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FOOTNOTES

1 The above summary of Malaysia's views is taken from a paper by W.J. Farmer, "The Antarctic Treaty System and Global Interests in the Antarctic" reproduced in Dept of Foreign Affairs, *Backgrounder*, No. 567, 15 April 1987, citing UN Doc. A/C 1/41/PV.49, 13-26.
2 (1987), 54-61.

Rights, Persons, and Organizations: A Legal Theory for Bureaucratic Society, by MEIR DAN-COHEN, (University of California Press, Berkeley, 1986), pp. i-xi, 1-271, with Index. Cloth recommended retail price US$35.00 (ISBN 0 520 04711 7).

Rights, Persons, and Organizations is a clever attempt to unfathom some of the deeper mysteries which surround the legal status of corporate entities. Given the incisive analysis provided, it is a work which deserves to be widely read. In my view, however, the methodology and philosophy which underlie *Rights, Persons, and Organizations* are too cramping. Although the author has done much to salvage Kantianism from the depths of corporateness, much is not enough.

The argument advanced in *Rights, Persons, and Organizations* may be reduced essentially as follows:

1. Large and complex organisations, public and private, dominate modern industrialised societies;
2. The treatment of organisations in law has been shaped by the concept of juristic personality, which is rooted in the assumption that the individual is the paradigmatic legal actor;
3. The failure of the law to differentiate between human persons and organisations is unrealistic and fundamentally problematic, especially in relation to the allocation of rights;
4. A legal theory is needed to help differentiate between human persons and organisations otherwise the development of the law is likely to be irrational and inconsistent;
5. A basic postulate, derived from organisation theory and metaphorical thinking, is that a corporation is "an intelligent machine" which is used to seek specific goals;
6. Another basic postulate, derived from liberal theories of justice, is that autonomy is the most fundamental value to be protected and should be protected regardless of any competing considerations of utility;

7. Organisations, qua organisations, have no legitimate claim to autonomy-based rights (they are means-serving intelligent machines) and hence their claims must be defended on utilitarian grounds;
8. Organisations may claim autonomy-based rights on behalf of human members but only where the protection of an autonomy-based right is a goal of the organisation;
9. Organisations impel a "regulation" rather than "adjudication" model of adjudication because the constraints imposed under an "adjudication" model (for example, focus on past conduct, precedent) flow from autonomy-based rights of human rather than organisational relevance; and
10. The state is an organisational entity which shares the limited rights-bearing status of organisations in general.

Rights, Persons, and Organizations is essential reading for anyone exploring the corporate void in the theories of Nozick, Rawls and Dworkin, and helps to give jurisprudence a promising semblance of modernity. The question which must be asked, however, is whether *Rights, Persons, and Organizations* provides a cogent theory of organisational rights. In my view, it does not succeed in this intractable task. A narrow conception of the function of legal theory is adopted, and this narrowness prevents Meir Dan-Cohen's fund of ideas from being fully exploited. More fundamentally, the central argument pivots on a Kantian concept of individual autonomy rather than on a comparative exposition and analysis of the various ways in which prime interests might best be protected by law in corporate society.

The function of legal theory, we are told, is to provide a critical, explanatory, and constructive framework of legal thinking but not to prepare blueprints showing what can be built upon that framework:

> legal theory is critical when it exposes the latent presuppositions (factual and normative) implicit in existing legal practices. It is explanatory when it unites various practices and relates them to a social or to a normative theory, which lends them coherence and meaning. It is constructive when it suggests new institutional arrangements and legal devices for the achievement of some ends. But legal theory can serve these goals only at the price of immediate relevance. It can offer only a partial view of the legal problems with which it deals. It cannot be more complete and truer to the richness of social reality than is the body of knowledge contained in the various disciplines on which it draws. The conclusions and recommendations of legal theory must therefore remain partial and tentative. To be applicable to the solution of problems, they must be filtered through or supplemented by the commonsense and good judgment of a wise practitioner fully cognizant of the details of the special legal issue. The first sin of legal theory is accordingly to presume that it can offer a blueprint for actual decision making and be a substitute for judicial and lawyerly wisdom....Like legal theory in general, this study does not purport, and should not be expected, to generate blueprints — specific practical proposals for immediate applicability. Its conclusions are strictly valid only within the hypothetical, artificial, simplified universe within which they are derived. Indeed, by promulgating theories of the kind that I am about to suggest, one assumes the risk of merely offering one set of blinkers as a substitute for another. More likely, in the competition with rival theories, the contenders may ultimately just cancel each other out. Still, even this would not make such theorizing altogether futile. As competing theories cancel each other out, they may sometimes open up a space, or they may create a clearing, within which practice

