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Are Corporations Evil?

DOUGLAS LITOWITZ*

The last few years have seen an unprecedented wave of corporate scandals implicating some of America's largest corporations — Enron, WorldCom, Adelphia, ImClone, Global Crossing, Qwest, and Tyco, just to name a few.¹ The particulars of each case are unique, but certain elements remain constant: massive accounting fraud, insider trading, influence-peddling, dubious tax avoidance schemes, outrageous perks for insiders, and complicity by overcompensated directors. Most of the fraudulent schemes required the willing participation of high-profile investment banks, brokerage houses, accounting firms, and law firms.² In the three years since the scandals broke, nearly one thousand publicly held corporations restated their finances in order to stave off lawsuits,³ triggering a staggering seven trillion dollar devaluation in the stock markets.⁴ The villains of this crime wave were predominantly white males who claimed that they were powerless to resist the structural imperatives

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1. There have been so many corporate scandals that newspapers and magazines are now publishing charts listing the various companies and the charges leveled against them. *See, e.g., Executives on Trial: Scandal Scorecard*, WALL ST. J., Oct. 3, 2003, at B1; *The Corporate Crime Scorecard*, MULTINATIONAL MONITOR, July/Aug. 2002, at 43-44. For a colorful description of the various scandals, see ARIANNA HUFFINGTON, PIGS AT THE TROUGH 1, 232 (2003) (containing a list of companies under the heading, "Who's Been Indicted?").

2. For example, Enron's most notorious sham transactions (entitled "Raptors") were the joint product of Andersen Consulting, the law firms of Vinson & Elkins and Kirkland & Ellis, and a bevy of investment banks including Merrill Lynch and Credit Suisse First Boston. *See, e.g., PETER C. FUSARO & ROSS M. MILLER, WHAT WENT WRONG AT ENRON 195-197* (2002) (containing Enron's original deal sheets for the transactions); Editorial, *Hold Lawyers Accountable in Corporate Fraud Scandals*, USA TODAY, Aug. 14, 2003 at A11 ("Lawyers signed off on the controversial transactions that ended in the recent collapse of giants, such as Enron, and cost shareholders billions"); Carrie Johnson, *Surviving the Accounting Upheaval; Ernst & Young Changing in Response to Pressures*, WASH. POST, July 30, 2003, at E1 (explaining that all of the 'big five' accounting firms were implicated in the corporate scandals); Julie Mason, *Committee Widens its Probe: Did Enron Pressure Banks?*, HOUSTON CHRON., Mar. 7, 2002, Bus. Sec., at 4 (discussing the role of investment banks in the Enron debacle).

3. HUFFINGTON, *supra* note 1, at 41 (noting that nearly 1000 earnings restatements have been filed since 1998); Cassell Bryan-Low, *Restatements Rise 22%*, WALL ST. J., Jan. 21, 2003, at C3; *Huron Consulting Group Releases 2003 Restatements Results*, BUS. WIRE, July 29, 2003.

4. *See, e.g., Bill Deener, Cost to Stay Public Soars for Small Companies*, DALLAS MORNING NEWS, July 20, 2003, at D1 ("About \$7 trillion in market capitalization is gone," said House of Representatives Financial Services Committee Spokesperson Peggy Peterson); *see also* Jon Chesto, *Scandal Fears Rock Markets*, BOSTON HERALD, July 11, 2002, Fin. Sec., at 1. ("All these corporate hucksters have managed to do what Osama bin Laden could not do," according to Wayne Ayers, the chief economist at FleetBoston Financial Corp.).

of the corporate marketplace. As one energy trader for Enron flatly stated, "I did it because I was trying to maximize profits for Enron."⁵ In case after case, corporate executives who would balk at stealing a candy bar from a convenience store suddenly found themselves at the center of a Ponzi scheme to defraud billions of dollars.

The recurrent pattern of a seemingly innocent person who loses his moral compass when placed within a large business institution raises the question of whether there is something *structurally* immoral about the modern corporation.⁶ Recent books on the corporate scandals are neatly divided on this question.⁷

On one side are a group of mostly left-leaning scholars and activists who see the modern corporation as a destructive behemoth that needs to be radically changed. As Professor Lawrence Mitchell writes in *Corporate Irresponsibility: America's Newest Export*, "Corporate misbehavior is not especially the fault of corporate managers, stockholders, and employees . . . [I]t is the result we should expect from the legal structure and rules we establish to create the corporation."⁸ As another scholar puts it, "[C]orporate managers, for the most part, are like you and me, except that they've spent a good part of their lives in the corporate system. That system, and the particular way it keeps score, holds them hostage."⁹ It should be obvious from the titles of the books by Thom Hartmann,¹⁰ Marjorie Kelly,¹¹ and Lawrence Mitchell¹² that they see the problem of corporate wrongdoing as related to the deep structure of corporations as legal entities. This is sometimes referred to as the "anti-

5. Davis Lazarus, *Energy Industry's Dirty Little Details About to See Light*, S.F. CHRON., Oct. 20, 2002, at G1.

6. See, e.g., GERRY SPENCE, FROM FREEDOM TO SLAVERY 71 (1993) ("The corporate structure may be a necessary evil to gather the capital required to carry on business, but the corporate structure, itself, is inherently evil.")

7. See Kedric Francis, *Piercing the Veil: Holding People Responsible for the Corporations They Create*, O.C. METRO, July 11, 2002, at 130 ("We all know something is very wrong in the corporate world, though many disagree on the causes and the fix. Some blame a few bad apples . . . [o]thers say the system is broken, inherently flawed."); see also David Wessel, *Venial Sins: Why the Bad Guys of the Boardroom Emerged en Masse*, WALL ST. J., June 20, 2002, at A1 ("One view, a staple of speeches by chief executives and government officials, underscores that only a small fraction of companies and executives stand accused of wrongdoing . . . [b]ut there's another view: The headline-making cases are symptoms of a broader disease, not exceptions, and a regulatory apparatus that isn't up to the challenge.")

8. LAWRENCE E. MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA'S NEWEST EXPORT* 97 (2001).

9. RALPH ESTES, *TYRANNY OF THE BOTTOM LINE: WHY CORPORATIONS MAKE GOOD PEOPLE DO BAD THINGS* 32 (1996).

10. THOM HARTMANN, *UNEQUAL PROTECTION: THE RISE OF CORPORATE DOMINANCE AND THE THEFT OF HUMAN RIGHTS* (2002).

11. MARJORIE KELLY, *THE DIVINE RIGHT OF CAPITAL: DETHRONING THE CORPORATE ARISTOCRACY* (2001).

12. MITCHELL, *supra* note 8.

corporation" position.¹³ At bottom, this position holds that corporations are inexorably driven to immoral conduct by the fundamental structure of corporate law, or to put the point colloquially, "Corporations make good people do bad things."¹⁴ Under this view, corporate scandals are inevitable because the modern corporation has a structural imperative to show a short-term profit even if this requires committing fraud and/or shifting costs onto employees, the community, and the environment. This notion of systemic rottenness looks beyond a few bad apples to an underlying problem with the very nature of the corporation as a social entity. Following the Enron debacle, members of the anti-corporation camp insisted that we focus on the "systemic nature of the problem," proclaiming that "Enron executives were only doing what the system suggested they had to do."¹⁵

On the other side of this debate is a collection of generally free-market thinkers who argue that the scandals were caused by *individuals* instead of entities. This was President Bush's stance when he came to Wall Street and blamed the scandals on a few "bad apples"¹⁶ who need to recover a "moral tone" of individual responsibility.¹⁷ This position is represented in a well-received new book on the history of corporations by John Micklethwait and Adrian Wooldridge, who celebrate the modern corporation as a source of tremendous productivity, innovation, and liberty.¹⁸ These thinkers are quick to point out that some of the worst atrocities in the annals of business history were committed by non-corporate entities. For example, the slave trade was conducted largely by *partnerships*, the Robber Barons of the early twentieth century held their interests in *trusts*, and the Western expropriation of the third world was in full swing for centuries prior to the invention of the multinational corporation. Not coincidentally, the countries with the most corporations are also the countries with the most civil liberties. And the widespread ownership of stock by ordinary Americans heralds a new type of democracy, as opposed a century ago when entire industries were owned by a few families. Micklethwait and Wooldridge are inclined to see corpora-

13. See, e.g., John Cavanagh & Jerry Mander, *Fixing the Rotten Corporate Barrel: States Grant Corporate Charters; They Should Start Taking Some of Them Away*, THE NATION, Dec. 23, 2002, at 22 ("Around the world, the spectrum of anticorporate activity is broad, with strategies ranging from reformist to transformational to abolitionist.").

14. ESTES, *supra* note 9.

15. Cavanagh & Mander, *supra* note 13, at 22.

16. See, e.g., Jeff Madrick, *Bush Talking Tough on Corporate Ethics, but Where is the Regulatory Bite?*, N.Y. TIMES, July 11, 2002, at C2.

17. See, e.g., Ronald Brownstein, *President Thinks Conscience Helps as Much as Laws*, ORLANDO SENTINEL, July 10, 2002, at A1.

