

Dunn, Craig

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*Evidence at his 1990 trial showed that John Borowski ordered his employees to dump toxic wastes down a sewer. A judge sentenced Borowski to two years in jail and fined him \$400,000. The president of metal-finisher Borjohn Optical Technology Inc. in Burlington, Mass. thus became the first person ever convicted under the four-year-old "knowing endangerment" provision of the Clean Water Act.*

Thus begins an April 22, 1991 *Business Week* article entitled "The Crackdown on Crime in the Suites," an article documenting the increasing legal liability of both managers and the corporations they represent. What is perhaps most amazing about the current changes in the law is that we as a society have only *recently* felt it necessary to intensify sanctions against corporate wrongdoing. Why might this be so? Are corporations suddenly behaving worse than they have in years past? Has corporate conduct formerly considered morally acceptable now been "criminalized"? Do current legal precedents mirror a fundamental transformation in the way we understand the corporation's impact upon society? Which is the "right" story to be told—and what are the managerial consequences of choosing correctly or incorrectly?

Each of these questions demands an answer informed by an historical account of the "nature" of corporate enterprise, and some appreciation for the link between law and morality. Those who fear all history is burdensome will be delighted to know that the development of the corporate business form is as fascinating as it is sensible. And the controversy surrounding the modern corporation is just as intriguing. Social, political, and organizational theorists routinely concede that business has produced a cornucopia of wealth—while in the same breath condemning the corporation for robbing individuals of their very humanity. Corporate activity has thus been considered noxious, largely due to the negative impact of business dealings on *people*—those inside as well as those outside the firm. It is interest in this relationship between the corporation and people that spawned the current issue of *Business Horizons*.

Concern with the issue of whether corporations are inherently wicked demands attention be given to two provisional questions: (1) What is the nature of the corporate enterprise? and (2) What might it mean to be wicked? Rather than addressing the relationship of the firm with all interested "stakeholders," attention will be limited to the impact of the corporate form upon the moral habits of managers—those who animate the corporation. Several biases will become evident. The first favors the view that individual virtue "counts" and organizational structure affects personal virtue. The second premise represents a limitation to the first: There exists no ultimate institutional resolution of the human condition. Although it is plausible that institutions affect moral practice, such systems are powerless to change human nature. Given this formulation, not only is the corporation a social as well as an economic institution; to the extent that managers within the firm are held harmless for actions they take on behalf of the firm, the corporation additionally functions as a pseudo-religious institution.

Such an outlandish claim demands justification. We will first trace corporate law to its roots in trusteeship theory, itself an outgrowth of accords between church and state. The moral character of the corporation will next be examined, followed by an overview of the primary tenets of morality itself. Finally, the metaphor of the Hebrew tabernacle will be employed to establish that the corporate form has often (although John Borowski might think not often enough) functioned as a mediating institution safeguarding managers from the law. In the process the true complexion of the corporation cannot help but be revealed.

## **THE NATURE OF THE CORPORATION**

For more than two centuries social theorists have probed the riddle of whether the corporation qualifies as a moral entity. The business ethics community has debated this same issue for several decades now. In spite of copious dialogue the dilemma persists. The mystery of the corporate nature can perhaps best be understood against the backdrop of trusteeship theory, for the corporation is essentially a network of "trust" relationships.

## The Corporation as a Network of Trusts

Trusteeship had its earliest origins in Roman law, where the trust was conceived as "a device through which the law permitted a testator to impose a duty on his heirs to convey part of the estate to a third party who could not legally be heir to the testator" (Fraher 1989). As with all trust arrangements, the involvement of three parties was called for: trustor, trustee, and beneficiary. The vehicle of the trust allowed for property dispositions such as the following:

I, Beowulf (*trustor*), do bind my lawful heir, Beowulf Jr. (*trustee*), to transfer one-third of my estate to my long-time companion Apollo (*beneficiary*) upon the most regrettable occasion of my death.

Although the Roman citizen could not bequeath property directly to a non-spousal lover—unless he had legally adopted his companion, which had become common practice—the trust allowed for the intended end of transferring estates to a third party without violating the laws survivorship then in place.

