[71] The literature on determinism is immense, reflecting the difficulty in confirming or denying its truth. This thesis is not about determinism and my arguments on corporate moral responsibility do not require a belief in or denial of determinism. Therefore, I only provide here an explanation of the basic idea sufficient to discuss the origins of Silver's moral disposition thesis.

predetermined set of circumstances. So, if radical determinism is true, then the ultimate originator thesis fails, which poses a challenge to the notion moral responsibility *tout court.*

In response, Silver presents three accounts capable of justifying the internal moral significance (the intrinsic nature of moral responsibility) of reactive attitudes even in the case that determinism is true. These accounts are 1) the goodwill thesis, 2) the appreciation of reasons thesis and 3) the moral disposition thesis. Each, if right, allows for determinism in that none require the actor to be an ultimate originator (Silver, D., 2005: 283-284). As this thesis is not a defence of the truth or falsity of radical determinism, I provide only short descriptions of the goodwill and appreciation of reasons theses as background to Silver's moral disposition thesis, which I intend to defend in the context of corporate moral responsibility.

The goodwill thesis claims that the level of goodwill demonstrated by the action(s) of an agent is responsible for the subsequent reactive attitudes.[72] If the agent's actions demonstrate an unacceptably low level of goodwill towards others, then there is reason for a negative reactive attitude (Silver, D., 2005: 283). The goodwill thesis is compatible with the truth of determinism in that all that is required of the agent is the intentional state of goodwill towards anyone affected by an action. It is of course possible to have an intention of goodwill towards someone without acting on it. The goodwill thesis allows for warranted reactive attitudes.

The goodwill thesis may also allow for expressions of goodwill by agents unable to understand the reasons for it, children, and some domestic animals for example. The combination of the idea that acts can express good will even if the agents of those acts do not really understand reasons for actions, and the idea that agents can always be held responsible for the level of goodwill expressed in their actions, might be thought to challenge the idea that actions must be reason-based to be assessed in terms of moral responsibility. The appreciation of reasons thesis addresses this potential deficiency by claiming that the agent understands the reasons for their moral responsibilities and that failing to meet these responsibilities is a matter of moral concern. Thus, the appreciation of reasons thesis is compatible with radical determinism in that it is not necessary for the agent to originate

[72] Goodwill in personal terms may be defined as, "a kindly feeling of approval and support: benevolent interest or concern" (Merriam Webster Dictionary).

actions to appreciate the reasons for praise or blame for actions and be able to respond accordingly. Unlike the goodwill thesis, the appreciation of reasons thesis demands that agents be capable of reasoning – they can recognise reasons and are appropriate targets of reactive attitudes (Silver, D., 2005: 284).

The moral disposition thesis developed by David Silver focuses on how agents are disposed to think about the ways in which they treat others and other things of value. He cites moral *character* as indicative of how we humans act and how we judge the way in which other humans treat people and other valuable things. A person who reliably demonstrates appropriate concern for others may be judged to have positive moral dispositions and can reasonably be relied upon to exercise moral concern as required.[73]

The moral disposition thesis is compatible with radical determinism because there is no requirement to know how a person came to have the specific way she thinks and acts: "…it does not matter how she came to have these settled dispositions" (Silver, D., 2005: 284). Additionally, the person does not need to be the ultimate originator of her actions to possess a positive (or indeed negative) moral character, neither does she have to be the originator of her moral character.

Silver addresses the objection to the moral disposition thesis that it seems to deny the possibility of an agent being held responsible for actions that may be described as "out of character", that is actions that run contrary to their settled dispositions (Silver, D., 2005: 285). For example, the animal-loving person who kicks out at a dog that bares its teeth and growls at her. Silver points out that knowing a person and their moral dispositions renders it, in many (most?) cases, easy to identify when an action is out of character, so not a central part of their settled dispositions. The animal-lover is morally responsible for the act of kicking the dog, which she might try to justify by saying that she reasonably believed the dog would attack her if she didn't show that she would attack the dog.

[73] However, a 'positive moral disposition' is a combination of various dispositions the having of which together constitute a good moral character. These are dispositions of thought, action and reaction to situations, persons, and other things of value. Therefore, I hereafter refer to 'dispositions' (plural) rather than 'disposition' (singular) when describing the elements of corporate culture that have significance to the attribution of moral responsibility.

4.3.1. Moral disposition theory and corporations

Silver's account claims that corporations have distinct cultures, determinable externally by observation of how their associates act: and further that these cultures are indicative of a company's moral dispositions and are analogous to human moral character. Because corporations have moral dispositions, 1) corporations are moral agents and 2) reactive attitudes towards corporations are appropriate.

Return to Turing Pharmaceuticals. By Silver's account, individual reactive attitudes directed at Martin Shkreli (the CEO) mark a belief that, "…he should not adopt and act upon this immoral view of the nature of corporate reasons." (Silver, D., 2005: 288). Thus, we are justified in condemning Shkreli's commitment to the corporate strategy of 'profit at any cost' which he articulated. Importantly we can also justify directing reactive attitudes towards the organisation and perhaps at the corporate associates. These reactive attitudes express our commitment to/expectation of adherence to "…the moral standards that are regulative of social life…" (Silver, D., 2005: 288). Such an expectation of corporate behaviour and the associates following it, may be justified on the basis that corporate associates are influenced, indeed directed by, the corporate culture. The culture is what it is because corporate associates made it so, and by their continued service the associates at least tacitly concur and reinforce it. Having negative reactive attitudes towards the organisation "…condemns the corporate culture which fosters unacceptable ways of taking into account the value of persons and other valuable entities." (Silver, D., 2005: 288).

Silver's application of the moral disposition thesis to corporations claims, 1) "…there are different subsets of the reactive attitudes with their own internal structure", 2) the rational warrant of any subset of reactive attitudes is justified by "…the internal structure, *of those very attitudes*"), 3) "a corporation's presumed deficiencies in regards to free agency, consciousness, intentionality, and corporeality are as irrelevant to the rational warrant of the corporate reactive attitudes as is the truth of determinism to the rational warrant of the individual reactive attitudes", 4) "…there are different *kinds* of moral responsibility. This includes *individual moral responsibility*…and *corporate moral responsibility*…", 5) "corporations have moral responsibilities, even if these responsibilities require acting in ways that are not financially beneficial" (Silver, D., 2005: 285, 289; emphasis in original).

By claim 1), Silver distinguishes between two targets of reactive attitudes, individual and corporate. We tend to have strong reactive attitudes to corporate actions, particularly those that result in harm to others. For example, I am compelled to use a particular financial services company that manages my pension on behalf of my erstwhile employer. My experience of their service to ordinary clients like me (I cannot speak to how my past employer experiences their service to them) is dreadful. They frequently get things wrong, have long response times to queries and so on. I have strong negative reactive attitudes (anger, frustration, resentment to name but three) towards the company, but rarely, though not never, towards the company employees with whom I interact. Those working for the company are empowered only to follow company policy and are expected to act only according to the corporate culture. Therefore, in most cases (excepting where there is evidence of incompetence) reactive attitudes towards them would not be rationally warranted as the company associates are bound by the company processes and procedures.

Whether the financial services company provides poor service to people like me as part of company policy to deliver a low-cost service to my past employer I cannot tell. I base my reactions on the service that is experienced by me. I consider my attitudes to the company's performance to be rationally warranted because it could, if it wished and invested appropriately, provide me a better service. It could reflect on its performance, identify deficiencies, and make changes – assuming there is a desire to make changes or to simply provide their customer with good service rather than their consumers. A 'provide a good service to consumers' culture would mandate such an action. The fact that at no time in the past six years of 'service' have I been asked to rate the service of the company indicates to me that their service to me (and other consumers) is not of importance to the company. It seems to me that the company is not reflecting on its service to those compelled to use their service.

Silver defends the appropriateness of company-directed reactive attitudes by considering his own reactive attitudes to corporate wrongs.[74] He claims that his reactive attitudes are aligned

[74] Company-directed, here, refers to reactive attitudes directed *at* a company in response to its actions, not those that may be directed *by* a company to others. The focus on the social element of the corporation exemplified by its culture, while not diminishing the importance of individual moral responsibilities, introduces the notion of two types of moral responsibility and reactive attitudes - corporate and individual. The individual responsibilities and reactive attitudes are those that we traditionally expect of persons as moral agents - no change. The

with folk reactive attitudes which he describes as, "…the ones that most people start with and keep unless they are led by philosophical considerations to disavow them." (Silver, D., 2005: 287). I suggest that folk reactive attitudes are similarly true of corporate moral responsibility itself, in that there is a strong intuition that these organisations can and should take moral responsibility for their actions that affect others.

Claim 2), states that the rational warrant of any subset of reactive attitudes is justified by "…the internal structure, *of those very attitudes*" (Silver, D., 2005: 285, emphasis in original). That is, each set of reactive attitudes (individual and corporate in this case) have conditions of justification that are specific to each. The rational warrants of individual reactive attitudes are therefore not those of the corporate attitudes. Silver notes in support of his claim that Strawson acknowledges that even within the various individual reactive attitudes, those such as fear and pity are justified in different ways to those of gratitude or forgiveness, for example (Silver, D., 2005: endnote 14, 292).

As noted above Silver justifies reactive attitudes about corporations based on these attitudes' validity as 'folk' reactions to corporate actions. He makes clear (see below) that the various characteristics of individuals that make them just targets of reactive attitudes are not needed for corporations to be just targets of reactive attitudes. The rational warrant of our individual reactive attitudes is not always suitable to be the same as that for corporate reactive attitudes. The example above on the administration of my pension does warrant blame for the company on its poor service and its indifference to poor service, but as I indicated it does not rightly blame the low-level employees for the corporation's service deficit.

The third claim, that "a corporation's presumed deficiencies in regard to free agency, consciousness, intentionality, and corporeality are…irrelevant to the rational warrant of the corporate reactive attitudes", addresses the common arguments against corporate moral responsibility. The first of these arguments is that corporations lack free agency, because companies are capable only of secondary actions (Velasquez, 1983: 3-4, Werhane, 1985: 57) in that every act of a corporation is an act of some or many corporate associates. Such acts are ones of which the corporate associate is the 'ultimate originator'. And thus, these acts are

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actions of companies that induce reactive attitudes toward them are governed by the culture of the organisation and the way it directs the actions of corporate associates.

not ones for which the corporation has moral responsibility. This is a strong charge against corporate moral responsibility. The alternative theories of goodwill and appreciation of reasons do not solve this. It is arguable that corporations cannot have goodwill towards others; neither can they understand reasons as they are lacking mental capacity. However, the moral disposition thesis structures the rational warrant of reactive attitudes on the basis of the *demonstrated* disposition of the company to act in particular ways. Its ability to be an 'ultimate originator' is not a necessary condition. The readily observable way the corporation acts towards others over time is the target of our reactive attitudes.

Consciousness (aligned with the sentience characteristic) is also a proposed deficiency of corporate entities. I noted earlier that it is unlikely that a corporation as an entity has much if any consciousness (List, 2018: 319). It may have a derivative consciousness based on the mental states of its associates, but as an entity it does seem unlikely to have consciousness. Manuel Velasquez claims that companies cannot, as entities, feel shame or "experience the suffering or loss that accompanies punishment" (Velasquez, 1983: 11) – corporations cannot have the mental states of guilt or suffering. I am persuaded by Kenneth Silver's proposition that the corporate associates do have these mental states, and so there is a derivative state for shame, guilt and so on that is a relevant conception of corporate shame, guilt and so on (Silver., K. 2022: 321-342).

However, Silver's concept of reactive attitudes towards companies does not have the same structure as reactive attitudes towards individuals. Silver makes plain that even if he accepts the lack of corporate consciousness or indeed corporate corporeality (the fourth objection to corporate moral responsibility) his reactive attitudes towards companies remain appropriate to him in the folk sense described above. Additionally, the moral disposition thesis does not entail corporate mental states (see below). Corporate character does consist of corporate dispositions, which in turn manifest in conscious decisions of the corporate associates acting as a group according to we-intentions.[75] Therefore, there is no mysterious singular conscious

[75] Certainly, in individual disposition this is not the case. One can have a particular disposition to be surrounded by persons younger than oneself in a party and this is an unconscious decision. The corporation as noted above has no, or very little consciousness, but is ruled by its procedures. These could of course be biased as the procedures are human construction, but this would likely be something we would see. For example, as an Asian person, one might there is no use in applying for a job at 'YZX' since that company

entity associated with a corporation, but rather the joint consciousnesses of the associates that work to form corporate dispositions (see the discussion below on corporate mental states).

The final attribute that it may be argued corporate entities lack is intentionality. Many have argued for the existence of intentional states in corporations (perhaps most notably, Peter French (1995), Christian List & Philip Pettit (2011) and Kendy Hess (2018)). However, whether corporations have intentional states remains contested (Manuel Velasquez, 1983; David Rönnegard, 2015). The moral disposition theory does not require the existence of any form of collective intention for the attribution of corporate moral responsibility. All that is required is that the corporation has an identifiable set of dispositions that form a culture, a particular way of doing business and attending to others and to things of value. If proponents of corporate intentions are right, then the culture will be a consequence of these intentions. If corporate intentionality is mythical, then by the moral disposition theory we still have a justification for attributing moral responsibility to the corporate culture, and for any accompanying reactive attitudes.

The argument of Kenneth Silver (2022: 321-342) that groups do not need mental states *per se* to act, that is, to perform group actions sidesteps the corporate intentionality argument. Silver asks the pragmatic question, "Why would they [groups] need mental states when they are made up of agents who are able to recognise their reasons for them, and to behave so as to constitute the group's response?" (Silver, K., 2022: 39-41). Silver argues that mental states facilitate actions by attending to the appropriate reasons for those actions. What is important for group action is that it is based on reasons that are understood by the members of the group (corporate associates for example) and assessed according to the overall set of the group's dispositions.

4.4. Corporations can communicate reasons and consequences

Corporations act on motivating reasons and are sensitive to reasons – companies can and do respond to changes in their environment, often based on reason. For it to be rational to expect corporations to be morally responsible for their actions they need to be able to explain their reasoning for actions and be able to answer for their consequences. Stated another way the

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discriminates against Asian applicants even if the people on the hiring committee aren't aware they discriminate.

corporation must be a 'conversable agent', that is, capable of communicative acts sufficiently sophisticated to allow them to make plain why, for what reasons, the corporation did what it did and in turn express their satisfaction or otherwise with their decision making and its outcome.

A natural human conversable agent uses reasons to arrive at beliefs, desires, intentions and so on. For example, when asked what we believe about something we assess our reply based on the evidence that we have available to us. If a positive response is consistent with our available evidence, then we agree; if inconsistent, we disagree; and if we have insufficient information, we express agnosticism. The use of reasons to determine our response makes our response an avowal. An avowal makes the statement commissive such that we risk penalty if we do not act in line with it. The commissive statement reflects our moral dispositions and living up to our avowals signals that we are trustworthy and fit participants in relationships with others.

Philip Pettit (2017: 15-35) argues that corporations are conversable agents in a similar manner to persons. Companies converse via corporate associates authorised to speak on behalf of the corporation. Pettit claims that statements of such persons are not merely reporting on the corporation but rather that the spokespersons "…speak with the same sort of authority that any one of us assumes when we speak as individuals for ourselves." (Pettit, 2017: 22). That statements by corporations have the same consequences (risk of penalty for not acting as indicated for example) as those of persons is, I think, uncontroversial. If a duly authorised company spokesperson, a Chief Financial Officer for example, says that the company will draw down its long-term debt by 10% in the next year, there are consequences for the company. Initially there may, for example, be an influx of investment in anticipation of the improved financial state of the company and an expectation of growth. Similarly, if the company fails to meet the target, investors may penalise it with short-term investor flight, and an erosion of credibility in company statements, much as we would be cautious of the credibility and moral dispositions of a person who did not keep promises.[76]

[76] There may of course have been unforeseeable economic/market reasons for missing the target, but most investors would expect to be informed of these as they occur, not simply see an end-of-year report that showed the missed target. This is also true for persons. You would expect me to email you to say because I am ill today, I can't attend the lecture that I promised to attend.

It is reasonable to ask whether a company that wished to evade moral responsibility for its actions, one that follows a profit at any cost strategy for example, could simply state that it is unable to make normative judgements. Alternatively, a company could claim that while capable of making normative judgements it did not have the resources to comply with the judgements without risking profitability (Pettit, 2017: 31-32). Examples of issues that might apply in the compliance case include paying a living wage to employees, ensuring that suppliers meet safety standards, and so on.

