Monsters, Incorporated: Why Corporations Aren't Persons and Why We Shouldn't Care Anyway

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ABSTRACT

While one might think the debate about corporate moral personhood already overplayed, this paper finds three reasons to intervene anew. First, the paper identifies a pair of fallacies that have plagued the debate and that have, until now, gone unnoticed. Second, it expands our conception of the requisites for personhood by foregrounding the role of moral emotion. Because it seems especially difficult to defend a corporate capacity for emotion, the paper holds greater promise for resolving the debate – resolving it, that is, in favor of those who would reject corporate personhood. But the paper also seeks to advance the debate in a more profound way – by arguing, finally, that in fact moral personhood is something of a red herring, for personhood might be neither necessary nor sufficient for recognizing corporate rights or holding corporations responsible. Focusing on corporate speech and conscience rights, and criminal liability for corporate wrongdoing, the paper concludes that the way we should treat the corporation turns on considerations that the personhood question does not determine.

INTRODUCTION

Corporations are monsters – not in the sense that they are hell-bent on evil but in the sense that they lack certain capacities that are the hallmarks of our humanity. In particular, and like most supernatural creatures populating both mythology and the movieplex, corporations lack the ability to appreciate what it might feel like to be the victim of a wrong and, not unrelatedly, the ability to feel bad when they do wrong. To put it in our folk terminology, the corporation lacks a heart.

Does it matter that corporations are heartless? It does, if having a heart, or to put it more formally, a capacity for emotion, is a prerequisite for personhood – a prerequisite, that is, for enjoying rights and bearing responsibility for one's wrongs. On a conception of personhood that identifies a capacity for emotion as necessary for personhood – a conception I will defend here – we have reason to ask whether the corporation is a person.

The question, though hardly new,[i] seems to press upon us with renewed urgency given recent judicial decisions expanding corporate rights, on the one hand, while rejecting the prospect of corporate responsibility for wrongs, on the other. Thus, in its much-reviled 2010 *Citizens United* decision, the Court conferred upon corporations political free speech rights very much like those that individuals enjoy.[ii] And lower courts seem prepared to recognize that corporations, like individuals, have conscience-based rights that, for example, immunize them from needing to offer contraceptive coverage in their health plans, as the Affordable Care Act would require.[iii] At the same time, caselaw in the last few years has protected corporations from liability in human rights abuses like torture and rape on the ground that corporations are not the kind of beings contemplated by the relevant statutes and doctrines.[iv]

Many of those who take up the question of corporate personhood operate with a mistaken understanding of the law, and an unhelpful body of theory. Thus opponents of *Citizens United* have as their rallying cry, "Corporations are not persons!,"[v] even though nowhere in the majority opinion does the Court recognize corporations as persons.[vi] And the philosophical debate about corporate personhood is so voluminous, with so many contributions on each side, that it wouldn't be untoward to deem it intractable, as I have elsewhere.[vii] No wonder we have achieved so little clarity in discerning the correct moral and legal status of the corporation.

I nonetheless think the debate about corporate personhood worth another – dare I say, final? – round, for three reasons. First, the debate is plagued by a pair of fallacies that have until now gone unnoticed. I seek to expose these fallacies in Part I. Second, much of the contestation around corporate personhood has operated with too thin a conception of what it takes to be a person. In particular, theorists have largely focused on the capacities for belief and intention, and disagreement has raged about whether or not the corporation possesses these. But there is another capacity that I believe necessary for personhood that has largely gone overlooked – a capacity for moral emotion. I defend the necessity of emotion for personhood in Part II and argue there that the corporation lacks the requisite capacity. In particular, I draw upon the philosophy of horror to arrive at a revealing, though admittedly fanciful, understanding of the corporation as a kind of heartless or soulless monster. If I am right that emotions are necessary for personhood and that the corporation does not possess a capacity for emotion, then the corporation would not qualify as a person even if it could believe and intend. That would put the final nail in the coffin of corporate personhood.

One might think this a significant outcome. In fact, its implications for our treatment of corporations are marginal at best, as I argue in Part III. This is not to say that the question of corporate personhood is irrelevant for determining whether the corporation should enjoy *any* rights, or whether it should *ever* be held morally responsible. A finding of personhood would be sufficient to ground some rights, and to justify some sanctions when the

corporation went wrong, as I suggest in Part III. But much of what concerns us about the rights and responsibilities properly borne by corporations does not in fact turn on corporate personhood. In particular, I contend, we might recognize corporate rights even if corporations are not persons; alternatively, corporations might legitimately be denied certain rights that we take to be foundational in our constitutional regime even if it turned out that they were persons. Similarly, I argue, we may be licensed in holding corporations morally and hence criminally responsible for their wrongful acts even if they are not persons; alternatively, we might have good reason to reject corporate criminal liability even if it turned out that corporations were persons.

In sum the paper seeks to establish that corporations are not persons, and that in any event the concerns that motivate inquiry into corporate personhood won't be satisfied no matter whether the corporation is or is not a person.

I. EXORCISING FALLACIES FROM THE DEBATE

The protracted nature of the debate about corporate personhood can be attributed at least in part to two fallacies that plague it. I seek to expose each in turn here.

A. Fallacy #1: *Whatever licenses our ascribing an act to a corporation also licenses our holding the corporation responsible for that act*

Whenever a member of an institution, like the corporation, commits a wrong, the first question that arises is whether the wrong is the member's alone or instead whether we are licensed in ascribing it to the institution to which he or she belongs. Thus if Bill Gates were to sell cocaine from his office at Microsoft headquarters, we would want to know whether it would be appropriate to prosecute not just him but also Microsoft for the drug dealing. Different bodies of law, and different theories, answer the question differently. Thus the Model Penal Code will deem the wrongdoer's act an act of the corporation just so long as it was authorized or at least recklessly tolerated by a senior manager.[viii] By contrast, federal criminal law does not require that a corporate official have any role to play in the wrongdoer's crime; just so long as the perpetrator acted within the scope of her agency and for the benefit the corporation, we may attribute the crime to the corporation.[ix] Theorists have identified still other grounds for finding that the corporate employee's act is properly attributable to the corporation. Thus, for example, some scholars argue that it will be appropriate to ascribe the employee's crime to the corporation where the corporation possesses an organizational structure without proper oversight mechanisms,[x] or an evil or crime-inducing corporate culture,[xi] or a history of like crimes to which it has never properly reacted.[xii] Others argue that corporations must and do enjoy some degree of autonomy relative to their constituent members and that this autonomy licenses our ascribing certain acts to the corporation rather than its members. Most significantly, and as Philip Pettit maintains in what is perhaps the most challenging contribution to the literature on corporate moral responsibility in the last decade, corporations must and do sometimes make decisions that reflect the combined contributions of their members but that no one member would endorse.[xiii] Given the fact that corporate decisions may be independent of the decisions of any member of the corporation, those decisions, and the acts in which they result, are the corporation's in the first instance, Pettit maintains.[xiv]

Now, suppose that one or more of these asserted grounds of attribution is compelling; on the basis of that ground, we are licensed in finding that the employee's wrong is a wrong of the corporation. It is crucial to note that *this finding says nothing about whether the corporation may be held responsible for the wrong*. Put differently, an employee's wrongdoing raises two distinct questions related to the corporation's culpability, though these have all too often been conflated: First, is the perpetrator's wrong properly *ascribed* to the corporation? Second, if it is, may we *assign* responsibility to the corporation for that wrong?

Analogizing to the case of individual criminal liability allows us to see that an affirmative answer to the *ascription* question provides no answer to the question of whether we may *assign* responsibility. Suppose that Jane intends to kill her nemesis, she points a gun at her nemesis, pulls the triggers, and fires a fatal shot. Jane has thereby satisfied the elements of the crime of murder, as standardly understood: She has performed the murderous act with the requisite mental state. In other words, the murder is properly ascribed to Jane. But to determine whether we may hold Jane responsible for murder requires that we answer a separate set of questions: Was Jane temporarily drugged, or is Jane below the age of moral maturity, or does Jane suffer from a longstanding mental illness that qualifies her for an insanity defense? To be sure, in the garden-variety murder case, we do not often entertain these questions, because we are licensed in presuming Jane's fitness for moral, and hence criminal, responsibility. But it is only because the presumption is warranted in most cases of individual crimes that we may elide questions about whether we may hold the defendant responsible for her criminal act.

