

EPILOGUE ON “CORPORATE PERSONHOOD” AND HUMANITY

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In discussions of corporate criminal liability, the question of corporations' moral personhood often plays a central role. These concluding remarks point out some troubling repercussions of the notion of personhood on our conception of human beings and their moral status. Humanity rather than personhood is proposed as a more appropriate category for grounding humans' dignity and their rights. This way of framing the discussion helps distinguish the proper treatment of humans from that of other subjects, be they corporations or animals.

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The title of this symposium invites us to consider a link between two topics: corporate personhood and criminal liability. The invitation does not purport to be original. In one form or another this link has been at the heart of a long and lively debate. But in accepting the invitation we must reconsider its terms and address them afresh. This is indeed what the various presenters in this symposium have done; they each throw some new light on the old issues. The light emanates from different sources: philosophical, historical, legal, or some combination of those. But though the approaches vary, and the conclusions sometimes conflict, the focal point is shared. A proper understanding of the personhood of corporations provides a key to the question of corporate criminal liability.

The starting point is what is considered to be a paradigm case: the ordinary subjects of criminal liability are individuals like you and me. The

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challenge is to situate corporations in a field dominated by individuals and in relationship to them. The notion of "personhood" allows us to do just that. The question of corporate personhood is much broader, of course, than that of corporate criminal liability. It arises whenever we consider what attitudes and policies toward corporations are appropriate. Still, criminal liability is of special significance in this regard: not only is the prospect of an impending sanction allegedly effective in focusing the mind, but in this case it focuses it in particular on the *moral* considerations that guide our interpersonal relations, thus drawing special attention to a notion of *moral* personhood, on which these considerations supposedly depend. In concluding our proceedings, however, it may be appropriate to indulge a philosophical foible to reflect on reflection, and so end on a reflexive note. Our discussion has fixed on the personhood of corporations with an eye to elucidating their treatment by law. In the following comments, I propose to change the focal point and draw attention to *us*, the people who conduct these deliberations, and to some implications that our engagement with the personhood of corporations may have on our own.

As a preliminary, it will be useful to sketch a rough picture of the lay of the argumentative land. We can conveniently distinguish three main approaches to corporate personhood: *formalist*, *reductionist*, and *realist*. On the formalist view, the corporation is nothing but the putative subject of the rights and obligations that the law confers. Reductionists, by contrast, maintain that to talk about collective entities, corporations included, is to designate nothing but an aggregate of individual agents and their interactions. By thus trivializing the notion of personhood in the one case or dispensing with it altogether in the other, neither formalists nor reductionists need seriously worry about the notion of personhood, its meaning, and its extension.

But a large and perhaps growing number of scholars are corporate realists. Their approach is, ontologically speaking, more ambitious, since it affirms the existence of the corporation quite apart from the legal arrangements that establish and govern it, and "over and above," as the saying goes, the aggregate of its individual members and their actions. Realists do not, of course, deny the obvious, namely that corporations are composed of human beings. They insist, however, on applying to corporations the general truth that the world is full of composites with global properties quite different from the properties of their components. Water is wet, for instance, whereas H₂O molecules are not.

Corporate realists can be further divided into three subcategories—call them the *notional*, the *epistemological*, and the *metaphysical*—differing in the level of “robustness” of the existence they claim for corporations, or put differently, in the size or nature of the gap they posit between the aggregate of individual members on the one side and the corporation as a distinct and unified entity on the other. A notional view highlights the fact that a reified conception of the corporation is deeply entrenched in ordinary language and practices, and it ascribes normative significance to such entrenchment. An epistemological view highlights the complexity of the network of relationships constitutive of the corporation, maintaining that this creates an insurmountable cognitive barrier for any attempt to account for the corporate phenomenon in individual terms. This leaves open the possibility that such reduction is possible in principle. The third, metaphysical view denies this last claim, insisting instead (on various and sometimes conflicting grounds) that corporations exhibit global properties that are not even in principle amenable to an individualist reduction.