As Roman precepts provided the basis for the British code, trusteeship arrangements were granted the force of law well into the Middle Ages. The Church welcomed such sanctions, for the mechanism of the trust was increasingly used to swell church coffers. Individuals regularly imposed duties upon their heirs to transfer wealth to representatives of the Church—an understandable occurrence in an age of indulgences. Monarchs, contemplating the historically unstable balance of power between Church and State, became increasingly concerned over what they viewed as excessive accumulations of wealth by the Church. Trusteeship law would not have been radically altered, however, had not the Church itself developed an interest in legislative reform. The thirteenth century gave rise to a number of ascetic orders; in many of these orders vows of poverty were central to the pursuit of Christian piety, resulting in prohibitions against devotees owning property. Potential donors anxious to support such orders found trusteeship instruments rendered useless as a result of austerity provisions.

In the process of fashioning a resolution to their unique predicaments, Church and State representatives revolutionized property theory. It was decided that the Church would be legally recognized as an institution having an identity separate and distinct from its membership. Legal title to property transferred to the Church would be held by the Church proper, relieving its ascetics of the stigmata attached to the property ownership. What such clerics *did* enjoy, however, was the beneficial use of these worldly goods, although not to the point that the Church might be “dilapidated.” By appointing laity to oversee the allocation of church offerings, clergy were able to fulfill the letter of their vows of poverty—they were, in fact, penniless—while violating the very spirit of those vows as they enjoyed the use of prodigious church resources.

Thus was the genesis of the modern corporation. Collectively the friars became a corporate entity organized under a charter granted by the sovereign:

[E]cclesiastical property-holding [thereby] gave birth to modern corporation theory. In trying to explain the roles of bishops, lower clergy, and laity, medieval lawyers ultimately decided that each church was an entity distinct from the persons who made up the church. The fictional person, the corporate entity, theoretically lived forever, and theoretically this fictional person had property rights and interests of its own. Vis-à-vis the corporate church, the clergy were agents subject to fiduciary duties. Hence the direct conveyance to the church ultimately produced legal rules that look to the modern reader like a combination of corporation law and trust law. (Fraher 1989)

The similarity between this archaic formulation and the celebrated ruling of Chief Justice Marshall in *Dartmouth College vs. Woodward* (1819) are striking:

A corporation is an artificial being, invisible, intangible, existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of creation confers upon it, either expressly, or as incidental to its very existence.

The pivotal controversy within the corporate social responsibility debate is whether moral character is an essential property of corporate existence. Application of the

trusteeship model within the corporate model provides one response. The board of directors assumes the role of trustee on behalf of the firm's owners (or shareholders), who are both trustors and beneficiaries. Managers, as hired agents of the board, bear derivative trust obligations to the shareholders. Powers of management are not absolute; "[t]hey are, rather, powers in trust. . . . The controlling group is, in form at least, managing and controlling a corporation for the benefit of the owners" (Berle and Means 1967). Managers find themselves in an untenable position: they are both trustees for the interests of enterprise shareholders *and*, within their role as corporate personnel, beneficiaries of corporate earnings. Duty demands that managers maximize organizational efficiency; self-interest urges the manager to consume corporate resources. Within the trusteeship model the virtue of the individual manager is relied upon to arbitrate this conflict of interest. Organizational participants, and they alone, bear the moral burden of corporate "activity"; the corporation itself is merely the medium within which they manage, and hence is amoral.

### **The Corporation as Person**

An alternative perspective holds that the corporation itself is the bearer of rights and responsibilities. Judicial rulings have increasingly granted corporations the legal status of "personhood." Such standing has guaranteed the corporation certain basic rights at law, including the right to autonomy, to economic freedom, even to freedom of speech. Corporate officers have generally supported the view that businesses are the rightful beneficiaries of such entitlements. Extending rights of persons to the corporation seems to suggest that such business enterprises are responsible moral beings.

Philosophers are fond of posing deceptively simple questions. One might wonder: Does it "make sense" to think of the corporation as a moral entity? Although the corporation has commonly been granted personhood status at law, it is not clear whether the corporation may be held morally responsible for "its" actions. In what, after all, does corporate "action" consist? Corporations are not able to "act" on their own; corporate "action" is no more than a parody of managerial practice. It might be argued that moral responsibilities attach to "personhood" rights, and therefore granting corporations

“personhood” status necessarily implies they are noble creatures as well. The intent of the law is much more restrictive. As a general principle, for legal claims to be justified they must have a moral basis. This doctrine, however, does not imply that all parties to legal transactions enjoy a moral character, any more than granting rights to animals suggests that animals are moral beings.

