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# Wesleyan Economic Working Papers

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<http://repec.wesleyan.edu/>  
Nº: 2013-003

## **Firms as Persons**

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May, 2013

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## Firms as Persons

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May 2013

**JEL Classifications:** A12, B40, D23, K20

I am grateful to participants in the June 2012 Conference on Economic Philosophy in Lille, Claude Roche, and three anonymous referees for helpful criticisms of an earlier draft of this essay. All remaining errors are my own.

## Firms as persons

**Abstract:** This essay asks whether business firms should be treated as moral or legal persons, capable of bearing rights and duties as distinct entities. Building on earlier work describing firms as *relational contracts in performance* (Adelstein 2010), it considers the nature of legal and moral personality, whether and when rights and duties can be assigned independently without a balancing symmetry, and what qualifies a subject for personhood, and thus for rights and duties. It argues for an asymmetric view of the rights and duties of firms. On the one hand, because the purposeful acts of firms typically cannot be reduced to the purposeful acts of any individual participant, there is a residual responsibility for the acts of the firm after the responsibility of each participant has been properly reckoned that can only be attributed to the firm. But on the other, while it may be convenient for participants and others that firms hold rights to ordinary property, because firms are never more than instruments created by living people for their own purposes, they have no right to life or liberty. In the absence of these rights, there is no basis for granting firms political rights to such things as free speech, free association or privacy. A concluding section considers the granting of constitutional rights to business corporations in the United States in light of these arguments.

**Keywords:** theories of the firm, contracts in performance, Kantian personhood, collective rights and duties

## Les firmes en tant que personnes

**Résumé :** Cet essai pose la question de savoir si les firmes doivent être traitées comme des personnes morales ou juridiques, capables d'endosser des droits et des devoirs en tant qu'entités distinctes. S'appuyant sur de précédents travaux où les firmes étaient décrites comme des *contrats relationnels en performance* (Adelstein 2010), il examine la nature de la personnalité juridique et morale, la possibilité d'assigner indépendamment et sans symétrie des droits et des devoirs, ainsi que les conditions permettant de qualifier un sujet de personne, ayant par extension des droits et des devoirs. Il plaide en faveur d'une approche asymétrique en ce qui concerne les droits et les devoirs des firmes. D'un côté, parce que les actions finalisées des firmes ne peuvent typiquement pas être réduites aux actions finalisées de n'importe quel individu participant, il existe une responsabilité résiduelle pour les actions d'une firme une fois que la responsabilité de chaque participant ait été proprement comptabilisée qui ne peut qu'être attribuée à la firme elle-même. Mais de l'autre, quand bien même qu'il soit utile pour les participants ainsi que pour d'autres de détenir collectivement des droits de propriété, parce que les firmes ne sont jamais que des instruments créés par des êtres vivants poursuivant leurs propres fins, elles n'ont pas le droit à la vie ou à la liberté. En l'absence de ces droits, il n'y a pas de justification pour accorder aux firmes des droits politiques comme les droits à la liberté d'expression, à la liberté d'association ou à l'intimité. Une partie conclue en considérant l'octroi de droits constitutionnels aux sociétés commerciales aux Etats-Unis à la lumière de ces arguments.

**Mots-clés :** théories de la firme, contrats en performance, personnalité kantienne, droits et devoirs collectifs

## FIRMS AS PERSONS

In earlier work (Adelstein 2010), I considered the interrelated ontological and epistemological questions of precisely what business firms are, whether and in what sense they are 'real' social actors, and whether their actions and effects can ultimately be traced without remainder to the actions of living people in real time or, contrarily, whether there is some irreducible aspect of their existence and operation that can only be attributed to a social collective as such. I described firms as 'contracts in performance,' ongoing, multi-lateral relational contracts from whose operation – that is, from performance over time by specific individuals in the roles and relationships defined by the contract – emerge each firm's idiosyncratic behavioral routines and organizational capabilities. I argued that because, in my account, every action of a firm supervenes on the actions of its human participants, this account is consistent with a reasonable individualism that allows for social outcomes to be determined by the actions and interactions of individuals. Nonetheless, adopting the standard of social reality posed by Searle (1995), I argued that firms were not, as many contemporary legal theorists claim, mere legal ephemera, but institutional facts and thus real social actors despite the fact that, characterized as relational contracts, they are in essence mental objects, or ideas.

The problem of firms as social actors has a normative aspect as well, the question of whether firms should be treated as moral or legal 'persons' in their own right, capable of bearing rights and duties as separate entities, distinct from the rights and duties of the in-

dividuals who are at any moment associated with (and through) them. Here, I address that question in light of the ontological and epistemological arguments of this earlier work.

