

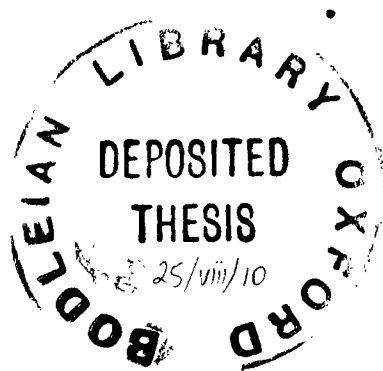
**The Theology of the Corporation:
*Sources and History of the Corporate
Relation in Christian Tradition***

By

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Abstract
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This essay presents evidence that the institution of the corporation has its origins and its main developmental 'epochs' in Judaeo-Christian theology. The notion of the *nahala* as the institutional symbol of the Covenant between YHWH and Israel is a primal example of the corporate relationship in its creation of an identity independent of its members, its demand for radical accountability on the part of its members, and in its provision of immunity for those who act in its name. On the basis of the same Covenant, St. Paul transforms an ancillary aspect of Roman Law, the *peculium*, into the central relationship of the Christian world through its implicit use as the institutional background to the concept of the Body of Christ. The exceptional nature of this relationship allows the medieval Franciscans and the papal curia to create what had been lacking in Roman Law, an institution which can own property but which cannot be owned. This relationship is subsequently theorized as the Eternal Covenant by Reformed theologians and successfully tested in one of the greatest theological/social experiments ever recorded, the 17th century settlement of North America. The alternative 'secular' explanation of the corporation provided by 19th century legal philosophy relies implicitly on the theological foundations of the corporation and remains incoherent without these foundations. The theological history of the corporation was recovered in the findings of 20th century social scientists, who also identified corporate finance as the central corporate activity in line with its Levitical origins. Although the law of the corporation is secular, the way in which this law was made a central component of modern life is theological. Without a recovery

of this theological context, the corporation is likely to continue as a serious social problem in need of severe constraint

Extended Abstract

The thesis of this essay is that the modern corporation is, in its origins and its ontology, a unique product of Judaeo-Christian religious doctrine and liturgical practice, and cannot be entirely understood, in its operation or in law, apart from its theological foundations. This thesis has been raised in a variety of formulations elsewhere, notably: culturally, by Chateaubriand [1858 (1802)], legally, by Maitland [1893], and ethically, by Stackhouse [1993, 1995]. However, I know of no scholar who has pursued it beyond its bare assertion. I offer the following argument in its support:

1. The modern corporation is a relationship. This relationship appears phenomenologically as an identity (name), in fact and in law. This identity provides immunity to its members who act in its name and in return demands accountability for those actions in terms of the criterion by which action is taken and justified. The public formulation and justification of these criteria constitute the fundamental purpose (or good) of the corporation. The corporation is ill-described by the disciplinary theories of economics, sociology, law, decision science, and systems science which distort this fundamental purpose. I propose an analytic approach which hypothesizes the corporation as an eschatological relationship of submission among its members in a search for the ground of present reality in the Spirit and its expectation of the future reality as the Kingdom of God.

2. There is strong evidence that the central elements of modern corporate association are the dogmatic and liturgical legacy of the Covenant, the biblical relationship

between YHWH and Israel. The Covenant does not fit any of the associational categories available in the ancient world. It is a unique process of mutual submission which is symbolized by a 'third', a concrete representation of the relationship itself, the interests of which are superior to the parties in the relationship. This 'third' provides identity, offers immunity for those who act in its name and demands radical accountability, thus establishing the primal corporate relationship. The apotheosis of this symbology is the *nahala* of *eretz Israel*, the space inhabited jointly by YHWH and Israel in which Israel searches for YHWH until it is eschatologically joined with Him in a society of righteousness. The *nahala*, like the modern corporation, is not straightforwardly owned by Israel and cannot be bought or sold. Israel is required to articulate the value of its use of the *nahala* in its Levitical practices of worship, a prototype of corporate management.

3. The corporate tradition is continued in the writings of St. Paul, particularly in his first letter to the Corinthians in which he introduces his concept of the Body of Christ. The Body, while based on the principles of the Covenant, dramatically shifts its symbology. For Paul, Christ becomes the inheritance, the new *nahala* of the faithful. This symbology is not fully intelligible in Semitic or Greek cultural models. However, there is textual evidence that Paul could be employing the well-known, but legally peripheral, Roman legal institution of the *peculium* as a cultural symbol of the Body. In the *peculium*, the *paterfamilias* cedes a portion of his estate temporarily to a member of the family; this portion is subsequently returned to the father with any 'increase' realized through commercial trade. As a social and legal institution, the *peculium* was a commonplace of contemporary Roman life and would have been well-known to Paul and his Corinthian audience, and may appear in other parts of the

New Testament. The *peculium* is consistent with the *nahala* in several key aspects but it also ‘radicalizes’ the *nahala* by including the ideas of the strict obedience to patriarchal authority within the Roman family and of ‘return’ to the father. Paul’s implicit use of the *peculium* provides the link between the Hebrew and modern forms of the corporation in its technical separation of *dominium* (ownership) and *usufructus* (benefit).

4. The theological distinctions inherent in the *nahala/peculium* are formally introduced in 13th century corporate civil law through a series of legal judgments that are a consequence of political and spiritual ambitions within the Church. With the Church’s claim to ultimate political authority, there arose a running legal battle between the papal curia and the emperor, a central feature of which was the legal status of the Church as a consequence of the 4th century edict of toleration. This order appeared to make the Church a creation of imperial authority. Papal policy was clearly to resist this view. The Augustinian theory of pure identity, derived from Trinitarian theology, provided an alternative account of the source of the Church as a corporation, a subsistent relation involving divine participation but independent of its individual human members. The opportunity for establishing a legal entity which reflected this theological concept arose with the Franciscan ambition to establish institutional poverty. In a series of curial rulings over the period of a century, a legal entity which could own but which could not be owned, and which was not dependent on stable membership was created through the progressive separation of *dominium* and *usufructus* in the manner of the *peculium*.

5. The first large-scale experience of unrestricted corporate development occurs in the Congregationalist settlement of New England during the mid-17th century. Exploiting the political vacuum created by English constitutional issues, settlers revived the covenantal traditions of the *peculium*, and adopted the Reformist theology of the Eternal Covenant as their model for political and social as well as ecclesiastical development. In this theology, formulated most completely by Johannes Cocceius, the relationship between Father and Son is not only an aspect of the Godhead but the source of all human political power and, therefore, a constitutional component of human society. Using this theology as an explicit guide, the immigrants successfully created an entire society based upon the principle of mutual submission. This society lasted for half a century and provided the legal and social foundation for the explosive growth of corporate association a century later.

6. In the wake of the French Revolution, the perennial issues about what constitutes the proper form of society became acute. How could the perceived excesses of individualism be curbed in the interests of a totality? How was the individual connected with the state? What constitutes a people? The corporate thought of the 19th century was philosophical not theological. It therefore sought answers which did not involve the divine. Hegel and his followers in political philosophy, notably Otto von Gierke, developed an ‘organic’ theory of the corporation as the political link between individual and the state, the latter being the ‘corporation of corporations’. These 19th century ‘organicists’ denied the ‘peculiar’ (*peculium*-based) character of the corporation and interpreted it instead as a ‘peculiarity’ (accidental oddity) of Christian culture with its roots in the German *Volk*. Based on questionable historical research, Idealist philosophy obscured and distorted the tradition of the corporate

nahala/peculium, turning its symbology into a symbolatry and thus misdirecting research for over a century.

7. The theological origins of the corporation were re-discovered in economic, sociological, and legal research of the early 20th century. Corporate proliferation had produced a profound intellectual crisis by the end of the 19th century, revealing the deficiency of contemporary thought about the corporation. The corporation had become a threat to both political liberals and philosophical conservatives, and was perceived as subversive even of national governments. This crisis is articulated initially by Thorstein Veblen in his 'institutional economics'. Subsequent landmark research by Berle and Means uncovered not just the real state of corporate development but the continuity of ancient biblical precedents on which the corporation is based in the separation of ownership and benefit. This research further demonstrates that the central and unavoidable issue of Corporate Finance is created by the theological 'structure' of the corporate interests as *dominium* and *usufructus*. This issue is not incidental or a problem to be corrected but an essential part of the corporate way of being, a fact of corporate life for corporate managers, other corporate members and for corporate regulators.

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8. The recent resurgence in hostility to the corporation is understandable given the level of historical and contemporary corporate misbehaviour. However this abuse occurs because of the separation of corporate legality (the distinction between *dominium* and *usufructus*) from the theological context (of identity, accountability and immunity) in which the corporation was created. Neither the reform nor the elimination of the corporation is likely to deliver an improvement in social

relationships without an acknowledgement of this condition by corporate managers, corporate regulators, corporate members, and corporate customers.

Chapter 1: Methodological Prologue

Quod malum in aliquo bono fundatur.

Augustine of Hippo,
Confessions VII

There is at present no theology of the corporation.¹ That there needs to be one, I consider self-evident. The corporation, by accounts of those dependent upon it and those affected by it, that is, most of us, is out of control in spiritual as well as worldly terms.² It has been characterized as the “all-embracing economic phenomenon of the 20th century.”³ Yet to many it seems to meet none but the most venal of human desires: greed, dominance, power, worldly standing, evasion of guilt and responsibility.⁴

My thesis is that the modern corporation, in both its historical origins and its ontology, is a unique product of Judaeo-Christian religious doctrine and liturgical practice, and that it cannot be entirely understood, in practice or in law, apart from its theological foundations. This thesis has been suggested in a variety of formulations elsewhere, in particular: culturally, by Chateaubriand [1858 (1802)], legally, by Maitland [1893], and ethically, by Stackhouse [1993, 1995, Gill [2001]]. O’Donovan makes a correlated point that: “...within every political society [and the corporation certainly is a political society] there occurs implicitly an act of worship of divine rule.”⁵ The thesis, remarkably, is also implicitly made by the business sociologists Ells and Walton when they conclude: “The question [of the significance of the corporation] cannot be handled from the exclusively economic or technicist [*sic*] point

¹ Cf. Stackhouse [1995 p501, 502].

² Cf. Stackhouse [1995 p505]; also Schrader [1993 p1].

³ Eells and Walton [1961 p13].

⁴ Cf. for example: *The Economist*, March 27, 1993, 7, ‘A Survey of Multinationals: Everybody’s Favourite Monsters’.

⁵ O’Donovan [1996 p49].

of view. Nor, would it appear, can it be resolved from a strictly humanistic approach.”⁶ It is also plausibly implied by Kaysen in his several references to the ‘soulful corporation’.⁷ The Dominican theologian, Yves Congar, perhaps come closest to an explication of the basic proposition when he states:

*In the corporative idea...the principle of unity is not so much rule by a territorial authority as the relation of many diverse parts with a spiritual principle of order.*⁸

I believe that this is a central insight into the nature of the corporation. However, Congar took the point no further in terms of secular application and, despite the various allusions mentioned above, I know of no scholar who has pursued the thesis beyond its bare assertion.

My thesis is neither an attack upon nor an *apologia* for the corporation as it exists, nor a statement of how the corporation could be in an ideal world, but an explanation of this institution in light of its history and the theological elements that are part of this history. The thesis presumes the capacity of theology “to display the intelligibility of political institutions and traditions”, as O’Donovan puts it, or, in the parallel conception of Dooyeweerd, to reveal “the underlying ontic order”.⁹

O’Donovan provides the specific entry point for my investigation:

*Recovery of theological description enables us to understand not only what the goods of our institutions and traditions are, but why and how those goods are limited and corruptible, and to what corresponding errors they have made us liable.*¹⁰

⁶ Eells and Walton [1961 p12].

⁷ Kaysen [1957].

⁸ Congar [1957 p34].

⁹ Cf. O’Donovan [2005 pxiii]. Dooyeweerd [1986 p18]. Also cf. Demant [1947 p11] and Thomas Aquinas, *Summa, De Malo Q5, a.1*

¹⁰ O’Donovan [Ibid pxiv]. Cf. also Stackhouse, cited in Gill [2001 p228].

It is, I claim, precisely the matter of 'goods' that is the central issue of the corporation. What are the goods that can be associated with the corporation? Are these goods recognized adequately by existing conceptions of the corporation? How does theology relate to these conceptions? To prematurely define these goods would be to destroy our ability to recover them in history or to foster them in the future.

Therefore the first methodological question with which this inquiry must deal is: How can the issue of the goods associated with the corporation be held open sufficiently so that we may judge which goods have been available, even if generally unrecognized as such, in its history?

1. The recognition and recovery of the historical goods available in and through the corporation demand in the first instance a credible ontological theory of the corporation.

The corporation in modern society does an uncountable number of things in a diversity of organizational and legal forms. It is the favoured form of commercial and financial enterprise both large and small. In that capacity it may be perceived as a tool of business in every variant of this occupation that imagination has reached. But the corporation is not restricted to such 'gainful' enterprise. It is also a common mode of association for almost every form of collective human effort. Charitable institutions, academic societies, religious orders and congregations, social clubs, and even governments today employ corporate association to pursue their distinctive, and often distinctly non-commercial, ends. In the past, the corporation has been linked to craft associations, town governments, parish churches, royal monopolies and early international enterprise. It is the sheer adaptability of the corporation that makes its

history and its inherent character so difficult to pin down. It *does* almost anything; and it can take on an equally varied appearances. If we define the corporation in terms of what it does or what it looks like at a particular moment, therefore, there is the likelihood of an indefinite number of competing histories and associated explanations of the institution, all claiming to be *the* corporate history and *the* explanation of the corporate good. But no arbitrary designation of structural or functional characteristics is sufficient to define the corporation. To presume otherwise is to run the risk of the *genetic fallacy*: the confusion of characteristics of the species with the species itself.

The problem of the genetic fallacy is particularly troublesome when considering what might be generally called the history of institutions, like the corporation, which are the product not just of ideas, but of social interactions that accrete and deposit layers of institutional detritus in which ideas, often contradictory, become entombed. In trying to trace out the connection from one generation of institutional developments to another, there is no mental genome or extra-linguistic unit-idea which can be isolated and compared with its predecessors or successors. The intellectual endeavour of 'philosophy' for example has a cultural meaning in the 5th century BCE that is quite different from the meaning today. A modern academic philosopher may feel an historical affinity with Socrates, but he shares few of the latter's institutional relationships or vulnerabilities. Similarly, there is no clear chain of institutional evolution of the 'church' which unambiguously links together successive manifestations of a corporate institution. Is, for example, the *ekklesia* described in the New Testament the forbear of the Roman Catholic Church because, perhaps, of a continuity of authority in the Bishop of Rome? Or is the authentic institution today the

dispersed and perhaps only nominally related churches of American Protestantism, precisely because of their congregational emphasis? Could both be considered valid successors? Or neither?

Not even in legal terms is institutional continuity clear. Is the 19th century decision of the United States Supreme Court that the corporation is an 'artificial person' protected by the 14th Amendment of the Constitution against enslavement an authentic articulation of the corporation as it really is, reinforcing for example the independent identity involved in corporate association? Or is it a political aberration designed to promote commercial advantage? Arguments are made to support both views. The newly appointed Justice to the United States Supreme Court considers that since the law makes the institution, the law can un-make it.¹¹ But with what rationale? Ultimately the law itself begs the question of institutional authenticity since it too evolves with no clear logic. Like any cultural stream, at various times the law meanders, becomes stagnant, reverses direction, disappears underground, and occasionally gets poisoned.

There are two specific methodological errors which have most often promoted the genetic fallacy. The first of these errors is the selection of 'accidental' (and incidental) structural characteristics to define the phenomenon in question: bare facts without their *milieu* and without an apparent critical judgment regarding their choice from among other facts. This error identifies certain corporate 'traits' as central and then searches for similar traits in historical records. Applied to the case at hand, the error causes us to be trapped in what a corporation *looks like* at any moment – its

¹¹ Cf. Jess Bravin, "Sotomajor Issues Challenge to a Century of Corporate Law", *Wall Street Journal* 17 September 2009, pA19.

organizational structure, its size, its legal status and its 'typical' descriptive features.

As Spaemann notes: "Everything we experience reminds us of something else in some respect."¹² When we conduct an historical analysis or attempt to trace the history of an idea or an institution, we are confronted with just this problem. And the things we are reminded of may be grossly misleading. The tricks which even biological evolution plays with progeny destroy the certainty of finding the face of the infant in the portrait of the ancestor. And the evolution of institutions is at least as complicated as that of biological organisms.

The most basic form of the genetic fallacy is that of vocabulary. The name 'corporation' has been used to relate the modern institution to the ancient Roman *corporatio*, suggesting, primarily on the basis of etymology, that the former is an evolutionary product of the latter.¹³ The idea of the modern corporation is not necessarily contained in the Latin word and the word itself certainly does not refer historically to the institution we know today. The designation 'corporation' (and its various modern equivalents) is neither necessary nor sufficient to identify the corporation historically in law. As I will show in subsequent chapters, the classical Roman legal vocabulary could not express the concept of today's corporation because Roman society knew of no such concept or practice. The methodological question is not therefore primarily linguistic. Rather the issue is one of historical sociology: Is there anything in history that in substance corresponds to the term 'corporation' in its basic social dynamics? To answer the latter we need to appreciate the phenomenon not just name it. What is the *intrinsic* logic or connection among institutional facts as

¹² Spaemann [1989 p124].

¹³ Cf. French [1992 p134ff] who finds the origin of the modern corporation, as *corporatio*, in the *Lex Julia* of 57 BCE.

they appear? Are other facts suggested by this logic, facts which may not be discernable with the investigative tools of the past?

The problem of accidental characteristics goes beyond the linguistic of course: any structural characteristics may or may not be essential to the phenomenon in question. So other typical corporate features (limited liability, legal recognition, immunity of directors, legal independence), as isolated facts, may or may not be an essential part of the corporation. As Donaldson notes:

These elementary characteristics [indefinite life, legal responsibility, and limited liability] ...are often taken as the sine qua non of corporate existence. Yet each of these characteristics was missing at one time or another in the corporation's history.¹⁴

Limited liability for example was not legally established until the late 19th century in Europe and North America.¹⁵ Even then it did not apply to all corporate entities. (The well-known American Express Company was incorporated but had unlimited liability until the mid-20th century). The choice of *any* characteristics therefore threatens to be arbitrary as well as misleading in historical analysis. An arbitrary choice allows one scholar, for example, to link medieval guilds with the modern corporation (both are frequently engaged in trade); while another links the same guilds to modern labour unions in direct opposition to the modern commercial corporation (guilds attempted to restrict trade, just as unions do, by controlling membership).¹⁶ Another scholar denies

¹⁴Donaldson [1982 pvii].

¹⁵ Some scholars make the case that limited liability arose from the desire of the (English) sovereign to limit losses to his investment in merchant companies. However it was a characteristic of continental corporations before those in England, which did not receive it until 1768. Cf. DuBois [1938].

¹⁶ Cf. Maitland [1911] and Hessen [1979]. The presumption that the corporation emerges from Roman *commercial* law is another example of the genetic fallacy. I will show in Chapters 3 and 6 that it, in all probability, emerges from Roman *family* law, which was co-opted by Canon Law and which carries on an independent Hebrew tradition. Stackhouse [1995 p503] hints at this possibility but offers no evidence. Sir Henry Maine makes the family law hypothesis but without argument. Cf. Maine [1861].

the descent of the corporation from chartered companies;¹⁷ while his opponent claims the chartered company as a direct ancestor of the modern corporation.¹⁸ Yet another popular writer finds not chartered companies but a species of exotic Florentine limited partnerships as the precursors of today's corporation – largely because he perceives both those partnerships and the corporation as embodying the social evil of 'corporatism'.¹⁹ The result is a sort of corporate fundamentalism, an insistence that one incidental characteristic of the corporation is the defining feature around which all else should align. The situation is not unlike that of Biblical fundamentalism in which selected Scriptural texts are separated from both their literary and historical contexts and thus are transformed into abstractions without spiritual force. Maurice Blondel summarizes the consequence, which is the same for dogmatic as it is for institutional research: "As a result of searching the facts, not for their real being, but for a narrow ideology, everything has been compromised."²⁰

A similar danger arises if one attempts to define the corporation historically in terms of its functionality, purpose, or role in society. What the corporation does *now* is considered as definitive – how it promotes itself, what 'value' it contributes through its presence, what other effects it has as a consequence of its operation in society. In the search for a satisfactory explanation of the current situation, the current role is projected into history to find its 'real' roots. The unwarranted presumption is that the functionality of the corporation is fixed, that it remains constant. This is the methodological assertion that the corporation exists throughout history in order to facilitate a specific purpose. By treating the corporation as the site of large-scale

¹⁷ Livermore [1935].

¹⁸ Micklethwait [2003].

¹⁹ Rushkoff [2009 p7].

²⁰ Blondel [1964 p232].

industrial activity, for example, one can trace the origins of IBM or General Electric, or Mitsubishi back to the organizational techniques used to construct the Egyptian pyramids and consequently show the advances made in corporate technique necessitated by sheer size of human endeavour.²¹ In suggesting, as another researcher does, that the role of the corporation is mainly that of concentration of finance,²² he can trace its origins to the Roman *fiscus* and its ‘tax-farming’ techniques and thereby provide an ‘explanation’ for the concentration of capital in corporate hands during the 19th century as the evolved form of this financial function.²³ This same *a priori* focus on finance, coupled with the notion of ‘competitive power’, however, allows another leading scholar to discover the origins of the corporation in the emerging European dynastic states of the early Middle Ages.²⁴ In contrast, another, by linking the corporation to liberal democratic politics, can claim it as a product of the American Revolution.²⁵ Yet another, by linking it to technological innovation, recognizes its birth only as late as the American railway expansion of the 1840’s.²⁶

The errors of structural similarity and functional stability become visible in the historical narrative told at or up to any point in history. Each age perceives different social and political forces as dominant and therefore perceives a distinctive causality, either as a causality of intention or a causality of mechanism. Having decided the dominant issue, historical research seeks out similar conditions and claims genetic relevance to the present circumstances. So in our current age the corporation is

²¹ Cf. Micklethwait [2003]; also Blough [1959 p7].

²² Cf. Hansmann [2002] for a typical modern legal/financial analysis. Financial concentration is a corporate role which is easily met by other means: Andrew Carnegie, for example, organized his massive steel holdings as a series of partnerships and until the 1980’s the most successful merchant/investment banks were partnerships.

²³ Cf. Goetzmann [2005].

²⁴ Veblen [1924 (1923) p22f]. Specifically, he finds the modern oil company to be the successor to the early European state.

²⁵ Novak [1988].

²⁶ Berle [1955] and Williamson [1981].

perceived as essentially a *commercial* undertaking which is determined in its function and role in society primarily by economic laws. However, there is no *a priori* reason to assign *any* single intention to corporate activity, commercial or otherwise.²⁷ This is what Blondel, in his analysis of the history of dogmatic ideas, refers to as the “substitution of scientific for real history.”²⁸ This is the projection of social roles mechanically from one period to another - a sort of temporal parochialism – that risks masking what might be different roles that are played at different times by the same institution and different forms that may indeed be the same in terms of functional dynamics.

Livermore sums up the methodological problem concisely:

*... [I]t is not sufficient merely to assemble an imposing array of pre-17th century forms of business organization, and to declare that the corporation of today rests upon one or another of the models so herded together. Nor is it any sounder approach to treat corporate evolution as linked closely with successive attempts by the political state to restrain or encourage the economic activity of citizens.*²⁹

What is required, therefore, even before analysis begins, is a theory of the corporation that can be tested historically, a theory not of what the corporation looks like or does but of what it *is*, an account of the way of being corporate, that is, a corporate ontology which is sufficiently descriptive to allow for confident tracking throughout history without prejudging what it might be doing or how the law, or politicians, might be distorting it at any particular time. Do the social sciences offer a plausible ontology of the corporation upon which to base such an historical analysis?

²⁷ Cf. Davis [v2 p261 et seq.]

²⁸ Blondel [op. cit. p238].

²⁹ Livermore [1939 p1].

2. The social sciences most directly concerned with the corporation do not provide a coherent explanation of how the corporation comes about or how it is maintained in existence.

Those disciplines that are most closely associated with the corporation – sociology, economics, legal and systems science, and decision-theory - each claim to provide a theory of the corporation. However, there is long-standing recognition that the disciplines tend merely to presume the existence of the corporation and then to impose their own disciplinary criteria onto the phenomenon, thus risking both forms of the genetic fallacy. Davis's view exposes the disciplinary problem at the start of the 20th century:

Political theory continues to contemplate placidly the sterile dualism of 'individual' and 'state'. The Law insists upon assimilating the fictional person of the corporation to the classic subject of rights and duties, the flesh and blood individual. Economics, disdaining even the word 'corporation' deals with the 'firm' as the incarnation of Adam Smith's Economic Man...Sociology has seen in the corporation...a significant subject of study [but] as a member of a larger class of ponderous, bureaucratic institutions in whose company the corporation is not comfortable. ”³⁰

Davis had yet to witness the development of management or decision sciences as specialized forms of corporate sociology. Nevertheless the situation had not improved with the arrival of this new knowledge. Over half a century later, in the opinion of the corporate sociologists, Ells and Walton:

It is widely recognized that the modern corporation has already run so far beyond the legal and economic rationalizations that seek to legitimize and explain it, that neither the scholar nor the executive can find a satisfactory vocabulary to articulate its essential meaning.³¹

³⁰Davis [1905 v1 pxvii].

³¹Ells and Walton [1961 p3].

This disciplinary confusion continued to the end of the 20th century. According to at least one philosopher involved in the corporate world:

We have[still] a number of competing and contradictory [disciplinary] frameworks within which different people and groups place the business corporation.³²

Are any of these frameworks useful for identifying the essential character of the corporation and its manifestation in history?

The problem confronted by the disciplines is precisely that of the good noted above. Each academic social discipline has its own conception of the good (value) through which it investigates the corporation. Each conception implies an ontology which is not established but simply presumed and then assessed against this good. Sociology, for example, generally considers the corporation as a nexus of relationships which is entirely in the service of individual components that are external to the corporation, the more socially accessible this nexus the better. Economics presumes, explicitly, that the corporation (as the economic 'firm') is a monolithic decision-maker with an existence that is contingent upon 'transactional efficiency'. Legal theory is split between two classical alternatives (and their variants), in terms largely set by 19th century philosophy, wherein the corporate 'whole' dominates its parts (Idealism) or the corporate components dominate the whole (Liberalism). Managerial 'decision theory' presumes, crucially, that the criteria of the good are supplied from a source external to the corporation, thereby entirely eliminating, *a priori*, a potentially important aspect of corporate being. Since there is no overarching rationale for the choice among these disciplinary descriptions of the corporation, they appear as simply arbitrary descriptions of the phenomenon. In fact, the tendency of each disciplinary

³²Schrader [1993 p4].

theory is to reduce the corporation to a temporary or merely nominal existence as I summarize here:

Economic theories

Economically speaking, the corporation is little more than a way stop on the road to perfect markets. The ‘standard’ ontology employed in economic science is that of ‘contract’ – a transactional relation of exchange.³³ Theoretically, in these terms, the corporation is an administrator of contracts between economically motivated parties. The corporation can (and should, economically speaking) exist only if the cost of making transactions through the corporate administration is lower (by some measure supplied by the economist) than that available in the market. However, only by making these contracts ‘biddable’ in an actual market could the corporation ensure itself of its own economic rationality. To do this, however, would inevitably reveal the economic inefficiency of the administration of contracts in which the corporation is involved: the market needs no such administration or its associated cost. According to classical micro-economic criteria of success, therefore, the corporation is bound to ultimately ‘outsource’ itself out of existence, with no thought about what else the corporation might provide.³⁴ It poses an ontology which is temporary and which will

³³ Cf. Coase [1937] as the classic text. This view is often presented as descriptive when it is patently prescriptive, for example, in Alchian & Demsetz [1972]: “[The corporation] has no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting between any two people ... to speak of managing, directing, or assigning workers to various tasks is a deceptive way of noting that the employer continually is involved in renegotiation of contracts on terms that must be acceptable to both parties.” Cf. also Williamson [1981].

³⁴ See for example Friedman [1970]. Friedman is a so-called ‘free marketeer’ except when it comes to the corporation, which, he believes can only accomplish its social function by pursuing an ill-defined concept of ‘profit’. The fact that his theory of liberal economics is fundamentally challenged by more advanced theories of financial markets hasn’t dampened his enthusiasm for prescriptive doctrine that would, one presumes, extend the encroachment of the corporation into markets, making the latter less competitive than otherwise. Ethicists make the same mistake. Stackhouse [1995 p504], for example, believes he knows what profit is: the difference between assets and liabilities as calculated on a typical

disappear in a world of perfect markets because it is conceived of in essence as a (inherently inferior) species of market.³⁵

Sociological theories

Sociologically the corporation must suffer a similarly destructive fate but in a centripetal rather than centrifugal manner. In economic theory the corporation is identified with the monolithic ‘firm’ that acts as a single central ‘player’ in its interactions with the rest of the world. Sociologically the role of the corporation is reversed; it becomes a neutral ‘forum’, an abstract mathematical point of no significance in itself except that it is the locus of politico-economic negotiation. As a nexus of divergent economic and other interests the corporation is sociologically defined as a sort of political moderator, not quite a market, but certainly an institution whose *raison d’être* has little to do with its *own* interests.³⁶ To the extent that this sort of existence is achieved, the corporation will have relinquished any claim to independent legitimacy.³⁷ It ceases to exist by default since it is indistinguishable from any random collection of interests. Anyone can claim membership as a ‘relevant’ party. The corporation in this conception becomes a purely political substitute for ‘government’ and is the basis for the ‘corporatism’ of Hegelian political

business balance sheet. He may be surprised to discover that this definition of profit is that of the accountant and differs radically from that of the actuary, the financial economist and the financial trader. In fact this definition of profit is a relatively recent innovation, arising with the adoption of double-entry book-keeping in the first two decades of the 20th century. I will discuss the consequences of alternative measures of corporate profit in Chapter 7.

³⁵The force of the presumption of transactional contracts cannot be overemphasized. Cf. Congar [1957 p44]: “Participation in God and in one another is a threat to the formal mechanism of contract...”

³⁶ Cf. Entzoni [1988 and 1993]. Cf. also Schrader [1993 p8, 9, 143]. Marx is arguably the first to make the corporation a nexus of relations of individuals with conflicting interests. Bonhoeffer comes close to this description in his *Sanctorum Communio*.

³⁷ Cf. Chazes in Mason [1959 p41]: “The error [of recognizing shareholders and others as members or participants] has more than theoretical importance because the line between those who are ‘inside’ and those who are ‘outside’ the corporation is the line between those we recognize as entitled to a regularized share in its processes of decision and those who are not.”

philosophy.³⁸ The result is effective dis-incorporation since the boundaries of the corporation become coterminous with that of general society.

Legal theories

“The law is slowly coming to the idea of the corporation by dealing with corporations (if we may call them so) of very different kinds”³⁹ The remark of the great English jurist, Maitland, indicates a degree of circumspection regarding the state of legal theory that is not shared by many of his colleagues. According to Maitland’s contemporary, American jurist Raymond, for example:

*The modern corporation is the product of arbitrary legislation struck off at a given time. It does not represent the natural growth of the corporate idea, but rather is a distorted application of the idea.*⁴⁰

Maitland was a true empiricist, Raymond a rationalist. Legal empiricists tend to wait for verdicts and interpret them *en masse* as almost revelatory of some underlying social fact.⁴¹ Rationalists on the other hand look for an order that they have already decided is correct by some criterion, and use that order to create consistency in judgment.⁴² Legal epistemology therefore is difficult to untangle from corporate ontology.

³⁸ Cf. Arthur Bentley cited by Latham in Mason [1959 p219]: “A corporation is a government through and through.”

³⁹ Pollock and Maitland [1898 v.1 p494]. I exclude from consideration here those late 20th century theories which attempt to make law a sub-discipline of economics. Cf. Bratton [1989].

⁴⁰ Raymond [1906 p364]. There is more than a hint of arrogance in Raymond, particularly considering that only in Coke and Blackstone, that is the 17th and 18th centuries, had the legal technicalities of the corporation become an object of study in English law. Cf. Davis [1905 v2 p210, 211]

⁴¹ Cf. Jenks [1905 p64]: “Law is rather a thing to be discovered than to be made.”

⁴² Arguably the most important representative of this sort of legal positivism is the English academic John Austin (1790-1859). See the classic text *Lectures on Jurisprudence, or The Philosophy of Positive Law* [1879].

Three of the most common legal theories of the corporation reflect the epistemological controversy in law: 1) the corporation as ‘artificial person’, 2) as a ‘concession’ of state sovereignty, and 3) as a ‘real relationship’ constituted by its members.⁴³ The first is the consequence of an empiricist approach which uses a pivotal ‘fact’ to propose a general truth, viz. the use by Pope Innocent IV in the 13th century of the term *persona ficta* in a single legal decision. I will critique this point of view at length in Chapters 4 and 6, but essentially it is a nominalist rejection of the corporation as anything but a collective term. The second is the result of a concept of social and civil power as a ‘stock’ which is distributed from the divine to the ruling human powers and subsequently to the rest of humanity. As such it is the favoured theory of ‘the establishment’ in its unceasing attempts to prevent uncontrolled corporate association from at least the Roman Empire onwards.⁴⁴ The ‘concessionary’ theory therefore simply moves the issue of the ontology of the corporate relation back into the ontological issue of the state. The last, the ‘real relationship’ theory, is largely the product of 19th century Idealist philosophy as a reaction to Enlightenment rationalism. It contends that there is in fact something actually existent that we can objectively call ‘the corporation’ as a living force in society. While I adhere to this general conclusion, I disagree with the Idealists’ ontological explanation for reasons I will make clear in Chapter 6.

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⁴³ There is a further theory based on the idea of contract. Traditionally this has been called the ‘collective’ theory, of a group aggregated and named, usually through contract. It is today called the ‘inherence theory’. Cf. Hessen [1979 pxiv]: “...corporations are created and sustained by an exercise of individual rights...of association and contract.” I consider this theory to include what is called the ‘representative’ theory in which one member stands as symbol for the rest as in Hobbes. It arose in reaction to the extreme concession theory espoused by Marshall and is typically employed by liberal economists to underpin their views of the corporation as a temporary phenomenon. I consider this view as an ancient example of the genetic fallacy. I reject it as making the corporation indistinguishable from the partnership (Roman *societas*).

⁴⁴ It was a favourite, for example, of United States Chief Justice Marshall in the early 19th century who faced the real threat of an uncontrolled growth in potentially powerful public associations in a country barely able to cope judicially with a lack of legal precedent. It is also the view of the latest member of the US Supreme Court, Sonia Sotomajor as noted above.

Systems theories

Systems theory presents an exception to the general rule that the social sciences do not address corporate ontology. As the study of the relationship between parts and wholes, systems theory recognises the possibility that purposive elements can maintain their integrity while being part of a 'larger' purposive entity.⁴⁵ It, therefore, at least allows an ontological category that recognizes the issue of interacting 'subjects' as part of a 'subjective' whole.⁴⁶ However, systems theory has little serious to say about the processes through which the corporation, as a distinctive form of association, is created, or about the conditions which might be necessary to ensure continued integrity of the whole or the parts – effectively how the whole can be prevented from annihilating the purposive character of the parts and vice versa.⁴⁷ Ackoff [1994] perceives this problem as a matter of countervailing power.⁴⁸ I will argue below that the corporation is a unique class of 'system' in which the relation between parts and wholes is based not on coercive power but on the abjuring of this power which creates a distinct power of cohesion.

⁴⁵ See, for example, Ackoff [1972].

⁴⁶ Cf. Ackoff [1974, 2003]. The properties of a system derive from the interaction, that is, the relationship, of the parts. This is a very Augustinian position which is compatible with most of this essay. Ackoff's work stops, however, with the idea of the 'purposeful' system. I would like to extend this thinking to that of the eschatological or perichoretic system. Ackoff's technique is one of 'dissolving messes' by recognizing the 'larger system' in which any problem arises. I am, in a sense, simply carrying this approach to its logical conclusion in this theological analysis.

⁴⁷ Ackoff [1994 and 1999] offers arguably the most thoughtful and consistent analyses of the corporation from a managerial point of view. However, the key concept that he employs is that of the 'circular organisation' through which those who are controlled control their controllers. In order to make this concept work, Ackoff must ignore a number of paradoxes of choice which are fatal to his argument. These paradoxes are summarized in the Appendix. As a consequence he is also forced into the intellectual and moral dead-end of 'purposeless power'. There are also numerous other practical difficulties including the fact that group decisions increase the difficulty of change considerably. Cf. Arrow [1971 p28 and p79].

⁴⁸ Cf. also Coleman [1982] for a similar analysis.

Decision theories

Quite apart from these 'substantive' disciplinary theories, the dilemma of the existence of the corporation has been raised pointedly from an entirely different direction: choice and the interaction among choices. The primary action identified in this discipline is that of *decision*, that is, considered choice among alternatives. The discipline attempts to establish reliable rules by which decisions should be made in light of other decisions taken simultaneously or subsequently. The primary importance of decision theory is that it highlights the consequences of related decisions taken by members of a group in negotiation, cooperation or competition. In doing so, it points to both the extreme importance and the severe difficulty of ensuring consistent criteria of decision involving even as few as two individual decision-makers. Unfortunately there is nothing in decision theory that is useful in defining a relationship that is specifically corporate. The nature of the interaction among independent decisions is held strictly at the level of the 'collective', that is, *any* group in which there are multiple decision-makers, for example: electoral populations, markets, the local citizenry, etc. In decision theory it matters little whether one is addressing the consequences of anonymous consumer preferences in 'the market' or of slightly different rules for investment choice among corporate managers. The relation among those involved is considered the same in all cases: as independent and self-seeking. The difficulty in basing the ontology of the corporation on decision-theory is summarized in the Appendix.

The Ontological Commonality of 'the Relation'

Despite the diversity and weaknesses of the disciplinary theories, they all suggest an aspect of the corporation that must be considered as part of the phenomenon: the corporation is a relation, an entity that is ‘there’ but only as a sustained connection, a social link, between and among corporate participants (members). In the terminology of the 17th century philosopher Henry Bisterfeld (1605-1655), it is an “entity, by which an entity is related to entity.”⁴⁹ The property of being-in-relation is an essential ontological feature. The corporation, that is, is neither substance nor accident in Aristotelian terms. Although each of the specific relations suggested by disciplinary theories must be rejected as inadequate to the phenomenon, all share this basic recognition. The proposition that the corporation is a relation is not contested by any scholars of whom I am aware.⁵⁰ This is important because it suggests that historical analysis must be guided by the character of this relation, since by consensus it is a relation that we refer to whenever we speak of the corporation. The existence of the corporation is entirely in the relation that it designates; it is not a mental state, and need not be ‘conscious’ therefore. The corporation is not *formed* in these relationships, it *is* these relationships, and has no ‘half-life’ beyond them. As a relation, the corporation cannot be created by the persons who enter into it.⁵¹ If this relation does not exist, neither does the corporation as an identifiable entity. The methodological issue is, therefore, precisely the nature of that relation: internally as it applies among its component members, and externally as it applies to other

⁴⁹ Leibniz [1923 v.6, I,153].

⁵⁰ Cf. Raymond [1906 p351]; Davis [1905 v1 p5]; Dewing [1953 p16f]. An exception would seem to be the *corporation sole* which exercised Maitland, particularly, as an unwarranted and unwanted anomaly, an ‘unhappy freak’ in English Law (Cf. Pollock and Maitland [1898 v.1 p488 n.1]); this is despite the fact that Blackstone considered it the great invention of ‘English genius’ that the Romans never thought of. Cf. *Commentaries* [1800 p468]. Applied mostly in parochial ecclesiastical law, I contend that it evidences the relationship with the dead and with the future holders of the office. The exception to this exception however is the American ‘S’ corporation and its more recent variations, in which no relationship among individuals, living or dead, is involved. It is rather a mere legal device through which individuals can qualify for certain tax advantages.

⁵¹ Cf. Maurice [1893(1869) p43].

institutions. The consequence for historical research is obvious: follow the relations. But what are the distinguishing marks of this relation? What is truly corporate as distinguished from the merely collective or the generally cooperative?

3. The phenomenology of the modern corporation points to its existence as a species of relation characterized by submission among its members to an independent corporate identity for whose interests they are accountable and from which they receive immunity from individual liability.

Because the corporation is so commonplace and so prone to distortion, it is easy to slander.⁵² Its very ubiquity may obscure its central relational dimensions by making them seem only conventional. However, I posit that the corporate relation is one that ensures the simultaneous integrity of corporate components as well as the corporation itself. ‘Being corporate’ does not reduce one’s humanity or the moral obligations under natural law. There is a relational ‘transformation’ of the individual, as he or she becomes incorporated, that changes his mode of being. But the components of the corporation (which may themselves be corporations) do not lose either the ability to choose or the responsibility of choice when they have entered into the corporate relationship. In fact, because of the public nature of the relationship, both the necessity of choice and the potential scrutiny of choices made are enforced as in no other relation. On the other hand, the responsibility of its components does not diminish in any way the responsibility of the corporation as an entirely separate entity.

⁵² Cf. Donaldson [1982 pviii]: “The concept of the corporation itself is so unlike run-of-the-mill concepts as to be labelled an outright fiction by sceptics.”

It is this unique relationship between parts and wholes – in which the integrity of each is maintained completely – that I claim as the most noteworthy aspect of the corporate relationship. The corporation, as a principle in society, defies the classical philosophical choice between Stoic liberalism, in which the ‘One’ does not exist independently of the ‘Many’ of which it is composed, and Platonic ‘totalisation’, in which the One, as the only real existent, absorbs the Many. It is a relationship which Leibniz characterized as *diversitas identitate compensata*, diversity offset or counter-balanced by identity.⁵³ In such a relationship, diversity is not reduced to unity (either in the intellectual sense of agreement or the ontological sense of uniformity of existence), it is maintained while an entirely separate identity is formed which encompasses this diversity as it is. In short, incorporation, while transformative, does not reduce individuality. On the contrary it promotes the diversity through which it subsists. This relationship can only be observed as a relationship, that is, as it occurs in all its dynamic complexity. I propose that this basic relation is encountered when three essential dynamic corporate characteristics are present together: identity, immunity and radical accountability. These are institutional characteristics which are dependent upon each other for their actualization. I discuss each briefly before proceeding to an initial characterization of their behavioural foundation.

Corporate Identity

The most striking character of the modern corporate relation is the identity⁵⁴ (institutional and individual) it has both in law and in general perception.⁵⁵ We take

⁵³ Leibniz [1923 v.6, I, 479].

⁵⁴ My intention is to avoid the spurious questions on the nature of ‘corporate personality’ through the use of the term ‘identity’. Clearly the corporation is not a human person. Nevertheless it is a real, and to a certain extent living, identity. This usage I believe corresponds with that of Congar ‘s [1957 p47] interpretation of personality. Cf. also Stackhouse [1993 p30]; Chadwick [1957 p31]; Metz [1980 p62].

for granted that there is such an existent as British Telecom or America Online because these are *names* with which we are familiar. We may not be aware of how such names become ‘names with power’, as it were, and in the normal course of events may not care. But it is important to recognize that the locus of corporate existence is in fact in the corporate name, its identity. So, while the corporate relationship is recognised as a matter of law, the legal form (inc., ltd., LLC. Cie. etc) does not constitute the corporation. In fact it is generally recognised in law, ancient and modern, that the corporation may exist without formal recognition (even illegally) if an association is perceived as acting in a ‘corporate manner’, that is, as having an identity entirely separate from that of its members.

There is no consistent terminology applied to the corporation across different cultures and legal systems. The connotations of the German *Korporation* are very different, for example, from that of the English or American *Corporation*, the former referring generally to a government institution while the latter, used without qualification, is most commonly interpreted as a ‘private’ entity. Nevertheless it is possible to articulate a distinction for the corporate relation that is generally applicable across jurisdictions and cultures. The corporate identity, the character of its name, is unlike any other associational identity and can be distinguished logically from other similar relations.⁵⁶ It is not a merely logical category that constitutes a designation for an otherwise un-associated group (a *collective*). It is not a contractual association among a fixed set of individuals (a *partnership*). It is not an association formed to pursue a single fixed purpose (a *trust*). It need not pursue aims that are common to all the

⁵⁵ Cf. Palmer [1968 p134]; Gower [1979 p100]; Goyder [1987 p18,19].

⁵⁶ Davis [1905 v1 p5]: “The technical legal description of [corporations] is so clearly unscientific that it must sooner or later be greatly modified or entirely dispensed with.” The situation has not improved over the last century. To dispense with all classification would not assist in explanation. Therefore I construct my own here based on reasonable criteria.

participants (a *collegium*). The corporate relationship is *sui generis*. The corporate identity is the source of the definition of what the corporation is, which, as will be discussed below, includes that which is of value to the corporation (corporate interests) as well as that which is of value to others (constraints on the corporate interests), including internal and external ‘stakeholders’ in differential manner. The corporate interests are neither the aggregate interests (public welfare), the collective interests (communal utility), nor the common interests (the intersection of individual interests) of either the members of the corporation or any other individuals or groups, although these other interests may be relevant in the formulation of the corporate interests. The corporate interests are ‘transcendent’ in that they are not derivable from any of the other formulations of group interests, particularly those of shareholders.⁵⁷ They are the interests of the name itself.

The corporate identity is not property in any conventional sense.⁵⁸ Although the corporate relation as an identity may possess (exercise dominion over) property, both morally and legally, the relation itself, as relationship, is not within any *mancipium* recognized within society. The law generally recognizes the corporation as a ‘person’, that is as an identity with independent legal status.⁵⁹ The corporation, however, comes under the law of persons not of property because, as a relation, it is simply not

⁵⁷Shareholders in any case are not necessary for corporate existence. In British law, for example, a ‘friendly society’ is distinguished by the prohibition against its issuing corporate shares to non-members. In short, there is no stock which can be bought and sold. Nevertheless the friendly society acts exactly as a corporation as the Christian Socialist Movement of the mid-nineteenth century discovered. Their numerous ‘associations’ could not achieve legal corporate status because of the expense – a required £1000 initial capitalization. John Ludlow, a leading corporate lawyer of the period devised the friendly society ‘tactic’ to avoid the problem, with no loss in corporate status. Cf. Raven [1968 p292]

⁵⁸Of course the corporate name may be licensed as a ‘word’. It may be changed or transferred to others, again as a word. But it may not be sold as the possessor of property.

⁵⁹A notable exception occurs in the jurisdiction of the Duchy of Sark where the corporation is not recognized at all. This fact has been used by generations of tax advisors to hide corporate control in Sark partnerships which own corporations that are not legally recognized by the island government..

property in the first instance.⁶⁰ Consequently the corporation cannot be bought or sold.⁶¹ Certain ‘third party’ rights associated with the corporation (particularly regarding election of corporate officers and equitable distribution of dividends) may be subject to purchase, sale and transfer but these do not include the essential corporate relation. To the extent that the ‘work’ done in the corporation is part of the corporate relation, neither can the labour of individuals be bought or sold in a contractual manner.⁶² There is no ‘labour market’ within the corporate relation.⁶³ Moreover the corporation, as a relation, is not created but, as in the relationship of marriage, *entered into* by its participants.⁶⁴ What is created by the individuals is the particular and specific identity of the relationship.⁶⁵

Corporate Immunity

The corporate relation is not a purely private arrangement. It is also a social institution. The relation may be initiated by private individuals, but, as in marriage, the corporate relationship is public, and publicly attested. Although there are few social restrictions on the aims of the relation, there are requirements, embodied in law, regarding the way in which the relation is conducted and its consequences. That is, the corporate relation is socially regulated; it includes ‘society’ (at minimum through the

⁶⁰ Cf. Troeltsch [1912 (1911) vol. 1 p249]; cf. also Pepper [1904].

⁶¹ In the United States this is formalized through the inclusion of the corporate person within the 14th Amendment to the Constitution which prohibits slavery. But this is not essential to corporate status as property. Cf. Donaldson [1982 p3]. Cf. Ireland [1999] for a good summary of the legal status of the corporation as non-property. It should also be noted that *within* the corporation, that is among its members, there is no private property. That is, there is no possibility of market exchange among parts of the corporation.

⁶² This is demonstrated by, among other things, the need to create personal service contracts for senior executives of acquired companies, lest they leave to the detriment of the business.

⁶³ This does not imply that there may not be a contract for *entering* the relationship by the corporation and the individual in the ‘labour market’. It should be noted however that even so-called ‘contracts of employment’ do not specify a *quid pro quo* in the manner of market contracts.

⁶⁴ Cf. Maurice [1869 p43].

⁶⁵ Cf. Galbraith [1977 p261].

law, but also through popular acceptance) as an implicit participant in the sense that it affects and somehow involves the rest of humanity with corporate members.

The relation is also public in the sense that it requires communication of what I call interests.⁶⁶ These interests are not those of the participants who are party to the corporation but entirely separate. The communication of corporate interests is the visible sign of corporate activity that can be not just be observed but criticised. It is the locus in which the private becomes public, wherein the personal becomes the social. Members of the corporation who act in its interests are not held accountable for their action by society at large for the consequences of those actions. This is a central and often controversial aspect of the corporate relation. As long as members hold corporate interests superior to their own, and as long as they do not act *ultra vires*,⁶⁷ that is beyond the legal constraints imposed on the corporation, they are insulated from civil liability.

Members are effectively 'forgiven' their mistakes in advance. The 'deal', however, is reciprocal: the corporate member effectively gives up many of the 'civil rights' he or she might enjoy in a market, that is to say, in a conventional contractual relation. All are accountable for the mistakes of all. If the corporate endeavour fails because of the error of some, all are affected without recourse. Recompense cannot be sought for corporate damages incurred from the good-faith actions of other corporate members.⁶⁸

On a less dramatic level, individuals may be subjected, for example, to various evaluations regarding competence or even personal motivation with no real right of

⁶⁶ Cf. Metz [1980 p51]; Demant [1936 p62].

⁶⁷ This is a virtual impossibility for the modern corporation. Cf. Rostow in Mason [1959 p51].

⁶⁸ This immunity also often applies to criminal liability as well. I will however avoid discussion of this aspect of the corporation since it is an extremely complex and changing field of inquiry.

appeal. They may be required to take part in a variety of mandatory activities - from training to 'group bonding' to endless numbers of meetings – which are more or less arbitrarily deemed important. The behaviour required may be designated as 'corporate loyalty' or just simply 'getting on'. In any case, however, it is behaviour that might well be considered abusive in other contexts. The fact that in general we don't find such restrictions on personal 'liberty' unacceptable perhaps indicates the degree to which we have internalized the corporate relation.

In a sense, therefore, the identity of the corporation subsumes the identities of the members as far as the rest of the world is concerned. This strange, almost bizarre, characteristic of the corporation becomes even stranger when we investigate its logic: the identities of the members who create the corporate identity are, at the moment of creation merged into and 'contained' by the corporate identity. Simultaneously new individual identities are created for the members, that of membership in the corporation. Each individual identity also 'contains' the corporate identity and may act not simply *for* but *as* the corporation. The condition of such identity is merely the acceptance of the existence of the corporate identity and its interests. This has several important connotations for corporate ontology.

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In the first instance, the corporate relation does not demand nor is it contained in any particular organisational form. The corporation is not the hierarchical or bureaucratic relationships of power, authority and function that may be created in order to undertake joint action for a particular purpose by the members of the corporation. Such organisational relationships are incidental to the existence of the corporation and

may be changed with no effect on the essential corporate relationship.⁶⁹ The only essential characteristic is the ‘loyalty’ by corporate members to the interests of the corporation, whatever they may be.

Secondly, the suggestion that the ontological reality of the corporation is determined by implicit or explicit agreement about purpose among any group of persons, including corporate founders or members, is unsustainable. No agreement about intent (most notably that of shared purpose) can be obtained reliably to the level required for corporate existence.⁷⁰ In other words, shared purpose or intention does *not* constitute, nor is it a pre-requisite of, the corporate relation.⁷¹ We do not create the corporation by collectively willing it to be so or by somehow ‘synchronizing’ intentions. Nor can law or any other discipline arbitrarily designate a relation as corporate.

‘Corporateness’ is a pre-requisite, not a result of shared purpose. Only by submission to the corporate identity itself, not by assertion of intent for that identity, does the corporate relation exist.⁷² This submission is not a form of subjection, but rather a form of personal exposure by which the individual makes herself vulnerable to corporate judgment by other members in a condition of:

⁶⁹ Pace French [1984 p139, 1992 p48ff] who believes that the corporation receives its ‘personality’ as well as its identity (he distinguishes these without definition) through its ‘Corporate Internal Decision Structure’ (CID), that is, its internal relations of hierarchical power. However such a concept is neither necessary nor sufficient to define the corporation since 1) these relationships change without changing corporate identity and 2) these relationships are certainly not uniquely corporate. The presumption that the corporation involves a particular organisation form is correlated with a presumption of purpose. For example Stackhouse [1987 p134] equates ‘corporation’ with ‘productive organisation’ which it need not be, and which then prejudices his consideration of what the corporation actually is and does.

⁷⁰ Cf. Appendix. Following F.D. Maurice, a body to which a group pledges allegiance because of a shared aim is a sect not a corporation.