Extending personhood rights to the corporation would seem to require that the corporation be subject to reciprocal duties. After all, rights do imply responsibilities. But to whom? My right to freedom of religion imposes a duty on *others*—a duty to refrain from interfering with my religious expression. My right to free speech imposes a duty on *others*—a duty to abstain from restricting my verbal expression. My right to bear arms imposes a duty on *others*—a duty prohibiting the seizure of my personal arsenal.

Certainly I have reciprocal responsibilities in each of these instances. But where do they come from? My right to religious expression reaches its limits when, in the name of "faith," I refuse to take my critically ill child to the doctor for medical treatment—my child has the right to life, and I therefore have the duty to do all within my means to preserve that life. My right to free speech reaches its limits when I slander a political adversary—my opponent has the right to security, and I therefore have the duty to refrain from defaming her character. My right to bear arms reaches its limits when I use a gun to kidnap someone—my victim has the right to freedom, and I therefore have the duty to refrain from restricting his movements.

In each case my responsibility is derived from the rights of others, not from rights I possess. And my responsibility is further dependent upon my capacity to "act"—a capacity no more available to the legal fiction of the corporation than to the criminally insane. Whereas it might "make sense" to think of the corporation as a person for the purpose of assigning legal rights, it is clear that granting personhood status to the corporation at law does not transform the corporation into a responsible moral being.

## **The Corporation as Bearer of Collective Rights**

Neither the "legal fiction" view that corporations are amoral, nor the "personhood" view that corporations are moral, offers a sensible account of corporate responsibility. A third alternative supposes that "the rights of organizations such as corporations are derived from, dependent upon, and secondary to, individual rights" (Werhane 1985). The reasoning is straightforward. Because they are rational moral agents, all persons possess a set of primary rights. Because corporations are not moral agents, such rights do not directly apply to them. Even though corporations are not capable of primary (or volitional) action, they nonetheless engage in secondary "actions" when they are moved to perform such "deeds" by corporate decision makers. Attached to the corporation's potential for "action" are derivative rights: "rights that they derive from their capacity to 'perform' secondary actions" (Werhane 1985). One fundamental characteristic of derivative rights is that such rights may not take precedence over individual rights. Corporations are therefore subject to the duty to respect the equal rights of individuals as well as other corporations; this responsibility, however, is in no way premised upon holding the corporation to be a *moral* entity.

## **ARE CORPORATIONS INHERENTLY WICKED?**

Critical examination of the three corporate models outlined above seems to indicate that the corporation bears no moral culpability for "its" activities, which is very different from saying the corporation may not be held legally liable for "its" actions. Before returning to this point, it is worth considering just what it might mean for the corporation to be "wicked."

Morality in general is concerned with what is good versus bad, right versus wrong, fair versus unfair, praiseworthy versus blameworthy. The classic language of ethics has often used such terms as should, ought, responsibility, duty, and obligation to discuss issues of morality, although in common usage such words are not necessarily laden with moral content. The term wicked also speaks of morality, although using the language of religion rather than that of philosophy. Standard definitions inform us that

wicked acts are "evil or morally bad in principle or practice; iniquitous." Synonyms for wicked include "ungodly," "profane," "immoral," "depraved," "heinous," "vile."

Such terms seem to have little application to the corporation-at least so far as it has been understood to this point. Unless the corporation is clothed with humanity, how can it possibly be considered "ungodly"? Or "profane"? Or "depraved"? Such anthropomorphism would certainly represent a misreading of organizational reality. But the question of corporate wickedness is not so easily resolved.

In his text on business ethics, DeGeorge (1986) affirms that corporations are not human beings.. He further contends:

The differences between human individuals and corporations. . . [are] significant from a moral point of view and from the point of view of moral responsibility. A corporation as such has no conscience, no feelings, no consciousness of its own. It has a conscience only to the extent that those who make it up act for it in such a way as to evince some comparable to conscience. Because a corporation only acts through those who act for it, it is the latter who must assume moral responsibility for the corporation.

DeGeorge's reasoning is compelling. His argument turns on the inability of the corporation to engage in independent action. Since the fiction of the corporation is incapable of independent action, it does not qualify as a moral entity-and can therefore in no way be considered evil or morally bad in *principle*. So far DeGeorge contributes nothing new to the prior discourse.

