The Fallacy of Corporate Moral Agency
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The Fallacy of Corporate Moral Agency

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Abstract

This book is a philosophical analysis of the corporation in society that spans the disciplines of Ethics, Law, Economics, and Political Philosophy. Part I poses a meta-ethical challenge to the position, generally accepted in Business Ethics, that a corporation qualifies as a moral agent. The most prominent theories of corporate moral agency are analysed by evaluating if they can satisfy the three necessary moral agency abilities of intentionality, autonomy, and an ability to act. Part I concludes that, metaphysically speaking, the corporation itself does not qualify as a moral agent, in part because the morally relevant sense of the abilities of intentionality and autonomy require awareness on behalf of the agent. Therefore, corporations cannot be morally responsible as distinct from their members. Attributions of moral responsibility to corporations are at best an elliptical way of referring to individual corporate members who may be morally responsible.

Part II proceeds from the premise that the corporation is not a moral agent. It seeks to descriptively evaluate what the corporation is and to prescriptively evaluate what role the corporation ought to have in society. By tracing the historical development of the corporate legal form in English and American law, it is argued that descriptively the corporate form is primarily a legal agent. It is also maintained that the corporation is a legal fiction granted to associations of individuals, and as such it is descriptively an instrument of the state.

Part II then proceeds to prescriptively argue that the corporation also ought to be an instrument of the state. As such, the state may legitimately regulate corporate actions to be in accord with national goals of social welfare. It is highlighted that although the corporate legal form is an instrument of the state, actual corporations are the instruments of their incorporators. Part II then takes issue with the prescriptions of the Corporate Social Responsibility movement which maintain that a wider constituency of stakeholders than merely shareholders ought to be considered in managerial decision-making. It is argued that many of the prescriptions of CSR are very difficult to uphold unless one also mistakenly advocates corporate moral agency. Furthermore, the issues that CSR wishes to
tackle are better addressed through public initiatives and legal enactments by the government. The normative force of the argument is that citizens of democratic states ought to primarily make calls for legal enactments in order to hold the corporate legal instruments accountable to their preferences.
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Introduction

There has for some time been a heightened interest in the ethical behaviour of business corporations from many areas of society. Consumers in developed countries have displayed a willingness to “vote” with their money by boycotting corporations that use child labour and have increased their demand for products that are environmentally friendly. Investors have increasingly started to put their money into “ethical funds” that vow not to invest in certain industries, for example, the military and tobacco and sex industries. International institutions have set up guidelines for good business practice, for example, the OECD Guidelines for Multinational Enterprises and the UN Global Compact. National governments have also started to make legal reforms, for example, the 2002 Sarbanes-Oxley Act in the USA following the corporate scandals of Enron and WorldCom. Importantly, many corporations and business leaders have begun to declare themselves as champions of Corporate Social Responsibility (CSR) by stating that they regard their corporations as having obligations to serve the communities in which they are active.

The field of business ethics as an academic pursuit has been steadily evolving, although it has received much more attention in recent times due to the enhanced interest from other parts of society. The contemporary academic field of business ethics originated in America during the 1970s and 1980s when several moral philosophers started inquiring whether or not the corporation qualified as a moral agent (e.g., Donaldson 1982; French 1984; Ladd 1970; Werhane 1985), that is, an entity that one may legitimately attribute with moral responsibility. However, since those days the issue of corporate moral agency has not captured the interest of many philosophers. Nowadays, the discourse in the field generally proceeds from the implicit premise that corporations are moral agents and that it is quite acceptable to hold corporations morally responsible.

Many of the ethical prescriptions made by academics and civil society about what corporations ought to do hinge on a conception of corporations as moral agents. Corporate moral agency is generally an underlying assumption for prescribing that corporations should sign up to voluntary ethical guidelines beyond the requirements of the law as well as corporate commitments to CSR. This is because corporations are said to have moral duties that guide their conduct which, if the duties are held
by the corporation itself rather than individual members, requires an assumption of corporate moral agency.

The aim of Part I of this book, titled “The Fallacy of Corporate Moral Agency”, is to re-evaluate the corporate moral agency debate. The overwhelming consensus in favour of corporate moral agency has led few people to question this fundamental tenet of the field. This debate has lain largely dormant for over a decade, and I aim to re-examine the issue in a more extensive and systematic fashion than previously done. Part I deals exclusively with the issue of corporate moral agency and the attribution of moral responsibility to corporations.