The same cannot be said about the corporation. The question of whether any corporation qualifies as a moral agent is one that has, manifestly, generated tremendous controversy.[xv] So the fact that doctrine and theory supply us with indicia of corporate action does not entail that they have established that corporations may be held responsible

for their acts. For example, and as I have argued elsewhere,[xvi] the fact that a corporation possesses a criminogenic structure or culture is a ground of its culpability only if the corporation is the kind of entity that can bear responsibility for the structure or culture it happens to possess. But why think the corporation responsible for its structure or culture? Wouldn't it make more sense to assign responsibility for the corporation's structure to the individuals who have organized the corporation, and to assign responsibility for the corporation's culture to those who have elaborated or sustained it?

Similar arguments can be waged against accounts, like Pettit's, that ground corporate moral responsibility in the corporation's normative autonomy. Where a corporation's decision-making procedure allows it to make a decision that no one of its members would endorse, why think that the corporation must therefore come to bear responsibility for that decision or the acts in which it eventuates? Why not instead think that some set of members – whether those who established the decision-making procedure, those who contributed the inputs resulting in the decision in question, all those who at least tacitly endorse the procedure by keeping it in place, or all of the above – bear responsibility for whatever decision the corporation makes? To motivate the possibility of member, rather than corporate, responsibility, consider the following analogy: Dr. Frankenstein's monster, we know from Mary Shelley's novel, carried out acts that its creator never imagined, let alone supported, killing the scientist's brother, long-time friend and wife.[xvii] Nonetheless, the mere ability of the monster to make and act on decisions independent of those its creator would have made for it does not establish that the monster is the kind of entity that may be held morally responsible for what it does. To be sure, in addition to being capable of harboring and acting on his intentions, Frankenstein's monster seems to have a rich emotional life, suffering from solitude, rejection, and remorse. His capacity for emotion may help to ground his moral agency. But the monster's capacity for emotion is separate from the kind of decisional autonomy that grounds Pettit's claim of corporate moral responsibility. The point then is that the corporation's ability to decide and act in ways that are independent of its members is not sufficient to ground its moral agency.

More generally, much of the work on corporate moral responsibility helpfully and persuasively provides us with factors that allow us to ascribe the wrongful act of some employee(s) to the corporation; on the basis of these factors we may consider the wrong a *wrong of the corporation*. Where doctrine and theory go astray, however, is in thinking that the corporation's ability to commit wrongs fits it to be held responsible for the wrongs it commits. Instead, whether we may *assign* responsibility to the corporation for its crimes depends on factors that are distinct from those grounding the ascription of the employee's acts to the corporation. I review these factors in Part II. First, though, it will be useful to see that a parallel fallacy plagues our thinking about corporate rights.

B. Fallacy #2: *Corporations can be served by rights so corporations must be the kind of beings that can bear rights.*

Just as the question, "Is Corporation C morally responsible for Act X?," breaks down into (1) a factual question about whether we may ascribe X to C, and (2) a metaphysical question about whether C is the kind of entity that can bear moral responsibility, so too the question "Why does A have rights?" breaks down into (1) a pragmatic question about what rights are for, and (2) a metaphysical question about the capacities in virtue of which A may be taken to be a legitimate right-holders. And just as some responsibility theorists tend to conflate the first two questions, so too some theorists of corporate rights tend to conflate the latter two, or so I shall seek to argue here.

More specifically, there are two different approaches to corporate rights in which the pragmatic and metaphysical questions run together. The first adopts an interest theory of rights, according to which the function of rights is to protect the right-holder's interests. The second takes the rights of the corporation to be constituted and justified entirely by the rights of the corporation's individual members. This second approach is ecumenical, then, when it comes to the pragmatic question – the reason for which individuals enjoy rights in their individual capacities, whatever it is, is also the reason for which the associations they form should enjoy those rights too. And the second approach seeks to elide the metaphysical question by relying on the moral standing of the corporation's individual members to carry over – mysteriously, as we shall see – to the corporation itself. In this way the second approach is also ecumenical with respect to the set of capacities necessary and sufficient to be a rights-holder. I address each of these approaches in turn.

1. Interest-based theories of corporate rights

In general, theorists conceive of rights as being valuable because they are part and parcel of our autonomy,[xviii] preserve self-respect,[xix] or protect our interests.[xx] The first two of these three grounds for rights pose difficulties for the proponent of corporate rights, since it is not at all clear that the corporation has autonomy or self-respect (or even possesses the relevant kind of "self" that can be respected). Unsurprisingly, then, the few theorists

who have entertained the notion of group or corporate rights[xxi] tend to posit them on the basis of an interest theory of rights.[xxii]

From the claim that rights are intended to protect interests, these theorists note that corporations have interests and they then infer – and here is where they go wrong – that corporations must then have rights to have their interests protected. Thus, for example, Larry May contends that the "capacity for having interests is … a sufficient condition for the ascription of such moral concepts as rights and harms."[xxiii] He seeks to argue that a group can have interests that are its own in the first instance – these are not merely the aggregation of the interests of the group's members. To take an illustration of his, a racially-motivated attack against a Black man harms not just him but also all members of his racial group, and it harms the status of the group too. This last harm is irreducibly group-based, and for May that is all that is needed to establish that the group has moral standing to complain or, equivalently as May would have it, that it has rights upon which to insist: "It is not just that each person is treated on the basis of his or her blackness, but also that all people who display blackness are treated as a coherent group. It is this latter fact which allows interest, *and moral standing*, to be ascribed to the group."[xxiv]

The problem with May's argument is the slippage from an irreducibly group interest to the inference of a group right. An example from the life of teams is illustrative: Teams have interests, and sometimes those interests are independent of, and even in conflict with, the interests of the players. For instance, it might be in the team's best interest that each player take a salary cut because the team will then have money to hire a superior coach, who can more readily lead the team to success. But to identify interests that are the team's in the first instance is not to establish that the team is legitimately positioned to insist that its interests be protected *for its own sake*. In other words, mere possession of interests does not entail possession of rights that would protect those interests.

We can see that the entailment is not automatic when we consider that not every being with interests is a legitimate rights-bearer. Indeed, it is for this reason that interest theorists typically qualify their accounts with statements about the capacities necessary to have one's interests protected through rights. Take for example Joseph Raz's paradigmatic statement of the view, that '"X has a right' *if X can have rights*, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.'"[xxv] Raz then goes on to specify just what kinds of beings can have rights – a specification that requires not just that one have a capacity to harbor interests but also that one be of ultimate value.[xxvi] Similarly, Matt Adler identifies as candidates for the additional requisite factors "the sophisticatedness of a creature's sentience, the capacity of the creature for reasoning in primitive ways, its ability to communicate and to receive communications, its understanding of the constraints within which its own needs can be satisfied, and so forth."[xxvii] In Part II, I shall have more to say about the factors I take to be necessary to be a rights-holder. The point for now is that interests alone do not suffice, and that we therefore have reason to reject theories of corporate rights that rest their accounts solely on the corporation's possession of interests independent of those its members.

2. *Individual-rights-based accounts of corporate rights*

The central claim for those who want to ground corporate rights on the basis of the rights of the corporation's individual members is given a succinct statement in *Santa Clara Railroad*, the 1883 Supreme Court case announcing that the corporation's status as a person under the Fourteenth Amendment was so self-evident as to obviate the need for argument on that score. In that case, the Court proclaimed that a corporation was nothing other than an association of individuals, who "do not, because of such association, lose their rights to protection, and equality of protection…. So, therefore, whenever a provision of the constitution or of a law guaranties to persons protection in their property, or affords to them the means for its protection, or prohibits injurious legislation affecting it, the benefits of the provision or law are extended to corporations; not to the name under which different persons are united, but to the individuals composing the union."