18. JOHN MICKLETHWAIT & ADRIAN WOOLDRIDGE, *THE COMPANY: A SHORT HISTORY OF A REVOLUTIONARY IDEA* (2003).

tions, and the market more generally, as self-regulating mechanisms that will root out chicanery for the simple reason that such behavior is not profitable and sustainable in the long run. All stock markets go through bubbles and scandals (dating back at least as far as Tulipmania in the 1630s) but sound business practices will always prevail and force investors to focus on fundamentals. The extreme version of this view can be found in a statement of former Columbia University President Nicholas Murray Butler: "The limited liability corporation is the greatest single discovery of modern times."¹⁹ Under this view, the recent corporate scandals are the product of simple greed (an ineradicable feature of the human condition) combined with lax monitoring by investors hoping to make a quick buck. Far from being structurally immoral, the modern corporation has improved the lives of millions of people and is correlated with advanced industrial societies where people are free, educated, informed, and prosperous. This position does not have a name in the popular literature, but for obvious reasons I will refer to it as the "corporate apologist" stance.

Which of the two views under consideration here, the anti-corporation position and the corporate apologist position, best characterizes the corporate wrongdoing that has dominated the business pages in recent years? Were the recent scandals rooted in the structure of corporate law, or were they caused by basic human greed, something that has existed in all societies since the beginning of time and which predates the modern corporation?

In this Essay, I will argue that neither position is entirely satisfactory. The corporate apologist stance is probably less useful in explaining the current scandals because it focuses exclusively on individual wrongdoing and thereby fails to give a larger account of why so many scandals involved *collective* decision-making instead of rogue individuals. Chalking everything up to individual greed may explain why some of the top executives committed fraudulent acts, but it doesn't explain the involvement of countless boards of directors, middle-managers, consultants, analysts, and supposedly neutral parties such as lawyers and outside accounting firms. Surely there is something structural and systemic that placed these otherwise law-abiding people in motion to perpetuate the meltdown of our financial markets.

The anti-corporation position has the advantage of seeking a systemic source for the scandals, but it runs aground by focusing too narrowly on corporations per se. After all, there are reasons for doubting that the corporate form, standing alone, is evil. Most of the authors

19. See 1 WILLIAM MEADE FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 21 at 43 (1917).

under consideration here concede that there is nothing evil about mom-and-pop corporations (which are, after all, *corporations*), and furthermore, many of the businesses involved in the “corporate” scandals were not corporate entities at all, but rather partnerships and limited partnerships. The anti-corporation stance has little to offer by way of explaining how these entities became active participants in fraudulent schemes.

In my opinion, we can best explain the recent scandals by looking beyond individuals and beyond corporations to the pernicious effect of *large institutions* staffed by desperate and pliant workers. All of the recent scandals involved massive institutions, suggesting that size is correlated with wrongdoing. When a business attains a certain size, the entity itself takes on a kind of transcendental force, converting everyone into mere role players to serve the higher purposes of the institutional empire. Massive size is also correlated with bureaucracy and an advanced division of labor, which ensure that managers remain far removed from the effects of their actions. All of the wrongdoing is mediated through endless layers of agents and advisors, with the result that no single person caused the problem and therefore no one individual is responsible. Distance, submission, mediation, role morality – these are not exclusively “corporate” phenomena; they can be found in other business structures of comparable size (whether partnerships, limited partnerships, or limited liability companies). Perhaps we need to look even deeper to the underlying economic order which functions as a breeding ground for corporate scandals. Viewed critically, our economy generates a massive labor pool of eager soldiers willing to serve any moneymaking institution, but who nevertheless lack the ability to recognize or resist being drawn into massive, abstract frauds. We need to broaden the discussion to include a consideration of institutions and underlying economic structures.

I. THE “PERFECT STORM” THEORY OF THE MODERN CORPORATION

Recent books by Thom Hartmann, Marjorie Kelly, and Lawrence Mitchell paint a “perfect storm” scenario beneath the current corporate scandals. For these thinkers, a stream of disastrous legal developments at the dawn of the twentieth century gave rise to the modern corporation as a force for evil. These legal events include the following: the rise of general incorporation statutes in the place of specific legislative charters during the late nineteenth century; the removal of corporate charter restrictions in the legislative “race to the bottom” during the early part of the twentieth century; the recognition of corporate personhood by the Supreme Court in the 1886 decision in *Santa Clara County v. Southern*

Pacific Railroad Co.;²⁰ and judicial acceptance of the notion that corporations are merely profit-making machines whose sole purpose is to maximize returns to investors. Taken together, these factors created the modern corporation as a voracious, single-minded, opportunistic Cyclops accountable only to greedy shareholders, possessing full rights of personhood while lacking any offsetting social conscience.

All of these authors operate from the basic historical insight that corporations played a minimal or nonexistent role for much of recorded legal history, making an appearance only in situations where a large enterprise was needed to accomplish a task too massive for smaller firms, such as founding a university, building bridges and roads, or funding an exploration. Under English law, and then in the early years of this country, a corporation could be established, otherwise referred to as chartered, only through a special legislative act bringing the corporation into existence. Further, such grants typically contained severe restrictions as to the corporation's capital structure, purpose, duration, management, and ability to merge with other entities. Corporations were limited to a specific public mission and could not be incorporated under a general purpose clause, which is the norm nowadays, such as "the corporation can pursue any and all lawful purposes."²¹ State legislatures retained the ability to examine corporate books and to revoke or amend charters, and, amazingly, shareholders did not always receive limited liability for their investments.²²

The requirement of obtaining a special legislative charter for each corporation meant that well-connected persons had a distinct advantage in getting a state legislature to approve a corporation. This proved anathema to Jacksonian democracy, and it was ill-suited to a vibrant and spontaneous economy where corporations needed to be chartered quickly so that they could raise massive capital for giant projects such as building railroads and telegraph lines. As a result of these pressures, the process of special chartering was replaced with "general" corporate stat-

20. 118 U.S. 394 (1886).

21. See, e.g., DEL. CODE ANN. tit. 8, § 102(a)(3) (2004) ("It shall be sufficient to state, either alone or with other businesses or purposes, that the purpose of the corporation is to engage in any lawful act or activity for which corporations may be organized under the General Corporation Law of Delaware, and by such statement all lawful acts and activities shall be within the purposes of the corporation, except for any express limitations, if any.").

22. These special charters can be found in any law library. See, e.g., *An Act to Incorporate the Geneva Manufacturing Company*, 42 Laws of Ohio 6 (January 13, 1844) (establishing a limit on capital stock of \$25,000, a limited purpose of manufacturing cotton and wool, and specifically providing that "[t]he stockholders shall be jointly and individually held liable for all the debts of the corporation."). Nowadays, the same business could be incorporated in Ohio for a perpetual duration, for any lawful purpose, with limited liability, with a capital limit of \$25 million, all by simply filling out a two-page form and submitting a fee to the Secretary of State.

utes that permitted any group of persons to set up a corporation without a legislative grant. This made corporations easier to form, but corporate law still retained limits as to an entity's size, duration, and purpose. In light of legal restrictions on corporations, the Robber Barons who came to prominence at the turn of the twentieth century held their empires in the form of trusts.²³ When the giant trusts were eventually dismantled as an illegal restraint of trade, the Robber Barons turned to the corporate form, enticed by states that had rewritten their general corporation laws to eliminate restrictions. This created the infamous "race to the bottom" where New Jersey, and then Delaware, began to strip away every significant restriction on corporations. Delaware ultimately became the preferred state of incorporation due to the permissiveness of its laws, a distinction that it still holds.²⁴

Once corporations were freed from restrictions as to purpose, size, duration, and governance, they started to grow to unparalleled heights, leading to a super-breed of multinational corporations.²⁵ The rise of giant corporations with millions of shares and the development of secondary markets for those shares brought about a unique separation of ownership and control. Stockholders theoretically "owned" the corporation, yet were so scattered and unorganized that they had virtually none of the control that typically comes with ownership of property.²⁶ For perhaps the first time in history, it became common for persons to invest in an enterprise and remain totally passive, leaving everything to managers who tended to self-perpetuate through their manipulation of the proxy machinery. This separation of ownership and control became the defining feature of the modern American corporation, giving rise to fears that the economy would be held hostage by a class of complacent managers.

23. One such restriction on corporations was that it was forbidden for one corporation to own stock in another corporation. HARRY HENN, *HANDBOOK ON THE LAW OF CORPORATIONS* § 183 at 349 (1970) ("The general rule once was that a corporation could not purchase shares of another corporation.").

24. See William Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 *YALE L.J.* 663 (1974) (recommending federally imposed minimum standards for state corporation statutes to counteract the race to the bottom).

25. Recently, some activists have claimed that multinational corporations generate more revenue than entire countries. For a critical take on this assertion, see MICKLETHWAIT & WOOLDRIDGE, *supra* note 18, at 176.

26. The separation of ownership and control was first analyzed at length in ADOLPH A. BERLE & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932). Their work pointed out an agency problem with the modern corporation: How can directors represent shareholders if they form a special managerial class whose interests lie in self-perpetuation? In the last decade, this agency problem was thought to have been solved by aligning the interests of management and stockholders by pegging executive compensation to an escalating stock price, thereby creating a win-win situation for managers and stockholders. Unfortunately, this provided a perverse incentive for executives to artificially inflate stock prices to trigger their compensation packages.

In this struggle between shareholders and executives, the people who fare the worst are the so-called *stakeholders*, such as employees, creditors, the community, and suppliers. Typically these entities and individuals lack voting power because they do not own shares of the company.

