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CORPORATE PERSONS

Roger Scruton and John Finnis

I—Roger Scruton

After begging and beseeching to several hard riders, who were wantonly pressing upon the pack, to no purpose, he let out at them in rather unmeasured terms, to the utter astonishment of one unfortunate wight, who claimed the privilege of exhibiting himself, upon the plea of being a committee man, and expressed his surprise at Mr. Nichol for using such dreadful language to one of his consequence. 'The Committee be d—d,' said Mr. Nichol, 'you are not worth d—mning singly, so I'll d—n you all in a lump'.

R. T. Vyner, *Notitia Venatica: A Treatise on Fox-Hunting*, London 1842, p. 6n.

I

Introduction. Prices in a market are determined by the choices of buyers and sellers; decisions in a committee are determined by the votes of members. In the first case, however, there is no decision as to what the price of anything should be. Prices arise by an 'invisible hand' from choices which do not intend them. In the second case a decision is taken by the committee as a result of common deliberation on the question before it. The difference between the two cases is hard to capture precisely, is barely noticed in the sociological theory of 'groups', and is strictly imperceivable to the theory of social choice, as this has been explored by Kenneth Arrow and his followers¹. Yet its political significance is enormous, since it underlies much that is at issue between socialists and their opponents. Plan *versus* market, state *versus* civil society, 'social' *versus* procedural justice, the 'general will' *versus* the will of all: in all these oppositions, I suspect, lurks

¹ See the comparison between markets and voting in Chapter 1 of K. J. Arrow, *Social Choice and Individual Values*, New York 1951. As Alfred Mackay puts it: 'the problem of social choice is this: how can many individual preferences be combined to yield a collective choice?': *Arrow's Theorem: The Paradox of Social Choice*, New Haven and London, Yale University Press, 1980, p. 1. So defined, the problem is indifferent to the distinction I have in mind.

some instance of the distinction between collective deliberation, and the unintended outcome of an 'invisible hand'.

A first step towards understanding that distinction—but only a first step—is through the study of a concept that has been unjustly neglected by contemporary social and political philosophy: the concept of the corporate person. Committees, as a rule, are corporate persons; markets are not, and cannot be. That sentence may not be clear to the reader now; but I hope to explain it in the course of this paper.

Consideration of collective action in recent jurisprudence has tended to focus on something vaguely called the 'group'², or else to offer some updated version of what Maitland called the 'bracket theory', but which we, with the hindsight³ of Russellian logic, might call the 'logical construction theory'. According to this theory—defended in a sophisticated form by H. L. A. Hart⁴—the rights and duties of corporations are created by the law, in order to adjudicate the independent legal interests of individuals. The concept of the corporate person, with its own rights and duties, is a procedural device, whereby the business of adjudication is made more manageable.

Theories of responsibility rarely mention the liabilities of groups—even though more harm has been done, and wilfully done, by groups than by individuals; while theories of the person and of personal identity proceed as though human persons were the only persons that there are. Modern political philosophy usually makes no distinction between institutions with personality and those without it. Nor does it see the importance of that distinction, or the manifest catastrophe of a political order (such as that established and upheld by communism) in which all forms of corporate personality have been reduced to the 'masks' or 'fictions' which positivistic jurisprudence wrongly holds them to be. In this paper I shall outline a defence of the view—traditionally associated with Gierke, Maitland and Figgis—that human individuals derive

² See the discussion in A. M. Honoré, 'Groups, Laws and Obedience,' in *Oxford Essays in Jurisprudence*, Second Series, ed. A. W. B. Simpson, Oxford, Clarendon Press, 1973.

³ F. W. Maitland, introduction to Otto von Gierke, *Political Theories of the Middle Ages*, tr. Maitland, Cambridge, Cambridge University Press, 1900, p. xxiv.

⁴ H. L. A. Hart, 'Definition and Theory in Jurisprudence', in *Essays in Jurisprudence and Philosophy*, Oxford, Clarendon Press, 1983, pp. 40-46.

their personality in part from corporations; and I shall indicate why it matters that corporate personality should be consecrated in our feelings, and acknowledged in our laws.

II

Firm, Church and Genossenschaft. Insofar as the corporation has appeared in recent philosophical discussion, it has been in the shape of the firm, as represented in English law by the limited liability company. At least one philosopher—Peter French⁵—has noticed that, unless we are prepared to assign rights and duties to firms over and above the rights and duties of their members, we shall be without the needed remedies against them. Nevertheless, French sees little virtue in the corporation, and although recognizing its claims to moral personality, does not view it as an end in itself, with an intrinsic claim to respect and protection. So far as I know, only one recent philosopher—Michael Novak⁶—has been bold enough to assign a full spiritual identity to the industrial corporation, and to discover in its workings the transfigurations of Grace. Others have gone to the opposite extreme, and endeavoured to show that the legal personality of the corporation corresponds to no moral reality. In an ingenious argument, Meir Dan-Cohen has maintained that legal personality is compatible with the existence of the corporation as a mere ‘intelligent machine’—one that could be owned and staffed by computers⁷. On the other hand, for all Dan-Cohen shows, the human being may be an ‘intelligent machine’—and if that were so, I contend, it would have no bearing whatsoever on his moral personality.

The firm will not be the main subject of my discussion, and it is worth explaining why. The firm is an association for a purpose, a means to an end, and is usually treated as such by those who work for it. It also stands in a contractual relation to

⁵ Peter A. French, *Collective and Corporate Responsibility*, New York, Columbia University Press, 1984.

⁶ Michael Novak, *Towards a Theology of the Corporation*, Washington, American Enterprise Institute, 1981. Novak gives seven signs of God’s Grace in the corporation: creativity, liberty, birth and mortality, the social motive, the social character, insight (the primary capital), and the risk of liberty and election.

⁷ Meir Dan-Cohen, *Rights, Persons and Organisations: A Legal Theory for Bureaucratic Society*, Berkeley, University of California Press, 1986: see especially the ‘story of the personless corporation’ (pp. 46–51).

its employees, and is dissoluble at will. Firms naturally lend themselves to the view that personification in law is a mere convenience, a device for protecting and limiting some 'common objective', and not the legal recognition of a new moral reality.

Roman law recognised two kinds of association: the *societas* and the *universitas*. A *societas* is constituted by a contractual relation between its members; its assets are owned by the members, subject to the terms of the contract which binds them. A *universitas* is a separate legal entity, which can hold property, and has rights and obligations distinct from those of its members. (An example is the *collegium*: perhaps the earliest form of corporation in law.) There is no decisive Roman authority for the view that the *universitas* is a *persona*⁸; nevertheless the *universitas* is often taken as a paradigm instance of corporate personality—precisely *because* it is not reducible to a contractual relation between its parts. Legally speaking, the modern firm is like a *universitas*; morally speaking, however, it is a partnership for gain, and in this resembles the *societas*⁹; hence firms have played only a minor role in the thinking of those who defend the personality of corporations.

Canon law described the corporate person as a *persona ficta*¹⁰. Its corporators stood in law as guardians of property which belonged in fact to no-one, and guardianship, rather than agency, became the mark of legally competent association. In a parallel, but more subtle, development, English law began to speak of a 'trust', deriving a law of trusts separate from the common law of the kingdom, by appeal to principles of equity which owed their authority in part to the canon law.¹¹

In *Das deutsche Genossenschaftsrecht*, Gierke made the bold suggestion that the canonist theory of the corporation—and all those views which derive from it—arises from the desire to

⁸ See P. W. Duff, *Personality in Roman Private Law*, Cambridge, Cambridge University Press, 1938, pp. 35–66 and 206–237, in which Duff discusses the various theories of corporate personality and their applicability to Roman Law. On the *collegium* and its importance in Roman society, see Th. Mommsen, *History of Rome*, tr. W. P. Dickson, 2nd Edition, New York, Scribners, 1868, vol. 1, pp. 218–231.

⁹ See also the interesting application of the Roman Law distinction to 'Civil Association' and its modern competitors, in Michael Oakshott, *On Human Conduct*, London, 1974.

¹⁰ *Das deutsche Genossenschaftsrecht*, vol. III, p. 279.

¹¹ Maitland, *op. cit.*, p. xl.

safeguard Natural Law, as the supreme source of right and obligation¹². The tendency of Natural Law is to confer rights and duties upon individuals, and to regard all legitimate groups as arising from, and reducible to, an agreement between their members. Even when the existence of non-contractual unions is recognized, the tendency is to see them not in terms of a will and personality of their own, but as the sign and product of some 'common purpose' among their human parts—who are therefore the true agents in all corporate actions. Thus the most sustained recent defence of Natural Law has this to say about the 'group':

A group, in the relevant sense, whether team, club, society, enterprise, corporation or community, is to be said to exist whenever there is, over an appreciable span of time, a co-ordination of activity by a number of persons, in the form of interactions, and with a view to a shared objective¹³.