As stated, the claim is simply that the state may not do to individuals indirectly – i.e., by targeting the corporation they form -- what it may not also, as a matter of constitutional law, do to these individuals directly. Problems arise however when the corporation's rights take on a life of their own, as they have done for example in the corporate political speech context. Thus *Citizens United* grounds the (purported) right of the corporation to spend unlimited corporate funds supporting or opposing candidates for office in the free speech rights of the corporation's members.[xxviii] But the modern for-profit corporation, held largely by institutional shareholders,[xxix] cannot be understood as a way for individuals to combine their voices in a single entity. The political interests of the corporation's members may well be diverse, or even divergent. And there is no requirement that management consult the corporation's shareholders – to say nothing of its employees, consumers or other stakeholders – to determine the targets of its political spending. In this way, while alleged corporate political speech rights may have their genesis in the free speech rights of the corporation's members, the corporation's political speech rights have become unmoored from those of its members. Seeking to protect corporate political speech is then tantamount to granting the corporation free speech protection in its own right.

A similar phenomenon can be seen in those cases seeking recognition of corporate conscience-based rights, as where corporations seek exemption from a provision in the Affordable Care Act (a.k.a. Obamacare) requiring that they provide insurance coverage for contraception. Here, as in the corporate political speech cases, the purported corporate right is alleged to stem from the rights of the individuals constituting the corporation. As the lawyer for one corporation challenging the contraception provision puts it, "'The legal case' for the religious freedom of corporations 'does not start with, "Does the corporation pray?" or "Does the corporation go to heaven?,"… It starts with the owner.'"[xxxxxxi] Here too, as in *Santa Clara*, then, the claim is that the state unjustly infringes upon individual constitutional rights when it imposes requirements upon the corporation that it could not constitutionally impose upon the corporation's individual members. So the asserted victim of the constitutional violation is not the corporation in its own right; instead, it is the individuals comprising it who claim the injury.

Again, however, the argument moves too quickly. If it were the case that individuals' constitutional rights necessarily carried over to the corporation they formed, else those rights would not receive their due protection, then corporations would have many rights that they are currently denied, such as the right to vote, to say nothing of the right to marry, the right to procreate, the right to divorce and so on.[xxxii] One might respond that corporations do not enjoy the right to vote, even though their members do, because conferring upon the corporation the right to vote would constitute a kind of double-counting – its members would have two bites at the apple while those unaffiliated with a corporation would enjoy only one. But the same can be said about corporate political speech, or protections for the "corporate" conscience. All of these are ways that allow some individuals to augment the power of the rights they hold relative to the power those rights carry for others who are not members of any corporation.

Put differently, the argument does no more than beg the question at issue – viz. whether individuals may press their constitutional rights only in their individual capacities or instead through the corporate form through which they unite as well. There may be some corporate bodies where it is plausible to claim that protecting individual constitutional rights requires recognizing that both the individuals and the corporation they form enjoy the rights in question, though the corporation would enjoy these rights only derivatively. The not-for-profit advocacy organization is paradigmatic here: Restricting the NAACP's speech is tantamount to violating the free speech rights of its members, all the more so when individuals face risks when speaking publicly, as was true in the heyday of the civil rights movement. Yet the situation is different for the large for-profit corporation. Even if we think we can identify a unitary corporate conscience in such a corporation, why must the state seek to protect that conscience when the corporation's members can speak their consciences in their individual capacities? Shareholders in a large corporation do not obviously face the kind of threats motivating protection of the group speech rights of, say, the NAACP. And, in any event, it is implausible to think that the large for-profit corporation is composed of individuals all of whose consciences align, such that one can identify *the* corporate conscience.[xxxiii] To protect the conscience-based rights of that kind of corporation is then not to protect the conscience-based rights of its individual members but instead to confer conscience-based protections upon the corporation in its own right.[xxxiv]

3. Summary

In this Section, we have surveyed two broad strategies seeking to ground corporate constitutional rights. The first identifies interests as the reason for which we enjoy rights; it then notes that corporations have interests – sometimes even interests independent of those of its members – and it concludes therefrom that corporations must have rights of their own. The second sees corporate rights as derivative, and protective, of the rights of the corporation's individual members, but it fails to note that once corporations are taken to have constitutional rights, these can take on a life of their own, perhaps even undermining the rights of the corporation's individual members.

Neither strategy gives us a compelling reason to recognize corporate constitutional rights, just as none of the strategies seeking to ground corporate moral agency gave us a compelling reason to conceive of corporations as moral agents. I shall now argue that there cannot be such a reason, because the corporation lacks a capacity crucial for both rights and responsibility.

II. MORAL EMOTIONS, RESPONSIBILITY AND RIGHTS

Supporters of corporate personhood conceive of the corporation as a moral agent, but they focus on the corporation's (alleged) capacities for intention and belief, to the exclusion of its capacity for moral emotion. While I believe that there are good reasons to doubt that the corporation can intend and believe in the ways necessary for moral agency, I set aside those doubts here, and instead argue, in Part II.A, that whatever else is necessary for moral agency, a capacity for moral emotion is, and the corporation lacks that capacity.

That argument, if successful, also undermines claims to corporate rights where these are grounded on a will theory of rights – briefly, a theory holding that (1) rights are fundamentally about choice, such that only those who can exercise choice are legitimate rights bearers,[xxxv] and(2) the capacity to choose is taken to be part and parcel of what it is to be an autonomous being[xxxvi] or a moral agent.[xxxvii] Insofar as a will theory has moral agency function as a necessary condition for rights-holding, corporations can no more enjoy rights on such a theory than they can be

held responsible. Interest theories of rights, on the other hand, demand less of rights-holders – on at least some such accounts, one may legitimately enjoy rights even if one is not a moral agent. In Part II.B, I argue that none of the reasons we have for acknowledging the rights of individuals who fail to satisfy the criteria for moral agency applies to the corporation.

A. Moral Agency and Emotion

In defending claims about the corporation's capacities for moral agency, theorists face the difficulty of accounting for the moral agency of entities that do not have minds, or at least the kind of minds that paradigmatic human moral agents possess.[xxxviii] To address this difficulty, these theorists adopt one of two strategies: They either reify the corporation in an attempt to argue that the capacities it does possess are functionally equivalent to the mental capacities of human moral agents; or, they argue that, though the corporation does not itself believe, intend, deliberate, or respond emotionally, its members do so on its behalf, and their doing so is sufficient to underpin the corporation's moral agency. I shall refer to accounts that adopt these strategies as, respectively, *reifying* and *recruiting* accounts. My general tactic in responding to reifying accounts will be to point out that descriptions of the corporation's agentive capacities leave something crucial out of the picture – in particular, a capacity for affect or moral emotion. I argue that recruiting accounts fail to explain adequately why the corporation ought to count as a moral agent in its own right when it is the corporation's members who exhibit the capacities typically thought to comprise moral agency.

1. Reifying Accounts

Since I shall here contend that a capacity for emotion is necessary for moral agency, I begin with accounts that deny the need for this capacity. Most famously, perhaps, Peter French contends that a capacity for intention is sufficient for moral agency, thereby obviating the need to locate a corporate capacity for emotion in order to ground its agency. His argument takes a syllogistic form:

P1. To be a moral person is to be an intentional agent.[xxxix]

P2. Corporations are intentional agents.

C. Therefore, corporations are moral persons.

French's initial argument for P1 is remarkably short, and focuses on just one reactive attitude – regret. He contends that the capacities required for regret – *viz.*, the capacities to view oneself "as the person who did x (where x is some untoward action) and to feel or wish that he had not done x, or that x had not had certain upshots" -- are the very same capacities required for intentional agency. Contra French, however, intentional agency need not encompass the capacity to view one's action as untoward, and still less the capacity to wish that one had acted otherwise. We need not think that animals are capable of regret in order to believe (correctly) that they exhibit intentionality. This is not to say that animals *cannot* experience regret. (The dog who has been trained not to eat her owner's shoes may well cower when she realizes that she has done the thing she has been trained not to do, and it may not be undue to interpret the cowering as an expression of regret.) It is simply to say that it seems obvious that some animals that do not experience regret nonetheless appear to act intentionally. (Think here of squirrels gathering nuts in the fall, or cats who know to communicate their desire to be petted by rubbing their foreheads against their owner's legs.)