In the case of inability to make the relevant judgements, that the company made the claim in the first place illustrates that it can indeed make normative judgements – it has just announced one such judgement. In the case of inability to comply, there may be a case for permitting the company more time to comply. Companies (like people) will always have competing priorities and must choose carefully. However, once the judgement that, for example, paying a living wage is an agreed objective, there is a corporate responsibility to find the means to comply.

It is not reasonable for a company to deny its moral dispositions or its ability to make moral decisions. The behaviour of the company, acting rightly or wrongly, is testament to their dispositions, whether positive or negative. As discussed previously (§4.2.) the moral dispositions of corporations are readily observable features of their behaviour. Thus, for an organisation to claim that it did not have any dispositions and/or that a company did not have the capacity to make moral decisions does not make sense. The company's approach to business may be seen as a disposition to act with moral sensibility or not, and this demonstrates that this capacity has been exercised.

In summary, the recognition by society that corporations have moral responsibilities is a sufficient condition for moral agency if it is possible to morally assess how a corporate culture determines the actions of its associates while doing business. This is possible because 1) the corporation acts from motivating reasons, 2) is sensitive to changes in the environment that produce new reasons and actions and 3) can communicate its reasons for action and account for their consequences.

I have argued that corporations are capable of being held morally responsible for their actions and are rightful recipients of blame, praise and so on, based on their moral dispositions as revealed in action.[77] In similar manner to persons, good dispositions will lead to morally good decisions and actions and poor dispositions to morally poor decisions and actions. I believe most persons attempt to develop positive moral dispositions if only on pragmatic (I don't wish to be treated badly so I try to treat others well) or utilitarian (behaving with concern for others increases overall wellbeing) grounds. Regardless of why one pays attention to moral issues there is a cost – our choice of actions may be constrained; we may have to do something we would rather not and so on. The development of good corporate moral dispositions has similar costs that in many cases may have financial consequences - increased labour costs associated with better working conditions leading to reduced profits for example. Is there, then, any theoretical basis for insisting that corporations make the effort to develop good moral dispositions?

4.5. Theoretical basis for social insistence of corporate moral responsibility

In chapter three, I employed John Searle's constitutive rule, "X counts as Y in context C", to describe the nature of functioning business corporations as social (institutional) facts.[78] Searle argues that constitutive rules may be iterated in the presence of new contexts to permit Y terms to become X terms at another level of a chain of social entities (Searle, 1995: 125). I argue below that utilisation of an iteration process offers a theoretical basis for justifying that corporations can act as morally responsible entities.

Searle uses the example of making a statement X^1 that becomes a promise Y^1 in context C^1. The context is an interaction between two persons and the action is stating, 'I promise that/to…'. In the context of human interaction, recognising the statement as a promise places the promiser under a moral obligation to another by making a binding commitment to perform an act for that person.

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[77] Actions may of course be observed that seem 'out of character' – not consistent with the moral dispositions of the entity. See §4.3. for an explanation of why such actions, if isolated instances, do not affect the nature of settled moral dispositions.

[78] I developed the constitutive rule that, "We recognise that when people perform in accordance with incorporation created by appropriate legal rules (X), we will think of them and treat them as a unitary body called a corporation (Y), so that they can perform more effectively in producing goods for sale (C)."

So, if we take a promise, Morwenna says, 'I will help fix your car if, once fixed, you take me to the concert tomorrow'. Julianne replies 'Yes, I will take you to the concert once my car is fixed'. This is a promise Julianne makes to Morwenna. Searle argues that if we change the context to that of the law, then the promise is now a legally binding promise – a contract. Thus, Searle argues that it is legitimate to iterate status functions such that, 'Y' terms can be 'X' terms in a new context (Searle, 1995: 125).

In the example of a promise, Searle claims that changing the context to that of the law as opposed to personal interaction, the same promise is transformed into a legal contract. Y^2 now has a new set of status functions and deontic powers associated with its transformation into a new social fact.[79] It now has the status of a legally enforceable promise. The promise (contract) now has legal as well as moral penalties in the event of it not being honoured.[80]

The iteration of Y terms in social institutions may be illustrated by reference to the internal workings of many hierarchical organisations. For example, in the British Army a person entering officer training is by declaration by the army recognised as an Officer Cadet.[81] On graduating from training s/he is declared to be a Second Lieutenant – the army (and society in general) recognises a new status for the person.

Thus, a person (X) is recognised to be a Second Lieutenant (Y) in the context (C), the British Army. S/he is now recognised to have the new status of 'army officer' with new powers (permitted to use, and order others to use lethal force when appropriate, for example) and new responsibilities (may be responsible for leading up to 30 soldiers in training and operations, for example).

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[79] In Searle's terms a status function is the power to do something not possible by virtue of physical form (a piece of polymer becomes a £5 note for example). A deontic power is a set of rights, duties, obligations and so on associated with the new status function See §3.1.).
[80] I provide an additional example of iteration in action (the British army) below as the promise/contract example may be challenged on the basis that in order for a promise to become part of a contract, simple change of context is not enough. Valid promises do not need "consideration", the legal term for what is "exchanged" for the promise. For us to have a contract whereby I agree to hand over my X to you, there must be some Y that you exchange for my X, even if the Y is ridiculously minimal (such as £1). But my promise to hand over my X to you is morally binding even if it was given without anything in return.
[81] See, https://www.army.mod.uk/who-we-are/our-people/ranks/ (accessed, April 6th, 2022)

After one to two years the Second Lieutenant may be considered for a new status, that of Lieutenant. If the internal selection criteria are met (these are the army's justification for recognition of a new status) the army will declare the Second Lieutenant to be a Lieutenant. The rank of Lieutenant has a new set of powers (ability to command Second Lieutenants for example) and additional responsibilities to those of a Second Lieutenant.

The process is repeated along the hierarchy (Lieutenant to Captain, then to Major, Lieutenant Colonel, Colonel and so on until the highest rank, Field Marshal). At each stage a new context (selection process) is invoked to assign the new declaration. Society recognises the process of iteration as valid within the context of the British Army.

4.5.1. Iteration Argument for a corporate moral agency constitutive rule

If we apply Searle's iteration move to the corporation and change the context, we can have a new constitutive rule iterated from our initial description of a corporate entity: *We recognise that when people perform in accordance with incorporation created by appropriate legal rules (X), we will think of them and treat them as a unitary body called a corporation (Y), so that they can perform more effectively in producing goods or services for sale (C).*[82]

The 'Y' term - *a unitary body called a corporation*, becomes the 'X' term of a new rule, described in the abstract below, and ultimately as "B." at the end of this section:

Rule 1: X counts as Y in context C

⇓

Rule 2: X^1 which counts as Y^1 in context C^1

In the new constitutive rule, X^1 represents a functioning business corporation. Y^1 is 'a corporate moral agent' - a status function that imposes on the corporation a new function – the expectation of doing business in a particular manner, and 'C^1' is the context within which the function is realised – morally significant acts associated with the production of goods and services. Therefore, we can now say:

A. **We recognise that X^1 counts as Y^I in context C^I**, where X^1 is a functioning business corporation, Y^I is a corporate moral agent in context, C^I, morally significant acts associated with the production of goods and services.

[82] Adapted from, Adelstein, R., 2010.

That is, when considering any morally significant question associated with the business of the functioning business corporation, that corporation is now recognised as having the *status* of a moral agent expected to reflect upon and decide to act in compliance with moral norms.

However, **A** imposes a restriction on the moral agency of the corporation to '*acts associated with the production of goods and services.*', which seems to make the context too narrow. While it would include all acts leading to harmful outcomes in the pursuit of business[83] (acts leading to pollution, harm to employees and so on) it would exclude morally positive acts in society as a whole (for example, making a donation of product to a disaster area, using company money to support social causes such as racial equality and so on). A corporation exists to do business in a particular market space, and it has been argued for many years that its direct goals and responsibilities are restricted solely to that business venture on behalf of the shareholders. Friedman, an early opponent of Corporate Social Responsibility (CSR)[84], stated that the purpose of a corporation is "…to make as much money as possible while conforming to the basic rules of the society, both those embodied in law *and those embodied in ethical custom*." (Friedman, 1970, emphasis mine).[85]

I stand neutral in the debate on the desirability of CSR between those who support companies acting on social issues and those who claim that corporations do not have the ability to do so, and it is not desirable for them to do so. Most companies are not, for example, experts on

[83] Harmful outcomes resulting from actions not in the pursuit of business remain covered by individual moral responsibility while working in a corporation. For example, a CEO hiring, physically attractive people, not to drive business but because she prefers attractive people is wrong and remains wrong.

[84] The idea of Corporate Social Responsibility (CSR) emerged in the 1960s and has gained in strength ever since. In broad terms it is the notion that companies have a responsibility to the society in which they operate some part of their gains in such a manner as to be socially valuable. Examples might include supporting social care, local clubs and societies, schools and so on. While in contemporary society many corporations do participate in these types of activities the justification for this use of corporate funds is contested by many on the grounds that this is not what companies are for and that it is questionable whether managers of corporations have the necessary skills to accurately determine social need, a role we usually delegate to politicians. The movement is however an indication of the strength of the intuition that companies have other-regarding responsibilities.

[85] There is a difficulty in applying the highlighted phrase – customs existing in the past may be ethically unsound today: for example, paying women less than men for the same work and so on. For this discussion I will assume this is not the case

social issues and what is needed to help, or best placed to supply it. I am not neutral on whether corporations should attend to morally relevant social actions – they should. I have in mind issues such as fair pay, safe working conditions, reasonable production expectations and so on. While many of these are legal requirements and governed by regulation and law, each has a moral dimension – at minimum, that of not treating persons as mere means rather than ends in themselves.

There are however moral questions that corporations simply will not encounter. For example, unlike competent persons, it is difficult to imagine a corporation ever being in a situation where it must decide whether to save a drowning woman, give aid to an ailing relative, attend the funeral of a deceased employee and so on. These are human-relevant cases that sit outside the responsibilities of corporations and indeed most have no obvious ability to engage in them as an entity.

There is however a place for corporate concern within some of these human situations. For example, it seems appropriate that a company should allow paid leave to an employee or small group of employees to visit a hospitalised colleague or attend a funeral; it would be expected not to penalise an employee for hours lost as they rescued the drowning woman; and it might even be expected to recognise internally their bravery. It is also appropriate for some organisations to directly attend to human cases. For example, a legal firm can reasonably be expected to do some *pro bono* work to provide access to legal representation for low-income persons, a supermarket chain may give food to disaster areas or food banks and so on.

So, the capacity for moral agency of corporations is not that of persons. It is reasonable only to expect corporations to reflect on issues and act accordingly within the boundaries of their moral scope. This means that a corporation's scope of moral concern is restricted by the nature of its abilities (a manufacturer of cameras is not well placed to physically assist in food delivery during a natural disaster, but a haulier likely is), and so the constitutive rule may be refined as follows:

B. We recognise that X^I counts as Y^I in context C^I, where X^I is a functioning corporation, Y^I is a corporate moral agent with restricted moral scope and C^I is the

context of morally significant acts within the boundaries of its capacity for moral agency.

B may be stated more fully as the following constitutive rule, *'We agree/recognise that when a corporation is a functioning business corporation X^I, we will think of it and treat it as a moral agent of restricted scope Y^I, so that it may produce goods and services and act in wider society in a manner consistent with moral norms within its capacity, C^I.* I refer to this constitutive rule as the 'moral company rule' in the rest of this thesis.

4.6. Conclusion

In this chapter I have argued that the corporation conceived as an institutional fact is the kind of thing that can have moral responsibilities. Corporations exist as entities created and sustained by natural humans to do business in an efficient manner to create wealth. Here I presented the argument that the culture of a corporate, the result of corporate processes and procedures, is analogous to human moral dispositions. Corporations have cultures that direct the corporate associates in their dealings with other persons and with other things of value. A corporate culture is constituted by the settled dispositions within the organisation that dispose it to act in particular ways while doing business. Focussing on the dispositions of corporations provides a target for the moral assessment of corporations even if corporations do not share the characteristics traditionally held necessary to attribute moral responsibility to humans. It may be argued here that what I am doing is wishing it to be true that corporations are morally responsible. What I call the iteration move is not fanciful; rather that it may be seen as recognising (in the Searlian sense of attributing new status and powers) that the dispositions of a company can rightly be the target of our reactive attitudes. The corporate culture determines the company's actions, which are readily observable in how they do business. The moral company rule (or something similar) is something that society may choose to insist upon.

CHAPTER 5: An economic challenge to corporate moral responsibility

"Economics without ethics is a caricature. Ethics without economics is a fairy tale."
Jakub Bożydar Wiśniewski (Polish academic political economist)

5. Introduction

Before examining the consequences of applying the 'moral company rule' I want to describe a very different view of the corporation and its place in society – that of an entity that exists only to make money, and which operates within a zone of moral exception. This account is proposed by David Rönnegard in his 2015 book, *The Fallacy of Corporate Moral Agency*. I outline his key arguments below.

Even if we (society) wish to insist on corporate moral responsibility, the concept of corporate moral responsibility has been challenged as having no place in a marketplace economy (Rönnegard, 2015: 193). Since the publication of Adam Smith's *Wealth of Nations* (1776) a distinction has been drawn between 'The Market' and the society in which it operates. Whereas members of society are generally recognised as being subject to the constraints of morality in the service of a desirable social order, the market has been considered to function best when free of constraints beyond regulations, the law and those constraints included as terms and conditions in contracts between market participants.

'The Market' has become a collective term that encompasses a wide variety of commercial exchange actions. There are in fact many markets each with their own characteristics. These range from the simple case of an individual buying bread from a baker through the vast market in durable consumer goods, the exchange of financial instruments, currencies and so on, to the provision of social care services by private companies. All these disparate activities are united by the fact that an exchange is being executed that involves a seller (the owner of goods or services) and a buyer (someone with a need or desire for the goods or services). Herein, I will use the term, the market, to describe the mechanism of exchange whereby any good or service is exchanged.[86]

[86] I make no distinction here between exchange for money or reciprocal exchange of goods or services (barter for example).

Adam Smith claimed that markets function best when traders act as individuals in pursuit of their own interests – the baker wants money, and the buyer wants bread. The mechanism of exchange is seen as non-personal wherein it is an axiom of an efficient market that participants pursue their own interests to the exclusion of their effect on others. Smith tells us that "It is not from the benevolence of the butcher, the brewer or the baker that we get our dinner, but from their regard for their own interest." (Smith, [1776], 2012: 19). This form of one-on-one exchange – money for food – may be contrasted with social interactions such as the provision of aid to someone in need, wherein a concern for others is expected and is formalised in moral codes by which society apportions praise or blame, approval, or disapproval. Thus, the distinction between the self-regarding market and the other-regarding society emerges.

Driven by demand for goods and services, the mechanism of the market acts to identify and/or create supply and sets prices based on the cost and magnitude of supply and the likely extent of demand, which may be a measure of the desirability of the items to buyers. If more than one market actor pursues the demand, then competition emerges, and prices are driven down thereby benefitting the buyer. When working well, the market environment tends towards a perfectly efficient market. Demand is met by supply at a price that profits suppliers and justifies their financial investment in the supply process.

Smith made very clear that he believed this non-personal mechanism of exchange had a social benefit and was linked to the social good. He talks of a 'system of natural liberty' (Smith, [1776], 2012: 686) that may be seen as a perfectly competitive market, *"*All systems…of restraint…being…completely taken away, the obvious and simple system of natural liberty establishes itself of its own accord.*"* (Smith, [1776], 2012: 686). Natural liberty leads the market actor to pursue, to the exclusion of concern for others, his/her own gain and yet, by so doing can, and in Smith's view does, benefit society *"*…he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention… By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it." (Smith, [1776], 2012: 445).

5.1. The market as a "Zone of Moral Exception"

David Rönnegard argues that the zone of moral exception (no other-regarding responsibilities in business) frees market actors to legitimately allocate resources (capital, workers and so on) to best commercial advantage regardless of the effects of that allocation on others (Rönnegard, 2015; 192-199). He maintains that as society values the benefits of the market it accepts as necessary the zone of moral exception to assure this type of allocational efficiency (Allocational Efficiency, *Investopedia*, 2018). I call Rönnegard's approach to business the economic actor model, based as it is only on economic factors to guide how business is done.

The rules of the zone of moral exception are the laws and regulations governing particular markets. Rönnegard argues that the market is a place wherein, so long as one plays by these rules, then actions that would be unacceptable elsewhere are permitted. So, moral exception allows for it to be right and proper to act for pure self-interest (Rönnegard, 2015: 195). He uses an analogy with professional boxing to illustrate. The boxing ring is the zone of moral exception in this case and while within the ring and so long as the rules are obeyed participants may act in a manner towards each other that is wholly unacceptable outside the ring.