It is true that Finnis expressly avoids the question of corporate personality—as does Honoré, to whose discussion he is obliquely referring¹⁴. He also goes on to gloss the idea of a 'shared objective' in terms of a 'common good' which soon emancipates itself from any *shared* purpose, to become a purpose, a will, and indeed a person, of its own. But perhaps this only goes to show how difficult it is for the unaided theory of Natural Law to encompass the subject of this paper.

There is more than one thing wrong with the theory of corporations which Gierke attributes to the exponents of Natural Law. It is not true, for example, that all legitimate associations are reducible to contracts; nor is it true that all associations are directed to some purpose beyond themselves—even if that is true of the firm and the partnership. Gierke's *Genossenschaft* ('fellowship') signified a kind of group friendship, whose purpose lay at least partly within itself¹⁵. Gierke's

¹² *Das deutsche Genossenschaftsrecht* was never finished. Two substantial portions from it have been translated, one by Maitland (see note 3 above), and one by Sir Ernest Barker, as Otto Gierke, *Natural Law and the Theory of Society, 1500-1800*, tr. Sir Ernest Barker, Cambridge, Cambridge University Press, 1934.

¹³ John Finnis, *Natural Law and Natural Rights*, Oxford, Clarendon Press, 1980, p. 153.

¹⁴ A. M. Honoré, *op. cit.*

¹⁵ Cf. Aristotle's distinction among the kinds of friendship, in *Nicomachean Ethics*, Book VIII. I discuss this at length in *Sexual Desire*, London, Weidenfeld and Nicolson, 1986, Chapter 9.

disciple, Figgis, took the church—and in particular the non-conformist church—as his example¹⁶. And although he (wrongly) described the church as deriving from a contract between its members, he was clear that its purpose is bound up with its own existence, and that you do not join a church for the sake of a salvation that could be achieved in some other way. If the church is a *means* to salvation, it is a *unique* means, whose purpose is inseparable from itself. The communion of the church includes the communion of the saints, and in joining it you participate in the sacred gifts, which have their being in the very act of association. Henri de Lubac expresses the point in Jesuit idiom:

[The Church] is either an historic institution or else she is the very city of God. In the first case, as a society founded by Christ for the salvation of men, she labours to bring them to it; she is then a means, and we can say with Pius IX: 'men were not made for the Church, but the Church was made for men: *propter nos homines et propter nostram salutem*'. A necessary means, a divine means, but provisional as means always are. Whereas in the second case, since the Bride is henceforward but one with the Bridegroom, she is that mysterious structure which will become fully a reality only at the end of time: no longer is she a means to unite humanity in God, but she is herself the end, that is to say, that union in its consummation¹⁷.

The question whether the church is an end in itself is distinct from the question whether it is constituted by a contract. The contractual theory was born among Calvinist sectarians in Holland, expounded by Voet¹⁸, and transported from that august source into Scottish Calvinism, whence Figgis derived it. The Roman Catholic Church seems to endorse the theory in its Tridentine liturgy, which refers to the church as a *compago spiritualis*. But this hardly does justice to St Paul's meaning, when he describes the adherents of the church as 'members' one of another, or to the meaning of the Book of Common Prayer,

¹⁶ J. N. Figgis, *Churches in the Modern State*, 2nd edition, London, Longmans, 1914.

¹⁷ Henri de Lubac, S. J., *Catholicism: A Study of Dogma in Relation to the Corporate Destiny of Mankind*, London, Burnes, Oates and Washbourne, 1950, pp. 26-7.

¹⁸ Gisbert Voet, *Politika ecclesiastica*, four vols., Amsterdam, 1663 et seq.

when it refers to 'baptism, wherein I was made a member of Christ': certainly no contract to which the speaker was a party!

To cut a long story short, we should distinguish among associations between the voluntary, the involuntary and the non-voluntary; between the contractual and the non-contractual, and, within the contractual, between those constituted by a contract *among* their members, and those which contract *with* their members; between those with an independent purpose, those with an internal purpose (e.g. the Church), and those with no purpose at all; and, within all those, between the personal and the impersonal. The club that really matters to its members is voluntary, and joined for the sake of membership. The ruling purpose of such a club is the club itself. In the eyes of its members it is not a means but an end: a bond in which you are at rest, as you are at rest beside your hearth. It is an object of respect and esteem, and no one who treats it as a mere instrument to his goals deserves the benefit of membership. In using the language of the Kantian imperative to describe such a club, I merely record the usual feelings of its members. It is such an association that was usually in mind, when nineteenth-century writers pleaded for the recognition of the moral personality of corporations.

III

The Moral Personality of Corporations. All of the following can be true of corporations (whether clubs, churches or firms):

- they make decisions;
- they act freely and responsibly;
- they have moral rights and duties;
- they have legal rights and duties;
- they can make laws for themselves and their members, for the breach of which they are held responsible;
- they are objects of praise and blame; of loyalty, pride and affection; of anger, resentment and hate;
- they are historical beings, which flourish and decline according to the success of their undertakings;
- they have habits of mind, including moral virtues and vices;
- they stand in personal relations, and can adopt many of the roles adopted by human persons. A corporation may even be the leading character in a drama (as in Wagner's *Die Meistersinger*).

How are we to interpret those statements? According to

Pufendorf, the corporation is a *persona moralis composita*, consisting in *homines . . . per vinculum morale in unum systema connexi*¹⁹. For Wilhelm von Humboldt, such a composite person 'should be regarded as nothing more than the union of the members at a given time'²⁰. Such has been the gut-reaction of liberal thinkers ever since. However, von Humboldt's suggestion manifestly fails to do justice to the fact that the membership of corporations is in a state of flux. Those who are members at the time when a decision is executed may not have been members when the decision was made; while a wholly new membership may have replaced them before the legal and moral consequences of the decision are felt. If we were to follow von Humboldt, then we should adjudicate the affairs of corporations by holding the present membership individually liable for the deeds of those to whom they have succeeded, and who may be already dead. This is both legally absurd and contrary to natural justice. Furthermore, the continuity of corporate agency is not explicable in terms of the continuity of individual plans. A corporation may even survive for periods, with all its rights and duties intact, despite having no members whatsoever. (For example, the vacant crown, or any other 'corporation sole' currently without an occupant.)

It is true, as Maitland has demonstrated²¹, that the device of corporate personality is not strictly necessary for the protection and control of associations—the English law of trusts being a rival method, whose very existence might tempt us to the view that 'personality', like 'trust', is a mere creature of the law which discerns it, and not something that exists 'in itself'. However, whenever the rights of beneficiaries are unknowable, trusts cannot safeguard their interests; and associations with no specifiable purposes, and no beneficial ownership of property, lie outside the domain of trusteeship altogether. Furthermore, it seems that trusts arose precisely because the

¹⁹ Pufendorf, *De Jure naturae et gentium*, Chapter 1, sections 12–13.

²⁰ W. von Humboldt, *Ideen*, quoted Gierke, ed. Barker, *op. cit.*, p. 127.

²¹ F. W. Maitland, *Collected Papers*, ed. H. A. L. Fisher, Cambridge, Cambridge University Press, 1911, vol. III: especially 'The Corporation Sole', 'The Unincorporate Body', 'Moral Personality and Legal Personality', 'Trust and Corporation'. Maitland's position is summarized in S. J. Stoljar, 'The Corporate Theories of F. W. Maitland', in Leicester C. Webb, ed., *Legal Personality and Political Pluralism*, Melbourne, 1958.

law has an inbuilt tendency to *recognize personality*, whether or not under that description. And this tendency persists, even in the face of Parliamentary attempts to thwart it. It was already clear in the celebrated *Taff Vale* case²², that the endeavour to free trade unions from the burdens of personality was in tension with the common law: and this tension has persisted to the present day, being the source of other, and more tangible conflicts, as those injured by the activities of unions seek a redress that is unjustly withheld from them.

Nevertheless, there has been a desire in English jurisprudence to acknowledge the legal personality of corporations, while denying their moral personality. This desire reflects a suspicion of the German *Genossenschaft*, with its Hegelian and Fichtean overtones. It is a small step, the English liberal supposes, from Gierke's *Genossenschaft* to the corporate state. If Mussolini and Hitler were more inspired by socialist than conservative visions of society, this only serves to show the threat of collectivism lurking behind the noble conceptions of German jurisprudence, which found their application, at last, in totalitarian power.