After an introductory discussion of firms as contracts in performance, I turn to the complex nature of legal and moral personality, whether and in what circumstances rights and duties can be assigned independently of one another, without a balancing symmetry, and what qualifies a subject for personhood, and thus for rights and duties. I briefly survey the existing literature in this area in terms of its relation to the contracts-in-performance model, and suggest where and how the latter can shed useful light on a question that has long bedeviled legal and moral philosophers. I argue that rights and duties need not be symmetrical in the case of firms, and that while their social reality and capacity for rational agency make firms appropriate bearers of moral and legal responsibilities, because they are instrumental means to human ends rather than autonomous ends in themselves, they are not proper bearers of moral or constitutional ('human') rights. A concluding section considers the granting of constitutional rights to business corporations by the United States Supreme Court toward the end of the nineteenth century in light of these arguments.

## **Contracts in Performance**

Firms come about when an entrepreneur succeeds in persuading others to abandon the current employment of their resources and cast their lot with the entrepreneur's plan to organize some small sphere of production in a new way. If they agree to do so, they bind one another to perform in accordance with a long-term *relational contract* that defines the roles and relationships that will govern the operation of the new enterprise and whose precise terms gradually change over time as individual participants come and go. Unlike *dis-*

*crete contracts*, which govern instantaneous transactions in what economists call perfectly competitive markets, relational contracts govern long-term relationships that participants hope to preserve over time in an uncertain environment as conditions and participants in the contract change. Successful firms are durable relational contracts that organize the interactions of sometimes very large numbers of people engaged in a particular kind of co-operative enterprise, the production of goods over time (Adelstein, 2010: 335-338).

The participants' agreement to this relational contract at every moment is what constitutes the firm as such, so that in the first instance, firms are ideas, or mental objects. But as Searle's (1995) rigorous analysis of social reality makes clear, they are nonetheless *social facts*, epistemically objective social realities constituted by a specific, broadly shared state of mind that Searle calls *collective intentionality*. By this he means that a group of individuals share a *we consciousness*, 'a sense of doing (wanting, believing, etc.) something together, and the individual intentionality that each person has is derived *from* the collective intentionality that they share.' It is a sense, shared both by participants in an enterprise and, in the third person, by others who recognize the common enterprise the participants are engaged in, that '*I* am [or they are] doing something only as part of *our* [or their] doing something' (*ibid.*: 23-6, emphases in original; Adelstein 2010: 345).

Searle illustrates this idea with the intentionality and behavior of a football team, one kind of relational contract, though it clearly describes the collective intentionality at work in the case of relational contracts like firms as well. But collective intentionality often takes milder forms, as when two people agree to take a walk together, and whenever it exists, a social fact is created for the individuals who share the intentionality. In this sense, social facts are ubiquitous. But social facts merely exist, they do not necessarily act. So-

cial facts become unitary social actors, a species of what Searle (1995:43-51) calls *institutional facts*, with the further creation of a specific collective intentionality that he summarizes as *X counts as Y in C*, where *X* is some object, *Y* is a symbolic status that the intentionality assigns to *X* so that *X* can perform a function for the group, and *C* specifies the context in which *X* will be recognized as *Y*. Firms are easily reduced to this account: participants and others agree that when participants act in accord with a certain relational contract (*X*), they will think of them and treat them as a unitary body called a firm (*Y*), so they can more effectively produce goods (*C*). Once this collective intentionality exists, the relational contract becomes an institutional fact, one that participants and others henceforth treat as an active social unit (Adelstein 2010: 346-347).

Once firms actually begin operating, as real people perform in real time in the roles and relationships defined by the contract, the firm becomes a relational contract in performance, and two crucial things happen. First, the firm takes on a quality I call *physicality*. At every moment, firms are physically manifested in the performance of their current participants in the roles and relationships defined by the contract at that moment. Second, performance of the contract leads to the emergence of routines and capabilities, patterned human interactions in real time that give firms a range of human-like capacities – to see, to think, to plan, to act – that often far exceed the cognate abilities of any actual human being. The physicality manifested in the performance of these routines is not complete, as human consciousness and intentionality condition every specific act performed by every firm, but that a firm's characteristic routines are in fact being performed is an outwardly physical phenomenon, visible to any observer. Almost everything a firm does can be observed by watching what its participants do; that it is a *firm* that is doing it is true only be-

cause of what people think (*ibid.*: 340-344). It is these three aspects of firms as contracts in performance, the collective intentionality that creates them, their physicality, and the powers of cognition and action that human performance of their routines enable them to exercise, that ground their claim not only to social reality, but to *rational agency* of often great consequence, and raise the question of whether they should be treated as moral or legal persons.