⁷¹ Cf. Demant [1936 p70]; Demant [1947 p24, 29]

⁷² That this must be so is a logical as well as a legal requirement. Without submission, assertion of intent is both destructive of the corporate relation and almost certainly unlawful. This may be difficult to accept but it is the case. Even eminent corporate commentators like J.K. Galbraith [1977 p 261] can confuse normal with aberrant corporate behaviour: “From the inter-personal exercise of power, the interaction ... of the participants, comes the personality of the corporation.” As in the note above regarding French, the exercise of power is neither necessary nor sufficient to constitute the corporation. My contention is that it is precisely the absence of such exercise which is necessary for corporate existence.

Radical Accountability

The implication of the ‘deal’ of the corporate relation is radical by any standard. Members of the corporation are not only obliged to further the corporate interests, they are obliged to articulate and promote these interests, as valid interests to promote. The members of the corporation are responsible for determining and proclaiming what constitutes the corporate interests; and for convincing others of the merits of these interests. Thus the primary duty of corporate members is to the corporation itself.

Directors’ duties are owed to their company, not to any third party group... [The] obligation to have regard to the interests of shareholders is not related to the actual shareholders at any particular moment in time... Company law does not prescribe how directors should balance all the factors that crowd in upon them when they make decisions.⁷³

There are no predetermined, prescribed or standard definitions or measures of these interests.⁷⁴ It seems reasonable to conclude therefore that the corporation as an institution goes beyond mere teleology in the limited sense of pursuing purpose. Rather it is about determining purpose, about judgment, that is evaluation – against a standard that is explicitly transcendental. Yet there is no external ‘worldly’ authority which can confirm this standard. Implicit in the ‘constitution’ of the corporation is the matter of the Good, therefore, a matter which is difficult to separate from theology. I

⁷³ Cf. Goldenberg [1995 p12].

⁷⁴ The landmark case of *Dodge v. Ford Motor Company*, 204 Mich. 459, 170 N.W. 668. (Mich. 1919), is sometimes cited to the contrary. However this case is about the rights of minority shareholders to the just distribution of profits rather than a mandate regarding the interests of the corporation. Numerous cases since have made this point clear, at least as clear as is possible in law. What the decision establishes incidentally, however, is that the interests of the shareholders are *not* those of the corporation and that shareholders may have very different interests among themselves. This is an important confirmation of corporate identity and independence

will use the term 'eschatological' below to define the sort of system which evaluates purpose transcendently, and equate this system with the corporation.

Purpose may be described in terms of a goal, objective, intention and so forth.

However in order to be effective these sorts of description must eventually be translated into more or less precise criteria of choice which are consistent with both the intention and each other. Ultimately such criteria must be stated in terms of metrics (scales) upon which better and worse outcomes of action may be assessed.

Numerous conventional metrics of profit, gain, capital, and wealth (and their components) are available. Many of these metrics are contraries, that is, uncorrelated with each other. Many are also contradictory, that is, inversely correlated with one another.⁷⁵ Some metrics are imposed from sources external to the corporation as constraints on corporate behaviour. However these constraining metrics need not be accepted as measures of success. Unconventional, even unique, metrics are possible as measures of the corporate interests, therefore. Articulating and choosing among these alternatives would seem to be of central importance to corporate life. Such activities require an ability to discern the important from the merely conventional, the enduring from the fashionable.

Because the corporation is an iconic institution of capitalism (the other being the 'market'), it is easy to mistake it for an essentially commercial entity.⁷⁶ It need be

⁷⁵ I think Goodchild [2002 p129] is mistaken in his assertion that "Capital does not depend on our evaluations; it is a self-positing system for stimulating evaluation that en-frames modern life." He is right to note that capital is a 'simulacra', a copy for which there is no original, in the sense that the metric chosen for capital *is* capital. The fact is, however, that this metric *is* chosen from among alternatives even if the choice goes unnoticed, and that choice involves some form of evaluation. So neither 'capital' nor any other metric of wealth or performance is 'self-positing'.

⁷⁶ Cf. Berle & Means [1932 p313]. Also Veblen [1923]; Goyder [1987]; Korten [1995]; Micklethaite [2003].

neither capitalist nor commercial (depending on the class of metrics it chooses). Nor does its association with capitalism imply that it is restricted to, or a champion of, so-called ‘free market economies’. The corporation, as noted above, is not essentially a commercial or even an economic relation. The relation may be constituted intentionally to serve a specific end but this end is not restricted nor need it remain stable.⁷⁷ The relation exists as easily within charitable and eleemosynary or socialist (or even communist) contexts as it does in a profit-seeking capitalist society. The corporation is therefore largely independent of political ideology and social structure, and it outlasts not just its membership, and its structures, but its purposes.

While the corporation may be emblematic of capitalism, it exists in great tension with the other capitalist institution of the market. In a significant sense the corporation is the very opposite of the market as a respite from the requirements of free economic exchange. Crucially there is no ‘price discovery mechanism’ in the corporate relationship.⁷⁸ The choice of the metric of value substitutes for the market process by which price is obtained. The corporate relationship itself is therefore *uneconomic*, in the specific sense that it is outside the realm of the economic theory of exchange. In the corporate relationship value is not determined by price but price is determined by value.⁷⁹ It is therefore ‘free’ in the sense of not being determined economically or obligated legally. The freedom to choose the criterion of value, determines the value

⁷⁷ Fiorenza [1986 p131] makes the distinction, here relevant, between assembling for a goal and assembling in order to share *something*. This is the basic ‘missing link’ in almost all discussions of the corporation. The freedom of corporate purpose seems to be inherently irritating to scholars who try to restrict this freedom by stating some arbitrary purpose (e.g. profit-making, social welfare, solidarity) as definitive and then conducting analysis in terms of this purpose. The result is predictable, namely that the corporation does not measure up to the purpose stated; or, in those instances where the purpose is presumed as morally questionable, exceeds any moral boundaries presumed appropriate by the researcher.

⁷⁸ Cf. for example Arrow [1974 p25]: “A firm, especially a large corporation, provides another major area [in addition to government] within which price relations are held in partial abeyance.”

⁷⁹ As in the case of transfer pricing among corporate divisions or departments.

we make of any other choice. Economic efficiency, in the sense of minimal use of resources in the pursuit of purpose, is of only secondary importance. To know what is efficient, it is first necessary to know what is valuable. Efficiency might be improved by command; knowledge of values cannot be.

Knowledge of values takes place in the corporation through its members, and only its members. Theologically, each member may be considered an ‘emanation’ of the Good in the requirement that he or she articulate and proclaim a version of the corporate good.⁸⁰ The corporate good at any moment is the articulation that encompasses, that is, includes as subsets, all other articulations by members of the corporation.⁸¹ Such an articulation is considered as objectively superior in terms of a hierarchy of values. It is also likely to provoke re-articulation by others; the corporate good is not stable but constantly changes as a consequence of discussion and experience. I conclude that the articulation of the corporate good cannot be carried out by repressing the fundamental freedom of all members to express the good since such repression, to the degree that it is employed, destroys the corporate mode of being.

Submission, service without either domination or servility, is the behavioural substance of the corporate relation.

It may be noted that the effect of this radical accountability is, if not contradictory to, at least in some degree of tension with, the existence of the corporate identity as an independent ‘centre of interests’. The interests of the corporation are not those of the

⁸⁰ Cf. Hildebrand [1962(1948); 1953].

⁸¹ The content of these subsets may vary and include moral principles as in the mode of MacIntyre [1990], scientific theories as in the mode of Kuhn [1962], and aesthetic criteria as in the mode of Hildebrand [1953].

members, who are expected to subordinate their own interests to those of the corporation. Yet these interests must be formulated and acted upon by these same members. On the one hand, the corporation *appears*, in the manner of Hegel, as if it were an all-consuming solution for the problem of the errant individual. Its interests are not individualistic but independent of its members. On the other hand, it *appears* as a mechanism for the furtherance of merely individual aims in the manner of Locke. Its interests are negotiated so that the interests of its members are somehow involved in the corporate interests. It *is* neither of these. Corporate interests are not more important intrinsically than individual interests. Corporate interests are not achieved in principle by compromise but by synthetic appreciation.⁸² The ontology of the corporation involves *both* Hegelian and Lockean elements but in a surprising combination. The key to understanding this combination is in the implications of *radical* accountability. Submission to the corporate interests is not just a matter of obedience. There is a prior obligation to take a ‘stand’ for the demand that obedience might make. Every member of the corporation must express publicly some conception of value and yet be prepared to ‘relativize’ such expression to the corporation as a whole. And only through such relativization can immunity be assured. I can define this relation tentatively in behavioural terms as one of mutual service without domination and without servility –submission - knowing that this is inadequate to the phenomenon.⁸³ I can only beg indulgence for time to discover the ‘meat’ of this term

⁸² Cf. Vickers [1965] in which the idea of ‘appreciative systems’ in the sense used here is of central importance.

⁸³ It is possible to state at this point what submission is not and to associate it with the theological. Spaemann [1989 p11] states the negative case: “There is nothing good either about always giving preference to one’s own wishes or always giving preference to those of others.” This is not submission. He goes on with the positive: “It *is* essential to take into account exactly what the wishes of which persons are in competition with which wishes of which other persons.” and [p123]: “Surrender is the true proof of possession.” Cf. also Thornton [1956 p22]: “...at its highest level obedience does not mean a mere acquiescence in what is ordained, nor does it necessarily mean an unquestioning acceptance of what is appointed. It is rather the submission of the whole self to God in self-oblation. It

as I proceed to discuss its historical manifestation. At this point I want only to establish the reasonableness of the idea of the relation of radical submission as a place to begin analysis.

Mutual service without domination or servility: this is the behaviour that results from simultaneous acquiescence to the interests of an independent identity *and* accountability for the articulation of the interests of that identity. It is the behaviour that creates the *name*, its purpose and its members as members. The ontology of the relation itself can be expressed using systems terminology. The corporation appears as a system in which the whole is simultaneously contained in each of its parts. From one aspect, it appears as if the whole contains and controls the parts; from another, as if the part contains and controls the whole. Admittedly, to visualize such a system is like trying to visualize light as a wave front and a particle at the same time. But it is not an incomprehensible proposition.⁸⁴ Both the whole and its components maintain their integrity, in fact they owe their identities, to their relations with each other.⁸⁵ Put another way, the relation termed ‘corporate’ is one of mutual penetration (circumcession/perichoresis) in which those participating in the relation are defined by that relation as the relation itself is defined by member participation. Each is mutually defined in a self-referential manner.⁸⁶ I will use the theological term ‘perichoretic’ in this narrow philosophical sense to describe this relation.

is consecration of all the faculties to the service of God.” Cf. Demant [1936 p70]: “The submission of the partially free creature, by his freedom to the fact of his creaturehood, is Worship.”

⁸⁴ For example, quantum physics recognizes this sort of phenomenon in the so-called Bose-Einstein condensate wherein individual atoms cooled to just above absolute zero effectively become one another.

⁸⁵ Cf. Bonhoeffer [1963 pp5, 34]: “Every concept of community is essentially related to the concept of person. It is impossible to say what constitutes a community without asking what constitutes a person... What one understands about person and community simultaneously makes a decisive statement about God.”

⁸⁶ This relation is termed by the scholastic philosophers ‘subsistent’. It is originally applied to the relation of the Persons of the divine Trinity and will be discussed in some detail in Chapter 4.

4. My hypothesis is that a more detailed investigation of the corporation as an eschatological relational concept in Scripture and in later Christian history will be able to demonstrate a coherent story of development and suggest the goods available through the corporation.

The corporation appears to be unique to Judaeo-Christian culture. I can find nothing like the notion of the corporation in classical thought. Plato has what might be considered the germ of a similar idea in the *Timaeus* where the *Receptacle* is the way in which he conceived the many actualities of the physical world as components in each other's natures. Significantly in the discussion of the corporation, the *Receptacle* imposes a common relationship on all that happens, but does not impose what that relationship shall be.⁸⁷ To my knowledge this is as close as the classical world came to recognition of the corporate relation. It is instructive, in this regard, to compare the Confederation of Delos under the leadership of Athens in the 5th century BCE with the roughly contemporary Israelite Confederacy. Even among the subsequent federations of the Greek city states during the 4th and 3rd centuries BCE "none could demonstrate the corporate idea."⁸⁸ Israel, as will be discussed in Chapter 2, on the other hand, has a real identity, that is, it is an entity which is more than merely a collective designation but denotes an existence that is separate from the identity of its members. This matter of identity, as noted above, is central to the character of the corporation and is essential for establishing both corporate accountability and corporate immunity.

⁸⁷ Cf. Epicurus's *Void, το κενον*. Milbank [1997 p276] captures a similar idea in his notion of 'complex space': "...wherein the whole exceeds the sum of the parts and the parts exceed the totalizing grasp of the whole."

⁸⁸ Cf. Rust [1947 p41f].

Cicero in *De Re Publica* seems to be striving to articulate the corporation: “A commonwealth is a thing of the people [*res publica*]. But a people is not any collection [*coetus*] of human beings brought together [*congregatus*] in just any sort of way, but an assemblage [*coetus*] of people in large numbers associated and a partnership [*societas*] in agreement [*consensu*] with respect to justice [*juris*] and a partnership for the common good [*utilitatis communione*].”⁸⁹ It seems to me that this attempt to define a commonwealth, particularly in its focus on justice which implies the simultaneous integrity of the individual and the community, before any concrete purpose can be formed, is the limit of classical thought. But still the corporation as an identity and a relationship beyond the *societas* (partnership) eludes him.

Other cultures, ancient and modern, also appear to lack an explicit corporate conception. The Chinese version of association is, for example, ‘clan-based’, that is, relies solely on genetic family ties in a manner similar to ancient Roman Law (without the exceptions I will identify in subsequent chapters) but unlike either Hebrew or Canon Law.⁹⁰ Specifically, there is no concept of an independent corporate identity beyond the clan as collective. The application of Western law to the Chinese category generates interesting tensions, therefore, because there is no equivalent historical Chinese relationship to that of the corporation.

Kitagawa also provides a Japanese perspective on the corporation.⁹¹ This appears to be yet another case where European legal concepts have been more or less thrust upon

⁸⁹I, XXV, 39 *Loeb Classical Library*, Vol. CCXIII, C. W. Keyes (ed.).

⁹⁰Cf. Ruskola [2000].

⁹¹Kitagawa [1960].

cultures that do not comprehend relevant Western distinctions. Historically the mode of Japanese economic organization was (and remains) the *Zaibatsu*, a family-based enterprise, with little connection to the corporation except the legal designation. Despite the dispersion of share-holdings after World War II, there is still no real distinction, in Japanese legal thought, between partnership and the corporate relationship.

Khanna claims Indian provenance for the corporation in the *sreni* of the sub-continent.⁹² This claim however is subject to the criticism of the genetic fallacy: by his own analysis, the *sreni* is a commercial partnership similar to the *commenda* and merchant adventurer partnerships of late medieval Europe. Finally, Leon-Portilla makes it clear that although pre-Colombian culture in Meso-American did have merchant and artisan guilds, these were clan-based as in Oriental cultures, and had no separate identity.⁹³

These diverse findings lend credence to Jouvenel's conclusion that: "The personification of the Whole is a great novelty of the Western world."⁹⁴ On the basis of the evidence noted above, I take this remark seriously as a confirmation of the ontology I am describing.. Something new had arrived in the world with Judaeo-Christian culture: a form of relationship which is indeed unique, or at the least a unique relational possibility among human beings. The relationship and its realization may take on concrete forms in a variety of other cultures and human conditions. Yet its source can be traced, I believe, to personalistic monotheism, to the God who

⁹² Khanna [2005].

⁹³ In Ells and Walton [1961 p595ff].

⁹⁴ Jouvenal [1947 p221]. Cf. also Raymond [1906 p350ff] for a purely legal perspective.

demonstrates this relationship to the world. Therefore I feel justified in pursuing my historical investigation solely within the confines of that Judaeo-Christian culture.

The locus of the corporate relation within Judaeo-Christian culture allows me to take the further methodological step of considering the relation in eschatological terms.⁹⁵

This culture is eschatological as a matter of both imminent experience (the Spirit as the Creator and Guarantor of reality) and as expectation of a final state (the Kingdom of God as creation re-created).⁹⁶ Ontology is determined by eschatology within this culture.⁹⁷ I make this move not for confessional but for methodological reasons. The culture is possessed of an eschatological faith which can be observed, for example, in its central commitments to Science, as the discovery of a stable reality, and to what generally might be called Industry, the endeavour towards material human improvement as participation in re-creation. The fact that these commitments are usually expressed in secular terms does not diminish their roots in faith nor their essentially theological content.

This eschatological approach implies that the ultimate, essential or true meaning of the corporate (or any other) relation – the explanation of corporate identity, immunity and radical accountability - is to be found in what the Judaeo-Christian culture has called ‘divine revelation’ and in the motivation this revelation provides to act. I make no claim here about the source, mechanism or verifiability of such revelation.

Throughout this essay, the term may be interpreted either as the enlightenment of

⁹⁵ This is actually common practice in the corporate world and is clear in certain financial practices like present value discounting and certain strategic planning approaches. Cf. Goodchild [2007] and Ackoff [1974]. To the extent that Islam shares this eschatological orientation, which is significant, it too should be included in this cultural *oeuvre*. However I am not competent to make this judgment.

⁹⁶ Cf. Dodd [1938 p32 et seq.; p63 et seq.]

⁹⁷ Cf. Goodchild [2007 p73].

humanity by God, or as the accumulated cultural wisdom of the culture. In this light, I will take terms such as identity, accountability and immunity as cultural expressions of the theological doctrine of redemption: the hopeful experience of and anticipatory realization of the Kingdom within creation. In Jewish and Christian tradition, identity is (and not just originates in) personal relationship with God, and through God with all of creation. In this tradition, our ultimate identities will only be achieved eschatologically, but we have, as it were, a temporary identity of transcendental searching for the divine within creation. It is for this that we are accountable and for which we have been granted immunity to the extent we accept this accountability – despite the defects of judgment to which we are inevitable prone as human beings.⁹⁸

The corporation, in this interpretation, is an eschatological symbol of theological doctrine despite the degree of secularization Judaeo-Christian culture may have undergone. The ethics of the Gospel as well as of the Hebrew Scriptures have been absorbed into Western culture. These ethics are a consequence of a distinctly eschatological view and it is my presumption that social institutions, particularly the corporation, bear a sort of cosmic echo at least of these ethics.⁹⁹ I offer the hypothesis, therefore, that the corporate core of identity, accountability and immunity is the historical thread that may be followed from epoch to epoch. In short, the institution of the corporation is a cultural product of a striving for The Kingdom as knowable and available to human beings and which, when ‘found’, evokes conduct appropriate to the *eschaton*.¹⁰⁰

⁹⁸ Cf. Bonaventure 1 *Sententiarum* 1.3.2: “*nata est anima ad percipiendum, quod est, ideo in eo solo debet quiescere et eo frui.*”

⁹⁹ Cf. Schrage cited in Britton [2003 p61].

¹⁰⁰ Cf. Schrage [1988 p29]; Demant [1947 p163].

A corollary of this approach is that worship is not just a liturgical or ecclesial activity but something that necessarily involves all of life, and is therefore practiced continuously within this culture, often even when it is denied. Put in more specific terms, I claim that the corporation is a mode of relationship that is not only divinely constituted as inherently valuable, in the manner defined above, but also that this is so on the basis of its facilitation in discerning value, including its own. Both points of view are worshipful. Eschatologically, there is no distinction between ends and means; and the corporation is both end and means in terms of worship. In other words, the good, while never fully articulated at any moment in time, is discoverable as values in the corporate relation over the course of time as a sort of ‘strange attractor’,¹⁰¹ eliciting movement toward a definite destination. This destination according to the traditions of the culture is God as the embodiment of all values.¹⁰² The imaginative process through which values are apprehended, articulated and expressed is one of revelation. The corporation is as it were an “infrastructure for the imagination of value” – a vehicle for revelation as well as a revelation itself.¹⁰³

Neither the content of this revelation nor the behaviour appropriate to it is necessarily deducible from universally recognized principles of human association. There is no ‘natural law’ from which the corporate relationship can be derived. The eschatological corporation is not a variant of a liberal utopian ideal constructed in light of present problems or transient concerns. Neither is its development to be perceived in terms of

¹⁰¹ The term is from Chaos Theory but the Anglican theologian, V.A. Demant [1941 p16], defined it at least two decades before the theory was formulated as “...a central position which is not actually reached as a final resting place but which exercises a continuous pull upon the human being. This central position or truth about man is never revealed phenomenally.” In the same tradition cf. Goodchild [2007 p196].

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¹⁰³ Goodchild [2007 p196] presents the need for such an entity. I believe that the corporation is the eschatological answer to his prayer.

social, legal, political, or economic causality. Keefe indicates the central reason why an eschatological approach is essential: “Non-theological disciplines address the world of nature without grace – an empty, sterile world of necessary causes and ultimately unsustainable presumptions that are held vigorously but without reason.”¹⁰⁴

The history of the corporation is not, I propose, one of causality and necessity but of will and freedom assisted by grace. These terms are also theological in origin within the culture, although the last, ‘grace’, may appear as alien except as part of explicitly religious discussion. As with the term ‘revelation’, I have no objection to an interpretation of ‘grace’ as cultural support for the will which promotes freedom.

The important implication of this move is that there is no essential ‘genetic connection’ between the corporation today and the *corporatio* or other institutional forms of the ancient world because there is no causality equivalent to that of biology at play. I consider the corporation as a relation of enduring (eschatological/permanent/eternal) importance which genuinely manifests itself variously in cultural records as well as in practice, and which consistently demonstrates (at least to some degree) the redemptive characteristics of identity, immunity and radical accountability. But I also consider the corporation to be easily corrupted and even forged. Examples of less than authentic corporations are more likely to be found in history than the genuine article. Distinguishing between the authentic and the counterfeit, even in the purely cultural sense of revelation as consolidated wisdom, is an inherent part of my approach.

¹⁰⁴ Keefe [1991 p272].

The genuine corporation requires grace, the ‘participation of the Spirit’. But such language should not be construed as requiring the introduction of a *deus ex machina*. Rather, we are assured in the culture that such grace is available and accessible. It is we who therefore perform an act sufficient to participate in the Spirit through ‘submission’. This is both access to grace and entry into the Kingdom. Neither corporate ‘organization’, in the sense of establishing roles of internal authority and responsibility, nor any set of corporate processes are able to create this condition.¹⁰⁵ In fact through encouraging the habit of fixing and submitting to the “sovereignty of self-evident purpose”,¹⁰⁶ internal organization and so-called ‘process design’ can promote the commission of enormous evil. Submission is the mark of the Spirit, and the measure of corporate success.

The remainder of this essay summarizes the results of this eschatological investigation over several of the most important ‘epochs’ of the life of the corporation. Chapter 2 documents the Judaic Covenant as the eschatological source of corporate association. My claim is that the corporation is presented in Scripture not just conceptually but as a matter of law and social practice in the Torah and as the covenantally symbolic *nahala* of *eretz Israel*. I substantiate this claim by reference to biblical accounts of the Covenant in terms of the relational aspects of identity, immunity and accountability as defined above

Chapter 3 continues the biblical explication of the corporation through an analysis of the concept of the eschatological Body of Christ in the epistles of St. Paul. It is my

¹⁰⁵ Guardini [1961 p47].

¹⁰⁶ Hildebrand [1962(1948) p170].

claim that Paul, in substituting this concept for that of the land of Israel as the ‘inheritance’ of the faithful and the symbol of the Covenant, implicitly intends to replace the legal practice of the Judaic *nahala* with the Roman practice of the *peculium*. I provide circumstantial evidence that both Paul and his audience are familiar with the *peculium*. I also outline why the *peculium*, as a model of social relationships, fits Paul’s theological intentions better than does the *nahala*. I will show in subsequent chapters how this shift by Paul is also the most likely source of the modern corporation through its separation of *dominium* (ownership) and *usufructus* (benefit).

Chapter 4 documents the entry of the corporation into modern, that is post-Roman, law. I argue that historical circumstances created a ‘window of opportunity’ for such an event in the ambitions of the medieval ‘imperial papacy’ and the opposite but equally ambitious desires for institutional poverty of the newly formed Franciscan Order. Both the papal curia and the Order shared the need to create a legal entity which was self-constituted yet independent of its members. To do this they had get beyond the constraints of Roman Law by using the theological concept of the ‘person as identity’ (subsistent relation) and the Pauline use of the *peculium*. Through a set of curial decisions based on these two theological concepts, the corporation was established as a legal institution which could own property but could not be owned, in the manner of the *nahala* and the *peculium*.

Chapter 5 recounts the continuing theological development of the idea and practice of the corporation through the Congregationalist Theology of the Eternal Covenant and its application in the settlement of North America. 16th century Covenant Theology

contains a complete eschatological theory of the corporation that is consistent with biblical sources and which is not influenced by the political or commercial power that distorted many other corporate efforts of the period. On the basis of this theory, settlers created a successful corporate community which was to form the experiential and legal foundation for the 19th century explosion in corporate association.

Chapter 6 is a critique of the most important 19th century analysis of the corporation, that conducted by the German jurist, Otto von Gierke. Gierke was among the first to investigate the corporation historically. Publicised widely in the Anglo-Saxon world by the British jurist, Frederick Maitland, Gierke influence extends into the 21st century. His intellectual presumptions are those of Hegelian Idealism through which he borrows the cultural form but not the traditions or doctrinal substance of Christian thinking about the corporation. My claim is that without its theological foundations, the corporation, in Gierke's analysis, is a dangerous travesty.

Chapter 7 is an evaluation of what is arguably the most important investigation of the corporation in the 20th century, *The Modern Corporation and Private Property* by Adolf Berle, a lawyer, and Gardiner Means, an economist. This study, published in 1932, documents the rise to dominance of the institution in the early years of the century. But, more importantly, it accurately and precisely confirms the *peculium*-like characteristics of the institution without having either the vocabulary or the historical theological background necessary to explain them. Berle and Means are also able to identify the 'Levitical' activity of finance, the articulation and application of criteria of value, as the centre point corporate life.

Finally Chapter 8 applies these historical findings to the contemporary debate about the corporation and its place in society. My conclusion is that the segregation of the legal and theological aspects of the corporation is the primary issue in the matter of corporate misbehaviour and ungovernability. Whether society at large wishes to accept the challenge posed by this issue is something that I do not address.

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Chapter 2: The Enduring Genius of Israel

The Covenant of the Nahala

More or less all men that God made, have managed to see...that there *is* justice here below; and even that there is nothing else but justice.

Thomas Carlyle
Past and Present

In the previous chapter I outlined a theoretical ontology of the corporation based on the notion of the submissive relation. In line with V.A. Demant, I take Scripture to be not a story of moral improvement but of new relationships.¹ Thus a major hypothesis of this theory is that the historical origins of the modern corporation may be found in ontological prototypes contained in Hebrew and Christian Scripture and traditions. The purpose of this chapter is to test this hypothesis with reference to the Old Testament. My claim is that the covenant of YHWH with the people of Israel is the prototype corporate relation. I will attempt to show that in the covenantal symbol of the *nahala* may be found the most important corporate characteristics of accountability, identity and immunity from which the modern corporation derives as a matter of both custom and law.

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1. The ancient Hebrew Covenant describes a form of association between YHWH and Israel that was likely unknown previously in the ancient world.

¹ Demant [1936 p31].

The Covenant (Heb. *b^erith²*) between YHWH and Israel is pervasive throughout the Hebrew Scriptures (with the exception of the Wisdom literature). But despite its centrality, the denotation of covenant does not appear stable. The sheer variability in its use and context suggests a meaning which cannot be determined by any fixed semantics of the time but which emerges with the relationship itself.³ That is, covenant is a term for a relationship that could not be reduced to a single existing concept in law, sociology or theology as these were recognized at the time.⁴ If so it is a term defined as much by its novelty as by its density of use. I will first describe the ‘skin’ of the concept in terms of those who participate in various forms of covenant before attempting any more penetrating dissection.

When it is used to describe a relationship among individuals, ‘covenant’ designates a range of mainly contractual associations, from international treaties to ‘handshake’ agreements, with little religious connotation. Contextually it may signify a lease agreement between a landlord and a nomadic gypsy or a conspiracy to overthrow a corrupt regime. This idea of covenant is persistent but hardly univocal.⁵

² Greek LXX = *diatheke* : disposition (of property), testament, (last) will. The word for the Sinai ‘pact’ in the ‘P’ language of the Pentateuch is not *berith* but *eduth*.

³ Cf. Nicholson [p15]: “...the Deuteronomic understanding of the term [*b^erith*] is the opposite of that of the Priestly authors [of the Pentateuch] for whom it meant God’s solemn promise; in Deuteronomy God’s promise to Israel recedes markedly, whilst the obligations he imposes on the people are sharply emphasized”.

⁴ Even the etymology of the word is unclear. The 13th century Spanish theologian Nahmanides [1960 1:4] argues for the root word *bero*, to create. Jacques Ellul [1960 p50] sees it coming from *barah*, to choose.

⁵ Cf. Gen 21:31, 32, cf. also 22-24 (*lease*); Gen.26:28 (*lease re-negotiation*); Gen 31:44ff (*civil contract*); Jos 9:15, cf. also 16-20 (*a cease fire agreement*); Ju 21:1 (*inter-tribal pact*); 1 Sam 20:8 (*oath of personal fealty*); 1 Sam 20:17, 42 (*personal pledge*); 2 Sam 3:12f (*political cabal*); 1 Kgs 7:13ff (*contractual work order*); 1 Kgs 15:19 (*military alliance*); 2 Kgs 11:4 (*dynastic conspiracy*). 2 Kings 11 is a sort of compendium of all the covenant ‘types’: between individuals, between an individual and YHWH, between Israel and YHWH, and, unusually, between king and people. Cf. 1 Sam 10:25, 2 Sam 5:3, and 1 Kings 12:1.

In denoting the relationship between individuals and YHWH, ‘covenant’ clearly refers to a magnanimous gratuity, with YHWH providing a gift much disproportionate to the acts of the individuals involved. The aspect of reward is unmistakable, although none of the individuals concerned were aware of the possibility of reward at the time of their action. The implication is that the individuals involved could have indeed refused the tasks set for them. Used in this way, the term is significantly less contractual than the purely individual covenants above.⁶ It remains in this context, however, an ambiguous term.

When signifying the relationship between or on behalf of Israel as a people and YHWH, however, Covenant is clearly intended to denote more than a static ‘state’ - of election, obligation or sanctity, much less, a contract or typical worldly relationship. It implies, for both Israel and YHWH, existential engagement in a continuing historical drama involving ‘the world’, not simply a static formal commitment to one another.⁷ The overall pattern of making, breaking and re-making this Covenant is an essential part of the Covenant itself.⁸ The use of Covenant in this context is entirely non-contractual, even when conditions are attached, since the bond between the parties is permanent and failure to meet conditions entails penalties *within* the covenant.⁹ The Covenant is a relationship which ultimately cannot be

⁶ Cf. Gen 6:18, 8:21, 9:8-9 (a *grant of immunity from annihilation*); Gen 17:4f; 22:16 (a gratuitous *grant of fertility and lebensraum*, the term *b^erith* occurs 13 times in Chapter 17 alone); Jos 11:12; 2 Sam 3:9; 2 Sam 23; Ch 7:18; 13:5, 21:7; Ps 84:4,5; Ps 89:2, 3; Ps 132:11,12; Jer 33:20 ff (*promise of dynastic longevity*); 1 Kgs 6:12 (*confirmation of dynastic promise*).

⁷ Cf. Novak [1995 p11]

⁸ The breaking of the tablets is, in this reading, an important event in the process of the Covenant: the Law is broken even before it is in place but the Covenant remains. Cf. Ho 11:8, 9.

⁹ Cf. [1946 p98]; Eichrodt [1961 v.1 p65-66]; Novak [1976 p23]. Pontifical Biblical Commission [2002 p44].

refused or abrogated.¹⁰ The characteristics of this relationship may be observed in each of the major covenantal events:

The Sinaitic/Horebic Covenant [Ex 19:3ff; 24:7; 34:10ff; Deut 4:13ff; 7:10ff; 10:17ff; 11:18ff]: the ‘hub’ of the Pentateuch, this is certainly the central statement of covenantal understanding. Clearly, the relationship described between YHWH and the entire people of Israel is mediated by Moses but entered into with awareness of consequences by both parties. Unlike the covenants with individuals, the relationship is highly conditioned, particularly in its deuteronomic form. It is, additionally, not based on previous behaviour by Israel but on YHWH’s graciousness; nor is there, therefore, any hint of reward for past actions. The focus is entirely prospective. The narration of Covenant formation is particularly prolonged, with Moses making several journeys up and down the sacred mountain as if handling negotiations between the parties. The fact that the Covenant is broken by the irruption of idolatry even before it has been fully negotiated is an important part of the narrative, as is Moses responsibility for this event in the opinion of YHWH.

The Covenant of Moab [Deut 29 :1ff]: a confirmation and extension of Sinai/Horeb, the relationship with YHWH is presented yet again, as if giving chance for second thoughts on the part of Israel. The penalties for non-compliance (both personal and corporate) are stated in more detail [29:17ff]. Finally the situation of Israel is presented as one of a stark choice: “I am offering you life and prosperity, death and disaster” [30:15]. This is an abiding

¹⁰ Cf. Novak [1995 p31].

choice not just for those present but for those out of earshot of Moses and for generations to come [30:6].

Covenant of Shechem [Jos 24]: a parallel to Moses enactment at Moab, Joshua re-confirms yet again the original covenant with YHWH without mentioning it explicitly (except by reference to the Book of the Law [24:26]). Again the people of Israel are confronted with the choice of affirming the relationship with YHWH, or not.

Covenant of Jehoiada [2 Kings 11:17]: A re-commitment to the covenant between Israel and YHWH made after a dynastic coup, suggesting the relationship with YHWH is independent of any single organizational or political form.

Covenant of Asa [2 Chr 15:12-15]: another affirmation of the covenant after an unspecified period of religious lapse. The royal household itself has given up the relationship with YHWH. King Asa is shamed into reform by the prophet Azariah. The corporate relationship with YHWH is not something merely formal and maintained by the 'heads of state' but a relation generally available throughout the population of Israel.

Covenant of Ezra and Nehemiah [Ezra 10; Neh 10]: a post-exilic reconfirmation of Sinai/Horeb. During the absence from Jerusalem and Judah, Yahwhistic awareness and practice had clearly suffered. Reconfirmation is

therefore preceded by a reading of the Law.¹¹ A notable addition to this is the agreement among the returning exiles to forbid inter-marriage with non-Israelites. Tithing is also introduced, apparently as a method to finance the massive re-building programme required. The corporate relation may imply temporary or expedient social policies, but it is not constituted by these.

Covenant of Jeremiah [Jer 30, 31]: a prophetic statement of the ultimate salvation of Israel despite military defeat, dispersion and apostasy. This is an anticipation of the 'new' covenant; an eschatological book of the law will be written, as it were, genetically on the hearts of all of Israel. Jerusalem will be re-built "...so that it will never be destroyed or demolished again" [31:40]. In one sense this is simply a restatement of Sinai; in another it is indeed an entirely new covenant, as is each of the above.

Covenant of Creation [Jer 13: 19, 20, 25; Hos 6: 7]: somewhat ambiguous references to creation itself as the symbol of covenant (with possibly some form of connection to the Noachic covenant). The suggestion here is that the Covenant applies in some manner to all of creation not just Israel.

It is clear from even this brief survey that the theological meaning of covenant is not to be found by reference to contemporary 'commonplace' usage. The analogy does not hold from human alliances or contracts to the divine. A new form of association is likely being suggested. It does not seem inaccurate to note this as a revelation in itself.

¹¹ Exile certainly caused a major re-assessment of the status of Covenant. In fact it could be a crucial impetus to revelation. The Priestly Document of the 6th and 5th centuries BCE for example represents theological learning brought about by the experience of exile and return to live among a pagan population. Cf. Thoma [1980 p39]. Cf. also Blenkinsopp [1992 p194].

The contemporary uniqueness of the Covenant is implicitly confirmed by the results of scholarly research over the last 100 years. These results point to an essential ambiguity, a core of mystery, in the relationship between YHWH and Israel as a defining characteristic of the relationship.¹² Biblical linguistic scholarship from the time of Julius Wellhausen (1844- 1918) has tended to focus almost exclusively on the *Sitz im Leben* semantics of *b^erith* in an attempt to pin down the meaning of the relationship between Israel and YHWH without notable success. As with translations of the term, attempts to produce a ‘standard’ interpretation are notoriously varied in their results, including: *promise on oath* (Valeton 1893), *cultic ceremony* (Kraetzschmat 1896), *tribal agreements* (Schivally 1901), ‘*union of spheres*’ (Pederson 1914), *legal union* (Begrich 1940), *international treaty* (Mendenhall 1954), *a treaty among equals* (Kohler 1956), *an intentional act* (Jepsen 1961), *an obligation* (Kutsch 1972), a mere *analogy* (McCarthy 1978), *proclamation of cosmic order* (Murray 1992)¹³.

The semantic fluidity of the term ‘covenant’, I suggest, reflects the revelatory character (and therefore inherent uncertainty) of the meaning of this relationship. One way to express the uniqueness of this relationship is to point out its reflexive nature: it is a revelation about itself. If the purpose of the election of Israel is to reveal God’s purpose in His creation, then there must be a process, a mechanism, through which that purpose manifests itself and which is ‘shown’ to mankind. This process must take

¹² Although, significantly, this scholarship does agree upon at least one thing according to Clements [1973 p324]: “There is widespread agreement that *berith* in the Old Testament cannot be separated from the concept of relationships...” I will argue below that the nature of this relationship may be more profitably determined by its performative aspects as documented in the biblical witness itself since the relationship, whatever its metaphorical background, is by definition *sui generis*.

¹³ Cf. Jer 33: 20-21.

a form that is ultimately intelligible in human speech and human experience. This implies a sequence of valid interpretations, a hermeneutic process for assigning meaning not just to experience but to previous interpretations. This sequence of interpretations in turn implies a definable relationship among interpreters. Thus the relationship itself is an inherent part of revelation. Election under the Covenant is not just being privy to its contents (the Law), therefore, but being cognizant of the nature of these relationships within the Covenant.

So it seems reasonable to say that revelation is not just discovered, it is created; and it is discovered/created at the same instant that community within the relationship of the Covenant is formed, and recognized as something unique. This is when God's self-disclosure actually begins. This concept of revelation implies not just community but development within community: "...the word [of God] is mere inception until it finds reception in an ear, and response in a mouth."¹⁴ The theology of the Covenant is, to the extent it is an historical process, indistinguishable from the sociology of learning.¹⁵ More precisely it involves the activities we associate with epistemology and axiology, the discovery of the real and its implications. It is the covenantal relationships which allow these activities to take place, or more properly these activities are the covenantal relationships.

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Since the covenantal relationship generates its own reflexive movement, it evolves as its meaning evolves through the reflection and experience of each generation, creating a trajectory of interpretation of the divine commands which is not simply moral but

¹⁴ Rosenzweig [1970 p110].

¹⁵ Cf. Hartman [1985 p136].

concerned with reality and its importance.¹⁶ This manticism is clear from the Torah in its various historical editions (Chronicles as a re-reading of Genesis, Samuel and Kings; the deuteronomic editing etc.), to the Prophets and Writings and their re-interpretation of history, to the construction of the *Mishnah* and the *Talmud* and beyond. The ‘content’ of the Covenant develops, disclosing not just God and His creation but itself.¹⁷ Similarly, the institutional development of Israel from tribal association, to monarchy, mutual dependence in exile, post-exilic reform movements, through the Pharisaic movement and its various rabbinic successors, is a continuous adaptation to circumstances, responding to the need to keep the process underway. The Covenant with Israel, in a sense, is a revelatory system in which each historical instance of divine grace is re-interpreted continuously leading to further gifts of grace and becoming a continuous ‘presence’ rather than an occasional intervention.¹⁸ This is literally wrestling with God (*Yisra –El*). YHWH is at all times a part of the social context, immanent as well as transcendent, engaged with Israel. There is directionality toward increasing completeness in this process but no progress since its end is the infinitely divine. YHWH’s eschatological promise of salvation defines the *terminus ad quem*; but each ‘lapse’ of Israel’s commitment is as catastrophic as any other in reducing God’s presence. And each re-creation of the covenant is a new reality of incommensurable uniqueness, an entirely new beginning. Learning about reality and its value takes place when looked at historically but when considered prospectively there is no predictable direction that can be foreseen. The Covenant is quite literally a struggle, requiring enormous endeavour. When Israel stops this endeavour, when it

¹⁶ Cf. Hartman [1985 p9]; Lodahl [1992 p56].

¹⁷ Cf. Ginzberg [1955 p4]. Also Tryggve [1988 p5].

¹⁸ The rabbinical saw is appropriate: “The reward of *mitzvah* is *mitzvah*.”

betrays its commitment to its custody of eternal values in the search itself, it 'prosper' in terms of moribund standards but it loses divine grace.¹⁹

In summary, the Covenant is not a vision, nor an agreement nor a contract nor a single event, nor even a single biblically attested arrangement between Israel and YHWH.²⁰ It is a commitment of mutual fidelity, a "total relationship,"²¹ through which a continuing process of judgment and choice, a history, is begun and re-begun, not a single personal or communal 'decision' as such. It is a process²² in which the only error seems to be cessation of the process of covenant-making itself. All the specific covenants between YHWH and Israel are simply milestones in this process - historical reminders not just that the Covenant needs to be renewed but that, when it is, it will be different depending on existential circumstances.²³ Surprisingly, therefore, there is no 'permanent' content to the covenant, factual or theoretical, *except* the process of the covenant as it unfolds and its underlying commitments.

2. The relation of the Covenant is one of mutual submission by YHWH and Israel as justice and is typically symbolized by a concrete object.

¹⁹ Cf. Danielou [1958 p172]; also Barth [1963 p38]; also Jenkins [1954 p171]. Also cf. with the Pauline command in Eph. 5:10 and Glatzer [1953 p203].

²⁰ Cf. Catholic Church [1966 Chap 1 Art 2].

²¹ Hartman [1985 p14].

²² As far as I am aware the idea of the Covenant as a process of continuous re-interpretation of events originates in von Rad [1962, 1968]. Eichrodt [1961-1967], writing in the 1930's, saw covenant as a process within the history of salvation in which the cross-section of belief remained the same at all times. Brueggemann [1992] looks at the Covenant as 'bipolar', alternately 'legitimizing structure' and 'embracing pain', creating new revelation through dialectical conflict. My presentation here contains elements from all three of these approaches.

²³ Wellhausen's theory is that Israel moved from a concept of 'natural bond' with YHWH to a concept of 'conditional treaty' (which for Wellhausen means covenant) through some form of ethical element (presumably a purely social institution) that ended up destroying the original national character. He looks on the result of this as the Covenant. I see the Covenant as the producer of both contemporary institutions as well as contemporary theology, whatever it happens to be called. The Covenant is the 'all-relativizer'.

YHWH submits in the Covenant with Israel. Divine submission is unavoidable if God is to reveal Himself within the creaturely limitations of mankind. Thus Urbach can state: “Abraham represents the shift from God the solitary Creator of Nature to God the self-limiting covenantal Lord of History.”²⁴ In the proclamation of the Covenant, God has already abased Himself as God. In a sense therefore the Covenant, that is the relation with Israel, is ‘superior’ to God Himself because God has ordained it as such. But as a relation, manifest only in the events of that relation, the Covenant might be considered ephemeral, hard to discern among the apparently important events of daily life. The reality of the covenantal relation is, therefore, often made explicit by God and by Israel in a ‘concrete’ object as a symbol of the reality created and maintained in covenant by Israel jointly with YHWH and to which both Israel and YHWH submit.

For example, the Noachic rainbow is symbolic of the Covenant with Noah to preserve humanity regardless of their transgressions, a divine *aide memoir*, visible to Israel as well as a reminder to Himself. The Abrahamic People themselves is another such symbol in its designation as an eschatological line. So too the Mosaic land of *eretz Israel*, and the Ark of the Covenant, and its transmission to the Jerusalem Temple.²⁵

All these are the covenant in concrete, one might prefer ‘concentrated’, form. They

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²⁴ Urbach [1979 p29].

²⁵ This of course is not a complete list of such symbols – the heap of stones in Gen 31:48, the Sabbath in Ex 31:12-17, the altar in Gen 12:8, 13:4 and Jos 22:26, the tamarisk tree in Gen 21:32,33, the sun and the moon in Ps 89:34ff, the stone which Jacob used for a pillow in Gen 28:10-22 (Cf. Clements [1965 p13]), and the stele in Is 9:19 are all such, though less significant, examples. Rather this list is meant to suggest an outline progression in the understanding of the term ‘covenant’ and of the nature of the theological relationship between Israel and YHWH. These symbols may be referred to as reminders, ‘witnesses’, suggesting precisely the aspect of third party identity I am trying to highlight. But it is crucial to recognise that this witness is created *in* the creation of the Covenant itself not before. It is the identity of the Covenant which is being established. Cf. Acts 7:44: “In the wilderness, our fathers had the tabernacle with them to remind them of the covenant.” Methodologically, it is important to consider these symbols as running from their theological source to their sociological effect and not vice versa.

are products of the faith/faithfulness relationship with YHWH that represent the 'cause' that both Israel and YHWH are engaged in. In each, God sovereignly forgoes his sovereignty while maintaining it within (or under) the reality created by Himself and the people of Israel.²⁶ And as the symbols of Covenant, they are also symbols of the reality of that relation as a relation. Performatively speaking, the covenant is created/discovered at the moment of mutual submission by Israel and YHWH.²⁷ The Covenant, and with it reality, comes into existence continuously in this action, and so too the symbol of that relation.²⁸

The Covenant doesn't make any individual's life easier.²⁹ Its salient social feature is that each Israelite has not just a responsibility *to* each other but also *for* each other.³⁰

The Covenant is not a matter solely for 'the leaders' of Israel nor is the reality of the Covenant only relevant for only 'big' decisions. It is the all-encompassing fact of the entire life of Israel. The concept of election does not tolerate the separation of the relationships of men with God and the relationships of men with men. This is a consequence of the fact that the individuals created by the Covenant are essential to its maintenance. According to Brueggemann:

Israel understands itself...as a community of persons bound in membership to each other, so that each person-as-member is to

²⁶ Note YHWH's submission to the law in Jer 2: 4-13 and Hos 4: 1-3 for example, in both defence and in prosecution. Other examples of the self-imposed restraint and submission of YHWH include Gen 9:17, Ps 105: 8-10; 106: 45; Is 43:24b; 54: 10; Ez 16:60; 2 Ch 21: 7. The idea of the 'binding of God' is of course not new. As noted by Lillback [2001 p137]: "...the essence of Calvin's conception of the covenant is the notion of the binding of God. This binding is God's own act of joining Himself with His creatures...the covenant is the means of union with God and man, the gracious self-binding of the infinite God" And of course the binding is mutual, [p166]: "The covenant is not just the binding of God to men but the binding of men to God."

²⁷ The theme of YHWH's self-subjugation throughout the OT is so obvious and so pervasive that it is easy to disregard it as a controlling fact of revelation. Perhaps the most beautiful and startling exposition of this is contained in Is 54 and 55.

²⁸ Cf. Clements [1965 p2]. Hosea introduced the figure of marriage as representing the relationship between YHWH and Israel. This also emphasizes the creation/discovery of a 'third' – the covenant as a marriage is a union with its own independent identity as a new reality for the partners.

²⁹ Cf. Eccl 7:15.

³⁰ Cf. Js 7.

*be treated well enough to be sustained as a full member of the community.*³¹

Each member of Israel is quite simply responsible for the ability of every other member to participate in the Covenant.³² This defines covenantal justice.

The ethic of covenantal justice is violated whenever either the transcendence or the presence of God is denied or, the equivalent, when the search for God as both is stopped. Stoppage occurs whenever the relationship with God is compromised by idolatry or by oppression (economic as well as political³³). In the covenantal ethic, injustice appears consistently as the ‘flip-side’ of idolatry, not because of any primitive Marxist theory but because the reality of God with us is seen in the right-ordered-ness of relationships with one another.³⁴ Thus the Prophets proclaim social injustice with the same vehemence as idolatry: “Woe to those who add house to house and join field to field until there is nowhere left and they are the sole inhabitants of the country”[Is 5: 8]. The great threat to Israel occurs when ‘success’ is taken for granted and fixed in its meaning by Israel’s leaders:

Woe to those who call what is bad good and what is good bad... woe to those who think themselves wise and believe themselves enlightened... This is why YHWH’s anger has blazed out against his people[Is 5: 20].

Justice is not the price of election, it is election *tout court*. As the theologian, David

Novak, succinctly puts it: “Justice is the bottom line”³⁵ of the covenant relation.

³¹ Brueggemann [1997 p421].

³² Cf. Ogletree [1983 p80]: “[In OT documents]...Morally speaking, the key point is social solidarity...I act not simply for myself but for the well-being of the whole people. I am answerable not simply to myself and my own principles, but to the whole people and its foundational principles. I am finally answerable for the people as well, for I am called to measure the corporate life of the people to whom I belong in terms of its founding principles.”

³³ See for example the biblical references for so-called Covenant Economics: Lev 25-27; Num 27; 36:6; Micah 2: 1-2; Ez 47: 2.

³⁴ Cf. Birch [1991 esp. p74ff].

³⁵ Presentation at the Society for the Study of Christian Ethics, Cambridge, September 2009. .

Justice is the cohesive force of Israel. This justice is first demonstrated by YHWH to Israel and then, in imitation of God, by the Israelites among themselves and in their relations with the rest of humanity: “You will love your neighbour as yourself”[Lev 19: 18] is the explicit divine command of justice. Justice is *the* covenantal good.³⁶ In the prophets, therefore, justice becomes a name of YHWH.³⁷

3. The Covenant is recognizable as corporate in its creation of identity and its establishment of immunity and radical accountability.

In the third chapter of the book of Exodus, YHWH announces to Moses: “I shall be with you.”[Ex 3: 11] This is the first indication we have of the concrete relation between God and man that is designated as the Covenant. God, while maintaining absolute transcendence over His creation, enters into this creation. He does so not just as a supernatural force or voice or sign or through a heavenly representative as in previous divine biblical manifestations, but as a person: “I”. In doing so he creates an identity for himself [Ex 3:13-15] and confirms the separate identity of Israel in the descendants of Abraham, Isaac and Jacob [Ex 3:16].³⁸ Name and existence are correlates in Semitic culture: “When God pronounces His name, the divine presence is made manifest.”³⁹

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³⁶ Cf. Mic 6: 8 on the equivalence of justice and the good.

³⁷ Cf. Jer 23: 6; Ps 33

³⁸ Identity is not a biblical word. However the concept of *yehida*, a Hebrew word meaning sole or unique is. This is frequently applied to express identity particularly of the human being, as in Gen 22:2 with reference to Abraham’s *only* son.

³⁹ Tryggve [1988 p9]. Cf. Ex 33:19; 34:3-6.

But the implications are even more significant than existence: “That which has a name of its own can no longer be a thing” notes the theologian Franz Rosenzweig.⁴⁰ A proper name is not a category or a species. A name creates a *subject* with whom another subject may have a mutual relationship. And a relationship is not a property of either subject. A new entity is created which includes these subjects but is not part of them.⁴¹ This is the nature of the Covenant - a world of relationships rather than a world of things. Within this Covenant, Israel (with God) will have *immunity* from the power of Egypt [Ex 3: 20]. Nevertheless the individuals of Israel remain accountable for their actions. The elders as a group must approach the king of Egypt and they must request release [Ex 3: 18]. YHWH will not simply transport the Israelites from Egypt. Moses himself must accept responsibility for convincing his confreres to undertake such action [4:1ff].⁴² The corporate relation between YHWH and Israel is described in the redemptive terms of identity, immunity and accountability. I will discuss each term in more detail here:

Incorporation into the Covenant creates identity

The events recorded in Exodus are likely to have occurred in the 13th century BCE.⁴³ The interpretation of God dwelling with his people, however, probably reaches its final written form as a concept of the post-exilic Priestly Code in late 6th century BCE.⁴⁴ Whether we recognize the transmission of this tradition as evolutionary and true to an original or discontinuous and redactional, it is remarkable how consistently

⁴⁰ Rosenzweig [1970 p186]; cf. Tryggve [1988].

⁴¹ The *Mishnah* identifies just such a relationship as the *Shekinah* itself. Cf. *Avot* III 2, 6. Cf. also Urbach [1979 p42].

⁴² Moses's brother Aaron is to become Moses's, that is to say God's, mouthpiece, and therefore also has total responsibility for convincing the elders.

⁴³ Cf. New Jerusalem Bible [p12].

⁴⁴ Cf. Congar [1962 p7].

the corporate relation of the Covenant is presented biblically. For example, the 6th century *Deutero-Isaiah*, written as a prophetic ‘design’ of the new, post-exilic Israel contains the same corporate elements as those of those Pentateuch: “Who formed you Israel?” [Is 43:1] inquires the Prophet, seeking confirmation of what his audience already knows. Israel is not a ‘natural’ grouping of Semitic tribes. Israel, as the glory of God, according to the Prophet, has a concrete corporate identity which is created by God and is separate from God, and separate as well from individual Hebrew persons or even the collective of all Hebrews. It is an identity given within and by the Covenant.⁴⁵

God identifies Himself as *The God of Israel*, not just as YHWH. In fact, it is in the establishment of the corporate covenant that the participants, YHWH and the people of Israel, receive their *names*. And as Rabbi Benamozegh stresses: “...to Judaism the name is the person, the word contains the essence of the being.”⁴⁶ “I am their God and they are my people” is actually an event in which names as real entities are created *along with* the relationship that also has a name. ‘YHWH’ is a covenant name, which God gives to Moses at the initiation of the Sinai covenant [Ex 3:13f]. It is inseparable from the Covenant. Hence in Hos 1:8, 9 Israel ceases to exist as a people at the precise time that they no longer know the name of YHWH. The identity of both disappears, at it were, with the identity of the Covenant.