Thus Sir Ernest Barker, distancing himself from Gierke, argues that no group can incur *moral* as opposed to *legal* liability: 'moral responsibility falls only on the individual moral agent . . . [and] it is a dangerous doctrine which would avert it from him and make it fall on any transcendental being'²³. So far as I can see, Barker offers two arguments for this position: first, he contends that we cannot attribute moral responsibility to a group without also attributing it to members of the group, and therefore that the responsibility of the members exhausts the content of corporate liability. Secondly, moral personality presupposes 'psychological personality'—the 'power or capacity of self-consciousness'²⁴—and this is resident only in the individual and never in the group²⁵.

Barker's first argument is without force. Suppose it were true that we could attribute moral responsibility to a group only if we also attribute such responsibility to its members. This would

²² See Ross M. Martin, 'Legal Personality and the Trade Union', in Webb, *op. cit.*, and the judgement of Denning LJ in *Bonsor v Musicians' Union* [1956] A.C. 104.

²³ Barker, *op. cit.*, p. lxxv.

²⁴ *ibid.*, p. lxii.

²⁵ *ibid.*, p. lxxiv.

give grounds for denying corporate liability only if the two responsibilities were exactly the same, so that the first attribution became redundant. But they need not be the same, either in content or in degree. Groups can commit crimes which lie beyond the capacity of any individual; they plan and encompass actions which no single human being could undertake. Thus, while it is true that the evil brought about by the National Socialist Party of Germany inculpates at least some of its members, and would not have been possible without their own evil intentions, these individuals are not, and could not be, blamed for all that the Nazi Party did. Some organizations—Communist Parties, for instance—have committed crimes which defy the human imagination, using individuals who intended only to act for the good. While there is a temptation to attribute these crimes to individuals—to Lenin, Stalin, Mao or Pol Pot—this shows an exaggerated estimate of the individual capacity for evil. Individuals are certainly inculpated in the murder of the Jews, the kulaks, and the Chinese and Cambodian 'bourgeoisie'. But no individual is guilty of the full extent of genocide that should be laid at the door of the Nazi and Communist Parties—not even Hitler or Stalin. Nor does membership of those evil institutions automatically confer the responsibility which lies on the group personality as a whole. Barker's refusal to attribute this responsibility to the collective has a commendable cause: namely, he wished to close the channel of easy excuses, to forbid the defence which says 'it was not *I* who did it, but the Party'. But it blinds him to a real moral evil for which he can propose no remedy: namely, that there are groups which ought not to exist—groups like the Nazi and Communist Parties, only the first of which has confronted its rightful destiny, in suffering judicial execution.

Barker's second argument is more interesting, since it suggests a metaphysical, rather than a moral, objection to the idea of corporate personality. It is undeniable that corporate persons lack subjective awareness, and are 'subjects' only in the technical sense of French and German law. It is true that they may have (and lack) self-knowledge: a corporation can deliberate in the first person plural, asking itself what we *really* want, believe or stand for. And the overcoming of self-deception may be as important in corporate life as in the life of individuals. But

self-knowledge must be distinguished from the 'self-awareness' of the Kantian subject: the "'I think" which accompanies all my perceptions'. I have immediate, incorrigible and self-intimating awareness of my present thoughts and sensations; consequently, I am presented with a 'subjective realm', concerning which I can make no distinction between how things seem and how things are. There is no such subjective realm in the life of corporations. Their mental processes are purely *objective*: as much the subject-matter of doubt and speculation in the first person plural, as in the third-person view of others. In this sense, there is no distinctive 'first-person view' on the affairs of corporations, nor is there such a thing (in Thomas Nagel's phrase) as 'what it is like' to be a church or a firm.

However, it is not clear what follows from that. It is certainly possible for corporations to act freely and independently. And while individuals are always involved in their acts, and provide the vehicle for their projection and accomplishment, the acts of corporations are not necessarily identical with the acts of individuals, either in themselves or in their moral consequences. A company can commit a crime of which no individual is guilty—even, it seems, the crime of manslaughter²⁶. It can confer benefits for which no individual can claim credit, and harms for which no individual need be blamed. Why should its lack of self-awareness impede our natural tendency to transfer our moral attitudes towards it, and to summon it for judgement in the tribunal of personal life?

IV

Natural and Corporate Persons. Three properties of the 'natural' person tend to be singled out as essential—in the sense that, were he to lose one of them, he would thereby cease to be. First is his unity and duration as an animal. The 'natural' person is a member of a natural kind, obedient to laws of nature which lie outside the scope of his will, and which confer on him a life of his own. Secondly, he is a rational agent—a particular kind of 'intentional system', which receives and stores information,

²⁶ See the argument of Stable J. in *R. v I.C.R. Haulage Ltd.* [1944] K.B. 551, and of Lord Caldecote CJ, in *DPP v Kent and Sussex Contractors* [1944] K.B. 146. See also the illuminating discussion in French, *op. cit.*, chapters 13 and 14.

forms plans for the future, and acts upon them. As a rational agent he is thought to have a 'will of his own', and to exhibit a certain kind of continuity through time. Some philosophers go so far as to suggest that it is this continuity (rather than identity) which really matters to our 'personal survival'. Thirdly, the natural person is self-aware. He identifies himself in the first person, and attributes to himself mental states, and a 'point of view', from a position of unique epistemological advantage. This is the most mysterious of the three features. Kant argued that the subject will not appear in any list of the *objects* of experience, and will therefore be absent from a description of the objective world²⁷. It is impossible to say what it is that I know, in knowing simply that *I* exist.

Puzzles about personal identity arise because philosophers suppose that the three features mark out three ways of *individuating* natural persons. I am this animal, whose identity through time resides in its uninterrupted life; I am this rational agent, whose identity through time is determined (on some theories) by a continuity of beliefs, reasonings, memories and projects; I am this self, whose identity through time is, in Kant's idiom, 'original', presupposed in my awareness, and determined by nothing knowable. If the 'I am' in those three statements is the sign of identity, then we face a paradox. For where is the necessary connection between the human animal and the rational agent, or between either and the 'self'? This rational agent, and this self-awareness, we feel, could have inhabited quite another body. But if I am this body and I am this agent, the two are identical, and identities are never contingent.

Such puzzles may be illusory. For it is a huge and unwarranted assumption that the 'I am' in the three statements referred to is a sign of identity. Moreover the belief in the 'self' may be no more than the shadow cast by self-referring language²⁸. All the same, it is worth pointing out that these puzzles, which put the concept of the natural person in constant question, leave that of the corporate person untouched. At most

²⁷ See the argument of the 'Paralogisms' in the second edition of the *Critique of Pure Reason*.

²⁸ Recent versions of the argument are to be found in S. Shoemaker, 'Self-Reference and Self-Awareness', *Journal of Philosophy*, lxxv, 1968, 555-67; and Gareth Evans, *The Varieties of Reference*, Oxford, Clarendon Press, 1982, ch. 7.

they show the corporate person to be composed of metaphysically problematic parts: but if you divide things finely enough, everything is composed of problematic parts. As we have already seen, there is no corporate self-awareness, and therefore no 'self-identity' to trouble the third-person identity of corporations. Moreover, there is no clash—not even an apparent clash—between natural and personal identity, since the corporation is not a natural kind.

This point has not always been appreciated. In an attempt to approximate corporate persons to their natural cousins, Gierke argued for the 'organic' nature of the *Genossenschaft*, claiming that it has a life, and a life-process, just as you and I. Its moral personality *consists* in this life, which is the thing that we ought to safeguard through the law of corporations. The idea is repeated forcefully by Figgis:

It is, in a word, a real life and personality which those bodies are forced to claim, which we believe that they possess by the nature of the case, and not by the arbitrary grant of the sovereign. To deny this real life is to be false to the facts of social existence, and is of the same nature as that denial of human personality which we call slavery, and is always in its nature unjust and tyrannical²⁹.

Hauriou objected to this way of arguing, as giving a wrong conception of what he called the 'individuality' of corporations. They have, he said, the individuality of institutions, not that of organisms³⁰. The intuitive distinction here is not easy to render in precise terms. But it casts interesting light on the contrast between the natural and the corporate person. Institutions are characterised by procedures and roles which exist independently of those who make use of them; they have a longevity conferred by the principle of succession to office, and this longevity is something which, in the nature of things, is not shared by an organism. Not every institution has personality, Hauriou claimed, although every institution has some measure of autonomy. 'Individual autonomy' corresponds to Spinoza's

²⁹ Figgis, *op. cit.*, p. 42: the grammatical oddity of the second sentence adds to, more than it detracts from, Figgis's natural vigour of style.