Early in the history of the modern corporation, the judicial branch sanctified the emerging model of the corporation as a profit-driven private entity devoid of any public mission. In the famous case of *Dodge v. Ford Motor Co.*,²⁷ the court chastised Henry Ford for refusing to declare a dividend from profits so that he could, instead, build a new plant that would produce affordable cars for the common man. According to the court:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of the directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.²⁸

This view would later reach an apex in Milton Friedman's claim that a corporation's sole public responsibility is the maximization of profits,²⁹ and in the now dominant "law and economics" notion that a corporation is a mere "nexus of contracts" between individuals seeking private gain, not a social entity with responsibilities to the community.³⁰

At the same time that corporations had fewer public responsibilities, because they didn't need to perform a public service to receive a charter and had no obligations to stakeholders, they were demanding increased rights as public citizens. These rights included constitutional rights on a par with "natural" persons. In a series of controversial decisions beginning with the *Santa Clara* case in 1886, the Supreme Court declared, without discussion, that corporations were legal "persons."³¹ This way of thinking survives in the notion that corporations have rights to free speech, privacy and due process. Yet, while corporations have many of the rights of natural persons, they lack the complex human

27. 170 N.W. 668 (Mich. 1919).

28. *Id.* at 684.

29. Milton Friedman, *The Social Responsibility of Business is to Increase Its Profits*, N.Y. TIMES MAGAZINE, Sept. 13, 1970, at 17.

30. *See, e.g.*, Frank H. Easterbrook & Daniel Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989) (viewing corporate law as an off-the-rack contract, reducing the transaction costs of separately negotiating every business point). *But see* STEPHEN BAINBRIDGE, CORPORATE LAW AND ECONOMICS 27-28 (2002) (claiming that the nexus of contracts model need not lead to short-term maximization of profits, since this would overly benefit shareholders at the expense of other contracting parties such as suppliers and creditors).

31. *Santa Clara County v. So. Pac. R.R. Co.*, 118 U.S. 394 (1886).

emotions that restrain immoral conduct, such as family ties, vulnerability, love, shame, and guilt. Indeed, in most major corporations there seems to be a serious disconnect between the executive suite and the shop floor: While earnings plummet and workers are laid off *en masse*, executives reap massive compensation packages, typically four hundred times that of an average worker.³²

Given this history, Hartmann, Kelly, and Mitchell tend to view the modern corporation as essentially sociopathic — something akin to a super-rich and well-connected human being who is motivated solely by return on investment and totally unmoved by attachments to family or community, or by human vulnerability. This complex “person” can divide itself into pieces, avoid taxes by moving its mailing address offshore, leave its hometown and lay off employees without shedding a tear, and live forever. Calling a corporation a “person” gives rise to bizarre situations such as a well-publicized recent case that came before the Supreme Court involving the sports apparel-maker Nike, which claimed the “right to lie” in press releases denying its ownership of overseas “sweatshops,” under the theory that any false statements were protected as free speech under the First Amendment.³³ More importantly, the right of free speech allows corporations to become key players in the political and regulatory process via campaign contributions. Enron, for example, donated heavily to George W. Bush while he was governor of Texas, his father before him, and a host of other politicians. Perhaps it was no coincidence that Enron was exempted from the strictures of the Public Utility Holding Company Act and from oversight by the Commodity Futures Trading Commission (CFTC).³⁴ As a profit-driven institution, the American corporation will, perhaps arguably *must*, make political donations in a manner that assures a profitable bottom line, which means “the *corporate* scandal is a *political* scandal.”³⁵

32. See, e.g., Douglas Feiden, *No Losses for Biggest Bosses*, N.Y. DAILY NEWS, Nov. 4, 2002, at 6 (noting that AT&T axed 10,000 jobs and lost nearly \$7 billion in 2001, yet the chief executive officer was awarded over \$20 million; Lucent Technologies posted a \$17 billion loss in 2001, yet the chairman was awarded a package in excess of \$22 million).

33. *Nike, Inc. v. Kasky*, 123 S. Ct. 2554 (2003) (dismissing the appeal on procedural grounds). In the decision below, the California Supreme Court ruled against Nike, claiming that their denials surrounding the “sweatshops” amounted to commercial speech with a lower threshold of constitutional protection, meaning that any false statements by Nike about the “sweatshops” could be actionable as false advertising. *Kasky v. Nike, Inc.*, 45 P.3d 243 (Cal. 2002).

34. See, e.g., Jackie Spinner, *Utility Act's Critics Point to Blackout*, WASH. POST, Aug. 20, 2003, at E4 (noting that Enron gained an exemption from the Public Utility Holding Company Act); Robert Manor, *Gramms Regulated Enron, Benefited from Ties*, CHI. TRIB., Jan. 18, 2002, at 17 (noting that Wendy Gramm, later a director at Enron, was chair of the CFTC when it passed a controversial set of rules exempting energy trading — Enron's specialty — from oversight by the CFTC).

35. HUFFINGTON, *supra* note 1, at 236 (emphasis added).

These, then, are the major themes of the anti-corporation movement, and they are repeated again and again like an endless mantra in the pronouncements from the anti-corporation side. Consider a typical proclamation from an activist who was formerly a securities lawyer at the renowned law firm of Skadden, Arps, Slate, Meagher & Flom:

The reason corporations are prone to violate the public interest is that corporate law establishes the corporation solely for one purpose — making money. Price gouging and externalizing costs serve this purpose. They increase profits. Nothing in the corporate law balances this requirement that the corporation pursue its own self-interest. Corporations should have obligations to the public as well as to shareholders. Corporations would not exist if state laws did not permit them to be created and to operate. Those laws can be amended to change the nature of the corporation so that it respects the public interest instead of destroying it. . . . Corporations are institutions, not people. They have no conscience, morals nor sense of right and wrong. They have no sense of living in a community. They have none of the human traits and characteristics that restrain people in ways that laws cannot and make living in a community possible. Although corporations act only through people, these people are forced to play roles that in some ways make them more like machines than human beings. Protecting the public good is not part of their job description.³⁶

Scholar and activist Noam Chomsky is even more direct in his disdain for corporate law:

'The board of directors of a corporation actually has a *legal obligation* to be a monster,' an ethical *monster*. Their legal obligation is to maximize profits for the shareholders, the stockholders. They're not supposed to do nice things. If they are, it is probably illegal, unless it's intended to mollify people, or improve market share, or something. That's the way it *works*. You don't expect corporations to be benevolent any more than you expect dictatorships to be benevolent. Maybe you can force them to be benevolent, but it's the tyrannical *structure* that's the problem³⁷

For these thinkers, the modern corporation is a hugely powerful behemoth with massive amounts of capital and no obligation to pursue the public interest. Further, these entities enjoy full rights to free speech and

36. Robert Hinkley, *Neither Enron Nor Deregulation*, published May 19, 2002, by CommonDreams.org, at <http://www.commondreams.org/views02/0519-07.htm> (last visited Mar. 29, 2004).

37. Noam Chomsky, *Taking Control of Our Lives: Freedom, Sovereignty, and Other Endangered Species*, Speech delivered to the Interhemispheric Resource Center in Santa Fe, New Mexico (Feb. 26, 2000), *paraphrasing* the view held by economist Milton Friedman, *supra* note 29, *transcribed* at <http://www.ratical.org/co-globalize/NC022600.html> (emphasis in transcript) (last visited Mar. 29, 2004).

lobbying yet do not have the nagging burdens of being tied to a community, a family, or a conscience. Finally, because the compensation of managers is often tied to the company's stock price, managers have an overwhelming personal and institutional incentive to maximize quarterly returns to shareholders, a mandate that forces them to adopt fraudulent schemes. What is even worse is that no one is willing to step forward and place any limits on this situation. Shareholders are simply playing the market in short-term speculation and would rather sell their stock (the so-called "Wall Street option") than engage in a costly battle with management to set the corporation on the right course. The directors are not going to change things because they are in bed with management, often preferring to rubber-stamp the CEO's conduct and simply resign when a scandal breaks out. To make matters even more difficult, recent legislation has placed nearly insurmountable procedural barriers in front of shareholders who have the temerity to bring a lawsuit for securities fraud.³⁸ The result is a nightmare of short-term desperation and book-keeping sorcery, where corporate insiders line their own pockets and obsess over stock price while externalizing all social costs onto unwilling and unknowing victims.

To their credit, the authors considered here are not content to merely complain about corporate misconduct — they actually float some fascinating proposals for reforming corporate law:

- A Constitutional amendment declaring that corporations are not natural persons and not entitled to constitutional rights;³⁹
- Granting states the power to revoke corporate charters based on immoral conduct negatively impacting the community (*e.g.*, mass layoffs, pollution, plant relocation);⁴⁰
- Requiring corporations to let employees vote on parity with shareholders and to serve on the board of directors;⁴¹
- Requiring corporations to make environmental and social disclo-

38. *See, e.g.*, The Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, 109 Stat. 737, codified as 15 U.S.C. § 77z-1, 77u-4 (imposing restrictions on class-action litigation alleging securities fraud). Most recently, the PSLRA was invoked by a federal judge to dismiss securities fraud claims brought against executives at WorldCom, which lost a staggering \$11 billion in what was perhaps the largest accounting scandal in United States history. *WorldCom Execs' Scandal Not Shown With Regard to Alleged Accounting Fraud*, 72 U.S.L.W. 1093 (Aug. 19, 2003).

39. *See* Daniel Brannen, *Commentary*, in HARTMANN, *supra* note 10, at 315.

40. *See* KELLY, *supra* note 11, at 175. New York Attorney General Eliot Spitzer has backed this concept, claiming that when a corporation is convicted of repeated felonies or endangers the public it should be "put to death, its corporate existence ended." *See* Cavanagh & Mander, *supra* note 13, at 24.