It is this identity in terms of which the actions of Israel as identity must be justified. To His *name* is the temple built, and it is the *name* that dwells in Jerusalem; in His *name* is concentrated everything about the *relationship* with His people, within the

⁴⁵ Cf. Britton [2003 p90].

⁴⁶ Benamozegh [1995 p116].

Covenant everything takes place through the *name*; simply knowing the *name* is participating in the Covenant. It is only with the divine *name*, that is, within the Covenant, that the corporate identity of Israel can continue: “So will your race and your name endure.”[Is 66: 22].

The Covenant is a ‘living name’. The reality of the relationship, as an identity analogous to a marriage, is stressed: “...your Creator is now your husband...So now I swear never to be angry with you and never to rebuke you again.” [Is 54: 5, 9]. The Covenant as relationship is not simply a ‘mega-tribe’, a collective name for the Twelve Tribes. The Horeb Covenant is constitutive of the people as a people, a people that only can be Israel when they are faithful (submissive) to the Covenant.⁴⁷ The emptying of one’s interests in the acceptance of those of another is not a sacrificial but a creative act by YHWH and Israel.

Israel is also an eschatological name, a name with power, the power to bind individuals to each other in a particular kind of social system.⁴⁸ This is the same power as the eschatological name of YHWH which fills all creation and by which God binds not just people together but the elements themselves.⁴⁹ Israel, therefore, creates individual identities in its members to the extent that it creates individuals who are named by God, not to the extent that it forms a collective composed of a uniform commonality of spiritual, intellectual or genetic class.⁵⁰ It is the name which has the power to establish the miracle of ‘right-relationship’, of justice within this diversity.⁵¹

⁴⁷ Cf. Jenkins [1958 p45].

⁴⁸ Cf. Barker [1987 p113] for discussion of the name as a power, especially a power to ‘bind’.

⁴⁹ Cf. Gen 48: 16; Zech 14: 9 and 1 Enoch 69: 13, 14, 21.

⁵⁰ Cf. Novak [1995 p3]

⁵¹ Cf. 3Kings 8: 27, 30 where God has no abiding place in His earthly temple except through his Name and Power.

Incorporation in the Covenant establishes corporate immunity and radical accountability.

Identity has another power; it is a source of protection.⁵² With total consistency the Prophet continues as he quotes YHWH: “It is I who blot out your sins of revolt for my sake.” [Is 53: 6]. Within the Covenant there is corporate immunity, the freedom from guilt. YHWH guarantees that those who act in His name, his identity, will be forgiven.⁵³ Thus the Covenant as a relation is a source of saving power: “God, save me by your name . . .” [Ps 54: 1]. The phrase ‘in the name of the Lord’ is of obvious import to Christians who use it and its variants to designate the involvement of God in human affairs. But this is not a turn of speech that has evolved as a euphemism for divine approval or protection. It is a liturgical term that refers specifically to the ceremonies of the Day of Atonement,⁵⁴ the most important ritual of the Covenant since it restored the covenantal bonds that had been broken by sin. The High Priest, acting as intermediary between YHWH and his people, wears the Tetragrammaton on his forehead during his assumption of the collective guilt of Israel in its failure to keep covenant obligations.⁵⁵ He acts literally in/with the name of the Lord (the Hebrew is the same).⁵⁶ Under the name of God he is protected from the sins which he ‘bears’ for

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⁵² Cf. Deut 32: 34.

⁵³ Cf. 2 Chr 7: 14,15; Jer 31: 34.

⁵⁴ Cf. Barker [2003, p65]. Cf. John 1:29. Heb 9:13,14 makes direct reference to the ritual of atonement.

⁵⁵ Hence the Christian heritage in the usage of Acts 4:12 (the name wherein we must be saved), John 14:13, 15:7 (the name we call upon to be saved), and Phil 2:10 (the name above every name). The high priest represents the whole cosmos before God in this ritual, not just Israel. Cf. Wis 18:24.

⁵⁶ Cf. also Rev 14:1 for a NT reference to the practice wherein the redeemed have the *name* on their foreheads.

Israel.⁵⁷ It is this liturgical usage which survives in the legal immunity provided by the corporation.⁵⁸

The correlate of immunity is accountability. But it is clear that this accountability is not so much for actions taken as for the *reasons* actions are taken: “State your case and justify yourself... We shall judge this together” [Is 43: 26].⁵⁹ A basic principle of the corporate way of being of Israel is this accountability for the underlying rationality of decision. Members of corporate Israel must be prepared always to justify their actions.⁶⁰ The standard of divine justice exceeds the demands mere civility or social awareness: “You are pledges for one another” [Js 22: 20], that is, pledges to YHWH. This is *zachuth aboth*, corporate justice. The standard is therefore transcendent and sits with YHWH.⁶¹ But it must be formulated in words and put into social and legal practice. It is at this point that Israel becomes vulnerable in the extreme.

YHWH commands righteous action but not the precise criterion for righteous action in the multitude of human situations: “Make fair judgement your concern, act with justice, for soon my salvation will come and my saving justice be manifest.” [Is 56: 1]. Whatever conceptions of fairness and justice we employ will be subject to God’s own judgement eschatologically. Simply declaring that one is acting in the name of YHWH is insufficient; obedience must be demonstrated against the eschatological

⁵⁷ Cf. Ps 32:1; Lev 10:17; Ex 28:38. Note ‘the blood of the covenant’ in Ex 24:3-8 referring to the ritual. This ritual is continued in Christianity. The making of the sign of the cross *on the forehead* was common practice until the 4th century. Cf. Sertillanges [1923 p225].

⁵⁸ As Pope Benedict XVI [p159] points out, the assumption of guilt by the Suffering Servant may not seem plausible today; and yet we are reminded of this fact daily in the corporate assumption of responsibility for our actions.

⁵⁹ Note the difference from YHWH’s challenge to the idols in 21: 21: “Present your case; produce your arguments.”

⁶⁰ This is echoed in the NT, for example in 1 Pet 3:15: “Always be ready to give an answer.”

⁶¹ Cf. Ps 7: 8, 9.

criterion of divine righteousness. *Per force* such a demonstration will prove impossible – and yet it is necessary as part of the Covenant. The result is a situation of acute and extreme judgmental vulnerability. The necessity to act and act well is not relieved by the uncertainty regarding the criterion of correct action. This is the situation of all corporate decision-makers. They must act in the interests of the corporation. But they must also define these interests as a criterion of decision such that they are defensible as the corporate (rather than personal or any other) interests. Such a defence can never be ‘air-tight’ and we are assured will be flawed.⁶² The essential freedom of the corporate relationship means that there is no self-evident criterion on which to base such a judgment. Unintended consequences are not just possible but likely, one never sees the whole picture, reason is obscured by passion, ignorance is inevitable. Therefore the decision-maker is ‘convicted’ from the start; he will be wrong no matter what his judgment.⁶³ But he must continue to articulate and to discard criteria in a never ending search for the good, the criterion of true value, that is, God.

The essential demand of the Covenant, therefore, is one of continuous and relentless interpretation about the basic orientation of reality – what it is and its significance.⁶⁴ There is no possibility of permanence in the content of the Covenant except in the continuous exercise of freedom by both God and man. The redactional process of Scripture is itself part of the reflective interpretation and progressive revelation of the covenant. Both the Deuteronomic Reform and the Priestly Code rewrite Israel’s

⁶² Cf. Ps 14: 2, 4.

⁶³ Cf. Ps 143: 2.

⁶⁴ Cf. Blenkinsopp [1992 p184]. Ps 78 is an explicit indication of continuous repetitive reflection of Israel. The more change, the more repetition appears to be necessary.

history, for example.⁶⁵ In one sense therefore the Covenant has no fixed meaning; and that means a great deal. It is the absence of, or at least reduction in, meaning that is felt by Israel which drives it again and again to revisit and revise its past relationship with God. It is worthwhile noting for example that the divine promises are not fully explicated in the earliest parts of the Old Testament; they emerge through corporate reflection.⁶⁶ In a sense this 'fluidity' is a consequence of freedom, the unbounded freedom of God and the gratuitous gift of freedom to man, and is an essential component of the Covenant. It might be said that the covenant is the enduring symbol of this freedom. And the inevitable cost of freedom is uncertainty, not the uncertainty involved in the lack of information but the fundamental, existential uncertainty of the meaning, the value, the intention, the proper criterion of any action. The ultimate Good is not defined in specific terms, except as God Himself. It is therefore the choice of the criterion of value, of success, of performance in human endeavour that is the unavoidable risk of corporate freedom.⁶⁷

Identity, accountability and immunity are liturgically demonstrated in the three requirements for 'incorporation' of any individual into Israel: circumcision, baptism and sacrifice.⁶⁸ *Circumcision* is the physical mark of identity required of every Jewish male. *Baptism* is a memorial of the saving action of YHWH at the Red Sea which provided immunity from the Egyptians. *Sacrifice* is demanded as an acknowledgement and allegiance to the Presence of God YHWH with Israel and to Whom Israel is perpetually accountable.

⁶⁵ Cf. Buber [1946 p18]; Johnstone [1987 p16, 37].

⁶⁶ Cf. Rust [1947 p95] who also points out that the promises to Abraham are clearly anachronistic.

⁶⁷ The melancholic ambiguity of the final verse of the Book of Judges [21:25] perhaps sums up the recognition of the 'two-edgedness' of the existential freedom of the Covenant: "In those days there was no King in Israel and everyone did as he saw fit."

⁶⁸ Cf. Shedd [1958 p49-51].

4. The nahala of the Covenant appears as the first legally established institutional corporation.

Gerhard Lohfink describes Israel as “the form of God, firmly rooted in the land.”⁶⁹

And it would be hard to deny the importance of physical territory in the symbology of the Hebrew Scriptures.⁷⁰ It does not seem an exaggeration, therefore, to suggest that the *name of eretz Israel* which ‘consists’ of the *name* of YHWH and the *name* of the people of Israel is the concrete symbol of Covenant as relationship. It is the presence of the *names* that creates *eretz Israel*; that makes it, therefore, the ‘real symbol’ of the divine-human relationship. Israel as a space often becomes indistinguishable from Israel as a relationship. For example, when Israel is in exile, it is not possible to carry out the Word fully even if the Spirit remains with the people.⁷¹ Land and Torah gradually become in a sense interchangeable so that the latter may become the transcendental space of Israel during Exile and in Diaspora. This space, therefore, is arguably the most important symbol of the Covenant. It is the space in which God and Man conduct their relationship. It also becomes an institution, expressed in law, which represents the Covenant visibly within Israel and to the world: the *nahala*.⁷²

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⁶⁹ Lohfink [1984 p5].

⁷⁰ Cf. Ex 15: 17, 2, Sam 7: 10, Is 60: 21, 61: 3, Jer 32: 41, 42: 10.

⁷¹ Cf. Dt 12: 5; Cf. Thoma [1980 p40]; Cf. also Nahminides *Commentary* on Dt 8: 10.

⁷² According to Hester, the term appears 213 times in the OT mostly in Numbers, Deuteronomy, Joshua and Psalms. It is also used in a verb form an additional 59 times. Cf. specifically: Num 26: 52-56; 27; 33: 55ff; 36: 6; Lev 25: 23; Jos 24: 8; Ez 47: 2; 1 Kgs 21: 3; Ps 2: 7; 105: 45ff; Eccles 17: 17. According to Hanson [1987 p53], the institution of the *nahala* most likely considerably post-dates the Book of the Covenant but reflects its principles entirely. Von Rad [1966 p92] concurs.

As the dynamic of the Covenant progressively defines the identity of both Israel and God, so the meaning of the physical territory of Israel evolves. And just as the synagogue and rabbinic Judaism emerge as institutional adaptations promoting the continuation of the 'learning system' of Israel, so too the ancient institution of *eretz Israel* as the *nahala*, the 'inheritance'⁷³ of Israel, emerges from the narrow idea of a plot of hereditary land to a form of cosmic association with universal meaning.

The oldest Jahwist and Elohist sources refer to the hereditary land of the clan or tribe; the Priestly Writer applies the term similarly.⁷⁴ It is the deuteronomist who first speaks of the *nahala* applying to Israel as a whole.⁷⁵ In the Psalms and Prophets *nahala* takes on a progressively wider meaning than just the land and begins to refer to both the people and the territory of Israel as the *nahala*, or 'portion' belonging to YHWH personally.⁷⁶ In the Book of Jubilees and in Enoch, the entire earth is considered as Israel's *nahala*.⁷⁷ Eventually, after the Exile, in Pharisaic and rabbinic Judaism, the land becomes a transcendental symbol, the inheritance of which is equated with having a share in the world to come, the Kingdom of God, a realm inhabited by both God and man.⁷⁸

⁷³ There is a separate idea of straightforward inheritance in the Hebrew word *segullah*. Cf. Ex 19: 5 where it is usually translated as 'treasured possession'. This word does not connote the covenantal aspects of *nahala* however and is not included in my consideration.

⁷⁴ Von Rad [1966 p80ff].

⁷⁵ Cf. Dt 4: 21, 38; 12: 19; 15: 4; 19: 10; 20: 16; 21: 23; 24: 4; 25: 19; 26: 1. Von Rad [1929 p43] maintains that in Deuteronomy the *nahala* become the chief expression, that is symbol, for divine blessing. Cf. Clements [1965 p113] who notes the deuteronomist's concentration on the Name as a correlate to his development of the *nahala*.

⁷⁶ Cf. Ps 28: 9, 68: 10, 78: 62, 94: 14, Is 19: 25, 47: 6, 63: 17, Jer 3: 19, 12: 14, 15. Cf. Hester [1968 p4].

⁷⁷ Cf. Jub 17: 3, 22: 14; 32: 19, En 5: 7

⁷⁸ Cf. Davies [1974 p121]. Davies also cites the Mishnah (*Sanhedrin* 10:1) and the *Testament of Job* as well as Philo's '*Questions on Genesis*' (*Comments on Gen* 15:1-8) supporting the idea of the land as a symbol of transcendental reality inhabited by both God and man. The evolution of the symbol reaches its peak perhaps in the 'sacralisation' of Jerusalem (e.g. Is 60:19, 20 and into the NT as the 'heavenly Jerusalem' of Revelation).

The religious origin of the corporation as a social and legal institution is perhaps most clearly suggested in this concept and practice of *nahala*. The *nahala*, as a symbol of the Covenant, connotes the relationship itself in terms of corporate identity, immunity and accountability. But it also goes beyond these characteristics. In the first instance, the *nahala* is inalienable in its permanence as part of the Covenant, and its status as ‘non-property’. The issue behind the story of Naboth’s vineyard in 1 Kgs 21 indicates the legal force involved: “No heritage may be transferred from one tribe to another; each Israelite tribe will stick to its own heritage.” [Num 36: 9]. The land of Israel literally belongs to (is) the Covenant: “He who takes refuge in me shall possess the land” [Is 57: 13(b)]. That is, the land of Israel is not a chattel of individuals, or tribes, or even YHWH but a consequence of Covenant. In short, because *eretz Israel* is part of the relation of the eternal Covenant, it is eternally inalienable; it could not be bought or sold. Land which cannot be bought or sold is not property. This is also the modern legal status of the corporation.

Further, the *nahala* is not straightforwardly an ‘asset’ to be exploited either by YHWH, or by those inhabiting the land. Both YHWH and Israel clearly have an interest in the *nahala* theologically speaking. But neither can exercise complete legal authority regarding its worldly fate. And although it is *possessed* by the tribes and families distributively, Israel also *possesses* the land collectively.⁷⁹ Consequently, according to the Talmud, the *nahala* does not indicate a conventional state of ownership.⁸⁰ This ambiguity in possession is another link to the modern corporation since it is the underlying reason for the its strange status in law. The origin of this status appears culturally complex.

⁷⁹ Cf. O’Donovan [1996 p41].

⁸⁰ Cf. I. Epstein (trans.), [The Babylonian Talmud, p188].

The conception of *nahala* may pre-date the Scriptural witness and may also have been present among other Semitic peoples,⁸¹ but is used by Scripture in a unique way.

Kennet has advanced the possibility that the *nahala* originates as a cultural rather than a theological notion, the latter being then derived from the former.⁸² He makes the essential point that the term has no modern English equivalent and that its typical translation as ‘legacy’ or ‘inheritance’ is misleading since even when used to discuss the apportionment for land among a man’s sons, it need not imply the death of the father. He presents evidence that the system of land tenure at the time of the conquest and for a considerable period thereafter was based on lots. These lots were recast periodically, perhaps in a seven year cycle. This, he posits, may be the basis for a ‘poetic metaphor’ applied to the apportionment of land, not just within Israel but among all the ‘nations’. If this was the case, the uncertainty of ownership could well have been adopted within Israel for theological reasons, suggesting as it does the gratuitousness of YHWH’s election of Israel and His gift of the land.

In any case, the issue of the relative standing of Israel and YHWH with regard to the land remains. It could be argued that this system of land apportionment was a sort of ‘leasehold’ tenure, to use the unusual English landholding system as a comparison.

While YHWH retained the ‘freehold’, Israel had some sort of long-term but nevertheless limited tenure on the land. Alternatively, the feudal idea of ownership vs. tenancy could be evoked to explain the situation. However neither of these is likely to express the distinction of the *nahala* adequately: The feudal model would imply that ‘dominion’ was retained by God, which is according to Gen 1: 26 is not the case. The

⁸¹ Cf. Malamat [1962 pp143ff].

⁸² Cf. R.H. Kennet [1933 pp73ff].

English model, on the other hand, both compromises human dominion, and doesn't touch on the point of the prohibition of alienation (since leaseholds may indeed be sold). How then can the *nahala* be interpreted theologically, other than simply as a re-statement of creation as belonging ontologically to God?

Von Rad, I believe, understates the complexity of the relationship of the *nahala* considerably when he claims that "The notion that YHWH is the true owner of the land can be traced back to the very oldest commandments."⁸³ Certainly, as Creator, YHWH is the source of all that is; but this fact does not compromise human ownership in general (dominion over the earth). Regarding the Promised Land specifically, YHWH commits it 'in promise' to the descendants of Abram without obvious qualification.⁸⁴ On the other hand, these descendants are to be as 'sojourners', implying something other (less?) than conventional owners in the arrangement.⁸⁵ And the first portion of the Promised Land is in fact purchased in the conventional way from the existing residents, suggesting a rather different kind of ownership intended in the *nahala*.⁸⁶ My suggestion is that, as a symbol of the Covenant to which and in which both YHWH and Israel are related, neither party controls its possession in any conventional sense. Parties to the Covenant quite literally live within the *nahala* and share an interest in it as an interest in each other. It is another way of describing the 'third thing' they create together as the concrete form of the Covenant.⁸⁷

⁸³ Von Rad [1966 p88].

⁸⁴ Cf. Gen 12: 7.

⁸⁵ Cf. Gen 27: 8; 28: 4; 36: 7; 38: 1; Ex 6: 4.

⁸⁶ Cf. Gen 23.

⁸⁷ Cf. Milbank [2003 p205]: "...the dyad of affinity occurs before the third of community..." There is a striking occurrence of this mode of thought in the *Targum Neofiti* concerning Ex 12:42 which survives from the first century of the Common Era: "...and Moses will go up from the midst of the desert and the Knig Messiah from the midst of Rome. One will lead at the head of the flock, and the other will lead at the head of the flock, and his Memra will lead between the two of them, and I and they will proceed together." Cf. McNamara, Martin (1994) *Passover Hymn of the Four Nights*,

I believe that a key point to the theological understanding of the *nahala* lies in the Levite tradition. The tribe of Levi was not allocated a ‘portion of land’, *helek*. Instead they were given cities, the relationally dense but agriculturally non-productive part of the Promised Land. Their function (and sole executor of the function after the removal of Abiathar, the last Aaronid chief priest, by Solomon⁸⁸) is the undisputed possession and maintenance of the national sanctuary, another concrete symbol of the Covenant. But Levite ‘possession’ is clearly not equivalent to unilateral dominion. YHWH cannot be owned in any sense.⁸⁹ The Levite position is complex: they both contain YHWH (as keepers of the temple) and are contained by YHWH (as members of Israel); and they contain Israel (as representatives of YHWH) and are contained in Israel (as representatives of Israel).⁹⁰ They are supported entirely by the rest of the community as representatives of YHWH and His Covenant.⁹¹ And as representatives of Israel to YHWH, they use the resources of the community (for example in the law concerning ‘firstlings’⁹²) without exercising any proprietary claim over them whatsoever. They are the “bond that unites the finite to the infinite.”⁹³ Their use of these resources is not mere consumption; it is worship: through them “the true requirements of serving God were continually kept before the eyes of his covenant people.”⁹⁴ Priestly use is therefore not priestly ownership but worshipful use.⁹⁵ The

Edinburgh, T&T Clark, p52. In this case the ‘third’ of the Memra is the relationship between Moses and Messiah. This triad forms, as a unit, yet another dyad with YHWH.

⁸⁸ Cf. 1 Kings 2: 26, 27.

⁸⁹ Cf. Charles [1917 p57].

⁹⁰ Cf. R. Abba in Buttrick [v3p877]; also Heb 7: 9 where there is recognition of the complexity of the Levite relationship.

⁹¹ Cf. Charles [1917 p30].

⁹² Cf. Prov 3: 9. Also Davies [1974 p28]

⁹³ Benamozegh [1995 p316]. Cf. Maimonides *Commentary on the Mishnah Torah* in Hartman [1985 p121]

⁹⁴ Rabbi Abba in Buttrick [v3p877].

⁹⁵ Cf. Ex 25-30

nahala suggests that divine justice, as the criterion of all action, means the worshipful use of property as something connected with 'dominion' but distinct from it.

The Levites, and their spiritual successors in the Houses of rabbinical scholars, set the standards of what constitutes worshipful use for all Israel, complementing the prophets who proclaim the power to act and demand action in the name of YHWH without providing the details of what actions are needed. For example, with the writing of Jeremiah (late 7th C BCE), the deuteronomic priestly code was also approaching completion.⁹⁶ This latter is a calm, un-dramatic statement by the priestly class, seemingly untroubled by the conditions that exercise the prophet, about intricate rules of Temple and social practice and precise elaborations of the law. Neusner documents this pattern in detail at the beginning of the Common Era as well.⁹⁷ The pseudepigraphical books 2 Baruch and 4 Ezra are apocalyptic laments about the condition of Israel, including the Roman war and the destruction of the Temple. Concurrent with their composition, however, the *Mishnah* is in preparation from numerous Talmudic, Midrashic and other traditional sources. And despite the worldly tumult occurring around them, the rabbinic compilers of the *Mishnah* focus solely on the complex issues and incredibly precise details of how YHWH must be honoured. Minute specifications of food production, inspection, preparation and consumption or sacrifice are formulated and progressively codified for the household, as if it were the successor to the Temple. The Sabbath, Festival Days, marriage, death, birth, all significant events in Jewish life, are made appropriate tributes to YHWH in good Levitical tradition.

⁹⁶ Cf. Buttrick [v1 p837, v3 pp888f].

⁹⁷ Cf. Neusner [1981 pp25-44].

In their service to YHWH and Israel, The Levites are themselves the symbolic first born and thus YHWH's own, a privileged symbol of the Covenant *within* Israel.⁹⁸ Their formulations of what constitutes right action are 'immunized' even within the community. The divine proclamation "They are mine" [Num 3: 13] strongly suggests that they are not to be molested. They have the same status as that of the Israelites in Egypt. They therefore will be protected within Israel as YHWH protected the Israelites in Egypt. The *nahala* of the Levites reiterates the immunity granted by the Covenant to Israel *within* Israel. Further, just as *eretz Israel* is to be a permanent possession under the Covenant, so the houses of the Levites are to remain part of the *nahala* of the Levites forever – contrary to any claims by other Israelites.⁹⁹ This emphasizes their immunity which remains in a certain degree of tension with worshipful use as demonstrated by the 'failure' of the Aaronid priesthood and the continuing need for prophetic presence which provokes them, through shame, to their appropriate action of setting standards of good for Israel. The prophets frequently attack 'those who handle the law' [Jer 2: 8]; and interpretations of the law by one rabbinic House are not infrequently contradicted by another. Indeed, the prophets may dismiss judgments from all Houses as mere pretence. So the articulation of worshipful use raises the threat of shame, as fear of the divine, for the priest or rabbi if he errs. Shame is a necessary threat to the privileged in the covenantal ecology of possession and use. Without it, and the means for generating it, worshipful use can easily collapse into domination, thus losing the critical distinction necessary to the maintenance of the Covenant.

⁹⁸ Cf. Benamozegh [1995 p282].

⁹⁹ Cf. Num 25: 32-34.

In summary, the sociological genius of the Covenant is that it mediates human relationships through the relationship with the divine and reveals justice, as the opportunity to fulfil the law, as its social principle. It is the search for the specific meaning of justice in concrete circumstances that involves Israel in a continuous quest.¹⁰⁰ This quest is corporate in that it involves the creation of an identity which is both formed by and forms the identity of its members. It is this corporate quest that creates the possibility of revelation – a sort of permanent collective state of listening for God, a spiritual Jodrell Bank created by God for the benefit of mankind.¹⁰¹ In short, Covenant is not a conventional agreement, but an irresistible mandate to search for God: “...start searching once more for your God YHWH, and if you search for him honestly and sincerely, you will find him.” [Deut 4: 29]. The *nahala* is the physical and legal corporate space in which this search takes place in all aspects of life. It is a space with a very specific identity that ‘instantiates’ the Covenant as a symbol of relationship. And it is a space within which there is both immunity and accountability. Acting within the Covenant assures continuing protection, but demands bearing the burden of freedom it allows. There is a sort of ecology of ownership of the *nahala* whose centre point is the Levitical priesthood which mediates between YHWH and Israel and creates a distinction between possession and worshipful use which is an essential part of the Covenant. This is, I believe, the primal corporation.

¹⁰⁰ Cf. Thornton [1950 p15].

¹⁰¹ Cf. Hartman [1985 p41, 50].

Chapter 3: The Bodily Revolution of St. Paul

The Covenant of the Peculium

Paul uses words as poets do; he regenerated them.
Charles Williams
The Descent of the Dove

In the last chapter I argued that the first cultural references to the corporation involve the Covenant between Israel and YHWH. In submitting to each other, Israel and YHWH create not just their own identities but the identity of a ‘third’, that is the Covenant itself as a living relationship which both parties consider as ‘superior’ and to which they dedicate themselves. The corporate relationship is concretely established as the *nahala* of *eretz Israel*. YHWH, as Creator, had granted mankind in general and Israel in particular, unqualified and inalienable proprietary authority over the earth and the land of Israel respectively. In turn, Israel voluntarily dedicates the results of this authority, the first fruits, back to YHWH in Levitical acts of worship. Thus as a scriptural revelation are the corporate characteristics of identity, immunity and radical accountability introduced into human society.

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In this chapter, I continue with the investigation of the Covenant begun in Chapter 2 through a consideration of The Body of Christ, as a term found in the first letter of St. Paul to the Corinthians. The Body, as St. Paul describes it, is a concept that is typically treated as either a descriptive reference to the

unity of the church¹ or as a metaphor for the redemptive relationship of Christians with Christ.² I suggest that the phrase is (also) an attempt by the Apostle to create a distinction concerning social relations that had not been available, or only marginally so, in Hebrew, Hellenistic or Roman culture. Paul is using implicitly, I will attempt to show, the relationship among family members of the household that obtains through the use of the *peculium*, a Roman institution and tradition.

Since the focus of my concern is associational, I will not address the possibly innovative interpretations of Jewish theology Paul makes.³ I presume that Paul, given his background and his statements, accepts without qualification the existence and continuing significance of the Covenant, even though he may be amending the conventional understanding of it to suit his purposes.⁴ So, I will concentrate solely on the new social relations Paul is suggesting. My hypothesis is that although the Body of Christ is a unique entity in Paul's conception, it is an instance of a replicable and often replicated relationship: the corporate, as this has been defined previously.⁵

¹Cf. Robinson [1952]; Kasemann [1971]; Soiron [1951].

²Cf. Best [1955]; Gundry [1976]; Thornton [1956].

³The literature of the *soma* is of course massive. Gundry [1976] provides a synopsis of the major modern theories developed since the theological significance of the term was established in 1920. Alternative theories include that of a physical body, the 'whole' person, a metonymy (i.e. the representation of one thing by another), a synecdoche (i.e. the representation of a whole by its parts), personality, and as an organism. Jewett [1971 p211ff] also summarises the major schools of interpretation of the Body including: Existentialist (Bultmann/Fuchs), Biblical-Relational (Gutbrod), Corporeal Apocalyptic (Albert Schweitzer), Corporal-Gnostic (Kasemann), Objective-Substitutionary (Percy), Corporal-Solidarity (J.A., T. Robinson), Metaphorical Corporate Personality (Best), and Practical Metaphorical (Menzelaar). The 'associational' interpretation in this paper shares some characteristics with many of these concepts but differs substantially from them all. It would be a needless digression to analyse the similarities and differences here. The closest parallel however is that of Best which is referred to below as necessary.

⁴Cf. Rm 3:31; also Cerfaux [1959 pp17f]

⁵Cf. Catholic Church [1943 p59]: "Whereas in a physical body the principle of unity joins the parts together in such a way that each of them completely lacks a subsistence of its own,

However, with Robinson, I take the view that Paul is communicating something new, the uniqueness of which we may no longer be aware because of familiarity:

It is not surprising that the content of the new wine [of Paul's conception] stretched the old skin [of associational language] to the breaking point, so that we now accept as commonplace the idea of the body corporate.⁶

1. The Pauline Body is an unprecedented but intelligible usage of the covenantal corporate relation in the Hebrew Scriptures.

Paul introduces his associational concept of the Body in the well-known pericope of 1 Cor. 6:15, "...your bodies are members of Christ's body..."⁷ His proximate intention is to provide a theological justification for the moral seriousness of sexual impropriety within the Corinthian Christian community. It is evident that some sort of antinomianism, possibly Gnostic in origin, has taken hold since he makes his point independently of his condemnation of the one guilty of incest in chapter 5. But his use of the term elsewhere demonstrates that he is not using the phrase in an *ad hoc* manner. Rather he employs it as a symbol of a much larger associational concept suggested piece-meal in his writings.⁸

It may be difficult for modern readers to experience the 'language shock' that Paul intends and, therefore, to appreciate the novelty of the

on the contrary in the mystical body the cohesive force ... unites the members with one another in such a way that each of them wholly retains his own personality."

⁶ Robinson [p50].

⁷ Cf. Jewett [p279]: "In the Corinthian correspondence one encounters for the first time the word *soma* as a technical term..."

⁸ Cf. 1 Cor 12: 12-27; Eph 3: 6, 4: 12, 16; Col 1:18.

phenomenon he is attempting to communicate. The proposition that Paul intended to shock in this way is implicit in the results of historical analysis. Jewett notes, for example, that “All efforts to find pre-Christian examples which characterise a group or society as *soma* have failed.”⁹ But even if Jewett cannot demonstrate the validity of this ‘black swan’ type of assertion in categorical terms, his conclusion certainly indicates that any such usage in ontological terms is rare at best. Banks agrees that the term *soma* has no exact (ontological) parallel in Jewish literature, even though the metaphoric notion of corporate personality existed in the Hebrew mentality.¹⁰ While the Judaic idea of humanity as a single organism is not disputed,¹¹ Schweizer concurs that the Hebrew language possesses no word for ‘body’ and that it is through the Septuagint that an equivalent term was introduced into Jewish thought for the first time (e.g. in Lev. 14:9 and Prov. 11:17).¹² In the Septuagint, the Greek *soma* translates no less than eleven Hebrew words (with cognates thirteen), for none of which it is a true equivalent.¹³

Nevertheless, while the term is novel, it is not alien to the experience of at least the Jewish component of Paul’s audience.¹⁴ Paul is steeped in the Hebrew Scriptures and does not express himself without frequent allusion to or quotation from them. It does not demand great leap of reason therefore to

⁹ Jewett [1971 p229]. The metaphor is common in classical literature, for example in the story of *Menenius Agrippa* in *Livy* 2:32. But Jewett intends an example that is more than metaphorical.

¹⁰ Banks [p69ff].

¹¹ Cf. Benamozegh [1995 p208].

¹² Schweizer [1964 p17].

¹³ Cf. Robinson [p11]. According to Robinson *soma* can be translated as ‘personality’ as the nearest English equivalent. This is relevant since the term does represent ‘identity’ in a specific manner I will show below.

¹⁴ Pace Prat [1926 p300] who claims to the contrary that “It is impossible to trace its [the Body of Christ’s] gradual development; it has no history.”

suppose that the history of the idea of the Body might be found in the Covenant with Israel.

After the Babylonian deportations of the 6th century BCE, Israel became the (dispersed) Jewish people, a people living not just largely beyond the boundaries of the Promised Land, but in a state which was at best only nominally religious. Eventually, after the destruction of the Temple in 70 CE, they had no real homeland at all. But despite continuous national setbacks, the people of Israel maintained a sense of gift from YHWH. This sense was not merely historical, a record of divine intervention found in the Scriptures. It was contemporary in the sense that the Scriptures themselves, particularly the Torah, were perceived as the abiding gift of God entrusted uniquely to Israel and to the Jewish people. Israel had become a people of the book rather than a people of the land.¹⁵ The Torah gradually became the *nahala* of the Diaspora in place of *eretz Israel*, the inalienable inheritance that symbolized the continuation of the Covenant.¹⁶

Both continuity and discontinuity are important for Paul. He is integrating the symbolic character of the land, the concept of inheritance as *Torah*, and the history of Israel together with his experience of the risen Christ.¹⁷

Several themes of continuity regarding the Body are clear. The essence of his reality consists in a relationship within the Body, which, like the

¹⁵ Cf. Davies [1974 p110]; Bension [1932 p22].

¹⁶ Cf. Davies [1974 p219]. The progression can be seen for example in Sir 4: 11-19, and 24: 1-34 where Wisdom takes up residence within the 'inheritance' of the Lord, the people of Israel thus spiritualizing the *nahala* but maintaining the idea of the *nahala* as the space inhabited by God and man.

¹⁷ Cf. Stunespring [1944].

Covenant, creates identity,¹⁸ provides immunity¹⁹ and demands total accountability.²⁰ For Paul, as for the Covenant, the Body is not the result of contract but of divine munificence, a gift.²¹ The Body is the ‘temple of the Spirit’²², that is, the place where God is present with man.²³ The Spirit remains, as in the Covenant, the organizing principle of the form of association represented by the Body.²⁴ And the relationship is grounded in a similar expectation: submission, including abandonment of compulsive self-assertion.²⁵ This expectation is very specific as Brunner notes: “The order intrinsic to the fellowship springing from the Holy Spirit was *diakonia* – service... a unity characterized by *mutual subordination*.”²⁶ It is this mutual subordination, the same as noticed in the Hebrew Scriptures, which is the heart of the Paul’s relationship in the Body.²⁷

Paul himself, as a part of the Diaspora, never makes mention of the land. But as Davies notes: “we can be sure that he felt the full force of the doctrine of the land...”²⁸ Paul’s deep knowledge of the Hebrew Scriptures and his Pharisaic background, might have led him, as it has done others, to ‘embody’ the Torah. Paul comes close to this in hinting to his Corinthian congregation that they have not inherited the land but the ‘mysteries of

¹⁸ Cf. 1 Cor 12: 27.

¹⁹ Cf. Rm 6: 14.

²⁰ Cf. 1 Cor 11: 27.

²¹ Cf. Rm 5.

²² 1 Cor 6: 19.

²³ Cf. 1 Cor 3: 16

²⁴ Cf. Campenhausen [1969 p58].

²⁵ Cf. 1 Cor 4: 11,13.Cf. Campenhausen [1969 p38].

²⁶ Brunner [1952 p54]. Also Campenhausen [1969 p55,69, 185].

²⁷ Cf. Phil. 2: 4; Eph. 5: 21f. Also Mt 23: 8-10; Mk 10: 44. Such relationships may be termed spiritual or eschatological because, as Brunner also notes, these are in fact interchangeable descriptors.

²⁸ Davies [1974 p166].

God'.²⁹ But he takes the allusion no further. Later parts of rabbinic (that is Pharisaic) Judaism, however, do just this. They consider the Torah, the revealed mysteries of God, as a living body with a soul, an entity which in mystical tradition is an emanation of, and even co-existent with, YHWH.³⁰ Paul does not take this step. Instead he uses the physical existence of Jesus the Christ, not the Torah, as the image, the specific place, the literal space inhabited by God and man as the replacement for *eretz Israel*. Davies sums up the situation created by Paul:

*The land has been 'Christified'. It is not the land promised as he had loved it that becomes his 'inheritance' but the living Lord, in whom was a new creation.*³¹

The implications of this move are profound. Christ is not 'inert' material as was the *nahala* of *eretz Israel*. He was a man who made choices; and the choices He made are remarkable. He chose the apparent role of a slave (*doulos*) not a religious leader; that is, a being with no rights or status. He chose to subject Himself voluntarily and without complaint to the grossest *injustice* despite the commands toward justice within the Covenant.³² He accepted death, not in the service or furtherance of justice but in obedience to His God and Father.

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As a human being, Christ was a model, not merely a symbol. Paul considered himself to be in a position similar to that of Christ and

²⁹ 1 Cor 4: 1.

³⁰ Bension [1932 p22].

³¹ Davies [1974 p168].

³² Cf. 1 Cor 9: 19; Phil 2: 7.

recommended to others Christ's as the mode of living demanded by Christ.³³ He participated personally in the injustice to Christ.³⁴ He too is a slave to all.³⁵ He expects others to adopt the same status.³⁶ He makes frequent references to the Suffering Servant theme of Isaiah,³⁷ but he does so in a manner that applies its message to individuals, not just to Israel as a whole or to the Messiah as God's representative.³⁸ Such self-denial is the mark of membership in the Body.³⁹ Paul makes it clear that he considers such abasement as a continuation of genuine Jewish tradition. He portrays Moses as having acted in a Christ-like manner, for example.⁴⁰ Without questioning the Law as a divine gift, Paul makes it dependent on Christ who provides the power for keeping it.⁴¹

Paul also makes it clear that he intends not simply a servant-relation to God, but a servant-relation to other members of the Body: "...everyone pursuing not selfish interests but those of others."⁴² As Martin puts it, Paul is "deconstructing power" in Corinth through the "disruptive hierarchy of the Body of Christ."⁴³ The preference is always for others, implying effective injustice (or at least absence of positive justice) for one's self, personal abasement, and the continuous deferral to the needs of others. Paul's object

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³³ Cf. 1 Cor 7: 21. 2 Cor 4: 5. Rm 6: 16-22.

³⁴ Cf. Phil 3: 10.

³⁵ Cf. 1 Cor 9: 19.

³⁶ Cf. Phil 3: 18. 1 Cor 4: 16, 17; 11: 1.

³⁷ Cf. Is 42-53.

³⁸ Cf. Rm 3: 26; 8: 31-33; 10: 15, 16, 17; Gal 1: 15; Heb 2: 10.

³⁹ Cf. 1 Cor 7: 23.

⁴⁰ Cf. Heb 3: 5. Cf. Chr 6: 49.

⁴¹ Cf. Rm 3: 21; 8: 1; Cerfaux [1959 p52].

⁴² Phil 2: 4. Cf. 1 Cor 10: 24. Also Rm 14: 19.

⁴³ Martin [1995 p79; cf. p87].

is not justice but love.⁴⁴ This, I conclude, is the essential character of the Body, the source of its unity as well as of the identities of its parts. It is indeed covenantal submission, but submission that recognizes no qualification whatsoever in terms of justice. This then becomes the inheritance which constitutes the Body, a living continuation of Christ. It is an inheritance which is at some distance from that of the *nahala*. So the liturgical symbols of incorporation also change from circumcision, baptism and sacrifice to faith, baptism and suffering in Christ.

If Paul is attempting to communicate this new relationship within the tradition of Covenant where might an appropriate cultural symbol for Paul's Body be found?

2. Semitic symbology does not seem to fit Paul's intention regarding the relational character of the Body.

A description of the 'Cosmic Adam', subsequently documented in Talmudic sources, might well have been available to Paul.⁴⁵ Paul does use a cognate idea in Christ as the new man, the new Adam, the prototype of the new humanity.⁴⁶ This could be related to the Hebrew conception that all of mankind is viewed as constituting a single being. Mankind is, in this conception, the organizing force of the universe, "whose stature reaches from earth to heaven, and whose width extends from one end of the world to

⁴⁴ Cf. Eph 4:16.

⁴⁵ By tradition this is attributed to Rabbi Eliezer Azariah at around 100 CE, and therefore very possibly was circulating at the time of Paul.

⁴⁶ Cf.; 2 Cor 5:17; 1 Cor 15: 45; Ep 2: 15.

the other.”⁴⁷ This model is organically unified. But *Mankind* appears here more as representative than assemblage. For example, it is applied to the kings of Israel such that: “...the king’s body is a sign – a code really – that signifies for Israelite spectators at once every male, the society, the cosmos and even YHWH.”⁴⁸ Paul’s image of the ‘new man’ could relate to this image. But this is certainly a different image than the Body, in which he is indicating much more than a mere representation of the whole by the parts or vice versa. There is differentiation among the members who retain their identities. They are unique individuals, neither a type nor a template, in their participation in the Body.

In the related idea of the ‘Celestial Adam’, the rabbis considered all souls were comprehended in that of Adam.⁴⁹ But the formulation suggests that this conception is no more than a collective ‘humanity’. Where the Cosmic Adam was ‘everyman’, Celestial Adam is a composite of ‘all men’. This is not a living being in its own right. Individuals in this conception are related only logically as members of the class ‘human’. The Body, however, is characterized by real relationships not logical similarities. Consequently this too fails to provide a basis for Paul’s conception of the Body.

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Dahl approaches this idea of the Body from a philosophical but culturally related angle when he describes Paul as employing an implicit ‘Semitic totality concept’ which was simply part of the Hebrew culture without articulation, a background idea which was simply ‘there’. According to

⁴⁷ *Mishnah: Haggiah 12a; Sanhedrin 38b.*

⁴⁸ Hamilton [2005 p267].

⁴⁹ *Mishnah: Yevamot 63b; Avodah Zarah 5a; Sanhedrin 4:5.*

Dahl, in Paul, “All reality is organised in a series of totalities within totalities. The final totality that signifies and comprehends the rest is God himself.”⁵⁰ Further, he notes: “[A] curious aspect of the totality concept is that the lesser, distinct totalities adhere within and in dynamic relations to larger ones... The lesser totality exists then in dynamic relation to the greater without losing its distinctive individuality.”⁵¹ This fits easily, I believe, with the covenantal relationship already discussed in Chapter 2 and would have been, I suspect, comprehensible in Greek and Latin culture. Shedd seems to have a similar vision when he says: “...the thinking of ancient Israel might be characterised as ‘synthetic’. It has well been described by the phrase ‘grasping of a totality’. Phenomena were perceived as being parts of some total relationship.”⁵² However, while both views are consistent with the Covenant, neither of them goes beyond it in identifying the distinctive character of the Body. The relationships are logical only. They are described functionally not ontologically, and so could apply to any social, or for that manner mechanical, system in which parts interact and elicit distinctive overall behaviour.

Moreover, these conceptions fail to capture positively Paul’s substantive emphasis on individuality and freedom within a larger identity of the Body, much less his message of radical submission.⁵³ Members of the Body do not lose their individuality or their purposeful character in the Body. Members of the Body are not members in light of some pre-existent characteristic,

⁵⁰ Dahl [1962 p61].

⁵¹ Idem.

⁵² Shedd [1958 p11].

⁵³ Cf. 1 Cor 15: 12.

ethnic or moral. They are members by the grace which gives them the ability to submit. The Body itself is a person, not merely a collective or a representative of something else.⁵⁴ Thus Paul seems to be reaching significantly beyond contemporary Semitic models of association.⁵⁵ Could Paul be using some other conceptual frame already embedded in the culture of the Corinthian audience that conforms to his theological intentions?

3. Contextual evidence suggests it is possible that Paul is using non-Semitic forms of association to modify the corporate relationship of the Covenant.

Jewish law, expressive as it is, is not likely to have been sufficiently familiar to the Corinthians for the rather sophisticated points Paul is making.⁵⁶ Cohen makes the important contextual observation that as an educated man of his time:

*Paul was eminently imbued with the culture of his day and was undoubtedly familiar with the current doctrines of Greek rhetoric and Roman law, which was natural for a man from Tarsus, the seat of a university where Stoic philosophy and Roman law were taught.*⁵⁷

⁵⁴ Cf. Guardini [1957 p82].

⁵⁵ Cf. Cerfaux [1959 p285]

⁵⁶ Cf. Hester [1968 p8] and Martin [1995 p73]. Brunner's [1952 p21] view that the split between secular and religious culture occurred precisely when Christians put themselves under Roman rather than Jewish Law, the later being both religious and civil, is somewhat speculative since Paul was clearly 'baptizing' the Roman concepts as he found them.

⁵⁷ Cohen [1966 p56].

Therefore it is not surprising that Paul introduces the term *soma* in 1 Cor. 12: 12ff after having made oblique reference (from v4 onward) to the primary public social relation for those living in Greek cultural space: the *polis*, the Greek city state.⁵⁸ Unlike the Hebrew conception of Israel as an identity independent of its members,⁵⁹ the Greek idea of *polis* is an entity which demands the activities of its inhabitants to exist at all. Each inhabitant performs a role, *prosopon*,⁶⁰ and it is through the collective performance of roles that the *polis* comes into being and maintains its existence.⁶¹ The *polis* is a group of individuals who constitute the entity through their actions. It has no identity other than as these actions as they are performed. That is to say, Athens or Sparta has no identity other than as Athenians and Spartans carrying out their civic roles. The *polis*, while certainly more than a logical congeries, is still a group designation, a collective name for a set of activities, not an entity separate from the activities that make it up. It is individuals interacting commercially, politically, culturally and socially.⁶² In Paul, the ‘roles’ of merchant, civic leader, lawyer, physician, sage become ‘parts’ or ‘gifts’ of apostle, prophet, teacher, healer, social worker and miracle worker; but the implicit Hellenistic reference is still a reasonable inference.

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However Paul also subtly transforms the traditional Hellenistic image of the *polis* through his revelation in v4 that God is at work in all the roles *prior* to

⁵⁸ This is also a common rhetorical move. Cf. Martin [1995 p94].

⁵⁹ Cf. ‘*Amida for Sabbath Vespers*’ in Singer [1912]: “Thou art one, Thy name is one, who is one in the world as Thy people Israel.”

⁶⁰ The Greek term for ‘person’, appropriately, denotes an actor’s mask and is possibly related to the Latin *per sonare*, ‘to speak through’. The connotation is one of ‘role’.

⁶¹ Cf. Martin [1995 p39].

⁶² Cf. Schmitz [2005 p16].

their interaction.⁶³ It is not, then, the exercise of the parts or roles that constitutes the Body; it is the prior existence of God at work in them as the Spirit that constitutes the Body which is already a unity. With this vital addition, Paul implies an entirely different sort of association than the *polis*. The Body is not after all like a well functioning Greek city.⁶⁴ The Body has its own independent existence not directly caused by its members but in which its members participate. The Body is a name ‘with power’, the power of binding members together, not through their own efforts but through those of an external force, the divine Spirit.⁶⁵ The individual members act for the ‘communal advantage’ of the Body as a separate entity not for the ‘common good’ of each or even for the ‘collective good’ of all, but for the Body to which they all belong.⁶⁶ This is not a traditional concept of association in Greek culture.⁶⁷

4. Paul’s associational model is more likely to come from Roman than Greek sources

⁶³ Cf. Eph 4: 15.

⁶⁴ As Jewett notes (p271): “1 Cor 12:12 identifies the Body with Christ himself, an identification which is unparalleled in the Hellenistic world.” Lohfink also recognizes that Paul is not using the language of the *polis* but suggests the assembly of Israel at Sinai as the model Paul has in mind (Cf. Congar [1957 p86]). I agree with Lohfink to the extent that Paul is still expressing ‘covenant’ but disagree because Paul is also attempting to redefine the ancient Covenant.

⁶⁵ Cf. 1 Cor 12: 12, 13; cf. Ep 1: 20.

⁶⁶ Cf. 1 Cor 12: 7. Cf. The phrase *pros to sympheron*, ‘for the communal advantage,’ I read in light of [10:33] as the opposite of ‘individual advantage’ even if this latter is collectively distributed. [10:23] indicates that ‘building up’ is what constitutes this communal advantage; and what is built is the Body itself. Hence my emphasis on the corporate nature of the pericope.

⁶⁷ Cf. Cerfaux [1959 pp272 et seq., 281 n34]. I reject here as well any use by Paul of the Hellenistic concepts of the *corpus magnum* and the more exotic Persian speculations on the *Anthropos* (cf. *ibid.* [p369]), similar Egyptian mysticism regarding Isis, the Zoroastrian *Ameshas Spentas* (cf. *ibid.* [p363]), and the world-man identified with Zeus in Orphism (cf. *ibid.* [p366]) for the same reasons as those noted above regarding the Jewish Cosmic Adam.

Perhaps therefore Paul is being influenced by Roman models of association.

Hester makes the plausible case on a related topic that:

...in trying to determine which systems of law Paul would turn to for his illustrations of the Inheritance concept, it would be the system with which he would be most familiar, which was most widespread, and which might be most familiar to the mixed congregations to whom his letters were addressed. The one system which fits, to a greater or lesser extent, all these categories is Roman law.⁶⁸

Paul was an ‘insider’ that is one who lived within the city walls rather than an ‘outsider’, that is, an inhabitant of the rural countryside. He and his mission are ‘of the city’. Corinth is a Roman city, a colony of the empire. And Paul is cosmopolitan, at least as far as the Roman Empire will allow. Consequently, as Sampley has shown,⁶⁹ it is very likely that Paul and his Corinthian audience were familiar with the sort of Roman entity that had to some extent replaced the Greek *polis* as the dominant form of social organisation in Hellenistic culture,⁷⁰ namely the *societas* or civil partnership.⁷¹ Crucially, the *societas* was governed by Roman private, rather than public, law. It could therefore be formed through simple contractual agreement at the will of a group of like-minded individuals. It did not require imperial approval. Unlike a mere collective, the *societas* has

⁶⁸Hester [1968 p7]; and MacMullen [1974].

⁶⁹ Sampley [1980].

⁷⁰ Cf. Banks [1980 p15]; also MacMullen [p6].

⁷¹ The Judaic approximation of the *societas* included the synagogue and the *haburoth* (brotherhoods) among which were the Pharisees among which Paul counted himself. But these have no formal status that we know of within Roman law. I do not consider in this work the related Roman institution of *corpus* (*collegium*) simply because it was not relevant (or likely even familiar) to Paul and his contemporaries. Cf. Schulz [p86ff]. For similar reasons I will also not consider the so-called *societas publicanorum*, an institution concerned mainly with tax collection. Little is known about them and their corporate character is mentioned in only four texts. Cf. Duff [1938 p159]. Finally although there are similarities between the Roman legal concept of *res nullius* and *nahala*, as more or less denoting the property of the Gods, the connotations of each are vastly different in that *nahala* is a gift from God rather than an inalienable chattel of God. Cf. Kantorowicz [p186ff].

interests. While these interests are not separate from those of its members, they are at least common to all members and they are made explicit, whereas the interests of the *polis* only emerge as a consequence of the interaction of its members, and need not ever be articulated. Those interests of the *societas* are stated as its goal, objective or purpose, its ‘business’. Any of its members can act for all (in the names of each of the others). Where the *polis* is re-active in its concerns and its actions, the *societas* may be considered active in the sense that it attempts to define common concerns in advance of action and as a criterion of good action. The mode of existence of the *societas* is therefore quite different from that of the *polis*.

The biblical evidence for Paul’s familiarity with the *societas* is considerable, including reference to the guild of silversmiths⁷²; the mystery cults⁷³ and the Stoics and Epicureans,⁷⁴ which are all examples of this form of association. Sampley makes the textual and circumstantial case that, although the concept is never referred to explicitly, Paul makes a number of allusions to contemporary commercial and legal practice, many of which are connected with *societas*. Nevertheless Sampley is careful to avoid any suggestion that Paul’s implicit use of *societas* is connected with his development of the associational concept of the Body. As the *polis*, the *societas* exists only to the extent that it is constituted through the contractual actions of its members with each other. While, unlike the *polis*, the members of the *societas* can commit and act for each other, they do not act for a distinct

⁷² Cf. Eph. 19: 24-27.

⁷³ Cf. 1 Cor. 8: 7-13.

⁷⁴ Cf. Acts 17: 18.

entity other than the members of the *societas* as such.⁷⁵ In Roman law, the members are contracted to one another and only for a specific purpose. If therefore one of the *socii*, partners, dies or withdraws, the *societas* is dissolved *ipso facto*. Similarly if one of the partners acts in other than good faith, that is, not in the interests of the group as agreed upon, the *societas* ceases to exist *de jure* and *de facto*.⁷⁶ It is automatically dissolved by improper action or even simply malicious intent. Such dissolution may not be apparent until after appropriate legal action confirms it, but in principle the event of dissolution pre-exists any judgment. The *societas*, therefore, is even less stable in its identity than the *polis* which is constituted by the voluntary performance of roles not the obligated continuity of contractual relationships. In addition, Sampley provides a very good reason why *societas* is inadequate to Paul's purpose: "*Societas* is not an all-pervasive model for Christian community...Paul never includes Christ or God as a partner..."⁷⁷ *Socii* are legally equal. There can be no equality in the relation of God and man for Paul. While the *societas* may be known to Paul, therefore, it does not appear to be a viable relational model on which Paul's Body is based.