In a refinement of his account, French expands the conditions for intentionality by incorporating into the notion of intentional agency a "Principle of Responsive Adjustment" ("PRA").[xl] He writes:

> [C]ats and other lower animals … can neither appreciate that an event for which their intentional or unintentional behavior has been causally responsible is untoward or worthy nor intentionally modify their ways of behaving to correct the offensive actions or to adopt the behavior that was productive of worthy results. In short, they are just not full-blooded intentional actors. Simply, they are not intentional actors.[xli]

Since corporations, on French's account, do exhibit the responsiveness that distinguishes persons from house pets, he concludes that corporations possess the full-blooded intentionality that is the hallmark of personhood.

The first thing to note in response to French's revised account is the too hasty connection between an ability to make responsive adjustments, on the one hand, and "full-blooded" intentionality, on the other. Instead, the ability to adjust responsively is a criterion for personhood distinct from intentionality – indeed, it is precisely because cats exhibit intentionality but not the capacity to correct their behavior in light of judgments about its moral worth that cats are not moral persons. Thus, by subsuming PRA into the notion of intentionality, French threatens to stretch that notion beyond recognition.

The second thing to note is the weakness of French's criteria for personhood. French insists that his theory "is not concerned with why the corporation should be moral."[xlii] Yet, at least intuitively, it *should* matter to the

moral person that she act morally. To see this, consider a steadfastly profit-oriented entrepreneur who is also a psychopath – by definition, one who is, *inter alia*, guiltless and unempathic.[xliii] Suppose that the entrepreneur's consumer base consists exclusively of a clientele who will deal only with morally upright businesses. The entrepreneur would be highly motivated to ensure that her business practices were morally unproblematic. That fact alone, however, would not establish that she qualified for moral agency, for her business decisions would be fully explained by her unwavering desire to turn a profit in a community that will only purchase from businesses that follow the moral law (whatever it is). If her clientele were to consist exclusively of customers who desired goods derived through immoral means (child labor, knowingly dangerous environmental practices, money laundering and so on), the psychopathic entrepreneur would be no less willing to oblige. Because she is constitutionally indifferent to the moral dimensions of her business practices, her conduct warrants neither praise nor blame – in short, she is not a morally responsible agent. And, if it is true for the individual that moral agency requires more than knowing right from wrong and being motivated to pursue right rather than wrong, it should be true for the collective as well.[xliv]

To summarize, the premise we have been considering is whether intentionality alone, or intentionality plus a capacity for responsive adjustment, are sufficient for moral personhood. For the foregoing reasons, I believe that they are not.

Margaret Gilbert advances an account of collective moral emotion that, at least at first glance, appears to escape the flaws in French's account. Gilbert refers to groups as plural subjects and she contends that a "*group G feels remorse over an act A* if and only if the members of *G* are jointly committed to feeling remorse as a body."[xlv] Yet, though Gilbert's understanding of collective remorse invokes the word "feeling," she does not in fact mean that the plural subject *feels* anything; remorse, for her, is exhausted by the actions and utterances of the individuals who together constitute the plural subject.[xlvi] Indeed, Gilbert denies that "'feeling-sensations'" are a necessary part of remorse, whether experienced by an individual or a collective, and so she is untroubled by the collective's inability to suffer pangs of remorse.[xlvii] Gilbert acknowledges that there may be *de facto* connections between collective remorse, as she understands it, and members' feelings of remorse over what the collective has done, but she insists that her account of collective remorse does not depend upon these connections – collective remorse makes sense, she argues, even if *no* member of the group *feels* remorse over what the group has done.[xlviii]

Even at the intuitive level, something seems amiss here. For example, we wouldn't be assuaged by some purportedly remorseful corporation, no matter how many public *mea culpas* it issued, if its members were all the while laughing their way to the bank. But suppose that the corporation's members did feel pangs of remorse over some wrongful corporate act. The question Gilbert's account prompts is whether the collective itself can satisfy the conditions for remorse if *it* is incapable of the feeling sensations that, at least typically, accompany remorse.

Again, the figure of the psychopath provides an answer. Imagine someone who meets Gilbert's definition of remorse: He displays the outward trappings of remorse in the appropriate circumstances but lacks any internal states that correspond to the outward displays. Can he be said to experience remorse? It is not clear that he can, for his reaction to a wrongful act seems to be no different than that of the psychopath: The psychopath is also capable of saying the appropriate things and performing restitutionary acts when he recognizes that he has violated a moral rule.[xlix] But the psychopath is, by definition, remorseless. So it is not clear that Gilbert's account of remorse, pared down as it is, ought to count as remorse at all.

More damningly, it is not clear that Gilbert's definition of remorse is even coherent. That definition presupposes that one can, despite being incapable of experiencing the affective component of remorse (or any other reactive attitude), still respond with displays of remorse whenever remorse is warranted (or with displays of any other reactive attitude whenever that attitude is warranted). But what could guarantee the appropriate response if not the capacity to experience it affectively?

More specifically, two things seem to be missing here. First, the response itself will be deficient if it is issued by someone who is incapable of feeling the emotion he purports to be experiencing. The conciliatory power of the response may well turn upon the possibility that the offeror of the response can be made to feel bad about his wrongdoing (even if he does not happen to feel bad about it at the time that he offers his response.) Second, the very ability to offer *any* response may depend upon the ability to experience the affective dimensions of the reactive attitudes. Put differently, it may be that discerning right from wrong amid the richly varied contexts in which we are called upon to act requires empathic and imaginative capacities that a being incapable of moral feelings does not possess.[l] In that case, neither the psychopath nor Gilbert's remorseful individual could reliably put remorse on display, for neither would be sufficiently sensitive to the instances requiring it. If I am right that one cannot experience the reactive attitudes if one is incapable of experiencing their affective components, and that one cannot be morally responsible if one cannot experience the reactive attitudes, then collectives, as Gilbert understands them, cannot be moral agents.

We are now in a position to see the relevance of emotions for moral responsibility more generally. First, being capable of moral judgment requires, I have suggested, a capacity for empathy. One needs to be able to contemplate what it will feel like to be on the receiving end of the act one is evaluating, which requires in turn rich imaginative capacities as well as experiences that allow one to reflect on what it felt likely to be in that or a similar situation at some time in the past. In addition, the phenomenological aspect of the moral emotions may well be crucial to engage in the practice of passing moral judgment. Participants in that practice may be counted on not just to know that the evaluated act is blameworthy or praiseworthy but also to be capable of experiencing the corresponding phenomenological correlates – to be susceptible to rage (if not actively enraged) alongside others who are condemning, or to swelling with pride (if not already in the grip of pride) alongside others who are kvelling. Perhaps most relevantly, if one is to be an object of blame, one must be capable of feeling bad – experiencing the pit in her stomach, the internal cringe – when one recognizes that one has done wrong, for the infliction of that unpleasant set of sensations may well be a significant part of what the practice of blaming is about.

Our survey of French's and Gilbert's accounts reveals that the reified collective lacks moral emotion, as well as its phenomenological correlates. As such, the corporation on a reifying account is too meager a being to fulfill the requirements of moral agency. I turn now to recruiting accounts, to see if reliance upon the capacities of the collective's members can secure its moral agency.

2. Recruiting Accounts

The distinction between reifying and recruiting accounts can perhaps be captured by analogy to different genres of alien-horror films – specifically, alien invasion and alien abduction films. On a reifying account, the corporation is like the alien invader – think here of the pod people in *Invasion of the Body Snatchers*.[li] Though pod people look like humans and can perform many of the acts that humans can perform, they are distinguished by their inability to experience emotion. The relevant deficiency of the pod person can be gleaned from an episode of Seinfeld, where Jerry, upset by Kramer's lack of social skills, says: "Let me explain something to you. You see, you're not normal. You're a great guy, I love you, but you're a pod. I, on the other hand, am a human being. I sometimes feel awkward, uncomfortable, even inhibited in certain situations with the other human beings. You wouldn't understand."[lii] Because Kramer is unembarrassable, not only can he not be trusted to act in socially appropriate ways; he also cannot be made to see when he acts in socially inappropriate ways, or to care that he does so. Similarly, the corporation, understood in the terms of the reifying account, cannot be made to see when it acts in morally inappropriate ways, or to care when it does so. For these reasons, the corporation, as it is conceived on a reifying account, fails to qualify for moral agency.