Leaving aside the lack of consensus on the morality of boxing, this analogy has force in the context of describing the zone of moral exception.[87] The rules of boxing describe precisely what participants may and may not do in the ring. However, the rules of boxing are other-regarding in the sense that they exist to protect the participants and fair play. Similarly, the rules that delineate the zone of moral exception exist to protect society (anti-pollution regulations for example) or subsets of society (worker's rights legislation for example).

I do not believe the boxing analogy has force in the context of the likely impact of moral concern in the market. If boxers were prohibited from striking each other, legal boxing ceases. If market participants were expected to attend to some measure of moral concern in executing commercial exchanges, the market would not cease. It would change, and Rönnegard could argue that it would cease to facilitate the efficient allocation of resources. I disagree on the basis that markets are already imperfect and are already constrained by law and regulation. Real-world markets are less than perfectly competitive and so are less than

[87] See for example, Davis, 1993, Herrara, 2002.

optimal allocators of resources. The introduction of an expectation to exercise a measure of other-regarding concern to the market may result in a reduction in allocation efficiency, but I argue that it is difficult to see why that should be certain. If market exchanges did include some measure of other-concern, so long as it applied equally to all actors, the markets would continue to be competitive. We already set the 'rules of the game' legislatively and tacitly accept that this may impact the capacity of the market to deliver the returns judged to be theoretically possible if there were no such constraints.

That total self-interest is essential to allocation efficiency presumes that the best financial result will be obtained by the absence of moral constraint and assumes, along with Adam Smith's 'invisible hand', that there will in turn be a social benefit. I subscribe to the conclusion that exchanges relatively free of constraint have been instrumental in the economic success of economies that have adopted this approach. Yet, over time societies have imposed and continue to impose additional legislative and regulatory constraints on business. What has been resisted is the relinquishment of a basic framework of freely chosen allocation of capital within these constraints. Free allocation continues to be considered an efficient promotor of economic growth and I believe would continue to do so in the presence of market-based moral concern.

In support of the acceptability of acts that may be of moral concern outside the market but are acceptable within the market to drive allocational efficiency, Rönnegard cites an example of pollution by a company to just at or below the legally permitted level. While causing pollution may, at an individual level, be a morally questionable act, a manger in a company sanctioning it in pursuit of commercial gain is not acting wrongly, so long as the law is obeyed. This is a compelling argument. It is difficult to imagine a production process that does not have some undesirable by-products. Even the careful, environmentally conscious farmer producing food to organic standards uses various types of manure to fertilize crops. The farmer's natural product if leaked into streams and rivers can cause significant damage to natural environments. I would however argue that there is a business-relevant responsibility on the producer (the company or the farmer) to minimize their by-products, even if currently below the legal levels. In the company's case there may be via a more efficient process that would ultimately be more cost-effective so benefiting self-interest and, in the case of the farmer, s/he should be acting to prevent the loss of a valuable asset. Both actions would be 'other-regarding' and simultaneously in the best interest of the self-interested commercial

activity in which they are engaged. While I concede Rönnegard's point that the actions he describes, taken within the law, are not morally objectionable, they may become so in the face of alternative options. The establishment of fixed legal and regulatory levels of permissible harm frequently lag behind the ability of technology to change what is possible[88] and the market competitor that embraces new production techniques first (the First Mover) frequently has the competitive edge in the market. Thus, I maintain that keeping an eye to the ethical conduct of a business venture is competitively advantageous and not excluded by the conditions of a perfect market or even market operation as it is at any time point.

5.2. Allocational efficiency

Two further aspects of market interactions considered conducive to allocational efficiency are cited by Rönnegard, reaction to pricing information and unrestrained self-interest in competitive strategies. These examples of commercially valuable moral choices, if accepted, raise the issues of whether market participants can be expected to accept moral constraint when it is not financially beneficial and whether indeed other-regarding actions done with gain in mind can be considered moral actions.

Rönnegard's second claim on the market as a zone of moral exception is that if a market is to be efficient then market participants must act directly on price information received to make the best use possible of their resources. He provides the example of a company recognising that it is paying employees more than the rate paid by competitors. Rönnegard argues that "…other things being equal, he [*employer*] should give them [*workers*] a pay cut…" (Rönnegard, 2015: 193, emphases mine). He claims that in this situation, regardless of what managers may think personally, in terms of their responsibilities to the company, the managers must immediately reduce wages. To do otherwise is, in Rönnegard's view a misuse of company assets.

I do agree that acting on price information is necessary for success in a market. I do not agree that in the real world of business 'all things being equal' is often (never?) the case. There are

[88] It may be argued that a notable exception to this are the regulations on engine emissions. Recent examples of companies acting fraudulently to ensure their vehicles meet new regulations suggest that the current politically approved regulations may be, at present, ahead of the ability of technology to meet, while still permitting manufacturers to compete successfully in the petrol and diesel-powered automobile market.

often several possible responses to any significant piece of market information, including the act of doing nothing. It is the job of the manager to decide the best option for their specific business at that time. To take the salary example, any manager in this situation should first assess if Rönnegard's advice has any potential risks. Examples of such risks include the negative effect on employee morale resulting in productivity loss and the possibility of losing the best performing employees (those who can most easily get new jobs). Particularly in this example of changes to remuneration these are risks that can manifest with immediate effect. On the positive side, options include transparency to employees on the new information and making clear that either 1) salaries will not be affected as the company values the work done and productivity achieved by employees and so judges that their remuneration rate is justified or 2) if the relationship between company and workforce is strong and positive, stating that it is inevitable that the difference will have to be reduced so raises will be smaller or non-existent in the next few years. The 'no change' option will not hurt productivity and may in the right conditions improve it so offsetting the cost. The slow change option meets the need to reduce the difference without endangering the economic conditions of employees. Net, there are options open to managers that permit a recognition of moral concern for employees that are consistent with managers' fiduciary duty to the company and shareholders. It is possible therefore to react to price information in a variety of ways, some of which have other-regarding dimensions.

Rönnegard's third claim on the market as a zone of moral exception is in the field of competitive strategy. He maintains, rightly, that managers do not have a responsibility to aid their competitors in their business. The manager should not be concerned about the negative effects of his/her strategy on competition. I agree with the sentiment here but take issue with how it is presented. Certainly, it is acceptable (within legally enforced limits) in the market environment to run campaigns that denigrate competitor products and so harm competitor sellers. My concern with the tenor of Rönnegard's example in using the words, 'negative impact' is that he appears to recommend this approach. There are good market-relevant reasons why we rarely encounter 'they are bad, we are good' type of marketing strategy – aside that is from legal and regulatory constraint. Consumers condemn it. Despite widespread scepticism about the motives and actions of companies, we have a strong intuition that companies ought to act with some level of moral concern – the movement for corporate social responsibility for example. Buyers will react poorly to a 'they are bad, we are good' marketing strategy. In contemporary markets such claims are usually suspect and

perceived to be so by consumers. Only in the case of goods that can be compared in terms of technical ability, and even here rarely, do we see this type of advertising.[89] Generally, it is simply bad business, bad use of the market instrument and a strategy that can only end with a 'rush to the bottom' as each company vies to denigrate each other. This is not illustrative of the working of an efficient market.

What consumers (buyers in the market) respond to positively (by buying the product/service) are strategies that demonstrate clearly and with some level of emotional connection the benefits of a company's own offering. The responsible marketing manager is not concerned, indeed will be delighted, and ultimately rewarded, if her company succeeds in taking market share from competition – that is her job. However, our intuitions about how that might be achieved or rather how it ought not to be achieved guide companies in their development of marketing strategies and has a moral dimension.

Rönnegard and any other proponent of the economic model may claim that some measure of corporate moral concern outlaws the element of competition. It may seem to outlaw a strategy to outcompete a rival and in turn destroy its business and company. I do not believe that fair competition is proscribed here: if by fair we mean that a market can reward a company with a better product or service (more functionality of product, reduced cost of service and so on) to the detriment of others is within the scope of the competitiveness that markets are supposed to offer.

Rönnegard's fourth claim it is that legal and regulatory constraint alone governs the right or wrongness of company actions. At this point it worth recalling that Rönnegard's overall project is to deny corporate moral agency. In the face of this claim only legal and regulatory sanctions are relevant constraints on corporate action. He accepts that the market is not morally free because it is framed normatively by a legal framework (Rönnegard, 2015: 196); hence his claim of a zone of moral *exception*. The law codifies and enforces the normative

[89] It has been pointed out to me that Apple used this advertising strategy (Luke Elson, University of Reading) The 'Get an Mac' (https://en.wikipedia.org/wiki/Get_a_Mac accessed, April 4th 2023) showed two men on a Microsoft user and one an Apple user, and they compared the performance of their computer, to the advantage of Apple. The concept was to attract persons buying a computer and not sure which to choose. Whether this worked in terms of sales - the point of advertising - we don't know. But it is a particular example where the point of purchase was technology and purchase would depend on what the buyer wanted the computer to do.

concerns of citizens. The market is however a space in society where market actors are free to behave in a self-interested manner that would not be the case in society as a whole. Competition, as free as possible in an imperfect market, is the sole objective and cooperation between market actors so any form of mutual concern is not compatible with the need to manage and/or react in business in a self-interested manner (Rönnegard, 2015: 196).

Rönnegard accepts that relying on the law and regulatory agencies places a significant responsibility on legislators and enforcement agencies – they must be able to enact and enforce laws and regulations expeditiously, fairly and in response to rapidly changing market environments and indeed the emergence of new markets.[90] The law is, however, imperfect and so he addresses the possibility that where legislative gaps exist it is possible for mangers (I would add corporations *qua* corporation entities here *contra* Rönnegard) to be morally blamed for decisions not legally prohibited yet normatively wrong (Rönnegard, 2015: 197). He gives no ground on the wrongness of *mala in se* offenses (those prohibited as morally wrong in themselves - murder for example) (Rönnegard, 2015: 199) but is open to permitting, in the zone of moral exception, occasions of *mala prohibita* offenses (those prohibited simply because a law exists) (Rönnegard, 2015: 197-199). Rönnegard's argument here runs along the lines of a cost/benefit analysis. It is acceptable for a company to breach a *mala prohibita* law and accept the consequences, for example, in situations where it is judged that the fine for the breach is less than the commercial gain achieved. It is, in Rönnegard's view, the role of legislators to set sanctions such as fines at a level likely to render negative the outcome of such cost/benefit analyses, but not so high as to inhibit the likelihood of investment. This balance, he claims, means that the state is itself engaging in a cost-benefit analysis – weighing social good against an expectation of some breaches of the law.

The temptation of market actors to violate *mala prohibita* laws in general, and those poorly drafted in particular, is significant. Rönnegard's cost/benefit approach, based as it is on rational calculation, may be alluring in many situations.[91] However, freeing managers from

[90] The current inability of legislation to regulate, to the satisfaction of society, the social media environment illustrates the challenge faced here. The ability of the companies involved to classify themselves as technology platforms rather than publishers effectively absolves them from constraint by current legislation.

[91] The case of the Ford Motor Company's approach to the deficiencies in their 'Pinto' model in the 1970s is a case in point. While the press reports of Ford's actions are not wholly accurate with respect to the detail of the analysis that led to decision-making, the company

moral constraint so that they are able to take, with impunity, these types of decisions, does not in my view aid the competitiveness of the market.

The ability to pay a fine for breaching a *mala prohibita* law is open only to individuals and companies that can afford it. If a company is in a position of market dominance for example, it may be able to consider and pursue a strategy of pricing-in a fine to their business. Competitors (certainly not all) in the market may not be able to afford the fines, and so the sanction will be prohibitive to them. This is likely true even in the situation where the fine is progressive – linked perhaps to total revenue. Cash-flow restrictions on smaller, less well capitalized companies would prohibit it. The result would be granting the ability to break the law by accepting the cost and would represent an asymmetric interference in the market of the type that Rönnegard (even though he accepts state regulation (Rönnegard, 2015: 199-204)) may hold unacceptable. The disturbance of the free allocation of resources inherent in such an approach can only be consistent with market freedom if it sanctions to equal extent all participants in the market. If we accept that similar moral concern constraints apply in the market (to managers and corporations), then blame and its resultant reputational damage would argue, financially, against a strategy of pricing-in fines.

A supporter of the economic model can highlight the considerable wealth creation that competition under the tacit or explicit guide of Rönnegard's zone of moral exception has delivered (See §5.1.). However, modern corporate policies and actions tend to suggest that unbridled self-interest is not the norm. To be clear, corporations act to increase allocational efficiency – they struggle to compete with players in their market and their end goal is profit. In terms of allocational efficiency, one of the common factors in a company is payroll. Many companies reduce their workforce periodically and the trend in recent times has been to achieve the reductions with some regard for the persons who have lost their jobs, severance pay, support to find another job and so on. Even in the most dramatic layoffs such as UK P&O Ferries in 2022, where the justification was allocational efficiency (the company believed it could hire lower paid seafarers), the compensation given was considerable.

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did perform a cost/benefit analysis based on likely costs due to deaths versus the cost of recall and vehicle modification. They concluded that their interests in the market were best served by accepting the liabilities associated with consumer deaths. It is worth noting here that Ford's consumers did not agree, and they lost market sales and market share, and experienced reputational damage that took years to repair.

The company's CEO, Peter Hebblethwaite, said at a House of Commons committee that, "We are making extremely generous payments…£36.5 million is we think the largest maritime settlement arrangement in history. There will be people receiving upwards of £170,000…About 40 will receive more than £100,000…".[92] P&O did not, during their layoff, respect their workforce, laying some off by Zoom meeting or even SMS texts, however P&O did provide compensation, albeit, financial. I believe the corporate world is slowly moving towards a sense of corporate moral responsibility that ought to be encouraged.

5.3. Moral concern in 'The Market'

Rönnegard's argument for the market as a zone of moral exception appears to offer a justification of market conditions as they exist. I do not agree that his assumption that actual practice is sound. Successful individual traders act to ensure their offering is acceptable to their buyers. Failure to achieve an acceptable service is to fail in the market.[93] The consequences are often rapid (the growth of websites rating traders makes poor service instantly available to many more, faster than word of mouth could) and significant – their livelihood is at risk. On the grander scale of markets, there is today a significant move by corporations big and small to present themselves as morally aware. As regards the current situation of markets today, this suggests that market actors believe other-regarding actions promise a competitive advantage, or at minimum are a prerequisite for effectively competing. If not, they would not allocate corporate resources to it. I would go further and argue that in demand-led markets, buyers are demanding that market actors do take account of moral concern in their trading. How strong this demand may be is an empirical question, but its presence is clear.[94]

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[92] House of Commons, Transport Committee & Business, Energy and Industrial Strategy Committee. Oral Evidence: P&O Ferries, HC 1231. Thursday 24 March 2022.

[93] I exclude here those individuals who set out to deliberately deceive or defraud.

[94] This is clear in policies of Corporate Social Responsibility, sustainability, and in the nature of corporate mission statements/employee business conduct manuals. See for example that of The Procter & Gamble Company (P&G Business Conduct Manual), which states, '*The portions of this Manual identified as "Worldwide Business Conduct Standards (What do I need to do or refrain from doing?)" are the Company's "code of ethics" for all Company employees, and also for the non-employee members of the Board of Directors of the Company in the course of their activities on behalf of or in connection with the Company*.' (My underline).

The concept of markets as merely instruments of exchange and providers of price information while cogent is a thin version of how we view and behave in markets – markets are much more than this. Markets are developed within a social context and their fundamental operation is one of human interaction. Markets exist because someone wants something that another produces. Successful markets have historically therefore been demand led. If demand ceases, then the market, indeed the need for that market, disappears.[95] Exchange of goods and services is a form of social interaction between persons and collectives of persons for the mutual benefit of both trading partners, and as such I believe is a candidate for moral concern.

I maintain that the condition of mutual unconcern for successful markets is relevant only at the point of the actual exchange (I am under no obligation to buy from you, neither are you obligated to sell to me). There are a variety of things necessary to move the actors along to the moment of exchange that are not matters of unconcern, in fact there are other-regarding actions without which no real-world conception of a competitive market can exist. Markets are processes of wealth creation and I believe that concern for others is a part of that process. I admit that it some areas of business this will be a threat. For example, any business selling an addictive product that brings a consumer benefit of pleasure or other benefit, but which ultimately requires increased doses for that benefit, is harming its consumers. The recent opioid scandal is just such a case.[96]

I do not say that markets are not spaces for the pursuit of self-regarding individual (or in the case of corporations, collective) gain rather that the most successful pursuit of gain entails other-regarding actions. For example, a successful exchange in any market is dependent on, at minimum, trust (the person buying bread trusts that it has not been adulterated by the

[95] A case in point is the Kodak company. Kodak was synonymous with photography (recall the 'Kodak moment' advertising) for most of the 20th century, due to its success in the market for photographic film. In the 1990s, Kodak came under financial pressure because of the decline in demand for photographic film and its slowness to embrace digital photography. Despite efforts to enter the digital market, Kodak had to file for Chapter 11 bankruptcy protection in January 2012. In August 2012 they sold the photographic film business. The company emerged from bankruptcy in 2013 and is now focused on imaging for businesses.
[96] https://www.cfr.org/backgrounder/fentanyl-and-us-opioid-epidemic (assessed July 26th, 2003)

baker[97]) and commercial fairness (successful exchanges usually benefit both parties). If these elements of market exchange are violated there are detrimental consequences for sellers, buyers, and the market itself.