### **Firms as Bearers of Duties and Rights<sup>1</sup>**

#### ***Personhood***

Personhood is at once a juristic, a philosophical and a moral concept, and sharply contested in all three spheres. Ordinary speech treats every human being as a person, and rarely is this label attached to anything else, particularly things that are not alive. But at law, as Maitland (1911: 307) put it, a person is an abstraction, a 'right-and-duty-bearing unit.' Maitland was concerned to show that the particular kind of firm called corporations are fully capable of bearing both rights and duties, and his definition hints at the truth that not every human being (or *natural person*) is a legal person, nor is every legal person a natural one. Normal adults typically are right-and-duty-bearing units, combining as they do a capacity for rational deliberation and agency and a unity of consciousness or sense of self in a single organism. Scruton (1989: 249-50), also a proponent of corporate personhood, elaborates these three canonical elements of natural personhood as, first, biological 'unity and duration as an animal [,] a natural kind;' second, rational agency, a 'kind of "intentional system,"' which receives and stores information, forms plans for the future and

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<sup>1</sup> This section draws on Adelstein (2012: 78-86).

acts upon them [so as to] have a "will of his own," and to exhibit a certain kind of continuity through time; and third, self-awareness, identifying oneself in the first person and attributing to oneself mental states and an epistemologically unique point of view, the 'most mysterious of the three features' and one, Scruton concedes, not easily ascribable to corporations.

Indeed, as Ohlin (2005: 212-29) points out, only some human beings have all three attributes of natural personhood, and there are plausible candidates for rights and duties, natural and otherwise, who lack one or more of the elements or in whom the elements are in tension. Children and incompetent adults, for example, have the first and third attributes but lack, temporarily or permanently, the second; patients with psychiatric disorders may exhibit the first but not the second or third. Rational agency and self-awareness, moreover, are matters of degree, not just in the sense that living people who are also legal persons display a broad spectrum of capacities for each but perhaps across species as well; animals may base a claim to rights on a diminished form of both. And, of course, there are collective actors like firms, which (or who) are not biological organisms, and may or may not be self-aware, but are, as I have argued, quite capable of intentionality and rational agency. For the law, the question in such cases is how to weigh the three elements in the context of each claimant's case for personhood, whether and to what extent the fact of a patient's humanity might outweigh her irrationality or lack of self-awareness in determining her rights, or the absence of a living body might absolve a rational, self-aware, active manufacturing enterprise of responsibility for its actions.

In American law, this last question is raised only by the specific form of relational contract called a *corporation*. Once a firm adopts a standard form of internal governance

and meets other statutory requirements for incorporation, the law recognizes it as a particular kind of institutional fact, a corporate actor to be treated by the courts as a legal person in its own right, detached from any and all of its human participants, able to own property, make contracts, and bear rights and duties in its own name, distinct from those of its participants. Other kinds of firms, those the law calls *proprietorships* and *partnerships*, are not organized as corporations, are not treated as distinct legal entities, and do not bear rights and duties beyond those of their participants. But while all corporations are firms as I describe them, not all firms are corporations. It is relational contracts in performance, not corporations as such, that manifest the collective capacity for intentionality and rational agency and the kind of unified consciousness grounded in the collective intentionality of individuals that is expressed in the coordinated performance of routines. Here, I treat all such firms, corporations or not, as social actors distinct from their human participants, and thus candidates for the same generic rights and duties.

The idea that living men and women are the proper *situs* of rights and duties is deeply engrained in liberal philosophy and politics. As bearers of personal duties or responsibilities, most adults have sufficient powers of cognition, intentionality, rational deliberation and action to create the capacity for *mens rea* and blameworthiness in contemplating and acting on their choices. And as bearers of personal rights, they are limited in the extent of their imposition on others by their mortal, imperfect bodies and, in this respect, stand in rough equality to one another as citizens. But firms may grow very large and powerful, in command of both material resources and practical capabilities of perception, cognition and effective action far beyond those available to individuals. When they do great harm, the case for holding them responsible as collective actors is strong, but

once granted it seems intuitively to demand some compensating recognition of rights, at least with respect to the activities that might generate the responsibility (Weinreb, 1992: 281-294). When the legal personhood of huge corporations became a political issue in the United States at the turn of the twentieth century, this symmetry of rights and duties enabled the friends of big business to join their foes in favor of it, the former to protect the corporations from government regulation, the latter to subject them to civil or criminal liability (Hager 1989: 579-92). And as Ripken (2009: 122-24) suggests, it is why many contemporary opponents of corporate rights resist the otherwise congenial notion of corporate responsibility so vigorously.

What qualifies a subject for personhood, and thus for rights and duties? For some, following Descartes, personhood demands the first and third attributes, a physical union of body and mind found only in biological units of sufficient complexity; for others, following Locke, it requires only the third, consciousness of a continuous self based on experience and memory (Ohlin, 2005: 213-14). But the arguments of interest here are those that start with Kant's (1993: 35-40) view, that the second attribute, rational agency, is enough to confer moral personhood. Kant argued that the rational agency of human beings gives them a right to be treated as ends in themselves, respected and preserved for their own sakes rather than used as means to the ends of others, tools without rights or duties of their own. The question is whether personhood should be extended on this basis to collective actors like firms, entitling them to the same presumptions of autonomy and responsibility enjoyed by living people.