Whereas pod people are mere shells of their human counterparts, the alien parasites of alien abduction films seek to overcome their missing human qualities by glomming onto humans, and recruiting their hosts' capacities in order to supplement their own. In *The Puppet Masters*, for example, humans are brought under the mental control of repulsive alien slugs that attach to the humans' backs.[liii] Understood in the terms of a recruiting account, the corporation is like an alien parasite, as it enlists humans to furnish it with the ability to interact in our world and, in particular, to interact as a moral agent. The challenge for the proponent of a recruiting account is to supplement the corporation's capacities enough to overcome charges that the corporation is no more than a pod, while also explaining why the corporation, rather than the members who supply so many of its capacities, ought to be the ultimate bearer of responsibility. I shall argue here that recruiting accounts cannot meet this challenge, focusing again on a capacity for moral emotion.

We have already seen that the conception of collective emotions that the reifying theorist adopts is unsatisfactory. Can the capacity for corporate or collective emotions be secured on a recruiting account? Deborah Tollefsen raises the interesting possibility that a group emotion need not be experienced by the group itself in order for it to count as a collective emotion. Instead, the collective emotion is the emotion "one feels in response to the actions of one's own group."[liv] In this way, Tollefsen's account preserves the phenomenological dimensions of the reactive attitudes, which the reifying account of collective emotions eschews as unnecessary.[lv]

Though Tollefsen's account goes a good distance toward making sense of the notion of a collective emotion, it does not establish that collectives experience the reactive attitudes in the way they should if they are to count as moral agents. On the understanding of responsibility I believe correct, one does not qualify for moral agency simply because one *can* experience the reactive attitudes; when one confronts the moral nature of one's acts, one *ought* to do so, for doing so is part and parcel of the confrontation. Thus, if a group has acted badly, to qualify for moral agency, it (or its members, if we are to adopt Tollefsen's account) ought to experience collective guilt. But nothing in Tollefsen's account secures the requisite "ought," for nothing in her account explains how group members will necessarily, or even regularly, come to experience guilt on behalf of their group. Indeed, she argues that, for any given member, the appropriateness of the collective emotion turns on whether that member concludes that the group has failed to satisfy demands to which the *member* believes the group ought to be held. For example,

on her account, whether an American ought to experience collective guilt over the lack of universal health care (happily, a now-outdated example) will turn on whether that American believes that the government has an obligation to provide universal health care.[lvi] But if the emotion is truly collective, then it ought not to be contingent upon vicissitudes among members' assessments of the group's act. In any event, even if all of the group's members agree that the group has failed in some respect, it is not clear that their shared determination will in fact guarantee their experience of guilt. To the extent that, *ex hypothese*, it is the collective that has committed the wrong, its members may well have *less* reason to experience guilt on its behalf. In short, Tollefsen's account of collective emotions makes sense of these emotions at the expense of severing the connection to *collective* attitudes of self-assessment, which moral agency requires. Nor does it seem likely that one could overcome this difficulty, for emotions cannot be compelled; at any rate, their significance would likely be greatly undercut if they could.[lvii]

In short, collectives cannot co-opt members' capacities to experience the reactive attitudes, for experience of them cannot be delegated and, even if it could, we are without an account that would explain why or how members could be counted upon to experience them in all of the instances that the collective should. Recruiting accounts thus cannot make the moral agency of the collective whole; the most they can do is to signal grounds for holding members themselves responsible.

3. *Conclusion*

The general problem with reifying and recruiting accounts is that they drive a wedge between the corporation and its members in a way that problematizes assignments of moral responsibility. Reifying accounts are functionalist in nature, and they thereby offer a conception of moral agency devoid of the internal emotional experiences that are, I have argued, constitutive of bearing responsibility. Recruiting accounts commit the opposite sin. They rely so heavily on their members' capacities for moral agency that it no longer becomes plausible to view the collective as a moral agent at all. In sum, without a heart, the corporation is like a monster who goes out into the world before its master has completed her creation, leaving the monster with some human-like features but without the full cognitive and emotional apparatuses necessary for moral personhood.

B. Moral Emotion and Rights

If I am right that corporations lack some of the requisites for moral agency, does it necessarily follow that they cannot qualify as rights-holders as well? The inference is problematic for two different reasons. First, on at least some interest-theories of rights, moral agency is not required for right-holding. Second, even on a will theory of rights, which does presuppose moral agency, it is not immediately clear that the capacity disqualifying the corporation from bearing responsibility – viz., a capacity for moral emotion – also disqualifies it from holding rights, for it might be that the capacity in question isn't necessary to satisfy the conception of moral agency that the will theory contemplates. I nonetheless argue here that the corporation cannot satisfy the requirements to be a rights-holder on either an interest or a will theory of rights.

1. Interest-based theories of rights

In a paradigmatic statement of the view, the interest theory of rights requires that the right-holder be the kind of being that (1) "can have rights," and (2) "other things being equal, an aspect of [that being's] well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty.'"[lviii] For present purposes, the corporate rights skeptic might think that the first condition presupposes a set of capacities that the corporation lacks. This is not so on many rights theories, however, and Joseph Raz goes so far as to include corporations in the set of rights holders by fiat.[lix] For the sake of argument, then, let us assume that (1) is satisfied, whatever it is taken to require, and focus instead on (2). Is the corporation's well-being a sufficient reason to hold some other person(s) to be under a duty? Note that an affirmative answer requires that we think of the corporation's well-being as sufficiently important *in its own right* to impose duties upon others. It will not do to locate the relevant interests in the members of the corporation, for interest theories seek to ground rights in the interests of those whom the rights protect. If the corporation's members have interests worthy of protection then the interest theory can ground rights to have those interests recognized by others, but that is not the same as saying that the corporation has rights.[lx]

What would it mean, then, to say that the corporation has interests in its own right worthy of protection by others? For one thing, we would have to allow that the corporation enjoyed rights of the same strength as individuals' rights, for nothing in the interest theory permits us to treat different rights-holders differently. In a conflict between corporate and individual rights, then, there is no *a priori* reason to think that the individual would prevail. More specifically, where the corporation's well-being was in tension with that of its members, there would be no *a priori* reason to favor the members' well-being at the corporation's expense. Put differently, then, finding corporate rights on the interest theory would commit us to thinking the corporation worthy of protection for its own sake, or as Raz terms it when referring to individuals, as being of ultimate value.

But here we end up with a claim likely to be rejected by many, because it is metaphysically suspect,[lxi] or

at least contrary to common-sense views of the corporation. As an intuitive matter, it seems like we care about the corporation only because, and to the extent that, we care about those whom it affects. A view of corporate rights that disconnects these from the rights of the corporation's owners (or those of its stakeholders more generally) seems implausible when rights have as their function the protection of sufficiently weighty interests because we do not conceive of the corporation as a being whose interests are sufficiently important to us to warrant our incurring duties on its behalf, especially when these duties protect the corporation while setting back the interests of individuals.

None of this is to say that it might not make sense – even on an interest theory of rights – to place restrictions or impose requirements upon individuals in order to protect or enhance the corporation's well-being. Individuals' interests might be well served by recognizing something like corporate rights; indeed, their interests might even mandate this recognition. But again and importantly this would not be to ground corporation's rights in their own interests, and so we would not have found corporate rights on the basis of an interest theory of rights.

2. ***Will theories of rights***

The defining feature of a right on the will theory is the choice it gives the right-holder over its disposition.[lxii] In particular, rights, on this view, confer upon those who possess them the choice whether to enforce or else waive the duties that correlate with the rights in question. The ability to choose, or administer, or exercise one's rights is then taken to be necessary to bear rights, at least in what the will theorist takes to be his paradigmatic case. To determine whether the corporation should qualify as a rights-holder on a will theory, then, we should consider whether it is the kind of being that can make the relevant kind of choices.