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5. The Roman institution of the peculium is an unexplored alternative model for Paul's associational concept of the Body

⁷⁵ Cf. Sampley [p14]: "The good of all partners [NB *not* the partnership] must be served by each partner (*socius*)." It should be noted that the partners could not bind the partnership to any new venture as well. That is, by law the *societas* was limited to goal-seeking not purposeful (goal-changing), much less eschatological (God-seeking) behaviour. Cf. Sampley [p72].

⁷⁶ Cf. Sampley [p14ff].

⁷⁷ Sampley [p111].

As far as I am aware, no scholar has investigated another prominent Roman legal institution, the *peculium*, as influential in Paul's thought. Nevertheless, the *peculium* was a central social and legal institution in Roman life throughout the empire. It would have been an everyday occurrence and therefore in conformity with Paul's use of everyday instances in other areas of law. It, I suspect, has not 'shown up on the radar' of investigations into Paul's ideology because, as in the specific instance of Hester in his study of inheritance, the *peculium* doesn't fit easily into modern categories. It is concerned primarily with familial relations and only incidentally associated with inheritance and has no close equivalent in modern law. And, as I will discuss below, although it is a social commonplace, it is not a central concept but a pragmatic exception to the mainstream of Roman law, and thus possibly overlooked in legal studies of Paul.

In simple terms, the *peculium* is a part of the father's estate which is entrusted to the son (or to any other household member including slaves) who operates 'in the world' and eventually returns to the father with that which was entrusted to him along with any gain (or loss). The son may, if he chooses, create *peculia* of his own with portions of that given him by the father. Transactions undertaken by the son are effectively 'bonded' to the amount of the *peculium*. It was not uncommon for slaves to be permitted to use the increase in the *peculium* as part of *redemptio* which could include both the annulment of the *peculium* and the manumission of the slave. The *peculium*, as I use the term here, may simultaneously refer to: 1) the property of the *paterfamilias* ceded temporarily to the son for his use; 2) the legal

statutes regulating this activity, 3) the social customs associated with this activity, and, of most significance to this inquiry, 4) the social relations inherent in all of these other aspects.

5.1 The *peculium* appears to provide an apt social and legal framework for expressing Paul's concept of redemption through Christ, Christ's relation to the Father, and humanity's relation to Christ in 1 Corinthians

A possible 'tip-off' to Paul's use of the *peculium* is his assertion in 1 Cor 15: 24

After that will come the end, when he will hand the kingdom over to God the Father, having abolished every principality, every ruling force and power...for he has put all things under his feet⁷⁸.

The previous text [vv 20, 23] mentions Christ as the 'first fruits' in a manner that suggests a legal reference to the Levitical *nahala*. This is an important and direct link to the Covenant and its symbology. But subsequent text [vv 26, 27, 28] makes it clear that *everything*, the entire created world not just the land of Israel,⁷⁹ has been subjected to Christ - to form, to govern, to judge - by 'the One', his Father. More significantly, Christ is to *return* all of this to the Father. This is not equivalent to, nor is it implied as a consequence of, God as Creator. The Levitical first fruits were constituted by only a fraction of the 'yield' of Israel and did not include the productive asset of the land itself. Rather the reference to 'return' concerns a specific and perhaps unique act by Christ involving God, and only Him. Barclay, I

⁷⁸ The Kingdom is not equivalent to the Body of Christ. Nevertheless, following Cullmann [1963 p229f] and Temple [1912 p68, 69], the Body has a central place in the lordship of Christ, that is the Kingdom. Therefore, I presume here that the social relationships of the Body are included in the Kingdom.

⁷⁹ As Cullmann [1963 p228] notes, the fact that the Kingdom includes the entire cosmos means that it is not the Church either.

believe correctly, links this to the issue of ownership raised in 1 Cor 3: 23.⁸⁰

If Barclay is correct, then the mystery deepens because this pericope appears to establish equivalence between the God /Christ relationship and the Christ/mankind relationship. I believe that Paul is in fact making another legal reference in v24 which follows on from his reference to the law of the *nahala* but which is meant to modify this reference substantially.

This notion of giving an inheritance back to the father who bequeathed it is not found, I believe, in the Hebrew Scriptures, suggesting that it might be an innovation by Paul. It is certainly not part of the law of the *nahala*.

Additionally, Hebrew tradition suggests a re-creation not a return of the created world under the eschatological 'lordship' of the Messiah. For example, Psalm 110 (quoted by Paul in v25) refers merely to the passive establishment of the Messiah by God's power not to any transaction between the parties. Paul adds the *theologoumen* of subjection to the One [vv 27, 28], which is unlikely to be the same notion as the Psalm's "sitting at the right hand" of YHWH.⁸¹ If these observations are correct, they point to a significant rhetorical, and I believe conceptual, departure by Paul which is explained by the *peculium*..

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There seems to be a general exegetical tendency to interpret the 'return' of v24 as part of the *parousia* as it relates to creation, rather than as something that occurs between God and Christ, or to confound these two aspects.

Luther, for example, considers the 'return' as signalling the presentation of

⁸⁰ In Barton and Muddiman [2201 p1131].

⁸¹ Cf. Heb 10: 13 and 1 Pt 3: 22 where the psalm is alluded to with no further comment.

the 'essence of the Father hidden in Christ' to 'Christ's own'.⁸² But such a presentation is not suggested by the text. Congar believes that 'return' is "...the natural consequence of Christ's regal and princely power [through which] he will establish the kingdom and then offer in homage to the Father."⁸³ But no reason is offered about why this might be 'natural' or why feudal-like 'homage' is a relationship that Christ has with the Father. Pannenberg interprets 'return' as part of the "annihilation of all that possesses lordship",⁸⁴ including apparently Christ's own lordship with that of the earthly powers. But this has rather awkward theological consequences since it seems to imply God's abdication as God. Oscar Cullmann finds "the subjection of the Son to the Father" contained in these verses to be the "key to all New Testament Christology."⁸⁵ But he too considers the 'return' indicated by Paul as equivalent to the 'visible' *parousia*, the eschatological second coming of Christ at which point Christ loses his lordship over creation.⁸⁶ This then leaves him with an apparent contradiction with regard to Rev 20, however, wherein the Lordship of Christ extends to a thousand year reign of the Kingdom. Christ cannot both give the Kingdom to the Father and maintain Lordship; therefore a 'correction' to Paul is required, according to Cullmann, in order to avoid an interregnum.⁸⁷ Collins denies the possibility of such an interregnum between the *parousia* and the end but offers no specific alternative interpretation.⁸⁸ Schnackenburg disagrees with Cullmann about this interregnum on grammatical grounds but makes no

⁸² Pelikan [2002 v18 p126].

⁸³ Congar [1968 p135].

⁸⁴ Pannenberg [1998 v3 p605].

⁸⁵ Cullmann [1963 p293].

⁸⁶ Ibid [p225].

⁸⁷ Ibid [p226]

⁸⁸ Collins [1999 p552].

positive explanation of the passage in terms of divine relations.⁸⁹ The issue about the relationship between Christ and God, therefore, appears somewhat uncertain. Hays notes the theological import: “It is impossible to avoid the impression that Paul is operating with what would later come to be called a subordinationist Christology.”⁹⁰

I believe that some light might be shed on these apparent difficulties by considering 1 Cor 15: 24 in the context of the *peculium* as a matter of the relationship between God as Father and Christ as Son without reference to the extra-deical aspects of the *parousia*. Several points may be noted to begin with about the promise of ‘return’. First, it is ultimately God who will enjoy the benefit of the Christ’s work of redemption in the eschatological future. This presupposes that Christ makes dispositions favourable to the God’s intentions. God has demonstrated, it is implied, fidelity to the actions of Christ by giving him freedom with His entire creation, effectively ‘bonding’ Christ’s actions. Christ freely grants his obedience to God in the action of his return of that granted him. On the face of it, these same points are the central components of the Roman legal institution of *peculium*. In order to explain why I believe the *peculium* is not a matter only of Christology but of wider Trinitarian theology, I have to expand my description of the institution and its history more fully.

The origin of the legal institution of *peculium* lies, appropriately enough, in dealing with the problem of the legal status of a son living separately from

⁸⁹ Schnackenburg [1963 p296].

⁹⁰ Hays [1997 p266].

the *paterfamilias*. Normally a son living within the household would be subject entirely to the command of the latter until the son established his own family through marriage. Until then the *paterfamilias* remained responsible for his actions and would be the only legally recognised person in cases of civil law. The son remained *sub patria potestate* and could not act *suo nomine*.⁹¹ *Peculium* provided a modification of this status for a son 'out in the world', either in the army or engaged in some commercial enterprise. In his employment of the *peculium* the son could commit his father to 'guarantees' on any transaction up to the amount of the *peculium*. The son remains accountable for his 'stewardship' to the father, but only to the father. The father's property, as an extension of himself, is 'within' the son *and* even within those whom the son may choose to include in the *peculium* and to whom he may wish to distribute the patrimony of the father. The *peculium* therefore is a not inappropriate contribution to what would eventually become Trinitarian theology. It establishes a relation between Father and Son and between the Son and those he chooses to include in the *peculium* such that each is completely free to act but do so in and for each other through the Son. As part of the Kingdom, the Body is part of this 'cascading' relationship from God through Christ.

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5.2 The *peculium* appears as a not unlikely background in other parts of the New Testament.

⁹¹ Cf. Zeber [1981 p45]

If the *peculium* is as commonplace and apt for expressing Christian theological concepts as is contended in this chapter, it is reasonable to expect evidence of its use elsewhere in the New Testament. And indeed it appears that 1 Corinthians is not alone in its allusions to the institution. The concept is plausibly implied in several parts of the gospels as well as in other Pauline epistles. It is, I believe, useful as a cultural reference not just in terms of the relationship Paul intends to describe between Christ and his Father, but to the theological concepts of adoption and redemption generally.

Mt 11:27 (and its parallel in Lk. 10:22) appears to confer the universe as Christ's *peculium*: "Everything has been entrusted to me by my Father." This is obviously not just *eretz Israel* so the notion of the *nahala*, even in its 'spiritualized' state is strained. It is still the world of creation, but *all* of it. Christ seems to take action consistent with that of the recipient of the *peculium* with regard to other members of the household in Lk. 22: 29: "And now I confer a kingdom on you, just as my Father conferred one on Me." In Jewish law such conferral might well imply abdication or retirement by Christ. But under the *peculium* Christ, while distributing his Kingdom, would not lose it; it remains His just as creation remains the Father's. Ownership, in the sense of benefit, does not pass with the transfer of the *peculium* although possession does. The fact that both narratives quote Jesus Himself suggests that the relationships involved are meant to be a fundamental part of the new creation.

The two aspects of ‘being entrusted’ and ‘entrusting’ are combined with the implication of the ‘return’ in Jn 17: 6f (and in 6: 65): “I have revealed your name to those whom you took from the world to give me. They were yours and you gave them to me, and they have kept your word. Now at last they have recognized that all you have given me comes from you...” Consistent with the above is Rev. 2: 26 (Cf. 3:21): “To anyone who proves victorious and keeps working for me until the end, I will give authority over the nations which I myself have been given by my Father...” Here the ‘fragmentation’ aspect of the *peculium*, its passing from recipient to recipient, seems particularly relevant.

Nevertheless it is in the Pauline writings that the use of *peculium* seems most apparent. Many of the most significant relationships Paul notes are to be found in the *peculium*. For example in the great hymn at the beginning of the letter to the Ephesians, the writer appears to be commenting on what could be construed easily as a pre-existent, eternal *peculium*. Christ Himself is chosen as the object of redemption (v 4), but is also the head of those redeemed (v 10), who have received their ‘heritage’ through Him (v 11). Believers are ‘adopted’ (v 5) by means of which they obtain their freedom (v 7). Since a *redemptio* that involved manumission actually implied creating a new member of the household; the slave could literally be adopted into the household as a family member, a son. Ep 2: 18 continues the theme of entry into the household where all have access to the Father through what metaphorically could be the Spirit as *peculium*. Ep 5: 5 has the unusual double reference to the “kingdom of Christ and of God” and uses

the equally odd construction to “have inheritance” for which somewhat complex eschatological explanations have been offered.⁹² The *peculium* may offer a far simpler explanation of both usages. Hence also in Gal. 4: 4-7: “No longer a slave but a son.” In fact Gal 4: 1-11 is a reasonable description of the position of the son as that of a slave under Roman law; and Paul’s reference to redemption/adoption through the gift of the Son is in a manner not inconsistent with the law of the *peculium* but unheard of in the Hebrew Scriptures.⁹³ This act also combines the act of manumission with that of adoption, both gifts frequently associated with the *peculium*. Rom 8:17 (cf. Eph 3:6) mentions believers becoming ‘co-heirs’ with Christ, a relationship which fits the relationship involved in the *peculium* according to the mechanics of Roman Law, but which has no obvious basis in Jewish law.⁹⁴ And in Gal. 3: 29 “Heirs according to promise.” could refer to the common practice of the *paterfamilias* in promising a slave freedom at the father’s death, a practice so much employed that it was temporarily enjoined.⁹⁵ Finally, in line with Rev 2: 26, the ‘cascade’ effect of *peculia* from slave to slave allowable under the *peculium* (a confirmation of Barclay’s hint about ownership) may be alluded to in 1 Cor. 3: 21-23: “You belong to Christ and Christ to God.” All these are aspects seem more consistent with the law of the *peculium*, than that of any other classical legal practices.

⁹² Cf. Schnackenburg [1963 p286].

⁹³ Cf. Cerfaux [1959 p40, 41, 88]. Cerfaux comments in the last on Paul’s “rather tenuous reasoning” in his ideas of Christian adoption, largely I believe because he does not know of the logic of the *peculium*.

⁹⁴ Cf. Foerster cited in Cerfaux *ibid* [p42 n82].

⁹⁵ Cf. Zeber [1981 p50].

5.3. The peculium of the Body exhibits corporate characteristics similar to the nahala of the Covenant, providing continuity in Paul's exposition.

I suggest that *nahala* and *peculium* are cognate concepts. They are sufficiently related to create a bridge between Hebrew and cosmopolitan thought; and sufficiently different for Paul to use in instruction regarding the news of Christ.

The similarities between *nahala* and *peculium* are considerable. Both are in the nature of gifts rather than economic transactions. Both are also objects of inter-generational transmission, that is they have an identity that is recognized in law and that 'connects' generations to an indefinite degree. In both, therefore, the connection between sonship and heirship is clear.

Neither involves, unlike the Roman *societas*, a contract, nor even an agreement since they are established at the will of the father. Each is firmly based in the family and is not inhibited by other civil relations, nor does it inhibit them. Individuals enter the *peculium*, as they do the *nahala*, as an already existing institutional relationship with all that implies about social approbation and acceptance.

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The familial foundation of the *peculium* and the *nahala* deserves special attention. Both concepts have father and son as the principals involved in the relationship, and both also provide the possibility of extending the relation to other members of the household, including servants and slaves as well as

genetic relations.⁹⁶ This is essential because, as Thornton points out, Paul's (and eschatologically Israel's) primary focus is on the *completeness* of the Corinthian community and not with its *welfare*.⁹⁷ The community can in fact function well enough without some of its members but it would then not be whole:

*Fundamentally the Pauline doctrine of the 'mystical body' emphasizes the idea of completeness in manifoldness ('not one is lacking'). The welfare of the body of course depends on the realization of the full potential of each member but this can only be achieved when the Spirit has already incorporated the full complement of members.*⁹⁸

Gilson connects the Body with the purpose of creation in this respect:

"...the principal reason for the multiplication of souls is the manifestation of God's goodness, and the more souls there are to which God can distribute all the forms of His graces, the more clearly it is revealed."⁹⁹

The fact that the *peculium*, like the *nahala*, is not contractual, and therefore not a commercial object, is also of importance. Neither relationship can be bought or sold; they are, as relationships, inalienable 'non-property'. The Roman son may not sell his *peculium* as such, just as the Hebrew son is prohibited from alienating the *nahala*. It is not the law of contract but the spirit of the *paterfamilias* as the cohesive force of the arrangement that permeates the entire family in the *peculium*. Everything, including its chattels, is in some sense part of the father; possessions are 'branded', as it were. This is consistent with the Hebrew conception of the family wherein a

⁹⁶ Ez 46:16-18.

⁹⁷ Cf. Thornton [1956 p68]. Cf. Ep 4: 12, 13.

⁹⁸ *Idem*.

⁹⁹ Gilson [1938 p321].

man's personality is thought of as extending throughout his house and household. Any part of a man's property is similarly thought of as an extension of his personality.¹⁰⁰ The son acts with the freedom of the father's spirit over the *nahala* just as does the son of the *peculium*.

Finally, and of most significance to the history of the corporation, the *nahala* and the *peculium* share the distinction between ownership and beneficial use, a distinction which is unavailable in the rest of Roman property law. This distinction will be discussed in more detail below. For now it is sufficient to note that the Levitical mandate to ensure the worshipful use of resources in the *nahala* is paralleled in the *peculium* in which it is expected the father's interests rule the actions of the son. The effect is such that the *peculium* acts as a sort of conduit for the entry of the principles of the *nahala* into European culture and law.

5.4. But the *peculium* has unique characteristics that fit Paul's distinctive theological purposes.

Despite these similarities, there are also significant differences between *nahala* and *peculium* which are not irrelevant to Paul's dogmatic instruction. The *potestas patri* does not exist in Jewish law.¹⁰¹ The whole tone of Paul regarding the Father is one of divine *potestas patri*, the absolute authority of the father in relation to the Son, a concept which is foreign to rabbinic law,

¹⁰⁰ Cf. Johnson [1961 pp4-6].

¹⁰¹ Cf. Ginzberg [1955 p15].

at least as we know it today.¹⁰² Therefore the nuances of the distinction which Paul makes between the Father and Christ cannot be captured in the idea of *nahala*. In the *peculium*, however, even the human father has absolute power which is not the case in the father bequeathing a *nahala*.¹⁰³ The implications for relations within the *peculium* are serious.

The fact that members within the Pauline Body are required to assist each other, take each other's part, consider each other's sensitivities is apparent and quite in line with the requirements of justice among members of the Covenant of the *nahala*. But what may be less apparent is that these requirements are but the tip of a relational iceberg that can only be termed revolutionary from the point of view of Jewish law. At its core is the very Roman family principle that only the *paterfamilias* has full standing in Roman law. All other members of the household – wives, children, servants, slaves – are legal non-entities except in rare circumstances like the *peculium*, which still imply implicit control by the head of the family. Their property is his property; they are indeed his property.¹⁰⁴ They have no rights, either in relation to the father *or* with relation to each other since they do not exist in law except as extensions of the father. Their obligation is solely one of obedience to him, and through this obedience they are related to each other.¹⁰⁵ This corresponds to Paul's teaching about a profound

¹⁰² Idem.

¹⁰³ Pace Hester [1968 p60] who considers that Paul conceived the 'elemental spirits of the world' as the unbridled powers of the Roman *paterfamilias* which were to be tamed by Christ.

¹⁰⁴ Cf. Maine [1861 p141]. This is the basis for limited liability, viz. the power of the *paterfamilias* to take the whole of the son's possessions without taking on the son's other liabilities.

¹⁰⁵ Obedience is clearly a major theme of the Hebrew Scriptures, for example in Deut 30. However, the connection between obedience to YHWH and the relational bond among

renunciation of individual ‘rights’ (or less anachronistically perhaps, ‘claims’) against one another, made plain in Paul’s exhortation to avoid ‘going to law’¹⁰⁶ This command goes beyond the requirements of the Holiness Code of Lev 17-26, particularly of Lev 19:18 concerning loving one’s neighbour as oneself. One is also, according to Paul, required to forego conventional notions of justice and to place one’s neighbour *higher* than oneself in the interest of familial relations.¹⁰⁷ This is the ethos of the Suffering Servant of *Deutero-Isaiah* not of the legal code in Leviticus. As a principle, there can be no formal justice among those who love.¹⁰⁸ There can only be obedience among those who love.¹⁰⁹ It is loving obedience which leads to justice and not formal procedures of law.¹¹⁰ The *peculium*, therefore, captures an ethos of familial love, not civic justice (nor its rationality¹¹¹), as the cohesive force of the redeemed society. Lest this be construed as misogynistic and tyrannical (*unjust*), it is important to consider this aspect of the *peculium* in the context of other differences from the *nahala*.

individuals is not made explicit before Paul as far as I am aware, although it could be considered as implicit in the corporate notion of Israel.

¹⁰⁶ Cf. 1 Cor. 6:1-8. This is a command still being interpreted by those who take the corporate relationship seriously. For example Thornton [1915 p195]: “The conflict of [natural] rights...once aroused, must if deprived of the other-worldly influence [grace], become more and more intense, until it occasions the dissolution of society.” Therefore he concludes, in paraphrase of Paul [p196] “Natural rights [are] subordinate to other-worldly love-values” within the corporate body. And [p199]: “The highest personal ideal is without doubt that a man should refrain not only from all use of force for purely personal ends, but also from the assertion of legal rights...” Thornton recognizes the corporate relationship as fundamentally opposed to the search for justice within natural rights because natural justice will always constrain a man to be jealous for the rights of others. In addition [p198] “The defect of rights is that they have no power to bind individuals together, but rather a tendency to separate them.” The recognition of this key corporate characteristic shows up specifically in the modern corporation as the ‘removal’ of the corporation from the market.

¹⁰⁷ Cf. Rm 15: 2; 1 Cor 9: 22; 10: 33; Gal 6: 2.

¹⁰⁸ Cf. 1 Cor 4: 3, 5. Cf. Pieper [1957 p28].

¹⁰⁹ Cf. Phil 2: 8; Heb 5: 8.

¹¹⁰ Cf. Rm 6: 16.

¹¹¹ Cf. 1 Cor 2: 4, 13.

The second difference between the *peculium* and the *nahala* is that the *peculium* applies to slaves not just to genetically-related progeny.¹¹² Such an inclusion would have been impossible under Jewish law, which required maintenance of the *nahala* strictly within the family lineage. Since Jews were prohibited from holding other Jews as slaves,¹¹³ the conditions of *peculium* could never be met in the Jewish household. The inheritance concepts implied by the *nahala* appear inadequate to Paul's intention to proclaim the universal availability of the Kingdom. Whereas the *peculium* captures the idea that even slaves are not only family members but entitled to a share of the Kingdom. It is not inaccurate to say that the *peculium* universalizes the *nahala*, making the implicit universality of Israel explicit.

Third, as noted above, the legal transfer of property under the *nahala* is a permanent, irrevocable act. There is no expectation that the ceding of property from father to son will be reversed during the lifetime of the father.¹¹⁴ Paul, perhaps with expectations of an imminent *parousia*, conceives Christ as returning the whole of creation, the *pleroma*, to the Father, not just any first fruits as might be required under the *nahala* of the Covenant. This suggests a unity of Father and Son which is captured in the Roman but not the Hebrew concept. Father and Son, through the *peculium*

¹¹² Cf. Campenhausen [1969 p22] who refers to the Hebrew institution of *shaliach* (apostle) as a sort of plenipotentiary who may be from outside the family. This may be the closest concept to the *peculium* in Jewish law.

¹¹³ Lev 25:39; indenture is permitted by Ex 21: 2-11, Dt 15:12-18 and Jer 34: 8-16. It seems more than unlikely that a family member in line of inheritance would be put in the position of indenture.

¹¹⁴ Ez 46:16.

relationship, are really one in the activity of redemption. Through the *peculium* Paul can convey the idea of “eschatological absorption”¹¹⁵ of the Son in the Father while maintaining their separate identities. This may help to ease issue of the interregnum and the subordinationist issues mentioned above.

Fourth, as noted above in the second difference, only sons can retain the hereditary portion of the *nahala*. That which is ‘in use’ by a slave or other family member not in the line of inheritance must be returned as part of the father’s patrimony to his sons on the event of his death. But in the case of the *peculium*, not only is it possible for the *peculium* to be given to a slave but it is customary for the slave to receive the contents of the *peculium*, or at least to use its increase, for his manumission.¹¹⁶ Further, recipients of the *peculium* may subsequently distribute it among other household members without loss to the *filius*. But all maintain the *pleroma*, the fullness they have received, without reduction.¹¹⁷ The *peculium* also includes any debts incurred by the slave,¹¹⁸ which may also be forgiven when the *peculium* is dissolved by *redemptio*, an aspect that is useful as part of Paul’s instruction about relief from the ‘debts’ of sin. No such distinctions are available in the *nahala*. The *peculium* is therefore quite literally the means of redemption

¹¹⁵ Cullmann [1963 p268].

¹¹⁶ This is the *legatum peculii*. The *administration peculii* implies that the slave ‘owned’ at least part of the *peculium* because he could use it to buy his freedom. Cf. Brinkhof [1978 p48, 122ff, 169]. It should be noted here that the contents of the *peculium* did not include that which was required for the slave’s life and health, that is, what might be considered ‘naturally’ as an obligation on the *paterfamilias*. Cf. Zeber [1981 p25]. One could understand Paul using the concept therefore to get across the ‘supernatural’ gift of the father in Christ. Also non-material as well as material objects could become subject to the *peculium*. That is to say that spiritual inheritance could be accommodated in the concept. Cf. Zeber [1981 p41].

¹¹⁷ Cf Col 2: 10.

¹¹⁸ Cf. Zeber [1981 p76-80].

and it makes sense to speak of Christ, as the Son, distributing the largesse of the Father to the rest of His household of humanity in its terms. Quite appropriately from the Christian point of view, in the words of one scholar of Roman law: “The *peculium* gave the slave hope.”¹¹⁹

The fifth difference is also related to the second and fourth above and consists in the fact that there is an inherent tension in the relation between *peculium* and *patrimonium*, as concepts in Roman law, that is not present in the law of the *nahala*. In Roman law the gift of the *peculium* to someone other than the eldest son (a slave whom the *paterfamilias* intends to free perhaps), can potentially reduce the inheritance that the heir receives (for example by granting manumission upon the *paterfamilias*'s death). This is explicitly prohibited, as noted above, in the law of the *nahala* in that the patrimony must be handed on intact.¹²⁰ This difference facilitates Paul's explanation of the apparent dis-inheritance of Israel (or the creation of a new Israel depending how one views the situation). The promise of the divine kingdom may be legally transferred to those who are not genetically related to Abraham under the *peculium*. Thus the new Israel may be created in the same manner that a Roman household might be extended. Additionally, the *peculium* provides the means to rebuke children who may have presumed too much concerning the father's generosity.

¹¹⁹ Duff [1958 p134]. Cf. also Zeber [1981 p15]: “The possession of *peculium* by a slave gave him his most important opportunity in life, the possibility of being set free.”

¹²⁰ Ez 46:16.

Therefore I conclude that it is not simply the easy similarity between the *nahala* and the *peculium* that Paul has exploited. It is the implicit theological turn in his concept of the Body that gives the *peculium* its primary significance. It fits well, I believe uniquely, with what Paul has to say theologically. It is, therefore, unreasonable to dismiss it as coincidence. Nevertheless, even if the *peculium* provides a plausible foundation for Paul's theological message, is it reasonable to suppose that he and his audience would have sufficient familiarity with it, for it to be effective?

6.. The *peculium* was embedded in Roman culture as a commonplace and therefore was almost certainly familiar to Paul and his Corinthian audience.

The earliest legal records for the *peculium* are the Theodosian summaries of the 4th century CE and the *Digests* of the *Corpus Juris Civilis* of the 6th century CE.¹²¹ There is insufficient legal documentation before these dates to verify the accuracy of these compilations. But there is no reason to suspect their veracity regarding the essential features of the *peculium*. Despite the hiatus of legal documentation in the classical period, Zeber considers that the *peculium* can be traced in some form or other to before the Law of the Twelve Tablets, the most ancient Roman code of mid-5th century BCE.

¹²¹ Up to the time of Justinian in the 6th century, there were no distinctions among the various kinds of *peculium* later to emerge. Cf. Zeber [1981 p7]. I therefore make no such distinctions here.

According to the Roman jurist, Ulpian (170-228 CE), as recorded in the *Digest*, the pretorial edict *de peculio*, the formal enactment of the *peculium* as a legal institution, was written about 100 years before Paul's writing, probably by the jurist Servius Sulpicianus Rufus (d.43 BCE). This document confirmed that both sons and slaves were 'persons in power' (*qui in alterius potestate esset*¹²²), that is, that they were authorized under the conditions of the *peculium*, contrary to all other tenets of Roman property law, to act independently. This meant that they could enter into contracts as if they had the status of the *paterfamilias*. They literally acted in his name.

The oldest useful sources regarding the institution are not legal but literary, primarily the plays of the writer Plautus (251-184 BCE), the scholarly writings of Varro (116-27 BCE), the comedies of Terentius (a manumitted slave of the late 2nd century BCE) and the Roman statesman and orator, Cicero (106-43 BCE). These are of greater significance here than legal data regarding the use and general knowledge about the *peculium* because they demonstrate the depth to which the institution had penetrated society even before it had been legally codified. Plautus's use of the term is sufficient to establish its currency. The *peculium* is mentioned in at least 13 of Plautus's 21 extant plays according to Zeber,¹²³ mostly in a satirical vein and often indicating the way in which the institution typically was abused by sons and slaves. Even wives and female slaves are mentioned by Plautus as recipients of *peculia*. No explanation of *peculium* is provided within the texts of these

¹²² Digest. 15,1,1,2-5.

¹²³ I can confirm only 8 (13 instances) of these 13, upon which my claims are based: *Asinaria* 2:2:11, 2:4:89; *Bacchides* 3:3:61; *Stichus* 5:5:10; *Mostellaria* 1:3:95, 4:1:3, 4:1:16; *Mercator* 1:1:94; *Casina* 2:2:27, 2:3:36; *Pseudolus* 4:7:86; *Trinummus* 2:4:33; *Captivi* 5:4:31.

plays; references occur as matter of fact instances of family life. It seems reasonable to conclude that the *peculium* was well known by the audiences. Whether they found the references amusing or personally relevant is an open question.

There is also good sociological reason for the pervasiveness of the institution. It is likely that the *peculium* became essential, and therefore common, during the 2nd century BCE in the wake of Rome's victories in the Punic wars. As trade expanded throughout the Mediterranean, it would have been necessary to have some means to 'empower' agents of the *paterfamilias* given the limited means within Roman law and in the fiduciary and financial techniques available in the ancient world.¹²⁴ In a society in which the legal organisational options for engaging in trading activity were the unstable *societas* and the largely unattainable *collegium* (which required imperial approval, equivalent to a Parliamentary Act), the *peculium* provided a sort of commercial safety-valve.¹²⁵ It specifically allowed the controlled distribution, exploitation and accumulation of commercial capital. Without the *peculium*, long distance commerce would have been almost impossible. Cohen also suggests a not irrelevant emotional component of the *peculium* that may have been particularly important in the spread of the institution by the entrepreneurial but disenfranchised young men of the time:

*The paradox of peculium is not without glamour,
romance and ambiguity. For it permitted a man, who*

¹²⁴ Cf. Zeber [1981 p16, 90].

¹²⁵ Cf. Brinkhof [1978 p4-7].

*could own no land, nor possess any civil rights to carry on the largest business adventures.*¹²⁶

Consequently, Corinth, a commercial centre and international *entrepot*, could not have achieved the status it had without the institution. It seems reasonable to conclude therefore that Paul would both know about and feel comfortable in alluding to the *peculium* among the city's residents without the need for explanation.

7. To the extent that Paul does use the *peculium* implicitly as the institutional matrix of his concept of the Body of Christ, he shifts the institution from the status of pragmatic exception to that of eschatological norm.

Despite the antiquity of the *peculium* and its importance in Roman society, it represents an important exception to at least two fundamental principles of Roman law: the 'impenetrability' of the family, and the concurrence of ownership and utility. In this sense the *peculium* is a pragmatic and minor exception to Roman legal philosophy.

As noted above, the Roman *paterfamilias* was, as far as the law was concerned, omnipotent within his own family. But the emperor was also legally omnipotent. This created a persistent legal tension in, not just law but political life because the only 'access' of the emperor, the state, into the family was through the *paterfamilias*. The *peculium*, however, provided a path for the state to enter into family relations, to actually regulate them to some degree at least. In practical terms, the *peculium* has aspects of both public and private law. Although it is an arrangement which is intra-familial,

¹²⁶ Cohen [p174].

its operation is effectual outside the family. It therefore needs some degree of legal uniformity, external recourse and mechanisms of social enforcement. In creating a legal category like the *peculium*, therefore, the state can and must legislate within the family. Just as significantly, decisions within the family have social ramifications. This confounding of public and private is of significance to medieval controversy regarding the corporation (as the Church), and in modern legal concepts of the corporation which still retain a 'peculiar' character as both public and private. Thus the source of the corporation can be traced to family law rather than contractual law. And thus the 'permanence' of the corporation, its extension beyond the life of any of its members, derives from the family.¹²⁷

The *peculium* also violates almost all of Roman property law, which rests on the assumption that the ownership of property cannot be separated from the utility or benefit enjoyed from that property. Technically, *dominium* is inseparable from *usufructus*. This is a very sensible legal principle which simply means that whoever benefits from property is the real owner of the property. Among other things it is a principle which is effective in preventing a variety of frauds like tax evasion, counterfeiting, pyramid-selling and so forth. But it is also a principle which is contradicted by the *peculium* in which the *de jure* beneficiary status of the father is 'compromised' by the *de facto* ownership status of the son. The annihilation

¹²⁷ Cf. Maurice [1898(1869) pp33-35]. Maurice, like many other 19th century Christian Socialists, was remarkably cognizant of the legal status of the corporation, most likely through his friendship with a leading corporate lawyer, John Malcolm Ludlow, who was also part of the movement.

of this principle – in the separation of *dominium* from *usufructus* - is in fact what makes the modern corporation possible as I will discuss in Chapter 4.

In terms of the history of the corporation in law, therefore, the important distinction in Roman Law regarding the corporation is between civil law and family law, that is, between *societas* and *familias*. It is the latter, family law not Public Law, that is, the source of the corporate relationship, particularly in the *peculium*. This is the assertion made by Maine: “The [Roman] family was a corporation.”¹²⁸ Radin supports this view and points out that “The corporation may have existed for centuries before it was realised that it presented a problem for the law or the government.”¹²⁹ I do not agree with the way in which these conclusions are formulated;¹³⁰ although I do agree with their intention – to point to the origin of the corporation in Roman family law. My contention here is that the primal exemplar of the corporation has been the Church as *peculium* as Paul conceived it in 1 Corinthians. Hillman supports this view implicitly in comparing the *peculium* to the modern corporate holding company (corporations which are part of other corporations). But since he does not recognize the Pauline move, he does not connect *peculium* to the Church.¹³¹

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If my assessment of Paul’s implicit use of the *peculium* is correct, he is responsible for transferring it from a sort of backwater of Roman law to its

¹²⁸ Cf. Maine [1931(1861) p153].

¹²⁹ Radin [1910 p33].

¹³⁰ For example, there is much that is un-corporate about the Roman family, the fact that only the *paterfamilias* is a recognized figure among other things; and while many institutional practices have indeed occurred long before formal legislation, there is nothing to suggest that the corporation as discussed here was present anywhere in Roman custom.

¹³¹ Cf. Hillman [1997].

place as a central feature of the new eschatological society he was promoting. The Body of Christ to the extent it is social is peculiar, that is, it exists as a set of relationships – between the Father and the Son, and between Christ and humanity – which conforms with the custom and law of the *peculium*. It is an idea that is embodied in the Church and which will therefore grow and proliferate as the Church becomes an important institution of the empire. The *peculium* therefore is not merely an antique oddity of Roman society but the social model of the dominant institution of our age, the corporation. This does not mean that the corporation is theological because it has been ‘baptized’ by Paul. It does mean that in implicitly promoting the *peculium* as a symbol of the Body of Christ, Paul is putting it in a very theological context. Like the expression of the Semitic cultural tradition of the *nahala*, Paul is re-stating the *peculium* in eschatological terms.¹³² This theological context is an essential element in the use of the *peculium* outside its highly restricted domain in Roman Law. The eventual development of the *peculium* into a central aspect of modern law is not without serious cost to the integrity of the legal system without maintenance of the theological context as I will discuss in subsequent chapters.

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¹³² Cf. Dodd [1938 p63]

Chapter 4: The Great Corporate Personification

The Medieval Covenant of Salt

Make friends with iniquitous mammon...
Luke 16:9

I have argued in previous chapters that the corporation can be traced credibly to its origins in the covenantal and Pauline traditions of Judaic-Christian culture. There is scholarly consensus that the Church is a direct descendant of these traditions as a manifestation of the corporation.¹ But the Church remained the unique, and therefore unrecognized, example of the relational genre until the political conditions of the 13th century provoked the entry of the corporate relation into law. The question which this chapter seeks to address is: How did the religious tradition of the *peculium/nahala* make the transition to civil life?

The legal institution of the modern corporation was established during a period which I will call the Great Personification. This is the period over just over 100 years from the beginning of the second decade of the 13th century. Before that period, there was no conception of ‘person’ in law as other than as a ‘type’ in Roman Law; neither was there a specific legal concept of the corporation as an identity independent of its

¹ Cf. Gierke [1977 p143f] although Gierke believes the unity of the Church is created by ‘the one will of its founder’ rather than the collective will and therefore rejects the Church as corporate model. Also cf. Jenks [1910 p26]; Davis [1905 p35ff]; and Sohm [1895] who makes repeated references to the Catholic Church as the prototypical corporation; also Sohm as cited in Brunner [1952 p42] in which he explicitly identifies the emergence of the corporate church in the 12th century. Sohm, interestingly, views the continued corporate status of the Church through the Middle Ages as detrimental to historic Christianity, an impediment to the direct relationship with Christ.

members. By the end of the 13th century the person had become a unique individual and the corporation was a person.² The cultural context is important for understanding the general conditions that promoted this transformation. As Lewis notes: "... feudalism had no clear concept of the individual, so it also had no clear concept of the community."³ It is during this period that the modern ideas of the both emerged forcefully in the issue of identity.

This contemporary issue of identity appears to have dominated European intellectual and religious culture throughout the 13th century. This is the period when the 4th century Nicaean doctrines of the person of Christ are not just re-affirmed but innovatively applied. This occurs first in the declaration of the doctrine of the Real Presence in the Eucharist (the *corpus verum* of the Lateran Council in 1215). The cult of *Corpus Christi* was officially instituted in 1264 but only following enormous popular demand based on visions by Juliana of Liege in 1208. Finally, the Church as the Mystical Body (the adjective only being used officially for the first time) was declared doctrinally in Boniface VIII's *Unam Sanctam* of 1302.⁴ These are issues of identity not physics. In these doctrines, the fleshly, sacramental and ecclesial bodies of Christ, are proclaimed as one corporate identity. They are doctrinal restatements of the Pauline Body as 1) Christ,⁵ 2) the Eucharistic gathering⁶ and 3) the totality of Christian membership.⁷ Personification is, in line with this doctrinal conclusion, the process of acquiring an identity not altering the molecular structure of matter. This

² Cf. Coleman [1982 p7].

³ Lewis [1954 p194].

⁴ It is also significant for an appreciation of the *Zeitgeist* in this regard that the Jewish mystical book, the *Zohar*, or *Book of Splendour*, is discovered (written/recovered?) in this same period. In it the Torah is personified in a similar manner. Cf. Bension [1932].

⁵ Cf. 1 Cor 12: 27.

⁶ Cf. 1 Cor 10: 16, 17.

⁷ Cf. 1 Cor 6: 15-17, 11: 29; Rm 12: 3-8.

process, although clearly one of religious belief, is not ‘mystical’ in the sense that it requires some special insight into spiritual existence. It is not even ‘metaphysical’ except to the extent that it makes reference historically to a covenantal theory of reality. It is a very practical process of making an identity, and therefore creating a unique meaning, by the act of naming.

Identity is, as I have shown previously, a central idea of the Covenant as understood in both Judaism and Christianity. It is, I claim, the matured covenantal thought about identity that plays a key part in the emergence of the modern corporate institution. However the historical situation is extremely complex. There is a multitude of suspects, too many to investigate each in any great detail. There are too many witnesses supplying far too much data, cultural, political and social, most of which are irrelevant to the case. And there are red herrings at every turn which distract attention from the real protagonists. Therefore in order to demonstrate my claim credibly, I am compelled by the situation to treat the emergence of the corporation as a type of mystery thriller, an institutional ‘whodunit’. Consequently I intend to lay out the findings of my investigation as if it were a criminal inquiry. I first want to establish, reasonably but hardly beyond doubt, the existence of a *motivation* for the emergence of the civil corporation, when the world had apparently done without it successfully. I will argue that the Church itself, as the prototypical corporate organization had a very strong motive for pursuing recognition of its status in civil terms. Second I will attempt to show that this motive was accompanied by the appropriate *means*, in this case a coherent theory of the corporate person as subsistent relation developed theologically over a millennium. Finally, I will identify the specific *opportunity* which presented itself in the ambition of the (then) newly formed Franciscan Order of Friars

to establish institutional poverty. This ambition provoked a series of legal decisions that resulted in the corporation as a part of civil law.

1. The corporate identity of the Church became of acute political significance in the beginning of the 13th century because of growing tension with the Empire.

The Catholic Church was legally established as a united collective entity by the Emperor Constantine in his edict of Milan in 313 CE.⁸ This is an ‘historical fact’. Prior to this act of imperial legislation, the so-called Universal Church, as well as its various *ecclesiae*, congregations, monasteries, and other establishments could be considered as illicit *collegia*, associations of individuals who had no formal contracts with each other but nevertheless held assemblies and conducted other group activities. Such associations did not have the recognition of the state, and therefore could be deemed, legally, non-existent and without legal protection for their property.⁹ Regardless, therefore, of its spiritual status, the Church did not become a legal fact until the emperor said it was so.¹⁰ As Ullmann summarises this view:

*...by conferring upon the Church the status of corporation¹¹
Constantine raised it from its subterranean existence and turned it
into a lawful body public... The Roman and Pauline conception of a
corporation fused with an ease that indeed was most remarkable.¹²*

⁸ Cf. Kantorowicz [p505].

⁹ Cf. Gilchrist [p11].

¹⁰ Cf. Taylor [p296]: “...under the Christian Roman Empire, the authority of the Church as well as its privileges rested upon imperial law.” These privileges included recognition of episcopal jurisdiction, the inalienability of property, freedom from taxation and public service, and the eligibility to receive bequests (a key aspect of Roman legal ‘personhood’).

¹¹ Ullmann uses this term in the manner of Gierke. I do not accept this usage for reasons I will explain fully in Chapter 6. My point here however is not about terminology but about political legitimacy.

¹² Ullmann [1975 p92]. One need not accept Ullmann’s view (influenced by Gierke) that Roman society was ‘anti-associational’ to recognize the political factors at work in a dictatorial society.

The Roman imperial regime had always been wary of the formation of any potentially political cooperative enterprise among its citizens. Such groups were by their very existence a possible threat to political stability (and tyranny), with the potential for creating an *imperium in imperio*. The Church, in its traditional attitude toward emperor worship and to military service, was just such a threat. Consequently, aside from the apparently innocuous (but nevertheless still suspect) forms of association like burial societies and local street associations, many sorts of potentially political civil union were undoubtedly discouraged as a matter of imperial policy. Constantine's act in recognising a very large and established body as a legitimate organisational entity in the empire is therefore unprecedented.

There were clear advantages in the decision for the Church. Persecution would stop. Church property could be protected. Most importantly perhaps, civil society could now be directly affected by clerical appeal to the highest rungs of the social and political ladder. Thus the Church could influence legislation using precisely the tactics of Public Law that had brought it legally into existence. An example that illustrates how effective these tactics could be is the Justinian codification, begun in 527 and finished in 534, which formed the basis of the renaissance of law in the Middle Ages. It is overwhelmingly an assemblage of Private Law made up of snippets of judgments from the 2nd to the 4th centuries.¹³ But the first book is entitled *On the Trinity, the Catholic Faith and the Prohibition of Public Discussion Concerning the Faith*. This has a focus on Public Law, particularly in matters of heresy and shows the enormous impact of the Church on government.

¹³ Cf. Ullmann [1975 p107].

Nevertheless, as Brundage notes: “[Under Constantine] the Church became virtually an organ of the imperial government...and an arm of imperial administration.”¹⁴

The ‘emancipation’ of the church, therefore, was a double edged sword for the recipients of imperial largesse. The emperor had acted under Roman Public Law, effectively the law of the sovereign, in ‘approving’ the Church.¹⁵ In Public Law there is really only one ‘subject’, the emperor himself. Although the Public Law may ultimately be considered to originate in ‘the people’, it is in fact the law of the dictatorial state imposed on the populace.¹⁶ Any power granted to any group, including the Church, is a derived power from that of the state.¹⁷ And it is a power that might be ‘un-granted’ as demonstrated subsequently, notably during the reign of Justinian. Private Law, on the other hand, is that which pertains to the general populace. It concerns agreements, contracts, and associations for the purpose of commerce or mutual social (or political) interest – all of which are created not by imperial approval but simply by mutual or common consent.

Various theories were put forward from time to time to suggest that the historical fact of imperial creation of the Church was not entirely accurate. For example, that the Roman Empire only really came into existence at the time of the recognition of the Church and that therefore it was not the empire that created the Church but God who created Church and empire simultaneously. Alternatively, it was surmised that the

¹⁴ Brundage [p7].

¹⁵ Brunner [1952 p21] is over-stating the case however when he says: “...the *Ecclesia* stands under the jurisdiction of the Roman Emperor and Roman jurisprudence, and this heathen order was granted complete recognition as the divinely appointed one (Rom 13:1-5) in spite of the fact that it stood in no sort of historical continuity with the process of special revelation.” Ullmann [1975], who follows Gierke’s terminology which I will question in a later chapter, makes the same point.

¹⁶ Ulpian’s view, cited in Post [1948 p47]: “Public law pertains to the *status rei Romanae*; private law to the utility of individuals.” As Post also points out, by the 13th century the distinction public/private was largely in chaos. My contention, in part, is that it is precisely this chaos which the papacy intended to order for its own benefit.

¹⁷ Hence the Emperor’s power to summon Church Councils, appoint bishops and other Church officials and Theodosius’s authority to declare Christianity the religion of the empire.

Church was formed by an act of the Spirit and only confirmed by the Emperor through his recognition. This allowed the Church to claim equality as an institution with the empire, and to claim secular sovereignty during periods when the post of *princeps* happened to be vacant. It was even suggested that that emperorship was a sacrament that required conferring by the Church to achieve full validity. Hence the creation of the doctrine of the Carolingian *translatio*, the right of the pope to rule in an inter-regnum and to consecrate the new emperor.¹⁸ These theories had questionable impact on the *realpolitik* of Church and empire, and they never settled the underlying issue of the legal status of the Church as an entity.

So the fact that the Emperor had acted under Public Law in the recognition of the collective status of the Church was a time bomb with a fuse of almost 1000 years. The uneasy but generally peaceful equilibrium between church and state (the two could hardly be distinguished at times) was upset at the beginning of the 13th century by a new set of claims by the papacy on behalf of the Church. Innocent III pursued a point made tentatively by several of his predecessors, namely that there is only one 'pontifex' (a traditional imperial title) or bridge to the divine, and it is the pope.¹⁹ In brief, Innocent claimed ultimate authority, not just on matters spiritual but any and all

¹⁸ The first official claim by the Church regarding the key issue of the *translatio* is in the Bull *Venerabilem* of 1202.

¹⁹ Cf. Sohm [p125] quoting Innocent III: "The Lord has given not only the whole church but the whole world to St. Peter to govern." Hildebrand, the reforming Pope Gregory VII (d 1085), began the battle against so-called 'lay investiture', that is, appointment of bishops by secular feudal lords. He also maintained, against the German emperor, the supremacy of the spiritual over the temporal power; the *scaerdotium* encompassed the *regnum* in the *Repubblica Christiania*. The prospects for enforcing such a claim were dim until fortune smiled on the papacy at the end of the 12th century in a sudden disruption in the continuity of the empire. Alanus marks the turning point in the general interpretation of the canon lawyers. Before him, the doctrine of the two swords was the dominant legal opinion. After Alanus's radical interpretations, the separation of spiritual and temporal power was effectively eliminated. Cf. Ullmann [1949 p147ff].

political judgements.²⁰ The policy of aggressive papal pursuit of dominance over the empire continued through most of the 13th century. The decretalist, Hostiensis, could still refer to the pope as '*dominus spiritualium et temporalium*' in the last quarter of the century and could still (apparently credibly) claim biblical authority by paraphrasing Paul to the effect that secular monarchs were '*sub pedibus eius*'. Consistency of papal purpose with regard to material concerns was high for the entire period.

The validity for the papal claim and the reasons that it was made in the way and at the time it was are not of concern in this essay. Neither is the issue of whether or not the designation of the Church as *collegium* by the emperor was accurate or correct. What is of importance to my argument here is that, having announced his intention of pursuing a confrontational policy, Innocent III (and his successors) had to provide reasons why such a claim should be considered valid. These reasons were expected to be not only theological but legal. As we shall explore below, it is likely that no adversaries before or since were so litigiously minded as that of the 13th century Popes and their Hohenstauffen opponents.²¹ Further, civil and ecclesiastical law (both based on Roman law), are not clearly demarcated at the time so that decisions in one domain are assimilated into the other with ease.²² "In the Middle Ages, Roman Law

²⁰ Cf. Post [1937 p406]. Innocent also had claimed his unique title of *vicarius Christi* in 1201. Cf. Kantorowicz [p91].

²¹ I believe the 'Staufen conflict' between the Pope and the Emperor in the 1230's is the spark for the establishment of the Church under private law. According to Ullmann [1975]: "The ferocious Staufen conflict with the papacy from the thirties of the 13th century onwards gave rise to a great many manifestoes, encyclicals, and appeals on both sides." One could surely add to this list 'legal manoeuvrings'.

²² Innocent III's first step however is not to promote such 'cross-over'. Rather Canon Law tradition about the two separate but equally sacred roles of Emperor and Pope (based on Lk 22:38 and Matt 16:19) had to be replaced. It doesn't seem an exaggeration to suggest therefore that most *decretals* have a not insignificant political component in addition to whatever other theological and legal points are being made. Cf. Watt [p35ff] who traces the series of decrees progressing sacerdotal superiority as well as the import of the Canons of The Lateran Council of 1215.

held good as universal law.’²³ The Pope was in a position, as it were, to ‘stack the deck’ since he is the final judge of cases in Canon law, which operates as a sort of supreme law of appeal²⁴ It is law that is in the hands of his theologians; theological and juridical knowledge are not therefore distinct.²⁵ The papacy doesn’t hesitate to use both to its own ends when the opportunity arises for what it perceives as the good of the Church.²⁶

One signal of papal policy and intention occurs in mid-century during the reign of Pope Innocent IV, previously Fieschi Sinibaldi, a former professor of law at Bologna and a long-time canonist of the papal curia. The matter at hand is an otherwise unexceptional case involving collective responsibility and the onus of punishment.²⁷ The substance of this decision is the legality of mass excommunication for the action of a national leader. The decision is unusual because it separates the identity of the *princeps* from that of the populace and that of the community as a whole. It also takes a rather remarkable view about the nature of the community involved. The medieval historian and political theorist, Thomas Gilby, evaluates the judgment at some length and concludes: “When Innocent IV decided against mass excommunication...he seems to have regarded a people much as the English do a law firm, namely as a

²³ Cf. Sohm [1895 p124].

²⁴ Cf. Ullmann [1975 p165]; Brundage [p3, p96ff]; Packard [p89]. Not until 1410 did the papacy give up the claim to appellate jurisdiction over secular courts. The authority of the Curia over all ecclesiastical courts has never been relinquished. Cf. Headley [1963 p75]. From the mid-12th century until the Reformation most popes were highly qualified jurists, and personally decided cases. The endurance of the juridical institution of the papacy is remarkable. For example it was Gregory IX who published the *Liber Extra* in 1234, containing all the *decretals* published since Gratian. This document was updated and remained in force until the new *Code of Canon Law* was introduced in 1918. Civil law did not become distinct from Canon law until the decline of the papacy in the 14th century.

²⁵ Cf. Sohm [from Canon Law vol. 2, cited in Brunner [1952 p41].

²⁶ Cf. Sohm [op. cit p41; orig.: *Canon Law* p83] also observes that up to this point in history Canon Law had been applied almost solely to the sacraments of the Church. It would appear therefore that a new political awareness in this regard had been achieved. Sohm argues this with regret since it is his fundamental view that the essential nature of *Ecclesia* stands in opposition to all law. Cf. Brunner [1952 p107]. His testimony in this regard *against* Gierke becomes even stronger.