The realist view is a thesis about the existence and the unity of corporations, not about their personhood. But it paves the way for the question of personhood, by presenting us with a subject about which the question of personhood can be intelligibly raised. Though the investigations of corporate personhood vary, some follow what has become a familiar pattern.¹ Schematically, it consists in two steps. Since, as has already been mentioned, human beings are the paradigm subjects, the first step explores the traits by virtue of which human beings have the moral status they claim to possess. The result is a schedule of properties deemed morally significant. These properties are taken to define a *person*. The next step is to detach the notion of personhood from its human source and inquire which entities possess the traits that define it. Specifically, we investigate the nature of corporations, asking whether or to what extent they exhibit the qualities of personhood, and so whether or in what form attitudes and policies that depend on personhood ought to apply to them. Let us call this approach *the standard scheme*.

The issue of corporate personhood in general, and the standard scheme in particular, are fraught with familiar dangers. Chief among them is the

1. *E.g.*, CHRISTIAN LIST & PHILIP PETTIT, GROUP AGENCY: THE POSSIBILITY, DESIGN, AND STATUS OF CORPORATE AGENTS (2011).

so-called *anthropomorphic fallacy*.² The red flag of anthropomorphizing is raised when we purport to impose on the corporation the image of a human being, and the question to which we are alerted is, How good is the fit? There is, however, another danger posed by the standard scheme, namely, that it may end up distorting our own image, in part because we shape it in anticipation of the new subjects to which it is supposed to apply. Either way, corporations may come out resembling human beings in morally (and legally) significant ways. We should accordingly be wary of *both* aberrations that may lead to this result. One is inappropriate anthropomorphizing. The other, less familiar but no less important, is that the projected *anthropos* may have been morphed out of shape.

We can gain some perspective on this point by relating the corporate personhood debate to a parallel discussion about the treatment of animals. The issues are strikingly similar. The common concern is whether nonhuman entities possess traits of moral personhood that entitle them to moral consideration similar to that extended to humans.³ And in both the cases of corporations and animals, the investigation is prompted by a similar worry: to attach basic and distinctive moral significance to humanity as such is to display a prejudice: "in favor of biological persons"⁴ when corporations are at issue, and in favor of the species *Homo sapiens* when animals are.⁵ The concept of a *person*, detached from that of a human being and endowed with primary moral significance, is designed to counter the alleged prejudice. The question of who *is* a person is supposedly open to objective, evenhanded inquiry. Self-serving human favoritism is ruled out.

Relating the corporate personhood debate to that of animal rights is instructive, since the claims and the rhetoric in regard to animals tend to be more extreme, and so help highlight some dangers that lurk in the case of corporations as well. In both cases, humanity is put on the defensive, with

2. For illustrative discussions of warnings to this effect, see ROBERT B. REICH, *SUPERCAPITALISM: THE TRANSFORMATION OF BUSINESS, DEMOCRACY, AND EVERYDAY LIFE* 218–19 (2007); John C. Coffee Jr., "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 386 n.2, 390, 441, 448 (1981).

3. The general issue is sometimes referred to as that of "moral considerability." See, e.g., MARK H. BERNSTEIN, *ON MORAL CONSIDERABILITY: AN ESSAY ON WHO MORALLY MATTERS* (1998).

4. Peter A. French, *The Corporation as a Moral Person*, 16 AM. PHIL. Q. 207, 208 (1979).

5. E.g., PETER SINGER, *ANIMAL LIBERATION* (1975, 1990).

some troubling results. One is the pressure to extend to these nonhumans the full panoply of human rights. Most of those who write in this vein balk at this conclusion and try to resist the pressure. But once the notion of personhood is introduced and occupies center stage, much footwork is required to avoid this slide, and the pressure occasionally prevails. A second danger is the flipside of the first. Resistance to the idea that corporations and animals should be granted certain rights, coupled with insistence that a concept of *personhood* is required to secure an evenhanded approach, creates pressure in the opposite direction, for it can also entail curtailing some human rights to bring them into alignment with those of the non-human "persons." Finally, and most alarmingly, once a detached concept of personhood replaces that of a human being, it turns out that human beings satisfy the conditions of personhood to varying degrees, and some do not even make the moral cut.⁶

These risks are all associated with the concept of personhood and its role within the standard scheme. We can avoid them by insisting that *humanity* rather than *personhood* is the fundamental moral category in light of which our own moral standing is to be understood. *Human rights* are what their label literally signifies, and they are grounded in *human dignity*, every human being's unconditional and inviolable worth. But this step appears unavailing and the resort to personhood inescapable, as long as the charge of prejudice stands. Upon reflection, however, the charge turns out to be entirely specious.⁷ The notion of prejudice that is being invoked is meant to be morally offensive, akin to attitudes such as racism or sexism. After all, not every irrational discrimination amounts to prejudice in this sense. It may be irrational to treat differently two cars because of a difference in color, but doing so doesn't display prejudice in the invidious sense manifested when treating two human beings differently because of their skin color. For the charge of prejudice to have its intended bite, it must presuppose a domain of entities with respect to whom moral standards of equal treatment apply; the idea of prejudice cannot by itself establish such a domain or circumscribe it. Specifically, the notion of prejudice presupposes