What does it mean to be capable of choosing whether to enforce or waive one's rights? At a minimum, choosing would seem to require a kind of self-awareness – what do I want? -- and a capacity for practical reasoning – will enforcing/waiving this right help me to get what I want? We can already question whether the corporation can meet these two criteria, for it seems fanciful to conceive of the corporation as engaging in the kind of introspection that ascertaining one's wants requires. And even if the corporation could peer inside itself, it would need to do more than merely identify its wants to count as a capable chooser; it would also need to be able to rank order these in order to determine which it most wants to fulfill and to reflect critically upon them in order to determine which are genuinely worth fulfilling.[lxiii] This evaluative enterprise requires, in turn, a capacity for judgment and this too, as the foregoing already suggests, depends crucially upon a capacity for emotion.

To elaborate further, it would be bizarre to think that identifying and evaluating one's goals was a purely cognitive matter, achieved entirely through a dispassionate assessment of the relevant factors. Again, just what factors count as relevant may require powers of discernment that themselves depend upon a capacity for emotion. For one thing, one has to imagine what it will feel like to be in the state of affairs that will obtain once a particular goal has been attained. In addition, the motivation to pursue one's goals, once identified, is clearly a matter of non-cognitive states as well – longing, drive, determination and so on. And we might well expect more than that from the capable chooser: The ideal rights-holder might depart from a consideration of her own interests and an inquiry into the means to fulfill them, but she would also attend to the interests of others and waive enforcement not just when doing so would advantage her but even when waiving went against her all-things-considered interests yet provided significant benefits to others. The ability to contemplate successfully the interests of others requires empathy – without empathy, one cannot imagine how enforcement will affect those against whom one's right is to be enforced. And the ability to sometimes yield to others by waiving one's rights requires more than empathy; it requires a kind of fellow-feeling, or a special kind of motivation that allows one to privilege others' interests relative to one's own.

In short, it should not surprise us that the corporation cannot satisfy the conception of personhood that the will theory contemplates. For the paradigmatic right-holder on the will theory is, as we have seen, a moral agent. While emotion plays a different role in rendering one morally responsible than in qualifying one to choose how to exercise one's rights, a capacity for emotion is nonetheless crucial for each. Without that capacity, the corporation can no more qualify as a right-holder on the will theory than it can on an interest theory of rights. For all of the foregoing reasons, then, the corporation fails to satisfy the requirements for personhood.

III. THE DUBIOUS RELEVANCE OF PERSONHOOD FOR RIGHTS AND RESPONSIBILITY

I have argued that personhood – whether conceived of as the status of holding rights or as qualifying for moral agency – requires a capacity for emotion, and that the corporation lacks this capacity. Perhaps I have nonetheless failed to persuade on one or both counts – one might continue to deny the necessity of emotion for personhood, or else operate with a thin (e.g., functionalist) conception of emotion such that the corporation can be seen to have the capacity in question. In this last Part, I seek to suggest that a successful denial of corporate personhood is, in the end, unnecessary because the personhood of the corporation is not in any case determinative when it comes to the questions about the moral and legal status of the corporation that matter most to us.

The claim to be defended here is not that personhood is irrelevant for all rights, or for all of our responsibility practice. There may be some extra-political rights (rights against torture or unjustified killing, for

example) that personhood alone would guarantee. And castigation in the face of corporate wrongs might be called for just so long as the wrongdoer is a person, as a way of demonstrating the kind of respect that persons deserve. In these ways, determining whether the corporation is a person can be dispositive. But the issues that occupy much public debate will not be resolved by demonstrating or denying that the corporation is a person. Here I restrict my attention to those cases that have permeated the discussion so far – assertions of corporate rights to political speech and conscience, and cases of corporate wrongs – and suggest reasons for which none of these cases will be settled by resolving the personhood question.[lxiv]

A. Rights

Even if I am right that corporations are not persons, we might still have reason to treat them as if they have at least some rights, for the sake of protecting the rights of their members. Unlike the strategies we encountered in Part I, the idea here would be to unabashedly recognize corporate rights as an artifice, grounded entirely in the real rights of the corporation's members. Further, the scope of these corporate rights would be constrained by their genesis in the rights of their members, such that corporate rights would be recognized only if, and to the extent that, the recognition served the rights of the corporation's members. And the extent of their recognition would also have to be sensitive to the rights of other individuals, namely those who are not members of the corporation, so that the exercise of the non-members' rights would not be unduly constrained by protecting the rights of individual members through the corporation. As I indicated in Part I, the strategy of protecting individuals' rights by recognizing rights of the corporation to which they belong may be especially suitable for those non-profit corporations functioning as advocacy organizations, like the NAACP. More would need to be shown in order for the members of the large for-profit corporation to establish that they too were entitled to have their corporation enjoy rights as a matter of protecting the members' individual rights. But to the extent that one could make out a persuasive case, it would then be clear that personhood was not a necessary ground for rights.

On the other hand, suppose one were to arrive at a compelling account of corporate personhood, such that the corporation were the kind of being that could qualify as a rights-holder. It still wouldn't follow that the corporation had the same free speech or conscience-based rights that individuals enjoy. For example, and as I argue elsewhere, rights of political speech obtain in the first instance for those who are expected to participate in the project of shared governance by, for example, voting, sitting on juries, serving in the military, etc. The for-profit corporation is not expected to play a role in any of these foundational political institutions. It is reasonable, then, to conceive of its political speech rights as weaker in strength than those of individual citizens – so much so that we may, I have argued, constrain the political speech rights of corporations if doing so is necessary to allow individuals genuine exercise of *their* political speech rights. Similarly, qualifying for conscience-based rights might require more than personhood too. On some accounts, possession of a soul might be necessary, and it would require further argumentation to establish that all persons (e.g., human and corporate) indeed possessed a soul. Alternatively, on a more secular account, we might require that the putative claimant of a conscience-based right demonstrate a sustained commitment to living in accordance with the value(s) allegedly threatened by the policy that the claimant protests. Thus, for example, corporate invocations of conscience-based rights to refrain from offering health insurance coverage for contraception would be compelling only if the corporation in question could demonstrate that *it* (and not just its members) had a longstanding commitment to the set of beliefs underpinning its opposition to contraception.

In sum, we might have reason to acknowledge corporate rights even if corporations are not persons, and we might have reason to deny corporate rights even if they are. These are matters to be decided on a case-by-case basis, and through analysis of the implications of corporate rights for the individuals whom recognition of those rights would affect.

B. ***Corporate Wrongs***

One of the factors motivating support for corporate moral or criminal responsibility is a concern about impunity in the face of corporate wrongs. Given the corporate form, it can sometimes be difficult to ascertain which members of the corporation participated in a wrong and to then punish those individuals. In addition, the corporate form can also magnify the amount of harm that these individuals together produce. In this way, even if we can identify the individual wrongdoers, the magnitude of the injury they have together inflicted may exceed the sum of their individual contributions. Where this is so, we are left, as I have argued elsewhere, with a remainder. That remainder alone might suffice to justify our prosecuting and punishing the corporation, even if the corporation does not qualify for personhood and so cannot be taken to be a moral agent. More specifically, the justification for corporate criminal liability might then lie in its deterrent effect (we want to dissuade the wrongdoing corporation, as well as others, from engaging in like conduct), or in its expressive implications (we want as a community to single out the corporation's conduct as wrongful). All of that to say that we might have good reasons to hold corporations

responsible for their wrongs even if they do not satisfy the criteria for moral agency.

But again, as with corporate rights, we should consider the implications for corporate responsibility should it turn out to be the case that the corporation could qualify as a moral agent. Here too personhood might not be sufficient to warrant the treatment we impose upon individuals. For one thing, the effects of corporate punishment on innocent members of the corporation might make the practice less tolerable than individual punishment. Thus, for example, wiping out Arthur Anderson had the effect of putting 28,000 people out of work, even though only a tiny fraction of that firm's employees participated in the accounting fraud. And even if it were possible to craft punishment such that it befell only the corporation's culpable members, we still might have reason to challenge criminal liability for corporations, for criminal liability might require more than personhood, just as robust political speech rights require more than personhood. For example, on some accounts of political obedience, we might think that criminal liability, like political speech, is the province only of those who enjoy a certain status within our polity – e.g., those with whom we have at least tacitly agreed to engage in mutual self-restraint. If such an account were right, the defender of corporate criminal liability would need to establish not only that the corporation is a person but also that it is a party to this (hypothetical) agreement.