41. KELLY, *supra* note 11, at 156.

- tures in addition to their financial disclosures;⁴²
- Allowing directors to focus on the long-term health of the corporation by granting five-year terms for directors, and by issuing annual earnings reports (instead of quarterly);⁴³
 - *Requiring* (rather than merely *permitting*) directors to take account of so-called *stakeholders* in addition to *stockholders*;⁴⁴ and
 - Amending the accounting rules and/or tax codes to reflect the contributions of workers as an “asset” and to provide incentives for socially responsible corporations.⁴⁵

In addition to suggesting these reforms, each of the anti-corporation books under consideration here zeroes in on a particular aspect of corporate law that the author finds particularly objectionable.

For example, Thom Hartmann directs most of his attention to the problem of corporate personhood raised by the *Santa Clara* decision.⁴⁶ Hartmann is convinced that the Supreme Court made a terrible mistake in that case by failing to recognize that the Fourteenth Amendment was intended to grant equality and personhood only to freed slaves, not to artificial “persons” such as corporations. Hartmann points out that *Santa Clara* was the culmination of a lengthy effort by railroad lawyers to avoid corporate taxation by asserting that the use of separate formulas for individual and corporate taxation was *discrimination* against corporate “persons.” Although *Santa Clara* is widely known as the key case on corporate personhood, anyone who reads the case will see that the actual decision turned entirely on the long-forgotten question of whether a fence on a right-of-way was properly included in a corporate tax assessment. The recognition of corporate personality is not contained in the judges’ opinions, but appears in a headnote inserted by the court reporter, mysteriously referencing the Chief Justice’s oral statement that the Court did not want to hear argument on whether a corporation is a “person” because the justices had already decided the matter in favor of recognizing corporations as persons within the Fourteenth Amendment. The text of the actual judicial opinion — the only part that is binding on future courts — says nothing about corporate personhood. After considerable research, Hartmann discovered that the mysterious headnote was

42. See ESTES, *supra* note 9, at 210 (advocating a Corporate Accountability Commission to mandate disclosure by public companies about how their practices affect stakeholders).

43. See MITCHELL, *supra* note 8, at 129, 161.

44. See KELLY, *supra* note 11, at 140.

45. See *id.* at 22; MITCHELL, *supra* note 8, at 246.

46. See HARTMANN, *supra* note 10, at 5 (“The real issue, rarely discussed but always present, is whether corporations truly are *persons* in a democracy. Should they stand shoulder to shoulder with you and me in the arena of rights, responsibilities, and the unique powers and equal protections conferred upon humans by the founders and framers of the United States Constitution and other democracies around the world that have used the United States as a model?”) (emphasis in original).

inserted by a court reporter who was a lawyer of some distinction, having longstanding ties to corporate and railroad interests. Hartmann rightly points out that since headnotes are not law, and since the Court never ruled on the personhood question in writing (and failed to cite any authorities), *Santa Clara* never really stood for the proposition that corporations are persons under the Fourteen Amendment. He also quotes from Supreme Court Justices Hugo Black and William Douglas, who were critical of *Santa Clara*, with Douglas proclaiming, "There was no history, logic, or reason given to support that view."⁴⁷ Hartmann's arguments against the precedential value of the headnote are not particularly new (as he acknowledges), but his fascinating exposé of the court reporter adds an important wrinkle to this controversy, raising fresh doubts about the foundational case on corporate personhood. Still, subsequent courts (including the Supreme Court) have recognized corporate personhood, which means that corporate personhood has earned the weight of precedent independent of the controversies surrounding *Santa Clara*.

Hartmann proposes that corporations be stripped of personhood, even going so far as to include an Appendix with a model municipal ordinance for repeal of corporate personhood. According to Hartmann, the danger of corporate personhood is that corporations have resources outstripping ordinary persons, which means they are in a position to assert their rights more vigorously, thereby influencing legislation and public opinion while remaining unmoved by conscience and ties to the community. Much of the book reads as a litany of corporate wrongdoing from the days of the East India Company and the Boston Tea Party to the latest trade talks under the World Trade Organization. Along the way, Hartmann nicely draws attention to a long line of American politicians and scholars who have expressed caution about the rise of corporations. Thomas Jefferson and James Madison cautioned against the dangers of corporations, in part because the American colonies were operated as corrupt English corporations. Later, Andrew Jackson blocked incorporation of the Second National Bank. Abraham Lincoln, once a lawyer for the railroads, was by the end of his life wondering whether corporations would threaten democracy by overpowering individual citizens. Within the last century, Presidents Woodrow Wilson and Franklin Roosevelt denounced the tyranny of monopolies and the concentration of capital in a few hands.

Hartmann's accounts of corporate malfeasance are moving and heartfelt, but his focus on the evil of corporate personhood is undercut by his historical descriptions of abuses that predate *Santa Clara*, and

47. *Id.* at 105.

which cannot be blamed entirely on corporate personhood. Thus, while Hartmann is doubtlessly correct that corporations have a long history of abusive behavior, he has failed to put his finger directly on the source of corporate wrongdoing. Undeterred by this inconsistency, Hartmann insists that personhood is the foundation of corporate evil, and in an exaggerated passage he claims that corporate personhood is responsible for our “increasingly toxic environment, a fragile and top-heavy economy, and a hollow culture.”⁴⁸ This is the age-old Frankenstein story of an inventor ruled by his creation — in this case, humans ruled by their own social construction. According to Hartmann, the key is to invert the hierarchy: “Only when corporations are again *legally* subordinate to those who authorized them — humans, and the governments representing them — will true change be possible. To bring this about will require a grassroots movement in communities all across America and the world to undo corporate personhood, leading to change in the definition of the word ‘person.’”⁴⁹ Nonetheless, at the same time, Hartmann admits that he has formed more than a dozen corporations himself, and that “corporations do much good in the world.”⁵⁰ Therefore, he doesn’t advocate the complete overthrow of corporations (as do more extreme social critics⁵¹) but a recognition that corporations are mere “agreements” (social conventions) that do not deserve the benefits that we bestow on natural persons. Yet Hartmann never clearly explains how the abolition of corporate personhood would remedy all the corporate evils he identifies. His analysis is further undercut by the concession that most corporations have minimal capitalization, are governed informally by a few people, and don’t commit much wrongdoing. His beef is with large multinational corporations (and rightly so), but this leaves open the question of whether the problem lies with personhood *per se* or with personhood for large multinational companies. Hartmann is not clear on whether personhood should be allowed for unincorporated business entities such as associations, partnerships, limited liability companies, and so forth. One presumes that Hartmann would be aghast if a hedge fund (structured as a limited partnership) were to engage in the type of lobbying and power-mongering that he finds so offensive in the hands of corporations. But if this is the case, then the real culprit is not

48. *Id.* at 6.

49. *Id.* at 252 (emphasis in original).

50. *Id.* at 6.

51. See, e.g., DERRICK JENSEN, THE CULTURE OF MAKE BELIEVE 441 (2002) (“Corporations are institutions created explicitly to separate humans from the effects of their actions, making them, by definition, inhuman and inhumane. To the degree that we desire to live in a human and humane world — and, really, to the degree that we wish to survive — corporations need to be eliminated.”).

the corporation *per se*, but certain large-scale business institutions more generally. By refusing to follow this logic to its conclusion, Hartmann misses the deeper source of evil in the current corporate crisis.

Marjorie Kelly's recent book also contains an attack on corporate personhood, but the brunt of her attack is reserved for "shareholder primacy" — the imperative that managers maximize returns to shareholders even if this leads to pollution, layoffs, and accounting shenanigans:

After more than a decade of advocating corporate social responsibility and seeing its promise often thwarted, I've come to ask myself, What is blocking change? The answer is now obvious to me. It's the mandate to maximize returns for shareholders, which means serving the interests of wealth before all other interests. It is a systemwide mandate that cannot be overcome by individual companies. It is a legal mandate with which voluntary change cannot compete.⁵²

Kelly points out that the obsession with maximizing shareholder value privileges owners (a small class of wealthy stockholders) at the expense of non-owners (that is, stakeholders) — solely on the criterion of ownership. This is played out in the differential treatment of shareholders and employees: employees give their sweat and blood to the company, yet they have no property claim on the wealth that they generate, and they are treated as an expense that needs to be reduced as low as possible. Shareholders, on the other hand, do not contribute fresh capital, but are nevertheless rewarded with profits derived from the efforts of the workers. This is the unfortunate feature of capitalism that so angered Marx (who railed against the expropriation of "surplus value" — the wealth that workers create beyond the funds necessary for their own sustenance).⁵³ Kelly sees a fundamental defect in corporate law for the failure to give employees any property rights (or even representation on the board of directors) while it rewards speculation by shareholders:

Corporate law says stockholders own everything the corporation now has and everything it will create into the perpetual future. Hence the increasing value of the corporation will flow forever to the shareholders, though they won't lift a finger to create that value. The presumption is literally *feudal*.⁵⁴

This "feudalism" is driven by the fact that a minuscule portion of Americans actually own estimable stock holdings, which means that the corporations that run our lives serve the interests of a small class of investors.

52. See KELLY, *supra* note 11, at xii-xiii.

53. See, e.g., Frederick Engels, *Socialism: Utopian and Scientific*, in THE MARX-ENGELS READER 700 (Robert C. Tucker ed., 1978) (explaining Marx's notion of surplus value, Engels states that, "the appropriation of unpaid labour is the basis of the capitalist mode of production and of the exploitation of the worker.").