One response is simply to deny the rational agency of firms altogether (e.g. Keeley 1981; Werhane 1989) and reduce their intentions and actions, and with them primary re-

sponsibility for the consequences, strictly to the intentions and actions of their human participants. In this light, firms, if they exist at all, can only be means, not autonomous ends, and have no claim to rights or duties. But I have denied the premise of this argument: firms *are* real, and though performance by their human participants is an indispensable part of their reality, their routines and capabilities are emergent phenomena, irreducible products of the interaction of the participants structured by a relational contract (Adelstein 2010). Nor can their actions be separated from these interactions and reduced to the acts of isolated individuals. These irreducibilities are precisely what make a firm's intentions and actions collective. If firms aren't moral persons, it isn't because they cannot act.

A second strategy is to detach responsibility from rights and reach conclusions about the one without much attention to implications for the other. This is the approach of French (1979; 1984) and Pettit (2002; 2007), who argue in different ways for corporate responsibility based on collective rational agency without discussing the rights this might imply, and Dan-Cohen (1986), who opposes granting Kantian 'autonomy rights' to firms as such because they can be portrayed as intelligent machines despite their powers of intentionality and action, without addressing the consequences this might have for corporate responsibility. A third approach is to argue directly for corporate personhood, without metaphor, in the style of Scruton (1989: 246-257) or McDonald (1987: 219-20). Though he acknowledges the differences between the kinds of intentionality and consciousness accessible to individuals and collectives, Scruton insists that corporate actors experience meaningful analogues to such feelings as pride, remorse and guilt and thus that they have moral lives and personalities, and that their role as essential mediating institutions between the state and the individual and the part they play in creating the social world within

which human personality develops justify their claim to moral personhood on a par with living people. McDonald goes further. Because large firms often have far greater capacity for intelligent agency than individuals, he suggests, and because they are in principle immortal and thus able to shoulder responsibility more fully than transient human beings, they rather than individuals may be the 'paradigm moral agents.'

### ***Firms as duty bearers***

French's normative account of corporate responsibility closely tracks the positive depiction of firms as contracts in performance. He divides collectives generally into two categories, *aggregates*, or loose collections of people such that a change in membership is enough to change the group's identity (my neighbors, a mob), and *conglomerates*, purposeful organizations whose continuous existence and identity are consistent with varying membership over time (universities, corporations, armies). Only the latter, he argues, can claim moral personhood and the ability to bear responsibility for harms done by their collective actions. To say that a mob is responsible for a death is just a shorthand way of describing the responsibility of each of its members as individuals; once the responsibility of every individual is reckoned, there is none left over to ascribe to the mob as such. But conglomerates, and business corporations in particular, act in such a way that responsibility for their actions cannot, or cannot always, be distributed without remainder among their participants, so that the residue must be ascribed to the firm as such. This attribution is justified whenever a firm displays the particular kind of intentionality and rational agency French calls 'a Corporation's Internal Decision (or CID) structure.'

The CID structure may be more or less formal or explicit, but for French, it must be

clearly visible and contain two essential elements that enable it to bear the Kantian weight he places on it: a clear description (a 'flow chart') of how decisions are to be made and actions taken to carry out the firm's policies and achieve its objectives, and a set of 'corporate decision recognition rules' that signify to participants and others that particular decisions and actions do in fact represent the decisions and actions of the firm. This structure is what I have described as the relational contract that constitutes the firm, the system of roles, relationships and procedures through which the firm is governed and operated.

When human actors are seen to perform in accord with the constitutive relational contract, the outcomes of their interactions become the institutional facts of the firm's actions. In similar terms, French maintains that a CID structure 'licenses the descriptive transformation of events, seen under another aspect as the acts of biological persons . . . , to corporate acts by exposing the corporate character of those events. A functioning CID Structure *incorporates* acts of biological persons. The kind of rational agency created by such a structure, he concludes, 'is a necessary and sufficient condition of moral personhood,' enough to hold firms responsible for their acts (1979: 211-215, emphasis in original).

Pettit's argument to the same conclusion also turns on the rational agency of collectives, and like French, he grounds the attribution of corporate responsibility in deliberative procedures that allow firms to 'simulate the performance of individual agents. They endorse certain goals and methods of reviewing goals and certain judgments and methods of updating judgments, and they follow procedures that enable them to pursue those goals in a manner that makes sense according to those judgments' (Pettit 2007: 172). Pettit also describes two kinds of groups and argues that only one, those he calls *social integrates*, display the kind of corporate intentionality that distinguishes the intentions and decisions

of the firm from those of its participants and provides the autonomy of moral choice and agency necessary to support corporate responsibility. And for Pettit too, the requisite autonomy is demonstrated by what French would call a CID structure. But only a very particular kind of CID will do, one that addresses the *discursive dilemma* that is posed in a variety of common settings to business firms.