²⁷ Cf. the *decretal, Romana Ecclesia*, [21 Apr 1246].

collective name for the partners.”²⁸ This allows Innocent to find the *princeps* guilty but effectively in violation of an implicit agreement involving the populace and therefore as *ultra vires*. The populace is therefore innocent. If this evaluation is correct, then Innocent had not considered the ethnic group concerned as might have been expected, that is, as the rather ill-defined *gens* (clan/tribe/nation) but as the very precisely conceived *societas*. In his judgment, Innocent also uses the term *persona ficta* in referring to this entity.²⁹ Innocent’s decision is important for two reasons. First it uses a concept of ‘person’ which is not legal and Roman but theological and Christian: a person as relation. I will discuss this concept in more detail below in the second section of this chapter. Second, and of critical importance to this part of my argument, Innocent is implicitly setting a precedent for the recognition of a collective under Private rather than Public Law. The fact that he doesn’t have a name for the entity he has in mind is not surprising; no such genus yet existed. Hence Gilby’s tentativeness with regard to its identification. The decision hidden within the decision, therefore, is to effectively (and literally) privatise the Church to the extent it can be established that it is a member of the as yet un-named legal class. Innocent is, in effect, attempting to amend Constantine’s edict through legal re-definition. The ruling would allow the legal assertion that the Church predated Constantine’s edict because it was created by its members under Private Law and not by the state under Public Law. Although this is a conclusion that cannot be proven definitively – there is no ‘smoking gun’ memorandum – it is at least plausible given the consistency and

²⁸ Gilby [1958 p217].

²⁹ The judgement in this case has become famous largely because of Otto von Gierke’s 19th century identification of it as the ‘birth’ of the corporation. As I will argue at length in Chapter 6, I believe this identification is fatally flawed. Cf. Rodriguez [1962 p291] for a summary of what Innocent *did* accomplish in defining legal corporate terminology.

thoroughness of the curia in matters concerning the empire.³⁰ Ullmann supports this conclusion when he stresses that “...the basic assumption behind every [papal legal judgement] was papal supremacy in the shape of a universal monarchal [sic] government.”³¹

And, of course, it is not just the Universal Church that is freed from the ontological control, as it were, of the sovereign. There were perhaps thousands of ‘illicit’ (that is, unrecognized) entities within the Church as well as outside it, that were potentially affected by Innocent’s decision. These entities were ‘free’ after the decision, in the sense that they were self constituted, if Innocent’s precedent were followed. But how could such a re-definition be assimilated into contemporary law which had its own long-established ecology? Is the Church a genuine *societas*? Is there really an implicit contract among members? What are its conditions? Does violation of contract imply dissolution of the Church? The *societas* seems unlikely to apply to the realities of an association like the Church. How could it be distinguished from other forms of partnership association? The *societas* might provide a legal haven outside of Public Law, but the Church would create a plethora of issues within Private Law. The key to these issues was in fact one of identity. The Church had an identity which was not dependent upon the identities of its members and yet somehow ‘incorporated’ them. These are covenantal issues; and a covenantal solution was at hand.

³⁰ Cf. Joan O’Donovan [2004 p81] who describes a “...continuing elaboration of Hildebrandine reforming ideas...to emancipate the church from her vassalage to secular lords... Their overall strategy was to construct a comprehensive ecclesiastical corporation ...”

³¹ Ullmann [1975 p84].

2. *The Covenantal/Augustinian idea of the corporate person as a relational subsistent identity replaced the Roman idea of the person as a legal role by the early 13th century.*

Roman law had always recognised the conventional, often arbitrary - that is to say, fictional - character of a legal 'person'. The derivation of the term *persona* itself suggests just this idea of public mask or façade. There is the tinge of falsity that is part of what we have come to term a Freudian *persona*, a 'front' that hides something (some one) more genuine, more real. A person, in Roman law is simply an abstraction, a class or *ordo* rather than an individual, with some sort of standing before the law³². The emperor was a person; a *paterfamilias* was a person; a Roman *civis* was yet another person. For those under Roman law, identity is a derivative of formal status not vice versa. Roman citizens received their names at the time of enfranchisement in a class.³³ The gradations of the *ordo* are representative 'types', categories, into which individuals fall (or more often do not) and which determine how the reality behind the mask is dealt with legally. The 'real' individuals may change but their classifications remain constant and their identities are irrelevant to the law as such. It is this concept of person which was to change fundamentally by the opening of the 13th century. And the change was brought about not through legal but theological thought.

2.1. Trinitarian Persons are the basic models for identity.

³² Cf. Sherwin-White [1963 p 144].

³³ Cf. Sherwin-White [1963 p145-46].

The Trinity is not a doctrine to be found in or through creation according to Christian tradition. It is without any question a purely revealed truth. Neither is it one among many of Christian expressions of theological truth. Rather it is the revelation through which all other doctrines must be interpreted.³⁴ It is the ‘core’ of Christian theology which was the core of Medieval Christendom. And as Taylor notes: “Political thinking in the Middle Ages sought its surest foundation in theology.”³⁵ Theological discussion was political discussion and vice versa. As such, Trinitarian theology is constitutional politics. The concept of a Trinitarian Person therefore is not just another point of contact between religion and general culture; it is a primal driving force of profound consequence.

The mainstream theological discussion of Christianity had sought firstly to clarify the divine status of Christ within monotheism; and secondly to explicate the peculiar character of the Christian notion of deity. To do this it had to construct a vocabulary for dealing with the apparent paradox that God is both One and Three. Ultimately the central terms in this vocabulary became those of ‘Person’ and ‘Substance’. But not before each of these terms was stretched beyond linguistic breaking point in translations between Latin and Greek, and even inverted during the course of doctrinal formulation. Since the result of this formulation is critical to an understanding of the 13th century ‘person’, some historical background is necessary.

Appropriately, the first to use the term ‘person’ with reference to the Father, Son and Holy Spirit of the Christian God was a Roman lawyer, Tertullian, in the early 3rd

³⁴ Barth [1936 p346]: “It is the doctrine of the Trinity which fundamentally distinguished the Christian doctrine of God as Christian.”

³⁵ Taylor [p304].

century.³⁶ Tertullian is nowhere concerned in his theology to defend the equality of the members of the Trinity. It seems reasonable, therefore, to conclude that Tertullian used the term in a more or less conventional legal sense given his background, namely as a mask or artificial manifestation of a 'real' Godhead lying behind it.³⁷ This conclusion is given weight when we recall that Tertullian ultimately joined the millenarianist Montanist sect, which held the belief that the three Persons of the Trinity were mere manifestations of the single sovereign God. In effect, that is, they considered 'person' as a presentational mask through which God reveals himself to the world.³⁸ Although posthumously condemned for heresy, the Church did adopt his dictum *una substantia tres persona* as the focus of further doctrinal development.

The Council of Nicaea in 325 makes the definitive statement of early Christianity in its conflict with Arianism about the nature of the Divine Being using the Greek terms *hypostasis* (person) and *ousia* (substance). This distinction serves to establish formally the equality of the Persons of the Father and the Son in response to the Arian threat to that belief. But Nicaea provides a definitive judgement without definitive definition. The terms are more political than they are theological. Neither term had an agreed connotation to the various factions involved. Literal translation into Latin is at least awkward since the terms are used, more or less equivalently, as *substantia*.

Arianism is therefore not rebuffed but simply tolerated, while the use of the new (and

³⁶ Cf. Hill [1982 p52]. There are three etymological theories of the word 'person'. One is that it derives from the Greek *prosopon*, denoting an actor's mask (possibly related to the Latin *per sonare*, to speak through). The other is that it is from an Etruscan term *phresu*, coincidentally also meaning 'masked'. The third is that the term is connected with the goddess Persephone. What is of concern in this paper, namely the theological and legal use of the term, points to the first two as both relevant and correct.

³⁷ This is a likely reason for the rejection of the word by Basil of Ancyra, a prominent 4th century *homoiousian*, that is 'like-substance', theologian. The Modalist Sabellians had used the term precisely in the Roman legal sense - as a mask. Cf. Hill [op. cit. p58].

³⁸ Cf. Gilby [op. cit. p237]; also attested by Jerome in 384 who refers to the sect as Sabellians.

pointedly unbiblical) terms is avoided by serious theologians who wish to evade the politics associated with the theology.³⁹

The 4th century Cappadocians were likely the first to speak explicitly of the possibility of *relation* being the defining category for the Trinitarian Persons.⁴⁰ Gregory Nazianzen, in particular, employed the concept of *skesis*, position or relation (but also connoting state, nature or condition through these terms; the precise definition is not clear), as a “Person-constituting element of God”⁴¹

2.2. The Augustinian theology of pure identity established a basic theory.

Not until Augustine’s exposition of Trinitarian theology in the early 5th century, however, is there real progress in a ‘systematic’ theology using the idea of ‘person’. Augustine is the first to treat ‘person’ not as a primitive term but as a designation in need of a careful analysis and definition if it is to be of any real theological or apologetic use. In his exposition, Augustine departs radically from the Tertullinanic notion of ‘person’ as conventional (that is to say fictitious) manifestation of God. For Augustine ‘person’ indeed signifies something unique - *aliquid singulare atque individuum* - but that ‘aliquid’ is defined in relational terms:

The chief point then that we must maintain is that whatever that supreme and divine majesty is called with reference to itself is said substance-wise; whatever it is called with reference to another is said not substance but relationship-wise [II.9].⁴²

³⁹ Even Augustine voices his hesitation about using terms ‘across languages’ as it were. The politics between Greeks and Latins is clear in *De Trinitate* V, II.10. Cf. Hill [p196].

⁴⁰ This possibly could be based on Plato’s idea of being as power, that is, as *inter-acting* in the *Sophist*.

⁴¹ Cf. Barth [1936 p419] indicating that even in the 20th century this idea still had currency. Cf. also Whitehead’s [1933 p142] *Doctrine of Internal Relations* which seems merely a crib from the Cappadocians. Gregory does not receive a citation.

⁴² References are to *De Trinitate*.

And:

...since the Father is only called so because he has a Son and the Son is only called so because he has a Father, these things are not said substance-wise...but relationship-wise [I.6].

And finally:

...as for the things each of the three in this triad is called that are proper or peculiar [NB] to himself, such things are never said with reference to self but only with reference to each other or to creation, and therefore it is clear that they are said by way of relationship and not by way of substance (III.12).

For Augustine, 'substance' is a way of being⁴³ [I.3]. God's unique way of being is that of unchangeability (immutability or simplicity). And this is what he equates with the Nicæan Greek *ousia*. God's substance does not include His external relationships since these are not essential to (are 'outside of') God. By definition relationships are not 'accidents' of God's way of being because nothing can be 'lost' in God if these things are modified [I.5]. But, and here is the 'mystery' of the Trinity, God's internal relationships *are* part of God's substance. Each divine Person is a unique and eternal nexus of relation with the other two.⁴⁴ Equality of substance is maintained and yet distinctiveness is also maintained - not through a differentiation of substance but through a differential sharing in or union of that substance by the Persons.

In fact Augustine recognises that the substance of each Person is exactly the same, and includes the unchanging relationships with each other. Their way of being is 'in relationship', which would seem to be part of God's substance. But since the relationships among the Persons are oppositional, that is unique to each of the Persons, these relationships cannot form part of God's substance, even though they

⁴³ Latin: *essentia* which is derived linguistically from *esse*.

⁴⁴ Cf. for example Smith [2003 p58].

are unchangeable and therefore part of the divine way of being. Augustine solves this problem in his theology of the Divine Names [III.12-16]. ‘God’ is a term designating the Supreme Being. ‘Person’ is a *name* for a particular and specific divine identity. The divine substance is the eternal interactions (processions) of these identities.⁴⁵ Although from a human perspective all the Persons are equally ‘God’, each remains an identity. The relationship between God and creation is always a relationship with a Person, who is complete God. A relationship with God in general, however, is simply not possible since God is not a Person. Put the other way round, only Persons (even divine ones) can have relationships and all they need to have a relationship is contained in the idea of identity.

2.3. Boethian Incommunicability affirms the theory.

This central notion of the divine name/identity is further emphasized by Boethius⁴⁶ about a century after Augustine:

...He who is Father does not transmit this name to the Son nor to the Holy Spirit. Hence it follows that this name is not attached to Him as something substantial [Utrum Pater et Filius 35].

Hence:

...not even the Trinity may be substantially predicated of God; for the Father is not Trinity...nor is the Son Trinity, nor the Holy Spirit Trinity, but the Trinity consists in a diversity of Persons, the Unity in simplicity of substance [UPF 50].

This is the doctrine of *incommunicability* which is progressively recognised during the Middle Ages as a central tenet of Trinitarian theology.⁴⁷ The only characteristic

⁴⁵ For Augustine divine immutability and divine self-identity are equivalent terms. Cf. Anderson [p27]. Also *Sermon VII, 7.7*: “...esse nomen est incommunicabilis.”

⁴⁶ According to Marenbon [2003 p71ff], Boethius uses ‘substance’ as a ‘first category’ Aristotelian thing, as *ousia*. This is also the way I interpret him here. However it is not unlikely that Aquinas uses the term in its second category sense, thus eliminating any connection to ‘form’.

not shared completely among the Persons of the Trinity is their individual identities.⁴⁸ Thus identity is not abstract but definite. Of even more significant import, being Persons is not even something that the members of the Trinity have in common. Each is a Person in a special, un-transferable and ungeneralizable way through their ‘proper and unique relationships’.⁴⁹ Consequently a Person is not even a member of a category but radically unique in its social union.⁵⁰ It is difficult to conceive of a concept of person more removed from that of the *ordo* Roman Law. It was, nevertheless a concept with enormous impact.⁵¹ It is in the shadow of Boethius that the 11th century Anselm coins his formula: *In divinis omnia sunt unum, ubi non obviate relationis oppositio*⁵² which has remained basically unchanged as a doctrine of the Church.⁵³

2.4. Scholasticism extends the theory to individuals and groups as the subsistent relation.

But the impact of this conception is not merely intellectual. It became part of the general Christian culture. By analogy (which must be considered as a virtual necessity

⁴⁷ Cf. Richard of St. Victor *de Trinitate* IV 6,8,21,22. Also Webb [1918 p55].

⁴⁸ Gilson’s view is that the identification of person and uniqueness did not exist in Augustinian doctrine before Boethius. Gibson on the other hand believes that Boethius (and Anselm as well) says nothing that is not already said in Augustine. Cf. Gibson [p214]. My view is intermediate between the two. Boethius, according to this account, recognised the fundamental import of what Augustine says and says so with sufficient clarity to be considered original in some sense at least. Gibson effectively admits this position [p212]: “Augustine cannot say that ‘*persona*’ simply means relation, and the idea for him remains confused and imprecise so that it is unclear whether we are being told that the three persons exist in relation to one another or whether relation is integral to the notion of person.” Boethius makes the first mistake in order to then get to the second.

⁴⁹ Cf. Hill [op.cit. p103]. Also Cf. Smith [p86]. By the 13th century it is recognised that the implication of the Augustinian insight is that the divine names include the divine relationships, that is, identity itself is the primitive concept involved in the Trinity, its ultimate reality.

⁵⁰ Boethius is making here the explicit break with the Roman connotations of person that Augustine could not quite reach because of the shifting meanings between Greek and Latin terms. Cf. Smith [p68].

⁵¹ Cf. Marenbon [p164, 171].

⁵² Cited in Barth [1936 p419].

⁵³ This formula was accepted as a dogmatic statement in 1441 by the Council of Florence.

given the pervasiveness of Christian thought throughout the world of Christendom⁵⁴), a human person is also a unique identity.⁵⁵ This is the meaning of “an individual substance”⁵⁶ This is a pure identity.⁵⁷ As such it is always *in* relationship with God and therefore has potential *for* relationship with other human beings. Since spirit is participation in the divine, a person is spiritual by definition; this is the nature of ‘subsistence’ and the basis for corporate unity of the Church.⁵⁸ No longer a particular role one plays in society, a person is explicitly social even before the relationships for which it has a potential are formulated.

The consequence of this mode of thought is that a person has no essence (*essentia*), no being as a fixed set of relationships, *except* in its relationship to the divine. This is the fixed point of humanity, its relationship to God. It is because of this relationship that human identity is stable. And it is what makes human identity incommunicable.

Identity is not therefore simply a function of variable human relationships, it is inherent in the existence of the person.⁵⁹ Creatures *are* and have their individual identity to the extent that they participate in God. Participation is a technical term for Augustine and he uses it carefully to distinguish between creation from nothing and

⁵⁴ Cf. Gilson [1938 p209, 228, 230]: “...analogy is the law according to which creation is effected.” For 13th century philosophy.

⁵⁵ Cf. Augustine *De Trin* 7.6.12. Also *De Trin* 8.7.10 and 8.8.12. In a sense, human persons are more complex to deal with than the divine Persons because of both creaturliness *and* sin. We are incapable of kenosis, (finding *krypsis* or concealment more to our taste) but can only recognize it as a divine act. Nevertheless we, too, are constituted socially as we have come to recognize, and are, therefore, familiar with subsistent relations as a matter of sociology if not theology. My contention is not necessarily that human identity is analogous to divine identity (particularly psychologically), only that human identity ‘participates’ in divine identity.

⁵⁶ “*Naturae rationabilis individua substantia*”. *Opuscula Sacra* V, iii, 4-5. According to Gibson, Boethius’s definition of person varies outside the fifth tractate. Cf. Gibson [p194]. I will not consider those variations here.

⁵⁷ Clark, in Lienhard [1993 pp99-120], would like to interpret ‘identity’ as “...an individual human being who is irreplaceable by another human being.” I think ‘irreplaceability’ is a rather different concept than incommunicability as conceived by Augustine and Boethius, not least because it appears to avoid any connections with relationships.

⁵⁸ Cf. Cyprian *De Cath. Eccl Unitate* c 23.

⁵⁹ Cf. Spaemann [2006 p1, 17, 32, 149, 182].

any sort of emanationism of the divine substance.⁶⁰ What is of concern to the point being made here, however, is that it is the participation in the eternally existent Trinity that *is* the identity of anything and everything, not just human beings.⁶¹ For Augustine, the Platonic forms corresponding to the different aspects of reality – every individual *thing, hoc aliquid*, in the cosmos⁶² - are effectively the ideas, archetypes, partial resemblances of God.⁶³ It is this and only this participation that creates the continuity of identity in a changeable world. But there is a particular class of relation that involves God reciprocally. In the technical language of the schools the person is a ‘subsistent relation’, that is, a metaphysically real relation, or, more accurately, a *mutual* relation between or among persons, at least one of whom is a Person. To subsist is to be an independent self-contained subject, not an object that merely exists in the universe.

Such a relation is constituted between one individual human being and God. But God is then the universal nexus of all of humanity as a unique set of subsistent relations. The subsistent relation constituting each person may be to some degree shared or ‘communicated’ in submission with others through God. St. Bonaventure, interpreting the doctrine of Boethius according to Richard of St. Victor, and extending it to the constitution of creature,⁶⁴ describes the situation:

...*personality is a relation..., a substantial relation – the substance considered in the relation which constitutes it. For it is this relation of submission on the part of the subject to the form*

⁶⁰ Participation for Augustine means to have *esse* without being it. Cf. Anderson [p59].

⁶¹ Hence Webb [p161] can conclude that “Of the conception of corporate personality it may be said, so far from conflicting with the Personality of God, it points with no uncertain finger to such an acknowledgement.”

⁶² Cf. Anderson [p54]; Gilson [1938 p320].

⁶³ As both origin and *telos*. The reality of ‘unformed matter’ consists in its ‘appetite’ for form. Cf. *Confessions*, XII,6.6. In the Augustinian account of creation form and matter are created together since matter without form is without God and cannot therefore exist. Cf. *A Literal Commentary on Genesis* I, 15,29. Cf. Quinn [1973 p507].

⁶⁴ Cf. Quinn [1973 p217].

*that constitutes personality and confers incommensurability upon it.*⁶⁵

The implication of note here is that a subset of these subsistent relations, persons, is also a person, a unique subsistent relation, a ‘form’ as idea of God, among any number of individuals. In fact Bonaventure suggests that it is in the nature of the ‘complete being,’ man, to co-operate to make another complete substance.⁶⁶

Cooperation is, as it were, “an unfilled capacity which gives rise to an unsatisfied desire.”⁶⁷ Submission to another through God creates a composite subsistent relation, a *complexio*, which includes more than one individual, just as the body includes more than one organ. According to Bonaventure’s philosophy, this relation may be entirely spiritual, that is, does not involve a combination of matter and form, but of form only.⁶⁸ It is, therefore, in a manner similar to a human person, a ‘supposit’, an individual thing divided from other things and subsisting in relation to God.⁶⁹ The group so constituted is a way of being and exists as such.⁷⁰ For Bonaventure, it is this divine idea which suggests itself to man as a revelation, not merely as a way of understanding the diversity of divine expression.⁷¹ Such a relation cannot be contractual because it involves the divine; but it is voluntary. While its precise composition may vary as persons enter or leave it, as in an ecclesial congregation, it is stable since at its core is the stability of the divine. It continues to exist as long as the relation of mutual submission, which is the grace of God’s presence, is maintained.⁷² Its specific name may be supplied by human wit (the Body of Christ, The parish

⁶⁵ Bonaventure as cited in Gilson [1938 p471 n.]. Hence Leibniz’s 17th construction of his *Monadology*, a society which communicates solely through God.

⁶⁶ Cf. 2 *Sententiarum* 12.1.3f.

⁶⁷ Gilson [1938 p325].

⁶⁸ Cf. Quinn [1973 p192].

⁶⁹ Cf. 1 *Sententiarum* 25.1.1-3. Subsisting suppositis include spirits as such for Bonaventure. Cf Quinn [1973 p186, 192].

⁷⁰ Cf. Quinn [1973 p186].

⁷¹ Cf. Quinn [1973 p495].

⁷² Cf. 1 *Sententiarum* 1.1.1.1 Bonaventura [1882].

Church of St. James, for example, or less pleasing, Enron), but it is a name, however imperfect, of God.⁷³ It is an expression (conception in its original significance⁷⁴) of God as part of the 'plurality of divine ideas'.⁷⁵ The composite subsistent relation is then a theory of the Covenant stated in contemporary language but solving the ancient problem of the One (God) in its relation to the Many (creation).⁷⁶ We are one with each other only in God's identity.⁷⁷ This is the first theoretical foundation for the civil corporation.⁷⁸

The subsistent relation is also, as Bracken points out, a new world view:

For an entity which exists in itself only in virtue of its intrinsic relatedness to other entities is by that very fact a part or member of a still more comprehensive, specifically social reality, namely, an ontological totality...The totality, to be sure, does not exist in independence of its constituent parts or members but only in and through their relations with one another. Yet, given this necessary qualification, it is nevertheless true (within this world view) that it is the society which first of all exists and that individual entities only exist insofar as they participate in the society.⁷⁹

This is an entity which is self-constituting but also independent of its membership.

The whole exists in each of the parts but only because the parts themselves by reason of their dynamic relations to one another together constitute the whole. Such an entity is precisely what the Church needs to distinguish itself from a mere partnership and an imperial college. But how does a theological concept, however well-honed and well-accepted, insert itself into the process of law? How would it be identified if it did

⁷³ Cf. Quinn [1973 p486].

⁷⁴ Cf. Gilson [1938 p147].

⁷⁵ Ibid [p495].

⁷⁶ Ibid [p148f].

⁷⁷ Ibid [p179].

⁷⁸ Cf. Gilson [1938 p323, 324]. It is significant that the American Pragmatists, particularly C.S. Peirce [1898], re-discovered the importance of the subsistent relation just as the corporation became dominant at the turn of the 20th century.

⁷⁹ Bracken [1984 p190].

succeed? The answer, I believe, is provided by the rather unusual legal case of the Franciscans.

3. A new legal entity, the civil corporation, emerged from an extended sequence of curial decisions provoked, paradoxically, by the desire of the Franciscans to ensure institutional impoverishment.

Surely one of the strangest meetings in history must be that of St Francis of Assisi and Pope Innocent III in 1210 to negotiate the new 'Rule' of Francis's small band of 'friars minor'. The one is the ultimate anti-establishment figure of the time, rejecting as a matter of fidelity to the message of Jesus not just possessions and the power they bestow, but even the right to possessions. The other is the recognized senior representative of Christ who claims complete power over the world in fidelity to this same message. Neither finds the other particularly threatening. As far as we can tell each acts with total respect and understanding toward the other. One senses that the mystery of Christ could have been at work.

3.1. Franciscan ambitions to establish institutional poverty constitute the 'trigger' for legal development

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Innocent's approval of the Franciscan Rule during this meeting sets off a series of events which might be considered even more paradoxical than the meeting itself. The result of these events, documented in subsequent papal *decretals*, is the creation of what we can appreciate as the modern corporate form: a self-standing organisational and legal entity with its own interests, that is neither owned nor otherwise determined

by the interests of others even those who are its beneficiaries. In short we can witness the realization of the Covenantal/Augustinian pure identity which is real and is shown to be so in subsequent history.⁸⁰

The Franciscan issue is simple in its description but, for the capabilities of pre-13th century law, difficult to resolve. The friars desire to renounce all rights to private property: "*Fratres nihil sibi approprient nec domum nec locum nec aliquam re*".⁸¹

The struggle implied by rights to property was unacceptable for them, within the true people of God, in line with the thought of St Paul. Biblically speaking, their ambition was to become spiritual Levites, the only tribe in Israel without its own portion of the *nahala*. Like the tribe of Levi, they desired to live and work within a *Covenant of Salt* whereby the rest of Christendom supported them through donation. Spiritually, Francis's intention was utter *kenosis* in the model of Christ.⁸²

Recognizing that the established religious orders, particularly the various congregations of Benedictine monks, did not protect themselves from material accumulation and evils of wealth through the simple renunciation of personal ownership,⁸³ their intention was to ensure such collective renunciation as well – to

⁸⁰ As Tierney [1955 p97] has noted, there were numerous practical problems that led Canonists to devote increasing attention to corporate law. Because of basic contradictions in relevant aspects of Roman Law that had been assimilated into Canon Law and the rise in 'illegitimate' associations (including friars, abbeys, bishoprics, colleges, chantries, guilds, religious orders, confraternities, and universities), as well as the simple rise in litigiousness, clarification was of crucial social importance. To some extent the supply of legal expertise was undoubtedly creating its own demand. All that being said, it is the Church which leads the way in formulating a legal theory of personality as noted above. Cf. Rashdall [p301, n2].

⁸¹ *Regula Bullata* of 1223, c.6: "Let the friars appropriate nothing for themselves, not a house nor a place nor anything else..." It is interesting to compare this with Wyclif's later ambitions to define a 'Lordship' regime which was not dependent upon property.

⁸² Cf. Burr [2001 p2].

⁸³ The Cluniac reforms of the 10th and 11th centuries, for example, had failed through their own success. The object was poverty, the result was wealth with its consequent temptations. Even the Cistercians who sought the wasteland and the wilderness at the edges of civilization, became propertied and

establish a *institutional* state of permanent and irrevocable beggary, of possessing *nothing at all*.⁸⁴ Their problem lay in the fact that Roman Civil Law, on which both Canon and contemporary Civil Law were based, held, as a general principle, the necessary correlation of *dominium* (proprietorship/possession) with the right of *usufructus* (enjoyment/use) regarding the property in question. If they enjoyed the latter in an unqualified manner, then the former was implied.⁸⁵

3.2. The inhibitions of Roman Law are central to Franciscan aspirations.

The concepts of *dominium* and *usufructus* are certainly not self-explanatory. As legal terms they can be associated easily with medieval *lordship* and *tenancy* or the more modern *trustee* and *beneficiary* relationships, for example. But neither of these pairs captures the Roman distinction. This is especially the case with ‘movables’ and ‘consumables’ which are at the crux of the Franciscan debates. English Law, for example, did not recognize ownership in movables, as distinct from possession, until well into the 19th century.⁸⁶ I do not have space here to trace the nuance of the distinction fully. It is essential, however, to appreciate that the Franciscan intention is to actualize a theological concept not to win a legal battle. To do this, they use, and distort where necessary, existing legal concepts.

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progressively corrupt – just as did, one might say, the original Baptist and Methodist congregations in the North American frontier 600 years later.

⁸⁴ Cf. Makinen [p12]. Also according to Gilby [p251]: “Corporate property was managed according to 13th century jurisprudence as if it were a matter of joint ownership.” This means partnership in the manner of the *societas*. Therefore collective ownership did not eliminate individual property rights. This is a continuation of Roman usage mingled with Germanic laws and various other traditions, which had no clear concept of separate corporate property until the sequence of decisions discussed below. Even today, when a Benedictine monastery is abandoned, the assets are treated as those of a partnership to be distributed among the dispersed monks.

⁸⁵ *Institutes* [II, IV, I, *Corpus juris civilis*].

⁸⁶ Cf. Jenks [p206].

There are a number of non-legal ways of interpreting the terms which could coincide with the Franciscans intention. It is possible, for example, to interpret these concepts, as Carruthers, in terms of ‘place’, *dominium* being analogous to *status*, the place or ‘standing’ in the religious (or any other) community; *usufructus* then being the equivalent to *ductus*, the intentional and emotional ‘direction of flow’ from *status*.⁸⁷ But it seems more likely that there is a contextual connection to the Augustinian terms *libertas minor* and *libertas major* to denote the freedom to act versus the freedom to choose the reason or end of action.⁸⁸ Theologically, the former is ‘natural’; the latter is possible only with supernatural grace. The evidence is impressionistic in much of the Franciscan debate during the first half of the century, but it does point to this as a reasonable description of contemporary thought patterns. As spiritual Levites, the Franciscans would want to abandon *libertas minor* in order to ensure no earthly impediment to the *libertas major*. Alexander of Hales (of whom Bonaventure was a disciple), for example, saw *dominium* as the power to coerce, that is, as a constraint on behaviour. He could be implying some other power of intention which cannot be coerced, therefore.⁸⁹ Bonaventure makes an Augustinian-like distinction in human reason between the ‘spirit’, as the ‘superior’ power of deliberation, and ‘soul’ as the ‘inferior’ power to move the body.⁹⁰ F.D. Maurice makes a theological distinction, which could have been inspired by Augustine or Bonaventure, defining ‘dominion’ and ‘authority’ in a way that suggests a similar conception, the latter being an educative function.⁹¹ Augustine also seems the likely basis for Berdyaev’s ‘first and second freedoms’, as the freedom to act and the freedom to choose why to act. This in turn may echo V.A. Demant’s ‘imperfect and

⁸⁷ Cf. Carruthers [1998 p88f, 97f].

⁸⁸ Cf. *Confessions* 8.9-10, *Civitas Dei* 5.9.4.

⁸⁹ Cf. Alexander of Hales, *Summa* Ques. 47, m.I.a.I.

⁹⁰ Cf. Quinn [1973 p199,200].

⁹¹ Maurice [1893 (1869) p23-25].

perfect liberty'.⁹² Demant does in fact make the explicit connection between imperfect liberty and *dominium* in a manner consistent with my impression above.⁹³ "Man has to find a way from *libertas minor* to *libertas major*."⁹⁴ Demant also notes that in the Middle Ages the second or perfect freedom was of dominant concern as indeed it was for the Franciscans, and that it is this distinction that is most difficult for 'moderns' to grasp.⁹⁵ Therefore, I feel it is not unreasonable to adopt a variant of Demant's interpretation in this essay and consider *dominium* as the liberty to act; and *usufructus* as the liberty to choose the criterion of right action.

It is important to recognize that Roman Law is a major impediment to Franciscan ambitions not just because it technically blocks their institutional ambitions. It also conflicts with the theological principle upon which the Covenant (including the *nahala* and the Pauline *peculium*) is based: human possession is for the glory of God. In the Covenant, therefore, *dominium* and *usufruct* are associated in an entirely different manner than in the mainstream of Roman Law in which ownership was defined entirely in terms of one's own interests. *Dominium* and *usufructus* were, as it were, locked together in material isolation from any obligations other than personal welfare. But, as discussed in a previous chapter, the people of Israel exercised only a limited proprietorship over the Promised Land through occupation. They worked the land and made a living from it, but the ultimate 'beneficiary' was YHWH, expressed communally through the landless Levite priesthood. Similarly in the law of the *peculium*, the son or other household member took possession of the designated part of the father's estate; but the father would ultimately, upon its return, enjoy its benefit

⁹² Cf. Berdyaev [1928 p1]; Demant [1936 p75 et seq.].

⁹³ Ibid. [p77].

⁹⁴ Ibid. [p78].

⁹⁵ Ibid. [p81].

along with any increase. The friars wanted to forego *dominium* in the manner of medieval Levites while retaining *usufructus*.⁹⁶ The confrontation between Christian and pagan Roman metaphysics might be adequately summarized in this single issue.

The intimacy the Order enjoyed with the papal curia allowed them to request assistance in creating legal arrangements which were consistent with Roman/Canon Law. This meant finding a way to separate *dominium* and *usufructus*, to create the legal conditions of the Covenant and the Pauline Body in medieval society. The solution to the legal problem was the *peculium*.

3.3. The solution to the Franciscan problem is not provided through a single decision but through a series of judgments that hinges on the legal possibilities of the *peculium*.

3.3.1. The first step in this process was in fact taken through the papal editing of the Rule prepared by St Francis in 1223. This Rule provided for the appointment of ‘spiritual friends’ who would be responsible for the purchase of clothing for the friars and for the care of aging or sick brothers.⁹⁷ Subsequently, as a consequence of the enormous success of the friars in attracting legacies and other donations, Pope Gregory IX was requested to provide a legal solution which conformed to the institutional desire of the Franciscans for impoverishment. The response was Gregory’s *decretal, Quia elongate* (1230), which mandated replacing the ‘friends’ with a *nuntius* or agent for the administration of the rapidly growing estate. This *nuntius* was to be a representative of the benefactors and thus technically not under

⁹⁶ This is still an active, if perennially elusive, theological goal. Cf. Lohfink [1984 p83].

⁹⁷ *Regula 1223, Chapter 4.*

Franciscan control.⁹⁸ Friars were to petition this agent for their daily needs. The agent was to look after the maintenance of church and residential buildings. In principle benefactors could ask the agent for the return of any gift, so in some sense transfer of ownership might not have taken place.⁹⁹ But the papal decree did not state explicitly who *did* own Franciscan property and so did not conform categorically with Francis's radical intention to rid the order of its possessions much less its members' right to possessions altogether.¹⁰⁰ Therefore although the arrangement did indicate the distinctiveness of the Franciscan poverty as corporate poverty, it did not sufficiently 'de-personalise' the friars individually or collectively in law.

3.3.2. After Francis's death, therefore, a new case was brought before the Pope, now Innocent IV. The Innocentian solution involved a more fundamental legal manoeuvre than the Gregorian: the actual transfer of property from the friars to the papacy. This was enacted in the papal *decretal*, *Ordinem vestrum* (14 Nov 1245) wherein the papacy did in fact take nominal control over Franciscan assets, but with the *nuntius* acting in law on behalf of the benefactor *and* the friars¹⁰¹ But curial lawyers shortly found this situation to be unsustainable.¹⁰² In order to exercise true *dominium*, that is ownership, over these assets, it was argued,¹⁰³ these would have to be managed in the interests of someone other than the friars. They found that since this was not the case,

⁹⁸ *Bullarium Franciscanum* 1:69.

⁹⁹ Although technically the benefactor could exercise his rights by taking back any contribution, such an event was unlikely for a number of obvious reasons – among others that it might have already been consumed or otherwise disposed of and any proceeds commingled with those of other benefactors.

¹⁰⁰ Technically the *nuntius* was intended as an agent of the benefactors not of the friars. But since the benefactors had in law renounced ownership of donations the question of ownership remained.

¹⁰¹ The 'experimental' starting point for the transfer of Franciscan property into papal ownership was in *Mira circa nos*, 19 July 1228 when Gregory IX took formal possession of the basilica at Assisi while the friars paid a nominal rent. Cf. Lambert [p99].

¹⁰² The friars, as they became more successful, also came under increasing attack from critics of their version of Christianity. The centre of this attack was the University of Paris where the secular Masters felt betrayed by the Franciscans and energetically challenged the 'reality' of their commitment to absolute poverty. Cf. Makinen [p21].

¹⁰³ Notably by the Parisian Masters.

the arrangement with the papacy was a sham. The Franciscans therefore maintained their unwanted property rights even if the property was nominally vested elsewhere.

3.3.3. The decisive act in this legal drama is contained in the next Innocentian decretal, *Quanto studiosus* (19 Aug 1246). This judgement contains an unprecedented innovation. Pope Innocent gives the friars permission to appoint (and replace) procurators on their own behalf with approval by the pope.¹⁰⁴ The procurators are to be permitted to buy, sell and administer goods without the prior approval of the Cardinal Protector, who is appointed by the pope. Although the decision makes it clear that the papacy is the ultimate owner of these goods, it creates what is in effect a 'reverse' *peculium*, a legacy after the fact, one might say. The pope is making it perfectly clear that his 'ownership', whatever else it may be, is not that of possession, control and administration. If there is one decision that can be said to create the corporation it is this one, since it begins a consistent trajectory of separation of *dominium* and *usufructus*.

Challenges to the legal structure of *Quanto studiosus* are successfully rebutted by Bonaventure (one time Regent Master of the Franciscans at the University of Paris and a particular target of the Seculars). By explicitly using the precedent of the *peculium*, he establishes the rationale for the breaking of the ancient principle of Roman Law.¹⁰⁵ It is worthwhile quoting Bonaventure's rebuttal to Gerard in the

¹⁰⁴ *Bullarium Franciscanum* 1:487f. Thus Innocent goes against the wishes of the 'rigorist' factions within the order, expressly, I believe, in order to meet the requirements of law.

¹⁰⁵ The main challenge comes from Gerard of Abbeville, a secular Master, who claims that "... use cannot be separated from possession with regard to things which vanish by use." Cf. Makinen [p47]. Gerard wants to put assets made available for use under the category of some sort of loan (*mutuum* or *commodatum*). Under the code of Justinian such loans would require some chance of repayment. Since this is not the case for consumables, Gerard concludes that no such 'loan' can take place and that the Franciscan arrangement is a sham. The fact that he fails to mention the possibility of handling the matter under the law of the *peculium* which is also a part of the Justinian code and quoted at length by

original text in order to understand how Bonaventure employs the institution of *peculium*:¹⁰⁶

*Nec obstat adversarius obiicit de qua usu consummuntur quod in eis proprietas non separator ab usu. Hoc enim fallit in peculio perfectio filii familias ubi filius familias usum habet et tamen proprietas nec ad momentum residet penes ipsum.*¹⁰⁷

He continues to refer specifically to the civil law of *peculium* in an extended exposition on the Franciscan theology and practice of poverty which is otherwise overwhelmingly based on biblical proof texts:

*As the law cautions: "...that the sons of the family may not be seen to retain or recuperate the possession of any object in particular."*¹⁰⁸

Bonaventure's legal move is a daring one. The *peculium* was, and indeed remains, a well-known but ill-regarded part of Canon Law, considered a hazard to the religious life to be discouraged and held suspect where not eliminated.¹⁰⁹ Defined as any proprietary right short of full ownership, it was used in the very earliest rules of religious orders and referred to the material and funds given to individuals for their own use by their religious association.¹¹⁰ Because of apparent abuse in this practice, presumably the retention of full possession in all but name, the individual *peculium* had been brought into ecclesiastical law from Roman Law in this very restricted sense, only in order to be banned by Pope Alexander III in the Third Lateran Council

Bonaventure suggests that it is a somewhat unfamiliar idea in the manner Bonaventure used it during this period and that it had perhaps fallen into disuse generally except for the controversial clerical practice noted below.

¹⁰⁶ *Apologia Pauperum XI, 7 (VIII 312 b).*

¹⁰⁷ Bonaventure [1966 p242]: "Neither is there any obstacle [to the legal distinction between ownership and use] in the fact objected by our adversary that, in the case of things consumed through their use, dominion is not distinct from use: the same occurs for instance, when a son receives from his father a sum of money, and makes use of it, without having dominion over it, for a single instant..." He references the *Institutes II, tit. 9, Acquiritur nobis.*

¹⁰⁸ Referring to *Digest L, tit. 17, De regulis iuris, reg. 94.*

¹⁰⁹ Cf. Mayr [1961]. The individual *peculium* was expressly forbidden by the early Pacomian and Schendoudian monasteries, as well as those controlled by St. Basil.

¹¹⁰ Particularly those under Augustinian rule. It was in use by the Dominicans at the time of the Franciscan debates. Cf. [Mayr p6,7]. Cf. Turner, [1929 p8]: "*Peculium* in the Western Church is as old as the religious state itself."

(1179).¹¹¹ This prohibition was re-stated by Innocent III and included the elimination of separating out or 'ear-marking' any property from the common property held by a religious community. The effect of these strictures of course would have been to paradoxically increase the wealth and consequent temptation to the entire community. At that point it appears that no distinction had been made between the common good and the corporate good. Therefore, Bonaventure took a real risk in invoking an ancient Roman principle in an environment which was prejudiced against a singularly inapt application of that principle. The fact that he did triumph through this argument suggests that a bit more than what we have in the bare documents was communicated with his colleagues and the Roman curia.

Bonaventure's legal logic and the construction of Innocent IV was upheld by both the Second Council of Lyon (1274), and in subsequent papal decree (Nicholas III's *Exiit qui seminat*, 14 Aug 1279) and therefore embedded in precedent.¹¹² Unlike previous Franciscan Bulls, moreover, this encyclical decree was directed toward the non-Franciscan world as an official statement of papal policy. Even the controversial rigorist Peter Olivi (+1298) did not find the institutional arrangements of the procurators objectionable in principle (although he did want clarification of who appointed and controlled them; and he did not want this control in the hands of the friars themselves¹¹³). Similarly the even more controversial Ubertino de Casales, objected only to self-nomination but nothing else as late as 1310.¹¹⁴

¹¹¹ Cf. Catholic Church [1937].

¹¹² The irony of the Franciscan venture continues in that *Exiit qui seminat* marks the apogee of the quest for absolute poverty in the final endorsement of an institution that has become known for its limitless greed.

¹¹³ Cf. Burr [2001 p61f].

¹¹⁴ Ibid. [2001 p127].

3.3.4. Under the conditions introduced in *Quanto studiosus*, *Ordinem vestrum* is re-issued by Pope Nicholas III in 1257. Additionally, Nicholas publishes, in that same year, a new *decretal*, *Exiit qui seminat*, which extends, in one sense, Franciscan control over the disposition of goods. According to the resulting canon law,¹¹⁵ the procurator is to be designated either the donor himself or someone nominated by him, or by the Franciscans if the donor is unwilling to nominate, the last being the normal case. The pope therefore removes himself yet another step from *dominium* by removing the need for his approval of appointments. On the other hand the papal bull also makes it clear that the friars have no right to instruct the procurators how to spend the funds available to the procurator. Nor are the friars permitted to bring the procurator to civil justice if they disagree with his policies. The procurators are thereby made entirely independent of the order as well as independent of the pope. According to Burr “Nicholas realizes that this interpretation seems to deprive the Franciscans of any legal claim to legacies...”¹¹⁶ That is, although the pope has removed ownership yet another step from himself, he has not moved it at all toward the Franciscans.

3.3.5. The penultimate step in the legal formation of the corporation is made by Pope Martin IV in his 1283 *decretal*, *Exultantes in domino*. He expands even further the Franciscan ‘privileges’ to include permission to, themselves, nominate the procurators who will act for the *utilitates* (benefit, profit, advantage) of the order. The procurators are also given the right to take civil action against those who might contest the legacies given to the order. They are also given the explicit right to interpret and act in the spirit of the Franciscan Rule, that is, to determine precisely what constitutes

¹¹⁵ *Corpus iuris canonici 1115-1118*.

¹¹⁶ Burr [1989 p100].

utilitates for the order not by reference to sentiment within the order but through interpretation of Francis's original intentions as contained in the Rule.¹¹⁷ The bull was officially accepted by the order in the chapter meeting of 1285. The procurators are as a consequence now self-contained in their power, not just over the physical assets of the Franciscan estate but over what constitutes appropriate use of these assets. They are in the position of the Levites in Israel with regard to the Franciscans (determining *usufructus* of the *nahala* 'worshipfully') and in the position of the Roman *filius* with regard to the papacy (exercising *dominium* as in the *peculium*).

3.3.6. The final act in this drama occurs almost exactly 100 years after it began: the denial by Pope John XXII in his 1323 *Ad conditorem* of any further ownership claim to assets controlled by the papacy on behalf of the Franciscans. This decision is conventionally perceived as undermining the Franciscan ambition to institutional impoverishment. However I suggest that it is in fact its completion in that it 'domesticates' the new institution by cutting the 'filial' links to the papacy. John, in this reading, simply continued the trajectory which had been set in the 1240's for decreasing the legal status of the papacy and the curia with regard to Franciscan ownership, while increasing the legal status of an identity that was neither the Church nor the Franciscan order itself. The 'rigorist', Ubertino, had already rejected the idea of expropriation of donations by the pope as a 'fiction' that the order would be better off abandoning in 1322.¹¹⁸ The patronage that resulted from such a close association with the papacy was exactly, in his opinion, what St. Francis had wanted to avoid. By cutting the final ties with the Franciscans (but not in a way in which *Exiit qui semiat*

¹¹⁷ *Bullarium Franciscanum* 3:501f.

¹¹⁸ Burr [2001 p274].

was explicitly contradicted) Pope John had effectively acquiesced to Ubertino's concerns and 'rounded off' the legal debate by denying any claim to ownership whatsoever.

At this point I, respectfully, must take issue with Burr's conclusion that John "established that the Franciscans had property."¹¹⁹ John's decision was based on the rationale that papal *dominium* and legal decrees maintaining it had not worked as intended. This was his reason for revisiting matters formally closed by *Exiit qui seminat*. And indeed papal ownership had passed its useful period and had become merely perfunctory, and likely an administrative burden on the papal curia. The issues of institutional poverty raised in the beginning of the 13th century were not those of the definition or degrees of perfection being argued in the 14th century controversy of *usus pauper*, that is, the precise character of evangelical poverty.¹²⁰ *Usus pauper* and issues related to it, increasing in intensity from the 1260's onward¹²¹, were not unrelated to the institutional debate that had preceded it but arose as a consequence of the successful conclusion of that debate not its continuation.

A important piece of negative evidence for this is that, despite the fact that John XXII's 1322 attack on the Franciscans was apparently directed at the *dominium/usufruct* distinction, Bonaventure's *peculium* defence is never used, as far as I can determine, by any Franciscan apologists in the 14th century: in particular by Ubertino de Casales (a leading 14th century rigorist), Michael of Cesena (the Minister General of the Order at the time of the debates) and Bonagrazia de Bergamo (the advocate for

¹¹⁹ Burr [2001 p276].

¹²⁰ This issue was raised explicitly only by Peter Olivi after 1279.

¹²¹ The shift from the legal character of the institution to the legal definition of the vow can be seen in *Exiit qui seminat* (1257).

the Franciscans appealing against the Pope's judgment). Bertrand de la Tour, the pope's advisor on *Ad conditorem*, feigns at one point not to comprehend the difference between *dominium* and *usus* although he subsequently claims to understand Nicholas's real intention in *Exiit*.¹²² It is at least possible, therefore, that although the issue is debated in classical terms, the real point of contention lies elsewhere. *Usus pauper* is an ideological question for the Church, not a legal issue for the Franciscans. This could well be the debate that Pope John is closing off.¹²³

John's conclusion to the *institutional* issue is therefore, in my reading, positive. During the century of debate, a new institutional arrangement had been created, one that did indeed make a distinction between the Roman Law categories of *dominium* and *usufructus*. The former had been progressively isolated within the Franciscan order in the office of the procurators. Through Pope John's decision, their *identity* had been established as independent of the papacy. But the procurators, as individuals, did not receive any additional rights; and they remained legally separate from the Order. The *Res* was not as an 'estate' to be managed in the interests of someone else but an asset to be used in the interests determined by the procurators. The power of *usufructus* was also lodged in the procurators, as it had been lodged in the Levites, as a matter of deciding the appropriate disposition or resources for God's glory. They did have to manage in the interests of the Order, but according to their interpretation of these interests, not according to the demands or interpretation of the friars. They were *accountable*. They had to decide, as it were, what constituted the glory of God at any moment. But interestingly the procurators had also developed *immunity* as well and could not be sued by the friars. They were not partners in the venture, nor trustees, nor

¹²² Cf. Nold [p129].

¹²³ It is of course possible that John and members of the Curia decided to reduce the cost of litigation directed toward themselves by 'disowning' the Franciscans. The effect on my argument is the same.

agents of the pope, nor of the Franciscan benefactors. They were, in effect, the identity as and when they acted in that name. Various changes in the mechanism for appointing procurators could subsequently take place without altering their basic legal position as a part of the *Res*. To the extent that all of the friars participated in the appointments, they may all be said to be procurators, responsible to each other in their interpretation of the vow of poverty. Thus Pope John also, quite appropriately, ‘domesticated’ the *usus pauper* debate within the Franciscan community.

3.4. The result of this sequence of decisions is the institutionalization of the Covenantal/Augustinian notion of identity in a new legal entity: the civil corporation.

The successive papal judgments had established a legal entity which is ‘pure identity’, a ‘third thing’, a subsistent relation, a *Res*, into which the Franciscan assets are progressively deposited and which is progressively recognized as an entity in its own right. The incommunicability of theological identity is transformed into the germ of inalienability of legal identity by Innocent. The concept of person-as-subsistent-relation has at this point ‘jumped species’, perhaps like a virus from poultry to man. The fact that this ‘thing’ was not a human individual was not relevant within this theory. Just as an individual congregation (a misnamed corporation sole) was the Body of Christ, a Person, so the Franciscan *Res* was a person that was composed of persons. So indeed, therefore, was the Universal Church, an identity which was only, at most, confirmed by the emperor at Milan in the 4th century.

We may argue with the Franciscans (and many did) that nothing had changed regarding their access or temptation to wealth, but something dramatic has occurred in

the world of jurisprudence. Certainly Tierney is correct when he notes that the 13th century Canonists were not primarily interested in the philosophical or theological problems posed by the corporation. And none felt it necessary to formulate a metaphysical basis for papal decisions.¹²⁴ Nor were the Franciscans ostensibly concerned with the legal condition of the Church. Canon lawyers, as many civil lawyers of the time, are interested in the structure of power¹²⁵ rather than the ontology of the corporation. But legal decisions had to be justified, and justified in a conceptual vocabulary which was at least plausible in the intellectual environment of the time. The effects of the decisions and their justification are probably beyond what any individual had in mind. Yet, the Franciscan *Res* was an independent identity created by what is in effect the *spiritual* authority of its participants, chief among whom was God. Whether or not there was anything like a full recognition of this in the sequence of judgements involved is imponderable. As a consequence, since the 13th century, the corporation (including the Church) has been treated as a fully 'competent' legal/sociological entity. This success may have promoted, paradoxically, progressive erosion in our understanding of the real source of the institution in the spirit.¹²⁶

¹²⁴Cf. Tierney [1955 p101]. I read Tierney to confirm that while it is unlikely there was an explicit theory of the case in the head of any canon lawyer, there was nevertheless at least a vague awareness of the institutional shift that was underway.

¹²⁵ That is, the relative power of the head and members of the 'Body'. This is the classic controversy between Pope Innocent IV and Cardinal Hostiensis: does ultimate power lie with the members or the head of the corporation? The metaphor itself prevents progress in answering, although it is still implicitly used even in modern discussions of organisation, ecclesial and secular. Cf. Tierney [p23-84].

¹²⁶ Cf. Thornton [1942 p2f].

Chapter 5: Sanctifying the Cosmos

The Eternal Covenant of New England Congregationalism

The best ideal is the true
And other truth is none
All glory be ascribed to
The holy Three in One

Gerard Manley Hopkins,
Summa

In the previous chapter I have described how the corporation, as a legal institution, recognized by both the state and society in general, emerged from Christian doctrine, the political needs of the 'imperial church', and the quest for evangelical poverty by the Franciscan friars during the 13th century. The scholastic concept of subsistent relation had been passed from theology to legal practice and merged with the tradition of the *nahala/peculium*. This successfully overcame the prohibition in Roman and Canon Law against separating possession (*dominium*) and benefit (*usufructus*) of property. In its legal form, the corporation spread with some considerable speed throughout Europe. The conventional history of the corporation has it 'evolving' from guild, to borough, to merchant adventurer company to chartered company and ultimately to the modern statutory corporation of the 19th century. However, while all these are examples of the corporation, they are also significant distortions of the covenantal, Pauline and Franciscan corporations. For these, the law of the corporation had been co-opted into a theological context grounded in the idea of mutual submission. This was taken for granted by Paul, in particular, for whom the law was only relevant in the context of the redemptive grace achieved by Christ.¹ In the late medieval and modern periods, the corporation, as a thing of law, quickly became a legal formality rather than a theological expression. As such it did not so much evolve

¹ Cf. Gal 3: 22; Rm 3: 20.

as adapt to the interests of prevailing power. The question I want to answer in this chapter is: Does the corporation show up historically in its genuine form as a representation of the Covenant?

Some hold that the modern corporation is the product of an intersection of state power and individual ambition within a theory of social contract. For them the corporation is a product of the exercise in liberal democracy and the economic doctrines of *laissez-faire* as they arose in the 18th century.² For others, the corporation originates in the state trading monopolies established in the 16th and 17th centuries as a result of monarchical power.³ Both opinions are, in a sense correct, in that ever since the time of Plautus, manifestations of the *nahala/peculium* and its descendants in the corporation are frequently instances of abuse. Any attempt to subvert the corporate relation to a purpose other than itself constitutes such abuse. My claim is not that these entities were something other than corporations, but that they were something less than genuine corporations. The corporation is not simply the separation of *dominium* and *usufructus*, although these are technical manifestations of its legal status. Nor is the corporation a 'right' to identity, accountability and immunity which has been associated with its legal form. The corporation is the relationship which is confirmed and fostered by this legal distinction. Since the legality can be so easily divorced from the substance of the relationship, the corporation, despite its generic endurance, is a rather delicate flower and withers when overcome by the sins associated with power: greed, self-obsession, the desire to control. Governments, and

² Cf. Novak [1990, 1991].