Violations of trust are particularly damaging to the growth and maintenance of exchange opportunities. While it is accepted that sellers will present their offering to best advantage when promoting it for sale, it is not accepted that they lie about it. Over-promoting may be such as not to constitute a lie, but it is nonetheless a harmful act, towards the seller and the buyer. The buyer receives less than expected (the product did not deliver on the promise, or the service was judged to be below the standard expected). The response of the buyer when next in the market will be to shun the offering of that seller so s/he experiences a loss of trade. In the markets of today where internet disseminated opinion is substantial and growing in sophistication, the seller may stand to lose a lot of future trade. In most businesses there is an expectation of repeat exchange, and it is often claimed that it is more expensive to acquire a new buyer than to keep an existing repeat buyer. Violations of trust threaten this and so make plain that exchanges are not seen as one-off events. I argue therefore that the condition of mutual unconcern is not how sellers or buyers see exchange in a real-word market.

Fairness is a more complicated issue as the concept of fairness in a commercial transaction, as in purely social interactions may, be in large part a matter of perception. However, real or imagined, negative perceptions have harmful implications. The notion of a 'fair price' is I would argue 'hard-wired' into our view of successful exchanges. While it is good business to work to source the lowest price for a good or service, it is not rational to sacrifice the quality of either in pursuit of cost-saving alone. Not sacrificing quality is particularly true if the item is to be part of a manufacturing process and the final product is the buyer's market offering, or the service provided is one that the buyer relies on for their own business (outsourcing of invoice administration for example). Violations of fairness in exchange are likely to have similar consequences as lack of trust – the two are related. To sustain a business is to be able to make multiple market exchanges, a process threatened if a perception of unfairness exists in mind(s) of the buyer(s).

[97] This example is not a significant issue in developed markets today (horsemeat substituted for beef is a recent example) but it is commonplace in many less developed parts of the world and certainly was the case in England when Adam Smith was laying down the notion of mutual unconcern.

Competition is critical here. In each of the above cases, in the presence of competition the buyer can mitigate their initial loss by looking to an alternative seller. Monopolies and cartels are legislated against, not only because they allow predatory pricing, but also because monopolies and cartels limit innovation and the choice available to potential buyers. Reducing competition, limits the buyer's ability to penalise the seller for breaches of trust, or fairness, or any other condition that a seller might reasonably expect.

I view business as a series of socially relevant, market-based relationships dependent on multiple exchanges and not in terms of a model of one-off exchange. I argue that in the environment of diverse mercantile activity and interaction between persons and collectives of persons, moral concern has and ought to have a place.

5.4 Conclusion

In summary, companies that structure their culture and dispositions around the notion of moral exception and adhere to what I call the economic model can readily become dismissive of concern for others in the conduct of their business and contentedly pursue the 'profit at any cost' strategy of Martin Shkreli's Turing Pharmaceuticals.

CHAPTER 6: Morally responsible corporations, their nature, and society's choice

"What is good for society is also good for business."
Petter Stordalen (Norwegian Businessman)

6. Introduction

I have argued that corporations exist as entities created and sustained by natural humans to do business in an efficient manner to create wealth. Corporations are brought into existence by a combination of laws (§1.2.1.) and recognition by society of their status in society (§3.2.). Companies rely on both the legal system and social recognition of their status to ensure the availability and legitimacy of the privileges of incorporation (§1.2.1.) so that they are able to do business as efficiently as possible. Since corporations are enabled to exist by the rules which society creates, and since corporations are given privileges, powers and protections by society, society should also expect that corporations *qua* corporate entities have not only legal but also moral responsibilities.

In the previous chapter I described the notion that corporations may in some measure be exempt from moral responsibility. I called this account the **economic actor model of corporate responsibility**. The economic actor model holds that corporations exist to create wealth and so long as their business conduct operates within the rules (legal and regulatory) corporate associates are free to act in a wholly self-regarding (perhaps better stated as, corporation-regarding) manner in their interactions with other people and things of value.

In §4.5.1., I developed a constitutive rule describing corporations that accepts the social nature of corporate entities described above: *'We agree/recognise that when a corporation is a functioning business corporation X^I, we will think of it and treat it as a moral agent of restricted scope Y^I, so that it may produce goods and services and act in wider society in a manner consistent with moral norms within its capacity, C^I.* I chose to call this the moral company rule and if this rule is employed in place of the economic actor model, then the environment for business changes and is conducted according to what I will call the **social actor model of corporate responsibility**. Here I 1) expand on the consequences of accepting the moral company rule in terms of the new status functions and deontic powers that it affords corporations and 2) discuss the dilemma that emerges by accepting the robustness of both the economic model and the social actor model. Do we deny that

corporations must exercise corporate moral responsibility in the expectation of economic gain, or do we insist as societies that corporations follow the social actor model and act to create wealth, with appropriate concern for others?

6.1. Moral Company Rule - Status Functions and Deontic Powers

It is an empirical matter whether society (the 'we' in the moral company rule) does indeed recognise corporations as moral agents; however, various groups in society such as those advocating Corporate Social Responsibility and ethical investing indicate that there is a movement towards recognition of corporate moral responsibility in the business and investment worlds. Additionally, colloquial responses to corporate misdeeds such as the Volkswagen emissions scandal (see §1.4.3.) which tend to run along the lines of, 'VW cheated emissions testing, that's where the blame lies', suggest an agreement in wider society.[98] The following assumes that society does recognise corporations as morally responsible and explores some of the consequences of acting on that recognition.

Within the assumption that society does recognise corporate moral responsibility lie at least three possible responses. Society holds 1) the corporate entity responsible and sanctions it but not the persons who acted on its behalf, 2) the corporate entity and certain individuals responsible and sanctions both, or 3) certain individuals responsible and sanctions them but not the corporation. Response number three may be dismissed as a policy option on the grounds of the risk of moral hazard in that the corporation would have no risk of sanction and would be free to induce, coerce or otherwise pressure its associates to act wrongly in the pursuit of gain.[99] Response number one risks leaving a remainder of responsibility (see §1.4.3.) that ought to be held by persons who knowingly acted wrongly albeit in the pursuit of a corporate objective. The second response seems to be most appropriate as it apportions blame and ultimately sanction to all those who acted wrongly; however, how any sanction

[98] It is of course likely that in some cases 'VW cheated' is being used by people as a shorthand for the individuals responsible. If one is not in possession of the details and complexity of the case, it is reasonable to assume that a senior corporate employee and/or a small group of employees are the appropriate recipients of blame. However, as the details and various legal sanctions on the corporation emerge, I believe the attribution of responsibility to the corporate entity becomes clear and appropriate.

[99] Moral hazard describes situations where an individual (or in this case a corporate entity) can take advantage of an activity, knowing that all the risks will be imposed on another party. See, https://corporatefinanceinstitute.com/resources/knowledge/other/moral-hazard/ (accessed, April 25th, 2022)

should be apportioned between the individuals and the corporate entity is a contested point (see, Collins, 2018: 197-220, for more information).

An important consequence of the moral company (constitutive) rule is that a new status and power(s) are recognised by society and corporations are expected to utilise them. Searle tells us that creating a new reality by constitutive rule involves, *"*…the collective intentional imposition of function on entities that cannot perform those functions without that imposition." (Searle, 1995: 40-43). In effect we (society) agree that it is right that corporations are morally responsible for actions done on their behalf. If this agreement is accepted, then question moves to whether this position is supportable.

Corporations could of course act in morally responsible ways regardless of whether society recognises them as moral agents, or arguably whether or not the corporation *qua* corporate entity is a moral agent.[100] It may be sufficient that a significant number of individual corporate associates act in line with their own sense of moral responsibility when acting on behalf of the corporation. Arguably many modern corporations already attempt to act with moral concern. Policies and procedures that have an ethical base include sustainable use of resources, personnel policies that avoid exploitation (ensuring that employees are treated as ends not mere means) and so on. However, acting with moral concern is not a mandatory element of their existence. Moral concern would be a mandated element of business by acceptance of the moral company rule.

I introduced the notions of Status Functions and Deontic Powers in chapter three. Briefly, a status function is a new function not necessarily available to an entity because of its form but rather because of a new status it has been accorded by social recognition. Deontic powers are a set of powers, responsibilities, obligations and so on that accompany the obtaining of a new status. Here I consider in more detail what these may entail for corporations acting in accordance with the moral company rule.

[100] In §1.5.2., I described the meaning of 'morally responsible' that I employ when discussing corporate moral responsibility. That is, to be morally responsible is to act intentionally in the presence of reasons for the action.

6.1.1. Status Functions

Status functions are imposed on (granted to) people or objects. There is nothing about a ten-pound note that makes it a unit of exchange unless and until we recognise it as such. Proponents of corporate moral agency must show that there is evidence of the capacity for moral agency consistent with the nature of a corporate entity and recognition that the entity is a moral agent.

Acceptance of the moral company rule changes the status of the corporation from a wealth creating corporate entity with no moral responsibilities to that of a wealth creating corporate moral agent of restricted scope, with the corporate entity required to reflect upon and act in accordance with moral norms as it does business. There are two ideas here, that of corporate moral agency and that of the nature of its restricted scope.

Moral agency for corporations and the scope of that agency are related and interconnected. Corporations espouse objectives such as 'consistently increasing profit', 'being market leader in xyz' and so on. While in some cases these objectives may appear together as for example, 'market leadership in xyz to sustainably grow profit', the scope of their view of the world and their actions in the world tend to be focussed within the ambit of their business. Corporations tend to have single over-arching aims such as those described above. Unlike natural persons, whose definition of a good life will likely involve several aims, the company usually links success in a single aim as constituting a good life for the corporation. The recognition of corporate moral agency extends the boundaries of concern for corporate entities but not to the same extent as for competent humans.

A corporation acts because of its contracted persons; it uses them as the means to achieve its business goals. Does it treat them as mere means? I interpret 'not treating as a mere means' in the context of business as respecting the person, their autonomy, rationality, their aims in life and so on. That the associates sell their labour to the corporation is but one element of their lives. However, it is a significant element, as without it many other things in their life cannot go well. Respect for the person and their skills would entail that their labour is remunerated at an appropriate level. There are many ways of determining that level, for instance having a third party review the salary of similar roles in the company's competitors. In a small company, respecting employees in terms of salaries would involve keeping in line with inflation and being mindful of salaries offered in job adverts and so on.

Arguably one could say that paying a salary (good or indifferent) meets the requirement of not treating employees as mere means. It might be thought that, if everyone employed is paid for their services at a level they consent to, as evidenced by the fact that they haven't quit their job, then their consent is being respected. I recall, back when salaries were paid by cash or cheque and delivered in an envelope, one small company's owner added a note to each salary package which said, 'Now we are even'. I do not know the environment (rural, small town, area where unemployment was high and so on) within which the company worked, but I can think of a variety of ways in which a salary does not make the employer and employee 'even'. The exchange may not be a voluntary choice. If you are a low-skilled worker in a rural environment with limited jobs within a commute, a one-company town and so on, the salary is certainly important, but in terms of respect for the individual I submit that other things can be important.

These other things are what Human Resources professionals calls soft incentives.[101] I mentioned some of these in §4.5.1. – allowing paid time for visiting a sick relative and so on. The point of these incentives is to make the workplace an environment where the best of associates is committed to the business, that is, when at work the associates give their best efforts to the company's we-intentions and the corporation has gone some way to meeting the respect of the person criterion. In the world of large corporations, recognition of good work (in private and in public), support for professional development (employees are allowed and paid to attend trade fairs, have their professional society fees paid and so on), and support for health and wellbeing (cut-price gym membership, employee health checks and so on) are common examples. In a small company, many of these things may not be affordable however, praise for good work, paid time off for family crises, a flexible work week and so on can, provide employees with a sense that their lives are respected by the employer.

Companies can and do also impact positively the lives of others not employed by them. I cite below two examples where a companies do good acts without obvious profit motive, according to their particular expertise.

[101] https://hrsoft.com/short-term-incentive/ (accessed, April 25th, 2023).

The Merck pharmaceutical company donates Ivermectin (Mectizan), a drug that treats river-blindness a severe parasite disease. The CEO of Merck Roy Vagelos championed the establishment of Mectizan Donation Program (MDP) with a series of partners including the World Bank, WHO and UNICEF, who could provide the distribution of the drug to infected areas. Merck provided the drug for free. The MDP organisation has delivered around 2.7 billion treatments around the world (Edmans, 2020: 23-26). For Merck, this was not a profit-driven exercise. The programme has costs, and still does cost Merck money. *Business Week* described the MDP programme in January 1988 as 'an unusual humanitarian gesture'. There are other pharmaceutical companies which do similar activities especially on drugs that can treat rare diseases.[102] However, Merck was one of the first to seek no reward for their activities and clearly set an example that other companies could emulate within their business expertise.

The Vodaphone company brought its excellence in mobile telephony to a significant social problem – the transfer of money in regions of the world where banking services were scarce. In Kenya, a government agency noticed that people were sending mobile phone minutes to their friends and relatives as a proxy for cash. As a result of a connection with Vodaphone a new system was created M-Pesa (M for mobile and Pesa the Swahili word for money). In 2007 Vodaphone launched the service in Kenya, and it has been reported as lifting 196,000 Kenyans out of poverty and increased the number of women in particular moving out of agriculture and into business and retail by 2014 (Edmands, 2020: 188-189). The programme has been rolled out into several countries. The M-Pesa programme cost Vodaphone its associates time and about a million pounds in development work. Again, the Vodaphone example illustrates again that when companies act in line with their expertise, good things can happen.

The programmes of Merck and Vodaphone are line with the 'restricted scope' element of the moral company rule (both companies used their particular expertise to do good) and does suggest that companies do forfeit a profit motive in some situations that help others.

[102] So-called 'orphan' drugs are chemicals that can treat rare (in the US 200,000 persons) disease that the company requests government help in providing it to the population. This is not the Merck model, but the companies do not make money from the orphan drug.

6.1.2. Deontic Powers

Recognition of the new status of corporations as wealth creating corporate moral agents of restricted scope, required to reflect upon and act in accordance with moral norms in business, affords them new powers (described by Searle as deontic powers and defined in terms of rights, duties, obligations and so on (Searle, 2010: 9)).[103] These rights, duties and so on fall into two categories, enabling powers (enabling the entity to do something it could not without its new status) and requirements (obligations and/or duties that its new status imposes on it). Enabling powers endow the entity with new rights, entitlements, and permissions to behave in a manner not previously open to it. In the case of requirements, the entity can now be compelled to do things that it otherwise would not have to do (Searle, 1995: 100).

In the case of corporations, positive powers conferred by the imposition of moral agency might include, 1) the right to moral consideration by society, for example the right not to be subverted in its pursuit of its aims (see Pasternak, 2017: 149-151, and below for a fuller discussion), 2) the option/ability to act in situations of moral concern in a manner that may have a financial cost, and 3) the entity's entitlement to society's praise for good actions and liability to blame for wrong actions. Recognition of 1-3 as corporate deontic powers seems to grant society's permission to the corporate entity to do business in a morally appropriate manner even in the face of shareholder resistance. If the moral company rule is accepted and business corporations are required to be morally responsible, then the *legitimate* expectations of shareholders will necessarily include a moral dimension.

6.1.3. Enabling powers

If the moral company rule is to have force, then it also must be founded on sound argument and some relevant objective features of corporations – features readily observable by third parties. If these readily observable features do not exist, then we would be 'agreeing/recognising' in error and the rule would fail to reflect reality.

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[103] Searle uses 'powers' in this specific manner throughout his work on constitutive rules. Powers are perhaps more usually used in ethics and the law as a right to change the deontic status of other things. For example, making a promise affords the promisee a right that she did not already have. However, I recognise that Searle was not discussing moral responsibilities but rather the attribution of the ability to do something not usually associated with the object or person or group of persons. I employ Searle's specific use of 'powers' herein for consistency with his constitutive rule theory.