Suppose a conclusion X requires that both premise A and premise B be true. A group can decide on X in two ways: it can have each member decide for himself on A and B and then vote only on the conclusion this implies for X, a *conclusion-centered procedure* (CCP), or it can poll the members only on the individual premises and let those decisions dictate the logical X, a *premise-centered procedure* (PCP). The dilemma arises because in many plausible cases, the two procedures lead to different conclusions by the group regarding X, and because PCPs in particular can reach conclusions on X that are not shared by even a single member. So choosing which kind of procedure to adopt, a choice that Pettit argues must be made by every group in one way or another, means choosing what kind of group its members want it to be: CCPs create groups that are nothing more than instruments of the current desires of their members, while PCPs enable groups to defy their membership on the question at hand so as to preserve logical consistency with other decisions.

Rock (2006: 1-6) shows that firms may confront the discursive dilemma in a variety of business situations, some involving the evaluation of A, B and X in a single decision, others in which A and B are previous collective decisions that are logically related to an X to be determined now. In both cases, the costs of logically inconsistent collective decisions to firms with reputations to protect and long-term obligations to meet can be very

great, which draws them to PCPs. A firm may choose to determine X by CCP, letting the decision of the group respond directly to the current views of members on X, but this may risk a collective decision that contradicts earlier ones on the basis of which costly investments have been made. Employing a PCP ensures that the firm's decisions will be seen by its participants and others as 'collectively rational' over time even where this produces outcomes that are contrary to the current views of members on X (Pettit 2002: 446-454). This latter possibility, that the collective decision on X may not reflect the conclusion of any of the members, suggests the sense in which Pettit claims that PCPs 'collectivize reason' and thus provide a basis in rational agency for the personhood of groups that adopt them. An organization that can defy its human participants in pursuit of consistency with its own, previously expressed positions does indeed appear to have a mind of its own.

Despite their differences, this last point is the crucial one for both French and Pettit. For French, the CID structure confers moral personality precisely because it allows the decisions of the firm to be made for the firm's own reasons and in pursuit of its own objectives, whatever the reasons and objectives of the structure's human participants might be (1979: 213-15). And for Pettit (2007: 184), moral autonomy is 'intuitively guaranteed' by the fact that, in many cases, 'the judgment of the group will have to be functionally independent of the corresponding member judgments, so that its intentional attitudes as a whole are most saliently unified by being, precisely, the attitudes of the group.' This position seems to me a straightforward extension of the positive depiction of firms as contracts in performance to the normative problem of moral responsibility. Firms are real social actors, ontologically distinct from their human participants, and in the operation of their routines and deployment of their capabilities, they apply real powers of perception, cognition,

deliberation and action to pursuit of their objectives. They have the capacity to appreciate and make moral choices, and the rational agency to act on them, all in ways that distinguish their intentions and actions from those of their human participants. In this metaphysical sense, as French (1979: 207) puts it, firms clearly are persons. There seems no reason to deny that, in matters of responsibility, they are moral persons as well.

### ***Firms as right bearers***

Without argument, French (1979: 207) draws an easy equivalence between duties and rights. Having shown that ascriptions of moral responsibility to firms are meaningful, he concludes that 'corporations can be full-fledged moral persons and have whatever privileges, rights and duties as are, in the normal course of affairs, accorded to moral persons.' Given the obvious differences of substance and scale in the attributes of personhood that distinguish firms from human beings, it is not apparent why this should be true. Indeed, if McDonald is correct, and firms' capabilities make them moral superpersons in relation to natural persons, perhaps firms should have more or broader rights than living men and women. But over their entire history, Americans in particular have been wary of the magnified powers of cognition and action possessed by large enterprises and their potential to turn real firms into economic or political superpersons, and the ascription to firms not just of identical rights, but even diminished or circumscribed versions of the rights of natural persons has consistently provoked resistance (cf. Winkler 2007). Even Scruton, who like French would accord corporations full moral personhood, is far more confident of his position in the case of bodies like churches, fraternal groups and universities, the institutions celebrated by Gierke (1987) as shields of individual men and women against a powerful

state, than he is for business firms, though he ultimately includes these too on his list of candidates for personhood. Scruton sees the purpose of *internal* institutions like churches as inextricably bound to their existence; their continued existence is the fulfillment of their purpose. A firm, in contrast, is an *independent* body, 'an association for a purpose, a means to an end, and is usually treated as such by those who work for it.' Unlike a church or a family, it 'stands in a contractual relation to its employees, and is dissoluble at will. [It] is not the legal recognition of a new moral reality' (1989: 241-42).