> can proceed with a somewhat greater degree of open-eyedness and somewhat diminished opportunity for blunder or bad faith. (pages 3-4,9)

This is a severely ascetic conception of legal theory. There seems little reason to believe that a deep theoretical structure in law is sound and worth following unless the application of that structure is at least imagined. Yet *Rights, Persons, and Organizations* immerses itself in few particular rights. Property rights and freedom of speech are discussed at some length, but other rights, such as the privilege against self-incrimination,[1] are canvassed only briefly. What is missing is a showing that the theory is plausible if applied across the range of rights. For instance, there is no analysis of the right against unreasonable searches and seizures despite the complex issues of privacy posed by the extension of the Fourth Amendment to corporate persons. At this point, among others, the reader is left to imply where the theory leads and what the social consequences are.[2] In the absence of further elaboration, the thesis of *Rights, Persons, and Organizations* seems rather ethereal.

Should we accept Dan-Cohen's idea of good legal theory? Reconsider Hugh Stretton's *The Political Sciences,* C. Wright Mills' *The Sociological Imagination,* and Robert Goodin's *Political Theory and Public Policy.*[3] These works expose the sterility of much of the abstract theorising which occurs in the social sciences and reveal by example what can more usefully be done. In contrast to their emphasis upon social programmes and social prognoses, *Rights, Persons, and Organizations* is unashamedly dedicated to developing a theoretical framework which, although meticulously rivetted together, is selective and only partially clad with applications. Symptomatic of this rather lifeless style of theorising is Dan-Cohen's metaphor of the personless person — a corporation which has bought all its own shares and which operates entirely by means of computers. Without denying that such a metaphor has some use as a counter to the matephor of the corporation as a human person,[4] the personless person is nonetheless a "crazy case"[5] which toys with the problem of corporateness rather than examining the social implications of different constructs of corporate reality.[6]

Methodology aside, the central argument of *Rights, Persons, and Organizations* is problematical. The argument revolves around a concept of individual autonomy which I find elusive in definition, capricious in application, and vulnerable to counter-intuition. Instead of questioning the relevance of Kantian intuition as a basis for the legal protection of interests in modern corporate society,[7] Dan-Cohen builds his framework upon it.[8]

An initial puzzle is the absence of any clear explanation why organisations lack the attributes of personhood which qualify individuals as holders of autonomy-based rights. It is not enough to contend that corporations are intelligent machines which act as means to human ends. The question is why corporations should be characterised as intelligent machines lacking the prerequisites for rightsworthy autonomy. Surprisingly, Dan-Cohen does not attempt specifically to refute the thesis of Peter French that corporations are moral persons,[9] or the argument of Thomas Donaldson that corporations are moral agents as distinct from moral persons.[10] Moreover, as Michael

McDonald has objected, it may be that the paradigm moral agent is not an individual but a collectivity:

> [c]onsider Dan-Cohen's characterisation of organisations as '*large, goal-oriented, permanent, complex, formal, decisionmaking, functional structures*' ... Not only does the organisation have all the capacities that are standardly taken to ground autonomy — viz., capacities for intelligent agency — but it also has them to a degree no human can. Thus, for example, a large corporation has available and can make use of far more information than one individual can. Moreover, the corporation is in principle 'immortal' and so better able to bear responsibility for its deeds than humans, whose sin dies with them.[11]

Granted, corporations lack human feelings and emotions, but this hardly disqualifies them from possessing the quality of autonomy. On the contrary, the lack of emotions and feelings promote rationality and in this respect, as well as in others, the corporation may be a paradigm moral agent.[12]

Another key issue, not fully resolved in *Rights, Persons, and Organizations,* is determining what amounts to an invasion of individual autonomy where individual interests are attacked through the medium of a corporation. Assume that a company is held criminally liable and subjected to a fine of $1 million. Under what circumstances, if any, may the company invoke a right not to be punished on the basis that the punishment will pass through to blameless individual shareholders, managers and workers? Dan-Cohen does not discuss this classic problem but it seems from his argument that the company would have no valid claim to a derivative autonomy right not to be punished.[13] The criterion advocated for recognition of derivative rights by an organisation is whether it is a goal of the organisation to protect some relevant autonomy-based right on behalf of individual associates; in the example we are considering, it is not a goal of the company to protect the autonomy-based right of individuals not to be punished except for their own blameworthy conduct. This criterion seems rather capricious. Assume the company had as one of its goals a policy of desert-based individual accountability for wrongs committed in the course of employment, coupled with a policy of production of all blameworthy suspects to the authorities for prosecution. Would this case fail to satisfy the criterion because of what Dan-Cohen cautions as "the potential for abuse"? Or has the company acted as the very model of the modern right-thinking Kantian?