The constitutive rule that establishes corporations as institutional facts is supported by a variety of objective features of corporations that support the validity of the rule (§2.3.) and a series of rights, entitlements requirements and obligations. I discuss each below.

Firstly, the *right* to moral consideration. Those who see the corporation as solely a mechanism for economic efficiency acting in a zone of moral exception (Rönnegard, 2015) will see no reason to support a corporation's right to moral consideration in any form. The rejection of the notion of group moral agency commits one to denying any rights to corporations beyond those entailed by the legal declaration of incorporation. However, even those in sympathy with the view that corporations ought to act morally may baulk at the idea of humans attributing moral rights to corporate entities. Why one may hesitate to grant moral rights to corporations, is outside the scope of this thesis, but I suggest it may at least in part be a result of the significant power and vulnerability imbalance between corporations and individual citizens. This imbalance may render society more prone to seeking to exert individual citizen rights than pay attention to those of a more powerful, less vulnerable entity.

Corporations are denied many of the rights of natural persons. For example, corporations have no right to life – a corporation can be dissolved if the shareholders and the directors agree or in a case of egregious law-breaking the courts may revoke corporate status. Corporate entities do not have votes in political elections, although in some countries companies can ally themselves with political parties and make partisan political statements and donations under the constitutional guarantee of free speech (*Citizens United vs. Fed. Election Comm'n.,* 558 U.S. 301 (2010)). This controversial decision of the US Supreme Court removed limits on corporate spending in federal elections. In the specific case it was ruled that the non-profit organisation Citizens United was permitted to distribute a political documentary critical of Democrat presidential contender Hillary Clinton. The court decided that to limit/prohibit spending on the distribution of the documentary would contravene freedom of speech and that corporate voices were an important component of the 'marketplace of ideas' (Greenfield, 2018: 3-6). Unlike natural persons, corporations may also be bought and sold, merged with other corporations etc. as mere commodities. There are therefore many human-specific rights that do not seem appropriate for corporate entities, and,

excepting some scholarly debate, society recognises these restrictions as appropriate to corporate entities.[104]

However, there is at least one well-described fundamental right to moral consideration that a corporate entity can claim – that of not being subverted in its aims. Avia Pasternak (Pasternak, 2017: 149-151) argues that if we agree that corporate entities are moral agents then we are committed to agreeing that these entities have moral rights, at some level. As a proponent of normative individualism where the rights of individual persons are paramount, Pasternak argues that corporate entities have *derivative* moral rights. The rights are derivative because they are grounded in the rights of those individuals associated with the corporation whether contracted to it or not.

Pasternak claims that, as rational agents, corporations will have a conception of what actions are to their rational advantage and so are aligned with a corporate conception of 'the good'. As with persons, in the event one corporation's moral power is subverted by another corporation, the subverted corporation may thereby act wrongly (and would be blameworthy). However, the wrongdoing would be in part caused by those subverting the corporation, and so they would also carry blame (Pasternak, 2017:150). To create a reason for someone to act wrongly (offering incentives to do so for example) or to create/inspire false beliefs in someone qualifies as moral subversion. Moral subversion such acts that undermine the victim's moral reasoning. Such subversion of a corporate entity could include such internally induced things as the withholding of information and misrepresentation of information that results in a wrong act. Examples include deliberate misinterpretation of pollution regulations or the deliberate structuring of the corporate decision-making process such as to restrict or impede moral reasoning. I envisage external subversion as including such things as unreasonable taxation or regulation by the state, which provides an incentive for wrong actions (respectively tax evasion and taking risks in regulated areas of business).

[104] The poles of this debate may be seen from the work of Kent Greenfield, a constitutional and corporate legal scholar, and the philosopher Kendy Hess. Greenfield argues for a limited, but nonetheless much greater than current, recognition of corporate personhood allied with a reciprocal corporate acceptance of and compliance with the norms of citizenship (Greenfield, 2018). Hess, although a supporter of corporate responsibility, argues against any corporate rights and holds that all rights that we claim for persons are to protect us from any who would exploit human vulnerability (Hess, 2013: 333).

Defining unreasonable taxation is a vexed topic.[105] What I have in mind here are taxes on goods, services, or doing business (employee or land taxes for example) that threaten the existence of the corporation. An example is a case brought to the Supreme Court of British Columbia by the Catalyst Paper Company in 2009.[106] Catalyst argued that property tax rates in a particular municipality in which Catalyst had manufacturing plants, were significantly higher than neighbouring municipalities. The CEO of Catalyst stated that, "Excessive property taxes are diverting scarce capital that's needed to support the long-term viability of our operations as we face one of the most difficult markets in decades…and continuing to pay excessive tax bills with borrowed money is just not sustainable or prudent, especially in current credit markets." The Catalyst company challenged the taxes in court, ultimately to lose the case. However, smaller, less powerful companies could risk closure, either by accepting the tax regime or because of the cost of a legal challenge to it.

Regulations are rarely perfect and there is always a temptation to find interpretations that permit actions intended to be prohibited. A contemporary example is the exemption of business meetings in UK restaurants from many restrictions during COVID pandemic lockdowns. One restaurant was reported as greeting all comers with 'Hello, welcome, business meeting, yes?'. However, deliberate, or unintended over-regulating, such as the imposition of prohibitive bureaucratic requirements, may also encourage evasion by deceit. If the regulatory paperwork is in any way ambiguous for example, the temptation to misrepresent will emerge.

In summary, corporate rights to moral consideration are not the same as for natural persons. However, a corporate entity has, at a minimum, a right to expect its associates and society at large to respect its ability to reason on moral questions related to the company's conception of the good (their business objectives principally). It could be argued that this right is a barrier to competition. However, to be useful in the context of business, 'respect' should be seen as allowing for fair competition. It is not intended to prevent Nike from trying to outperform Adidas in the market for trainers. Companies operating in what is supposed to be

[105] Taxation of an activity will, at some level, threaten its continuation. It is the role of the body imposing the tax to ensure that, assuming the activity is desirable, the tax does not terminate an otherwise useful activity or reduce competition by making it too difficult for competitors to emerge.

[106] https://www.catalystpaper.com/media/news/corporate/catalyst-takes-legal-action-challenge-unreasonable-taxation (accessed, January 19th, 2021).

a competitive market have a moral right that the state tries to guarantee that competition between these companies is fair. Respect here includes honouring a competitor's right to work to take market share for example. [107]

The second *right* for a company following the moral company rule is to take a position on acts with moral import that may cost more (see §6.1.2. for extant examples). The recent controversy around the clothing company Boohoo using sweatshop suppliers who paid workers well below the minimum wage (as low as £3.50 versus the contemporary legal minimum of £8.72) is a case in point.[108] Good business dictates that the lowest possible cost of goods is desirable both as a means of increasing profits and offering competitive pricing to consumers. However, the outcry following the *Sunday Times* undercover investigation suggests that society was either outraged at the law-breaking and/or expected companies to act with concern for others, in this case employees of suppliers, even if it means cost increases.[109] An independent review led by Alison Levitt QC (Levitt, 2020) reported, amongst other findings: "…(i) Boohoo's extraordinary commercial growth has been so fast that its governance processes have failed to keep pace; (ii) It has concentrated on revenue generation sometimes at the expense of the other, equally important, obligations which large corporate entities have…". In her view, corporations have 'other, equally important, obligations', which speaks to a social expectation of moral responsibility.[110]

There are also examples of companies taking moral responsibility at the expense of economic efficiency, such as the actions of the Johnson & Johnson company to the Tylenol tampering incident in 1982 (see §1.5.1. and, Merck, Vodaphone in §6.1.2.).

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[107] 'Fair' is a tricky term. What I have in mind here is that the competition is conducted within the law and regulations and that neither company is being dishonest in how they approach organising their business to compete effectively.

[108] https://www.independent.co.uk/news/uk/home-news/boohoo-leicester-factories-modern-slavery-boohoo-leicester-factories-modern-slavery-investigation-coronavirus-coronavirus-fast-fashion-a9602086.html (accessed, September 30th, 2020).

[109] https://www.thetimes.co.uk/article/boohoos-sweatshop-suppliers-they-only-exploit-us-they-make-huge-profits-and-pay-us-peanuts-lwj7d8fg2 (accessed, September 30th, 2020).

[110] It is possible that she meant her comment to be restricted to legal obligations, but as reported, there was no such clarification. Consequently, I read her opinion in terms of overall obligations to others.

The constitutive rule asks for an *entitlement* to praise for good actions and blame for wrong actions. Here there is an imbalance. The actions of corporations are, rightly, under considerable scrutiny by the media, consumer activists and so on. Incidences of real or suspected corporate misdeeds are commonly reported and commented upon. The media and public are quick to condemn wrongdoing. There is little doubt that society recognises (correctly as I see it) corporate moral responsibility and society's right to apportion blame. One contemporary example is the ability of corporations to legally avoid taxes in particular countries by allocating sales to a subsidiary company registered elsewhere.

On the other side it is rare for companies to receive praise to such an extent for good actions. It may be argued that praise is not warranted because the sacrifice of companies to perform a moral act is less than for a person. Many good acts by companies may be characterised as just good business (see Johnson & Johnson's CEO quote above and chapter epigraph). However, profit is a company's primary (perhaps only) aim and is society's reason for permitting and recognising incorporation. So, I would argue that a loss of revenue is a sacrifice for a company in the same manner as, for example, time spent performing a charitable act is a sacrifice for you or me. While ultimately the boost to a company's reputation may improve business, arguably the pleasure of having been charitable is also a benefit to the charitable person.

However, such actions do take place and get some recognition in the media. One recent example is the response of the Procter & Gamble Company to the aftermath of Hurricane Laura in the U.S. State of Louisiana (Business Wire, August 31, 2020). Procter & Gamble provided free products and services to local communities. Many companies perform similar civic duties at larger relative business costs than that sustained by Procter & Gamble in Louisiana (distilleries switching production to alcohol-based hand cleanser during the worst of the Covid pandemic for example) and smaller local activities such as supporting amateur sports teams.

Therefore, evidence such as the examples above (and those in §6.1.2.) points to the fact that in many cases corporations take responsibilities to others seriously and act accordingly. If the moral company rule is to have real force in holding corporations morally responsible for wrong acts, then there is a reciprocal responsibility on society to recognise that one

consequence of the rule is that we should offer praise for good corporate acts. Such praise can only encourage moral reflection and improvement in corporate entities (see below).

6.1.4. Requirements of corporate moral responsibility

There are several *requirements* for a company associated with corporate moral responsibility. These requirements, obligations and/or duties are similar to the requirements, obligations and duties that we ascribe to human moral agents. These may include, 1) a requirement to demonstrate reasons for moral aspects of business decisions, 2) an obligation to honour the Kantian concepts of treating people as ends not merely as means, and 3) a duty to engage in moral improvement (learning from mistakes and changing internal structures accordingly).[111] There is empirical evidence that some companies exercise each of these negative powers. However, I do not mean to suggest that every corporation meets these standards, but rather that corporate entities clearly have the capacity to act in accordance with the requirements, obligations and duties outlined above, as required by the moral company rule.[112] I offer examples of corporate actions on each negative deontic power – requirements, obligations, and duties - below.

One other requirement is to demonstrate appropriate explanation of the reasons behind moral aspects of business decisions. Proving that we have reflected on a decision may be seen, at least in part, as a matter of consistency between what we say and what we do. However, there are many decisions we make on matters of moral import that are automatic in the sense that we simply react in line with our settled moral dispositions. For example, I will swerve when driving to avoid a collision with a dog or cat. It is only on telling the story that I may reflect and mention that I didn't want to injure them. The swerve was an instant reaction. Such an automatic response will be true at some level for companies also. Some decisions such as whether to provide short measures in our products, will require little or no reflection since

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[111] It should be noted that as with humans the exercise of these moral powers by corporations is optional. Even though I believe that I have the obligation and duty described in 2) and 3) I am free, at a cost to the perception of my moral dispositions, to opt in some situations to decline to meet them.

[112] For example, as Ray Fisman and Tim Sullivan point out, '*The owners of a company with fat profit margins and an unassailable position in the marketplace…can afford to be honest and charitable. But business owners in the cutthroat business of textile production in Bangladesh, say, might not have this luxury.*' (Fisman & Sullivan, The Inner Lives of Market: How people shape them and they shape us. *New York, Public Affairs*, 2016:180, cited in Storr & Choi, *Do markets corrupt our morals?* Palgrave, Macmillan. 2020: 40).

providing short measure is simply not how the company operates and anyone suggesting it would be out of step with the company's dispositions and operating principles.

However, as many corporations have extensive processes and procedures for reflective decision-making on many business-related matters and decisions tend to be more involved, the 'automatic' response is a less likely scenario. Reflection is built into the processes and procedures to ensure reasoned decision-making. Absent the situation where the company's ethos means that reflection is unconscious (the short measure example above) it is reasonable to expect deliberation/reflection on decisions from corporate entities. The current debate about corporations 'greenwashing' (making announcements about environmental issues but not doing much in response) demonstrates the need for consistency between words and deeds.[113] When companies are shown not to meet a requirement for action in response to policies, blame and sanction tend to be swift.

Take, for example, the recycling of single-use coffee capsules. The global coffee capsule market has been estimated as worth over $10 billion and growing fast. But the discarded capsules remain difficult to recycle. The problem is that consumers usually must use special recycling services instead of local general recycling services. Despite this, in Canada, the Keurig beverage company claimed on their capsule packaging that consumers could recycle their single-use plastic coffee pods by simply breaking open the top, emptying out the coffee, and throwing the empty pods into recycling bins. However, the empty capsules were not accepted at recycling centres in most Canadian provinces (Quebec and British Columbia being exceptions). It is reported that the city of Toronto alone had to remove 90 tonnes of plastic pods from recycling bins in 2021. Keurig were taken to court and ultimately fined three million Canadian Dollars and ordered to change the misleading recycling claims on the packaging.[114]

There are also good examples of companies observing the moral responsibility to help solve environmental issues and explaining their reasoning. Consider the example of General Motors (GM). Recognising the impact of automobiles on the environment, GM has a stated

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[113] See, for example, *The Daily Orange*, March 2020. https://dailyorange.com/2020/03/fashion-companies-use-greenwashing-lie-consumers/ (accessed, December 14th, 2022)

[114] https://thesustainableagency.com/blog/greenwashing-examples/ (accessed, March 26th, 2022)

objective of reducing its carbon footprint to zero by 2040. In support GM have a publicly stated plan with objectives such as to launch thirty new model electric vehicles by 2025. This goal and plan illustrate a commitment following reasoned reflection and can (and indeed will) be monitored by society to verify its veracity.[115] It is worthy of note that there is already evidence of the strategy in action with the US launch of the 2024 Chevrolet Equinox an all-electric, mid-range vehicle and a commitment to launch all-electric vehicles in Europe and the UK.[116]

My account has an *obligation* to honour the Kantian concept of treating people as ends not merely as means. Earlier I highlighted the example of the fashion company Boohoo and its suppliers acting in contravention of this obligation (§6.1.3.).[117] The Boohoo case appears to be one where the company acted in line with the idea that the market is morality-free or a zone of moral exception (§5.1., Rönnegard, 2015). While there are lapses in the conduct of any company, as there are moral lapses in the case of persons, examples of good corporate policies on employee and supplier treatment are highlighted on company websites today, allowing public scrutiny, or public concern, if they are not published.

The extent of corporate compliance with these obligations is an empirical question; however, the annual lists of 'Best Companies to Work For' attest to the endeavour of many corporations to meet the obligation of not treating their employees as mere means. One UK example (Best Companies[118]) that reports "the best 33 companies to work for" asks employees questions, in confidence, about company performance in the following categories – Fair Deal, Wellbeing, Personal Growth, My Company, My Manager, My Team, Giving Something Back and Leadership. These are all relevant areas illustrative of corporate employee care objectives in action. I suggest that citation on lists like this constitutes praise

[115] https://news.gm.com/newsroom.detail.html/Pages/news/us/en/2021/jan/0128-carbon.html (accessed, January 4th, 2023)
[116] https://www.cbsnews.com/news/general-motors-reveals-new-electric-vehicle/ (accessed, January 24th, 2023) and https://www.moveelectric.com/e-cars/us-car-giant-general-motors-return-uk-all-ev-line (accessed, January 25th, 2023)
[117] It can be argued that as the workers agreed to the salaries they were treated as ends in themselves. However, at this end of the job market I suggest they were indirectly coerced by the absolute need to get some sort of employment.
[118] https://www.b.co.uk/best-companies-league-tables?companysize=Big (accessed, December 14th, 2022)

in an appropriate form for corporate entities – it is an appropriate expression of positive corporate reactive attitudes.