54. KELLY, *supra* note 11, at 48 (emphasis added).

Kelly finds shareholder primacy particularly galling since most shareholders purchase shares in a secondary market (say, on the stock exchange) and therefore do not supply any fresh capital to the corporation — they are akin to used-car buyers. In other words, giving special status to shareholders over employees solely on the grounds that they are investors instead of workers is tantamount to *wealth discrimination*. Hence the subtitle of her book: *Dethroning the Corporate Aristocracy* — in the place of an aristocracy based on hereditary lineage, we have substituted an aristocracy based on the possession of wealth in the form of corporate shares.

One drawback to Kelly's otherwise lucid analysis is her failure to appreciate the value of secondary markets. The primary market is made possible by the existence of a secondary market that allows liquidity for the initial investors who would otherwise be stuck with the stock received in an initial public offering. Without the "used-car" market for stocks, there would be a much smaller primary market, impairing the ability of firms to raise capital, and thereby leading to fewer innovative products and services. Furthermore, Kelly doesn't realize that share ownership need not be a passive activity of wealth-extraction; shareholders can add value to the corporation by removing and replacing directors, voting for mergers and fundamental changes, and amending the corporate charter. Companies have a legitimate interest in keeping the price of their shares high in the secondary market, because the company can then use its own shares as a resource for rewarding employees, purchasing other companies via stock, impressing lenders, and garnering name recognition.

Kelly chastises the modern corporation as the "brainchild of brutal men in a brutal age, hell-bent of amassing for themselves untold wealth, and leading a feudal revolt against the notion that corporations must serve the public good."⁵⁵ This feudalism can be reversed only with increased democratization — especially by democratizing the corporation to give a voice to employees, the community, the environment, and other stakeholders. Kelly calls for fundamental change in corporate law by shifting the focus away from shareholders toward a more holistic notion of the corporation as a public enterprise with an obligation to all persons connected to it.⁵⁶ This is all well and good, but one wonders why the focus is always on the corporation as a species. There is nothing especially aristocratic (that is, undemocratic) about the corporation

55. *Id.* at 142.

56. Kelly's argument has resonance with Blair and Stout's "team production" model of the corporation. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247 (1999) (arguing that managers do not have a duty to maximize stock price but rather to mediate the demands of competing stakeholders).

that cannot also be said about the limited partnership, the limited liability company, or the business trust, which suggests that (notwithstanding her wonderful suggestions) Kelly hasn't quite put her finger on the question of whether corporations are inherently evil. Like Hartmann, she fails to explain why smaller corporations, having the same basic legal structure, are not inherently evil as well. Her book is a wonderful introduction to many of the anti-corporation positions on key issues, but it doesn't address the larger question of wrongdoing across various business structures.

Lawrence Mitchell, a highly respected professor of corporate law, writes at a much higher level of sophistication than the other authors under consideration here. Whereas Hartmann focuses on corporate personality and Kelly focuses on shareholder primacy, Mitchell sees the problem of corporate irresponsibility as tied to what he calls "short-termism" – the imperative to provide maximum return on investment in the shortest possible time frame. As he explains:

Simply put, I will argue that the main problem with American corporations — the main cause of their irresponsibility — is their drive to maximize short-term stock prices, a result that no thoughtful person really wants. The root of the problem is the corporate structure itself: the corporation's legal structure encourages managers to aim exactly for this short-term result, and it does so by constraining their freedom to act responsibly and morally: the result is immoral behavior.⁵⁷

Yet Mitchell seems to flip-flop on his claim that the problem is structural. He says that maximization of shareholder profit "is *not* a legal requirement . . . [yet] arises from the *legal* structure of the American corporation and the rules of corporate law."⁵⁸ He says that "[t]he corporation's legal structure and rules result in the dictum to maximize shareholder profit,"⁵⁹ but concludes that "[t]he structure is not intrinsically bad."⁶⁰ In all likelihood he is asserting that short-termism is imbricated in the *existing* structure of corporate law but isn't inherent in the concept of the corporation itself. This means that there could be such a thing as a responsible corporation, but not under the current legal framework.

Like Hartmann and Kelly, Mitchell points out how corporations have veered from their original role as publicly chartered enterprises, and he has harsh words for corporate personhood and limited liability, both of which lead to the imposition of externalities on third parties. Also like Kelly and Hartmann, he favors stakeholder laws to permit directors to consider a corporation's impact on third parties. But unlike

57. MITCHELL, *supra* note 8, at 3.

58. *Id.* at 4 (emphasis added).

59. *Id.* at 97.

60. *Id.* at 277.

the other authors, Mitchell has the expertise to expose the *vacuity* of corporate law from an internal perspective. Rather than simply railing from a distance about corporate misconduct, he gets inside the legal doctrines and shows how the business judgment rule and the conflict-of-interest provisions of the Delaware General Corporation Act fail to set meaningful limits on directors, who remain powerfully insulated from lawsuits no matter how outrageous their conduct. He also demonstrates that shareholders face insurmountable difficulties when trying to reign in executives via derivative lawsuits and proxy fights. After detailing these structural flaws in Delaware law, Mitchell insists that corporations are not inherently evil, and he insists that “the most important solution is not *legal*; it is *normative*.”⁶¹ Like classical economic thinkers, he believes that the centralized management inherent in the corporate form is highly efficient and socially productive — it merely needs to be tied to long-term incentives.

Mitchell focuses almost exclusively on corporations, but one wonders if his comments extend to other business structures. At the beginning of the book he asserts generally that the structural problems with the modern corporation are tied to a more general bias toward liberalism running through American law. According to Mitchell, our legal system adopts a posture of radical individualism, where people are responsible only for their own welfare instead of having a duty to rescue others.⁶² The modern corporation is the apex of this current — it is the ultimate self-concerned “person” who exists to benefit its own bottom line and disregards others. Mitchell says that this is made possible by the adoption of role morality whereby the players within the corporation are compelled to make decisions to feed this voracious beast’s hunger for profits, even if their decisions as role players within the corporation are not the ones that they would personally approve in their everyday lives outside the office. Mitchell’s discussion of the underlying assumptions of American law raise the possibility that the problems identified in *Corporate Irresponsibility* are not solely *corporate* problems but are instead part of a larger problem of institutions generally, a suggestion that I will take up in the final section of this Essay.

II. THE PROBLEM WITH BLAMING CORPORATIONS

All of the anti-corporation books under consideration here end up fudging the question of whether corporations are, as Gerry Spence says, “inherently evil.”⁶³ There is at least one good reason for doubting this

61. *Id.* at 277 (emphasis added).

62. *Id.* at 30.

63. SPENCE, *supra* note 6.

claim: If corporate law suffered from a systemic defect, we would expect to find wrongdoing evenly distributed among various types of corporations — from close corporations to publicly held corporations, from “S” corporations to “C” corporations. But in fact the anti-corporation movement focuses exclusively on the wrongdoing of large, public, often multinational corporations. Rarely is there a critique of mom-and-pop corporations, which are numerically more common, such as the neighborhood dry cleaners or the local grocer. This is a tacit admission that corporate wrongdoing is not related to the structure of corporations alone, but is instead correlated with the size of an entity and whether it is publicly held. To put the matter differently, it is wrong to generalize about the faulty structure of “corporations” while tacitly conceding that *most* corporations do not generate immoral behavior. The endless focus on large multinational corporations is a tacit admission that small corporations are not correlated with evil, thereby raising the possibility that wrongdoing is more accurately tied to some factor other than corporate status.

A second major reason for doubting the “inherent evil” argument is the existence, perhaps somewhat rare, of corporate entities that are socially conscious. This would not be possible if the corporate form itself caused wrongdoing. Levi Strauss, Ben & Jerry’s and The Body Shop are often mentioned as companies that have tried, somewhat unsuccessfully at times, to balance profits and social responsibility.⁶⁴ In addition, there are mutual funds and products that invest solely in responsible businesses or donate a substantial portion of profits to good causes, such as the Domini Social Responsibility Funds and the Working Assets Visa. These examples demonstrate that the corporate form, standing alone, is not a barrier to socially responsible conduct. Indeed, there is nothing to prevent a “for-profit” corporation from setting itself up through charter and bylaw provisions to spend its profits on charity, employees, or protecting the environment. In fact, the RTMark Corporation is a for-profit Delaware corporation that is set up to encourage worker-based sabotage and guerilla tactics such as funding a project that switched the voice boxes in G.I. Joe and Barbie dolls.⁶⁵ This is an extreme example, but it suggests that corporations are largely empty vessels nowadays; they are not inherently profit-seeking machines that externalize all costs onto unwitting third parties. To be sure, some corporations fit this description, but it is not corporate law that necessarily

64. The magazine *Business Ethics* has an annual list of the 100 best corporate citizens. See BUSINESS ETHICS, Mar./Apr. 2002, available at http://www.business-ethics.com/2002_100_best_corporate_citizens.htm (last visited Feb. 4, 2004).

65. See Alissa Quart, *Cultural Sabotage Waged in Cyberspace*, N.Y. TIMES, Aug. 17, 2000, at G10.

propels them to that conduct. In the end, the problem with corporate law is that it lacks fail-safe mechanisms forcing managers to place value on non-economic factors such as the community, employees, and the environment. Corporate law suffers from a flaw of *omission*, not *commission*. In some ways corporations can be seen as a progressive form of business organization because corporate law allows investors to elect and remove directors, bring derivative claims, approve organic changes, demand appraisal rights, and force a dissolution of the business. In theory, at least, the corporation is meant to function as a democracy held in check by voting investors.