Plainly not every assault on a corporation entails an invasion of the autonomy-based rights of individual associates but *Rights, Persons, and Organizations* seems to go to an opposite extreme. What is the basis of the very limited platform of corporate rights which Dan-Cohen is prepared to recognise? Reliance is placed on a variety of considerations, namely organisational slack, the principle of double effect, the absence of personal contact, and the principle of non-aggregation of individual interests.[14] Instructive as Dan-Cohen's discussion of these considerations is, not all will agree with the limited corporate rights position he derives from them. The principles of double effect and non-aggregation of individual interests are suspect and much more controversial than Dan-Cohen seems willing to debate.[15] Consider also the factors of organisational slack and absence of personal contact. These factors may or may not be present in a given case.

Assume that the company in our example above is placed on probation a condition of which is that the $1 million fine be recouped from top management in a proportion commensurate with the salary of each top manager. In a case such as this the harm inflicted on a company is passed through directly to known individuals.

More problematic is the basic assumption that a theory of organisational rights can safely be founded on Kantian-style intuition about the paramountcy of individual autonomy.[16] Why should we take so individualistic an intuition as a starting point for analysing rights claims by *organisations?* At least two counter-intuitions spring to mind. The first is that corporate power compromises the autonomy of individuals but gives in return a number of opportunities that would not exist in an original pre-corporate state of individual autonomy. If so, analysing modern organisational rights claims from the standpoint of individuals in some pre-corporate state of autonomy is off kilter because the corporate factor in promoting human well-being is not included in the foundational rights-according intuition. A second counter-intuition is that corporate power may enhance the autonomy and well-being of some individuals at the expense of others to an extent that is alien to an idealised pre-corporate society where all are equal. If so, assessing modern organisational rights by reference to pre-corporate individual autonomy seems inherently biased because the inegalitarian dimension of corporate power is excluded from the basic rights-recognising intuition.[17]

As one would expect, counter-intuitions of this kind can have significantly different implications from those drawn in *Rights, Persons, and Organizations.* One possible implication is that the capacity of organisations for promoting human well-being may make them better rights-bearers than individuals in some contexts. Organisations can express and maintain a collective policy long after the death of particular members, and the ability of an organisation to support and implement such a policy may far exceed the atomistic resources of individual members. Moreover, the impact of a violation of an interest may be minimal when viewed in relation to any one individual and yet the cumulative effect of a large number of violations may be serious and sufficient to warrant recognition of a group right. These considerations are reflected under the Canadian Constitution, which creates distinctively collective rights in relation to the protection of educational interests.[18]

Another implication, stemming from the second counter-intuition mentioned above, is that claims by organisations to property rights need to be assessed squarely in terms of equality of welfare. Contrast the theory advanced in *Rights, Persons, and Organizations* which focuses not on equality of welfare but on autonomy-based rightshood. According to *Rights, Persons, and Organizations,* property rights relate to autonomy and only individuals are fit subjects of autonomy-based rights; any claims by organisations to property fall into the realm of utilitarian assessment. This way of structuring corporate rights allows equality of welfare to trump corporate claims to property but the focus is autonomy-based rights, not equality of welfare. The

die-hard individualist is not forced immediately to come to grips with the inegalitarian consequences of individualism in a corporate-powered society but is engaged in debate over the issue of autonomy.[19] If the debate is centred on that issue, the die-hard individualist may well win by challenging Dan-Cohen's position that corporations are unfit to claim untrumpable rights to property. That position, after all, is vulnerable: staunch advocates of the nightwatchman state will rebel against the contention that the existence of a corporate veil necessarily means that property held beneficially by individuals via corporate ownership is not subject to the same protective rights as those which apply to property held directly by individuals.

