

## **The Well-Being of a Corporation: Parables for a Legal Concept in Ethical Crisis**

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*From Aristotle to Drucker, Friedman to MacIntyre and Sandel, academics and practitioners to media commentators and various stakeholders, the responsibility of business to society has been discussed continuously. Impacting these discussions is the status of the corporation as a “person” under the law. This paper will provide a summary overview of those discussions and offer three parables, created by the author, to address the chronic ethical crises in business that face society today.*

### **INTRODUCTION**

...I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. As a result of the war, corporations have been enthroned and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working upon the prejudices of the people until all wealth is aggregated in a few hands and the Republic is destroyed. (Abraham Lincoln, quoted in Beets, p. 202)

Although the Republic remains, Lincoln’s fears are still very much with us one hundred and seventy three years later as wealth is aggregated in fewer and fewer hands than ever before and corporations take on artificial but potent lives separate and apart from their shareholders. In 1939, seventy five years after Lincoln’s remarks, William O. Douglas, then chairman of the Securities and Exchange Commission, voiced his own concerns: “(o)ne aspect of modern life, which has gone far to stifle men is the rapid growth of tremendous corporations. Enormous spiritual sacrifices are made in the transformation of shopkeepers into employees...” (Douglas, p. 291). Seventy-five years passed between Lincoln’s comments and Douglas’ and now another seventy-three years have passed between Douglas’ comments and today. Little has changed. Each year brings renewed public and private disillusionments with the perceived lack of ethics in business and a scramble ensues to find scapegoats to hold accountable as greed and unaccountability threaten the economic well being of all and the chasm between the very wealthy and the rest grows exponentially. In the conclusion of his book, *What Money Can’t Buy: the moral limits of markets*, Sandel (p. 203), writes

Democracy does not require perfect equality but it does require that citizens share in a common life. What matters is that people of different backgrounds and social position encounter one another, and bump up against one another, in the course of everyday life. For this is how we learn to negotiate and abide our differences, and how we come to care for the common good.

The role of corporations in civic life and whether corporations themselves share a responsibility for the common good has been much discussed. This paper will briefly look at the history of the corporation as a legal entity, and the debate that status has generated as to the responsibilities of a corporation to society. It will also discuss the role of investors as the life source of a corporation and their responsibility for the well being of a corporation. Finally, it will present three parables, created by the author, that address those issues and which illustrate the active ingredients necessary for a prescription to effectively treat a legal concept in ethical crisis.

## **A LEGAL CONCEPT IN ETHICAL CRISIS**

### **Status of a Corporation as a Person**

In the case of *Dartmouth College v. Woodward* (1819) United States Supreme Court Chief Justice John Marshall defined a corporation as "... an artificial being, invisible, intangible, and existing only in contemplation of law." The Court Reporter for the *Santa Clara County v. Southern Pacific Railroad* case (1886) noted in the "Statement of Facts" for the case, based on a comment by the Chief Justice prior to the announcement of the court's decision, that corporations are "persons within the intent of the clause in section 1 of the 14<sup>th</sup> Amendment," (Beets, p. 207) thereby setting in motion the precedent of a corporation as a person under the law that has repercussions to this day. However, the concept of the corporation as a person predates American law by millennia. The concept of the corporation as an entity separate and apart from its owners had its origin in ancient Rome, which "... gave birth to the idea of the personhood of a business organization; i.e., that an organization can be considered an acceptable legal entity that can be vested by the government with many legal rights that previously had been granted only to individual humans." (Beets, p. 198.) Thus "(f)or the first time in human history, the identity of business organizations were not simply an extension of their owners but an identity of a separate entity with a life, existence, rights, purposes, and goals apart from those individual owners." (Beets, p. 198 citing others). Most recently, the United States Supreme Court, in the 2010 *Citizens United* case "... resoundingly endorsed the idea that for purposes of politics, corporations are the same as people, with the same protection under the First Amendment." (Bennett, 2012). If corporations are thus recognized as persons, with the same rights and constitutional protections as persons, what are their responsibilities as persons? Or should they be held to an even higher standard of responsibility than human persons? After all, as the concept of the corporation as person has taken on an accepted legal life of its own, it has evolved into a sort of super-personhood with attributes beyond that of a human person, for example, perpetual existence. And if we are creating corporate persons who potentially never die, are we in danger of creating a sort of super-personhood that could further evolve into a "Frankenstein" (Miller, 2002) turning on its creators if they neglect to nurture it and imbue it with ethical values? The question continues to resonate: do corporations have a responsibility to the society that created them?