³ Cf. Micklethwaite. Also cf. Berle [1955].

not just those which tend toward absolutism or tyranny, and powerful groups in society, particularly groups with economic power, appear perennially 'on the make' to capture and distort the character of the corporation by divorcing the legal and the relational.

1. Because the legal form of the corporation is so easily divorced from its theological context, it typically has shown up historically as an instrument of political or personal ambition.

One of the earliest⁴ and most obvious instances of such distortion is the royal 'asset stripping' carried out by Edward IV of England who, in 1461, had seized power from Henry VI but was prevented from personally benefiting from the spoils of his victory because of legal technicalities about Henry's ownership of the Duchy of Lancaster, which was considered as inalienable Crown property. On advice from his ministers, and with the approval of Parliament, Edward promptly incorporated the Duchy, ensuring that its identity would be maintained, then sold off its assets, and left the Duchy as an identity devoid of most of its former holdings.⁵ Not all examples of corporate distortion are so blatant. The 'incorporation' of English boroughs, to use another example, was arguably a method of royal control not democratic devolution.⁶ Similarly, medieval guilds, despite the romantic tinge applied by 19th and early 20th century literary apologists, were local monopolies designed to ensure the welfare of a craft elite. So too, on a much larger scale, are the merchant-adventurer companies of

⁴ Maitland [1893 p6] traces the first use of the legal term 'corporation' in England to the second half of the 15thC. Therefore it is likely that the events described here are among the first to employ the new 'technology' of corporate organization.

⁵ Cf. Kantorowicz [1997 p403].

⁶ Cf. Merewether [1972 p860-869]. The first borough charter as a corporation is dated by Merewether to 1440 in Kingston upon Hull. Thus Henry VI perhaps was not unfamiliar with incorporation as a political tactic two decades before Edward IV.

the Renaissance which aimed at exclusive access to huge geographic regions as the 'privatized' arms of sovereign power.⁷ It does not seem an exaggeration to suggest that most historical appearances of the corporation are to some degree affected by the interests of power.

Not only the examples cited above, but the legal and customary origins of the corporation in the *peculium* itself are ostensibly commercial. And despite the corporate proto-type of the Church and the not infrequent subversion of the corporation by government, the main occurrences of the corporation have been in the domain of private commercial activity: in primary industries, manufacturing, trade, distribution and in the provision of services. The corporation is most commonly associated with commercial undertaking because it most often defines itself as having commercial interests. Davies attributes the proliferation of the commercial corporation in the 19th century to the dual effects of general economic expansion and political liberalization.⁸ While this is undoubtedly correct in that both of these conditions are necessary for the expansion of the corporation, it does not explain the specific choice of the corporation over other forms of joint endeavour. The question of why the corporation should have become the preferred form of pursuing commercial interests is not an issue which I can address adequately in this essay. Nevertheless it is possible to at least sketch some of the most likely reasons.

In the first instance, it would be financially imprudent in many circumstances for an individual or group of individuals not to take advantage of incorporation in modern society. The cost is nominal; the restrictions on activity so minimal, and the benefits

⁷ The first joint stock company was the East India Company in 1600, the primary task of which was to engage in trade war against the Dutch. Cf. Davis [1905 v2]

⁸ Davis [1905 v2 p261f].

so significant (mainly in limited liability and tax reduction or deferment), that most business ventures are incorporated as a matter of course.⁹ It is unlikely, however, that a preference for the corporate form in the 19th century and before stems from the 'legitimate' needs for large-scale finance either in the late medieval or early modern periods for reasons I have suggested in Chapter 1. On the other hand there are good reasons to believe that the corporation, precisely because of the differentiation between *dominium* and *usufructus* on which it is based, is easy prey to less than legitimate private enterprise. The fraud underlying the South Sea Bubble of the early 18th century would not have been possible except for the corporate structure of English joint stock companies. The rapacious and monopolistic commercial predation of the American robber barons of the late 19th century might have taken place without the use of the corporation; but the profits available to the new class of 'market capitalist' were dependent on the emergence of capital markets which in turn was dependent on the institutional proliferation of the corporation as a source of share trading, and so the corporation was promoted by 'needless' greed.

During the 20th century, it seems likely that corporate status is implicated in many of the criminal and simply irresponsible actions taken by corporate employees. The scandalous actions taken by, for example, the Chisso Corporation to pollute the environs of Minimata, Japan with mercury from 1932 until 1968;¹⁰ or Union Carbide in poisoning perhaps as many as 500,000 people with the pesticide, methyl

⁹ An exception is that of professional accountants in many jurisdictions who are prevented from incorporation so that each individual partner remains totally liable for the debts of the firm. This fact was of great import to the largest accountancy in the world, Arthur Andersen, when it was forced into bankruptcy through its criminal association with Enron in 2002. Regarding limited liability for small corporation, it is unlikely that creditors will accept anything other than personal guarantees for debt.

¹⁰ Cf. <http://www1.american.edu/TED/MINAMATA.HTM>

isocyanate, in Bhopal, India in 1984;¹¹ or the Hooker Chemical Company which between 1942 and 1952 created an environmental catastrophe resulting in at least thousands of deaths, miscarriages, birth defects and cancers by dumping toxic chemicals in the city of Niagara Falls, New York¹² were all encouraged by the individual immunity granted to directors of these companies and the limited liability status that the companies enjoyed. In all these instances, no clear accountability was ever enforced and the indemnity for damages was largely 'externailized' to the state. Similarly the 21st century economic disasters (frauds) of Enron,¹³ Lehman Brothers,¹⁴ and Bernard Madoff¹⁵ could not have occurred but for the freedom given to corporate managers to determine (and promote) the criteria of success in a less than Levitical manner. Therefore, I conclude that one very good reason for the dominance of the corporation in modern commercial activity is its very capacity to create mischief. Is it possible to calculate whether the mischief created is worth the potential offered either personally or socially? Such a question simply raises the corporate issue in another guise: on what scale or metric of value could such a calculation take place? The answer can only be adequately determined corporately. As an individual or group of individuals, is it possible to conduct a calculation that leads to a rational argument for or against incorporation? It is certainly possible to conduct such a calculation using some mutually agreed scale (a typical mode of contract negotiation). But, in the event the calculation leads to a decision to incorporate, the scale upon which the decision

¹¹ Cf. <http://www.sprol.com/2009/04/bhopal-indias-union-carbide-gas-leak/>

¹² Cf. <http://www.nytimes.com/1988/08/05/nyregion/after-10-years-the-trauma-of-love-canal-continues.html>

¹³ Cf. http://www.citizen.org/documents/Blind_Faith.PDF

¹⁴ http://topics.nytimes.com/top/news/business/companies/lehman_brothers_holdings_inc/index.html

¹⁵ Cf. <http://www.reuters.com/article/ousivMolt/idUSTRE4BB74H20081212>

has been made is immediately open to question. As with the commitment to marriage, therefore, it is unlikely that any such rational calculation takes place.¹⁶

What is offered through the corporation, its payoff, is unity. There can be little contention around the proposition that unity is an essential element of effective cooperative human effort. The greater the unity among the greater numbers of individuals, the greater the cooperative potential, spiritual as well as material. This is one way of expressing St. Paul's concern about 'completeness' in the Body of Christ.¹⁷ And there is unlikely to be a corporate executive anywhere who would not recognize unity among corporate members as the primary constraint on business success (and longevity), however that success is defined. But corporate unity is eschatological not instrumental. It is an end not a means to an end. As soon as corporate unity is promoted as an instrument of purpose other than itself, the very unity required to meet that purpose is compromised. This is why it is essential to appreciate that purpose is a consequence of corporateness and not vice versa. As in marriage, similarity of intention (or at least a hope of such) may be a necessary condition for incorporation to be initiated (Bill Gates and his colleagues enjoyed exploring the new computer technology when Microsoft was launched in 1975). But unless the true corporate interests are allowed to emerge and to be articulated and to be altered within the corporate commitment, corporate unity will simply depreciate, and with it the ability to do anything at all. This is what some management thinkers have described as the "failure of success."¹⁸

¹⁶ I will address the issue of what conditions might be necessary for the existence of the corporation in Chapter 8.

¹⁷ Cf. Ep 4: 12, 13.

¹⁸ Cf. Pascale [1990]; Evans in Chowdhury [2003 pp66ff].

So the real corporate issue is not about commercial vs. other kinds of corporate endeavour. It is about corporateness not about commerciality. Loss of the former will ultimately result in loss of the latter, as industrial giants like the General Motors Corporation among many others have discovered. But charities and governments can be just as abusive of their corporate status as any commercial undertaking, and just as significant failures; in impact, these may be difficult to distinguish from commercial disasters.¹⁹ A signal example is that of the modern university, considered by some to be a progenitor of the corporate species. The Latin term itself, *universitas*, is often translated (inaccurately) as ‘corporation’.²⁰ Indeed, in the first several centuries of the development of the university, from say the late 12th to the late 14th centuries, the universities may well have been very nearly genuine corporate institutions in the manner I have defined in this essay. These institutions, for example in Bologna, Paris, Salamanca, and subsequently Oxford, Cambridge, Prague, and Uppsala were developments of abbey and episcopal schools, run for and by clerics, with curricula that were uniformly focussed on the divine and its presence in the world, even when they might appear historically as mere ‘trade schools’ for the law, empire or church.²¹ Theology, the intellectual pursuit and praise of God, was not just the Queen of the Sciences but the corporate purpose that had emerged from the commitments of mutual religious submission that had already been made by university participants, usually before they had even entered academic work. In Oxford, this submission became part of the statutes of the University by mid-13th century, when the academic masters were

¹⁹ The ongoing saga of the Equitable Life Mutual Insurance Society in the UK is a case in point. In legal terms this was not a commercial but a cooperative venture. In practice, it hardly matters to the policy-holders (including the author) affected.

²⁰ Cf. Davis [1905 p224].

²¹ Cf. Rashdall [1936 v1 p42] where he identifies Abelard as the instigator of the ‘university movement’ based precisely on his theological method.

bound by oath to obey *Deo et universitati*.²² The modern descendants of these medieval organizations owe perhaps more to institutional inertia than to a continuation of these sorts of commitments. The power of the *names* of these ancient universities, and subsequent names coined in similar corporate endeavour, persist in their ability to attract students, teachers, and (most importantly?) funds from benefactors and governments. Nevertheless this is not a power ostensibly created or renewed by continuing mutual submission among academic departments who may share nothing but a residual attraction to the name. Hence the perennial issue of the purpose of the modern university from, at least, Newman²³ to Pelikan.²⁴ It is an issue which cannot be resolved, according to the ontology I have offered in this essay, without the mutual submission that has been absent for some indeterminate period.²⁵ I do not suggest that modern universities are *not* corporations. But I do note that in the ontology of the corporation presented here, they are demonstrably not genuine corporations to the extent that there is no coherent purpose, corporate interests independent of the interests of the parts, which has been credibly expressed and adopted for the whole.²⁶

The problem presented by the university as a corporate institution is precisely the same as that for any commercial organization (and indeed as those of the parts of each): How can the criteria of choice, of success, of ‘excellence’ be coherently

²² Ibid [v3 p54 n1]. Rashdall also reports a distinct mutual submission in which “The University submits to the presidency of the bishop’s officer, but at the same time, by as it were absorbing the chancellorship into itself, is able to arrogate to itself all the powers of that office.” The process is not unlike that of the creation of the Franciscan *Res*.

²³ Newman [1873].

²⁴ Pelikan [1992]. Cf. also MacIntyre [1990].

²⁵ As I will discuss later in this chapter, the establishment of Harvard University in the 17th century represents a renewal of the medieval practice of corporate creation of the university through mutual submission. I suspect that the half-life of this practice was much shorter than in the medieval period however.

²⁶ This is not equivalent to establishing that there is some mutual advantage to be derived from the presence of the Faculty of Science alongside the Faculty of Theology. In the unlikely event that each of these groups found the annoying bureaucracy, the constant misunderstandings and the possible loss of funding from time to time costs worth paying for the association, there is still no corporate purpose.

articulated and assembled among parts and the whole? Each part of the commercial organization has departments (individuals, sections, divisions, subsidiaries) which have distinct professional standards just as in the academic departments of a university. The marketing manager may 'know' for example, through 30 years of experience and continuous rivalry with his counterpart in a major competitor, that market share is the principle criterion of success. To obtain market share one invests by reducing prices to attract custom and is thereby able to obtain 'economies of scale' because of the fixed cost based of current plant and equipment. The operations manager of the same company however typically 'knows' something different. Throughout her 30 year career, she has learned that one must invest in the latest plant and equipment in order to have the lowest unit production cost (which she monitors daily) among major producers so that eventually prices can be reduced confidently to obtain market share. The competing investment proposals which each presents to the relevant corporate committee will therefore have not just a different rationale but entirely incompatible world views with incommensurable criteria upon which the investment decision should be based. To the degree that there is no 'superior' criterion of choice which 'captures' the aspirations of both parties *and* the corporate interests, there is *de facto* no corporate relationship.²⁷

Corporate criteria are produced by the corporate relation. The corporate relation is not an institutional process, or a management technique, or a 12 Step programme to corporate well-being. It exists in the behaviour of mutual submission. Analysis and

²⁷ This example is based on an actual case of a large European oil company in Southeast Asia. The actual 'consolidated' metric that was ultimately used in the decision was surprising to all concerned: the level of assets shared with the local national oil company. The investment which increased shared assets the greatest was the criterion employed. This did not mean that one of the proposals was accepted over the other. It did mean that both departments reconsidered the proposals to be made in light of the new criterion.

technique cannot comprehend the incommensurability of alternative criteria and so nominate only criteria they might find most common and then fix these as principles.²⁸ The underlying relationship is, I claim throughout this essay, the only enduring part of the corporation; and that is difficult to document in modern case studies. This is what makes it so difficult to identify enduring corporate characteristics.

However, there is at least one specific period in history wherein the corporation was allowed to show itself for what it is, its true value as a symbol of the eschatological Kingdom. This period is the half-century of the Puritan settlement of North America from approximately 1620 to 1670. In European social thought, all political relationships seemed suspect at the time, but in New England, in its temporary freedom from the existing institutions of power, relationships mattered above all else, particularly relationships modelled on the divine. These relationships are consciously (and self-consciously) and persistently corporate. It is through these corporate relationships that political, religious, commercial, and social purposes were articulated and pursued simultaneously and consistently with no distinction among them, and no need to make such distinctions. In the remainder of this chapter I intend to show that the first large-scale use of the corporation, in its modern sense as an association which is freely available to express its own interests, is the product of the exercise of self-constituted ecclesiastical and civil authority based on a daring social interpretation of Trinitarian theology. Evidence for the validity of this claim includes, primarily, the development and practical application of the Reformed doctrine of the Covenant of

²⁸ Cf. Peters [1982]. This is the method of almost all corporate analysis and results in contradictory and incoherent conclusions about virtually every aspect of corporate endeavour. All of the factors which Peter's and his colleagues identified as essential to corporate success were subsequently shown to be relative or of little general importance.

Redemption (the *Eternal Covenant*), from its sources in Rhineland Europe to its formulation in English Puritanism and thence to its realisation as a sociological force in American Congregationalism. These events created a culture that was ‘corporate’ not just in structure but in its fundamental social attitudes. It is this culture that is the source of the explosive American (and ultimately global) proliferation of the corporation in the 19th century.

2. The Reformed doctrine of the Eternal Covenant re-established the theory of the corporation in covenantal terms as a constitutional component of human society.

If the 13th century may be characterised by the confluence of great rivers of thought about the corporation, the 16th and 17th are more like the delta of this enormous stream of thought as it slows, spreads and almost imperceptibly merges with the ocean of European culture. Between the two periods, this river cuts a deep if often ill-defined canyon which in fact serves to direct this culture in certain directions and which leaves features of varying degrees of durability on the general landscape: universities, industrial and religious confraternities, trade and civil associations in a variety of forms, and ecclesiological novelties. These manifestations, however, add little to the practical development or theoretical discussion of the biblical or medieval concepts of the corporation: the simultaneously created and mutually reinforcing identities of the One and the Many. More often than not, the corporation was high-jacked in its primitive legal forms to serve the interests of the sovereign and dominant economic interests. In general, the discussion and debate is pragmatic, legal, state-political, or ecclesio-political, and directed toward the defence (or attack), justification and

rationalisation of existing institutions (e.g. the city-state, the empire, monarchy, the papacy) rather than toward an articulation, much less an understanding, of the corporate entity as a general form of human association. There is more stagnation than development during this period until the tide of European culture begins to flood the North American continent and enters an institutional vacuum in which the corporation can be recognised for what it is: a particular way of being.

The upstream (and literally so) sources of this flow are relatively easy to identify in the earliest centres of Calvinist Protestantism: Geneva and Zurich.²⁹ Unlike the initial stages of the English break with Rome, which maintained an episcopal hierarchy and the Church as a united, if only national, institution, the Continental Reformation created an ecclesiological problem of intense and immediate importance. Without a legitimizing (and legitimate) worldly institutional structure, how could the church be considered as a unity? One answer, developed progressively in Reformed circles, was: by participation in the divine Covenant. The Covenant became an important motif throughout Protestant theology, therefore, beginning with Calvin. But only gradually through the 16th century did it become a dominant theme, particularly of English and Scottish Puritanism in their attempt to ‘complete’ the English Reformation. By the 1590’s, the theological topic of the Covenant was assimilated

²⁹ I am not considering here important but secondary tributaries to the covenant tradition, that of the Englishmen William Tyndale and John Frith, and the Tridentine participant Ambrosianus Catharinus, for example, on the grounds that it is the Swiss tradition that is of such overwhelming effect in both England and New England. The ‘idiom’ of the covenant is in fact used by both the ‘strict’ Calvinists as well as the more Arminian parts of the Reformed movement. It is also used by *infra* as well as *supra*-lapsarians. In general, therefore, I will only consider the ‘main channel’ of covenant thought, avoiding the many interesting but distracting Scottish, Anabaptist and Lutheran theological variants of the 16th and 17th centuries. Nor will I consider in this essay the development in the 18th century of Baptist and Methodist covenanting since these are largely derivative from the Puritan experience. Perhaps the most serious omission is that of Alister McGrath’s [1984, 1985, 1987, 1993] critique of covenant in terms of the *pactum* of the *via moderna*. McGrath traces the origins of covenant theology to the nominalist views of the 14th century Franciscans and the notion of God’s self-limiting power to the 12th century. Although it seems clear to me that McGrath traces the ‘deviant’ trail of *pactum* as contract rather than covenant, the interaction between the two ‘schools’ leads to persistent terminological difficulties which I do not have space here to address. Cf. Courtenay [1984].

generally into English theology and eventually found its way into the heart of the Westminster Confession (1647). But the impact of a particularly radical version of Covenant theology is of even greater significance. This is the theology of the Covenant of Redemption (the Eternal Covenant) that would shape not just the ecclesial organisation of the Puritans of the 17th century, but their civil structures and their basic social perceptions and expectations.

2.1 The continuity of covenantal thought with ancient tradition can be detected in the vocabulary of its 16th and 17th century theologians.

The essentials of all Covenant theology are contained in the biblical accounts of creation and sin in the Old Testament, interpreted in light of the revelation of Jesus Christ in the New. But, surprisingly perhaps, it had never before been an explicit topic of Christian theology. St. Paul's explication of the New Covenant had been commented upon occasionally by the Greek and Latin Fathers³⁰ but their treatment was not central to their theology, nor was it extensive or systematic. Augustine³¹ is frequently cited as the last to mention the Covenant before Calvin resurrected the term theologically. However, it is a gross injustice to suggest that the terminological hiatus or recovery implies a fundamental shift in doctrine.³² No such shift is implied by

³⁰ And according to Burrage [1904], possibly even by Pliny in a letter to the Emperor Trajan in 112 CE!

³¹ Cf. *Civitas Dei*, Book XVI, chap 27, *De Trinitate* and *De Baptismo contra Donatistas*, as well as the *Sermons*, particularly 144, 156, and 71.

³² Pace De Jong [1945 p16] and Dillistone [1951 p117]. The abiding Scholastic concern with the *pactum* during the Middle Ages is strong proof against such assertions. Nevertheless one can sympathise with the point they are implicitly making, namely that the theology of the *pactum* had been effectively hi-jacked by legalists and an emerging vocabulary of contractualism. What was neglected before the Reformation was the Spirit. Cf. Rees [1915 p173]: "During the Middle Ages, Augustine's doctrine of grace and the Holy Spirit as its author was submerged by other factors, so that all practical interest into the Spirit passed out of the consciousness of the church." The fact that Aquinas can treat of divine revelation without mentioning the Spirit at all is a significant supporting fact for this opinion. This is, perhaps, the underlying truth of Dillistone and De Jong.

Calvin's usage.³³ In fact it is in the general doctrines of the Covenant that the common foundations of most Christian confessions can be found.³⁴ The language of the Covenant is no doubt convenient for making certain polemical (mainly ecclesiological) points and for identifying oneself regarding more general doctrinal positions,³⁵ but it is not incompatible with more traditional (especially Augustinian) language.

There is an underlying historical consistency in the Reformed usage of the term 'covenant' that is important for understanding the entire development of subsequent covenant theology. This usage seems to have been spontaneously adopted among many of the Reformers since there appears to be no treatise arguing for it explicitly. Calvin is one of the first to allude to this tradition in the *Institutes*. For example, in *Book II, x, 1*, he makes reference to God's 'peculiar people'. This is not, of course, a comment on the oddity of believers but about their status as the *peculium*, the special property of the Lord. He says explicitly that he regards this as the same 'inheritance' as that of the Hebrew Fathers and as the basis of not just spiritual but ecclesiastical (specifically corporate) continuity. The phrase becomes common among almost all of the Reformed leaders. The use of *peculium* in the Second Helvetic Confession of 1566, authored by Bullinger, makes the usage official, as it were.³⁶ Even more

³³ Cf. McGrath [1985]; Asselt [2001]; Strehle [1988].

³⁴ Bernard of Clairvaux's formulation of the role of the Spirit in covenant, for example, would not be out of place in any Reformed, Lutheran, or Roman Catholic discussion: "The Spirit is said to proceed in two ways: Whence? And Whither? Whence? From the Father and the Son. Whither? To the creatures. By proceeding he predestines; by breathing forth he calls whom he has predestined; by indwelling he justifies whom he has called." [*Sentences* § 2]. The affirmation of the covenant (or its equivalent, the *filioque*) is a feature not just of every Reformed confession, but of the Anglican *39 Articles* and of the pronouncements of the Council of Trent. Cf. Rees [1915 p177].

³⁵ Cf. De Jong [1945 p24]: "Wherever the Reformed religion made its appearance, the idea of the covenant became prominent." But certainly even this sectarian monopoly of language has waned. Cf. Donald Keefe's *Covenantal Theology* [1991] and Benedict XVI's *Many Religions, One Covenant* [1998].

³⁶ *Chapter XX para 4*.

pointedly, this document also makes reference to not just the New and Old Testaments but also to Bonaventure's 13th century defence of the Franciscan 'Res', quoting the Church Doctor at length.³⁷

The tradition of the *peculium* is handed down among generations of covenant theologians.³⁸ Richard Sibbes (1577-1635), one of the Cambridge circle so influential for American Puritanism, formulates a typically dense construction: "...for those whose God God is, are a *peculiar people*."³⁹ And "He singleth us out to be a *peculiar people*...It is a *peculiar covenant* with his *peculiar people*...we are God's *peculiar thing* by some *peculiar thing* that we can do...It is a *peculiar covenant*"⁴⁰ etc. Thomas Hooker opens his major work with citations of Ex 19:5 and Deut 26:18, both referring to the *peculium/nahala*.⁴¹ The central character presented in this chapter, Johannes Cocceius, makes repeated references to the fact that the Father gives the Heirs, the elect, to the Son in the manner of the *peculium*.⁴² His student, Witsius, alludes to the Son's *peculiar relationship* to the elect, invoking implicitly the Roman legal status of 'downstream' holders of *peculia* from the *filius* of the household and applying it not just to the gifts from the Father but to the sins of the elect as well – Christ is responsible for both.⁴³

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³⁷ Cf. *Sermones decades quinque* 339a for example.

³⁸ It should be noted here that Luther's distinction between the Kingdom of Christ and the Kingdom of God, the former being handed over to the Father is also a reference to the *peculium*. Cf. Headley [1963 p39].

³⁹ Sibbes [1973 p9].

⁴⁰ Ibid. [p19ff].

⁴¹ Thomas Hooker [1649 p4].

⁴² Cf. Asselt [2001].

⁴³ Witsius [1775 (1693) p182, 184ff].

Other technical, largely juristic, terms used in covenant theology like *sponsio* and *constitutio*, also refer obliquely to the *peculium*. For example, Witsius's definition of the Covenant of Redemption is a clear statement of the *peculium* relationship:

*The Father gives the Son to be the Head and the Redeemer of the Elect; and the Son presents himself as a Sponsor or Surety for them. This Covenant is between God and the Mediator not the Elect and God.*⁴⁴

With regard to the 'application' of covenant theology in Puritan New England, it is clear that John Cotton is using the same idea in referring to the covenant:

"[By covenant]...a people is received and established to be a peculiar people...and each of them lay hold of the same spiritual privileges and hold forth the same holy duties".⁴⁵ ...when the elect are united with Christ in the covenant, they have 'the righteousness of Christ' imputed to them and so the Lord accounteth us his children".⁴⁶

This is in perfect accord with the Roman Law of *peculium*. John Owen in his treatise on the Spirit, the *Pneumatologia*, alludes to the *peculium* as well in his remark that "The Son is the treasury of the Father".⁴⁷

The theme of the *peculium* even finds its way into purely governmental documents. For example, the re-issue of the Massachusetts Bay Colony charter of 1629 refers to 1 Peter 2: 9-12 and therefore the colonists as 'a peculiar people'. One suspects that the Anselmic idea of ransom-payment may perhaps have its origins in the return of the *peculium* to the Father and, therefore, that its influence is even more subtly felt throughout Reformation theology. It is possible that once the legal franchise extended beyond the *paterfamilias* in the 18th and 19th centuries the understanding of the concept of the *peculium* is simply lost.

⁴⁴ Idem.

⁴⁵ John Cotton [1654 p4].

⁴⁶ Ibid. [p33].

⁴⁷ Owen [1998(1674) p38].

2.2 However, the 17th century formulation of covenant theology took a dramatic step in viewing the covenant as intra-deical and world-constituting.

Thus there is a direct line of thought and practice from the *peculium* of the New Testament, Bonaventure's argumentation for the Franciscan *Res* and the Reformation idea of the Covenant. In mid-17th century this link became even more explicit when the German/Dutch theologian, Johannes Cocceius (1603-69), the 'Protestant Descartes', and Hermann Witsius (1636-1708)⁴⁸ made a bold theological move.⁴⁹ They made explicit what was only implicit in Bullinger and other predecessors.⁵⁰ According to Cocceius and Witsius, the Covenant is not simply a relationship between God and man; it is a relationship *within* the divine Trinity itself.⁵¹ As far as man is concerned, it is *the* relationship within the Trinity that is relevant for the salvation of all creation.⁵² This was the Covenant of Redemption⁵³, an eternal arrangement between the Father and the Son in which creation and redemption are contemplated as a single divine act.⁵⁴ This pact between Father and Son is the

⁴⁸ Witsius, a student of Cocceius, had a great influence in New England toward the end of the 17th century. Cf. De Jong [1945 p30]. But by then the exercise of covenantal practice had become largely ritualistic. I therefore will not consider Witsius contribution further.

⁴⁹ Cf. Gottlob Schrenk, cited in McCoy and Baker [1991 p70]. It is interesting to note in this regard that Cocceius's *Summa* (1669) is Barth's second reference (after Augustine) in *The Doctrine of the Word of God* [CD 1936 (1932) p1].

⁵⁰ Cf. Smith [2002 p17]; Lindsay [1849 p530]. The Eternal Covenant can be seen in retrospect to be common currency during the 16th century. I use Cocceius as a formal point of reference because of his explicitness. Samuel Rutherford (1600-61), Thomas Brooks (1608-80), Thomas Manton (1620-77) and Francis Turretin (1623-87) are all contemporaries of Cocceius who refer to the Spirit as having some role in the creation or execution of this covenant.

⁵¹ There is good reason to believe, as I will show as the analysis proceeds, that as the relationship between Father and Son, the Covenant is in fact the Spirit. Why this is not made explicit in any of the covenantal writings must remain a mystery as far as this work is concerned. Cf. Lodahl [1992 p28]

⁵² Relevant biblical texts for the 'eternal covenant' are Eph 1:4, 3:11, and 2 Tim 1:9.

⁵³ Although the term had been used previously by other covenant theologians to refer either to the original Calvinistic relation between God and man or, as in the case of Olevianus (cf. Weir [1989 p135]), either with reference to the Covenant of Works or of Works and Grace together, I will use the term only to refer to Cocceius's intra-Trinitarian 'agreement' between Father and Son. Alternative terms include *pactum salutis* and the *consilium pactis Jehovae et Sacerdotis*.

⁵⁴ Cf. Cocceius [1654, IV, 88]; Cocceius [1665 XIII, 32]

Covenant under which all others are formed – not simply those between God and man, but among men as well.⁵⁵ Cocceius and Witsius draw out the implicit in St. Paul and formulate the *peculium*-relationship as part of divinity itself.

Covenant is, in other words, the true mode of existence of the universe; it is what makes creation a cosmos, an orderly, that is, potentially righteous, universe, the God-created-presence-of-God in the creature, the perichoretic system of God and the world in Christ.⁵⁶ It ‘guarantees’ the reliability of the created world since it is a pact between God and Christ, and thus indissoluble since God cannot betray Himself. In the words of John Owen:

*God Himself hath undertaken the whole, both for his continuing with us, and our continuing with Him... Though there be sundry persons in Covenant, yet there is but one undertaker on all hands, and that is God Himself.*⁵⁷

Covenant is the essential character of all reality.⁵⁸ Covenant is *the* mark, source and ‘stuff’ of the world, not something added to it. It is the basis for not just salvation but for the rationality, comprehensibility, intelligibility, ultimately the benignity of the universe.⁵⁹ And despite the seriousness of man’s sin, the Covenant remains the ultimate ‘equation’ of the world.

2.3 This Eternal Covenant is in fact a conception of the Spirit as the organizing principle of corporate life uniting politics and worship.

⁵⁵ Cf. Heppe [1950 p382]

⁵⁶ Cf. Miller [1954 p407f].

⁵⁷ Owen [1998 (1674) p40].

⁵⁸ Cf. van Til quoted in Smith [2002 p57]; also Miller [1954 p5].

⁵⁹ Cf. Smith [2002 p69].

Cocceius's formulation was radical in several important ways. First it provided a means to mitigate two perennial ecclesiological problems in Protestantism: antinomianism and Arminianism. The Covenant of Works as well as the Covenant of Grace are 'merely' aspects of the over-arching Covenant of Redemption. There is no discontinuity between God and mankind and the rest of the created world signified in the first two versions of the covenant. Creation, sin and redemption take place within the context of obedience to the divine will as expressed in Scriptural commands and through the community of the 'larger' church. Neither would the distinction between unilateral and bilateral covenant have any further relevance since the eternal availability of the covenant is assured by its undertaking by 'equals', viz. Persons of the divine Trinity.

Further, and more importantly (if more subtly), the Covenant of Redemption obscures any clear distinction between politics and religion.⁶⁰ As James Torrance suggests:⁶¹ even more than any other form of covenant theology, the Covenant of Redemption provides a 'theology of politics'. This Eternal Covenant cuts off the path to rationalising political association through either natural law or contract theory.⁶² It also 'theologizes' the political doctrine of the religion of the local leader as the religion of the land (*cuius regio, eius religio*)⁶³ which had excluded Calvinists (as well as Anabaptists) from the rights enjoyed by Lutherans as a consequence of the Peace of Augsburg in 1555. The Covenant of Redemption is a means by which

⁶⁰ Cf. Elazar [1996 p1].

⁶¹ Cf. Torrance [1988 p53].

⁶² Critics of covenant theory often base their analysis on the separation of the Covenants of Works and Grace in the late 16th century (cf. Trinterud [1951 p49]) because such distinction allows social contract theory to creep in the back door, as it were. Cocceius closes this door most sharply with the eternal Covenant of Redemption, however; and with it the social contract as a legitimate source of corporate association. This was the real threat of Presbyterianism to Congregationalism in New England.

⁶³ This also obviously redefines this doctrine such that the meaning of both *regio* and the impersonal pronouns are changed. The former is wherever covenanting takes place. The latter refers to those of the covenant, not a prince.

creation may participate in the inner life of God Himself.⁶⁴ Acceptance of the Covenant by an individual or a congregation (in fact any group) is such participation: a response to the divine Love itself, to the objective presence of the Spirit as offered by God to his creatures. It is in the acceptance of the Spirit that the association among men becomes more than simply collective. The Spirit is what gives life – not just to individuals but to *any* human gathering. But ‘acceptance’ means precisely the same sort of mutual submission as that between Father and Son. Thus the historical rivalry between the two swords of the *Sacerdotium* and the *Imperium* is resolved. It is by mutual submission of the two that the worldly order of government is created. Lawful authority is the result of such mutually submissive action.

The most profound aspects of Cocceius’s covenantal theory, however, are its implications for the source and distribution of not just political authority but all created power.⁶⁵ The Covenant of Redemption is indeed a claim about the ‘immanent’ Trinity, that is, about how God is *a se*. But it is nevertheless a claim limited to what might be considered ‘relevant’ to God’s role in creation and redemption. And it is a claim that, while not based on any direct revelation, is a not unreasonable deduction from the doctrine of the Trinity.⁶⁶ In this theory, divine power proceeds from the union of Father and Son in the Covenant, which is the Spirit Himself.⁶⁷ The Spirit is the message and the messenger, the promise and the one who promises, who enters into a relationship with humanity. It is this union that produces power in the world that is not worldly power. Such power is a consequence not of some transference of energy from God to his creation. Power does not ‘flow’ from the monarchical majesty

⁶⁴ Cf. Miller [1954 p8].

⁶⁵ Cf. 1 Cor 12:7-11.

⁶⁶ Cf. Barth [CD II 2:102, 114-115, IV 1: 54-66; IV p60, 63, 65, 66]; Kuyper cited in Smith [2002 p29].

⁶⁷ That is, the Spirit is the ‘subsistent’ *κοινωνία* between Father and Son. Cf. Thornton [1942 p170]; Gräbe [2006 p147]; McClelland [1957 p187].

of the Father *through* the conduit of the Son to the Spirit and hence to creatures, as if from an infinite reservoir that is channelled through a series of sluices and weirs. Rather creation itself and all the forces, potencies and latencies in it are the result of an intra-deical act of submission – of the Son in the first instance to the will of the Father, but of the Father as well in establishing the situation of choice for the Son.⁶⁸ The Covenant is the name of this loving mutual submission, the outpouring of the Spirit, precisely the infinite love between Father and Son.⁶⁹ It is in this love and only in this love that divine power is created and manifest.⁷⁰ Cocceius’s interpretation of the revelation of the Trinity is therefore significant as a concept of worldly power *generation*⁷¹ as well as of the nature of the Trinity. Power is not in some way shared or delegated by God, parcelled out among creatures according to some fixed schedule or hierarchy. Rather the means of power generation, as it were, is revealed as mutual submission in love.⁷² Real power in the world is created by believers through their relations with others⁷³, relations that are intermediated by the Spirit as covenantal power. Thomas Hooker summarizes the existential situation:

*...the believer being moved by the stroke of the Spirit of the Father is made able to close with the Father and the Son... a man must have fellowship with the Spirit before he can have fellowship with the Father and the Son.*⁷⁴

Despite the radical nature of its content, the language of the Covenant of Redemption appears to have been accepted without serious controversy – or at least incorporated

⁶⁸ Cf. McCoy [1956 p309].

⁶⁹ Cf. Heppel [1950 p382, 387].

⁷⁰ Cf. 1 Cor 12:7-11; Hooker [1638 pA1, 26, 30, 35, 170]; Gill [1769 p355].

⁷¹ This term is in fact used by Alexander of Hales in his discussion of the relationship between the Father and the Son. Cf. Watkin-Jones [1922 p147].

⁷² Cf. Cocceius [1654, IV, 89].

⁷³ Cf. McCoy and Baker [1991 p59, 78].

⁷⁴ Hooker [1638 p38]. Cf. also Hooker [1644 p15].

without significant comment - into the theology of various Reformed groups.⁷⁵ In particular, it seems to have been congenial to those Puritan émigrés from England who were associated with the University of Franeker (at which Cocceius was eventually professor of theology). Most notably, the Puritan divine, William Ames (a teacher of Cocceius) certainly espoused the theory by the 1620's and incorporated it into his own teaching. It is through Ames and several others attending Franeker that the Covenant of Redemption became an orthodox interpretation of revelation.⁷⁶ As such, it was part of the arsenal of doctrine that could be brought to bear as required. And it may have been indeed a very practical requirement that triggered its use and rapid promulgation in a very peculiar set of circumstances – the Puritan emigration to North America. Here it was to shape not just a theology but a culture and to provide not just an abstract articulation of basic presumptions about the world but a very practical, eventually procedural, approach to social organisation.

3. The practice of the New England Puritans involved the conscious, and successful, execution of the theology of the Eternal Covenant in both civil and ecclesiastical life.

By a free mutuall consent of Believers Joyning and covenanting to live as Members of a Holy Society together in all religious and vertuous duties as Christ and his Apostles did institute and practise

⁷⁵ Cf. Heppie [1950 p376]. A recent theologian who has rejected Cocceius covenant is Lyle Bierma [1996 p77] who prefers to locate the covenant not in the Trinity but in the two natures of Christ. He seems to be an exception to widespread acceptance. Torrance is also one of the few modern theologians who finds (his interpretation of) covenant theology to be the cause of many evils in Reformed Christianity – including the loss of the distinction between contract and covenant.

⁷⁶ The leading 20th century historian of Puritanism in America, Perry Miller, viewed covenant theology in general as an effective repudiation of early 16th century Calvinism, particularly the strict doctrine of double-predestination. More recent scholarship questions this view vigorously (see Wong [1998] and Møller [1963] for example). Smith [2002 p61] notes that, also contrary to Miller: “Reformed theology has historically been committed to the notion of a covenant among the Persons of the Trinity.” McCoy [1956, 1991] and Baker [1980] on the other hand judge that ‘Federalism’ is an alternative tradition entirely to Calvinism, starting with Bullinger. Bierma [1996 p61] sees no real evolution of covenant thought from Zwingli through Calvin and Bullinger. My intention here is not to enter into that debate but simply to document the fundamental effects of covenant theology in terms of Puritan social organisation and practice presuming its general acceptance.

*in the Gospell. By such free mutuall consent also all Civill perfect corporation did first beginne.*⁷⁷

This is not necessarily an example or an extension of a *biblically directed* covenant.⁷⁸

Nowhere does such a civil arrangement receive approval in a biblical text.⁷⁹ It is an example of the *theology* of Cocceius as derived from his (and his predecessors') reading of the Old and New Testaments.⁸⁰ But the typical Reformed categories of conditional/unconditional, pre/post lapsarian, supra/infra-lapsarian, Mosaic/Davidic and other metaphysical or theological distinctions simply do not apply. This covenant is a way of living one's life as much as it is a revelation about the divine life.⁸¹ And it is far more ontological than it is moralistic. That is, it is more concerned about describing the basic reality of the world than it is about specific Christian doctrine. It is the reality which they knew existed that the Puritan settlers of New England⁸² were confirming - not some code of law, Deuteronomic or otherwise.⁸³ The 'experiment' of New England was not one of implementing a particular legal code but of a mode of being in a reality that was objective and 'already there' as part of the cosmic order. It is this ontological emphasis that even sympathetic scholars of the period may miss.

⁷⁷ Henry Jacob cited in Burrage [1904 p157]; cf. also de Kuyper cited in Smith [2002 p45] and van Til cited in Smith [2002 p100].

⁷⁸ Cf. the so-called "covenant silence" of the New Testament (apart of course for the mainly relational corporate or 'symbiotic' forms (such as Jn 6:56, 14:10, 14:26, 15:4, 16:12-13 and 17:23, this last being a sort of mandate itself for the corporation). John Cotton's explanation for the lack of covenantal references is that they would have been politically inappropriate! See Gräbe [2006 p98]. Cf. also Van Zandt [1882 p29].

⁷⁹ Solomon Stoddard, the 'Pope of the Connecticut Valley', found the whole idea of 'covenantal churches' unscriptural in 1700. Jonathan Edwards, his son-in-law "found no basis for positing an external vs. an internal covenant" (Noll [2002 p46]) and that "It was a delusion to think that New England as a whole enjoyed a special covenant with God" [p47].

⁸⁰ William Ames, Cocceius's teacher at Franeker, is the architect of Congregational ecclesiology in New England. Although he never left Holland, he "...participated in the New England way in everything short of actually immigrating." (Sprunger [1972 p200]). To the Congregationalists of New England, Ames's writings and advice were prophetic (Cf. Cotton [1645 p13]). Miller [1937 p256] calls him "the father of the New England church polity". His widow and children did eventually immigrate in 1637 and were assisted by many in the new world, particularly Thomas Hooker and John Winthrop.

⁸¹ Cf. McCoy and Baker [1991 p20].

⁸² 'New England' includes towns in New Jersey and Long Island and Nova Scotia under the jurisdiction of the Bay Colony as well as some Puritan settlements further afield in Virginia, Georgia and North Carolina. Cf. Weir [2006 p17].

⁸³ The exception was New Haven until it was assimilated into the Connecticut Valley colonies.

This focus is clear from the very deliberate and very radical activity undertaken in every part of society from the family to the highest civic authority. This is the importance of the “freedom of social space.”⁸⁴ It allowed the colonists to uncover the shapes of primordial institutions in the granite rock of New England. And they were acutely aware of the paradoxical sort of action, the indefensible, irrational way in which these institutions were to be found: not by withdrawing themselves into a wilderness hermitage and awaiting the ascetic’s vision, but by appreciating the presence of God in the Spirit within one’s fellow.⁸⁵ This is the locus of discovery, as far as they are concerned, regarding God’s will for the world.⁸⁶ This is how the latent institutions became visible. And this is the purpose of the corporate communities that they created according to specific, if implicit, principles. I summarize the main principles that can be discerned in their activities here:

3.1. The Corporation is Self-constituted

What made not just a church but a civic community,⁸⁷ an association of any sort, was a commitment to one another,⁸⁸ not a bishop or an existing presbytery, nor a local magistrate, nor a representative of the Sovereign.⁸⁹ No mediating earthly authority is ever mentioned in the Covenants and approval is never sought (although legal confirmation often is).⁹⁰

⁸⁴ Strout [1973 p10].

⁸⁵ Cf. Strout [p19].

⁸⁶ Cf. William Perkins cited in Strout [1973 p11].

⁸⁷ Cf. De Jong [1945 p78]; Botein [1983 p32].

⁸⁸ Cf. Stout [p19]; Cotton [1645 p63].

⁸⁹ Cf. Cotton Mather speaking on the (earliest known English) Covenant of 1608, cited in Burrage [1904 p54]; Kent [1895, p13]; Burrage [1904 p36].

⁹⁰ Cf. Weir [2005 p156].

Perry Miller's comment summarises this Puritan view of association succinctly:

"...only thus, in fact, could any institution come into being."⁹¹ Not only was Cocceius's theology radical, therefore, it was also applied radically within the emerging Puritan culture.⁹² John Waddington encapsulates the entire history of the Congregationalist movement:

...from the first movement in 1567 to the Revolution of 1688 [as] that of a continuous and well sustained conflict for the freedom of religious [and consequently civil]⁹³ association and of independence from external control.⁹⁴

Neither the State nor the law of the State could constitute a corporation.⁹⁵ Thomas Hooker's *Apologia* for the Congregational theory of corporate formation leaves no doubt about the reality or legitimacy of self-constitution:

Mutual covenanting and confederating of the Saints in the fellowship of the faith according to the order of the Gospel, is that which gives constitution and being to a visible church.⁹⁶

⁹¹ Miller [1931 p669]. Also cf. Ellis [1888 p20]; Weir [2005 p9]; *Cambridge Platform* of 1648 [Chapter XVII paras. 3, 5 and 6]. It is instructive to contrast this view with that of the contemporary Sheppard [1659 p1] in England: "A Corporation, or an Incorporation (which is all one) is a Body in fiction of Law; or a Body Politick that endureth in perpetuall succession." This view is perpetuated by Chief Justice Marshall in the landmark *Dartmouth College vs. Woodward* case over 150 years later: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. But the mere creature of law, it possesses only those properties which the charter of its creation confers upon it...By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object, like an immortal being." Neither statement seems to reflect the experience of New England Congregationalism.

⁹²The idea of the church-covenant for example was at the time unique to New England (cf. Strehle [1988 p348]). One way to express the differences in the political spectra of England and New England during the period is to suggest Richard Hooker as the centre of English church politics between traditional Anglicans and Presbyterians. In America the centre could reasonably be placed in Thomas Hooker, sitting between Congregationalists and radical Baptists. Herbert Wallace Schneider [1931 p17] makes the point thus: "The Puritan ideal...was in New England more than an ideal, it was a profound rule of practice."

⁹³ Cf. Burrage [1904 p93]; Wallace [1931 p76ff].

⁹⁴ Waddington [1874].

⁹⁵ For example, the Mayflower Compact (recalling that only 35 of the 102 arriving were covenanters of the Leiden congregation): "We...covenant and combine ourselves together into a civic body politick [clearly illegal]...to enact constitute and frame laws [also illegal]...unto which we promise all due submission and obedience [likely treasonous]..." Is it surprising that the King abrogated the charter of the Virginia Company, under whose aegis the Mayflower sailed, in favour of himself in 1624? The Scottish National Covenant was declared treasonous in 1685. The threat of extreme action by the State was real. Cf. Peel [1948].

⁹⁶ Hooker [1648 p46].

And Hooker defines his terms precisely by specifying the components of the covenant:

*1. The Act that is performed betwixt some men for the while, and so passeth away in the expression.*⁹⁷

2. The State [that is, 'condition'] arising from the Act of obligation which is nothing else but the relation of these persons thus obliged."

This is the explicit retrieval of the Augustinian view of 'person' as being constituted in relationship as well as the revival of the scholastic concept of *subsistent relation* itself as the "relation of engagement". To this Hooker adds an entirely non-metaphysical interpretation, namely that the relationship and the act are coincidental. Both are unquestionably real, but neither exists independently of the other. So he is able to conclude that: "...[by] the right conceiving of the nature of the thing, I mean the incorporating of men together." This constitutes the first explicit ontological theory of the civil corporation of which I am aware.

3.2. The Spirit is Necessary for Corporate Formation

The Spirit is made present in this relation of engagement which is the vehicle of the Covenant, the abode of the Spirit: "Every spiritual or ecclesiastical corporation receives its being from a spiritual combination."⁹⁸ But not just the ecclesiastical:

*...all Civil Relations are found in the Covenant...there is no other way given whereby a people (Sui juris) free from natural and compulsory engagements, can be united or combined together into one visible body, to stand by Mutuall Relation, fellow-members of the same body, but only by Mutuall Covenant.*⁹⁹

⁹⁷ Thus the need for continuous re-expression in human behaviour as noted below.

⁹⁸ Ibid. [p50].

⁹⁹ Cotton [1645 p4]. This is also the only way for new members to enter [p63].

And just as the act and the relationship of the Covenant are correlates, so are the act and the presence of the Spirit. It is this engagement that "...gives each power over another, and maintains and holds up communion with each other."¹⁰⁰ This is Cocceius's corporate 'power generation' applied to the created world without inhibition.¹⁰¹ When the Dorchester (Mass.) First Church in 1636 stated that:

*...we do lastly covenant and promise to further to our utmost power...the best spiritual good of each other, and of all and everyone that may be members of the congregation"*¹⁰²,

they were *at least* formulating an ideal of a kenotic/perichoretic union with each other – a collective emptying of self to make room for the other, a fundamental and continuous exchanging of positions, and thereby an incredible level of personal intimacy.¹⁰³ Self-negation was self-discovery. More than that: it was *faith*. John Preston had made faith a very specific relational as well as cognitive act:

*[It is in the very nature of faith]... that it empties a man, it takes a man quite off his own bottome; faith cometh as an empty hand, and receiveth all from God and gives all to God.*¹⁰⁴

Faith does not merit salvation but it is the relationship of salvation, contained in the act itself. Faith is the receiving of the Covenant therefore. This is an orthodox Reformed stance¹⁰⁵ but one that emphasizes in a more Lutheran way, perhaps, the service of God through one's fellow man.

¹⁰⁰ Ibid. [p46, 51].

¹⁰¹ Cocceius's theology in particular continued to spread and be explicitly referenced. Increase Mather in 1682, for example, virtually cites Cocceius in his introduction to Willard [1682 pii]: "... The Covenant of Redemption: Those glorious and blessed Transactions which have from the days of Eternity, passed between Father and Son..."

¹⁰² Cited in Weir [2005 p153]. Weir considers this as the 'classic formulary' after the mid-1630's. This statement is made in the same year as the foundation of Harvard University as the first corporation in America. This act, unapproved by King or Parliament, may well have been the *causus belli* for the revocation of the colonial charters and the establishment of the short-lived Dominion of New England 50 years later. The first business corporation was not founded until 1732 in New London Connecticut, the first bank not until after the revolution.

¹⁰³ This Covenant also identifies Christ as the "spiritual husband" of the congregation and of the individual members thus making an allusion to the medieval concept of the Marian church which emphasized the intimacy between Christ and his Mother/Spouse. Cf. Weir [2005 p158].

¹⁰⁴ Preston [1639 p43].

¹⁰⁵ Cf. McCoy and Baker [1991 p23].

3.3. The Act of Incorporation is an Act of Total Submission

The visible standard for this behaviour was not adherence to a ‘code’ but loving submission as noted above: Submission to God, submission to Christ, submission to each other in the ‘holy watch’ and submission to the government of the church through the local congregation.¹⁰⁶ This represents total surrender¹⁰⁷, not of one’s responsibility, but of one’s moralistic self.¹⁰⁸ It demanded a “communal commitment to holiness that did not allow for private or secret sin.”¹⁰⁹ Precisely as Richard Niebuhr articulates: “...through unlimited promise, responsibility to and for each other...” The cosmos that is sanctified in the Covenant is what one must take total responsibility for. This is precisely the antithesis of any moralism. There is no analysis to be made. Judgement is already accomplished. There is evil in the world and it is *my* own responsibility – utterly. And it is only through the consequent crushing guilt that I can find my way to Him who takes responsibility even for me.¹¹⁰

This was practical theology in a very specific sense: faith was a response of the whole man, not just the will but the intellect and judgement, public and private, individual

¹⁰⁶ Cf. Weir [2005 p154] in his summary of the covenant formulary parts.

¹⁰⁷ Cf. Miller [1954 p376].

¹⁰⁸ Submission does not mean avoiding responsibility but taking on much greater responsibility than man can exercise competently. Cotton (cited in Miller [1979 p139]) is aware of two modes of failure by individuals in the community: the first is by offering oneself as a substitute for others in taking affliction upon themselves; the second, fatal, way is to succumb to the ‘contagions’ of the times and places they live in. Yet we are not to avoid “the sinnes of the Town and Country’ we live in. Miller’s judgement is relevant at this point: “I think it not too rough a modernization of Cotton’s injunction to say that in times of public crisis we are not to submit or to sit apart, we are to become active critics of our society.”

¹⁰⁹ Weir [p161].

¹¹⁰ As Niebuhr remarks [p134], the tendency for the covenant idea to degenerate into a contractual obligation is evident in subsequent American history. But it has always been evident through the entire history of Judaism and Christianity (Cf. e.g. Torrance [1970 p56]) - the moralistic attempt to separate out ‘my’ responsibility from that of others. The very nature of the corporate relationship prevents such ‘parsing’ of responsibility.

and communal, complete and entire.¹¹¹ This response is performative: it shapes an identity.¹¹²

For the joining of faithfull Christians into fellowship and estate of a Church, we finde not in Scripture that God hath done it in any other way then by entering all of them together (as one man) into an holy Covenant with himselfe, To take the Lord...for their God, and to give up themselves to him, and to one another in his feare; and their walking in profound subjection to all his holy Ordinances: their cleaving to one another, as fellow-members of the same body, in brotherly love and holy watchfulnesse unto mutual edification of Jesus Christ.¹¹³

All of life was involved in the Covenant because the Covenant was the source of all life and knowledge about life.¹¹⁴ Thomas Shephard: “Whatever power one hath over another, if it be not by way of conquest or natural relation (as the father over the childe), it is by covenant.”¹¹⁵ This is a relationship of universal import and of unconstrained assent.¹¹⁶ Thomas Hooker:

Covenants made through ‘natural free engagements’ governed the relationships between prince and people, husbands and wives, maters and servants, all confederations and all corporations.¹¹⁷

The role of the local government, of the magistracy, of the State was to recognise and protect the corporate entities that were created through covenant, to acknowledge indeed the very presence of the Spirit in these associations.¹¹⁸ The State did not sponsor or even endorse the corporate entity; rather the State was to emerge from it.¹¹⁹ The corporation was as much an act of God as of man and was not to be compromised

¹¹¹ Cf. Wilcox [1959 p161].

¹¹² Cf. McCoy [1963 p363].