A final reason for questioning the charge of “inherent evil” is that a lot of so-called “corporate” wrongdoing is being committed with the active participation of non-corporate entities such as limited liability companies, partnerships (general and limited), trusts, and other structures. As mentioned earlier, the Enron debacle involved a range of business structures bound together in a massive fraudulent scheme.⁶⁶ A comprehensive account of the corporate scandals would need to explain how these non-corporate entities could produce similar acts of destruction while lacking the requisite evil structure of corporations. After all, the worst offenses in American business history have been committed by *trusts*, not by corporations.⁶⁷ All of this suggests that corporate law is not solely to blame, but that wrongdoing is prevalent in any business institution that takes the form of a gigantic bureaucratic monolith run by a cadre of insiders who are disconnected with employees and consumers, and where the pressure to generate revenue compels the adoption of an instrumental rationality that overpowers individual conscience.

Many of these counterarguments to the anti-corporation camp can be found in Micklethwait and Wooldridge’s history of the company,⁶⁸ which covers both the American corporation and the English joint-stock company. Both authors write for *The Economist* magazine and unabashedly proclaim that the modern corporation is a source of social

66. See MIMI SWARTZ & SHERRON WATKINS, POWER FAILURE: THE INSIDE STORY OF THE COLLAPSE OF ENRON 373 (2003) (showing the various types of corporate and unincorporated entities involved in a single off-balance sheet deal).

67. Perhaps the most notorious labor battle in American history was the Homestead battle in Pittsburgh where striking workers were murdered. The business structure in that instance was a limited partnership controlled by Andrew Carnegie. See, e.g., LEON WOLFF, LOCKOUT: THE STORY OF THE HOMESTEAD STRIKE 54-55 (1965). The cruelest business owner in English literature may be Charles Dickens’ Scrooge, who conducted business as the partnership “Scrooge & Marley.” See CHARLES DICKENS, A CHRISTMAS CAROL IN PROSE 2 (1894). Some of the most recent “corporate” scandals involve hedge funds organized as limited liability companies and limited partnerships. See, e.g., *SEC Officials Seek Trading Information Via Letters to Mutual Funds, Intermediaries*, 72 U.S.L.W. 2142 (Sept. 16, 2003).

68. MICKLETHWAIT & WOOLDRIDGE, *supra* note 18.

progress. The corporate structure allows entrepreneurs to raise massive amounts of capital for large projects and research agendas, thereby providing the widest range of new products and services.⁶⁹ As they point out, countries with many corporations tend to have citizens who enjoy the broadest political freedoms.⁷⁰ Further, the history of corporations is becoming *less* brutal: "In general, companies have become more ethical: more honest, more humane, more socially responsible."⁷¹ For Micklethwait and Wooldridge, the corporate scandals cannot be traced to the corporate form of business: "There was nothing particularly 'corporate' about hiding debts in dodgy partnerships or spending \$6,000 on a gold-and-burgundy floral-patterned shower curtain — and then charging it to the company that you ran (as the head of Tyco did)."⁷² Instead of joining the chorus for greater corporate regulation, they caution against overregulation and suggest that the market will self-regulate because investors burned in the dot-com crash will soon insist that companies show long-term fundamental strength. Micklethwait and Wooldridge draw attention to the progressive side of corporations as vehicles for democracy and equality. The concept of limited liability, for example, tends to benefit lower income entrepreneurs who otherwise would not be willing to stake their personal assets in a risky venture. Similarly, the rise of employee stock ownership plans means that, for the first time in history, workers can have a hand in electing their managers. Compared to the private trusts and limited partnerships employed by the Robber Barons, the modern corporation is highly transparent to public scrutiny and infinitely more answerable to regulators. Furthermore, corporations need not be locked into the short-termism decried by Mitchell and others because that attitude is not sustainable — it drives away good employees and it destroys the element of trust necessary for any business to thrive. In fact, nothing in corporate law literally requires a board of directors to pursue profit maximization in the short-term. In any event, short-termism is simply a trend that cannot be sustained over the long haul, which means that the market will ultimately gravitate toward stable companies that offer a reasonable (if not spectacular) rate of return.

All of this is useful as a corrective for some of the more extreme claims of the anti-corporation position, but one gets the nagging feeling

69. *Id.*

70. *Id.* Nonetheless, Micklethwait and Wooldridge should not push this point too far, since corporations played a big role in Nazi Germany and fascist Italy. In fact, Mussolini referred to fascism as "corporatism" due to the connection between government and business. DENIS MACK SMITH, MUSSOLINI 271 (1982) (quoting Mussolini: "[T]he fascist state is corporative or it is nothing."). Still, the basic point seems well-taken: corporations are generally a creature of the West, where civil liberties have a longer tradition than in other parts of the world.

71. See *id.* MICKLETHWAIT & WOOLDRIDGE, *supra* note 18.

72. *Id.* at 156.

that Micklethwait and Wooldridge are simply dodging the larger question of systemic (structural) evil when they blame the corporate scandals on greedy individuals. The problem with appealing to raw human greed is that most of the wrongdoing in the recent scandals was filtered through layers of employees, bankers, advisors, and consultants — most of whom had little to gain from the fraudulent transactions, but were simply “doing their jobs.” The confessions of these people make clear that they felt torn between their individual conscience and their corporate role. Prior to the Enron scandal, an insider confessed, “I know that it would be devastating to all of us, but I wish we would get caught. We’re such a crooked company.”⁷³ This suggests that there is something systemic that channels, enables, justifies, and legitimates the fraudulent schemes at the heart of the recent debacles. In what follows I suggest that wrongdoing is related to *institutions*, particularly large bureaucracies where managers spend all of their time exercising instrumental reasoning in furtherance of the institution’s ready-made goals. My intention is to shift the debate from the narrow issue of *corporations* to the broader question of *institutions* and the *underlying economic conditions* that fostered the scandals.

III. BROADENING THE FOCUS TO INSTITUTIONS AND UNDERLYING ECONOMIC CONDITIONS

If we look closely at the recent corporate scandals from the wider perspective of institutions and background economic conditions, three salient factors stand out. First, there is the question of size: All of the institutions involved in the corporate scandals were large and impersonal. Second, in each case there was a diffuse and untraceable causal chain from the insiders’ fraudulent acts to the disastrous effects on third parties. Third, the institutions enjoyed tremendous prestige, power, and authority in the eyes of their employees and the general public: The institutions were staffed by minions who were desperate to stay afloat and lacked the capacity to resist orders. When these factors align, the stage is set for scandal.

On the question of size, it is no coincidence that the scandals involved massive companies. When an institution reaches a certain critical mass, the lowly individual worker cannot peer around the curtain to see fallible human beings pulling the strings — the institution begins to loom large, as if it had a life and a force all its own. For example, if the sole shareholder of a one-man corporation tells an employee to engage in a questionable transaction for the greater good of *the institution*, the

73. SWARTZ & WATKINS, *supra* note 66, at 287.

employee would probably laugh — after all, there is no “institution” apart from the actual human being barking out orders. But things somehow change when the institution in question is a multinational colossus and the command is filtered through a series of middlemen. Suddenly there is only a stark choice between obedience and losing your job. The obvious decision is to keep your position and rationalize your conduct as mandated by some mystical, invisible, and immortal entity — the “firm” or the “company.”

In *The Grapes of Wrath*, John Steinbeck gives an example of a giant, faceless institution demanding obedience. In a famous scene, henchmen from the bank tell a group of farmers that the decision to evict them came from “the bank” and not from individual men:

“We’re sorry. It’s not us. It’s the monster. The bank isn’t like a man.”

“Yes, but the bank is only made of men.”

“No, you’re wrong there — quite wrong there. The bank is something else than men. It happens that every man in a bank hates what the bank does, and yet the bank does it. The bank is something more than men, I tell you. It’s the monster. Men made it, but they can’t control it.”

“. . . The monster isn’t men, but it can make men do what it wants.”⁷⁴

A little later in the story, a farmer tries to stop the bank’s tractor-driver from razing his farmhouse by making him feel guilty for destroying another man’s property, but the tractor-driver refuses to accept responsibility:

“It’s not me. There is nothing I can do. I’ll lose my job if I don’t do it. And look — suppose you kill me? They’ll just hang you, but long before you’re hung there’ll be another guy on the tractor, and he’ll bump the house down. You’re not killing the right guy.”

”That’s so,” the tenant said. “Who gave you orders? I’ll go after him. He’s the one to kill.”

“You’re wrong. He got his orders from the bank. The bank told him, ‘Clear those people out or it’s your job.’”

“Well, there’s a president of the bank. There’s a board of directors. I’ll fill up the magazine of the rifle and go into the bank.”

The driver said, “Fellow was telling me the bank gets orders from the East. The orders were, ‘Make the land show profit or we’ll close you up.’”

74. JOHN STEINBECK, *THE GRAPES OF WRATH* 45-46 (1939).

"But where does it stop? Who can we shoot? I don't aim to starve to death before I kill the man that's starving me."

"I don't know. Maybe there's nobody to shoot. Maybe the thing isn't men at all. Maybe, like you said, the property's doing it. Anyway I told you my orders."

"I got to figure," the tenant said. "We all got to figure. There's some way to stop this. It's not like lightening or earthquakes. We've got a bad thing made by men, and by God that's something we can change."⁷⁵

There is a disturbing paradox here. The agents of the corporation feel compelled to engage in morally objectionable conduct to serve the corporation, yet the "corporation" doesn't really exist apart from its agents. Authorities on agency law make clear that "[t]oday, most of the world's work is performed by agents,"⁷⁶ while at the same time "a corporate body can only act by agents."⁷⁷ This creates a vicious circle of endless agents trying to further the interests of an invisible principal.⁷⁸ The whole process borders on idolatry, creating an artificial entity and then claiming that the entity has commanded one to act in a certain way. This would be humorous if it didn't lead to man-made disasters for which no one is willing to assume responsibility.