I first put forward three uncontroversial necessary conditions for moral agency. These conditions will serve as the foundation of our evaluation of the corporation’s metaphysical status as a moral agent. I then start the analysis by systematically scrutinizing the theories espoused by some of the most influential advocates of corporate moral agency and consider if they satisfy our three conditions. These theories have in common that they allow for the possibility of attributing moral responsibility to a corporation where no moral fault may be found with the corporate members, thus lodging the responsibility with the corporation itself as a moral agent. I show that none of the espoused theories meet the necessary conditions for moral agency in the relevant way. I maintain that if it is moral responsibility that we wish to attribute to a corporation for a certain event, then we will not be making a legitimate attribution of moral responsibility if we are lodging that attribution with the corporate entity itself rather than a set of its members.

However, the use of corporate names as the subjects or moral responsibility predicates is clearly part of our use of language, and it is therefore important to make sense of such statements. Therefore, I next move on to inquire what the reference of a corporate name is when used as the subject of a moral responsibility attribution. In other words, does the corporate name refer to an entity that is logically distinct from the corporate members, or is the name used to refer to the set of members that are morally responsible? I suggest that corporate names in moral responsibility attributions implicitly refer to the subset of corporate members that are morally responsible for the event being attributed and that we only use the corporate name because of transparency difficulties in identifying who the responsible individuals are.

Next, I show how one can construct better theories of corporate moral agency with the aid of theories of collective intentionality. The idea is that if we can construct a theory of collective moral agency that is completely dependent on the intentionality of individual members who themselves are moral agents, then we may have a theory that meets our necessary moral agency conditions. Bearing in mind the theories of corporate moral agency that I have criticized and the theories I have constructed with the aid of collective intentionality, I wrap up Part I by presenting a taxonomy of legitimate and illegitimate corporate moral responsibility attributions. The principal conclusion to be drawn from this taxonomy is that moral responsibility may only be legitimately attributed to corporations when that responsibility is meant to lodge with the corporate members and that corporations are never moral agents in and of themselves.
Part II is titled “The Role of the Corporation in Society” and takes as its premise the conclusion from Part I, namely, that the corporation is not a moral agent. Because few have thought to question corporate moral agency, few have also thought of exploring the implications of it not being such an agent. Having argued against corporate moral agency, I need to say something constructive about what the corporation is in order to hold it accountable. If corporations are not moral agents, then what are they?

The answer to this question is the first aim of Part II explained in the section titled “The Role of the Corporation in Society: The Descriptive View”. I maintain that corporations are primarily legal agents and further that the corporate legal form serves an important role as an instrument of the state. I trace the evolution of the corporate legal form in English and American law from the first chartered craft guilds by the Crown in the fifteenth century up to the establishment of the modern corporate legal form in the second half of the nineteenth century. This historical analysis is also viewed through the perspectives of three competing theories in law over the nature of the firm: the Legal Fiction Theory, the Nexus-of-Contracts Theory, and the Real Entity Theory. Interestingly, these theories overlap with the debate on corporate moral agency. I maintain that the Legal Fiction Theory is a descriptively dominant representation of the nature of corporations.

Clearly, corporations are not merely legal agents existing only in contemplation of the law because as organizations they are metaphysically comprised of human members, but from the perspective of holding the entities themselves accountable, corporations are primarily legal agents. As legal agents, corporations differ from moral agents in that they are not ends in themselves. Instead, actual corporations and the corporate legal form are both created for certain instrumental purposes. I suggest that actual corporations are the instruments of the incorporating parties, while the corporate legal form is the instrument of the state to promote economic growth and regulate economic activity for the public good. This provides a useful distinction between the goal and the role of the corporation: its goal is to be an instrument to further the interests of shareholders, while its social role is to further the interests of the state.

Having answered descriptively what the role of the corporation in society is, the second aim of Part II is to answer what role the corporation ought to have in our society. This section is titled “The Role of the Corporation in Society: The Prescriptive View”. I here make use of the distinction between the goal and the role of the corporation. First, I look at whether the corporate legal form ought to have a role as an instrument of the state. This involves scrutinizing the libertarian nexus-of-contracts objection that state use of the corporate legal form is an illegitimate interference with the corporate goal because it infringes on the absolute property rights of shareholders. I argue that the foundation for absolute property rights is very weak and instead maintain that the best justification for private property rights is that they are instrumentally beneficial to citizens. If we cannot uphold absolute property rights, this opens the door for the state to use the corporate legal form as an instrument to further the public good.

Next, I consider whether or not actual corporations ought to be primarily the instruments of the incorporating parties. This involves a head-on confrontation