¹¹³ Cotton [1645 p2]; cf. Burr [2001 p3]. Interestingly this is also an aspect of the *Misnah* (*Misnah Sotah* 9:15, Rabbi Phineas, CE 165-200) in its regard for the Holy Spirit’s role in social organization: “The Torah leads to watchfulness, watchfulness to strictures, strictures to sinlessness...sinfearing to holiness, holiness to the Holy Spirit.”

¹¹⁴ Cf. Miller [1954 p376].

¹¹⁵ Cited in Holifield [2003 p41] from Shephard, *Defence of the Answer*, 2, 106.

¹¹⁶ Cf. Miller [1954 p376].

¹¹⁷ Holifield [p41]. Cf. also McCoy and Baker [1991 p13].

¹¹⁸ Cf. for example Hooker’s election sermon of 1638 establishing civil government through theological argument in Waddington [p322].

¹¹⁹ Cf. Weir [2005 p4].

by any other considerations. As John Winthrop put it to the colonists in 1630: "...a church springing from your own bowels".¹²⁰ Thomas Hooker captures the radical character of the commitment involved in corporate participation. Regarding accountability by the 'Faithful Covenanter':

...there must be answerable expression and putting forth of the inward disposition and frame of heart outwardly in tongue and life...If it be within, it will break forth¹²¹.

The convergence of the theoretical and practical strands of covenant thought indeed breaks forth – with explosive force – in the American wilderness.

One might be suspicious of the self-reporting of radical Puritans regarding the level of mutual devotion implied by covenant if it were not for the basic facts of their existence: whole communities up-rooted themselves from their birth place, their neighbours and their families, to travel, often penniless, to foreign countries or simply unexplored territories wherein the threat of persecution, suffering and death always existed. These émigrés considered that Covenant creates a new identity, not an obligation under an existing identity. The 'officers' of this community appointed by the Crown or under Charter have no superior status for them; they merely have *additional* duties. But even in these they are to submit.¹²²

3.4. The State is a Witness and Limited Authority.

In the existing social structure of Europe, the presumption that true corporate life - civil as well as ecclesiastical - was solely a matter of this process called covenanting was bound to lead to immense strife and violence. In England for example the

¹²⁰ Address by John Winthrop April 7, 1630, cited in Waddington [1874 p255].

¹²¹ Thomas Hooker [1975 (1626-1633) p200].

¹²² Cf. Robinson [1851 III, p42].

foundation of a new church congregation involved establishing a new parish which required an act of Parliament. To establish a congregation independent of the parochial system was an act of treason.¹²³ But in America there was no institutional equilibrium to upset. There were, indeed, no institutions save the ones created by the colonists.¹²⁴ David Weir's summary of the situation would be hard to better: "In Europe the covenant was an instrument of reformation. In the New World, the covenant was an instrument of formation"¹²⁵. Upon its establishment, each New England town became a completely self-sufficient entity that governed itself entirely.¹²⁶ John Winthrop, perhaps the *least* radical of the non-separating Massachusetts Bay Colony immigrants, announced his agenda for the colony even before reaching the New World:

*It is by mutuall consent, through special overvaluing providence ... to seeke out a place of cohabitation and Consortesship under a due form of government both ciuill and ecclesisticall, In such cases as this, the care of the publique must oversway all private respects ... Wee are entered into a Covenant with him for this worke ... Wee haue professed to enterprise these and those accounts, upon these and those ends For this end, wee must be knitt together as one man.*¹²⁷

The Bay Colony was not completely free of the influence of existing European institutions, however. Winthrop considered that the colony was a society founded upon biblical principles. But his opponents thought that also it was "...dependent upon the grant also of our Sovereign", that is, upon the royal charter which had

¹²³ Cf. Weir [2005 p17]. And at least 42 people died for this sort of treasonous act of separation. Cf. Peel [op.cit.].

¹²⁴ The colony that was to become Maine is an exception to the pattern in the rest of New England. It was originally a grant to Gorges and Mason but was in 1639 established under the feudal jurisdiction of the bishop of Durham and was authorised to found parishes and construct churches. Cf. Weir [2005 p43].

¹²⁵ Weir [2005 p221].

¹²⁶ Cf. Stout [p22]. A 'chain of order' was progressively constructed joining family, town, church and commonwealth into a systematic whole – very much in the manner of Althusian 'symbiotes'.

¹²⁷ From "A Model of Christian Charity", *Winthrop Papers*, 11 (Boston 1931), cited in Miller [1931 p699].

‘incorporated’ the endeavour according to English law.¹²⁸ Winthrop would not have it, however, and at some points seems to reject the royal patent as the basis for the new society.¹²⁹ Nevertheless even for him corporate existence involves both the formal charter, which Miller considers merely an ‘accidental circumstance’,¹³⁰ and the covenanting process:

*...we agreed to walke according to the rules of the gossell. And thus you have both a Christian commonweale and the same founded upon the patent, and both included within my description.*¹³¹

That is, the corporation begins when the *dominium* given by the charter is balanced, as it were, by the exercise of *usufructus* demanded by the Covenant. The charter remained a constraint that had to be recognised for purposes of security of tenure and protection from other potential settlers. But it did not of itself constitute a society or even an ‘entity’ within society. The Covenant produced a *real* thing in the new relationship that was enacted through it, a distinct, palpable, living *body*¹³². Royal or Parliamentary charters may have been necessary for purposes of legitimacy,¹³³ but they were insufficient for the establishment of real corporate government which could only be established through covenanting.¹³⁴ The chartered company was, on its own,

¹²⁸ Cf. Sheppard [1659] for a summary of contemporary corporate law. Royal (or at the time, the Lord Protector’s) Charter, Parliamentary Act, Common Law and Prescription are the legally recognised modes of corporate creation. None of these covered what was about to take place in New England, for which there was no real legal precedent.

¹²⁹ Implicitly, so had the original separating Pilgrims of the Plymouth Colony through their agreement to a ‘compact’ quite independently of the charter of the Virginia Company under which they had set sail. For both groups the charter was a necessary legality, the covenant was the controlling reality.

¹³⁰ Cf. Miller [1931 p706].

¹³¹ Winthrop, quoted in Miller [1931 p706].

¹³² Cf. for example the 1683 *Covenant of the Bradford (Conn.) Church* cited in Weir [2005 p138]; also Mather [1643 p9].

¹³³ That is, the royal and legislative focus of incorporation was land (patents were the confirmation of deeds), something quite distinct from the covenant incorporation into a human/divine relationship. Cf. Weir [2005 p127]. Interestingly, this correlates with Augustine’s view that private property was the basis for the creation of the state.

¹³⁴ The confirmation of ‘gathered’ civil communities was through the simple judicial affirmation of the *name* of the community. Cf. Weir [2005 p125].

lifeless. The Spirit not the Law is, for the colonists, what vivifies the community.¹³⁵ In any case, even in strictly legal terms “...the charter was completely inadequate for what was demanded of it.”¹³⁶ Unlike a constitution, a covenant gives discretion, a most important consideration in coping with the myriad new circumstances of the new environment. The covenant does not specify God’s will; it commits all who participate to its discovery. And this is the basis for the judgments of the magistrates of the Bay Colony until the imposition of the Dominion of New England in 1689.¹³⁷

3.5. The Corporation is Sustained by Participation in the Determination of ‘Purpose’

Further, the covenant had to be sustained by continued action on the part of its members. There was no metaphysical momentum. There were often ceremonies of re-covenanting,¹³⁸ but the real sign of the covenant was the everyday behaviour of those who participated. As Bulkeley reminded his congregation:

¹³⁵ The term ‘theocracy’ has been applied many times to the resultant society in New England (Cf. e.g. Nuttall [p119ff] and Zaret [1985 p19]). The term is coined by Josephus in his *Contra Apionem* to denote the particular *politeuma* of the Jewish ‘worshipful society’. Congregational New England was certainly such a society. However the term also connotes a government by priests. This is a considerable misrepresentation (as is one of ‘democracy’) of the Congregationalist experiment. Power does not flow from an infinite source in a covenanted society; it is created by covenantal action, that is, by mutual submission. God is in no sense the president or chief executive in such a society, as if at the top of a celestial hierarchy with the Temple as His court. John Eliot (1604-1690), the Puritan ‘missionary to the Indians’, was severely censured and his book, *The Christian Commonwealth* was banned by the Massachusetts General Court for suggesting that theocracy was a Christian requirement. The Spirit is present in Puritan government to the extent that humanity participates in the covenant, regardless of the form of government adopted. As Forsyth [1912 p104f] recognizes about the English Puritans: “Under the rule of the [Puritan] saints, all views and denominations had been free within the pale of Christ’s grace, and they insisted on moral uniformity only...Dogma was free, polity was free, only ethic was fixed....coercion was only applied in matters of conduct” The North American Puritans may have enforced this regime differently but not in essentials. They were Pietists. Cf. Hambrick-Stowe [1982]. The Puritans didn’t have enough theology for a theocracy; they probably had too much Anabaptism for a democracy.

¹³⁶ Miller [1931 p705]. Also cf. Botein [1965 p52].

¹³⁷ The Dominion was likely the response of the newly re-established English government to the unauthorized incorporation of Harvard University, suggesting how seriously the matter was considered.

¹³⁸ Cf. Willard [1682]. Introduced formally in 1676, according to Stout [p97ff], these became “merely ritualistic” and were used as recruiting devices as missionary Congregationalism declined. They are the origins of the ‘American revival’ tent and camp meetings of the 18th and 19th centuries as well as the radio and televangelists of the 20th and 21st.

*The Lord looks for more from thee than from other people, more zeale for God, more love to his truth, more justice and equity in thy ways...*¹³⁹

The Spirit continues to exist within the covenant only as it remains alive to and among the members themselves. The language of covenant implied a continuity of the bond as the membership changed, even from generation to generation, but this language is hopefully (that is filled with hope) performative as in prayer. Its power lies in transforming the covenanter not in changing the world through incantation.

The situation in the remote Connecticut River Valley was even less constrained by existing institutions than in the Bay Colony. When Thomas Hooker led his band of migrants from Newtown in 1636, he had no royal charter, no legal right whatsoever, to do so.¹⁴⁰ But he did have the theory of the covenant to guide him. On that basis alone, with no reference to either the King or the Bay Colony, he established a new colony.¹⁴¹ New England Congregationalism, as noted above, was grounded on the idea of State as well as Church Covenantalism.¹⁴² The later was in fact considered more important than the former. But in both spheres of life the covenant:

¹³⁹ Stout [p26].

¹⁴⁰ Winthrop, as the agent of the Earl of Warwick, who had received the lands in grant from the King in 1632, did recognise some form of legitimacy of their claim in return for their recognition of the Warwick grant, an interesting *quid pro quo*. Cf. Miller [1931 p696]. The Rhode Island settlement covenants also pre-dated the charter for the Rhode Island Plantations by several years. Cf. Bates [1940 p148].

¹⁴¹ New Haven was also founded without authorization under a carefully formulated covenant that included both church and state in 1639, as were its 'daughters' in New Jersey, a Dutch colony until 1664. The express direction of this charter was that the civil authority establishes and maintains the church and New Haven was the only colony to attempt to implement Mosaic Law. Cf. Weir [2005 p91]. The Geneva of Calvin was clearly the model these covenanters had in mind.

¹⁴² In line, of course, with, in the first instance, the original Swiss Reformers: Cf. Baker [1980 p107]; Weir [2005 p134, 239]. Long before Puritan America, Zurich considered itself a covenanted community, a 'sacral society', the New Israel, the *corpus Christianum* writ small in a similar manner. As Hooker walked into the Connecticut Valley, however, there was no one, at least no one with an army, who could contest his assertion, and likely experience, that the Congregational covenant was truly generalised in the eternal Covenant of Redemption. I suspect that the initial ease with which the New England Puritans ignored the earthly law of corporations was an important reason for the demise of their covenanted society.

*...is that sement that soders them all, that soul as it were, that acts all the parts and particular persons in such a way, for he that will enter, must also willingly binde and ingage himself to each member of that society to promote the good of the whole, or else a member he actually is not.*¹⁴³

Hooker's relative institutional freedom gave him the opportunity to press the issue of the 'good of the whole' beyond the limits that even the Bay Colony could achieve.

Whereas Winthrop had to give at least lip service to the 'purpose' contained in the charter, Hooker could effectively make up his own. He could, but he didn't. Instead, as Miller¹⁴⁴ points out, he adopted a principle that "the whole body of participants in a political covenant should declare the covenant's purpose" – effectively that the covenant is *not* defined by one or other shared purpose, but to the contrary that purpose is decided *within* covenant, and it is decided by all who are party to it:

*...the corporation is a true body when it hath no major or other offices... People must by mutual consent grow up into engagement with one another in a corporative way, before they should do the duties of a corporation.*¹⁴⁵

This is a crucial corporate point that is implicit in the entire history of the corporate notion from Israel through the Body of Christ, and into the Franciscan controversy of the 13th century. Corporate purpose is determined by an already existing corporate community. Such determination is an unavoidable responsibility of such a community,¹⁴⁶ but it can only be exercised with the presence of the Spirit, who can only be 'summoned' through covenantal action.¹⁴⁷ In other words, the

¹⁴³ Hooker [1648 Part I, p47].

¹⁴⁴ Miller [1931 p702].

¹⁴⁵ Hooker [1648 p11]. Cf. Møller [p65] commenting on Perkin's *Golden Chaine*; Sturm [1973 p352]; Jones [1949 p10].

¹⁴⁶ Cf. Wilcox [1959 p171 ff].

¹⁴⁷ Recognition of this central point is lacking in almost all scholarship about the corporation. The presumption that shared purpose is the thing that binds the members of the corporation together leads ultimately to the Arrow paradox which I have mentioned previously. As Møller [1963] suggests, this is in part due to the 'sociological' perspective applied to 17th century Puritanism by Miller and others. The inability to 'see' the basic inaccuracy of the sociological cart of 'purpose' before the theological 'horse' of the covenant relationship is an indication of the importance of the theological approach itself in the analysis of the corporation.

Congregationalists recognized explicitly that the corporation, civil as well as ecclesiastical, does not exist on the plane of 'rights', even though the entity of the corporation might be defined along with purported rights in law. In fact the corporation, as St. Paul defined it in First Corinthians and the Franciscans formulated it with the Roman Curia, is the product of the radical abjuration of rights in law. Ultimately it does not stand upon rights but upon love.

3.6. The Abiding Function of the Corporate Community is Epistemological/Axiological

The effect of the covenant on the determination of purpose is profound, but hardly noticeable unless one is prepared to see it. As Karl Barth noted:

[Covenant] theology is concerned with the bold view of a history of God and man which unfolds itself from creation to the day of judgement.¹⁴⁸

The idea of a history that 'unfolds' rather than a static reality that develops predictably is new to (modern) theology and politics. It is an implicit recognition of the Covenant however in both the Old and New Testaments. All fixed ideas of God, and therefore reality (including morality), are not just incorrect, they are undermined by the nature of the Covenant itself, which requires continuous and permanent searching. That is, the Covenant is a process, activity, not a stable state. It must be continuously renewed or it ceases to exist. In the journey from Leiden to Portsmouth before their departure to America, the so-called Pilgrims heard their chaplain, Dr. Robinson, instruct them on theological epistemology, not dogma, reminding them of the main function of the covenant:

¹⁴⁸ Barth [*Church Dogmatics IV* p55].

*...whereby we promise and covenant with God and with one another, to receive whatsoever light or truth shall be made known to us from his written word.*¹⁴⁹

Simultaneously, covenantal content is something that cannot be alienated by choice.

To exist, the corporate community must have a purpose, but whatever purpose it has is always inadequate for its existence.¹⁵⁰ God is its permanent horizon of purpose but that horizon must be always tentatively filled by *some* concrete human purpose. At the end of the Puritan period, Wise could still declare:

*The Spirit of Man is the Candle of the Lord, searching all the inward parts of the Belly. There may be many larger Volumes in this dark recess called the Belly to be read by that Candle God has Light up.*¹⁵¹

This persistent axiological drive, which is toward the good, the valuable, the worthwhile is a result of the tension between Spirit and Word, the “warp of piety woven with the woof of reason”¹⁵² that is inherent in Congregationalism.¹⁵³ The Covenant consists of continuous inquiry regarding the ‘Belly’, the world in which man finds himself. There are not fixed measures of salvation, or indeed any kind of success. There is only a dedicated searching in light of apocalyptic surprise.¹⁵⁴ Each temporary success is only an indication of its infinite deficiency. As Miller observes:

*The peculiarly Puritan element in the conception [of the standard of the good, the valuable etc.] is the insistence that no particular content may be [permanently] attached to the standard; it is in fact synonymous with God...Puritanism demanded of Puritans that they remain always conscious of this divine norm, even if they could not formulate it...*¹⁵⁵

3.7. The Corporate Community is a Fractal

¹⁴⁹ In the year 1620, quoted in Waddington [1874 p213, 214].

¹⁵⁰ That is, of course, *simul justus et peccator*.

¹⁵¹ Wise [1717 p31].

¹⁵² Miller [1954 p444].

¹⁵³ Cf. Rees [1915 p191]; McCoy [1963 p360].

¹⁵⁴ Cf. McCoy and Baker [1991 p78]. Cocceius view is that the restlessness of change was implanted with the creation of humanity within the original covenant of God.

¹⁵⁵ Miller [1954 p45].

The individual congregation (the *coetus fidelium*) is, in a sense, the corporate ‘atom’ of the Puritan community.¹⁵⁶ But this commonplace is an inadequate metaphor, because the Puritan view of the world was essentially fractal, that is, it appeared the same at various levels of generality or specificity. A congregation has all the powers of the church in general; it in fact ‘contained the whole church’ in a distinctly perichoretic manner; but it was not the kingdom of heaven even if all its members were ‘Saints’. As John Cotton put it:

*...a particular congregation of believers is never called the kingdom of heaven; being but a member of a corporation of that kingdom.*¹⁵⁷

Each congregation was a whole, but it was not complete. The implication is clear: members of the congregation were *also* members of the larger corporate body of the universal church of which Christ was also a member.¹⁵⁸ *That* church also existed in the local congregation, which also existed in themselves, all as corporations.¹⁵⁹ Christ was in them through the Church, a perichoretic union as ‘solid’ as any proposed by the Cappadocian Fathers. This is not a hierarchy, either representative or aristocratic. Following Althusius, one might call it a universal symbiosis but this word has acquired a number of modern meanings that Althusius would likely not approve – particularly the biological connotation of taking a free ride from other species.

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¹⁵⁶ Cf. Forsyth [1912 p140]: “[The Independent] church was not an institution but a corporation.”

¹⁵⁷ Cotton [1648] cited in Ziff [1958 p322].

¹⁵⁸ Cf. Ames [1642 I, pp32-35]. Also cf. Sprunger [p185].

¹⁵⁹ Cf. Forsyth [1912 p140].

So too did “...central colonial governments emerge out of town governments.”¹⁶⁰ Confirming charters came later if at all for these emergent civil entities. The 1643 Articles of Confederation of the United Colonies of New England¹⁶¹ is just such a ‘grassroots’ inter-corporate document, as were the earlier Woburn and Medfield Combinations on a smaller scale. This last even included *nahala*- like restrictions on the sale of land to outsiders.¹⁶² The documents of the Confederation effectively replaced all the royal charters¹⁶³ and are important to the first American Articles of Confederation over 100 years hence as well as the Constitution of the United States. These were self-described ‘Consociations’ (an Althusian term) of civil entities, organised in the same way as Congregationalist churches. And they had the same ultimate purpose: “...the advancement of the Kingdom of Jesus Christ and the Christian Gospell.”¹⁶⁴ It does not seem an excessive gesture therefore to agree with John Wise’s early 18th evaluation of the covenantal corporate community as a divine revelation:

I look upon the Discovery and Settlement of the Congregational Way, as the Boon, the Gratuity, the largesse of Divine Bounty, which the Lord graciously bestowed on this People, that followed him into this Wilderness...the Lord did more for them than for any People in the World, in shewing them the Pattern of his House... ”¹⁶⁵

It may be difficult for us in the 21st century to appreciate what Wise saw in the Puritan corporation: an institutionalized entity that was dedicated to the union of man with God through the union of man with man in the modern corporation. But it is that and

¹⁶⁰ Weir [2005 p75]. Also McCoy and Baker [1991 p87ff]. The chronology is instructive. The first ‘tranche’ of civil covenants include those of towns: Salem (1629), Cambridge (1632), and Dorchester (1633). The second tranche includes combinations of towns: The Fundamental Orders of Connecticut (1639), The New Haven Plantation Covenant (1638), The Dover Combination (1639), The Providence Plantation Agreement (1640) and the Massachusetts Body of Liberties (1641). The culminating covenanting combination is the New England Confederation (1641).

¹⁶¹ Involving Connecticut, Massachusetts Bay, New Haven, New Plymouth with Maine and New Hampshire participating by assimilation.

¹⁶² Cf. Weir [2005 p107].

¹⁶³ Cf. Weir [2005 p109].

¹⁶⁴ *Ibid* [p112].

¹⁶⁵ *Ibid* [p28]; Cf. Brunner [1952 p14f].

not the sterile legal simulacrum of corporate existence found among ‘merchant adventurers or in ‘chartered companies’ or ‘joint stock companies’ in which the genesis of the dominant form of 21st century social existence may be found. This is why the legal historian, Livermore, can conclude categorically regarding the Puritan idea of free corporate association:

It was the juristic basis of congregationalism throughout New England for nearly 200 years thereafter, and was consequently marked for as great a destiny in its original ecclesiastical sphere as on its civil side...It is impossible to trace the further burgeoning of the notion that by free association corporations could be created...but it was active the length of the Atlantic seaboard. This was a social phenomenon of the first magnitude and it would be absurd to suppose that it was abruptly ended when...an act of assembly came into wider use during the 18th century.¹⁶⁶

Wise can call the Congregational church, even in the midst of the Puritan dissolution, the “compleat Corporation”,¹⁶⁷ a “Gospell Church Essentially considered as a Body Incorporated”¹⁶⁸ It was self-constituted but with divine assistance; it established its own administration and standards of mutual watchfulness; it was an ‘organick body’ and shared in a ‘judicial part of government’. The corporation as thus perceived by Wise was a unity:

In which [sovereign] Covenant is included that submission and Union of Wills by which a State may be conceived to be but one Person. So that the most proper definition of a Civil State is this, viz., A Civil State is a Compound Moral Person whose Will (united by those covenants before passed) is the Will of All.¹⁶⁹

The persistence of this conception might be demonstrated in a number of ways. I think that American literature is perhaps one of the most compelling:

They were one man not thirty. For as the one ship that held them all; though it was put together of all contrasting things ... yet all

¹⁶⁶ Livermore [1939 px, xix, xxi].

¹⁶⁷ Wise [1958 (1717) p13].

¹⁶⁸ Ibid [p 75].

¹⁶⁹ Ibid [p45].

*these ran into one another in the one concrete hull ...; even so, all the individualities of the crew ... were welded into one mass.*¹⁷⁰

¹⁷⁰ Herman Melville, *Moby Dick* [1851].

Chapter 7: Submitting to the Discipline of the Corporation

Rediscovering the Covenant in the 20th Century

Finance is inhibiting all other freedoms [and] it is an inescapable necessity of all actions.

Will Dyson,
Artist Among the Bankers.

In the last chapter I argued that the 19th century ‘organicist’ theory of the corporation undermined not only itself but its ‘shadow’, the ‘fictional theory’, and its main competitor, the ‘concession theory’, to which it is actually cousin. All of these theories rely on the remnants of traditional Christian doctrine but distort the foundations upon which they are erected. The idea of the ‘spirit’, in particular, is degraded from the divine and active to the cerebral and genetically passive. Corporate participation, in this theory, becomes little more than possession of personal interests, cultural or economic, similar to those of others. The result is a mutant monstrosity rather than a coherent reconciliation of the One and the Many, and certainly not a symbol of the biblical Covenant and its historical interpretations. Can the corporation as a religious institution be recovered out of the detritus of 19th century Idealist philosophy?

Gierke wrote at the very dawn of what can justifiably be called the Corporate Age. Neither he nor his Idealist colleagues had had a real experience of the full impact of the freedom of corporate association in New England or that which was to come in Old England by the end of the century. The half century following Gierke’s *Genossenschaftsrecht* saw the realization of his legal vision of the unrestricted right to corporate association in Europe and North America, and effectively, therefore, throughout the industrialized world. The progressive liberalization of corporate

legislation made corporate formation a matter of procedural registration rather than government approval in every significant jurisdiction. But, while this legal freedom had been achieved, its expected sociological and economic consequences had not.

It is, in retrospect, as if the 19th century corporate philosophers were scholastic academics commenting on the metaphysics of light without any experimental facilities; they could only speculate on the effects of their suppositions. By the dawn of the 20th century, through the proliferation of the corporation, these effects were becoming apparent. They differed radically from the expectations of not just legal but economic theorists as well. Unaccounted for by liberal economic theory, the corporation emerged as the driving force in a global economic system. It, and not the market, had triumphed as the dominant institution of a post-capitalist society.

Unaccounted for by Idealist philosophy, the corporation had become the principal threat to all other forms of association. It had become a beast that consumed its rivals, even, in the opinion of some, to the extent of undermining the nation state. The form of the corporation was again as common as it was in Puritan New England, but instead of an orderly and integrated society, the results were rapaciousness and greed on a scale never before seen. This was the age of the 'robber barons' in American business, men like Gould, Carnegie and Rockefeller, J.P. Morgan and Vanderbilt, who had adopted and shaped the legal arrangements of the corporation to suit their drive toward exploitation, emulating sovereign power's example of centuries in the co-option of the legal corporation.

The remainder of this chapter considers the way in which corporate developments in the late 19th and early 20th centuries were perceived and responded to intellectually. I

hope to show that the religious origins of the corporation are re-discovered in this experience, however unaware of this the protagonists may have been of their discovery. I have chosen three primary authors and their most relevant works to ‘test’ the explanatory competence of the relational theory of the corporation described in previous chapters. None of these authors formulates a theory of the corporation. Rather they are primarily interested in describing what, for them, is a startling and important (or dangerous) institution in the modern corporation. The facts they assemble are generally not meant as theoretical but phenomenological observations. Those of the first author, Thorstein Veblen, are, in fact, intentionally tendentious in order to raise public awareness of the issues he sees. The other two, Adolf Berle and Gardiner Means are much more ‘establishment’ figures, whose intention is to document rather than criticise corporate developments. My intention is to assemble their views, findings and conclusions of these writers as ‘raw facts’ within the context of the corporate theory and history developed thus far. What they find, I believe, confirms the corporation as a relation in which the ancient covenantal, Pauline and Franciscan conceptions of the separation of proprietorship and dispositional power, *dominium and usufructus*, can be distinguished clearly.

1. Corporate proliferation had produced a profound intellectual crisis by the early 20th century which is formulated initially by Thorstein Veblen .

Thorstein Veblen, the American institutional economist, was among the first to recognize that neither liberal economic theory nor the philosophy of corporate Idealism could account for the conditions of the early 20th century. Lockean economic individualism, he observed, was premised on the ownership of ‘self’ and the product

of one's labour. This 'Natural Right' had been far exceeded in the accumulation of wealth by a representative 'Substantial Citizen', who received monetary income which had not been earned in such Lockean labour. This income was "something for nothing". The designation included not just the robber barons but all those who 'invested'.¹ Schooled in classical economic theory, Veblen was concerned that the direction of economic activity was directly opposed to that suggested by liberal theory: increasing competition leading to 'Pareto optimality', the best use of resources overall. The concentration of wealth had led instead to a reduction in competition, the rampant waste of natural resources, profit-seeking brutality, the corruption of democracy and the reduction in the real 'value' of life – particularly in America but generally throughout the industrialized world. This is a world dominated not by markets but by rapacious concentrations of wealth and influence.² He is in no doubt about the proximate cause of this state of affairs. It is the modern corporation, "the prime institutional factor that establishes and governs the established order of society" which is the target of his wrath. He refers to the corporation eponymously by what he perceives its salient feature: 'absentee ownership', the possession of the right of *usufruct* over property which is directly in the control of others.³

¹ Veblen [1924 (1923) p12]. Veblen is careful to avoid Marxist vocabulary such as 'capitalist' and 'excess value of labour'. The issue for him is not ideological - Socialism or Capitalism [cf. p9] - but the institutional structure of society and the basic motivations upon which it is built.

² Cf. *ibid.* [p76].

³ *Ibid.* [p22]. Veblen uses the precise term '*usufruct*' frequently throughout his argument. He also refers to the 'peculiar institution' of the corporation – twice in one opening paragraph [p4] and links that term to 'absentee ownership'. Although he never refers to the Roman Law distinction between *dominium* and *usufruct*, it appears to be constantly on the tip of his tongue, so to speak. Yet he does not make the explicit connection between their separation and the nature of the corporation. Moreover he frequently refers to the 'absentee owner' as equivalent to the 'absentee manager' [p7, 12], indicating a confusion about the implications of this separation. Veblen is concerned that the *usufruct* is being captured by those who have *dominium*. This is precisely the reverse of the feudal situation in which those who had *dominium* did not have *usufructus*, the latter belonging to tenants, who as long as they had heirs, would maintain it. To a certain degree this was also the situation within 18th and 19th century capitalism. *Dominium* and *usufructus* were held jointly by the capitalist mill owner (rarely in a corporate name), the latter being 'shared' with labour. This is the situation described by Marx; it is generally not the situation of the public company by the 1920's. Veblen's misperception is that *usufructus* remains tied to the capitalist in the mode of the early 19th century.

But Veblen recognizes that the Hegelian theory of association espoused by Gierke has also been invalidated. Instead of a corporatist state composed of a hierarchy of corporate associations contributing to the unity of the whole and representing the interests of their members, the national state was in fact profoundly threatened by the corporation. He assesses the situation pointedly: "In national material effect, the national frontiers no longer divide anything but national groups of special interests."⁴ Gierke had never considered the possibility that national interest groups might have more interests in common with those across national frontiers than those who spoke the same language. Veblen shows that interests of any sort are a tenuous foundation for the corporation. But even the composition of these interests groups is not what the Idealists expected. The Substantial Citizen is not a member or a representative of the 'underlying population'; he is an exploiter of that population with no real national loyalty, who uses that population not just commercially but militarily to advance his own interests.⁵ The corporatist as well as the individualist corporation had clearly gone awry.

Therefore, according to Veblen, this new order of things demanded a new conceptual appreciation of the world. The world had become corporate.⁶ The intellectual

⁴ Ibid. [p6].

⁵ Veblen places the First World War on the doorstep of capitalism. Interestingly, 20 years later, Burnham concludes [p168]: "The War of 1914 was the last great war of the capitalist society; the War of 1939 is the first great war of managerial society." Davis Smith (in Kaysen [1996 p35]) agrees with Burnham's timing: "By World War I the professional manager had effectively replaced the financial capitalist." Veblen may have been slightly pre-mature therefore regarding the institutional culpability of the corporation.

⁶ Ibid [p207ff]. He dates this, not unreasonably, from the turn of the century. Presuming that he means that the majority of productive assets are corporate by this time, he estimate is not in conflict with the more rigorous estimates of Berle and Means some 15 years later that corporations controlled two thirds of these assets. Cf. Berle and Means [1991 pliii]. Veblen also dates the beginning of the process of corporate domination to the passage of the English Companies Acts of the 1850's. In this he is on less

response he suggests is the abandonment of “time-worn principles of ownership and control, which are now coming to a head in a system of absentee ownership and control.”⁷ However, the principles he is referring to – Lockean individualism and Hegelian corporatism - are those that are not quite time-worn enough. He explicitly rejects the investigation of the ‘spiritual heritage’ of the modern corporation which might have revealed to him more fundamental principles than could be seen in corporate theory since the Enlightenment.⁸ Although his institutional descriptions are unparalleled, he is never very precise about which legal principles are involved (except perhaps those that permit any kind of incorporation) and he is unable to develop any real programme for advancing this thesis practically. Without its theological constituents, the corporation had become enigmatic as well as dangerous.

2. Landmark research by Berle and Means reveals not just the real state of corporate development but the continuity of ancient biblical precedents on which the corporation is based.

Veblen’s designation of ‘absentee ownership’ to refer to the corporation is one that probably seems eccentric to 21st century ears.⁹ But it does suggest, however imprecisely, the perennial issue that abides in the concept of corporate association: the separation of dominion and the beneficial disposition of resources. He is implicitly critical of this separation, largely because, as a society, we are unable to cope with it

sure ground. Liberalization of corporate formation had proceeded consistently since the Revolution in North America and the recognition of *de facto* corporations by parliament in the 1830’s.

⁷ Veblen [1924 p5].

⁸ Cf. *ibid.* [p21]. This despite the fact that he recognizes the existing state of affairs as a ‘spiritual order’.

⁹ In fact, it is clear that Veblen could not imagine his Substantial Citizen as desiring anything but control over his ‘corporate assets’. Not until the formulation of so-called Modern Portfolio Theory in the 1950’s was the presumption of the desire for *control* by an investor shown to be irrational. See the classic text: Markowitz, Harry M. [1959].

legally. He can see no precedent for it because he has limited himself to a historical horizon of about 150 years. He therefore cannot appreciate the *nahala* of *eretz Israel*, the Pauline *peculium*, the Franciscan *Res*, or the divinely inspired corporate drive of the American Congregationalists. Veblen recognizes that the corporation represents a real change in the nature of not just business but modern society. Not until a decade after Veblen's analysis, however, is the factual material available to show why Veblen was correct in his concern; and why he was wrong in his solution.

A hint at the actual state of perception of corporate affairs from outside Veblen's reformist camp was offered by a Wall Street lawyer, Sears. In a prosaic and uninformative account of a life in investment banking he notes that "Wide distribution of stock means a common interest of the average man in corporate finance."¹⁰ Written just before the stock market crash of 1929, Sears provides a rather buoyant account of the joys of shareholding. He believes that while the lack of shareholder participation, absentee ownership, is to be regretted, this is only because it takes from him, the shareholder "...the full thrill of the romance of business to which he is entitled."¹¹ He therefore suggests more factory visits to re-instil the pride of achievement into the modern shareholding democracy, a reconnection, however trivial, of ownership and workmanship which Veblen valued so highly in his reading of economic history. The impact of such a suggestion is likely to have been minimal, but it did, and perhaps still does, reflect the level of general misunderstanding about the corporation and its dynamics.¹²

¹⁰ Sears [p35].

¹¹ Ibid [p29].

¹² This level of intellectual rigour may also be found more recently in Bogle [2005], the self-proclaimed mission of which is to "return capitalism to its owners". Bogle sees the separation of ownership as a "pathological mutation" without realizing that it is a necessary aspect of the

Entering into this factual as well as theoretical vacuum, the work of two researchers, Adolf Berle, a lawyer, and Gardiner Means, an economist, came as a shock perhaps as significant as that of the work on Quantum Physics for which Werner Heisenberg received the Nobel Prize in the same year. The results of this research were summarized in their *The Modern Corporation and Private Property* and empirically identified the true cause of the crisis of the corporation. This crisis was not the result of the simple proliferation of the corporation in the previous half century. Nor was it, as Veblen had diagnosed, the result of the fact that most productive resources were under corporate control. The real crisis, the really remarkable fact about corporate existence, was that corporate 'owners' were no longer corporate 'managers'. In fact, Berle and Means insist, the traditional categories of ownership had ceased to apply to the corporation at all.¹³ Unknown to Veblen, the laws of property had already changed, and changed so fundamentally that the otherwise phlegmatic authors of *The Modern Corporation* found it appropriate to call this change a 'revolution'. At almost every instance where they refer to 'ownership', therefore, they feel compelled to qualify its meaning so as not to mislead the reader.¹⁴

The main thesis of the Berle and Means analysis is that whatever else its impact, the growth of the corporation has created a profound institutional change in the concepts

corporation, and that this mutation took place in the 13th not the 20th century. Cf. also William Pfaff, 'A Pathological Mutation in Capitalism', *International Herald Tribune*, Sept 9, 2002.

¹³ Cf. Nisbet [1961(1953) px]: "Schumpeter warned us that the transition from capitalism to socialism would not even be noticed by a population whose idea of property is not hard property but soft property – shares and equities in something distant, personally unmanaged and impersonal.

¹⁴ The shock of this conclusion has been blunted by time. It is important therefore to recall Schrader's point [1993 p2]: "...most economic theorists prior to this century [the 20th] viewed the modern form of corporate business, as a form in which business control is exercised by salaried executives, as either unworkable or in compatible with the working of a free market economy."

of property and wealth, in particular 'productive' property and wealth¹⁵ They find specifically that:

*Not only is [property] divorced from the decision-making power of its supposedly beneficial holders...but it has come to encompass a set of conceptions superimposed upon the central reality of domination over tangible things.*¹⁶

It is difficult to imagine a more concise statement than this of the principle of the Franciscan *Res* established by St. Bonaventure: "Ownership of wealth without appreciable control and control of wealth without appreciable ownership..."¹⁷ In this modern form, the very practical significance of the Franciscan success can be observed. Power no longer attaches to property as in feudalism, but to the manager who controls property. This is the reality of the world; and it is corporate.

Berle targets the precise distinction that drove the Franciscan debates:

*Property, theoretically considered, has two sets of attributes. On the one hand it can be a medium for creation and production and development. On the other hand, it offers possibility for reception, enjoyment and consumption*¹⁸.

¹⁵Cf. Berle and Means [1967 (1932) pviii]. Berle and Means may be more often cited than read. For example Charles Handy, the 'Peter Drucker of Britain and Ireland' can write in the 1997 edition of the *Harvard Business Review*: "The idea of a corporation as the property of the current holders of its shares is confusing because it does not make clear where power lies. As, such the notion is an affront to natural justice because it gives inadequate recognition to the people who work in the corporation and who are increasingly its principal assets. To talk of owning other people, as shareholders implicitly do, might even be considered immoral. Moreover language of property and ownership is an insult to democracy." The raising in status he proposes for people, from that of property to that of asset, may betray a certain regret, who can tell. He does go on to say that the corporation should not be treated like a piece of property, but as a community. He may not be aware that it is legally already not a piece of property, and never has been. Nevertheless it is clear that neither Handy nor his likely audience has assimilated Berle and Means after more than 60 years.

¹⁶ Ibid. [pxii].

¹⁷ Ibid. [p66].

¹⁸ Berle [1955 p18]. It is of interest, however, that he places the origin of this phenomenon in the 16th century joint stock company and claims its rationale as 'size'.

He is noting the crucial difference between *dominium* and *usufructus* that is the source of the strangeness of the corporation. And he pinpoints the central place of the corporation in the realization of this distinction:

*The 20th century Corporation has proved to be the great instrumentality by which these two groups of property attributes have been separated from one another.*¹⁹

Berle and Means did not consider this development to be one among many aspects of the corporation but its primary characteristic.²⁰ They even, in a limited way, suggest the real source of the corporation in their identification of the Catholic Church as the ‘most perfect example’ of the species.²¹ The literal peculiarity of the corporation had been re-discovered, even though the vocabulary to describe it had been lost. In Means’s introduction to the 1964 edition of their work, he not only cites the numerous confirmations of the original research during the intervening 30 years but makes the fundamental intellectual point: “...the crucial implication of this corporate revolution was the extent to which it made obsolete the basic concepts underlying the body of traditional economic theory...”²² The corporation was indeed unlike any entity conceived in the discipline of economics.²³

And not only in economics: the sociological phenomenon of the corporation they documented was equally strange. They see clearly that corporate members, that is, managers, do exercise a very specific sort of ownership:

*Management may be defined as that body of men who, in law, have formally assumed the duties of experiencing dominion over the corporate business and assets.*²⁴

¹⁹ Ibid. [p19].

²⁰ Idem.

²¹ Ibid. [p82n].

²² Ibid. [pxxvi].

²³ Unlike Veblen, however, Means consider the corporation as [1991 pliv]: “the flower of our industrial organization.” Berle is uncommitted.

²⁴ Ibid. [p196].

For the first time in economic history, it was perceived that *dominium* was being exercised not by those of either landed or financial wealth, but by those who are (at least apparently) employed by the wealthy.²⁵ This was an historical reversal that cut to the heart of Veblen's polemic. Veblen's capitalist villains might still, for the moment, retain their *usufruct* but they were no longer in charge. But their status even regarding this residual right was also questionable because they were no longer the recognized beneficiaries of corporate success:

*Management stands in a fiduciary capacity towards the corporation ... The legal doctrine that the judgement of the directors must prevail as to the best interests of the enterprise... the interpretation of the board of directors as to what constitutes [those interests] being practically final.*²⁶

Fiduciary capacity towards the *corporation*? Surely mustn't this represent some sort of un-remarked political *coup* of the recent past? Or an inadvertent legislative error? But it could be neither since it appeared as the general rule regardless of the jurisdiction or nationality. It had become clear that the law regards management accountability as an 'internal' matter, which involves, under normal circumstances, only those who are members (managers) of the corporation, not the shareholders. And this responsibility extends even to the articulation of what the interests of the corporation might be, including the formulation of the corporate 'metric' upon which success is to be measured. That qualifying 'practically' in their remarks opens up the corporation to public scrutiny not to external direction. An apparently incomprehensible event has occurred: the owner, in any traditional sense in the non-corporate world, had vanished. This is not simply disconcerting, it is fundamentally incomprehensible that real property can be alienated without it passing to the explicit

²⁵ Cf. Burnham [1942] for a sociological analysis of this phenomenon. His central observation is the demise of the bourgeois capitalist economy and its consequences for the political system.

²⁶ Ibid. [pxii; also p197].

ownership of another. As far as I am aware there is no legal theory about why the two aspects of 'ownership' should be separated at all, much less an analysis of the legal precedents from which the denial of the ownership of real property by and to the shareholders should spring. Only two intellectual options seems to be available: either accept the theological distinction of *dominium* and *usufructus* implied by the *nahala/peculium* of St. Paul and the defence of the Franciscans by St. Bonaventure, or consider the corporation as an enormous legal irrationality.²⁷

3. Denial of Berle and Means's research leads to absurd efforts to avoid the theological source of the corporation.

Corporate members clearly – factually as well as legally – have *dominium*, managerial control over the property of the corporation. But who is entitled to the *usufructus*, the 'increase' which the corporation produces; and by whom is this increase to be determined? The acculturated response to this question is likely to be 'The shareholder'. This is what Veblen believes has actually been the case in his comparison between dynasties and the corporation, each claiming "an individual usufruct of their underlying populations....until by degrees [the corporation] has come to dominate the organization of industry and has taken over the usufruct of the community's workmanship."²⁸ How valid is Veblen's Lockean analogy?

²⁷ The distinction itself remains incomprehensible to many legal scholars, as if it is an aberration that must be ignored rather than explained in theory. Cf. Hansmann [1988]: "In theory, the rights to control and to residual earnings could be held by different persons. In practice, however, they are generally joined, since those with control would otherwise have little incentive to use their control to maximize the residual earnings." By this last term Hansmann means *usufructus*: "[that which] encompass[es] all net returns to the firm." The prejudicial character of the way he uses the term, however, is clear.

²⁸ Veblen [1924 p22,50].

Berle and Means had demonstrated categorically that the shareholder and the manager were divorced in the modern corporation both *de facto* and *de jure*. This left the *usus* of the corporation hanging in mid-air, as it were.²⁹ If managerial *dominium* were left uncontrolled by an indefinite beneficiary, what could such management be working *for*? Surely not for themselves. Historically the corporation had been controlled by the belief that man's earthly purposes demand an interpretation and justification through transcendent reality. But secular philosophy had rejected this presumption.³⁰ This issue was ignored by theorists for 40 years. Not until the 1970's did the first glimmerings of Agency Theory appear.³¹ This theory attempts to re-establish links of responsibility from corporate managers to corporate shareholders, or, latterly to any and all corporate 'stakeholders', those with any interest, financial or otherwise, in the corporation.³² However, such theory is fatally flawed for several fundamental reasons, any of which destroys not just the practicality but its theoretical rationality:³³

1. Agency, as a principle, does not reduce but creates moral hazard. The actual 'state of play' in the corporation is unqualifiedly asserted by Berle and Means: "The directors of the corporation are not the 'owners'; they are not the agents of the stockholders and are not obliged to follow their instructions."³⁴ Therefore Agency Theory cannot be an explanation of what is. Rather it is a normative proposal which must rest on its inherent rationality. Agency Theory is driven by the fear of 'moral hazard' in a corporate management with no firm measure of success. This is its first

²⁹ Reckitt noticed this very early. Cf. Gore [1922 p181].

³⁰ Cf. Peck in Reckitt [1945 p139].

³¹ The seminal text is Alchian, Armen A & Demsetz, Harold [1972].

³² See, for example, Charles Hill and Thomas Jones [1992].

³³ While full of imaginative ethical 'what-ifs', this field is not simply counter-factual but potentially destructive. As a matter of corporate principle as well as fact, Hurff [1950 p96f] summarizes the *status quo*: "...the management of large corporations is ultimately unaccountable to the stockholders."

³⁴ Berle and Means [pviii].

‘irrationality’. Berle and Means quip insightfully “First rate men will never be dummies; third rate men can never be prevented from being dummies.”³⁵ The ‘moral hazard’ of the corporation is not that managers are put in the path of temptation by their power of *usufructus* but that they are relieved of this responsibility. For example, in every major corporate fraud, the issue has never been a lack of a clear ‘metric’, but rather a very clear metric which has been ‘arbitraged’ by managers. Enron had a very precise method of calculation of its value – supplied by its bankers. This is also the case in the great trading scandals of recent years: traders in American, British and French banks have simply taken the logic of the metrics supplied to them by the external regulators or the internal ‘risk managers’ and carried them to their logical conclusions – at the expense of other measures which were ‘taken for granted’ by everyone except the managers.

2. *Agency does not recognize the character of the relations among members.* Berle and Means identify the distinctly perichoretic nature of the corporation. Noting that it is probably best to equate ‘managers’ with ‘members’ since statute law tends to follow common law in this area,³⁶ they continue:

*Evolution of the corporation...has developed a situation in which the dominant forces within the corporation are frequently not the directors or ordinary officers...but are individuals or controlling groups who have no necessary titular place in the corporate scheme.*³⁷

That is, the hierarchical structures of corporate organizations hide the real relations that constitute their existence. Agency disrupts these relations fatally by claiming some members to be agents (directors) and some not (employees).

³⁵ Berle and Means [p210].

³⁶ Ibid. [p197].

³⁷ Ibid. [p207].

3. *Agency presumes a patent counter-factual regarding the consistency and coherence of stakeholder interests.* There is no reason to believe that shareholders, or stakeholders more generally, share similar or even compatible interests. Financially speaking, for example, one set of shareholders may prefer high payouts of dividends, while others prefer that corporate management maintain funds internally in order to promote capital gains of the shares on the stock market. Bankers, as one of a class of stakeholders, have interests that often run counter to those of shareholders or other creditors, preferring perhaps to close a distressed business rather than allowing it to continue in operation in order to be able to salvage at least something of past lending. Shareholders may then be left with nothing. The idea that the role of corporate management is to somehow arbitrate among these various interests and to formulate a 'metric' that reflects an acceptable calculus among them is clearly ludicrous.³⁸ This situation is of course compounded by the consequences of the Arrow theorem discussed in the Appendix.

4. *Agency cannot meet its own axiological requirements.* It is simply not possible to know what the 'utility preferences' of investors or other stakeholders might be. The reason for this is straightforward: any 'model of value' formulated by economists or other social scientists is impossible to verify empirically. For example, the so-called Capital Asset Pricing Model (CAPM) purports to assess investor 'rationality' by noting the difference between what it pretends is the definitive statement of value against actual share prices. And indeed there are substantial differences. Do such results mean that investors are irrational? Certainly they mean that investors do not use CAPM in their calculations (or what is confounded with this: they simply get it

³⁸ This is precisely the sort of management duty proposed. See Bowie and Freeman [1992 p5f].

wrong). But far more likely, they mean that the CAPM does not take account of factors that are important to investors – either the same factors for all investors or individual factors for some, it makes no difference.

5. *Agency is likely to be illegal.* Shareholders, especially those that may dominate through the magnitude of their holdings, are expressly forbidden from engaging in activities that may not be in the corporate interests in at least some jurisdictions. The decision of the United States Supreme Court Justice Taft in 1893 in *Central Trust vs. Bridges*, 57 Fed. 753, 766 (USCCA 1893) is of crucial relevance: the separation of the corporation and the shareholders is such that it necessitated the ‘prevention of harm of undue influence by shareholders’. This became known as the ‘doctrine of the dominant stockholder’ and was used to prevent harm in equity to generations of minority shareholders. Such a doctrine is common in jurisdictions which experience significant corporate presence. Its effect of course is management independence. It is notable in this regard that when courts give recompense for wrongs done by a manager, relief is to the corporation not the shareholders. This is rationale if for no other reason than the *moral hazard* presented by the alternative when managers are also shareholders.

This leaves Agency Theory unable to make the link it would like between *dominium* and *usufructus*. Having been divorced during the Franciscan controversy of the 13th century, the marriage is long over and in no way ripe for reconciliation. Coleman correctly points out that the possibility of the acquisition of “excessive rights” by corporate managers results from the separation of what he terms the usage rights (the right to control the use of the property for the pursuit of a given purpose) and the

benefit rights (the right to benefit from the use of the property).³⁹ He argues that even where no illegal actions are undertaken, corporate resources tend to be diverted to those exercising usage rights at the expense of all other natural persons in society.⁴⁰ But the law separating the two is firmly embedded in corporate tradition, law and structure. As noted in Chapter 4, that law and tradition, and structure, while originally Roman, acquired a distinctive Christian context regarding the corporate relation itself.. It is only in this Christian context of identity, accountability and immunity that the separation in makes legal sense; Roman Law could not comprehend such a split – except in the highly specialized instances of the sacred property of the gods, and the familial *peculium*. The theological roots of the corporation explain the separation not as an issue to be resolved but as a fundamental aspect of the corporate relation.

4. Corporate usufruct is not an economic (socialist or capitalist) or legal, but rather a theological term.

The corporation is an institution that is not owned, categorically, by anyone.

Management *dominium* does not entitle corporate members to personal possession of corporate assets, and shareholder ‘rights’ are limited to those of voting (mainly a right to delegate to management-controlled ‘proxies’⁴¹) and equity in law regarding distributions and similar matters. To say the corporation is owned by no one is to state the case fairly but not completely because the corporation is, as close as one can come to it, the property of the divine *Paterfamilias, God the Father*. In demonstrating that

³⁹ Coleman, a sociologist, makes no mention of *dominium* or *usufructus*, suggesting that he too has re-discovered the Roman distinction as something new and disturbing about modern corporate law. Coleman also believes that shareholders own the corporation and are the beneficiaries of corporate activity, which is legally incorrect.

⁴⁰ Cf. Coleman [1982].

⁴¹ Berle and Means [p129].

the corporation is neither personal property nor the property of the state, the Berle and Means research points to this theological explanation of divine *usufructus*.

There is a sub-text to the Berle and Means results which is easy to miss but hard to ignore once it is seen. It is likely that Berle and Means chose not to make it more explicit for political reasons. Nevertheless the message is reasonably plain: many of the most important predictions of Marxist theory were precisely correct. Marx, for rather Augustinian reasons, had predicted the eventual triumph of the proletariat, those who did not live off capital- and had little of the property/wealth of society - over the capitalist class, those who controlled the productive resources of society through their rights of ownership. Means's economic analysis shows clearly that this is the actual trajectory that Western society had followed in the 80 or so years between Marx's predictions and the emergence of the corporation as the dominant social institution.

To be clear: Berle and Means do not confirm Marxist theory, just many of its expectations. Marx saw the factory but he was blind to the corporation. Nevertheless, just as he anticipated, the 'labourer' was raised to a commanding position in society. He had obtained control over the productive assets of society. This control had fallen to those who owned, as a class (namely the corporate managers), relatively few of those assets.⁴² This was achieved through "...massive collectivization..."⁴³

Simultaneously, the owners of corporate stockholdings represented but an

⁴² This is not to say that corporate managers are not wealthy, only that their wealth does not generally allow them to control the corporate bodies of which they are members. The focus of this essay on the so-called 'public company'. In principle there is no difference in speaking of the 'private' or 'closely held' corporation, just more confusing.

⁴³ Berle and Means [p_{xxv}].

insignificant number of corporate managers in their own companies.⁴⁴ Just as important, these owners owned nothing like the productive property of previous generations of capitalists, but rather very specific and very restricted claims that are entirely divorced from productive activity; these claims are "...a mere symbol of ownership..."⁴⁵. Further financial research beginning in the 1950's, showed that this arrangement was *rational* from an investor's point of view: investment, to correctly balance risk and reward, must be diversified, that is, spread among as many alternatives as possible, and therefore with as little control as possible over the corporations themselves.⁴⁶

Productive capital had in fact become voluntarily socialized (alienated from individuals), directly and indirectly.⁴⁷ "Property devoted to production is *de facto* no longer considered personal."⁴⁸ In some sense, all corporate property had in fact become 'public'. Berle's parallel legal analysis showed that, in other than the most trivial cases, there was not (nor is there now) any reliable way in which these 'corporate owners' can influence either the actions or the succession of corporate

⁴⁴ Ibid. [px]: "...in crude summation most 'owners' do not manage, most managers (corporate administrators) do not own..."

⁴⁵ Ibid. [p65].

⁴⁶ It should be noted that the Anglican theologian Maurice Reckitt had recognized precisely the same phenomenon as early as 1921. Cf. Gore [1922 p181].