### **Responsibility of Business to Society**

Milton Friedman (1974, p.72) framed the question in terms of the corporation's agents and the pursuit of corporate profits: "... do *corporate executives*, provided they stay within the law, have responsibilities in their business activities other than to make as much money for their stockholders as possible?" While his answer, as we are all familiar with, was "no they do not," David Langstaff (1), President and CEO, TASC, Inc., disagrees. "Today, corporate purpose is being held hostage by the myth of shareholder primacy," he writes and quotes UCLA Professor Lynn Stout that "(c)hasing shareholder value is a managerial choice – not a legal requirement." (Langstaff, p. 2) In an article calling for the redefinition of the purpose of a corporation around the concept of shared value, "which involves creating economic value in a way that *also* creates value for society by addressing its needs and challenges," Porter and Kramer (64) write that "(t)he purpose of a corporation must be redefined as creating shared value, not just profit per se." (64) Unfortunately, the concept of "profit" gets glossed over in many of these discussions. What is profit? It vastly oversimplifies the term to state that it is the difference between revenues and expenses. Friedman (1970) entitled his classic article "The Social Responsibility of Business is to Increase its

Profits”, and the term “profit maximization” has been a clarion call ever since. But, as the furor over the heads of the auto industry flying into the nation’s capital for a bailout of their financial difficulties showed, the executives considered private jet travel a necessary and a valid expense even though, by taking that expense rather than commercial travel, it arguably lessened corporate profits. So perhaps the question should be asked - are there valid social expenses that are the responsibility of the corporation even though, like private jet travel for corporate executives, they also arguably lessen corporate profits? In a similar vein, why are excessive bonuses viewed as valid expenses, even though they lessen profits, while other stakeholder expenses are viewed as improper and seen as irresponsible because from a Friedman perspective they are only seen as lessening corporate profits for the shareholders? Porter and Kramer’s (pp. 75, 77) concept of shared value recognizes that “(n)ot all profits are equal” and “...focuses companies on the right kind of profits – profits that create societal benefits rather than diminish them.” They call for “... a more sophisticated form of capitalism, one imbued with social purpose. But that purpose should arise not out of charity but out of a deeper understanding of competition and economic value creation.” For as they state “(i)t is not philanthropy but self-interested behavior to create economic value by creating societal value.”

The interplay and development of individual responsibility and community runs through the works of Aristotle, Drucker, MacIntyre, Solomon and many others who have struggled with the concepts of social responsibility of business and business ethics. “MacIntyre was one of the first moral philosophers to propose a return to Aristotelian virtue-based ethics because of its focus on excellence (virtue), community, personal character, individual, and external actions as a moral guide for action and decision making.” (Kurzynski, p 7 ) In the same vein, Solomon (pp. 1021, 1023), who has developed a theoretical virtue-based framework to what he calls “an Aristotelian approach to business”, has written that

emphasis on community, however, should not be taken to eclipse the importance of the individual and individual responsibility. In fact, the contrary is true: it is only within the context of community that individuality is developed and defined, and our all-important sense of individual integrity is dependent upon and not opposed to the community in which integrity gets both its meaning and its chance to prove itself.”

However, according to Rohr, (p. 42).“The individual became ‘individuated’ in the West, without a keen awareness of the common good or the harmonizing of body, mind, heart, and community.” Modern educational practices do not help. As Porter (p. 77) points out,

Because of the traditional divide between economic concerns and social ones, people in the public and private sectors have often followed very different educational and career paths. As a result, few managers have the understanding of social and environmental issues required to move beyond today’s CSR approaches, and few social sector leaders have the managerial training and entrepreneurial mind-set needed to implement shared value models.”

As a result, the debate over the social responsibility of business continues and ethical crises recur regularly unabated. In referring to these recurring ethical crises Drucker once wrote

If our modern pluralistic society is to escape the same fate, the leaders of all Institutions will have to learn to be leaders beyond the walls. They will have to learn that it is not enough for them to lead their own institutions [...] they will also have to learn how to become leaders in the community. In fact they will have to learn to create community. This goes way beyond what is understood as social responsibility. Social Responsibility is usually defined as doing no harm to others in the pursuit of one’s own interest or of one’s own task. The new pluralism requires what might be called civic responsibility: giving to the community in the pursuit of one’s own interest or of one’s own task.” (Kurzynski, p. 14, citing Drucker, 1999.)