But what of *practice*? Wickedness is concerned with both precept and outcomes; actions are to be gauged on the basis of "principle or practice." The corporation might be amoral in principle, but this is insufficient to conclude that the corporation is not wicked. Corporate practice must be harmless as well. It is therefore worth examining a broader notion of corporate responsibility that expresses what it might mean for the corporation to be evil or morally bad in practice.

Whereas corporate institutions may be considered morally neutral, their very structures may nonetheless prejudice managers to lay moral considerations aside. This would be particularly true if persons within the corporation were held harmless for actions taken on its behalf. Had John Borowski anticipated the personal penalty for his conduct, he certainly would not have instructed his employees to dump toxic waste down a sewer. Borowski relied upon the counsel of legal precedent, which suggested that he would bear no personal liability for actions taken as an agent of Borjohn Optical Technology Inc., to his peril.

### **Corporate liability at Law**

The doctrine of limited liability is frequently cited as a primary benefit of business incorporation. Corporations are often preferred to partnerships or sole proprietorships because of the doctrine of restricting shareholders' financial risk to the amount of their capital stock investment. Shareholders' personal assets may not be attached to satisfy corporate obligations—with one notable exception. Third parties may bring suit that “attempt to 'pierce the corporate veil' and ask the court to look behind the corporate entity and take action as though no entity separate from the members existed” (Corley and Robert 1975). Barring such drastic judicial intervention, shareholders enjoy strict limits upon their liability for corporate misdeeds.

With the transformation of the trusteeship model into modern agency law, the doctrine of limited liability has been extended to safeguard managers. As a rule, “an agent is not personally liable on contracts that he has entered into on behalf of his disclosed principal, and the liability is solely that of the principal” (Corley and Robert 1975). As applied in the business context, this places liability for contractual mismanagement upon the corporation itself rather than upon its representatives. This ruling does not extend to the commission of torts; much to John Borowski’s chagrin, establishing that an employee's wrongful act was committed within the course of employment is not grounds for relief from personal prosecution. The doctrine of *respondeat superior*, however, further imposes indirect liability for the commission of torts—whether

committed through negligence or intention—upon the corporation. Given their "deep pockets," corporations are more attractive legal prey than are individuals.

While DeGeorge (1986) has concluded that directors and managers "must assume moral responsibility for the corporation," forensic practice often minimizes the personal liability of manager-agents. One might wonder how such a tradition affects the moral habits of practicing managers.

### **The Corporation as Pseudo-Religious Institution**

Whereas the difference between legal and moral culpability is evident, it is all too common to assume that because an action is legal it is therefore "right." The converse is equally true: actions not condemned by law tend to be viewed as morally acceptable. Such close connection between legality and morality is not unusual when one considers that for legal claims to be justified they must have a moral basis (Werhane 1985). The notion that the corporation shields individuals from personal legal liability for actions taken on behalf of the firm, when conjoined with the principle that the "good society" quite naturally arises through the unreflective pursuit of profit, has been interpreted as giving managers a moral license to adopt a strict economic account of corporate responsibility.

But is the corporation a strong enough institution to shield a person from legal as well as moral accountability? After all, it is the Church that has historically functioned as intermediary between the Law and the laity. The parallel between corporate and religious practice is only strengthened as careful consideration is given to the metaphor of the corporate veil.

The veil is one of the central ideograms in the Judeo-Christian tradition. Following the Hebrew exodus from Egypt, God commanded his people to construct a tabernacle within which God promised to commune with the Israelites. The outer courtyard of the tabernacle enclosed an area 75 feet wide and 150 feet long with a linen fence suspended on brazen pillars standing seven-and-a-half feet in height. At the eastern entrance to the compound were located a brazen altar and washbasin used for the

ceremonial cleansing of the worshipers. The tabernacle proper was a portable building constructed of gold-plated acacia wood boards capped with cloth and leather roof, measuring 15 feet wide, 15 feet high, and 45 feet long. This structure was positioned at the western end of the courtyard.

The tabernacle itself was divided into two rooms, the holy place and the holiest of holies. Within the outer room, the holy place, were three pieces of furniture: dining table, lamp, and altar of incense. The inner room, or holiest of holies—a perfect cube 15 feet in width, length, and height—housed the ark of the covenant containing the stone tablets upon which were etched the Ten Commandments. And separating the holiest of holies with its sacred artifacts from the rest of the tabernacle was the veil, woven of linen and embroidered in gold, purple, blue, and scarlet with figures of the cherubim.