The final requirement is a *duty* to engage in moral improvement (learning from mistakes). Having made a mistake, a person will use the experience to reason better in the future and not make the same mistake again. When applied to moral questions that is, in essence, what moral improvement consists in. Learning from mistakes is a common corporate response to the discovery of wrong actions. The response by the Boohoo company to the issue cited above illustrates learning from mistakes at a corporate level. In response to the analysis of the issue by the independent inquiry (instituted by the company) Boohoo made clear that the Board of Directors accepted all the recommendations of the enquiry and were putting new measures/procedures in place to prevent a recurrence.[119] Only time will tell if the new measures work and are supplemented in the future, but the assessment of mitigation procedures, illustrates reflection on moral issues and a desire to improve.[120]

I conclude that there are sufficient relevant objective features of corporations – features readily observable by third parties – that support the notion that it would be right to recognise the moral company rule. Corporations are clearly able to act as moral agents within the scope of their business expertise. Many do but withholding society's expectation of moral aspects of business makes the option of Turing Pharmaceuticals' strategy available.

6.2. Objections

There are two commonly voiced objections to the corporate response to the deontic powers discussed above: 1) there are many examples of companies not practising these and 2) where companies do, it is only for commercial gain and so their actions do not represent moral responses.

The first I have tried to acknowledge in each section above by highlighting bad as well as good practice. I make the case only that corporate entities have the capacity to behave as

[119] https://www.reuters.com/article/us-boohoo-suppliers-idUSKBN2490PU (accessed, December 14th, 2022)

[120] Since writing the above, it seems as if Boohoo did not keep its promises and continues to exploit suppliers, suggesting poor corporate dispositions. See: https://www.bbc.co.uk/news/uk-67218916 (accessed, November 6th, 2023).

moral agents. Overall, I submit, companies are just as fallible as humans, and in addition, are in the shadow of the mantra (faded but not gone) that morality has no place in commercial activity, a mantra with no echo in other areas of life except perhaps some wars. If the moral company rule were recognised as part of the business world, companies would be in a more supportive moral environment.

The second, moral concern for commercial gain, is more difficult to address. By the moral company rule, companies are restricted in their moral agency to their fields of endeavour – their business. Corporations can only be expected to act with moral concern within their capabilities and expertise as a company (see §4.5.1. – a camera manufacturer is unlikely to be able to physically assist in food delivery following a natural disaster, but a haulier probably is). While, in common with persons, there may be little virtue available to companies from acting with moral sensibility simply as a means to financial gain, the results of morally sound actions by corporations are likely to be beneficial to others. Importantly, as companies affect the lives of so many people, any benefits accrued from corporate moral sensibility will have significant effects. However, some examples of positive corporate moral actions (acting with concern for others) do not entail efficient use of resources for gain. As I have privileged experience of Procter & Gamble, I can say with confidence that helping in Louisiana (§6.1.3.) did less for sales of the *Tide* laundry brand than would spending the same amount of money on direct-to-consumer advertising. The Merck and Vodaphone examples also provide evidence of corporate decision not made for profit reasons (§6.1.1.).

6.3. Summary

Acceptance of the constitutive rule, *'We agree/recognise that when a corporation is a functioning business corporation X^I, we will think of it and treat it as a moral agent of restricted scope Y^I, so that it may produce goods and services and act in wider society in a manner consistent with moral norms within its capacity, C^I'*, would afford corporations a series of new status functions and deontic powers. Taken as a 'package' these functions and powers would institutionalise moral responsibility for actions that affect natural persons others and other things of value. The new status of moral agent would be accompanied by a social expectation that companies behave towards others in similar manner to humans.

6.4. A dilemma

Just as humans often pay a cost when acting with moral sensitivity, so also there would be costs to corporations rejecting the 'zone of moral exception' notion described in §5.1. and so, there is a choice for society to make between the two models of business activity. I have called these models the economic actor model and the social actor model. The economic actor model is the established view of commerce and holds that corporations exist to maximise (or optimise) profit, acting within the law, but with no other-regarding responsibilities. The social actor model acknowledges the importance of corporate economic activity within the law (that is after all what legal systems licence them for) but in addition expects corporations *qua* corporate entities and their associates to assume moral responsibilities beyond their legal duties.

There is therefore a dilemma: do we accept economic efficiency without moral responsibility or insist on economic efficiency with moral responsibility? Society has the option to choose between these as corporations exist only because we (or more precisely the legal systems that regulate our societies) grant them privileges that the persons requesting incorporation could not otherwise accrue.[121] I describe here the principles of both models and highlight some of the consequences of accepting each.

6.4.1. The economic actor model

The option of characterising corporations solely as economic actors, which I call the economic actor model, denies a role for morality in the legal pursuit of economic gain (see 5.1.), consistent with the zone of moral exception thesis (Rönnegard, 2015: 192-199). According to the economic actor model, neither the corporation nor its associates should be constrained in their business actions by 'other-regarding' considerations.[122] The economic model is based on the notion of financial benefit as the sole goal of the corporation, acting in the marketplace within the law. It views moral considerations as interventions in the market

[121] Recall, important examples are limited liability for shareholders, asset lock-in (investors cannot recover their investment from the corporation, they may only sell their shares in the market), ability to sue (and be sued) as an entity in law (see §1.2.1.).

[122] One successful exception to the maximise profit objective is the John Lewis Partnership. Their stated profit aim is, "We aim to make **sufficient profit** to retain our financial independence, invest in our Partners…". (emphasis mine). https://www.johnlewispartnership.co.uk/purpose/happier-business.html (accessed, January 4th, 2023)

system which are unnecessary and detrimental to the aspiration of market exchange efficiency, which, if achieved, benefits society. This concept is based on the work of Adam Smith in the 18th century, and I introduced its history in §5.

Since the time of Smith's work, many models of markets and company responsibility have tacitly or explicitly held that the market is either free of moral sentiment (free of the need by participants to consider their effects on others) or at least a 'zone of moral exception' where participants (including corporations and those acting on behalf of corporations) are excepted from normative moral responsibilities (see §5.1. for more detail). So long as corporations are functioning within the law and any relevant regulatory constraints, the company, and those contracted to it, are free (indeed in some cases expected) to act with self-interest, where that interest is expected to be that of the corporation.

This thesis is not the place to analyse principles of market economics. It is however important to note that since the time of Adam Smith empirical evidence suggests that markets which encourage enterprise and the pursuit of wealth have been efficient environments for wealth creation. For example, increases in Gross Domestic Product (GDP) per person since 1800 in the US and England are significant at c. 22-fold in US[123] and c. 12-fold in England.[124] These markets were not 'free' in the sense of being without regulation; however, in both cases individuals and companies were rewarded for enterprise and successful competition by the accumulation of personal wealth.[125] The creation of such considerable wealth in countries with strong legal and regulatory systems coupled with a desire to keep markets as competitive as possible is one potent reason in favour of grasping the economic actor horn of the dilemma.

6.4.2. The social actor model

The social actor model (the corporation as morally responsible for its actions) places commercial exchanges in the realm of quotidian social interactions. It rejects the ideas that

[123] See https://www.bbc.com/future/article/20190111-seven-reasons-why-the-world-is-improving (accessed, April 27th, 2022)).
[124] https://ourworldindata.org/grapher/gdp-per-capita-in-the-uk-since-1270 (accessed, April 27th, 2022)
[125] It should be noted here that much of the wealth created in England was the result of exploitation of resources of other countries under colonial rule. Additionally in the US expansion across a resource-rich continent was an important factor in the country's success.

corporations are separate from society and that the market is a morality free zone or zone of moral exception. Rather, it insists that the market is not a separate social space. Interactions between market participants (individuals, partnerships,[126] corporations) while doing business are held subject to the same rules as any other set of social interactions. The model expects all participants, corporate entities and persons acting within corporate entities to act with moral concern. Overall, the social actor model is an expectation that market participants act to optimise their financial success and create wealth, but to do so with moral concern.

Moral concern here involves adherence to moral principles such as concern for others. For example, as discussed in §6.1., the social actor model, as I conceive it, would place an obligation on companies to honour the Kantian concept of treating others (corporate associates, suppliers, consumers, other corporations) as ends and not as mere means. Market participants would therefore be expected to reflect on decisions and ultimately act with appropriate moral concern.[127]

To illustrate with a simple example, consider Adam Smith's now famous butcher, brewer, and baker.[128] According to the social actor model, the butcher and baker would be under an obligation to strive to keep prices reasonable and perhaps to donate unsold products to the needy, directly in Smith's time and to a local foodbank today. The brewer should treat his suppliers (farmers and others under contract) as partners in the business of brewing by avoiding 'winner takes all' negotiating.[129] Further, while donating free beer to the poor may be a suspect act, providing the organic waste from brewing free or at minimal cost to farmers and horticulturists as animal food or fertilizer could be a reasonable expectation. These acts

[126] Partnerships are business agreements where two or more people share the ownership, as well as the responsibility for managing a company. They also share the income and are personally responsible for any losses associated with the business.
[127] Would this mean that a company could not compete another into bankruptcy? In a market where competition is fair, then no, a free enterprise system allows for the redundancies of poor products and obsolete technologies.
[128] "It is not from the benevolence of the butcher, the brewer or the baker that we get our dinner, but from their regard for their own interest." (Smith, [1776], 2012: 19).
[129] The practice of negotiating agreements that benefit one party to the disadvantage or even detriment of another. Clearly, within the Kantian view of treating others as mere means, consent on the part of the disadvantaged party could be considered morally acceptable. However, I submit that in many situations the power imbalance between the parties (a large corporation versus a sole trader for example) renders the practice suspect at minimum.

are of course also open to large corporate butchers, brewers, and bakers albeit on a different scale.

Application of the economic actor model may be justified by the expectation of high financial returns on investment and allocational efficiency leading to increased wealth overall. The social model may be justified based on the nature of incorporation – the fact that corporations are social constructs permitted in the expectation of wealth creation. I have argued above (§1.2.) that functioning business corporations are best seen as amalgams of three necessary elements the legal entity (a person in the eyes of the law), the people contracted to the legal entity, and the person to person and person to legal entity relationships. The legal entity is a grant, by the state, of various privileges, embodied in the legal entity, and available to the human element of the corporate entity to facilitate business. Society makes possible these privileges (that are either difficult or impossible to achieve without legal mandate) in the expectation of social benefit. There is an expectation, at minimum, that wealth will be created in the form of new jobs and tax revenue. The expectation of an overall positive social benefit means that incorporation comes with restrictions on the externalities that corporations can impose on society. In general terms externalities may be seen as effects that are imposed on society by business activity.[130] For example, the pollution of a river or the atmosphere by a production process is imposing on society some of the negative effects of manufacture. Pollution regulations are designed to prevent pollution altogether, or at least to shift the cost back onto the manufacturer.[131]

Regulation intended to protect stakeholders is common and necessary, to ensure that information concerning goods and services are freely available and to prevent unintentional or intentional corporate harms. Market imperfections are commonly seen in cases where unfair competition arises or competition ceases. An example of regulatory intervention is anti-trust legislation – the prevention of monopoly suppliers.

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[130] "…[externalities] occur in an economy when the production or consumption of a specific good or service impacts a third party that is not directly related to the production or consumption of that good or service." https://www.investopedia.com/terms/e/externality.asp (accessed December 1st, 2020).

[131] This is a negative externality. There are also positive externalities. For example, a company encouraging its workforce to walk or cycle to work would reduce automobile pollution and so be a positive for society.

Persons outside the corporation will find it difficult to access information on the intricacies of corporate decisions. There is what is described as the corporate veil through which it is difficult to see. The regulation of corporate accounting and financial activities aims to permit current and potential investors to have near perfect information[132] on the actual state of the company *per se* and, in comparison with others, to permit reasoned investment. Direct protection of consumers of goods and services is also regulated. A signature example is the pharmaceutical industry, which has some of the most restrictive corporate regulations. While regulation may be seen by some of those following the economic actor model as a hinderance to an optimally efficient market, it may be justified by the greater social good.[133] Strong healthcare regulation is likely to result in fewer welfare hazards and lower costs to healthcare systems.

It is primarily the question of social good that the social actor model addresses. It encourages economic efficiency and profitability while expecting moral concern by corporations. One reason for the addition of moral concern is that regulation and legislation usually follow events rather than pre-empt them. To stay with the pharmaceutical industry, many of the regulations in force today were introduced in response to a series of severe cases of drug side effects. For example, many of today's regulations have their origin in the thalidomide disaster in the 1960s.[134]

The social actor model expects those behind the so-called corporate veil (individual corporate associates and the corporate entity via its decision-making procedures) to act with moral

[132] The nature of business is such that near-perfect information may seem an impossible situation. By near-perfect I mean that information on the knowable strengths, weaknesses, opportunities, and threats for the company is available to investors.
[133] The provision of medical services and medicines is highly restricted in the most countries for reasons mainly to do with the desperation of those needing medical services and medicines and the lack of expertise of most people. To have medical services and medicines highly restricted but not to have heavy restrictions on the pharmaceutical industry would be bizarre even if we follow the economic actor model.
[134] Thalidomide is a drug developed for pregnancy-related morning sickness that was later found to cause death or severe abnormalities in babies. It is estimated that it led to the death of c. 2,000 children and serious birth defects in more than 10,000. It is worth noting that it is an effective drug that is currently used to treat a skin condition and one form of cancer. The issue was its effects on the development of foetuses, resulting in birth defects.

concern. The expectation is that corporate moral sensibility would make corporate harms less likely and in the best case avoid the need for some regulations. While the avoidance of new regulation is a utopian vision, I believe it is reasonable to expect fewer regulatory and legal violations with the social actor model, a point in favour of grasping this horn of the dilemma and choosing to pursue the social actor model.

6.4.3. Foreseeable risks to grasping each horn of the dilemma

The situation today regarding moral concern in business is a middle ground where the nature of particular market actors (individual and corporate) seems to lie on a continuum between lack of moral concern (the Turing Pharmaceuticals example), claims of moral concern that are not easily verified (most major corporations have some statement of concern in their public Vision and Mission statements) and companies that show concern for others (Johnston & Johnston, Merck, Vodaphone and Procter & Gamble examples). We could of course elect to maintain the current state of affairs. However, I argue above (chapter 4) in favour of corporate entities (as social facts) being capable of moral concern. If that is right, then choosing to require corporations to exercise that capability and to foster a social expectation of corporate concern for others seems apposite.

Below, I describe above some of the consequences that may reasonably be predicted on adoption of each of the economic and social actor models. It is important to recognise that both models have potentially negative consequences in the form of risks to business, and costs to society. Some of these are predictable; however, it must be acknowledged that, whichever horn of the dilemma is grasped, there would likely be unpredictable consequences over time. Regardless of which model is adopted it is likely that there will continue to be a role for *post-hoc* regulation of market actors. I describe here an overview of some of the predictable negative consequences of each model.

6.5. Economic actor model - consequences

Foreseeable negative consequences of the economic actor model include 1) imposition of unreasonable expectations of the legal and regulatory systems and 2) legitimisation of ‘might is right’ in the business world.

The principal negative consequence of the economic actor model is also one of its attractions – the fact that legislation and regulation would be the only constraint on business-related

actions. As the law and regulation establish the 'rules of the game' and any action within the rules is acceptable, there would be significant pressure on both legislators and regulators to move swiftly to sanction and introduce new rules in response to new situations and ultimately to be able to anticipate problems. Both the law and regulation are however in large part retrospective, acting in response to harmful acts. Additionally, regulators are slow to react to new business activities. Current debates on the regulation of technology companies such as Facebook and 'X' (previously called Twitter) illustrate the difficulties in regulation, 'keeping up' with business innovation. Additionally, the absence of any constraint beyond legislation and regulation is likely to encourage companies to actively seek loopholes and 'workarounds' to expand what is acceptable within the rules. Finally, as successful businesses tend to be innovative businesses, the ability of lawmakers and regulators to anticipate harms is limited. Who foresaw the growth of social media and more importantly the associated business model that relies on the trading of personal information, and its impact on society?

Turn now to the legitimisation of 'might is right'. If the economic actor model endorses the concept of a morality-free zone for business, then companies are encouraged to do everything possible to increase financial returns. There are no obligations other than to make money and obey laws and regulations. Recall David Rönnegard's example of regulated boxing as a metaphor for how actions not permissible in ordinary life are acceptable in the ring so long as the rules are followed. In boxing, the strongest (definable in many ways such as incapacitation of opponent, technical superiority, fastest, and so on) wins. While legislation and regulation can work to control the worst excesses of corporate power, in the absence of any recourse to consideration of what is the right or wrong thing to do in each situation, the most powerful will prevail to the detriment of others. Examples of areas where others can be disadvantaged include employee benefits (I would cite here the demise of Defined Benefit Pensions in the UK[135]), unreasonable, yet legal, price gouging (the Turing Pharmaceuticals example), corporate negotiating tactics that cause supplier businesses to fail, and so on.