In addition to the size factor, the recent scandals involved a diffuse causal chain between the fraudulent acts and their ultimate effects on third parties. When Professor Mitchell cites egregious examples of misconduct in *Corporate Irresponsibility*⁷⁹ (such as mass layoffs, clandestine dumping of toxic waste, and automobile manufacturers designing unsafe cars to save a few pennies), he suggests that such misconduct is possible only because the corporate managers never have to face their victims. In other words, their decisions are so heavily mediated that they become disowned. In this way, a corporate insider can justify cooking the books or burying hazardous waste as something that *the corporation* is doing and that cannot be traced back to him personally. Philosopher John Laches captured this wonderfully:

75. *Id.* at 51-52.

76. HAROLD GILL REUSCHLEIN & WILLIAM A. GREGORY, *THE LAW OF AGENCY AND PARTNERSHIP* 3 (2d ed. 1990).

77. 2 WILLIAM MEADE FLETCHER ET AL., *FLETCHER CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS* § 275 (perm. ed., rev. vol. 1998).

78. This was the situation parodied by Kafka in a short parable entitled *Couriers*:

They were offered the choice between becoming kings or the couriers of kings. The way children would, they all wanted to be couriers. Therefore there are only couriers who hurry about the world, shouting to each other — since there are no kings — messages that have become meaningless. They would like to put an end to this miserable life of theirs but they dare not because of their oaths of service.

FRANZ KAFKA, *THE BASIC KAFKA* 185 (1979).

79. MITCHELL, *supra* note 8.

With the consequences out of view, people can be parties to the most abhorrent acts without ever raising the question of their own role and responsibility. Wage earners who insert the fuse in bombs can then view their activity as but a series of repetitive motions performed for a living. Railroad workers who take trainloads of prisoners to extermination camps can think of themselves as simply providing transportation. . . . It is no cop-out to think oneself blameless and condemn society. It is the natural result of large-scale mediation which inevitably leads to monstrous ignorance.⁸⁰

In an economic system with an advanced division of labor, every project is collective and no one is ultimately responsible. The executives appointed by the board of directors claim to be driven by the need to show a profit to the shareholders, the middle-managers are merely doing what the executives tell them to do, the workers are merely following orders from the middle-managers, and the lawyers and bankers are merely giving professional advice while disclaiming responsibility for their client's behavior. The collective nature of the project seduces individuals into a strange feeling of power without responsibility.⁸¹ In a recent interview, a former trader at Enron explained that the sham transactions were concocted in an isolated bubble inside Enron headquarters, where analysts "worked late into the night massaging numbers" and "flipping millions a day."⁸² When he was inside this bubble, the young man thought to himself, "What's not to believe?"⁸³ Only after he was fired did he realize that his life at Enron "was about pumping hydrocarbons into the atmosphere and raping people on deals."⁸⁴ As of this writing, a full two years after the Enron scandal was made public, none of the central figures (including Chairman and CEO Kenneth Lay, CFO Andrew Fastow, and President Jeffrey Skilling) has accepted a shred of responsibility.⁸⁵

80. JOHN LACHS, *RESPONSIBILITY AND THE INDIVIDUAL IN MODERN SOCIETY* 13 (1981).

81. This was first noted by sociologist Gustav Le Bon: "The individual forming part of a group acquires, solely from numerical considerations, a sentiment of invincible power which allows him to yield to instincts which, had he been alone, he would perforce have kept under restraint. He will be the less disposed to check himself, from the consideration that, a group being anonymous and in consequence irresponsible, the sentiment of responsibility which always controls individuals disappears entirely." *Quoted in SIGMUND FREUD, GROUP PSYCHOLOGY AND THE ANALYSIS OF THE EGO* 6 (1959).

82. See Charles Bowden, *Caught in the Dream of Enron*, *GENTLEMAN'S Q.*, June 2002, at 217, 219-220.

83. *Id.* at 220.

84. *Id.* at 221.

85. The *group* dynamic in all of the corporate scandals brings to mind the Cabaret joke from Berlin in the 1930s: "'Show me one Nazi.' 'What do you mean? Here is a whole room full of Nazis.' 'Yes, but show me *one* Nazi.'" Nevitt Sanford & Craig Comstock, *Sanctions for Evil*, in *SANCTIONS FOR EVIL: SOURCES OF SOCIAL DESTRUCTIVENESS* 1, 3 (Nevitt Sanford & Craig Comstock eds., 1971). In other words, the recent scandals did not involve silent embezzlement by

The nearest parallel to this suspension of individual conscience in service of a vague institutional imperative can be found in times of war, a point that can be seen when comparing the following quotes, the first from an author commenting on the managers at A.H. Robins who marketed the dangerous Dalkon Shield, and the second from George Orwell's reflections during World War II:

The human being who would not harm you on an individual, face-to-face basis, who is charitable, civic-minded, loving and devout, will wound or kill you from behind the corporate veil.⁸⁶

As I write, highly civilised human beings are flying overhead, trying to kill me. They do not feel any enmity against me as an individual, nor I against them. They are only "doing their duty," as the saying goes. Most of them, I have no doubt, are kind-hearted law abiding men who would never dream of committing murder in private life.⁸⁷

In this light, the congressional hearings into the Enron and WorldCom scandals were oddly reminiscent of the Nuremberg Trials, with the defendants proclaiming that they were merely following orders and doing their duty as good corporate soldiers.

Reporting on the trial of Nazi mastermind Adolph Eichmann, philosopher Hannah Arendt proclaimed that Eichmann illustrated the "banality of evil," the capacity of ordinary bureaucrats to participate in a mass scheme of injustice and then blame the institution instead of accepting personal responsibility.⁸⁸ In modern institutions, whether corporations like Enron or accounting firms like Arthur Andersen, thousands of seemingly normal persons have restricted themselves to instrumental rationality and cannot see beyond the immediate intra-firm consequences of their actions. Arendt's term "banal" seems appropriate here, since the executives accused of wrongdoing tend to be conservative upper-middle class white males, a group that is hardly ever considered a threat to society. Arendt's thesis about the banality of evil remains controversial because most people prefer to see immorality as a breakdown in *individual* psychology,⁸⁹ but Arendt makes the more

a single disaffected employee, but collective action by corporate insiders acting together with attorneys, consultants, and financial institutions.

86. MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALCON SHIELD* (1985).

87. George Orwell, *England Your England*, A COLLECTION OF ESSAYS 257 (1954).

88. HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* (1964). Despite his role in the mass deportation and extermination of Jews in Nazi Germany, Eichmann insisted that, "I sat at my desk and did my work." *Quoted in* PETER PAPADATOS, *THE EICHMANN TRIAL* 29 (1964).

89. *See* T.W. ADORNO ET AL., *THE AUTHORITARIAN PERSONALITY* 1 (Max Horkheimer ed., 1950) (focusing on the "*potentially fascist* individual, one whose structure is such as to render him particularly susceptible to anti-democratic propaganda"). By contrast, the Israeli psychiatrist

troubling suggestion that cruelty is *systemic*, that certain types of social arrangements and institutions drive ordinary people into monstrous crimes. People are easily drawn into immoral systems because they are asked to perform only a narrow function within the system: each act, considered alone, does not cause an immediate harm. In the Enron case, a single fraudulent transaction was the joint product of hundreds of executives, consultants, lawyers, and accountants — each performing a rather innocent part of the whole (setting up a corporation, rendering tax advice, making a few stock trades), yet the cumulative effect was to defraud investors, bankrupt the company, rock the financial markets, and destroy thousands of people's lives. The key factors here are distance and mediation. Just as it is easier to kill someone by pushing a button than in hand-to-hand combat, it is easier to defraud consumers and investors, devastate a community, or dump pollution by approving a business plan in a boardroom. Whereas a small business owner with a handful of employees has to come face-to-face with the specific individuals whom he lays off, the CEO of a large company can fire thousands of people with a single email message, then hire security guards to clear the discarded workers out of the building.

This depiction of innocent men bandied about by economic forces seems to resonate in real-world accounts of disastrous corporate blunders. Consider the Corvair, a General Motors car that was produced and marketed to the public despite evidence that it was unsafe (several GM managers had family members or friends who were injured in Corvairs). A memoir of the debacle by former executive John De Lorean makes clear that the system overpowered the individuals:

There wasn't a man in top GM management who had anything to do with the Corvair who would *purposely* build a car that he knew would hurt or kill people. But, as part of the management team pushing for increased sales and profits, each gave his approval to decisions which produced the car in the face of serious doubts that were raised about its safety. . . . The system has a different morality as a group than the people do as individuals. . . . Morality has to do with people. If an action is viewed primarily from the perspective of its effect on people, it is put into the moral realm. Business in America, however, is impersonal.⁹⁰

The behavior of these men was eminently rational in the sense of following a business calculus, quantifying the various options, arranging for

assigned to examine Adolf Eichmann reportedly stated that, "This man is entirely normal . . . more normal than I feel myself after this examination." *Quoted in PAPADATOS, supra* note 88, at 28.