In Kantian terms, this concession is decisive, for it removes firms, despite their rational agency, from the category of autonomous ends, valued and preserved for their own sake, to the category of means that, if they are given rights and duties at all, receive them only on condition that this serve the ends of living people. This breaks the intuitive link between rights and duties – if rights and duties are placed in firms because of their utility to people, and Kantian rights of people take priority over utilitarian rights of firms, there is no reason to suppose that any firm's rights and duties must reciprocate one another or meet some other test of fairness to the firm as such. This is Dan-Cohen's (1986) strategy. Through an ingenious thought experiment involving a firm hypothetically operating for a time without the participation of any human beings, one that even a friendly critic (Fisse 1987: 297) calls 'a "crazy case" which toys with the problem of corporateness,' Dan-Cohen argues that firms are in principle intelligent machines, and that as machines, they are not Kantian persons entitled to autonomy rights but instruments given whatever rights they possess solely for the benefit of Kantian persons. A firm may exercise an autonomy right only on behalf of specific people who hold that right, provided that the protection of that very autonomy right is the purpose of the firm, and then only if it is socially useful

that it be allowed to do so.

Once firms are denied Kantian personhood, their rights become a matter of policy, and one can argue for or against any array of rights and duties for any firm, irrespective of whether these fall heavily on one side or the other or whether all firms are granted the same array of rights and duties, solely on the basis of empirical estimations of social costs and benefits. It is, for example, often convenient for both participants in a firm and those who deal with it for the firm to own and dispose of property in its own name, as corporations do. Enabling a firm to own material or financial property frequently makes it easier to transfer or liquidate that property in commerce, and vesting intellectual property rights to new knowledge created by the operation of a firm's routines in the firm as such, rather than trying to apportion them among the participants, may be the only practical way to preserve incentives to participate in the routines themselves.

But granting ordinary property rights to firms for utilitarian reasons does not imply that firms are appropriate bearers of political or moral rights as well. To be sure, firms whose purpose is to increase the value of the property of their owners might, as firms, be given the same rights to due process or equal protection with regard to that property that their owners possess as natural persons. But here too, as Dan-Cohen suggests, this is not because the firms themselves are entitled to such rights, as living people are, but because it is convenient for their owners (and others) to allow the firm to assert these autonomy rights for them rather than exercise the same rights themselves. Living people are entitled to due process and equal protection with regard to their property, but firms are not, and have these rights only to the extent and for as long as they remain a cost-effective way to protect the property rights of living people. Whether they have other political or moral

rights, say to free speech or privacy, depends on whether they can be said to be asserting a similar autonomy right on behalf of their human participants and, if so, whether the social benefits of permitting them to do so exceed the social costs. Thus, one may consistently argue that firms have fundamental rights to due process and equal protection with regard to property and then deny on utilitarian grounds that they should be given the same rights to such things as free speech or privacy that people have, or any rights to them at all (cf. Greenwood 2007).

In this view, firms, though they may be fully intentional subjects, are second-class moral persons. But as Katsuhito Iwai (1999: 585) points out in the case of corporations, this is in the 'dual nature' of the beast. Corporations are legal persons, and as such owners of property, but at the same time they are themselves the property of human owners, like any other thing those people might own. They are thus more than things, but less than people. People own themselves, and absent slavery cannot own other people, but corporations, though they can own other corporations, cannot own themselves, and (thought experiments aside) are ultimately owned by living people. And though it is harder for stockholders to dissolve corporations than it is for partners or proprietors to dissolve their enterprises (cf. Blair 2003), the part of firms that is property is not legally protected from willful destruction at the hands of lawful competitors in the market. As Scruton recognizes, firms are not created so they can experience life in the sense that men and women do, finding identity, realizing potential, serving others, or fulfilling some other existential mission, but specifically so they can effectively perform certain functions in organizing production for the economic benefit of living people. In Kantian terms, we have no interest in the existence or survival of any firm in the way we do those of living people. No

law-abiding firm has a right to live if it is unprofitable and defeated by fair competition, as every law-abiding man or woman has a right to live even if their lives are unsuccessful or unhappy. Indeed, the failure of firms produces important empirical knowledge in the market order: every unsuccessful enterprise reveals a way in which productive resources cannot profitably be organized and perhaps a reason why, indispensable knowledge that cannot be created in any other way and is quickly dispersed to others through interaction in the market order. In the competitive world to which we allow their human creators to commit them, for the benefit of everyone, the most useful thing that most firms do is die.

One could respond that once a firm is up and running, its routines and capabilities might give it the ability to perform desirable social tasks in ways that have merit even if they cannot be made profitable, and that this particular knowledge and capability would be lost with the dissolution of the firm. This may be the case, though if it is, the possibility for improving on it remains open, if an entrepreneur can find a way to preserve the merits of the older organization in a profitable new one. But it is not the individual firm in isolation that produces knowledge in the market order, it is the competitive process that tests the organizational experiment that each firm represents and separates those that can make production pay for itself from those that can't. What is important for the creation of knowledge about how to organize production in profitable ways is not the survival of any single firm, but the survival of the spontaneously ordered process of competition and discovery in which they are all immersed. As Kantians, we care whether people survive because we consider them ends rather than means, but we do not care in the same way about the survival of firms (though we may care much about the distress of the people they leave behind) because every firm is part of a larger system that performs desirable tasks for

people, some of which require the dissolution of unsuccessful firms, and it is that beneficial larger system, not any individual firm, that people have an interest in preserving.