³⁰ Maurice Hauriou, *Précis de droit administratif*, 6th edition, Paris, Librairie Sirey, 1907.

conatus: organisms have it, and so do institutions; stones, however, do not. It constitutes '*l'état des choses immédiatement nécessaire pour l'acquisition de la personnalité*'³¹. Personality exists, according to Hauriou, only where there is a corporate will: i.e. only where decisions are taken and responsibilities assumed, which are not the decisions or responsibilities of any single human being.

Hauriou therefore makes a distinction between those institutions which have no personality and which exist in the realm of *things*, and those which have personality, and which are *subjects*. (This word, taken from legal parlance, should not be understood in the sense of Kant or Hegel.) Hauriou's way of drawing this distinction—in terms of the forces acting on and maintaining an institution—is highly questionable; the distinction, however, is not, and I return to it below.

Hauriou's suggestion shows why there is no conflict between the 'individuality' of institutions and their nature as persons. Those features which confer personality—the decision-making process, and the channels of accountability—also establish the identity of the institution. These are institutional facts, and also constitutive of the institution which displays them. The usual paradoxes of personal identity—which arise from a tension between the first and third-person perspectives, and a further tension (real or imagined) within the third-person perspective, between the personal and animal natures of the embodied agent—do not and cannot arise.

Of course, there can be puzzle-cases about corporate identity. Is the University of Oxford the same person now as it was in Wycliffe's day? Is Routledge and Kegan Paul the same person since its takeover by Associated Books? And such questions may present real moral and spiritual difficulties: consider the question, 'Which is the true Church?' asked, for example, at the time of the Council of Constance. Nevertheless, these difficulties stem from the concept of identity through time, and not from any metaphysical insecurity in the idea of the corporate person. They are not to be confused with those difficulties about human personality, which arise from the supposition that questions about personal identity are settled in two (perhaps three) independent ways.

³¹ *ibid.*, p. 34.

We ought not, then, to deny the personality of institutions, merely because they do not possess those features which make the concept of the 'natural person' so inherently problematic. On the contrary. It is precisely by studying the case of corporate personality, that we see how to understand the human person. The human being is, first and foremost, an animal. He is 'naturally' a person, only in that he *acquires* personality, in the circumstances which cause him to flourish. In this sense corporations are also natural persons. By flourishing as institutions (i.e. according to their nature) they acquire what we acquire, as we flourish in conjunction with our kind.

V

Natural and Corporate Personality Compared. This is not to say that natural and corporate persons are comparable in every respect. I have already mentioned some important similarities, concerning the agency, rights and liabilities of corporations. In addition, corporations may be the objects of inter-personal attitudes: of resentment, anger and gratitude—even of love and hate. We can have responsibilities towards institutions, and they towards us, which are not just duties in law.

At the same time there are inter-personal attitudes which cannot have corporations as their (intentional) objects: namely, all those attitudes which depend upon the thought that their object is a living thing, or that it has first-person awareness. Sexual desire and erotic love, for example, which are directed towards the living embodiment of the first-person perspective, require the two elements of human existence which no corporation can display. Furthermore, and for the same reason, there are attitudes which cannot be attributed to corporations. A corporation cannot possess mental states which must be 'felt' or 'experienced' if they are to be possessed at all. Such mental states require a unique 'subject of consciousness', and even if we do, on occasion, attribute them to animals, this will not license their attribution to things which have no sensuous experience, and no 'point of view'. If a corporation can love its members, therefore, it is not with the felt love of a mother for her child, but only with the abstract love to which we are commanded.

We should notice, however, that there are mental states which need not be, and which in some sense cannot be, felt:

beliefs, certain kinds of deliberative desire, intentions, the recognition of duties, and the dispositions which govern our response to them. All those, I suggest, lie within the mental repertoire of corporations. We can even attribute feelings of a kind to corporations, such as pride, remorse, guilt and other moral emotions. For such feelings approximate to policies, and are sincere only when their policies prevail. The penitence of Leontes, in *A Winter's Tale*, is constituted by his expiation, rather than his pain. Expiation is the sign of true remorse, and can be undertaken as well by a corporation as by an individual. The moral life is to a great extent composed of such emotions, which all have their corporate analogues. Indeed, they owe their genesis to association: shame and pride arise in the human heart only in circumstances which generate the pride and shame of corporations.

VI

Ontological Priorities. Are we to conclude, then, that corporations are real moral persons, with a claim to consideration comparable to the claim of the human soul? One argument has been held to count against that over-simple conclusion: namely, that individual persons are 'ontologically prior' to corporations. The argument is variously expressed, often using vague terms of the 'nothing over and above' variety, sometimes leaning on the even vaguer 'methodological individualism' of Popper and his followers. The thesis of the 'ontological priority' of the individual seems to involve two claims: First, if corporations have moral personality, it is only by virtue of the moral personality of their members; secondly, there could be individual persons without corporations, but no corporations without the individuals which act for them. Together the claims form the plausible remainder of positivist and reductionist theories of society, and for the rest of this paper I shall experiment with an interesting—if not entirely decisive—rejoinder to them. I suppose that the true begetter of this rejoinder was Hegel³², but he was anticipated by Burke, and also by Rousseau and Fichte. Whatever the virtues of those writers, none of them had that instinct for valid argument which would recommend them to an analytical philosopher, and everything

³² In *The Philosophy of Right* and *The Phenomenology of Spirit*.

they said must be rewritten, in a language which they would have abhorred.

The suggestion is this: we are natural persons only in that we are disposed by nature to *become* persons, and we become persons only by creating personal institutions and the ties of membership which join us to them. Personality is only embryonic in that 'immediate' ('subjective') relation to the world which is the initial stance of consciousness, and is only gradually wrested from the world, in a process of interaction with others. To gain a moral personality and the rights and duties that go with it, is automatically to acquire what Bradley was to call a 'station' in the social world³³. The various forms of fellowship—from the 'immediate' union of the family, through the 'mediated' ties of contract, to the fully 'realized' association in civil society and state—are the instruments of our own self-development, and without them we could not 'become what we truly are'.

Moreover, it is by virtue of the moral personality of associations that the individual personality emerges (and vice versa): the corporations exert a kind of tutelage over their members, demanding the recognition of objective rights and duties. The individual *owes* something to family, community and membership, and it is through recognizing this that he acquires the conception of an *objective* obligation—an obligation that arises independently of any consent to it, and which therefore lies in the nature of things, outside the individual will. Hence the importance of associations—such as the family and the church—which stand in non-contractual relations to their members, and whose moral reality cannot be captured in terms of an agreement. Recent discussions, which take the firm as their principal example, fail to engage with the Hegelian argument, and indeed, beg the most important question, in taking the freely contracting individual as their starting point. Such an individual comes into existence, the Hegelians argue, already marked by the ties of membership, and without those ties, which compel him to recognize and to honour the personality of institutions, he would not possess the autonomy that is necessary for any contractual undertaking.

³³ F. H. Bradley, 'My Station and its Duties', in *Ethical Studies*, 2nd edition, Oxford, Oxford University Press, 1927.

By way of clarifying the argument, I shall consider what I take to be the three most important objections to it:

(1) Even if corporations are *empirically* necessary for the development of moral personality in the individual, this does not refute the claim that individuals are ontologically prior in the sense intended. Human individuals are ontologically prior to corporations if and only if it is logically possible for the individual to exist without the corporation, and not for the corporation to exist without the individual. (On *one* of the readings I earlier gave of the phrase ‘ontologically prior’: some may prefer to substitute the other reading.)

(2) The argument does not tell us with any clarity what the experience of membership is supposed to confer, how it is necessary to individual personality, and why the *personality* of the group plays a part in bestowing it.

(3) Even if the associations which form the individual’s personality are non-contractual, this is an historical accident. Indeed, there is a tendency for institutions gradually to revise themselves in conformity with contractual principles, so as to be reconstituted as ‘relations between consenting adults’, rather than objective forms of membership. (This is the real meaning of changes in the law of marriage. In a sense, you could say that the main spiritual task of Enlightenment liberalism has been to rid the world of membership, and to put contract in its place.)