[135] A Defined Benefit pension is one which calculates pension awards based on years enrolled in the scheme and final salary. They assure an income for life and are often inflation linked. The most common alternative is the Defined Contribution pension where the employer and the employee both make contributions to a 'pot' which is invested. On retirement the proceeds are used to purchase a pension. It should be acknowledged that government had a significant hand in the change to Defined Contribution pensions, but companies were quick to turn to cheaper, less generous options once empowered.

6.6. Social actor model

Foreseeable negative consequences of the social actor model can also have undesirable social and commercial effects. For example, price increases are a simple way for companies to recoup the costs of a business re-organised to meet moral responsibilities that incur additional cost. As companies work to maintain returns to shareholders, there will be a temptation to increase costs to consumers.

There is also a risk of increased conflict within corporations. Moral questions tend to generate strong feelings. Therefore, individuals and importantly groups within companies (the sales department resisting restraints on certain practices, the manufacturing department resisting cost/productivity constraints and so on) may find themselves in dispute with the corporation's aims and objectives. Strong corporate entities tend to have strong processes and procedures in place to manage internecine conflict so I suggest that this would be a short-term risk rather than a drag on the company's efforts to embed moral responsibility in quotidian business practise.

In addition to risk of cost increase and conflict, I see three additional predictable issues: 1) violation of the shareholder primacy convention, 2) society holding corporations to a higher standard than persons and 3) corporate response as a generator of business complexity.

The shareholder primacy convention holds that corporations should act only in the best interest of their shareholders, most or all of whom have invested in anticipation of a generous return.[136] Acting always in the interests of shareholders is embodied in the 'shareholder primacy norm' (SPN) (Rönnegard, 2015: 108-117). Shareholder primacy is a convention, designed to prevent company directors from acting beyond their powers and importantly, in situations where personal interests conflict with corporate interests, to ensure that the corporate interest is acted upon regardless of the personal (Rönnegard, 2015: 108-9).

[136] This is a widely accepted expectation of company governance. However, there are situations where it is not followed. In some cases, shareholders and management may have divergent interests, a fact which management often tries to keep hidden from shareholders. Management may also make decisions in the best interests of management, not shareholders. This is illustrative of the fact that corporations are no less fallible than humans.

Violations of the SPN are most likely when a morally responsible act incurs additional cost. Recall the example of the company discovering that it was paying its employees more than competitors (§5.2.). There is a clear case for reducing the salaries immediately, so immediately acting on price information as required by market efficiency. Reducing salaries would be expected to increase returns, at least in the short term. If the company did not respond it would be in violation of its duty to shareholders by tolerating an additional cost in the business. The social actor model requires that the company take account of the impact of salary reductions on its employees and in the strongest interpretation of the model would mandate 'no change'. But the 'no change' option may be unrealistic. Taking the 'no change' strategy, without reflection, would provide investors with a case that the company was not acting in their best interest and may generate legal action and investor flight that could damage the company, thus disadvantaging many stakeholders. I described two options open to managers: 1) justification of 'no change' assuming if and only if this is neutral to shareholder return, and 2) a phased reduction in the salary bill by restricting increases over time. If the 'phased reduction' option is chosen then the competitive difference is managed, without threatening the economic conditions of employees, and in a manner consistent with managers' fiduciary duty to the company and shareholders.

The second possible negative consequence is that society may hold corporations to a higher standard than persons. No-one is a perfect moral actor. Natural persons generally fall between the extremes of moral reprobates and moral exemplars. Most people reflect on issues and make genuine effort to 'do the right thing'. Human fallibility means that individuals make mistakes, make bad choices, delude themselves on their reasons for choices and so on. As corporations are collectives of people acting in line with corporate 'we-intentions' I see no reason to suppose that corporate choices would be less prone to these lapses. Over time, society has developed a fine-tuned sense of how actions are to be judged with blame, shame and sanction applied with sensitivity in most individual cases. Such an ability to judge reasonably is not obviously at play when corporate actions are assessed.

The corporate entity acts through its associates and the social actor model asks that those people reflect, when necessary, and act in business by the same rules as they would in everyday life. Praise and sanction are due to individuals in response to morally relevant actions. When doing business, these same people are acting as a collective and the social

actor model requires that collective acts are similarly the result of reflection and moral concern. In cases of serious complex wrongs where no person or set of persons can be identified as the malefactors, it is the corporate entity (person in law) that is sanctioned. Similarly, when a corporate act may be judged to be praiseworthy, the entity should, on my view, receive appropriate commendation.

When we judge those with power and influence there is a tendency to hold those with power to a higher standard of conduct than we do ourselves. This is commonly seen in media and social judgement on cases of moral lapses in politicians for example. Similarly, a glance at the content of any general media outlet will uncover many reports of corporate wrongs, real or suspected, and few accounts of praise for good corporate actions. While there is clear justification for an expectation of probity the risk is a lapse into judgements on personal behaviour for example that are of no or little relevance to the performance of the person in a particular role.

There exists a general mistrust of corporations in society whereby ulterior motives are frequently sought when companies announce positive news on an ethical issue. The contemporary charge of 'greenwashing' when companies announce environmentally friendly actions/policies is a case in point. Mistrust will not disappear in the event of acceptance of the social actor model; indeed, there is a risk that it will intensify. While scrutiny is essential and mechanisms that permit society to see 'behind the veil' of the corporation would be required, it is likely that we will forget that in the social actor model corporations will fall into the same categories as persons (exemplar, reprobate, and everything in between) regarding their moral responsibilities. Combining the mistrust with a poorly developed ability to judge corporate actions reasonably carries a risk that society's expectations of corporate moral responsibility in the social actor model will be so great as to be unachievable and so significantly undermines the force of the social actor model.[137]

The third potential negative consequence of the social actor model is that the corporate response to acting with moral concern generates business complexity and by extension cost.

[137] It can of course be argued that establishing an unattainable goal would act to prevent corporate complacency. Exploring this is not within the scope of this work, save to say that at a personal level, if the goal is unattainable, I would be inclined to do the minimum necessary to prevent censure.

The social actor model requires that every corporate associate attend to responsibilities within their sphere of expertise as individuals working as a collective. The corporation will be judged on the collective achievements of its associates – there will need to be a 'we-intention' to act with moral concern in business.

In the social actor model, integrity becomes a fundamental element of every corporate associate's approach to business. However, it is inevitable that the social actor model would generate increased complexity (and internal costs) as companies work to integrate and formalise the new expectations into how business is done. For example, it seems reasonable to expect management to look for expertise in the form of external consultants and to try to reduce internal disruption as the new expectations are integrated into their business processes and procedures. Additionally, a common corporate approach to regulation is likely, that is, to appoint a Vice President and establish a new department to manage the new expectations and reduce the impact on those directly involved in production. This department will be a cost and its efforts will increase the complexity of doing business. One area would be likely, the need for additional transparency on how the company is acting internally so that society can judge whether expectations are being met and it is reasonable to expect additional reporting to meet the expectation.

6.7. Which horn do we grasp?

Whichever horn of the corporate actor dilemma (economic or social actor model) we choose, there will likely be negative consequences both foreseeable as described above, and unforeseeable. The question to be answered is, having acknowledged the likelihood of some negative consequences, and matching them against foreseeable benefits, which of the two models do we think is most acceptable – which horn of the dilemma should we grasp?

I am persuaded by the application of the social actor model and see it as an evolutionary step in the development of society's expectations of the nature of corporate actions. The fact that many companies already act, in some measure, with moral concern illustrates that the evolution is already in progress and that recognising the social actor model is consistent with the effective wealth creation that incorporation is designed to facilitate. Based on my arguments in the preceding chapters I see four main pillars of the argument for recognition and acceptance of the social actor model.

First, corporations are real social entities that are fit to be moral agents. While the scope of their ability to perform acts of moral concern are limited by their capabilities as business organisations, within that scope they can reasonably be expected to act with concern for others. Their moral dispositions (the underlying principles companies use to judge how to act) are analogous to those of persons, ranging from poor to good and it seems right to react to their morally relevant actions by assessing the apparent dispositions of the corporation, as we do with morally competent humans.

Second, laws and social mores can distort activities in markets when they are free of moral concern, seen as zones of moral exception for example. For many years in many societies, it was considered acceptable to discriminate against ethnic minorities concerning jobs, salary and so on. By 'acceptable' I mean that it was both a social norm to consider these groups less worthy than a majority group and importantly, that these discriminatory views were supported by the law. In market terms there was a distortion in that companies were permitted, and by social pressure, encouraged to do such things as paying some employees and suppliers less than others and could charge some customers more and restrict access to some places of commerce ('whites only' restaurants in South Africa and the US, UK holiday camps blacklisting families on the basis of their Irish surname for example).[138] Thus, the legal and regulatory 'rules of the game' founded on social prejudice restricted rather than freed markets. Companies operating in a society where moral concern in business is an expectation (the social actor model) are likely to be operating in an environment where these distortions could be challenged and minimised on the basis that the distortions represent a 'harm to business'. I do not suggest a utopian perfection here, merely that adding moral concern to the social expectations of commerce has the potential to enhance market efficiency.[139]

Third, the inclusion of companies as members of the 'moral community' will encourage moral reflection and improvements in corporate moral concern for others and other things of value. Corporate associates tend to act in line with corporate expectations (corporate we-

[138] https://www.theguardian.com/uk-news/2021/mar/02/secret-pontins-blacklist-irish-surnames (accessed, January 27th, 2023)

[139] Society will have an ongoing responsibility to ensure that companies (perhaps especially small concerns such as family businesses) do not act on misguided moral concern. Examples include *moral* disapproval of LGBTQIA+ persons, mixed-race couples and so on.

intentions) and so within the social actor model would be encouraged to bring their individual moral sensibility to their business activities. That is, associates would not be expected to act in business in a manner necessarily contrary to how they act in everyday life, as is the case with the economic actor modal.

There are certain companies that many would not work for. For example, as a Life Scientist I would not work for Turing Pharmaceuticals, and an antivivisection person would not work (unless intending to subvert the company) for an animal testing company and so on. But these are personal choices on where to work based on personal moral considerations and we accept the restriction.

Other examples of the complexity of companies taking a view on moral issues could be a company which has a morally pro-trans policy but with a significant employee base which for their own moral reasons object, or a company based in a morally conservative community where many of the men employed would be uncomfortable with a woman working with them.[140] Again, I believe that work for these companies is a personal choice of the individual. However, in the case where companies introduce policies with which current associates disagree, the company must act as it sees morally fit. Both examples are deleterious because the personal moral codes of some employees may affect how others are treated, both inside the company and outside.

In recent times, companies have addressed such conflict with employees by focussing on 'the business' – what the corporate associates come to work for, their we-intentions. Many (all?) of the various corporate diversity programmes begin with the mantra that everyone's experience and contribution is unique and valuable. It is the contribution of the many different views that drive the business in a manner not possible with a non-diverse workforce. Some companies also build support groups into the policy, which could be a faith group or an LGPTQIA+ group and so on that meets in working hours - lunch time for example. This is not the place for an assessment of these policies. Personal moral codes tend to be non-negotiable, so a company acting on the cases above, even with a mitigation plan, may lose employees. As acting with concern for others does often cause discomfort for the actor, it is likely that the 'pain' is what the company must adsorb to act with moral concern.

[140] I thank Luke Elson (University of Reading) for drawing my attention to these examples.

Fourth, if the social actor model were accepted, praise and blame would become effective sanctions. Ideally these sanctions would ultimately become "dilutive to earnings per share" perhaps even to Martin Shkreli's company (see §4.2.1.). This is possible as companies can 1) respond to reactive attitudes, 2) have the power to reflect on, explain/support their actions, and 3) change their behaviour thus improving their moral dispositions. Many businesses, particularly large corporations use, Key Performance Indicators (KPIs), often specific to day-to-day aspects of their activities that are considered vital to business success.[141] Acceptance and implementation of the social actor model would likely encourage moral improvement (likely not described in such a portentous phrase) to join the list of closely measured KPIs in business.

6.8. Conclusion

I have argued here in favour of applying the moral company rule to corporations in recognition of their status as real entities capable of acting with moral concern. I am persuaded that recognition of the social actor model as an element of corporate governance is a socially desirable aim.

[141] See https://www.thebritishacademy.ac.uk/programmes/future-of-the-corporation/ (accessed, June 28th, 2022).

CHAPTER 7: Recognising corporate moral responsibility

"You think I don't know what a thesis is, right? …
I have a daughter…she did a thesis - great big fat bundle of words about sod all."
The Beiderbeck Trilogy, *I The Beiderbeck Affair*, Alan Plater, 1985. Granada Television, 51:08.

7. Introduction

I have argued that it is appropriate to hold corporations *qua* corporate entities morally responsible for their actions. I proposed a moral company rule to guide the parameters of social recognition of corporate moral responsibility. In this chapter I bring together the elements of my claims into a single line of argument in favour of corporate moral responsibility. I conclude the chapter with 1) a discussion of some of the issues associated with achieving the social recognition of corporate moral responsibility and 2) some of the future work that these issues warrant. I aim to show that I can avoid the charge in the epigraph.

My approach to understanding the nature of corporations is consistent with John Searle's contention that to grasp the nature of a complex collective it is necessary, "…to be able to think yourself into the institution [*corporation*] to understand it." (Searle 2005: 22, [*corporation*] mine). Thinking inside the corporation shows a series of characteristics of corporations that stand out as readily observable (by third parties) and are critical to the structure and functioning of corporations. I have taken the accommodation of these characteristics to be fundamental to any successful theory of the corporation. I make this choice on the basis that while no-one would deny the existence of corporations, many have challenged the notion that there exists a corporate entity that is additional to and separate from those working for it. I claim that a theory that can accommodate the observable characteristics of corporations in action has the potential to make clear their nature and indeed is able to show the independence of corporations as entities apart from their associated persons.

7.1. The corporation

When corporations are functioning (producing goods or services) there are three readily observable, indivisible elements to them. First, the legal entity that is brought into being by an appropriate legal process. Second, the persons associated with it – employees contracted to act on behalf of the legal entity. Third, the various relationships that guide employees in

achieving the goals of the corporation – person to person, person to company, company to person and so on. Together these elements constitute the corporation; they are necessary components. Therefore, I take a tripartite entity of these elements to *be* a corporation.

The existence of the corporate entity is justified by its ability to meet seven criteria for existence. Readily observable features of the functioning corporation stand to justify the criteria. I followed David Gindis (2009) in characterising corporate identity in terms of four readily observable features of the functioning corporation (§1.3. for the complete list) and included three of my own criteria (§1.4.).

First, identity. No two functioning corporations are the same, even if they are engaged in providing similar goods or services. For example, Nike and Puma make trainers and compete worldwide. However, each has clearly (readily observable) different organisational structures based on specific contracts etc., motivational strategies, internal beliefs, and capabilities. These differences create the distinct nature of each and are consistent with corporate identity.

The second criterion is unity. The corporation is distinct from its associates in that the associates are often obliged by their contracts to act in the best interest of the corporation's goals rather than personal goals. I cited the example of working for a company having 120-day payment terms that were at odds with my personal principle of 'payment on delivery'.

Thirdly, persistence in time. Corporations frequently outlive their founders and in some cases many generations of associates. Despite this, many years after a corporation is brought onto being there are readily observable features of the corporation that have survived. Examples include a particular manner of doing business, unique internal structures and so on.

The fourth criterion for existence is causal power. Corporations produce goods and services collectively that could not be achieved by individuals or small groups of individuals. Companies bring together often vast resources of expertise and align it to a single corporate aim. Causal power is what makes corporations so powerful and influential in the world.

Fifthly, consistency with experience and contracts. The experience of corporate associates is clearly that of working for something. Associates (especially long-serving associates) tend to be very loyal to the organisation, and, if asked about their experience will talk of 'my

company'. Associates also describe the company's goals and procedures as their own – 'this is how we do business at XYZ company'. Most associates in today's corporate world are on relational contracts (§1.2.3.) which encourages affinity with the organisation.

The sixth criterion is corporate culture and character. Corporations generate an individual character by means of the processes and procedures used to structure the organisation to do business in a focused manner. These processes and procedures are company specific and define how the company treats persons and other things of value (see below). It manifests in statements such as 'XYZ is a tough negotiator', 'ABC is an ethical company' and so on. The culture of a company develops with time and in line with its character. It is one of the most common things expressed by associates if asked how it is to work at XYZ. Responses such as 'XYZ is a great (dreadful) employer', 'I love what I do at XYZ, it is always well rewarded' and so on. Character and culture are closely linked with character being the more easily observed by a third party; however, I believe that a poor corporate character will not result in a good corporate culture.