### **Corporations and the American Constitution**

Despite all this, in the United States corporations, alone among forms of business organization, have enjoyed constitutional rights to due process and equal protection of the laws for well over a century. Before 1850, when almost every American firm was either a sole proprietorship or a small partnership, business relations were governed primarily by contract law, individual owners and partners bore unlimited liability for the debts of their enterprises, and firms as such were understood as convenient legal artifacts, transparent, insubstantial masks behind which easily identifiable human beings who could be held personally responsible for the conduct of their firm did business. Neither proprietorships nor partnerships had continuous existence of their own, and both were dissolved by the departure of any owner or partner, for any reason. The privilege of incorporation, which gave firms a separate, potentially perpetual legal personality that could survive the departure of any of its participants, was granted sparingly by state legislatures. Its primary purpose was to protect investments in relatively large, 'public' enterprises like bridge or turnpike construction that required the commitment of substantial human and material resources for lengthy periods by 'shielding' the enterprise from dissolution at the hands of a minority owner or partner (Blair 2004: 47-57; Hansmann, *et al* 2006: 1337-1343). Corporations were thus treated as *artificial entities*, created with the legal properties they had solely by legislative action and consequently endowed with only those rights and powers the legislature chose to give them (*Dartmouth College* 1819: 636).

But with the industrialization of the early nineteenth century, as increasing numbers of ordinary commercial firms took on the character of the early corporations and sought the entity-shielding advantages of incorporation, a powerful movement arose to transform the privilege of incorporation into a right, freely available to any entrepreneur for the organization of any lawful business. By 1875, it had succeeded everywhere in the United States, and corporations, almost all of them featuring limited liability for stockholders in addition to the protections of entity-shielding, were quickly becoming much more numerous, and much larger, than they had ever been before (Blumberg 1986: 591-595). As they did, and the states attempted to check their growth or influence their operations through popular legislation, supporters of the corporations looked to the courts for protection from the close governmental regulation that was possible under the artificial entity theory. Their legal strategy was to dismiss the idea of a distinct corporate entity itself as an obsolete legal fiction, and replace the conception of the corporation as a concession by the legislature with one that portrayed it as a 'natural' outcome of free exchange that originates independently of the state. They analogized corporations, even the very large ones the states were keenest to regulate, to small partnerships, and looked through the corporation as an entity to focus instead on the property rights of its owners as individuals (Mark 1987: 1457-60; Lamoreaux 2004: 41-43). The fourteenth amendment rights to due process and equal protection, they argued, should be extended to corporations as such to protect the rights of their owners as individuals from regulation that would be unconstitutional if it were applied directly to living people.

In a famously terse opinion (*Santa Clara County* 1886), the Supreme Court agreed, 'without argument, without justification, without explanation, and without dissent' (Win-

kler 2007: 865). The theory on which they apparently did so was expressed in an earlier circuit court opinion by Justice Stephen J. Field, the most influential nineteenth-century Justice after John Marshall and a great friend of big business on the Supreme Court from 1863 to 1897. 'Private corporations,' he wrote,

are, it is true, artificial persons, but ... they consist of aggregations of individuals united for some legitimate business.... It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the States, should cease to exert such protection the moment the person becomes a member of a corporation.... On the contrary, we think that it is well established ... that whenever a provision of the constitution, or of a law, guarantees to persons the enjoyment of property or affords them means for its protection, or prohibits legislation injuriously affecting them, the benefits of the provision extend to corporations, and that the courts will always look beyond the name of the artificial being to the individuals whom it represents (*San Mateo County* 1882: 743-744).

Purely on its own terms, this was wrong as a matter of elementary legal logic, an error with enormous political significance. It is of course not the case that shareholders surrender their constitutional rights to due process or equal protection and become defenseless to expropriation when they contract to create a corporation. Once one 'looks beyond' the corporate entity to the individuals it represents, one sees all the corporation's property already protected by the constitutional rights of its owners, which makes granting the

same rights to the entity logically redundant. If a statute unconstitutionally takes the property of a corporation, it has directly taken the property of its individual owners, who fully retain their capacity to vindicate their rights in court. Indeed, the corporation itself gives them a powerful vehicle for combining their claims of individual right into a kind of class action carried on through the instrument of the corporation and with the assistance of its resources, which are likely to be much greater than those of any shareholder, without the need for any recognition of rights in the corporation as such. As Field observed, corporations are a means to hold and administer the property rights of thousands of owners *in the aggregate*, greatly magnifying the incentive of corporations to assert those rights and the resources they can mobilize to do so. But the Court's casual reproduction of Field's mistake, if such it was, now made the idea that constitutional rights could inhere in corporations as such a permanent feature of American jurisprudence. Its significance was felt almost immediately, as the Court soon embarked on a forty-year campaign to expand the rights of property owners against all forms of government regulation in the name of 'substantive due process' (Adelstein 2012: 218-229).