I envisage the Hegelian replying in the following terms to those three considerations:

To the first point he might say that ontological priority, construed in terms of logical possibilities, is of no metaphysical significance. It is *logically* possible for the parts of an organism—the cells—to persist without the organism, and not logically possible for the organism to persist without its parts. Nevertheless (a) the organism is a real existent *in addition to* its parts, and (b) the parts owe their existence, not just empirically, but also metaphysically, to their participation in the whole which nurtures them. (It is the *nature* of a cell, to belong to a larger organism.) Could not a similar relation obtain, between the corporation and the individual (similar in *these* respects, at least, Hauriou’s argument notwithstanding)?

To the second point, the Hegelian will reply (in opposition to such thinkers as Kant and Rawls) that we cannot isolate the individual in thought from all his non-contractual obligations, and from every group which engenders them, and still suppose that he is the fully autonomous rational agent envisaged by the liberal imagination, able to decide, to repent, and to bind himself, and to look on the world with the distinctive countenance of personality. Agency is the greatest irrationality, until tempered and guided by a sense of value. It is value which justifies the ends of conduct, and which therefore justifies the means. But whence comes the idea of value? Only, the Hegelian suggests, through that sense of transcendent answerability—of being ‘called to account’—which is the gift of association. The non-contractual obligation inducts us to the moral life, and grants us therewith the goals of rational choice.

To the third point the Hegelian may give a more empirical answer. It is, he might say, a plain fact of modern history that the dissolution of transcendent bonds in the ever-flowing stream of contract has eroded also the sense of obligation. Contracts are more easily broken, to the extent that they are seen *only* as contracts; and honesty is on the decline precisely in those situations (the free untrammelled market in human relations) where it becomes the sole remaining prop of human society. Consider marriage. Even if this is, or has become, a contract, it is at least a contract of fidelity. Yet have people become more, or less faithful to their spouses, since learning to see the duty to be so as arising by agreement, and not by virtue of the ‘sacrament’ itself? The answer is obvious. (For ‘sacrament’ read ‘membership’: the sense of God’s participation in our social life is the best intuitive way available to us, of understanding and accepting its non-contractual basis.) The least that can be said is that something vital is missing from the natural person who is without the experience of membership—something necessary to his perfection. Lacking it, your attitude to the world and to others is one of ‘diminished responsibility’, while your personal relations become defeasible, rescindable, and renegotiable in the interests of gain.

VII

Full Corporate Personality. The reply is by no means conclusive,

and is particularly weak in its second point: the attempt to show that corporate persons are somehow necessary to our moral development. I therefore return to this point in the concluding section, to see if anything more can be said by way of elaborating it. Before doing so, however, it will be useful to take a fresh look at Hauriou's somewhat dustily presented distinction between institutions with personality, and those which exist 'in the realm of things'.

Not all associations are institutions, and not all institutions are persons. Hauriou's suggestion that all corporate persons are institutions offers a way of counting them (provided we have some grasp of the identity-conditions for institutions). But it has the consequence that many associations—including many that are closest to us, like individual friendship—are not persons. Moral personality is a matter of degree, and an institution might gain or lose some of its personal attributes during the course of its history. Thus there are institutions which make decisions, but which recognize neither legal nor moral liability for their 'errors' (the Mafia, the Communist Party); there are those which confess their faults and make amends for them, but which are deprived of all law-making capacity and depend upon others to set limits to their conduct (the firm); there are those which impose their will on their members, and even conscript those members regardless of their own desires, but which nevertheless acknowledge personal responsibility for their welfare (armies): there are those which, while possessing moral personality, endeavour to escape the legal burden of it, and which constitute themselves accordingly (trade unions). I shall therefore draw a contrast between the most fully personal institution conceivable, and a 'thing'-institution, and try to show what happens to the social world, when 'thing'-institutions displace corporate persons in its regulation.

Consider an institution with the following features:

1. It is a voluntary association, which has no penalties for those who withdraw from it.
2. The primary benefit that it offers its members is the benefit of membership, and all that is intrinsically connected with membership.
3. It has no contract with its members, and enshrines no

contract between them. Its assets are its own, and held in trust for no one.

4. It is a deliberative body, and its deliberations are conciliar, proceeding by rational discussion among its members. (The deliberative procedure may or may not be democratic; what is important for personality is that it be *constitutional*—i.e. that there be a means to determine whether it has been correctly followed, and a remedy for irregularities.)

5. It is authoritative, so that its decisions may be binding on its members. (This authority may be recognized, and made an object of reverence and enjoyment, through custom and ceremony.)

6. It is a law-making body, exerting jurisdiction over its members. The process of adjudication conforms to natural justice (as understood in English Administrative Law): the judge is independent, there is a right of hearing, laws are applied consistently and a right of appeal exists for irregularities.

7. It is open and answerable in all its workings. Records are kept of decisions, which can be publicly criticized, and publicly justified. The corporation regards itself as bound by its own law (if it has one) and obliged to make amends for its transgression.

8. It is obedient to the moral law and remorseful for its transgressions. Sins committed by the corporation are atoned for, once acknowledged, and accomplices are held up to shame.

9. It is obedient to the positive law of the state within which it resides.

10. It is accorded legal personality or the equivalent, so as to conduct its affairs as an independent legal entity, subject to due process.

It should be obvious that the least important of those features, from the point of view of moral personality, is the last: the external recognition granted by the law. If the first nine features are present, then the tenth is simply what Gierke and Figgis say it is: the recognition by the sovereign of an evident moral reality. And if this recognition is withheld—as from the Catholic Church in the Ukraine, or from the trade union Solidarity in Poland, or from the Jazz Section of the Musicians' Union in Czechoslovakia (to take three notorious recent examples)—an injustice is done. To suppose that feature 10 is capable in itself of creating any or all of features 1 to 9 is to have but a rudimentary

understanding of the forms of social life. We can also see why Gierke and Figgis were wary of the view that legal personality must be bestowed by the state if it is to exist at all: for this puts in the hands of the State the power to destroy associations. It is surely a marvellous device of English law that it has been able, through the concept of trust, to enable moral persons to create their own legal identity, and to claim the recognition which is due to them, while asking permission of no one besides their members. It is this, rather than any actual or implied Bill of Rights, that has been the greatest source of English liberty. For the freedom to associate, and to protect our associations from their natural predator, the sovereign, is the most precious freedom that we have.

It should also be obvious that the institution that I have described approximates closely to the Church, as this was understood by the canonists—or at least the Church in its conciliar interpretation, the church of Nicholas of Cusa and Jan Hus. All that it lacks (although for the believer this is everything) is the gift of the Holy Spirit, the gift which makes it an end in itself in the fullest sense. Clubs, societies and *Genossenschaften* usually make no such claim for themselves—and if they are ends in themselves, it is only in the less potent sense of being means to nothing else. There are also corporations which, while possessing sufficiently many of the listed features to be accorded moral personality, do not possess the full personality of the institution that I have envisaged. Firms, for example, possess features 1, 4, 5 (as a rule), 7, 8, 9 and 10 (as a rule). And by comparing the various partial realizations of the above ideal, we should come to an understanding of the relative importance, for the idea of personality, of the features I have mentioned, and of the separate contribution that they make to the richness of social life.

VIII

The War Against Corporate Persons. Hostility to corporate persons—as sources of authority, bestowers of value, and supplicants to power—has been, according to Gierke, a regular concomitant of the political philosophies based in Natural Law. Natural-law theory tends to employ an abstract (as we should say Kantian, or Rawlsian) conception of the individual agent,

who is presented as the sole possessor of rights and duties. The individual derives these rights and duties from his faculty of choice, and with the benefit of no institution. The institutions which surround him owe their legitimacy to his contract to maintain them, and are ultimately subservient to the State—the supreme institution in which the sum of human contracts is inscribed and given personality, like the runes on Wotan's spear. The State tends to be seen as the only permissible corporate person; all others either derive from it, or else remain suspect, usurpers of its power and threats to the rights of individuals. Thus, according to Gierke:

In the age of Enlightenment, the prestige of historical law increasingly paled before the splendour of the new ideal law, and the more it paled, the easier it was to advance from denying that corporations had a sanction in Natural Law to questioning whether they existed at all. Natural-law theory of this extreme order became a powerful ally of the practical policies which were directed to the destruction of the corporative system of Estates inherited from the Middle Ages. There were now two forces in the field—the State, with its passion for omnipotence: the Individual, with his desire for liberation³⁴.