Where philosophies clash, it would be foolhardy for a law-maker arbitrarily to follow one philosophy rather than another. A choice must be made, and making an informed choice requires analysis of at least the comparative implications of competing ideas. This is hardly a novel exercise. The need to arrive at some commendable solution in the face of philosophical uncertainty is a perennial difficulty of law-making. Indeed, a large part of the genius (pragmatic wizardry?) of the common law has been to devise workable solutions on issues where philosophers habitually disagree. Futhermore, the task in law of extracting order from theoretical chaos is not confined to philosophy but extends across a broad range of other disciplines, including economics, the so-called queen of the social sciences. Instead of trying to reflect the practical talents of law in attempting to make sense of an immense theoretical diversity, Dan-Cohen would lead our assessment of corporate rights back down the path of Kantian individual autonomy.

To conclude, *Rights, Persons, and Organizations* is an intriguing masterpiece but falls within a narrow methodological tradition and represents one school of philosophical thought. There are other schools of thought and more vivid and convincing methods of presentation. For one instructive example[20] compare Stretton's *Capitalism, Socialism, and the Environment,* a work which graphically spells out what the author sees as the inegalitarian implications of the liberal ideal in contemporary individualism. In constrast, *Rights, Persons, and Organizations* frames corporateness in law with a liberal ideal but does not try to depict the social consequences. Both approaches inevitably amount to illusion, but which is the more telling?

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FOOTNOTES

1 *Cf.* H.R. Fiebach, "The Constitutional Rights of Associations to Assert the Privilege Against Self-Incrimination" (1964) 112 *U Pa L Rev* 394.

2 *Cf.* H. Stretton, *The Political Sciences* Ch. 9.
3 See also P. Streeten, (ed.), *Value in Social Theory: A Selection of Essays on Methodology by Gunnar Myrdal* (1968).
4 See further G. Morgan, *Images of Organization* (1986) for a comprehensive analysis of the range of metaphors available. Note also that the personless corporation represented by Dan-Cohen may not do justice to the capacities of an intelligent machine: *cf.* V. Milan, *The Cybernetic Samurai* (1985).
5 R.E. Goodin, *Political Theory and Public Policy* (1982) 8-12.
6 See generally G. Burrell and G. Morgan, *Sociological Paradigms and Organisational Analysis* (1979).
7 *Cf. e.g.,* R. Unger, *Knowledge and Politics* (1975).
8 An explanation offered in *Rights, Persons, and Organizations,* 8, is that the object is to articulate "a normative conception of organizations that is viable in terms of dominant modes of present legal discourse". I do not see how this justifies unquestioning acceptance and application of individualistic rights-based theories to the position of organisations.
9 P.A. French, *Collective and Corporate Responsibility* (1984).
10 T. Donaldson, *Corporations and Morality* (1982).
11 M. McDonald, "The Personless Paradigm" (1987) 37 *U Toronto LJ* 212, 219-220.
12 *Id.,* 220.
13 It would be possible, however, to claim such a right on the basis of utilitarian considerations.
14 *i.e.,* if A has a weightier right than each person B-Z then A has a weightier right than B-Z combined.
15 As to the principle of double effect see the criticism in J. Glover, *Causing Death and Saving Lives* (1977) Ch. 6; J.L. Mackie, *Ethics: Inventing Right and Wrong* (1977) 160-168. As regards interpersonal comparisons and additivity of interests see further J.S. Coleman, *Individual Interests and Collective Action* (1986) Ch. 2.
16 Compare P. Pettit, "Liberalism and Republicanism: Variations on a Theme from Roberto Unger" (1987) 43 *Bull Australian Soc Legal Phil* 190.
17 See further S. Lukes, *Individualism* (1973) 156-157.
18 *Attorney-General of Quebec* v. *Quebec Association of Protestant School Boards* (1984) 10 DLR (4d) 321. See further note 11 *supra,* 224-225; M. McDonald, "Collective Rights and Tyranny" (1986) 56 *U Ottowa Q* 115.
19 This of course raises the question whether rights-talk should be abandoned if one's focus is on equality of welfare. See generally Z. Bankowski, "Law Left Right Behind" (1984) 7 *UNSWLJ* 362; S. Scheingold, "Radical Lawyers and Socialist Ideals: The Quandary of Rights" (1987) 43 *Bull Australian Soc Legal Phil* 232.
20 For another see J.L. Mashaw, *Bureaucratic Justice: Managing Social Security Disability Claims* (1983).