The theory that huge business firms were mere fictions proved to be as ephemeral as the corporations it portrayed. The separation of ownership from control in large corporations rendered the partnership analogy untenable, and the fiction theory could not be squared with the undeniable social presence and collective powers of the new industrial giants. Its successor was what Gindis (2009: 31-36) calls *real entity* theory, in which corporations are fully reified, treated as real, purposeful creatures distinct from their participants and endowed with economic interests and purposes of their own. After 1895, English and American writers struggled to adapt this essentially collectivist conception to the

individualist landscape of common law and Lockean liberalism. The earliest realists embraced a literal organicism that depicted a corporation, in Maitland's words (in Gierke 1900: xxvi), as 'no fiction, no symbol [but] a living organism and a real person, with body and members and a will of its own.' By 1920, a second generation of realists had largely abandoned this view for a milder notion of collectivity that acknowledged that the corporation was not actually an organism but insisted that it was a real social entity, identifiable as such, as Ernst Freund (1897: 47) put it, by 'its unity, its distinctiveness, and its identity in succession.' But as early as 1906, in holding that a corporation had fourth amendment rights of privacy regarding internal documents that even stockholders had no right to see (*Hale* 1906), the Supreme Court made its abandonment of the fiction theory clear, and adopted instead a conception of the corporation that enabled it to exercise rights that could not be traced to the rights of its owners. This expansion of protection beyond the fourteenth amendment's guarantees of due process and equal protection has in turn been the basis for later extensions of first amendment rights to free speech and association to corporations (e.g. *First National Bank* 1978).

In the context of the times, stressing the corporation's reality and clothing it in the language of personhood had a cultural resonance that strongly favored the political and legal interests of real corporations and continues to influence popular attitudes toward them. As Mark (1987: 1472) puts it, characterizing corporations as persons 'proved the perfect rhetorical weapon, asserting the panoply of individualist protections for the corporation and shifting the role of the state from guardian to invader of rights.' At the same time that it made the corporation an individual, the word 'person' also invoked the collective power of individuals united in a single, vibrant unit. Corporate personhood was a

metaphor perfectly suited to the nascent collectivism of the late nineteenth century. After 1870, American intellectuals increasingly depicted society as an organism, a concrete, living entity with interests distinct from, and superior to, those of its living constituents (Tariello 1982: 53-69). Real entity theory was the mirror of this collectivism in the realm of production, and 'a major factor in legitimating big business' (Horwitz 1985: 176, 181-3) in the courts of law and public opinion. The continuing economic and political dominance of large corporations in our own day is testimony to its lasting power and effect.

## Conclusion

The contracts-in-performance model of firms, coupled to a Kantian perspective on moral personhood, points to an asymmetric conclusion on the rights and duties of firms as such, as distinct from those of their human participants. On the one hand, because the purposeful acts of firms are typically the consequence of the interactive performance of the firm's characteristic routines by its human participants but cannot meaningfully be reduced to the purposeful acts of any individual participant, there is a residual responsibility for the acts of the firm after the responsibility of each participant has been properly reckoned that can only be attributed to the firm. But on the other, while it may or may not be convenient for firms to hold rights to fair treatment regarding property in proxy for their human participants, there is no good reason to grant firms moral or political rights distinct from or in addition to those already possessed by their human participants. On the contrary, given the often superhuman powers of cognition and action possessed by large firms and the vast resources they control, granting redundant rights of this sort to firms as such may cause significant political distortion in a liberal democracy. Because firms are never

more than instruments created by living men and women for their own purposes, they have no right to life. Nor, since they are owned by others, do they have a right to liberty. In the absence of rights to life or liberty, there is no basis for granting firms political rights to such things as equal protection, free speech, or privacy that might flow from these fundamental rights.

These conclusions rest on a conception of firms as relational contracts, voluntarily entered into by all participants and free of any exercise of power or authority to which its subjects have not consented. But it is clear that many functioning institutions and organizations, from families and armies to prisons and slave plantations, do not comfortably fit this description and yet may be real social actors in the same sense that firms are. Even in ordinary business firms, unequal relations of power are common and participants are not always completely free to avoid or resist them. Individuals within these collectives, or in ordinary firms, may not act volitionally in the sense that participants in relational contracts do, and this may have important implications not just for the moral quality of their own acts but for those of the larger collective as well. How the moral or political quality of the relationships within a collective affect the rights and duties of the collective in such cases is an open question.

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