The final criterion for existence is the ability to deal with remainders of responsibility. Consider the case of a corporate wrong action that had a simple cause such as an operator failing to implement safety protocols resulting in harm to another associate for example. Here we rightly apply sanction to the operator and potentially also her manager. However as detailed in §1.4.3. corporate wrongs are usually complex, involving many associates acting in line with the corporate character and culture in pursuit of a particular goal, so we are often left with a sense that although some of the human actors are responsible there is something else that is open to censure. This intuition is characterised in statements such as 'VW cheated emissions testing'. Any theory of the nature of the corporation must be able to account for these remainders, and I claim that taking account of remainders of responsibility is as true for moral responsibility (intentional acts resulting in harm) as it is for legal responsibility (acts that contravene a law or regulation).

Bringing these seven readily observable features together provides a framework to determine a workable theory of the nature of corporations.

7.2. Corporations as real entities

Is there a theory of the nature of corporations that will permit us to justify holding corporations morally responsible? I outlined three theories of the corporation that I named the legalistic theories – Legal Entity theory, Aggregation theory and Nexus of Contracts theory. I argued that none of these theories were able to meet the criteria above; that they were unable to accommodate the readily observable features of functioning corporations. Certainly, the legalistic theories fulfil the legal need to define something to litigate against, but that is all.

The Legal Entity theory holds that the corporation is the legal entity established by satisfying the conditions of incorporation. The legal entity is recognised in law as a fictional person and as such can be held legally responsible for actions. I believe the Legal Entity theory is inadequate. Corporations are not fictions, they are visible complex organisations of persons, relationships, and contracts. Legal Entity theory cannot account for the observable features of a company in action.

Aggregation theory claims that, once activated a corporation is composed of the legal person and the individual natural persons who act on behalf of the company. Aggregation theory admits of no entity that is a corporation, rather corporations are simply an aggregate of individuals with certain business-relevant responsibilities. Perhaps the strongest objection to Aggregation theory is a matter of degree. It is not clear where to stop when deciding which persons constitute the aggregate; suppliers, shareholders, consultants are all contracted to the corporation but are they to be 'the corporation'? Also, Aggregation theory has a problem with persistence in time. As associates (however we define them) change we have a new aggregate. Which aggregate should be the corporation?

The third legalistic theory is the Nexus of Contracts theory. Nexus of Contracts theory claims that the corporation is simply a focus or interface which links the various contractual agreements that animate the company. According to Nexus of Contracts theory there is no entity only the component parts held together at/by the interface of contract. Nexus of Contracts theory is unable to account for the criteria for existence detailed above as there is, if the corporation is simply a nexus of contracts, nothing to measure against the observable features of a corporation. These features are those of the contracts only.

One alternative to the legalistic theories is the Real Entity theory whereby there does exist an entity that depends on persons to animate it but has characteristics that are independent of those persons. Real Entity theory meets all the criteria for existence detailed above in large part because Real Entity theory claims that here is a thing in the world that is the corporation. If Real Entity theory is right then, the question now becomes what kind of entity is the corporation?

7.3. The corporation is a social (institutional) fact

Recall that I summarised my argument thus far as follows:

(1) Incorporation creates fictional persons[142] – corporations

(2) The combination of a corporate (fictional) legal person, those humans contracted to it and their relationships creates a quasi-biological organisation – a functioning business corporation

(3) Readily observable features of functioning business corporations qualify them as real entities.

I extended the argument to include further premises, leading to a conclusion that corporate entities are well described as institutional (social) entities:

(4) Functioning business corporations are institutional facts, founded on readily observable features.

(5) Institutional facts are real, social entities in the world.

(C) Therefore, functioning business corporations are real social entities.

A corporation is not an entity in the manner of everyday things such as buildings, persons, books and so on. As discussed in §1.5.3., one cannot point to something that *is* a corporation, one cannot meet a corporation *qua* corporate entity. My defence of premises (4) and (5) follows the social ontology theory of John Searle (Searle, 1995, 2010) which conceives of the corporation as an institutional fact.

Searle argues that institutions such as governments, armies, corporations and so on are established by recognition of their existence as social facts. He claims that corporations are

[142] When a corporation is established by law, the entity (in law) that comes into existence is considered by the law to be a person subject to legislation governing corporations. It can be sued, it can sue, it can own property (buildings, plant and machinery, patents, knowhow) as if it was a person.

social facts according to a constitutive rule, "X counts as (is recognised as) Y in context C". X becomes Y by the recognition of X's having a new status and power(s) that it did not previously have.[143] For example, a rock placed at my study door becomes a doorstop.

A corporation may be characterised by the following constitutive rule:
We recognise that when people perform in accordance with incorporation created by appropriate legal rules (X), we will think of them and treat them as a unitary body called a corporation (Y), so that they can perform more effectively in producing goods or providing services (C).[144] In this rule, 'we' is society; therefore if Searle is right, a corporation becomes a fact in society, a social fact. This constitutive rule is consistent with the tripartite model of the corporation and allows for the readily observable features of functional corporations.

7.4. Corporations *qua* corporate entities have moral dispositions that permit moral reasoning

The responsibility with which this thesis is concerned is moral responsibility. That is the responsibility for an action (with a good or bad result) that was intentionally committed by an entity with the ability to reason beforehand and choose to act on the basis of reasons. One way in which we make judgements on moral responsibility of adult, mentally uncompromised humans (paradigmatic moral agents) is to consider what the action suggests about their moral dispositions. Are we disposed to be truthful? Do we regularly attend to the needs of vulnerable persons? If, yes, in both we have at least some positive moral dispositions. Alternatively, if we may tend to lie to improve our standing with others, and we tend to avoid having to help someone in need, we have at least some negative moral dispositions. We usually make judgements on the moral dispositions of others using their behaviour over time as an indicator of settled moral dispositions.

I argued from the work of David Silver (Silver, 2005) who claimed that corporations have moral dispositions in a manner analogous to those of humans. Corporations have a settled manner with which they treat persons and other things of value (other corporations, the environment and so on). As humans rely on mental states to develop and utilise their moral

[143] A constitutive rule brings new something into being. Contrast with regulative rules that govern an activity that already exists – rules of chess for example.
[144] Adapted from, Adelstein, R., 2010. Firms as social actors. *Journal of Institutional Economics*, *6*(3), pp.329-349.

dispositions, the fact that companies do not have mental states is a common objection to the notion that companies can reason and choose actions with moral import. However, companies are animated by signature moral agents – their corporate associates which the companies can use in lieu of corporate mental states.

We can readily observe corporate character and culture, both of which serve to govern the manner in which companies treat others. We see companies that have suspect moral dispositions (the Turing Pharmaceuticals example, §4.2.1.) and those who try to act with concern for others (the Merck, Procter & Gamble, Vodaphone, Johnson & Johnson examples) just as we see persons with suspect or good moral dispositions. The culture of a corporation is its settled dispositions in action.

7.5. Recognising corporate moral dispositions - a new constitutive rule

John Searle argues that constitutive rules may be iterated in the presence of new contexts to permit Y terms to become X terms at another level of a chain of social entities (Searle, 1995: 125, §4.5.1.). If we apply iteration to the corporation a new constitutive rule may be developed:

'We agree/recognise that when a corporation is a functioning business corporation X^{I}, we will think of it and treat it as a moral agent of restricted scope Y^{I}, so that it may produce goods and services and act in wider society in a manner consistent with moral norms within its capacity, $C^{I'}$. I called this the 'moral company rule'. The end qualifier, '…within its capacity…' is included to take account of the fact that corporations, while real entities, are not persons and so can act on fewer moral issues than persons. I used the example of a camera manufacturer not being well suited to delivering aid to a disaster area while a haulier probably is.

7.6. Society can hold corporations morally responsible via a 'moral company rule'

Society holds many similar social institutions morally responsible. Democratically elected governments for example rely on general recognition of their existence and composition and we expect them to act with concern for others. If this recognition is challenged, then the

government is at risk of dissolution.[145] Historically, many governments have suffered the fate of having their legitimacy questioned by lack of society's recognition.

The situation is not so clear in the case of corporations. When I explain to non-philosophers that my thesis explores whether we can hold corporate entities to moral scrutiny and moral responsibility for their actions, the answer is invariably, "of course you can". My subsequent explanations of the issues around corporate reality and so on have so far been unable to shake their conviction that morality is for companies as much as for persons. However, their conviction loses force when the matter of effective moral praise or sanction is introduced. My friends and acquaintances have, so far, been unable to offer solutions that do not involve legal sanction.

Legal sanction may result in companies being stripped of their ability to do business as a corporate entity. The case of Arthur Andersen company following the Enron scandal uncovered in 2001 where the Andersen company was denied its licence to practice accounting, which resulted in its demise is an example. [146] However, while the activities of the Enron company and its accountants were arguably morally suspect, the companies were sanctioned for law-breaking. There is, to my knowledge, no examples of major corporation being dissolved on the bases of moral turpitude. However, at the level of small business concerns, it may be possible. For example, sometimes law firms are dissolved due to not meeting the Law Society rules about treating their customers. But in effect the firms will be sanctioned for breaking the rules regardless of moral import.

The above examples are extreme and, unless one lives in a theocratic country, one does not expect to be executed for moral turpitude. In §4.3. I argued that corporations demonstrated moral dispositions in a manner analogous to those of persons and further that companies had the ability to reflect on their actions and improve their moral dispositions. If this is right then moral praise and blame should be effective sanctions in themselves, in a manner analogous to their effect on persons.

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[145] A contemporary example is the current unrest in Brazil following the defeat of a populist president Jair Bolsonaro. Many of his supporters are calling for dissolution of the elected government of the new president in favour of a military coup. (See, https://www.bbc.co.uk/news/world-latin-america-64204860 (accessed, January 9th, 2023)

[146] See, https://www.britannica.com/event/Enron-scandal/Downfall-and-bankruptcy (accessed, January 9th, 2023)

If the moral company rule is accepted, then society has a duty to express praise and blame and may require in return a positive response from companies. In the case of praise this may include reinforcement of particular actions (improved employee conditions for example). In the case of blame evidence of reflection and actions that demonstrate a commitment to improvement (published reports of investigations and plans to improve implemented and their effects reported for example). It may be argued that these types of reaction, while valuable, do not reflect the emotional aspects of moral response such as blame followed by shame and praise followed by joy, associated with natural persons.

To understand how praise, shame and so on can be experienced by companies, we need to return to the importance of corporate associates in their role as animating the corporate entity. I believe that most, if not all, corporate associates experience shame at wrong actions by their company and joy at good actions. To illustrate this, I draw on personal experience of working in a large corporation, The Procter & Gamble Company. In 2011 Procter & Gamble (along with two other companies) was prosecuted by the European Union for price-fixing. Procter & Gamble was fined 211.2 million Euros.[147]

When the prosecution was revealed, I recall a sense of shame and disappointment that 'my' company would engage in price-fixing. In subsequent conversations with colleagues in various parts of the world similar emotional responses were reported, including anger in some cases. Procter & Gamble has a strong corporate culture and prides itself on taking an ethically sound approach to business. Employees expect positive corporate moral dispositions in the conduct of business and the price-fixing was both legally and morally wrong. It is worth noting that 1) the fine had been reduced based on positive company disclosures in response to the prosecution and 2) additional annual employee training on cartels, bribery and business conduct were rapidly instituted by the company. These demonstrate company reflection on the issue and desire to ensure business was conducted according to its desired moral dispositions.

[147] See, https://www.reuters.com/article/us-eu-cartel-idUSTRE73C1XV20110413 (accessed, January 10th, 2023)

I do not believe Procter & Gamble is unique in having and acting on positive moral dispositions. It should be noted that one company involved in the cartel reported it to the authorities once they identified its existence. This company was rewarded for this expression of their moral dispositions by escaping a fine, a measure by the regulatory authority that was, I think, an appropriate regulatory and ethical response to a good corporate action. The company did not have to make the disclosure, so risking censure and a fine for their participation. They could have elected to remove themselves from the cartel and bury the evidence of their participation in creative reporting.

Additionally, I recall the pleasure I felt when I first heard a presentation on the water purification system developed by Procter & Gamble and the U.S. Centers for Disease Control (see §1.5.1.). As a Research & Development scientist, I was inspired by hearing about the technology development from the scientist who did it and then the impact in communities where it was being used. Subsequently I tell anyone who will listen how valuable the water purification system is and that the company provides it 'at cost' to Non-Governmental Organisations.

Perhaps the most effective sanction on companies for wrong actions would be a boycott of their products or services and/or investor flight. If profit is indeed the corporate measure/equivalent of a good life, then reducing it would represent genuine damage to their aims in life. I draw an analogy with a person denied trust by others following evidence of repeated dishonesty. If part of their requirement for a good life is the approval of others and they have been lying to enhance their standing, the removal of trust will be a significant cost.

Consumer sanction and praise are becoming increasingly easy. The availability of rapid anonymous communication routes between consumers and consumer advocacy groups and between corporations and consumers has facilitated a series of mechanisms for consumer sanction. For example, many small companies (and sole Traders) use specialist web sites to generate business (Checkatrade™ for example). Each of these sites request comments on completion of transactions. A series of poor or ambivalent responses from users will affect future business so companies are encouraged to avoid poor work, poor business practise and so on. These sites have the ability to allow users to express negative or positive reactive attitudes to companies that have the potential to benefit or harm their business.

In §6.1.2., 6.1.3. I argued that if the moral company rule is to have force, then persons have a responsibility (duty) to express praise and blame for good and bad corporate actions. One of the most effective is investor flight and/or investor reluctance to invest. This is where the large investor has a role as they can exert most impact. However, at least at the level of the individual small to medium investor the evidence suggests that this remains problematic. A few months ago, my Independent Financial Advisor was required by the regulator of his business to administer a short questionnaire that determined his clients' attitude to ethical investments. He explained to me afterwards that the intent was to ensure that investors understood the nature of these investments before committing funds. A key metric was how amenable the investor is to achieving lower than expected (ethical investment vehicle versus traditional vehicle) returns in exchange for the assurance of ethical business practices. My Independent Financial Advisor was able to tell me that none of his clients, thus far, qualified as ethical investors.[148]

I was not surprised by this response of small investors who have a limited range of options open to them; however, the fact that there are sufficient businesses classified as 'ethical'[149] speaks to the increased interest in moral responsibility in business. Implementation of the moral company rule would require companies to adapt how they do business and how they treat other persons and things of value. Adaptation will have a cost, either immediately (change in working conditions for example) or in the future (increased cost base over time). This thesis is not a business strategy or economics document; however, companies who already meet the criteria for 'ethical investment' must have found ways to incorporate these responsibility-to-others elements into their business models. It seems to me that the efforts of these companies indicates that it is possible for other corporations to follow suit without significant risk to business performance especially if the pressure on corporations to follow suit was universal.

[148] It should be noted that the questionnaire asked the 'returns' question in a very neutral manner and it was embedded in a series of other questions relevant to ethical investing, so the final 'score' was a composite of several metrics. I am also obliged to confess that I was not classified as an ethical investor by the questionnaire.

[149] I struggle with this as the obvious question is, 'so the others are unethical?'. My understanding is that there are a series of attributes assessed by regulators and investment companies which a business must have to qualify.

In the final analysis society's recognition of corporate moral responsibility must be encouraged by investors as the investors are key arbiters of how businesses are run. Companies, via their directors, will respond to investor 'push' on this issue as they are currently on environmental concerns. We as citizens have the responsibility to make clear our expectations by appropriate reactive attitudes and actions (consumer flight for example) to ensure that the business and investment environment is supportive of corporate moral responsibilities.

7.7. Future work

If corporate moral responsibility is accepted, then arguably the most difficult question is how moral praise, or perhaps more importantly, blame, should be apportioned. I described in §1.4.3. responsibility for corporate actions tend to be complex and so the portions of praise and blame due to corporations and their associates will rarely be equally distributed.

Recall the case of the demise of the US-based Arthur Andersen international accounting company in 2002. The end of the company was a direct result of it being denied renewal of its accounting license. The demise of the company affected every employee. Consider a recently hired secretary in the company's Italian office. He will have lost his job because of something he did not, and indeed given his position in the company, could not have had anything to do with. Addressing this question is outside the scope of this thesis however: I believe it is worthy of more research.

7.8. Conclusion

This thesis presents a case for the social recognition of business corporations as moral agents of restricted scope. I have argued that the corporation is best conceived of as a real entity – an entity created and sustained by natural humans to do business in an efficient manner to create wealth – and as such can assume moral responsibility. Society has, I believe, a choice to make between corporate wealth creation with or without moral sensitivity in the conduct of corporations.

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