Such a view, defended by Althusius, was adopted also by Hobbes, both in *De cive* and in *Leviathan*. Perhaps its earliest transfer into practice came with the French Revolutionaries who, on August 18th 1792, decreed that 'a state that is truly free ought not to suffer within its bosom any corporation, not even such as, being dedicated to public instruction, have merited well of the *patrie*'³⁵. Writing before the bolsheviks came to power, Auguste Cochin gave a trenchant analysis of the French Revolution, studying the system of 'parallel structures' established in the Breton countryside³⁶. He described the transformation as involving a move away from personal government, (in which civil powers are also persons, sometimes individual, usually

³⁴ Gierke, ed. Barker, *op. cit.*, p. 165.

³⁵ Quoted in Maitland, 'Moral Personality and Legal Personality', in *Collected Papers*, *op. cit.*, vol. III, p. 312.

³⁶ Auguste Cochin. *Les Sociétés de pensée et la Révolution en Bretagne*, Paris, Honoré Champion, 2 vols, 1925.

corporate), towards a new kind of 'impersonal government', which would be a true 'administration of things'. As Cochin shows, the exercise of power, once 'de-personalized', becomes unanswerable: decisions are taken for which no person is liable, and neither the rights nor the duties of associations are defined. Associations are regarded with suspicion, unless and until controlled by the central 'machine'; and all, in the end, are subverted or destroyed.

The process of de-personalization was perfected by Lenin, through a brilliant invention which we might call, following Russian usage, the 'Potemkin institution'. All associations were to be infiltrated by the Party and made subservient to it. They could retain no autonomy, and any attempt to do so was visited with the harshest punishment. Particularly important were the churches: the paradigm *Genossenschaften*, whose personality is founded in a transcendent bond of membership. The Russian Orthodox Church was forced to become the servant of the Party: those churches which were not infiltrated were suppressed, and all corporate action by religious bodies other than the act of worship was forbidden³⁷. Other institutions which had acquired moral personality—universities, schools, clubs and societies—were also either destroyed or turned into Potemkin replicas, in which the semblance of autonomy was the thinnest mask for external control. Private charities were expropriated and then suppressed, and in place of the personal institutions of civil society were created the thing-institutions of the communist State: the *komsomol*, the unions of workers and artists, and the 'agitation centres' which were to serve as churches of the new belief. No thing-institution had reality, other than that conferred on it by the Party, which was to possess the sum of institutional autonomy, united beneath a single corporate command. Thus was the Enlightenment vision of emancipation realized at last, as men were freed from the bonds of membership which had previously ensnared them, and conscripted to a purpose that was not their own.

It was as much the pursuit of de-personalization as the belief in cranky economic theories that dictated the policies of collectivisation and a centralised economy. The farm and the

³⁷ See Timothy Ware, *The Orthodox Church*.

firm are also corporate persons; they have the capacity for autonomous action and responsible choice. They can go bankrupt, commit crimes, offer benefits and incur obligations. Such facts threaten the Party's monopoly of associative power. These institutions too, therefore, were forced to become Potemkin replicas, to serve as masks for decisions which were not their own, and which frequently answered in no way to their interests. Even those institutions whose reality derives from contract were deprived of the moral personality that would otherwise accrue to them, and made part of the great machine. Thus was the government of men replaced by the administration of things, as all persons, corporate and natural, were reduced to things. Power was henceforth exercised in a spirit of calculation: a purely instrumental view of association (as a means to the transmission of power—a 'transmission belt', in Lenin's phrase) accompanied a purely instrumental view of the individual (as a means to his own replacement, by the New Socialist Man). Neither men nor groups were to be treated as ends in themselves, but all were subject to a single imperative, which recognized no limit to its actions, since it was without the principle of answerability from which the sanctity of limits derives. The 'socialist legality' of Stalin granted legal personality to Potemkin institutions: but it was a Potemkin personality, and no individual could be sure of binding a corporate person either by law or by contract. The agent which dictated institutional choices—the Party—possessed only defective personality, and could not be sued. The greatest criminal, who was also the greatest tortfeasor, could be brought before neither the criminal nor the civil law.³⁸

The process that I have described was not everywhere successful. And even when most successful, it leaves one corporate person standing triumphant amid the ruins of social life: the Party itself. But it is a monstrous person, no longer capable of moral conduct; a person which cannot take responsibility for its actions, and which can confess to its faults only as 'errors' imposed on it by misguided members, and never as its own actions, for which repentance and atonement are due.

³⁸ I have argued this point in more detail in 'Rechtsgefühl and the Rule of Law', in J. C. Nyíri and B. Smith, eds., *Practical Knowledge*, London, Croom Helm, 1988.

The moral personality of this all-encompassing Leviathan is impaired: unable to view others as ends in themselves, it lacks such a view of itself. It has set itself outside the moral realm, in a place of pure calculation, blameless only because it denies the possibility of blame. Like its shortlived disciple, the Nazi party, it is a corporate psychopath, respected by none, and feared by all.

When Sir Ernest Barker voiced the fears of the decent liberal Englishman, and criticized the incipient 'collectivism' of the German idea of the corporation, he failed to understand that personality requires mutuality. The autonomous rational agent exists in reciprocal relation to his kind, and is a person only to the extent that he acknowledges and defers to the personality of others. The true corporate person is as much bound to respect the autonomy of individuals as they are bound to respect the autonomy of groups. A world of corporate persons is a world of free association: it is the antithesis of collectivism, which imposes a world of conscription, where all association is centrally controlled, and all institutions are things. Collectivism involves a sustained war, not on the individual as such, but on the *person*, whether individual or corporate. The trouble with Hitler was not that he listened to the voice which speaks through Fichte, Hegel and Gierke, but that he listened to that other voice, which sounds through Robespierre, Marx and Lenin, and which promises to reduce the intricate moral fact of personality to the single, seizable commodity of power.

IX

The Hegelian Revisited. Something vital to the body politic is destroyed, therefore, when associations are deprived of their personality, reduced to things, and treated as the instruments of power. But what does the *individual* lose by this process, and in what way is his personality impaired by it? The Hegelian claim was that individual personality requires for its fruition not only association, but also a personal relation to the corporation which is thereby formed. Does anything really entitle the Hegelian to so strong a conclusion?

Certainly it is hard to lean, at this point, on the facts of history. Even when the greatest effort is made to eradicate associations³⁹,

³⁹ Some measure of the energy expended in this cause can be gained from the fact that Janos Kádár, during his two years as Minister of the Interior following the Communist

the mark of corporate personality endures: people meet in secret, establish 'black' institutions, rehearse the memory of common life in ritual and story-telling, and perceive (thanks to the residues of civil architecture) the personal face in churches, villages and towns. Perhaps when Ceausescu's schemes are accomplished, we shall have, in Romania, an example of a society in which the experience of corporate personality has been finally extinguished. But it is an unsatisfactory argument that requires us to wait for so melancholy an outcome. Nor is it enough to point to the prevailing cynicism of those who live in the world of thing-institutions—to their sense that nothing has intrinsic value, or should be pursued for any other reason than the profit. For this cynicism is widespread elsewhere, and is attributable, at least in part, to currents of opinion that lie outside the control even of the Communist Party.

The Hegelian needs to show an *internal relation* (as he would put it) between natural and corporate personality: to show, in other words, that something essential to the first must be obtained through the second. This essential thing has been designated by many vague but pregnant names: civilisation, culture, or (in Hegel) *Bildung*. I have glossed it so far in terms of non-contractual obligation, which, I contend, is necessary to the full flowering of rational agency—being invoked, *pace* Gauthier⁴⁰, in any serious morality. But two difficulties present themselves, which between them cause me to doubt that the Hegelian argument, plausible though it is in many respects, can be carried through. The first is that there are associations founded in non-contractual obligation, and which are also ends in themselves, but which have no other features of corporate personality: love and friendship are the prime examples. Why are *these* not sufficient for the generation of the sense of non-contractual obligation, and what is gained, in addition, through their personification (say, in a family or a club)? Secondly, we lack a proof that the individual must *recognize* the personality of associations if he is to be improved by them. Is it not enough to be joined in fellowship

coup d'état in 1948, was able to destroy 15,000 associations, at a time when the population of Hungary was about 8M. This heroic achievement notwithstanding, the courts are still working full time to dissolve new associations and punish their members: the recent case of the Fidesz group being particularly interesting to the student of communist legality.

⁴⁰D. P. Gauthier, *Morals by Agreement*.

with others, assigning rights and duties to yourself and them?