The holiest of holes was a place of mystical reverence for the Israelite nation, as the very presence of God dwelt above the mercy seat that served as lid for the ark of the covenant. Because none could look upon God and live, the veil served to insulate the twelve Hebrew tribes from the wrath of God. Consider the expository of DeHaan (1955) on this point:

[B]efore entering the holy of holies...the way is barred completely by a heavy veil, or curtain, which forbids anyone to enter except the high priest once a year on the day of atonement with the precious shed blood taken from the altar of burnt offering. For him to enter at any other time meant immediate death, or to enter without blood meant death. All others, therefore, were barred, and not even the common priesthood was allowed to enter in, and any attempt to enter meant certain death. So before we can enter into the place of the ark, the veil must be taken care of, for behind this veil is the ark, the great symbol of the throne of Almighty God. But it is a throne of judgment, for a Holy God shines above the throne, and in the ark itself is that which condemns the sinner before God. In this ark reposed a copy of the broken law which God had given to Moses in the mountain, and that law speaks of judgment, condemnation and death for the sinner.

And the *corporate veil*? In practice it too represents an institutional fortification serving to isolate the wrongdoer from the law.

As noted earlier, there is a difference between forensic *law* and moral *Law*—revealing the point at which the metaphor of the veil begins to unravel. It would be a gross error for manager agents to presume the corporate institution holds them morally as well as legally harmless for actions taken on its behalf. And if the corporation is not able to accomplish the stronger commission of moral protection, what rationale might be offered for suggesting that managers neglect their personal ethical ideal in favor of simply seeking to maximize shareholder wealth?

Are corporations inherently wicked? To inhere means "to exist permanently and inseparably in, as a quality, attribute, or element." For corporations to be considered nefarious they would therefore have to qualify as wicked in *principle*. Given that the corporation lacks the essential characteristics of moral personhood, it cannot be concluded that corporations are morally flawed.

The question of *practice* is a different matter. Consider again the case of John Borowski, or any others like him. Is it any wonder that, believing the corporation to provide sanctuary from personal moral culpability, he behaved wickedly? We are quick to equate legal protection with moral immunity, for by so doing we see an escape from human tragedy. Perhaps Dostoyevski was right: Given that we are not happy so long as we are saddled with moral duty, we are willing to sacrifice our very freedom in order to be relieved of responsibility.

So we marvel at an economic system, sustained by managerial "high priests," that relies upon the self-interested pursuit of happiness to bring about the "good society." Because corporate "laity" have no clear burden for actions taken on behalf of the firm, corporate decision making seems to be devoid of any moral "flavor." However, such stoic rationality violates our innate sense of moral justice. This reality is reflected in the subtle but dramatic transformation our judicial system has undergone with respect to treatment of corporate wrongdoers. It is increasingly unpopular for the John Borowskis of the

corporate world to be afforded moral amnesty. A radical rethinking of the basic charter of corporate governance is afoot, as courts become sympathetic to personal accounts of moral duty. Corporations failing to institutionalize such changes, though hardly wicked in principle, will nonetheless continue to promote wickedness in practice.

Ethical decisions must, alas, remain within the purview of personal morality. While the corporation is one forum within which personal morality may be given expression, freedom from moral guilt must be sought beyond the corporate veil.

## References

A.A. Berle and G.C. Means, *The Modern Corporation and Private Property* (New York: Harcourt, Brace & World, 1967).

R.N. Corley and W.J. Robert, *Principles of Business Law* (Englewood Cliffs, N.J.: Prentice-Hall, 1975).

R.T. DeGeorge, *Business Ethic* (New York: Macmillan, 1986).

M.R. DeHaan, *The Tabernacle* (Grand Rapids, Mich.: Zondervan, 1955).

F. Dostoyevski, *The Grand Inquisitor*, C. Garnett trans. (Indianapolis: Bobbs-Merrill, 1948).

R.M. Fraher, "The Historical Origins of Trusteeship and Charitable Foundations," presented at the Poynter Center Conference on Ethical Duties of Trustees, Indiana University, Bloomington, Indiana, 1989.

T. Smart, "The Crackdown on Crime in the Suites," *Business Week*, April 22, 1991, pp. 102-104.

P.H. Werhane, *Persons, Rights, & Corporations* (Englewood Cliffs, N.J.: Prentice-Hall, 1985).

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