Finally, it should be noted that we need not insist upon corporate criminal liability in order to address the concern about impunity for corporate wrongs. Instead, we might overcome that concern by embracing a conception of shared responsibility that allows us to hold individual members of the corporation responsible for the corporate wrong independent of their participation in that wrong. Indeed, a more general implication of this paper is to seek to shift the debate from questions about corporations to questions about the corporation's members: When and why might individual members' rights ground our recognizing corporate rights? And when and why might we hold individual members responsible for corporate wrongs? The voluminous debate about corporate moral personhood has for too long occluded inquiries into shared rights and shared responsibility. It is time for business ethicists to take up these questions.

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[i] There is now a voluminous literature on corporate moral personhood with seminal contributions including, but in no way limited to, the following: Peter A. French, Collective and Corporate Responsibility (1984); Margaret Gilbert, Sociality and Responsibility 129 (2000); Philip Pettit, *Responsibility Incorporated*, 117 Ethics 171, 177 (2007); Patricia H. Werhane, Persons, Rights, & Corporations (1985); David Copp, *On the Agency of Certain Collective Entities: An Argument from "Normative Autonomy,"* 30 Midwest Studies in Philosophy 194 (2006); Kevin Gibson, *Fictitious Persons and Real Responsibilities*, 14 J. Bus. Ethics 761, 761 (1995); Manuel G. Velasquez, *Why Corporations Are Not Morally Responsible for Anything They Do*, Bus. & Prof'l Ethics J., Spring 198.

[ii] 558 U.S. 310 (2010).

[iii] See, e.g., Frederic J. Frommer, Judge grants company injunction against health-care law contraception efforts, Wash. Post, Nov. 19, 2012.

[iv] See, e.g., *Kiobel v. Royal Dutch Petroleum* (docket 10-1491); *Mohamad v. Palestinian Authority* (docket 11-88).

[v] For example, several Vermont state representatives have sponsored a resolution in the wake of *Citizens United* that would have "the General Assembly urge Congress to propose an amendment to the United States Constitution for the states' consideration which provides that corporations are not persons under the laws of the United States or any of its jurisdictional subdivisions." J.R.S. 11, Vermont Legislative Bill Tracking System, Jan. 21, 2011, *available at* http://www.leg.state.vt.us/docs/2012/journal/SJ110121.pdf#page=1.

[vi] See, e.g., Amy J. Sepinwall, ***Citizens United and the Ineluctable Question of Corporate Citizenship,*** 44 Conn. L. Rev. 575 (2012).

[vii] [Citation omitted for purposes of preserving anonymity.]

[viii] Model Penal Code § 2.07(1)(c) (1985).

[ix] See, e.g., *New York Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481, 493 (1909).

[x] See, e.g., Larry May, Sharing Responsibility 42-52 & 73-86 (1992).

[xi] See, e.g., Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 Minn. L. Rev. 1095, 1121–46 (1991).

[xii] Fisse and Braithwaite. For a general overview and persuasive critique of corporate moral responsibility as rooted in the corporation's structure, culture, or capacity to encourage evil-doing, see David Luban, Alan Strudler & David Wasserman, *Moral Responsibility in the Age of Bureaucracy*, 90 Mich. L. Rev. 2348, 2367–77 (1992).

[xiii] Philip Pettit, *Responsibility Incorporated*, 117 ETHICS 171 (2007). See also Pettit and List; David Copp, *On the Agency of Certain Collective Entities: An Argument from "Normative Autonomy,"* MIDWEST STUDIES IN PHILOSOPHY 194, 211 (2006).

[xiv] More specifically, Pettit contends that it would be inappropriate to blame any individuals for the corporate act. While some individuals may bear responsibility for states of affairs connected with the act – in particular, the corporation's founders will be responsible for having created the corporate agent, and the members who carried out the act will each be responsible for it – it may be the case that no one is responsible for the act as a whole. *Id.* at 194. In such a case, there will be "a deficit in the accounting books, and the only possible way to guard against this may be to allow for corporate responsibility of the group in the name of

[xv] For a partial list of intervenors in the debate, see footnote 1.

[xvi] [Citation omitted for purposes of preserving anonymity.]

[xvii] Mary Shelly, Frankenstein (1994).

[xviii] See, e.g., H.L.A. Hart, Carl Wellman.

[xix] See, e.g., Joel Feinberg, The Nature and Value of Rights, J. of Value Inquiry (1970).

[xx] See, e.g., Joseph Raz, Matthew Adler.

[xxi] For the claim that the notion of group rights has been understudied, see Dwight G. Newman, Collective Interests and Collective Rights, 49 Am. J. Juris. 127, 127 (2004).

[xxii] See, e.g., May, Larry, 1987, *The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights*, Notre Dame: University of Notre Dame Press; McDonald, Michael, 1991, "Should Communities have Rights? Reflections on Liberal Individualism", *Canadian Journal of Law and Jurisprudence*, 4 (2): 217–237; Newman, Dwight G., 2004, "Collective Interests and Collective Rights", *American Journal of Jursiprudence*, 49: 127–164.

One might be concerned that only beings capable of engaging in critical thinking could have interests if interests are understood as subjective preferences. Importantly, though, the notion of interest at issue here is an objective one – X is in A's interest if and only if X would enhance A's welfare. See, e.g., Newman, supra note ___ at 129-130.

Peter French's account is an exception to the strategy of grounding corporate rights on the basis of corporate interests, as French conceives of the corporation as a moral agent in its own right, and he grounds corporate rights on the corporation's moral agency. I critique French's account in Part II, infra.

[xxiii] Larry May, The Morality of Groups: Collective Responsibility, Group-Based Harms and Corporate Rights 112 (1987).

[xxiv] Id. at 117 (italics added).

[xxv] (Raz 1986, 166, italics added). The interests worthy of protection are interests in those "goods whose satisfaction is required for a recognizably human life, whatever a person's particular plans, and distinctive conceptions of the good." Sarah Hannan, Draft, Autonomy, Well-being, and Children's Rights: A Hybrid Account 8, available at https://politicalscience.stanford.edu/sites/default/files/workshop-materials/pt_hannan.pdf.

[xxvi] Id. at 166. Raz acknowledges corporate rights, but he also recognizes that corporations are not of ultimate value. See id. at 176-78. Instead, his justification for corporate rights is frustratingly brief: "There is little that needs to be said here of the capacity of corporations and other 'artificial' persons to have rights. Whatever explains and accounts for the existence of such persons … also accounts for their capacity to have rights." Id. at 176. Thus Raz seems prepared to admit corporations into the class of right-holders only because the law treats them as right-holders. But since my objective here could be cast as one seeking to investigate whether the law is *correct* in so treating the corporation, I will not follow Raz in assuming from the outset that corporations have a capacity to have rights.

[xxvii] *Id.* at 40.

[xxviii] 585 U.S. at ____, slip op. at 26 (quoting *Bellotti*, 435 U.S. at 784).

[xxix] *See, e.g.*, Daniel H. Greenwood, *Fictional Shareholders: For Whom Are Corporate Managers Trustees, Revisited*, 69 S. CAL. L. REV. 1021 (1996).

[xxx] Bill Keller, The Conscience of a Corporation, N.Y. Times, A19, Feb. 11, 2013, at http://www.nytimes.com/2013/02/11/opinion/keller-the-conscience-of-a-corporation.html?pagewanted=all

[xxxi] The claim that the corporation's conscience is one and the same as its member(s) might be more plausible in the case of a privately held corporation, especially one owned by a small handful of individuals, such that the corporation is nothing but the alter ego of the individuals owning it. Thus the court in Tyndale House Publishers v. Sebelius might have had reason to hold that "the beliefs of Tyndale [the corporation] and its owners are indistinguishable. ... The court has no reason to doubt, moreover, that Tyndale's religious objection to providing insurance coverage for certain contraceptives reflects the beliefs of Tyndale's owners." Even here however it is not clear whether the individual owners should always be permitted to exercise their consciences through the corporation, with detrimental effects for other arguable members (e.g., employees) of the corporation.