Let us return in thought, therefore, to the world of thing-institutions, and try to discover what the individual lacks in that world. The primary thing that is missing, I believe, is the *long-term view*. No obligation endures there—not even the obligations of love and friendship—beyond the lifetime of the individuals who undertake them; nor does any obligation exist towards those who are not present to reciprocate it. The unborn and the dead are not only disenfranchised: they have lost all claim on the living. Their claims can be acknowledged only if there are persons who endure long enough to enter into personal relation, both with us, the living, and with them. The true public spirit—the spirit from which civil society and all its benefits derives—requires just such a projection of our duties beyond the grave. The care for future generations must be *entrusted* to persons who will exist when they exist: and if there are no such persons surrounding me, how can I have that care, except as a helpless anxiety? I can enter into no personal obligation that will bind me to past and future souls, nor can you. Only a corporate person can enter such an obligation, and only through corporate persons, therefore, can the relation to the unborn and the dead be made articulate and binding. (Thus when, as in aristocracies, this relation is made articulate through the *family*, the family ceases to be the bond of present love, and becomes an institution, with a personality distinct from those of its members.)

That this relation to the unborn and the dead is necessary for the fulfilment of the rational agent is something that we should not doubt. For it forms the premise of self-justification. The individual is justified by the knowledge that he did right by those who survive him, whom he never knew, and who promised him nothing; and equally by those who preceded him and bequeathed to him unknowingly their store of trust. In the broadest sense, then, the corporate person is necessary to the *ecology* of rational agency, and without it our aims will be as truncated as our lives. One might say of corporate persons generally what Joubert said of the old civil and religious institutions of France: *ce sont les crampons qui unissent une génération à une autre.*⁴¹

⁴¹ I am very grateful to the late Ian McFetridge and David Wiggins, whose comments greatly helped me in preparing this paper.

CORPORATE PERSONS

Roger Scruton and John Finnis

II—John Finnis

PERSONS AND THEIR ASSOCIATIONS

It would be hard to take seriously an enquiry into the personality of Scruton's 'corporations'—committees, firms, churches, clubs, political parties, partnerships, universities and schools, farms and (aristocratic) families, states and Mafias, armies and trade unions—if one really considered individual people so 'metaphysically insecure' and 'inherently problematic' that we could 'see how to understand the human person' only by first studying 'the case of corporate personality'. Scruton professes to find people less securely persons than their associations, and grants if not concedes bad arguments for doubting the unity, identity and wholeness of the rational animals he misnames 'embodied agents'. But in the end it is clear that for him, too, institutions and other associations are worth calling personal primarily because they enable individual human people to pursue shared purposes, fruitfully, in association with others who like them have had or will have lifetimes which last, in Scruton's words, from birth to grave. The thus persisting and organic unity, identity and wholeness of each of these people provides us (for all its irreducible and puzzling complexity) with the paradigm of personhood.¹

I

Because I am committed to writing this paper in time for printing, I am composing it straight onto a word processor; though I am feeling mildly rheumatic from a cold, I am

¹ Strawson's arguments for the primitiveness of the concept of 'person', in *Individuals: An Essay in Descriptive Metaphysics* (Methuen, 1959), pp. 87–116, seem successful but, as Germain Grisez argues, *Beyond the New Theism* (U. Notre Dame P., 1975), p. 348, fail to distinguish between people and other sentient organisms; Grisez remedies the failure of Strawson's argumentation to respond to the self/body, as distinct from mind/body, problem: *ibid.*, pp. 347–53.

exercising my fingers in tapping out this sentence, and am hoping that its multiple self-references will help convey certain views which I formed years ago and am still sure of after some days reflecting on Scruton's paper.

Scruton speaks as if it were a 'huge and unwarranted assumption' that the 'I am' which occurs six times in the preceding sentence is a sign of the lasting and bodily identity of the one animal and rational substance (I myself) who moves, feels, cogitates, judges, chooses, makes commitments, and moves material objects in order to carry out his choice, fulfil his commitment, communicate his meaning and report his feelings—and who equally is reflexive subject, not only experiencing his being and acting in all these ways but also knowing himself both as object and subject of that experiencing, being and doing. Now, certainly, the use of 'I am' is neither necessary nor sufficient to provide even a dialectical (in Aristotle's sense) 'proof' of that substantial identity. But I know no warrant for Scruton's assumption that neither this feature, nor the fact that that same sentence can be translated into many languages without significant loss of meaning, is a *sign* of such identity.² And, on the contrary, neither the experience of bodily (animal), rational, responsible and self-conscious agency, nor the critical reflective judgement that such agency instantiates the several irreducible aspects of the personal identity of one of a natural kind of rational animal,³ is an *assumption*.

This personal identity, which one both experiences and *pace* Kant and Scruton can critically affirm to be exemplified in one's responsible acting, is paradigmatic. If this is illusory, or even 'metaphysically problematic' (in the sense of open to reasonable doubt), we lack any basis upon which to raise any interesting question about whether or not associations or groups of us are

²No such warrant is afforded by the various arguments of Vendler, Anscombe and Strawson discussed in Mackie, 'The Transcendental "I"', in van Straaten, *Philosophical Subjects* (OUP, 1980) pp. 48–61, on which see Strawson, *ibid.*, pp. 266–71. The 'transparency' of the first-person singular has its importance, but not as a warrant for Scruton's assumption: Finnis, *Fundamentals of Ethics* (OUP, 1983) pp. 3, 23, 70–74, 114, 117, 141, 143.

³Which kind? Well, that which includes at least all those whom I expect to read the first sentence of this section with sympathy. I need not say more, since Scruton accepts that the natural human person belongs to a natural kind.

(identifiable as) (corporate) persons.⁴ Indeed, and as one would expect, Scruton's mode of analysing and arguing for the personality of groups, throughout his paper, belies his claim that corporate personality is epistemologically prior to, or in some similar way privileged in comparison with, the personhood of people.

II

The nature (explanatory account) of any active reality is best understood by identifying its capacities (potentialities), and these by attending to its activities.⁵ People's personal reality is *fully* manifested only in their chosen actions. Where one's action is fully voluntary, one's 'prior' deliberation and choice can often be clearly identified and distinguished from the action itself only with some artificiality and for analytical convenience. *A fortiori*, a community's reality, its 'personal' character, is fully manifested and instantiated only by its corporate, collaborative or co-operative *action*.⁶

In line with his tolerance of Kant's and other dualistic conceptions of personal reality, Scruton's case for attributing personality to certain human associations seems to give explanatory primacy to the fact that these associations *decide* matters 'as a result of common deliberation' (sec. I), 'proceeding by rational discussion among its members' (sec. VII). And he frowns on social-choice theory's incapacity, as he thinks, to mark the distinction between decision by collective deliberation and the emergence of e.g. prices as the side-effect of 'choices which do not intend them'. But, in thus giving primacy

⁴ Equally, if one holds with Scruton that the discovery that one is a 'mere intelligent machine' should have 'no bearing whatever' on one's judgments about one's 'moral personality', one lacks any basis for raising interesting questions about personal responsibility, let alone about the distinction which Scruton wishes to make much of, between *thing*-institutions and personal-institutions.

⁵ Cf. Aristotle, *de Anima* II, 4: 415a 16-21.

⁶ The primary meaning of *Genossenschaft* is 'a co-operative'. Barker 'left *Genossenschaft* as "fellowship", following good authority', but speaking *propria voce* identified it as a 'system of fellowship', paradigmatically 'the company of brothers, linked by the right hand of fellowship, and knit together by a spirit of fraternity, who pursued the common interest of their group (whether based on profession, or occupation, or the simple foundation of voluntary association) and vindicated its common honour with a common ardour': Introduction to Gierke, *Natural Law and the Theory of Society 1500 to 1800* (Cambridge UP [1934], 1950), xc, lviii.

to deliberation and decision in the account of corporations, he seems to overlook the fact that corporate decisions are often not unlike a market's pricing, in bearing only an accidental relation to any common deliberation and/or rational discussion which preceded them.

For: The 'social-choice' theory of voting demonstrates, for example, the easy possibility of cycles (intransitivity): a majority prefer *A* to *B*, a majority prefer *B* to *C*, and a majority prefer *C* to *A*—so that the outcome depends not so much upon any common deliberations as on accidents of process (e.g. which vote is taken first). (The possibility of cycles is independent of, but their probability is much enhanced by, tactical voting.) So, even healthy groups often have to act collectively despite widespread knowledge or belief that the collective decision to be put into effect is only the accidental side-effect of other decisions, collective and individual, and has only the appearance of analogy with the emergence of an individual's choice of action from his own deliberation.⁷ In these cases, group action is undertaken in order to carry out a decision which has emerged from the 'black box' (invisible hand?) of formally correct process as a kind of side-effect of any 'common deliberation', an effect which perhaps few of those deliberating about the decision, and none involved in executing it, either desired or even reluctantly intended.