6. See, e.g., Peter Singer, UNSANCTIFYING HUMAN LIFE: ESSAYS ON ETHICS (Helga Kuhse ed., 2002); MICHAEL TOOLEY, ABORTION AND INFANTICIDE (1983).

7. Compare BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY, ch. 6 (1985), and Williams, *The Human Prejudice*, in PHILOSOPHY AS A HUMANISTIC DISCIPLINE 135–52 (2006).

an answer to the question whether *humanity* or *personhood* ought to designate the category of beings with respect to whom a standard of moral equality applies; the notion of prejudice cannot help us choose between them.

But even with the anxiety about prejudice relieved, some account of humanity's special moral status may still seem required. To be sure, for those who adhere to it, the ideal of human dignity defines the core of their humanism and serves as their most fundamental normative premise; it is not the conclusion of a train of reasoning but its starting point. Still, such an appeal to humanism may not be satisfactory, especially since the humanist tradition is multifaceted, and not all facets equally attractive. For example, one strand in the humanist tradition appeals to a robust conception of human nature and to related ideas of natural law, which many find objectionable. Indeed, the concept of personhood may be recruited in opposing such trends. However, there is another humanist strand that bases human dignity not on a distinctive human nature but rather on its absence. This strand goes as far back as Giovanni Pico della Mirandola and his famous fifteenth-century *Oration on the Dignity of Man*.⁸ Anticipating such modern schools of thought as existentialism, communitarianism, and postmodernism, Pico proclaims the theme of human self-creation: what distinguishes humanity from the rest of creation and indeed gives it its special, elevated worth is that Man has no essence, and so must create his own. Put in a more contemporary idiom, on this *constructive view* the self is the largely unintended byproduct of individual actions and collective practices, whose primary orientation is not the creation of a self but the accomplishment of some individual or collective goals.

But why is self-creation a source of elevated worth? Though different answers have been proffered, an appealing approach gives Pico's view a Kantian gloss by linking the notion of self-creation to Kant's insistence on human intelligibility.⁹ The key is that to contend that humanity creates itself is not to maintain that we create our own organisms. Rather, human self-creation takes place in the medium of meaning: the meanings we create, create us. What in turn makes human action intelligible, what gives it meaning, is that it is done for the sake of something or other. To act

8. GIOVANNI PICO DELLA MIRANDOLA, *ORATION ON THE DIGNITY OF MAN* (A. Robert Caponigri trans., 1956) (1486).

9. The main text is IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSIC OF MORALS* (1948) (1785).

intelligibly requires that one's ends be deemed worth pursuing, and so valuable. In this sense all human action consists in the projection and attempted realization of purported values. Since we deem these values worth pursuing, we must endorse them. This is the sense in which, in pursuing any value at all, we must recognize ourselves as the ultimate authority. To recognize ourselves as having a definitive authority over ourselves is to defer to ourselves. This amounts to recognizing our superior worth.

The role of human beings in a Kantian axiology is accordingly not in the first place as the objects of valuation but as its subjects, as the creators and origins of value: humanity creates a system of meanings within which facts become intelligible and evaluative judgments possible. Once a system of categories, concepts, values, and the like is in place, it makes room for, among many other things, human beings seen as empirical objects of observation. And as the observation of human beings reveals, they do generally display the kinds of traits we commonly associate with one or another notion of personhood. However, personhood is variable and contingent, whereas human dignity is unitary and categorical. People differ in their level of rationality and agency, and some display such capacities only marginally or not at all. Similar variation occurs intrapersonally as well. The capacities in question fluctuate and are occasionally extinguished, as during sleep or a coma. But none of this affects dignity and the respect it mandates. Granted, the apposite manifestation of respect is sensitive to a human being's state and capacities. Though respect ordinarily requires deference to self-regarding choices, for instance, this requirement is moot in the case of someone who can't make any. But whatever the requisite manifestation of respect, the underlying value—dignity—is possessed by all human beings fully, equally, and uninterruptedly.