[xxxii] Cf. Stephen Bainbridge, *Citizens United and the Constitutional Rights of Corporations*, PROFESSORBAINBRIDGE.COM, Jan. 18, 2011, *at* http://www.professorbainbridge.com/professorbainbridgecom/2011/01/citizens- united-and-the-constitutional-rights-of-corporations.html (describing an effort to protest *Citizens United* in which a woman held a news conference to announce the start to her search for a corporate spouse).

[xxxiii] Cf. JOHN SALMOND, JURISPRUDENCE 285 (1920) ("Ten men do not become in fact one person, because they associate themselves together for one end, any more than two horses become one animal when they draw the same cart.").

[xxxiv] There is a variant on the strategy that seeks to avoid the metaphysical question about whether the corporation possesses the requisite capacities to be a rights-holder, and focuses only on the pragmatic question. On this alternative strategy, commentators contend that corporations are saddled with duties, that rights are the corollaries of duties, and that if the corporation is to be duty-bound it must then enjoy rights as well. The problem with this strategy is that it too begs the question about the moral status of the corporation. If it is a mistake to impose duties upon the corporation – and to subject it to the same evaluative framework where it fails to fulfill these duties – it is no less of a mistake to recognize corporate rights. Effectively, then, the strategy seeks to make two wrongs a right. Given the logical flaw in this strategy, I set it to one side.

[xxxv] Thus, for example, H.L.A. Hart contends that our general rights "are rights which all men *capable of choice* have in the absence of those special conditions that give rise to special rights." Hart, "Are There Any Natural Rights?," 188 (italics added). See also Leif Wenar, The Analysis of Rights, 253 ("Only those beings that have certain capacities—the capacities to exercise choice in controlling their own actions and the duties of others—are potential will theory right-holders.").

Elsewhere, Hart seeks to extend rights to individuals not capable of choice – e.g., children – by arguing that a rights-holder could have a representative who chooses on her behalf whether to enforce or waive the duty in question. 'Bentham on Legal Rights', in *Oxford Essays in Jurisprudence*, 2nd series, A. W. Simpson (ed.) Oxford: Clarendon Press: 171–201, 184 n. 6.

[xxxvi] See, e.g., Graham, Keith, 2002, *Practical Reasoning in a Social World* 89-93; May, Larry, 1987, *The Morality of Groups: Collective Responsibility, Group-Based Harm, and Corporate Rights*, Notre Dame: University of Notre Dame Press; McDonald, Michael, 1991, "Should Communities have Rights? Reflections on Liberal Individualism", *Canadian Journal of Law and Jurisprudence*, 4 (2): 217–237.

[xxxvii] See, e.g., Galenkamp, Marlies, 1993, *Individualism and Collectivism: the Concept of Collective Rights*, Rotterdam: Rotterdamse Filosofische Studies.

[xxxviii] As Paul Sheehy notes, "[a]n immediate objection to regarding groups as capable of sustaining moral judgments is that moral responsibility is grounded in the agentive and so minded capacity of an actor. A group as an entity in its own right is not minded and so cannot stand as an *agent* in our evaluation of those events or states it causes." Paul Sheehy, *Holding Them Responsible*, MIDWEST STUDIES IN PHILOSOPHY 74, 77 (2006).

[xxxix] Or, to use French's language, "the capacities and capabilities usually wanted for 'moral persons' can be unpacked from the set of empirical generalizations that elucidate the intentional agency … [of] 'person[s].'" PETER FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 91 (1984).

[xl] PETER FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY 164-66 (1984). This refinement is elaborated in response to a critique of his account in THOMAS DONALDSON, CORPORATIONS AND MORALITY (1982), who offers an argument similar to mine.

[xli] *Id.* at 166.

[xlii] *Id.* at 169.

[xliii] *See* Robert J. Smith, *The Psychopath as Moral Agent*, 45 PHILOSOPHY & PHENOMENOLOGICAL RESEARCH 177, 177 n.1 (1984).

[xliv] *But cf.* Michael McKenna, *Collective Responsibility and an Agent Meaning Theory*, MIDWEST STUDIES IN PHILOSOPHY 16, 29 (2006) (arguing that something like French's PRA (what McKenna refers to as "reasons-responsiveness"), along with intentionality, is sufficient for moral agency, but expressing deep skepticism that corporations possess the capacity to make responsive adjustments in light of reasons).

[xlv] MARGARET GILBERT, SOCIALITY AND RESPONSIBILITY 135 (2000) (emphasis in original).

[xlvi] *Id.*; *see also id.* at 137-38.

[xlvii] *id.* at 135-36.

[xlviii] *Id.*

[xlix] I purposely avoid referring to these acts as "reconciliatory" (though Gilbert does so) because the possibility of reconciliation without the perpetrator's feeling of remorse is precisely what's at issue.

[l] *Compare* Nancy Sherman, *Taking Responsibility for Our Emotions*, 16 J. SOC. PHIL. & POL'Y 294, 298 (1999) ("without finely attuned emotions, we are simply insensitive to much crucial moral data and are morally bumbling in our interactions with others and our understanding of ourselves").
[li] *Invasion of the Body Snatchers* (Philip Kaufman dir., 1978).
[lii] "The Apartment," *Seinfeld* (1991).
[liii] *The Puppet Masters* (Stuart Orme dir., 1994).
[liv] *Id*.
[lv] *See, e.g.*, Gilbert, *supra* text accompanying notes 140-46.
[lvi] *See id.* at 235.
[lvii] Sheehy presents a possible way around the concern about compelled emotions when he argues that members' emotional responses follow as a matter of course from reflection upon the group's deeds: "To be a true member entails that one just does respond in certain ways in particular contexts. To take pride in *our* achievements and feel shame at *our* failures may just be part of what it is to be a member." *Supra* note 152 at 87. If the claim is descriptive, it fails. It is not at all obvious that members of a group experience remorse in response to group transgressions. Indeed, members who protested the group transgression may be more liable to respond to the transgression with indignation than remorse. If, on the other hand, Sheehy thinks the connection between group act and members' emotion is conceptual (what it is to be a group member is to experience remorse where the group transgresses) or normative (what it is to be a group member is to be under an obligation to experience remorse where the group transgresses), then I might well be inclined to agree. But neither the conceptual nor the normative versions of the claim would suffice for establishing collective emotion without some account explaining why members' emotions count as emotions of the collective.
[lviii] (Raz 1986, 166). The interests worthy of protection are interests in those "goods whose satisfaction is required for a recognizably human life, whatever a person's particular plans, and distinctive conceptions of the good." Sarah Hannan, Draft, Autonomy, Well-being, and Children's Rights: A Hybrid Account 8, available at https://politicalscience.stanford.edu/sites/default/files/workshop-materials/pt_hannan.pdf.
[lix] Raz, Morality of Freedom, 176.
[lx] Frances Kamm raises this point in an effort to argue that Raz's understanding of the journalist's right to protect his sources, which Raz grounds on the right of the *public* to a free press, is inconsistent with Raz's general understanding of rights. As she writes, "If the satisfaction of the interests of others is the reason why the journalist gets a right to have his interest protected, his interest is *not sufficient* to give rise to the duty of non-interference with his speech" (Frances Kamm, "Rights," *Oxford Handbook of Jurisprudence and Philosophy of Law* [Oxford: Oxford University Press, 2002], pp. 476–513, 485).
[lxi]
[lxii] See, e.g., Hart, Wellman.
[lxiii] Cf. Work on primary and secondary desires, e.g., Frankfurt.
[lxiv] Others have questioned the fruitfulness of an inquiry into personhood for purposes of determining the corporation's rights or responsibilities, but they have staked a far more modest position than the one I defend here: These other theorists maintain that we must first ascertain that the corporation possesses some set of features before recognizing it as an entity that can enjoy rights or bear responsibility, but they deny that these features need be necessary or sufficient for personhood. In other words, for these theorists, the question of whether the corporation is or is not a person is a red herring. Importantly, these theorists remain committed to the notion that the corporation's metaphysical or ontological or moral status remains decisive.

In contrast with these other theorists, a central claim of this paper is that the corporation's metaphysical or ontological or moral status is not in fact dispositive when it comes to determining whether it may bear the rights and the kind of responsibility that vex us the most – in particular, free speech rights, rights of conscience, and the moral responsibility that underpins criminal liability.