90. John De Lorean & J. Patrick Wright, *How Moral Men Make Immoral Decisions — A Look inside GM*, in *THE BIG BUSINESS READER* 36, 38-43 (Mark Green & Robert Massie, Jr. eds., 1980).

production and marketing, and performing other tasks necessary to bring the car to market. These were successful, ambitious, clear-eyed, respectable, well-dressed men who lived in the suburbs, raised kids, went to church, served on the PTA, and so forth, yet they were collectively involved in producing a death machine.

The notion of willing "agents" who do what they are told within a large institution brings to mind the work of Stanley Milgram, who conducted experiments on authority at Yale University in the early 1960s. Milgram brought in people off the street to participate in experiments where they were asked to administer electric shocks to innocent victims as part of an experiment on learning (the shocks were fake; the victims were actors).⁹¹ In the standard version of the experiment, the person off the street was asked to be a "teacher" who administered a series of increasingly powerful shocks to a "learner" under the direction of an "experimenter" in an official-looking lab coat. For each wrong answer, the "teacher" would give an increasingly strong electric shock to the "learner" by flipping a switch on an apparatus connected to electrodes strapped to the "learner." Milgram purposely designed the experiment so that the victim gave consistently wrong answers, thereby presenting the "teacher" with the option of giving increasing shocks or breaking off the experiment. When the "teacher" showed signs of hesitation at the severity of the shocks (and the resulting screams and protestations), the experimenter would prod the teacher by saying things like, "Please continue . . . The experiment requires that you continue . . . You have no other choice, you *must* go on."⁹² Milgram found that an amazing percentage of ordinary Americans from all walks of life administered the shocks with increasing voltages, even to the point of inflicting screaming pain and heart attacks. Interestingly, Milgram found that people were loath to administer the shocks if the experiment was slightly modified to require holding the subject's hand onto the "electric" device; they found it much easier to administer shocks from behind a partition, and it was easiest of all when the teacher performed a subsidiary action that caused another person to actually flip the switch.⁹³ Milgram's conclusion from this variation of the experiment is especially chilling:

Any competent manager of a destructive bureaucratic system can arrange his personnel so that only the most callous and obtuse are directly involved in violence. The greater part of the personnel can

91. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY: AN EXPERIMENTAL VIEW* (1974).

92. *Id.* at 21 (emphasis in original).

93. Milgram pointed out that diffusion of the causal chain within the experiment seemed to approximate the conditions of modern society: "Thus there is a fragmentation of the total human act; no one man decides to carry out the evil act and is confronted with its consequences. The person who assumes full responsibility for the act has evaporated." *Id.* at 11.

consist of men and women who, by virtue of their distance from the actual acts of brutality, will feel little strain in their performance of supportive functions. They will feel doubly absolved from responsibility. First, legitimate authority has given full warrant for their actions. Second, they have not themselves committed brutal physical acts.⁹⁴

In other words, cruelty is inversely correlated with proximity to the victim.⁹⁵

According to Milgram, the key to the subjects' behavior is that they were placed in an "agentic state," *i.e.*, converted into the agents of some larger institution such as "Yale University" or, more abstractly, "Advancement of Science." As long as the individual perceives the authority to be legitimate, she focuses only on the immediate task at hand and invests all of her shame and pride in how well she performs the narrow task, regardless of the larger consequences of the entire project. In the same way, the engineers who designed mobile gas chambers for the Nazis showed little remorse over the murder of innocents and spent most of their time apologizing for the inefficiencies of their designs.⁹⁶ To Milgram's credit, he saw that this occurs in every situation where authority is perceived as legitimate and the causal chain is diffuse, a situation found in every large business institution — banks, corporations, funds, law firms, brokerage houses, and accounting firms.

Had Milgram studied law, he would have realized that the "agentic state" has a strong resonance in corporate law because agency is the cell form of business organization. A sole proprietor operates through agents, partners are deemed agents for each other, and corporations can act only through their agents. Viewed in this light, Milgram's work deserves attention from legal scholars because it suggests that the recent corporate scandals are part of a larger problem of agency within totalizing institutions (whether in corporate form or not) that tap into the hidden fascism in all of us. This is not solely a *corporate* problem,⁹⁷

94. *Id.* at 122.

95. See ZYGMUNT BAUMAN, *MODERNITY AND THE HOLOCAUST* 155 (1989) ("It is difficult to harm a person we touch. It is somewhat easier to afflict pain upon a person we only see at a distance. It is still easier in the case of a person we only hear. It is quite easy to be cruel toward a person we neither hear nor see."). See also Andrew Kimbrell, *Confronting Evil*, *TIKKUN MAGAZINE*, Nov./Dec. 2001, available at 2001 WL 10587414, at *5 ("I have been in many corporate law firms and boardrooms and have yet to see any 'high fives' or hear shouts of satisfaction at the deaths, injuries, or crimes against nature that these organizations cause. But that of course simply underscores the problem; the corporation is fully distanced in time and space from its actions.").

96. BAUMAN, *supra* note 95, at 195.

97. See JENSEN, *supra* note 51, at 442 ("Corporations don't cause destruction; they are tools to facilitate it, legalize it, rationalize it, make it respectable."). It is worth remembering that acts of institutionalized, impersonal evil can be found outside the corporate context (for example, in the

and therefore it cannot be wholly solved with increased corporate regulations of the type enacted in the wake of the corporate scandals.⁹⁸ The real evil lies in *institutions* of a certain size that can dwarf the individual and reduce him to an agentic state of submission while distancing him from the effects of his actions.

The final factor at work in the recent scandals is the involvement of mid-level enablers who are seduced by the power and prestige of large moneymaking institutions. Typically these enablers are young people who lack the power to resist orders. Consider the story of a young trader at Enron who is described as “straight, hardworking, ambitious, polite”⁹⁹:

He doesn't even understand some of the numbers. But, then, how could he? He's only been on the job a short while. He'll fake it; he'll win. He tells himself, I'm a young kid, two years out of college. I'm living inside the only thing I understand, the model, that's how business is done. . . . Here is how it often works: you are never asked to commit a crime; you are asked to make the model pay out. You are never asked to lie; you are asked to structure. Your work eighty to ninety hours a week, you never rest, you have no life beyond your models. You produce. What's not to believe? You are in the hottest company in the universe, whatever the hell it is really about.¹⁰⁰

Here we reach the deepest cause of corporate wrongdoing, namely that our economy is built upon a massive labor pool of desperate people who lack the educational and financial wherewithal to refuse orders in the workplace. These people are thrown into a brutal and competitive search for work, with a desperate need to make money to service the massive debt loads that most young people are carrying. They struggle to find work and spend their days haunted by the fear of losing a job that was so hard to get in the first place. We are talking about *millions* of passive and unreflective people who have absorbed the overriding cultural message that success is ultimately measured in dollars and cents. They constitute what social critic Pierre Bourdieu called a “reserve army of employees rendered docile.”¹⁰¹

military) and even in non-capitalist systems such as Communist Russia and China, where otherwise law-abiding people participated in mass crimes in the name of obedience to the State.

98. For example, nothing in the Sarbanes-Oxley Act forces executives to come face-to-face with the victims of corporate fraud and immorality. See Sarbanes-Oxley Act of 2002, 15 U.S.C. §§ 7201-7266 (2002) (establishing a Public Company Accounting Oversight Board to oversee the audits of public companies, requiring executives to certify financial reports, and mandating the adoption of ethical codes by public companies).

99. See Bowden, *supra* note 82, at 217, 220.

100. *Id.*

101. Pierre Bourdieu, *Neoliberalism, The Utopia (Becoming a Reality) of Unlimited Exploitation*, in *ACTS OF RESISTANCE: AGAINST THE TYRANNY OF THE MARKET* 94 (Richard Nice trans. 1999).

This reserve army exists at all levels of the hierarchy, even at the higher levels, especially among managers. The ultimate foundation of the entire economic order placed under the sign of freedom is in effect the structural violence of unemployment, of the insecurity of job tenure and the menace of layoff that it implies.¹⁰²

In other words, our precarious economy creates workers who are ripe for assuming what Milgram called the “agentic state” of blind obedience to any authority perceived as legitimate.¹⁰³ It goes without saying that any large institution oriented toward money-making (corporations, investment banks, law firms, and so forth) are considered *de facto* legitimate precisely because they make money.¹⁰⁴ This adds up to a frightening picture: Most people in this country are easily recruited into large business institutions where they will happily assume a small role within a larger causal chain whose end result is massive fraud and illegality.

The books under consideration here raise the important question of whether we should view the recent corporate scandals through the lens of individual greed or by questioning the legal structure of the American corporation. However, if I am correct, we must look even deeper. At some point, we must come to grips with an underlying economic and cultural system that effortlessly transforms ordinary people into agents of destruction when they step inside large business institutions.

102. *Id.* at 98.

103. See Maury Silver & Daniel Geller, *On The Irrelevance of Evil: The Organization and Individual Action*, 34 J. SOC. ISSUES 125, 131 (1978) (“The fragmentation of action and the need for job security explain the ease with which individuals will accept almost any organizational legitimation.”). One presumes that the converse of this formulation is equally true, that is, people who have job security (and a social safety net) are less likely to obey orders blindly.

104. Marx recognized how money fosters the veneer of legitimacy: “Money is the supreme good, therefore its possessor is good. Money, besides, saves me the trouble of being dishonest: I am therefore presumed honest. I am *brainless*, but money is the *real brain* of all things and how then should its possessor be brainless?” Karl Marx, *Economic and Philosophical Manuscripts of 1844*, in 3 KARL MARX — FREDERICK ENGELS COLLECTED WORKS 324 (1975).