If some such connection between self-creation and human worth be granted, however, other questions loom large. Two in particular must be mentioned. The first is a worry that appeal to human self-creation begs the crucial question, Who exactly is included in this venture; who counts as a human being? Indeed, the record in this regard has been quite odious. But following in Pico's footsteps may in fact allay these concerns. Pico's *Oration* is a spin on the story of creation, and so he treats humanity as one biological species among others. The thesis of human self-creation is accordingly grounded in a system of classification in which the extension of *Homo sapiens* is as naturally fixed as is the extension of *Loxodonta africana*. Who is a human being is therefore a given; what she is, is not.

To be sure, the capacity for self-creation requires that the conception of humanity as a biological species be overlaid with another order of signification in which the organism is endowed with meaning and thus is made intelligible. But attending to the meanings that distinguish humanity from other species does not undo the biological extension of the term. Think by analogy of the relationship in the case of books between the physical volume and, say, the novel it contains. Irrelevant complications aside, the extension of *book* in some library would be the same irrespective of whether one were to attend to the volumes or to the novels. For example, one can confidently count the books even if, illiterate, one could not tell apart *Anna Karenina* from *The Old Man and the Sea*.

This reassurance that the contours of dignity encompass the entire human race leaves open, however, a second cardinal question about the subject of self-creation. Human self-creation can be given a collective interpretation, as involving humanity as a whole, or a distributive interpretation, according to which each individual forges her own identity. *The social construction of the self*, which fixes on society as the arena of human self-creation, is intermediate between these poles. The choice between the universal, the social, and the individual as the site of self-creation does not appear to be easy, but it is not in fact necessary, or indeed possible, since each of the interpretations implies the others as well. To see this point, reconsider the picture of the social as intermediate between the individual and the universal. Intermediate in what sense? One answer would be *numerically*, as "many" is intermediate between "one" and "all." But the view of self-creation as manifesting human intelligibility and as occurring in the medium of meaning suggests another answer. Meanings are abstract, and so the difference can be conceived as a matter of levels of abstraction: the social is more abstract than the individual, and the universal yet more abstract. Or, stated in reverse, social meanings are a more concrete elaboration of universal meaning, and individual meanings a further and yet more concrete elaboration of social ones.

Privileging humanity over personhood as the primary site of dignity faces many obstacles that cannot be here considered, and that the above sketch, even if on the right track, cannot by itself remove. But let me conclude by relating the preceding comments to the case mentioned earlier of human beings who fall below the threshold of personhood, such as those who are in a permanent vegetative state. Don't these people pose an obvious challenge to the humanity approach advocated here? Given that on any

plausible scale of personhood traits they score no higher than the vegetables to which they are implicitly compared, what entitles them to a different moral standing? Why would their mere species affiliation count? The example is unsettling, but the foregoing comments suggest that it cuts precisely the other way. Unlike a cabbage or a cucumber, the permanently comatose fills us with horror and dread. Why? The answer has two parts. First, it is not a *misfortune* for a vegetable to be in a vegetative state; whereas it is a great misfortune for John or Mary to be in this state. Failure to satisfy the conditions of personhood (whatever they are) is for a human being to *fall short*. But this is only half the answer, since vegetables too may come up short in terms of standards of perfection that apply to *them*, and yet fail to elicit in us a similar response to our response to the comatose. So the second reason for our dread in the face of the comatose is that we recognize in her a horrible version of ourselves. Not only because we may suffer a similar fate: the likelihood of this may be quite remote, depending on the details of the case. Rather, our reaction can be better explained by the fact that the comatose human exhibits a radically degraded version of the meaning of human life, which at a higher level of abstraction is the meaning of our lives as well.

The permanently comatose is not a person; but she is a human being all the same. She is a version of humanity, the only moral subject there is. The meanings constitutive of humanity range over various levels of abstraction, from the multiplicity of concrete versions in individual lives to the abstract unity that marks universal humanity as a whole. This creates a backdrop and a perspective for investigating our own traits, capacities, and vulnerabilities, as well as those of corporations or animals, and for contemplating the normative implications of those traits, capacities, and vulnerabilities for their possessors and for others. In conducting such investigations and in engaging in such contemplation, an important old caveat must, however, be heeded: not to confound a watching eye with an eye being watched.