In working our way out of these crises Langstaff (pp. 3, 4, 7) agrees that it comes down to leadership, and speaks of both Board leadership and CEO leadership as lacking. “The key to the solution to this problem of excessive short-termism, and everyone pointing a finger at everyone else, is having a thoughtful and

engaged board of directors,” he writes, adding “(u)nfortunately, many CEOs do not show the necessary leadership, and instead have been co-opted by the short-term market forces and interests of its financial investors.” This author, however, contends that those very investors themselves have a social responsibility to society.

### **Responsibility of Investors in a Corporation to Society**

Is there a difference in the “social responsibility” of running a business between a corporation that is privately owned and one that is publically owned with shareholders far removed from the day-to-day operations of a business? Friedman seemed to think so. The individual proprietor, in Friedman’s (1970) view “... is spending his own money, not someone else’s.” But Friedman ignores examples like those mentioned above of accepted “expenses”, such as private jets and disproportionate bonuses that, sometimes in spite of poor performance, increase management benefits but lessen shareholder profits. He could argue that such expenses are necessary, in some convoluted way, to increase profits but as Langstaff (p. 2) argues “... pursuing a multi-stakeholder approach to running a business will, in fact, deliver the best returns to shareholders... over time...”.

The question then turns to the social responsibility of those shareholders, the investors in a corporation. An April 2011 Gallup survey found that 54% of Americans reported owning stock, either as individual stocks, stock mutual funds, or stocks in a 401(k) or IRA. The survey also found that stocks are usually owned by those aged 50 to 64, with a college or postgraduate degree and earning \$75,000 a year or more. (Gallup) Many of these investors do not trade stocks personally, but depend on stockbrokers and fund managers.

“There is a lesson in the story of the pension fund manager who was asked whether she would invest in a company doing business in a country that permits slavery. ‘Do you mean me, personally, or as a fund manager?’ she responded. When people feel entitled or compelled to compromise their own ethics to advance the interests of a business or its shareholders, it is an invitation to mischief.” (Bagley, p. 19.)

Society itself has granted to corporations the status of personhood under the law, but it is an abstract, theoretical, purely legal personhood that is granted – one that can only act through its human agents. And while we recognize that corporations can act only through such agents, and while we can recognize and deal with the human failings of those agents, we often fail to understand the complex duality that exists between the corporation as a fictitious person and its agents as human persons. Perhaps fund managers and investors, even though they are the life source of a corporation, should be referred to as agents in absentia. They have, for the most part, no personal connection to the corporation or its policies and many never exercise their voting rights to elect directors whereby they could affect corporate policy. Friedman stresses that a corporation’s human agents should act for the benefit of the shareholders, but shareholders do not always act for the benefit of the corporation. Many shareholders are short-term shareholders driven by short-term swings in the stock market as they seek personal or institutional trading profits rather than the corporate profits of the companies in which they “invest”. As a result of these short-term pressures, corporate business executives “have become so focused on managing the bottom-line that they have lost a sense of responsibility for the well being of the industry, the employee and society in general.” Kurzynski (p. 7).

### **The Well-Being of a Corporation**

Being human is complex, and a human person needs their human organism to be in balance, to not only live, but to live well. We keep a person well by nutrients, exercise, medications, sun, companionship, holistic values, etc. But what is necessary for the well being of a corporation as a person? As Porter (p.66) has pointed out

At a very basic level, the competitiveness of a company and the health of the communities around it are closely related. A business needs a successful community, not only to create demand for its products but also to provide critical public assets and a supportive

environment. A community needs successful businesses to provide jobs and wealth creation opportunities for its citizens.”

Panelists and audience members at the 2008 Harvard Business School Centennial Global Business Summit on Corporate Governance (2008) viewed the board of directors as the entity charged with ensuring the well-being of a corporation, but found that boards had abdicated their responsibility and proposed solutions that included “...changing how boards are selected, changing the expectations for how boards operate, and reexamining the motivations for why board members serve”. But the problem is deeper than that. The conference probed what it is about American society that supports board abdication of their responsibility of ensuring the well-being of a corporation, and “...expressed the view that business has lost its sense of societal purpose.” It was noted that “(i)n 1908 when HBS was founded, contributing value to society was a major aim of business. HBS was formed to study how to reconcile profit aims with the need to take care of workers.” This author contends that returning business to its sense of societal purpose can be accomplished only when the well-being of a corporation is seen as related to the well-being of society and the responsibility for that task is generally accepted as lying not only with a board but with investors as well. This will entail a shift in how society in general views corporations and the pursuit of wealth. While the Harvard Conference “...did not resolve the reasons of America’s wealth obsession, examples of it flowed freely,” and the conference found that “American materialism plays out in board governance through short term horizons.” Kurzynski (p. 7) termed it a “a misguided understanding of leadership, a misconception of what leadership is supposed to be about – in short a crisis of character in corporate America.” Whether corporations will result in responsible corporate citizens or, like Frankenstein, turn on their creators depends in large measure on the ethical modeling within those organizations, (Miller, p. 110) and ethical modeling is an issue of leadership.