The classic ground for denying that communities have a substantial identity is that their individual members, though parts of that whole which we rightly identify as a community, do and suffer things which are in no sense actions or experiences or events in the life of the community.⁸ This seems right, though circular (and in need—and capable only—of dialectical ex-

⁷ Another consequence, also not of the first importance, of Scruton's emphasis on decision as primary mark of personality is the prominence he gives to committees and their supposed personality, at the expense of the corporation within which, and on behalf of which, typically, a committee deliberates and decides. Committees, as their name implies, are characteristically commissioned to investigate and/or deliberate and/or decide on behalf of the body which committed this role to them. Scruton's elision of the two appears in his opening pages and recurs when listing the features of fully personal corporations: the list begins with three and ends with three or four features of the whole association ('It is voluntary', etc.), but in the middle switches without notice to features of a governing element ('It is deliberative/authoritative/a law-making body').

⁸ See e.g. Aquinas, in *Eth.*, intro., para. 5. This, not any notion that contract is prerequisite to group identity, is the reason why political theory in its central form is wont to reject the claim that groups are persons or bodies, and to treat such assertions as

plication and defence) in the way that definitions of primitive terms must be. In any case, Scruton I think concedes this denial, when he himself denies that groups are [members of] 'natural kinds', a matter he assimilates with animal life, unity and duration.⁹

The consequence to be drawn from the position thus conceded is this. A human community's reality is no more and no less than the reality of group action, together with such acts and dispositions to act of the group's members as manifest their readiness to participate in, and emotional responsiveness to, the group's action, for the sake of the good(s) which give(s) point to that action.¹⁰ That is to say: The reality of a community is the reality of an order of human, truly personal acts, an order brought into being and maintained by the choices (and dispositions to choose, and responses to choices) of persons.

III

Being constituted by, and having no existence independently of, the many individual acts of those people who participate in that action, the action and other reality of a community is properly understood only in that critical discourse which attends systematically to the 'existential', i.e. to the intelligibilities which originate in personal choices to act. That critical discourse we call 'moral'.¹¹ And in a moral analysis of human affairs, a community's action is not reducible to the whole collection of those individuals' acts or any subset of them, nor even to that

justified only if taken as metaphorical: Aquinas, *Summa Theologiae* III, q.8 a.1 ad 2 ('in metaphoribus locutionibus . . . similitudo . . . non . . . rei veritas'). Any Tridentine reference to the *compago spiritualis* will have nothing to do with theories that the Church is formed by contract and everything to do with the Bible; for in the Vulgate, *compago* and its cognates signify, never a compact (agreement), but always a joint, frame or bodily structure or structuring (see Daniel 5.6, 10.16; Job 10.11; Ecclesiasticus 11.5; Hebrews 4.12; thus *compactum* in Ephesians 4.16 means, as Knox appropriately translates, that the social body of the Church is 'organized [by the head, Christ]').

⁹The tradition uses 'natural' differently and says that some groups, such as the nuclear family and the *communitas perfecta* imperfectly exemplified by the modern state, are natural kinds, though still only 'accidental' rather than substantial wholes.

¹⁰For, if natures are understood by understanding capacities, and capacities by understanding their actuations, those actions are understood by knowing their objects (point): *de Anima* loc. cit. supra n.5.

¹¹Hence, too, the justice of the old view that if one must speak of the personality of groups, one had better call it 'moral personality'—as Scruton comes round to doing.

whole collection together with the common plan (so far as there is one). The action of the group itself—the group's action itself—can, as Scruton says, be rightly assessed as upright or immoral.

Sharing Scruton's judgements about certain particular acts of genocide, I shall discuss another (proposed) act of genocide. I do so in order to clarify the reasons for sharing Scruton's general claim: that such acts should indeed be ascribed to the group, as subject, though without prejudice to the moral responsibility of those people who participate in the social act.

Maintaining a nuclear deterrent is rightly said to be the act of the nation-state which does so: the act of credibly threatening to impose retaliatory nuclear destruction on some potential adversary nation-state. Not all members of the group participate in that act, and some have no moral responsibility for it. Those who have no moral responsibility for it could never be rightly punished for it; but as members they might be rightly called upon to contribute to compensating victims of the group's misdeeds.¹² As for those who participate in the social act of maintaining the deterrent, they do so by choosing to do something to further this act of the group, e.g. to authorise its funding, or to assist in the construction of weapons, or the elaboration of plans to use them, or the maintenance of systems for guiding or delivering them.

Now: Anyone who both participates in communicating the deterrent threat and would be involved in executing it on the day can personally be bluffing (i.e. can have the secret intention not to do anything, on the day, towards executing it). (Anyone who participates only in maintaining the system but who would have no part in executing or not executing it on the day—e.g. a backbench MP voting to fund it—*cannot* be bluffing, however much he may hope that others are bluffing.) But the group act *cannot* be a bluff. For just as an individual's morally significant act is defined by the proposal which he adopts by choice, so a

¹² Here I differ from Scruton, who says (sec. III) that it is 'legally absurd and contrary to natural justice' to hold the present membership 'individually liable for the deeds of those to whom they have succeeded'. This is not clear to me; though English statute law prevents it, the law of other systems provides for the personal liability of partners for the debts and other liabilities of the partnership incurred before they joined. The position is not less complex than I have indicated it in the text.

group's act is defined by its public proposal—i.e. by the form in which it is proposed to members of the group, for them to participate in or not. And the public proposal of the deterrent is not a proposal to bluff our adversaries. It is the proposal to deter them by a manifest capability and will to impose on them 'unacceptable losses'. But the intentional imposition of such losses precisely satisfies the definition, in English as in international law and in sound morality, of genocide. Therefore, since the social act of maintaining the deterrent cannot be a bluff, but must involve the conditional intention to impose those losses, everyone who chooses to participate in that social act—including everyone who is personally bluffing, and everyone who hopes¹³ that all who can be are—is choosing to participate in a real social choice: to commit genocide under certain foreseeable conditions.

The moral responsibility of all these individual participants is a real personal responsibility. But it is clearly various, according as one individual is personally bluffing and another is not, one hopes that others are bluffing and another does not care, one participates for want of any other employment and another out of interest in maintaining our democratic order, and so forth. Yet the moral analysis of and judgement upon the social act of maintaining the deterrent can remain single and unvaried: *this* act involves the intention to commit genocide and so I may not participate in it in any way or for any reason. The difference summarised in the two preceding sentences affords the strongest reason I know for holding that social acts, though constituted by, are irreducible to the acts of people in the acting group.

IV

Scruton, having done what he could for it, finally drops the 'Hegelian claim . . . that individual personality requires for its fruition not only association, but also a personal relation to the corporation which is thereby formed' (sec. IX). Indeed, as he says, 'there are associations founded in non-contractual obligation,

¹³ Against all the evidence—but let that pass. For the full story, factual and conceptual, see Finnis, Boyle and Grisez, *Nuclear Deterrence, Morality and Realism* (OUP, 1987), ch. V.

and which are also ends in themselves, but which have no other features of corporate personality: love and friendship are the prime examples'. To be improved by your associations, it is enough that you 'be joined in fellowship with others, assigning rights and duties to yourself and them' (*ibid.*). Thus Scruton accepts the core of the central tradition of moral and political reflection—in his paper incautiously given the same name as currents which everywhere oppose it and for which Hobbes is a source and master.

'Personality' is a distracting metaphor in a realistic moral and political analysis of human associations and their actions. The metaphor is always tugged between its two historic sources. On the one hand, there is *persona* as mask; to this corresponds the law's carefree attribution of legal personality to *anything* that figures as the subject of legal relations, particularly litigious and/or property relations: idols, funds, parcels of property on the quayside, ships, the Crown. . . . On the other hand, there is *persona* as individual substance, of a rational nature (Boethius); to this corresponds nothing (save metaphorically) in the many orderings of human association which we call groups—nothing except the people who are members.

Everything that Scruton wants to say about the injustices and inhumanity of Soviet social organizations can be said more precisely than the distinction between 'thing-institution' and 'person-institution' allows. The distinction obscures its own point, since it diverts attention both from the reduction of people themselves to 'things' (mere means) in the machinations of their rulers, and from the status of the (say) Stalinist Party as at once 'person' (agent) and 'thing' (tool). The injustices are all done to people, whose well-being and fulfilment is seriously injured by the restrictions upon, and manipulations of, the various forms of association which they have, or might otherwise have, with one another.

'Association' and 'community' (like 'organisation' and even 'structure') always best understood when considered as verbs, and suffice, I suggest, for all Scruton's legitimate purposes.