## **PARABLES FOR A LEGAL CONCEPT IN ETHICAL CRISIS**

Sandel (p. 203), in concluding his book, *What Money Can’t Buy the moral limits of markets*, decries what he terms the “skyboxification” of American life....” where “the marketization of everything means that people of affluence and people of modest means lead increasingly separate lives.” This author would contend that the “skyboxification” of which Sandel writes is reflective of corporate governance as well. But as academic conferences and journals keep discussing and debating these issues, the problems and failings keep repeating themselves like a groundhog day of corporate ethical crises. Only the actors change. Perhaps the artifice of three parables, created by this author, will allow us another perspective and a fresh look at these problems.

### **The Potter and the Pot of Gold**

There once was a potter who fashioned a simple pot from the clay of the earth for his son on the day of his birth. He worked long and hard, patiently shaping it around a powerful emptiness before subjecting it to very high temperatures that transformed its many exterior blemishes into beauty. As the potter took the pot from the kiln, he looked inside the pot and marveled at the well-formed empty space that offered a world of endless possibilities for its use. While it was still too hot to handle he spat into the emptiness of the pot and as his spittle sizzled it evaporated filling the pot it with the essence of his spirit and values. Through the years the potter told his son, “One day this pot will be yours”. When his son came of age the potter presented the pot to his son and his son left his birthplace to go and find his own place in the world. “Remember, my son, that this pot carries the values and spirit of all I have taught you. Safeguard it and no matter what you experience leave room for your essence.” The son smiled and nodded, not understanding why his father was giving him a large empty pot. As he made his way beyond his birthplace, the son was soon distracted by a myriad of rainbows that he pursued relentlessly in search of mythical gold. He made his way to a tall walled street at the far reaches of all he knew. There he was promised as much gold as he could fit into his simple pot if he only learned the ways of this walled street. He rejoiced that he had such a large pot for he was told that he would only be able to acquire as much gold as his pot allowed. The day

came when he was unable to see anything beyond the walled street. This didn't bother him because as he followed the example of his new mentors he began to acquire bits and pieces of gold that he put into his pot. As he put more and more gold into his pot there remained very little space left for the essence his father had bequeathed him. But he kept stuffing more and more gold into the pot until it began to crack. That didn't bother him because the crack actually allowed him to squeeze more gold into the pot. Finally one day, as the son was trying to squeeze more gold into the pot than the pot could handle, it broke and all his gold spilled out onto the ground. His mentors and those around him were so intent on trying to gather the gold for themselves that they failed to notice the approach of a ferocious storm that soon enveloped the walled street, sweeping away all the gold, leaving in its place only dust. The son sat dejected and then noticed the broken pot at his feet. He picked it up and tried to put it back together but some of the pieces were missing. Some had been ground to dust in the rush for the gold coins. Some were buried deep beneath the remnants of the dust storm. He cradled the remaining pieces of the pot, feeling a pervasive emptiness.

### **A Bull, A Bear and A Butterfly**

Once a bull, a bear and a butterfly shared a beautiful bounteous open space in harmony with all manner of creation. Each used the space according to its own needs without ever infringing upon or diminishing the needs of the other. In fact it never occurred to them to do so. Then one day a stranger happened upon their shared space and reveled in his discovery. "This is so damn good," he said to himself, laughing and clapping his hands. The bull, the bear and the butterfly heard the strange sounds and wondered what it was. As they moved closer they saw an unfamiliar sight - a short, two-footed, red-faced stranger. They watched in wonderment, as the stranger bent down and violently tore grass and flowers from their treasured earth. He stood erect and began to dance as he threw them over his head, repeating over and over, "And it's all mine... all mine"! They continued to stare at him with increased puzzlement as he kicked at the earth, repeating over and over, "Mine! Mine! Mine!". The beginnings of unfamiliar feelings of anger and resentment stirred within them for no one had ever done what he was doing to the flowers and grassy fields. The butterfly flew toward the strange sight and began to circle the stranger's head. The stranger had not seen such a large beautiful butterfly before and watched entranced as it flitted above him, its myriad of bright colors reflected in the mid-day sun. The butterfly danced in wider and wider circles until it rested on a bush next to the bull and bear. At first the stranger was startled to see them and then he smiled. His smile grew wider and wider until it practically swallowed his face. Once again he began clapping his hands and shouting at them "you are mine! All mine!" The stranger was an opportunist from another time and place and he saw the bull as a fertile force to be harnessed, the bear as a predator to be tamed, the butterfly as an object of beauty to be collected, and the space they shared as a resource to be exploited.

They did not understand and were surprised when he began to chase the butterfly across the grassy fields. The butterfly thought the stranger was playing with her and flapped her wings joyously sending waves of contentment across untold miles of verdant fields, refreshing the bull and the bear and creating ripples of calm across the globe. Then, as if from nowhere, the stranger produced a net and scowled menacingly as he pursued the elusive butterfly. The butterfly sensed that something had changed and, as she attempted to avoid the stranger, her wings flapped faster and faster, resulting in new storms developing across the horizon.

### **The Shepherd and the Grasshoppers**

There once was a blind man given responsibility for tending a diverse flock of sheep. He was entrusted with overseeing their migration from pasture to pasture and ensuring that they made it to market in a timely manner. The color of their faces mattered not to him - whether they were black, white, red or mottled. He never noticed whether they were ewes or rams or even hairy sheep. Whether they were bred for their meat or wool was of no concern to him. In fact he didn't care about them at all, except for their marketability. His flock at one time included a four-horned, slender and colorful Leadersheep, known for its intelligence and instinctual ability to sense danger and lead flock and shepherd to safety when faced

with a deadly storm. When he was told that a Leadersheep would no longer be part of his flock because they were to be bred to meatier non-leader lines he was pleased. He thought a Leadersheep to be superfluous. After all he was the shepherd. Wasn't that all the sheep needed to know. One day he sensed that the landscape had changed and that he was in an unfamiliar pasture. He didn't understand how he could have made a wrong turn. He had followed all the patterns he was familiar with. What could have changed? What could he do? He felt the wind change and sensed a storm coming. The sheep began growing restless. He suddenly remembered an old adage he had learned when training to be a shepherd: a good shepherd always keeps his ears close to the ground so he will know what to do. Using his long staff he guided the sheep around him. Then grasping tightly his newly fashioned rod he lowered himself down and put his ear to the ground to see if he could get a sense of what he should do. The sheep began growing restless and huddled together. The Shepherd's ears were so close to the ground that they filled with grasshoppers and he couldn't make up his mind as to the right thing to do. He shook his head and struggled to stand. Suddenly, one of the sheep broke from the flock and took off in a new direction. The other sheep blindly followed, as did the blind shepherd. "They must know where they're going," he said to himself. "It must be the right thing to do. After all, they are all going in the same direction." He followed their repetitive bleating until he heard an unfamiliar elongated Baaaaaa as he followed the flock off a cliff.

## CONCLUSION

Alasdair MacIntyre. in concluding his book, *After Virtue*, writes that our times parallel the Dark Ages. He cautions us that

It is always dangerous to draw too precise parallels between one historical period and another; and among the most misleading of such parallels are those that have been drawn between our own age in Europe and North America and the epoch in which the Roman Empire declined into the Dark Ages. Nonetheless certain parallels are there. A crucial turning point in that earlier history occurred when men and women of good will turned aside from the task of shoring up the Roman *imperium* and ceased to identify the continuation of civility and moral community with the maintenance of that *imperium*. What they set themselves to achieve instead – often not recognizing fully what they were doing – was the construction of new forms of community within which the moral life could be sustained so that both morality and civility might survive the coming ages of barbarism and darkness. If my account of our moral condition is correct, we ought also to conclude that for some time now we too have reached that turning point. What matters at this stage is the construction of local forms of community within which civility and the intellectual and moral life can be sustained through the new dark ages, which are already upon us. (MacIntyre, 1981)

Thirty one years after MacIntyre wrote that a new dark age is upon us the dark clouds have moved beyond the horizon and are more and more visible. This paper traced the beginnings of the corporation as a person from ancient Rome to the legal concept in ethical crisis today. The parables above were meant to serve as a reminder that an effective prescription to treat these recurring crises in business ethics entails the transmission of values, a heightened sense of community and a better understanding of leadership.

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