⁴⁷ Not just in its use but in its aggregation as well. Corporations are largely 'self-funding' in normal operations (emancipated from dependence upon individual savings and 'capital' markets). The so-called 'capital markets' are dominated not by the need for new amounts of capital but by trading that has nothing to do with the financial needs of corporations. Berle and Means [pxxi]: "Stock markets are not places of investment but liquidity. They no longer allocate capital...Both wealth and wealth-holders are divorced from the productive – that is, the commercial – process..." Shareholder's take no risk that is associated with the enterprise in which they own shares. They do take the risk of misestimating the future value of shares. The two risks are not correlated much less the same. This is the basis for Arbitrage Pricing Theory noted above: "Curious as it may seem, the fact appears to be that liquid property, at least under the corporate system, obtains a set of values in exchange, represented by market prices, which are not immediately dependent upon, or at least only obliquely connected with, the underlying values of the properties themselves." Berle and Means [p250]. Finally: "Justification of stockholder *inheritance* must be sought outside of economic reasoning." Ibid. [pxxiii]. This could well be a cultural reference to the *peculium* given Berle's background.

⁴⁸ Ibid. [pxvii].

managers. It was unclear, as well, even *who* should be recognised as ‘owners’: “...the American state is an [unrecognized] investor in practically every substantial enterprise...”⁴⁹ The proletariat was indeed the *matrix* of the new man, who had emancipated himself and who has moved outside existing society.⁵⁰ Or could it be a manifestation of the Body of Christ attracting all humanity to Himself? In terms of sheer surprise and unpredictability of this series of events, this qualifies as at least mysterious.

The corporation also had become a tool of social policy. On the one hand, corporate members were subject to an increasing body of law imposing on individuals a measure of loyalty to the central enterprise. On the other hand, laws enforcing racial integration and prohibiting a range of other discriminatory practice, and promoting general social policy used the corporation as their ‘vehicle’ for enforcement.

Companies over a certain size and those involved with government contracts were the convenient target of legislation. Similarly, the corporation became the focus of anti-competitive practice by governments who, by tradition and law, could not compel individuals to restrict their material ambitions without serious constitutional problems. Submission of individual interests to that of the corporation was being progressively institutionalised.

⁴⁹ Ibid. [pxvi]. The importance of government spending in defence and various sorts of research & development is of course widely recognized. President Eisenhower’s concern about the ‘military-industrial complex’ and J. K. Galbraith’s *The New Industrial State* are but two indications of this which have failed to impress hard-line economists like Milton Friedman that ‘ownership’ has a quite different meaning in the corporate than in the feudal or mercantilist world. The ambiguity of corporate ownership is clear in many other ways as well. For example in Germany, shareholders act more like bondholders elsewhere in demanding a steady stream of predictable dividends; bondholders, on the other hand are frequently respond positively to requests for rearranging credit conditions, thus reversing the typical positions. Many jurisdictions in Europe have provisions for election of directors by bondholders and employees not just by shareholders.

⁵⁰ Cf. Lowith [1949 p37].

Corporate managers had become the new ruling class.⁵¹ The proletariat had indeed succeeded in taking dominion over capital, albeit in a manner completely unexpected by Marx, who did not anticipate the profound institutional implications of the corporation. Indeed the obvious meaning of the Berle and Means conclusions: "...the state considers that it can control the framework and basis of production and commerce..."⁵² is only gingerly alluded to in the final pages: "...the corporate development represents a far greater approach towards communist modalities than appears anywhere else in our system."⁵³ Their qualifying remarks are spot on: "The communist thinks of the community in terms of a state; the corporate director in terms of an enterprise."⁵⁴ The difference is purely semantic. The reality is often congruent.⁵⁵

Nevertheless, the dominance of the corporation does not equate to the triumph of Marxist socialism. Marx had no thought of the theological distinction, or its power. The state may exhibit aspects of *dominium* over the corporation but it does not have any claim to its *usus*. The state does not own the assets of production as Marx had envisioned; it merely has 'residual' rights to elect directors. The corporation remains property that cannot be bought or sold. It is simply *non-economic* and therefore outside of Marxist categories. This is demonstrable in those state corporations which are entirely controlled by government agencies.⁵⁶ In recent times many of these have been 'privatized', that is open to widespread public ownership. In the process, no

⁵¹ Cf. Ells and Walton [1961 p33]. Cf. Burnham [1941]. Cf. Fenn [1959].

⁵² Berle and Means [pxix].

⁵³ Idem.

⁵⁴ Ibid. [p244].

⁵⁵ Cf. Drucker [1946] cited in Chapter 1, n.26 & n.61. At precisely the same time that Friedrich von Hayek's *The Fatal Conceit* was triumphalistically extolling the virtues of corporate capitalism on the grounds of 'freedom', James Burnham's *The Managerial Revolution*, was rather more quietly noting that "Those nations ... which have advanced furthest toward the managerial social structure are...*totalitarian* dictatorships."

⁵⁶ The *Tennessee Valley Authority* and the *New York Port Authority* are salient examples of state corporations at the time of Berle and Means first publication.

transfer of *usufructus* takes place. The new shareholders have exactly the same (residual and very limited) rights of *dominium* that the old ones had.

Therefore the corporation is neither personal nor institutional property, just as the early Franciscans had intended. Their debates after Bonaventure were in fact quite rationally directed into the legal definition of *usus* as the content of the vow of poverty. Each friar, just as each corporate manager, must ultimately make his own interpretation of the 'rule' in very concrete circumstances. This interpretation is free but always subject to community scrutiny. Theologically, in this interpretation, the interpreter is giving *himself* in the use or consumption of property. Ultimately, at institutional level, the theological corporate *usufructus* was hinted at by St. Paul: it is the corporation itself, the body that will be returned to the Father by the Son. By this is clearly meant the relations that have been established, not in some structural 'fixedness' but in living actuality, the activity of mutual submission, that is the corporation. This, I suggest, is the import of the Levitical priesthood, the early Christian brotherhood, the mendicant ambition, and the Puritan experiment in New England. Just as the relation between Father and Son in the Eternal Covenant was given to mankind, so mankind was to offer it back, through Christ, in their own relations. The 'objective', in other words was corporate union, but not for its own sake. Rather it was for the sake of union with God. Such union requires human acceptance of the divine claim on the *usus* of human effort, not in the sense of an oblation of resources, but precisely in an oblation, that is to say submission, of self in corporate decision.

5. The central and unavoidable issue of Corporate Finance is generated by the theological history of the corporation.

Berle and Means's findings demonstrate at least as well as the contemporaneous existentialist philosophy how the Enlightenment Project had failed, at least in terms of economic thought: "This dissolution of the atom of property destroys the very foundation on which the economic order of the past three centuries has rested."⁵⁷ The corporation not the market had replaced feudalism. In this Berle and Means concur completely with Veblen. But they are also aware, in a way that perhaps Veblen is not, of the philosophical implications of their work when they add: "...the crucial implication of this corporate revolution was the extent to which it made obsolete the basic concepts underlying the body of traditional economic theory..."⁵⁸ Veblen viewed economic theory as a rationalization of social evil, Berle and Means as simply wrong and corrigible. Nevertheless all three identify the focus for necessary theoretical change: the discipline of corporation (or corporate) finance, which Berle and Means define as "the relations between the corporation as managed by the group in control, and those who hold participations in it..."⁵⁹ Veblen is less precise but perhaps more familiar in his view of corporate finance as the techniques of evaluation that are typical of corporate finance directors and which in a sense structurally establish these same relations.⁶⁰ Corporate finance as the epicentre of the tectonic movements had been well-observed even within theology. By the 1930's Maurice

⁵⁷ Berle and Means [p8].

⁵⁸ Ibid. [pxxvi].

⁵⁹ Berle and Means thereby make a distinction between internal and external which I do not consider necessary. The issue for the corporation as a whole is the same for any of its parts. Nevertheless I will restrict my discussion to the corporation as a whole in this essay.

⁶⁰ Veblen's source for corporate finance technique is Meade [1910], an old but not irrelevant text. It has been replaced by many since, but the focus on precise calculation as well as 'impersonality' not to say inhumanity still prevails.

Reckitt, theological academic and scion of a commercial family, could state with confidence something that had eluded many others: “Modern civilization is in essence financial rather than industrial.”⁶¹ Reckitt’s colleague, David Peck, saw the implication of this in practical terms as the challenge : “...to force finance back into its true role...the lever of all reconstruction.”⁶² Peck also recognized that the issue is essentially theological:

*[In secularism, man] compels himself to search for an end amidst means. He has no possible criterion of judgment, for no such end as man can thus seek is by its nature an end.*⁶³

The Berle and Means research in fact gave support to these theological observations by showing how a space had opened up intellectually for consideration of the divine in human judgment. The nucleus of the atomic disintegration that has taken place in economic theory, as Berle and Means see it, is the central anthropological assumption of greed as a (gnostic) principle rather than as the aberration of sin:

*Stockholders to whom the profits of the corporation go, cannot be motivated by those profits to a more efficient use of the property, since they have surrendered all disposition of it to those who control the enterprise. The explosion of the atom of property destroys the basis of the old assumption that the quest for profits will spur the owner of industrial property to its effective use. It consequently challenges the fundamental economic principle of individual initiative in industrial enterprise. It raises for re-examination the question of the motive force back of industry, and the ends for which the modern corporation can or will be run.*⁶⁴

This is a remarkable conclusion. The corporation is not just a respite from the impersonal demands of the market; it is an institution in which the anthropological presumptions of the market – in general, self-seeking advantage – do not have a place.

⁶¹ Reckitt [1934 p2]. He had recognized this point as early as 1921. Cf. Gore [1922 p167]. Cf. Reckitt [1933 p46] for a more traditional formulation of the point. Reckitt [1933 p66] also recognized that the rise of the corporation implied an entirely new relationship in society. Cf. Demant [1936 p241et seq.].

⁶² Peck in Reckitt [1945 p140].

⁶³ Ibid. [p139].

⁶⁴ Berle and Means [p139].

This is not to say that there cannot be the same motivations as in the market, only that such presumptions are not involved in a theory of the corporation. The corporation is precisely the *locus* of the choice and examination of motivation, the place where there is no compulsion about the criterion of choice to be used but which demands such a criterion and demands that it be subject to public scrutiny.⁶⁵

What then is the replacement corporate objective for ‘profit’ as defined either by the economist or the accountant or the mystical referent of the ‘shareholder’ as arbiter of value? This is what Goodchild recognizes as a “crisis of representation”.⁶⁶ Ells notes without apparent irony that “Profits are defined in many different ways.”⁶⁷ And so is every other apparently ‘neutral’ term used to describe the result of corporate activity: capital, cost, wealth, revenue etc. Economics simply turns every end into a means toward a further end. Financial accounting on the other hand obscures focus on what matters, the metric, by fixing attention on what is counted on the metric. But no metric is categorically necessary for corporate use, nor does any one span the range of possible corporate metrics. Any fixed metric is not just wrong, it is unjust, and un-corporate.⁶⁸ It limits human freedom to be sure; but more crucially it limits human attention so that the scope of freedom is diminished to a mathematical point. Fixed metrics are deterministic, reducing corporate participation to efficiency and expansion and their associated techniques. Shareholders, even if they had any legal standing to determine the metric (which they do not have), can have any number of contrary or

⁶⁵ This is why French [1984] is correct in pointing out that the corporation is the institution which formulates the ‘metric’ of society. There is no other institution in which this takes place. And there is no reason that it cannot be the “supple, imaginative body that is capable of being affected by and indicating the potency of forces of evaluation” in Goodchild [2007 p196].

⁶⁶ Goodchild [2007 p63]. This crisis is implicitly recognized as well by Demant [1936 p241,242] when he states that “Finance is trade in the symbols of trading...[and] there is a fundamental falsity in the system of effective money symbols which are supposed to represent real wealth.”

⁶⁷ Ells and Walton [1961 p325].

⁶⁸ Cf. Goodchild [2007 p196].

contradictory views about their interests that are constantly changing in light of their own experiences. The basic principle that is ignored by economics and veiled in accounting is this: *Value is its own representation*⁶⁹. There is nothing that underlies value except the way it is articulated. There is no external point of reference to which a metric of value can be compared in the same way as points can be compared on that metric. This is the reason for the tremendous power of financial accounting systems and the tyranny of double-entry bookkeeping. These systems are simply the most articulate value-representation available. They overpower alternatives with their precision and internal rationality. Nevertheless they are ultimately arbitrary, not only in their mechanics (for example in the distinction between cost and investment) but in their choice of metric (accounting profit and its variants, discounting techniques etc.), and in the cultic use of financial theory.⁷⁰ It is the institution of financial accounting therefore which is the kernel of corporate ethics. Goodchild is correct therefore when he claims that “A revaluation of all values may begin with a modification of the practice of accounting.”⁷¹ And that this is the necessary condition for “...orienting economic behaviour towards that which is taken as mattering rather than allowing economic behaviour to determine what matters.”⁷²

⁶⁹ It is in this claim that I differ from Goodchild who believes that “value should never be confused with a property, measure or object.” Like Goodchild I do consider value as relational. But as such it must be perceived and expressed socially. The corporation demands ‘measure’ as a particular mode of expression of value. I also consider that value is objective in the sense that it is part of a divine order. However the expression of that divine order is always via language and therefore relational and consists in the communication itself. There is nothing behind or beyond this gift of value-communication except the inexpressibly divine. It is not the case therefore that “To liberate true value from accounting it is necessary to assume that true value resists accounting.”[p185] Rather it is necessary to assume that any representation of value resists modification in an almost liturgical way. Accounting is a symptom not a cause of the problem. It is true that “value can never be mastered” [p185], just as it is true that God cannot be used as the ultimate ‘object’ of value.

⁷⁰ Cf. Goodchild [2007 p57, 73, 178, 196] who correctly identifies discounting in financial theory, the symbolization of time’ as comparable to religious sacrifice.

⁷¹ Ibid. [p183].

⁷² Ibid. [p184]

Even conscious awareness of value is mediated by some symbolic expression.⁷³ The articulation of value is a matter of pure creative choice, not arbitrary choice to be sure, but certainly of deliberate choice, decision. And this is an ethical (and theological) issue at the very centre of corporate activity. The crisis is eschatological, that is, it has to do with the intrinsically valuable as well as the ultimately valuable. It is a crisis of the whole because "...sentiment toward the whole is the only ultimate means of measuring value."⁷⁴ This is why Goodchild is correct to note that "...financial value is essentially religious" since it must take into consideration the criteria of true wealth.⁷⁵

Even Meade, the unashamed servant of business enterprise, recognizes that this choice requires a competence quite distinct from the rapacious skills of his masters: "The subject of corporate finance is not concerned with the methods by which profits are made."⁷⁶ Finance is either the source or the inhibition of all other freedoms within the corporation. 'What constitutes the 'good' corporation or 'good' corporate management?' is the question to be answered.⁷⁷ Means is very explicit about this: "...can criteria for good performance be developed to guide corporate management and inducements be provided to encourage the good?" It is not the strategic programme, or particular corporate 'policies', or the cleverness of organizational tactics, that the manager is essentially responsible for, nor indeed any of the particular 'methods' by which commercial and industrial and charitable activities are pursued. The corporation through the 'bracketing' of, the indeterminateness of the claim on,

⁷³ Cf. *ibid.* [p92].

⁷⁴ Weaver [1984 (1948) p75]

⁷⁵ *Ibid.* [p12].

⁷⁶ Meade [1910 p169].

⁷⁷ In this Alasdair MacIntyre is right in his criticism of 'managerialism': "Good is what passes for good" and no more.

usus creates a clear duty of radical accountability, a very specific accountability for the criterion of action, the motive force of the corporation. Hence corporate finance is the only management function which cannot be transferred elsewhere without destroying the essential corporate relation. The skills involved therefore are not technical but spiritual: mainly humility, reverence and prayerfulness.

There are innumerable potential claimants to the *usufructus* of the corporation.⁷⁸

These potential claimants do not simply arrange themselves, as in English common law, into the categories of legal vs. equitable ownership. This is a distinction deriving from Trust law wherein the trust deed is highly restrictive as to purpose and clearly identifies beneficial ownership in a manner which is not applicable to the corporation – either practically or theologically. Thirty years after Berle and Means research, Ells and Walton confirm their fundamental conclusion:

The corporate person acts through its board of directors as a collective body, and it is they alone who may determine how the property [of the corporation] is used, how earnings are calculated and how net earnings are distributed."⁷⁹

This is radical accountability. It can only be understood theologically because it is at root a theological distinction. This is why Dewing and the Agency theorists are so fundamentally misleading.⁸⁰ It is the *construction* of the metric that is critical and yet to some degree imponderable, not its enforcement. There *is* neither a 'standard' metric nor a 'fool-proof' technique for arriving at a metric.⁸¹ The law cannot give a definite purpose on which to build such a metric; neither can a simple nodding of heads among corporate managers.

⁷⁸ Cf. Ells and Walton [1961 p170ff].

⁷⁹ Ells and Walton [1961 p164].

⁸⁰ Dewing [1919]. See also Appendix A.

⁸¹ Cf. Goodchild [2007 p90, 168, 169, 174].

Means concludes in his 1962 edition of *The Modern Corporation* (and therefore without the legal balance provided by Berle who had died):

An answer to [the corporate finance] question cannot be found in law. It must be found in the economic and social background of law.

This conclusion is crucial, and it is one that the law, that is the legal system, has successfully adhered to. To date there has been no positive imposition of a legal ‘corporate standard’ of performance or evaluation by legislation or court decision.⁸²

But Means goes on to note, with no trace of irony apparent, that “...no criterion of good corporate performance has yet been worked out...”⁸³ This after approximately 40 years of investigating ‘the economic and social background of the law.’ His use of the singular ‘criterion’ is indicative of the presumption he implicitly adopts: that there is a unique and analytical answer to the corporate finance question. And that this answer will be forthcoming from the discipline of economics. How reasonable is this assumption, which is also shared by the broad spectrum of financial economists?

Means’s pregnant ‘yet’ doesn’t fully respect the amount of effort and time that has already been spent in trying to crack the corporate finance question. Plato was of the opinion that a ‘standard’ measure of the good is not possible.⁸⁴ Kant’s dictum was that the only measure of the good was a good will. Nevertheless, one has to accept the basic premise of rational discourse: there is no rational criterion by which to determine or identify the criterion of rationality. This is the fundamental problem

⁸² There have been attempts to make such impositions, however. Cf. Rappaport [1986].

⁸³ Ibid. [pxxxv]. The emphasis is mine. Progress in this discipline is seen by Berle and Means in their first edition as more an advance in corporate morality than in profitability or personal development. However, they clearly believe that there is a rational solution to this issue although they do not point to a specific method for its resolution. In the 1962 edition, Means (Berle is by then deceased) makes a notably more rationalistic case. The content is moral; the tone is that of an engineer talking to a metallurgist.

⁸⁴ 7th Letter, 341 c5; and Plato’s view is that we can get to the good only through frequent and informal discussion. He recognized that the good always refers to a particular subject in particular circumstances. Part of these ‘circumstances’ is in fact disagreement between different interests or points of view.

shared by all attempts to formulate singular and uniform measures of corporate value. Like the ‘missing link’ of evolution, we wouldn’t know such a criterion even if we had it. There are literally dozens of conflicting criteria proposed by economists, management scientists, sociologists, and ambitious corporate consultants. Each ‘works’ to the extent that if they are measured and if people are paid or otherwise encouraged to promote them, they will advance along the metric specified. But why is the metric chosen the correct one? Can we expect it to remain stable?

Means is suggesting that the right choice can be arrived at through expert analysis and opinion arrived at within the intellectual discipline of ‘corporate finance’. That is, that these experts in corporate finance are the prophets of the corporation. The very relevant history of the Franciscan controversy, however, suggests that this will not be the case: *Qui custodes custodiet?* As I suggested in Chapter 1, each discipline has its own, and its own ultimately unjustifiable, criterion for constructing the criterion of corporate choice. None can be considered definitive; therefore none advances the solution to the corporate finance issue. This issue is a permanent feature of corporate existence. Every answer to this issue is simultaneously wrong (in the sense that it may be superseded⁸⁵) and yet necessary (because without it action cannot take place). The only thing that justifies this inevitable error is the ‘form’ of the corporate association itself, the mutual submission that generates the continuous search for its replacement. This is the eschatological end of the corporation, the very concrete manner in which the corporation ‘transcends’ the individual, not because the corporation is in some

⁸⁵I prefer this formulation to that of Goodchild who [2007 p174] contends that “What truly matters always exceeds representation.” This proposition seems true enough in the sense that what truly matters is God who cannot be adequately represented by definition. This is but another way of expressing Kierkegaard’s recognition that “Before God man is always in the wrong.” However the possibility of interpreting Goodchild in a Gnostic manner such that measurement itself becomes an object of suspicion is real.

manner superior to the individual but because it brings the corporate member to new beginnings which he could not reach by his own power. Solovyof suggests a criterion which conforms to the eschatological character of the corporation:

*...the manner in which the Good, while remaining true to itself, and consequently justifying itself, grows in completeness and definiteness as the conditions of the historical and natural environment become more complex.*⁸⁶

Not only does this criterion provide a practical guide for corporate finance, it correlates well with the epistemological/axiological corporate history of Judaism and Christianity. Completeness is the way to find the best metric available; and this metric will also be the most definite. But as Goodchild notes: "...true valuation is necessarily local, partial and responsive, attending to what impacts most urgently upon it."⁸⁷ This means not only that the metric is in a constant state of flux, it is also in a constant process of integration with others within the corporate relation.

I do not intend to pursue here the far-reaching implications that this state of affairs has for both the management and the regulation of the corporation. I believe it is sufficient to point out that the radical accountability of the corporate manager is the central and unavoidable ethical challenge of the corporation. This is not a challenge posed from, as it were, the outside (from, for example, academics, social critics, or regulators), but is rather inherent in the corporation itself. Moreover, it is a challenge that has no 'best practice', that is to say entirely defensible, response. The manager cannot rely on technique or procedure to fulfil her obligations. Vulnerability, *personal* risk, cannot be reduced if the obligation is to be met. That this risk is substantial is self-evident. It is at least understandable therefore why so many corporate managers

⁸⁶ Solovyof [1918 (1898)]. Cf. Reckitt [1934 p2] for a more poetic but equivalent statement as "capacity to reflect the radiance of God".

⁸⁷ Goodchild [2007 p186].

attempt to avoid the corporate obligation, and perhaps even why so many are *allowed* by their corporate superiors to avoid it. The last word belongs to Ells and Walton in their recognition of what's missing in the modern corporation.: "For those who would manage the corporation, mere capability is not enough."⁸⁸

⁸⁸ Ells and Walton [1961 pv].

Chapter 8: Summary and Conclusions

We rejoice in our abandon and are never so full of the sense of accomplishment as when we have struck some bulwark of our culture a deadly blow.

Richard M. Weaver
Ideas Have Consequences

The modern corporation is the product of a religious tradition. According to that tradition, God gave mankind dominion over all over creation. But He also created a Covenant between Himself and His creation, an inexplicable sharing of freedom and responsibility, within which this dominion was to be exercised. The use to which man's dominion is to be put is clear within the Covenant: the furtherance of God's glory in the disposition of the resources of creation. But even in the clarity of the covenantal demands, this disposition is voluntary, and the precise criterion of action is left as a matter of choice not direction. The corporation, as a mode of association, is a memorial and an instance of that Covenant: perhaps a *vestigium trinitatis in creatura*, that is, a decaying remnant of archaic religious practice, or possibly a *vestigium creaturae in trinitate*, a scrap of participatory involvement in deity itself. The corporation, like the rest of creation, has been compromised by the mysterious dynamics of sin. This shows up in the corporation as the divorce of legal form and technics from theological context and substance. Nevertheless, the existence of the corporation announces both the divine presence and the mystery of that presence in human terms as challenges to the conventions of human society. It is a unique form of cooperative effort which reveals the reasons for its existence as measures of value

toward which action is to be oriented. It allows, in fact demands, the continuous encounter with the good. It is 'unnatural' in a number of ways, among which are its independent identity, its radical requirements for participation, its ambiguous proprietary status and its uniquely flexible structural and functional character. On the other hand, the corporation is revealed as the 'natural' relationship of mutual service in which human beings are intended to exist.¹

This narrative is supported by the findings of the research presented in this essay which provide:

- 1) A coherent distinction between the corporate and other forms of association (an identity created with but independent of the identity of its members);
- 2) An intelligible history and rationale for the unusual corporate ownership structure (the distinction *dominium/usufructus* including its historical progression from the *nahala, peculium*, and subsistent relation);
- 3) A credible identification of the unique social role of the corporation, its place in the 'ontic order' (as a 'vehicle' for unity in the discovery of the good)
- 4) An understanding of the unique relational dynamics of the corporation, its 'ethical ecology' (the interplay of radical accountability and immunity) which have no parallels in any other social institution.
- 5) An identification of the essential 'identity-maintaining' obligation of corporate membership: submission as service without servility (a spiritual activity exhibited in behaviour).

¹ Cf. Reckitt [1933 p163].

At least items (2), and (4) and perhaps (1) and (5)² are outside the reach of any other theory of the corporation of which I am aware. (3) covers the realm of current disciplinary theories which become special cases within the ontological theory presented here.

Is this narrative and associated theory of the corporation, its history, existence, and social impact, in other words its good, relevant in the contemporary debate about the institution and its future?

1. The most prominent contemporary alternative to the ontological theory of the corporation presented in this essay is that of the cultural accident theory which argues for the institutional elimination of the corporation. While this argument is actually an indictment of modern culture rather than the corporate institution, the challenge of this alternative theory stands.

Corporate critics like Chomsky [1999], Korten [2001], Bakan [2004], and Rushkoff [2009] are among many recent thinkers³ who consider the corporation a social monstrosity arrived at partially by serendipity and partially by evil intent. They consider the corporation a sociological blunder, something that entered the henhouse of Western civilization under a loose plank while the occupants slept. It is, they believe, the root cause of most of the ethical, political, environmental and economic ills in the world. Their shared aim is to outlaw or otherwise disempower the

² The qualification must be made because of the tyrannical claim by some jurists that the law and the only the law decides what constitutes the corporation and what makes it different from other forms of association. That claim is historically refutable but nevertheless made.

³ I do not consider here those whose primary target is corporate capitalism rather than the corporation itself. This larger group of critics includes, most notably, Monbiot [2000], Hertz [2001], and Klein [2007] and Reich [2007].

institution. Their common claim, simply put, is that since the corporation is implicated in almost all the dis-ease on the planet, it is the root cause of that dis-ease and should be prohibited in a civilized society. They all point specifically, in differential measure, to the characteristics which I have identified as corporate identity, immunity and radical accountability as those which are most harmful. Treatment of the corporation as a person is aberrant, they claim for example, because it places property above persons. Provision of immunity to corporate members is socially irresponsible because it promotes recklessness with the world's resources and sociopathic behaviour among corporate executives. Corporate accountability to the corporation itself is an outrageous and unwarranted liberty since the actions of the corporation affect many outside the corporation with opposing but valid interests. These thinkers also point to the consistent and persistent failure to regulate the corporation effectively, over the last 200 years in particular, as evidence of its impenetrably aberrant character.

Two points about this position are noteworthy. First, despite its relative novelty over the last half-century, during which the corporation was promoted falsely as one of the most significant pieces of modern instrumental technology available to mankind, the cultural accident theory is the historically dominant view. It is difficult to find anyone writing serious analysis before mid-20th century,⁴ apart from the 19th century Hegelians, who considers it a positive social force, even among those who ardently defend classic liberal politics or political economics of almost any stripe. Thomas Hobbes, for example, considered corporations to be the 'entrails of the body politic'.

⁴ The intellectual rehabilitation of the corporation is quite reasonably attributed to Drucker [1946], a detailed analysis of what made General Motors corporate. This has never been out of print since its initial publication and initiated a distinctive genre of corporate self-help manuals that continues to shape corporate self-image.

Adam Smith found the corporation a reprehensible institution and saw no future for it except in a few 'monopoly' situations. John Stuart Mill was intensely suspicious of its motives and methods. Popular sentiment, unusually perhaps, fell in line with that of the *intelligentsia*. In the United States, as the corporation began to flourish during the Jacksonian period of the 1820's and 30's, popular opposition ran consistently high, if only ineffectually so since it did not halt institutional advance. As the corporation became dominant in the latter half of the 19th century, a central concern in the US was that it would prove a stepping stone to socialism. In Britain W.S. Gilbert and Arthur Sullivan lampooned the Victorian idea of progress embodied in the corporation as 'Utopia, Limited.' But it is likely that there is no more fulsome expression of popular distaste than that in a British pamphlet of the mid-18th century:

*How destructive have Companies been to this Nation. I should think the bare mentioning of the very Word would be sufficient to deter us from executing another upon the same principle.*⁵

With such overwhelming opposition it is not surprising that the corporation has been an object of public ire. The British Parliament anathematized it for most of the 18th Century because of its patent usefulness in fraud, notably the so-called South Sea Bubble. Yet it continued to exist and prosper outside formal legal sanction.⁶ For most of the 19th century the prevailing legal doctrine in the US was that of Chief Justice Marshall who mistrusted the institution and wanted it restricted by governmental action. Yet the individual states were in a virtual competition to provide the most accommodating environment for corporate existence throughout the century. At least four American Presidents – Lincoln, Hayes, Theodore Roosevelt and Eisenhower (all Republicans) – distrusted it as an anti-democratic institution and regretted its growth.

⁵ British Museum Collection [1750].

⁶ Not until the reforms of the 1830's was incorporation resumed on any scale but one of the central parts of reform was the acknowledgement of the corporations that had been created *de facto* during the previous century,

Yet despite this persistent negative social attitude toward the corporation, the institution continued to grow in size, scope and influence without check, especially during Republican administrations. This suggests that whatever the social ills which are perpetrated through the corporation, mere disapproval, distaste, or disgust, even on a large scale, is insufficient to seriously dislodge it from its dominant position. Some sort of coherent theory of the case must provide a rationale to support naked sentiment.

This then prompts the second point about the cultural accident theory: it does not provide such a rationale. The simple correlation between corporate presence and material evil does not imply the conclusion that the institution is the cause of the very real evil at issue. The institution is pervasive in modern society and could not be but involved in the increase in human misery wherever it occurs. Certainly the corporation does not solve any social problem in the sense that the mere creation of a corporate entity could prevent horrid actions. But neither does it promote them in its genuine form. Criminal-minded corporate executives are just as likely to be criminal minded partners or sole entrepreneurs if the corporation were abolished. This argument of, as it were, guilt by association, is the same as that contained in attacks against the Church (and religion in general) in light of the patent evil perpetrated historically in the name of Christianity or Judaism or Islam. At best such argument is guilty of cultural illiteracy. At worst it is little more than an expression of adolescent rage at the injustice and hate expressed by humanity against itself and the rest of creation. Humanity is guilty; and it is the inescapable guilt of humanity, which cannot be relieved by good intentions, that is a central message of the Arrow Theorem which I have alluded to throughout this essay. That guilt cannot be mitigated by the mere

destruction of the human institutions through which evil is perpetrated. As the psalmist says: none would survive.⁷ What is the alternative design? How could society cope with human evil in superior ways? The cultural accident theory has no answers.

Nevertheless there is an underlying merit to the cultural accident theory. The corporation is, as emphasized in Chapter 1, a social entity which exists in a larger society. Without social approbation among those it affects not just those who are its members, the subsistent relation among its members is compromised. This relation is not the 'environment' or the 'circumstances' of the corporation; it is the corporation itself. The Church, as corporation, accepted the less than ideal consequences of the edict of Milan because they didn't damage the relationship and still permitted expansion into society. The New England Confederation, as corporation, lost its corporate status (even in its ecclesial aspects) because of the re-exertion of political power from an unexpected direction. If the modern corporation is not reformed so that it meets at least minimal standards of natural justice, it may as well be eliminated. And the cultural accidentalists are undoubtedly correct: centuries of corporate legislation and regulation have not produced an appreciable improvement in corporate-related behaviour. The South Sea Bubble of 1720, in fact, was but a ripple compared with the economic and social *tsunami* of the international mortgage market in 2008. The sheer concentration of resources in the largest corporate institutions makes them a danger to society because of the systematic risk of failure they pose.

⁷ Ps 130: 3.

But the cultural accident theorists have not grasped the nettle in their own polemical garden. The corporation is born of a particular, and particularly religious, culture. That culture formed a context in which the corporation was a coherent component. That culture has now evolved such that it, like the *Deutsche Volk* of Gierke, considers its current state to be one of socio-biological development from which the matrix theology can be excised beneficially. Its *Geist*, then, may be considered as purely secular, a material product of history rather than a spiritual force from outside itself. The corporation in this evolved culture is, like many other contemporary institutions, increasingly out of place, cut off from the source of its own existence, and patently troublesome. To the extent that the world has accepted the 19th century account of the Covenant of Culture promoted by Idealist philosophers and their followers, it may be expected that the corporation will continue its apparently aberrant behaviour. But the question of the corporation is equally the question of the culture. There is indeed a mismatch between the theologically conceived institution and the secular society in which it operates. But which is to give way? My suggestion is that if the theological foundations of the modern corporation cannot be accepted within modern society, it is likely that the institution is unsalvageable. There are three presumptions in particular which are essential to the existence of the corporation but which may not be acceptable in today's society: the theological nature of personal identity, Judaeo-Christian anthropology, and the reality of the Spirit.

- 1. The corporation presumes that personal identity is not a possession of the individual but an essential part of the corporate relationship which cannot be managed by directive or manipulated for personal fulfilment.***

John Locke's categorical claim to self ownership is not compatible with the existence of the corporation, either ontologically or pragmatically, in modern society. The individual, as covenantal relationship, may have *dominium* over his body but he is responsible to others, ultimately to the divine, for its *usufructus*. This is an essential determinant of individual identity. Personal identity is formed simultaneously with corporate identity in the manner of the subsistent relation. To the extent that human beings consider themselves as Lockean individuals able to merely 'contract' their self-possession, no identity of this kind, personal or corporate, can be created.

Pragmatically, Lockean individualism implies the exploitation of the corporate identity (name) for purely personal gain. The only relationships that must be 'maintained' in this sort of enterprise are contractual. There is, and can be, no contribution to the whole because of the consequences of Arrow Impossibility. The corporate name is merely nominal in this philosophy; it has no reality and only residual psychological symbolism. It is, in short, a brand identity, a symbol of itself rather than an identity as relationship. Just as the individuals who exploit the corporation for individual gain have no real relational identity so the corporation becomes a logo without *logos*, a symbol with no real ontological referent. Brand identity is applied to both human beings and to corporations, both of which are re-packaged, re-branded, re-positioned and re-launched periodically, almost as commodities, as the need arises. It seems likely that this is precisely the sort of stance taken by many current corporate executives and perhaps corporate members in general. The manifestation of this attitude is abdication of responsibility for determining *usufructus*, resulting in what MacIntyre terms 'managerialism', the

oppressive adherence to criteria of success laid out by convention in the hope of personal advancement.⁸

Abdication of responsibility for decisions about *usufructus* is widespread in the corporation, not merely as a matter of neglect but as a principle of educational policy and of positive corporate norms. Business schools produce graduates who are meant to lead the largest and most important corporations on the planet but who have never been confronted by the moral demand of the corporation for radical accountability in the choice of which metrics of choice are appropriate in business life. Corporate 'structure' and management custom most often ensure that responsibility for this choice is severely limited within the organization and then restricted to a handful of incommensurable and flawed alternatives. Metrics of *usufructus* are then imposed on the corporate populace, even at the most senior levels. It is the practice of accounting that matters most to all corporate members but the practice that is most restricted to 'experts' who have very little contact with the world of the corporation. So-called management accounting is relatively easy to transform into a process for the formulation of metrics that matter.⁹ Financial accounting is less tractable but it is possible to negotiate exceptions to the irrational constraints posed by fixed standards with external corporate stakeholders. Unless the process of de-humanization within the corporation caused by fixed metrics can be interrupted, the corporation will become what some legal theorists already see it as: a nexus of contracts among competing brand-identities as the modern equivalent of Roman legal *personae*.

⁸ Cf. MacIntyre [1981].

⁹ Cf. Treacy [1995] as an initial attempt to articulate such a process.

The process of articulating corporate *usufructus* is inevitably theological since it is implicitly concerned with the ultimate criterion of life and the nature of true wealth. This process includes not only the measure or metric by which corporate action and results are to be assessed, but the corporate relation itself. Both are ultimately directed toward the divine. The *ontological value* of every corporate participant is precisely his or her ability to manifest various aspects of divine goodness.¹⁰ Thus the value of individuals is not premised on an arbitrary attribution of ‘human dignity’ but on a very specific relationship with God which is a necessary condition of corporate life. Only through the recognition of this value can any corporate value be identified and responded to. While, the *telos* of the market is unconstrained individualism, the *eschaton* of the corporation is righteousness, the right relation between God and human beings and among human beings, epitomized by Judaic justice and Christian love. Human relationships are not divine but they give access to the divine. The corporate relationship in its genuine form is simply this. Without recognition of the ontological value of each member, the corporation as such cannot function; it deteriorates, as the science of economics would have it do, into a defective form of market.¹¹ This result is corporate failure – a failure which is the direct consequence *not* of lack of innovative thought on the part of corporate leaders, nor of defects in dedication and goodwill or knowledge among corporate participants at large.¹²

Rather the cause of failure is most frequently not a *lack* but most often an *excess* of personal assertiveness, of self-belief, of obsessive drive to realize a personal ‘vision for the future’, of personal ambition for advancement, any of which implies a

¹⁰ Cf. Hildebrand. [1943 p6 et seq.]. Also cf. Maurice [1959 (1838) v3 p288].

¹¹ Cf. Goodchild [2007 p184]. The ontological value of each individual is immeasurable precisely because it is relational.

¹² From personal experience this covers the range of conventional assessments of corporate error: ignorance, incompetence and ill-will.

violation of the demands of not just justice but love. Such assertiveness does not overcome ignorance or falsehood or lack of goodwill, but more likely adds to these resentment and silent obduracy. The resulting cross-purposes are the symptoms of a false relationship to God not just to other human beings. The authority granted to individuals within the corporation to determine *usufructus* has no secure foundation without renunciation of *dominium* over the corporate relation itself, and becomes mere status and position rather than a source of cooperative power. It might be argued that a reduction in self-assertion is too much to demand from modern man, that the egotism necessary to survive in modern society is a positive adaptation, and with it the facility to withdraw from the corporate community into one's self is an advantage. Perhaps so; but then this drive will simply continue to sow destruction in extra-corporate ways if the cultural accident theory prevails. "To be something in himself is man's ambition, man's sin."¹³

2. The corporation presumes an anthropology of goodness inhibited by sin but not of inherent evil.

The separation of *dominium* and *usufructus*, although implicit in both the Hebrew *nahala* and the Pauline *peculium* as well as the Franciscan *Res* is entirely alien to Roman and Greek traditions of thought. It is a separation which is rejected outright by the bulk of Roman Law, reflecting the presumption that, except in unusual circumstances, self-interest is a determining fact of ownership: he who owns is he who benefits from ownership. Thus the significance of Franciscan cooperation with the papal curia: by making the *peculium* central to their claim, the Franciscans,

¹³ Maurice [1959(1838)v1 p289].

following St. Paul, turned a legal exception into a legal rule by creating a theological context of mutual submission. Ownership was thereby no longer a 'closed relationship' between property and owner but a relationship that required further refinement in thought as well as in law.

It is important to note that the Roman attitude did not arise from a primitive *naïveté*. The positive sanction against recognition of the distinction indicates that it had been attempted in Roman legal history, and rejected through experience. That is, that there was a possibility that the two elements of ownership could be considered independently of one another was actively denied, probably on sound pragmatic grounds given the literary evidence we have of its misuse. To allow their separateness would have been to open a legal can of worms with no clear benefit to anyone. The fact that we in the modern world are still dealing with the complexities of corporate existence, and their potential for abuse, 2000 years later suggests that the Roman legal system had it right in terms of legal coherence. It is clearly possible to *do* everything one does with a corporation without relying on the corporation itself.¹⁴ There is certainly no compelling evidence that the corporation is economically or sociologically necessary.

It seems a not unlikely possibility, therefore, that a Roman jurist transported to the modern world would consider the corporation absurd. This jurist might have seen the advantage, the necessity even, of a trust arrangement whereby the office of *dominium* was tied to a very specific *usufructus*, vested elsewhere than in that office. But he would undoubtedly require a set of background legislation which ensured that the

¹⁴ Cf. Warren [1929].

vagaries of human behaviour would be kept in check by a raft of constraints and penalties on the trustee, limiting his ability and reducing his motivation to obfuscate his commitments or betray his beneficiaries. It is unimaginable that our fictitious jurist would find the corporation, with its complete freedom of designation of *usus*, as anything other than an unworkable legal monster.

There is in this consideration of the Roman attitude, therefore, an important embedded presumption: if not a Manichean presumption of inherent evil, at least a suspicion about human goodness. We may share this suspicion. It is clear that those who promote the necessity of Agency Theory and the necessity for social regulation of the corporation, as if corporate managers were ‘natural’ rogues and thieves, do share this suspicion. However it also must be apparent that the tradition, out of which the corporation emerges, Jewish and Christian, pointedly does not share this suspicion. Even more remarkably, the law emanating from that tradition does not share this suspicion. The law authorizes a mantle of sanctity (literally), the legal presumption that management action is taken for the best interests of the corporate institution. The easiest route for the cultural accidents proponents to effectively neutralize the potential for corporate mischief would be to adopt Agency Theory as their policy and insist upon a single externally dictated measure of success, perhaps judicially mandated and reviewed, for all corporate endeavours. This would have the effect of socializing the issue of *usufructus* while maintaining all other corporate customs and legislation. This is not an impossible political ambition. And if popular ire is aroused sufficiently against the corporation, it may well be the manner in which the institution will be regulated in the future, as a Benthamite community which is maintained by the mutual suspicion of its members.

But before the move toward Agency Theory is taken it is crucial to recognize a basic reality: The separation of *usufructus* from *dominium* is not just a legal innovation, it creates a moral hiatus, a space in which freedom must be exercised, and which must be acknowledged and filled by managerial decision.¹⁵ The consequence is that the corporation unveils what money conceals: value. The corporation emancipates its members from the power of money, not by ‘hiding’ from the market but by replacing the market with the possibility for discovering what value really means. The cultural accident theorists should perhaps reflect on the relative humanity of the market vs. the corporation and on the likelihood that parliaments or courts will produce an improvement in the standards of corporate action.

The ‘positive’ anthropology of the corporation suggests an alternative form of social regulation for the corporation which seems not to have occurred to the cultural accident theorists. It implies not the adherence to technique and procedure in the calculation along a single uniform metric, which is the basis of all current accounting audit and financial regulation, but the public announcement of the metrics which have been decided within the corporation as both decision criteria and constraints on corporate action: “...the judgments you give are the judgments you will get, and the standard you use will be the standard used for you.”¹⁶ I do not have the opportunity in this essay to develop this theme of ‘positive regulation’. I must point out however that corporate immunity makes sense, as forgiveness of understandable human error, as long as it is clear that this sort of truly radical accountability has been simultaneously

¹⁵ Berle [1954 p148] is therefore justified in making his claim that “...the corporation, almost against its will, has been compelled to assume in appreciable part the role of conscience-carrier of the 20th century.” He is alluding in this to the perennial denial by the corporate manager of his moral status.

¹⁶ Matt. 7: 2.

assumed. Without this recognition, effective corporate regulation is likely to continue to prove inadequate.

3. The corporation presumes the participation of the Spirit as an essential reality of corporate life; and such participation can only be invited through submission not achieved through technique.

It is generally recognized by 21st century corporate managers that the unity of the corporation is essential to the achievement of effective joint effort, whatever the anticipated achievement might be. This gets expressed in such terms as ‘strategy’, ‘vision’, ‘coordination programme’, ‘total re-engineering’ or dozens of other phrases meant to connote coherent joint action. However, it has also become clear that such unity cannot be commanded. “Be united”, “Work together without direction”, “take part willingly”, “Be spontaneously creative” are not meaningful managerial instructions. Such instructions cannot be used, in whatever form, to create cohesion in a corporate organization which, as almost all do, has already (necessarily) fragmented itself in a hierarchical organization with distinct tasks and functional responsibilities, performed by individuals with unique histories and interpretations of those histories. Eclecticism is not unity. Passive acceptance of command is not unity. Anticipation of reward is not unity.

Only mutual submission of the sort described in New England Congregationalism, the medieval Franciscan community, the Pauline Body and Levitical worship is unity. Each part of a corporate organization, commercial or otherwise, just as each academic discipline, has its own criterion of ‘excellence’, of what it means to be ‘good’ at one’s

job etc. These need not be compatible much less mutually re-enforcing. And the fact that responsibilities have been separated means that there will always remain an irreducible residue in the organizational calculus that is due to 'interaction' rather than mere action, and that, therefore, cannot be pinned down to a single centre of responsibility. Any approach to corporate unity which either ignores the existence of individual wills and their individual truths, or which considers them as accidental and inconvenient, "a friction to be regretted and allowed for"¹⁷ will fail. This is the ultimate reason for the disappointment with so-called 'management technique'. Such technique is little more than an attempt to establish uniformity of vocabulary and the acceptance of pain by others.¹⁸

In fact the corporation exists as a unity before it can decide about what it might accomplish with that unity. And unity, where and when it occurs, is simply miraculous.¹⁹ The Covenant existed and defined Israel as a unity before any action, or indeed any goal could be decided within the corporate community; equally the Covenant existed and defined the Congregationalist communities before they had even embarked on their adventure. There was no ancient Hebrew or Calvinistic management technique, some forgotten secret of discussion or negotiation, some systematic programme of *rapprochement* which created the people of Israel from the twelve individual tribes or the Plymouth Brethren from a diverse assortment of *émigrés*. Unification was simply beyond their capability. Gierke implicitly recognized this in his analysis, which was, in intention and expression, entirely secular. Even Berle and Means, removed as they were from theological issues, knew that the

¹⁷ Maurice [1959(1838)v.1 p222].

¹⁸ Cf. Smith [1990] for one of the few case studies of how this process is executed and its consequences.

¹⁹ Cf. Goodchild [2007 p122].

constitution of the corporation was beyond rational disciplinary thought.²⁰ There is something, which has absolutely nothing to do with the strivings of the individuals who constitute the corporation, but which is necessary for them to become a unified group, something that is provided from outside themselves. Gierke, in his Romanticist thought identified this ‘something from outside’ with the past, the particular history of a people, specifically the Germanic people. It was, for him, the *Geist* of this people through which they could be, indeed already were, united.

The corporation, therefore, demands a significant measure of humility regarding its own competence. The corporation is an act of faith not in one’s fellows, but in one’s relationship with the divine. This act of faith involves giving up faith in oneself, one’s vision, ambition, direction, to be able to create the conditions of the corporation in the first place. The very identity of the corporation depends on the admission of helplessness in achieving corporate unity: “Once success usurps the place of justice and goodness...the spirit is stricken indeed.”²¹ This is a spiritual interpretation of the Arrow Theorem: it is a continuing living reminder that unity is a gift from elsewhere.

The Puritan theology of the Eternal Covenant is an explicit formulation of the inadequacy of human ability. Just as in Joel 3, it is the Spirit who creates the new world order. The sin of the corporation is the attempt to reach its existence by the finite human spirit. The genuine corporation involves participation in the divine. More specifically it involves taking part in the Spirit as the subsistent relation between God

²⁰ This may underestimate the effect of Berle’s background on his implicit understanding of his own work. He was ‘Jr.’ to the ‘Sr.’ who wrote *Modern Interpretations of the Gospel Life*. To a certain extent my interpretation of the *Modern Corporation* conforms to that title. It could well be that Berle’s was intended to as well. The last chapter in his *Capitalist Revolution* is entitled ‘Corporate Capitalism and the ‘City of God’.

²¹ Guardini [1961 p61].

the Father and Christ the Son. The mode of this participation is the emulation of that relation of mutual submission in complete faith and faithfulness. Such emulation is not an inferior form of the divine relation but a means through which the divine relation becomes available to humanity.²² But this sort of human relationship is not something that humanity has naturally available. It is a gift from the very subsistent relation, the Spirit, in which one participates. Submission to one's fellow can only be achieved in and through submission to the Spirit, God as the divine relationship between Father and Son. The presence of the Spirit and the activity of mutual submission are not causal events but simultaneous. This is no mere 'openness' to suggestion or the effect of a procedure of 'syndication'. It is not a 'giving up' but a 'giving in', an offering of self, including the exposure of one's own criterion of value, in which a new identity is accepted. This identity does need to be confirmed formally within society but, as in marriage, such confirmation is itself a religious act that affirms an established divine order. And just as in marriage, the relationship of the corporation, the Spirit, is real not an ephemeral abstraction such as Capital. It is a relationship of grace not indebtedness or obligation. The presence of the Spirit is the presence of the reign of God, the Kingdom which is both future and present.

In conclusion, therefore, the challenge of the cultural accident theory is not primarily one directed to the corporation but to the entire social fabric in which the corporation is embedded. The corporation can indeed be considered as an archaic remnant of a more primitive society in which it was formed, and, in light of that origin, suppressed in a variety of legal and political ways. But the theological presumptions of the corporation are also embedded in our society in many other educational, political,

²² Cf. Maurice [1959(1838) v.3 p288].

medical and charitable and scientific institutions. Are these, too, archaic? Perhaps the most compelling caveat for consideration by the cultural accident programme is provided by the American educator, Scott Buchanan (1895-1968): “The corporation is the perpetual adult school of our society, as cities like Athens have been in the past.”²³ And in the corporation at least, Athens has a great deal to do with Jerusalem

In retrospect and prospect: Scholarly work on the theology of the corporation is almost non-existent over the last century. I hope therefore to have provided the groundwork for further investigation and clarification of the phenomenon. The identification of what I believe are the most significant ‘epochs’ of corporate history provides a chronological framework which breaks out of the constraints of thinking misdirected by the genetic fallacy. There are gaps in this framework – inevitably given the time span involved. Nevertheless, I believe it is complete enough to stimulate further research, even if such research is intended as corrective to this essay.

I hope also to have shown that theology has a role to play in the debate about current social issues that is ‘internal’ to those issues. That is, theology is not a discipline to be ‘applied’ as an alternative set of methodological criteria; it is rather a way of revealing the foundations, as it were, of current events in the cultural and personal presumptions that we make about the relationship between the creaturely and the divine. Radical Orthodoxy’s claim that “there is no secular” is in this sense, at least, correct.

²³ Buchanan [1958 p11].

Although I have not pursued the ethical implications of the corporation as a theological entity, I believe that the direction that such ethics would take is clear from the analysis – the discovery of the genuinely and objectively important. I consider that Dietrich von Hildebrand’s work is of central relevance to articulating the ethics of the corporation in terms of identifying increasingly more inclusive criteria of value, as the “aspiration toward higher values.”²⁴ Hildebrand’s work provides not just a direction for further research but a framework in which to consider the developments in the crucial discipline of corporate finance since Berle and Means’s analysis. Within that frame, there appears to be a rather clear trajectory from the early work in corporate value by Geoffrey Vickers [1965] to the highly publicised, if less rigorous, work of Tom Peter’s [1982] and his epigones, to the fashion for ‘balanced scorecards’ and so-called corporate ‘re-engineering’ at the turn of the century. Along with advances in the more formal mathematical area of theoretical finance and so-called ‘derivatives’, these are the most important intellectual developments that are highlighted by my research to date. I believe that the establishment of a connection between these developments and theology would make a significant contribution to both endeavours.

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²⁴ Hildebrand [1948 p10].

Appendix : The Paradoxes of Purpose

The cause of the world's disruption is to be sought in the darkness of the mind which is no longer illuminated by the light of the Holy Spirit. It is because of this darkness that men plunge forward... in pursuit of the good as they obscurely see it, hating and denouncing their enemy who may be equally seeking for a partial veiled good.

Michael de la Bedoyere,
Christianity in the Market

The merely natural unity of economic interests is not sufficient to secure the result that each in working for himself should also work for all.

Vladimir Solovyof,
The Justification of the Good

The mistake of Liberalism was imagining that free discussion was all that was needed to let truth triumph, whereas unless people have substantially the same experience, logical controversy is nothing more than systematized misunderstanding.

W.H. Auden,
Christianity and Social Revolution

Quite apart from the 'substantive' theories of the corporation, the dilemma of the corporate relation has been raised pointedly from an entirely different direction: the nature of the 'managerial' interaction among those who participate. The primary action identified is that of *decision*, that is, considered choice among alternatives.¹ The importance of decision theory is that it highlights the consequences of related decisions taken by members of a group in negotiation, cooperation or competition. In doing so, it points to both the extreme importance and the severe difficulty of ensuring consistent criteria of decision involving even as few as two individual decision-makers.²

The Arrow Paradox

¹ Decision theory enters the existential activity of corporate participants only *after* a so-called *choice-space* has been determined. Since such determination logically involves a *prior* choice of the criteria by which such a space may be constituted, decision theory defers, as it were, to the other disciplines and takes up the problem as one of consistent rationality among multiple persons.

² This is the so-called *Prisoner's Dilemma* which represents a commonplace situation of 'second-guessing' one's colleagues or opponents. I will not discuss this further here.

The relevant results of decision theory for discussion of the corporate relation can be generally referred to as the *paradoxes of purpose* and are represented by the so-called Arrow Possibility Theorem formulated by the economist Kenneth Arrow (1921-). I reference the Arrow theorem frequently in the course several chapters of this essay. It is one of several important paradoxes of group decision-making that show genuine shared purpose to be impossible for any collective³ under ‘natural’ conditions.⁴ I refer to Arrow as the general term for all of these paradoxes not because it includes the others but because it is the most well-known. There is simply no set of practical conditions that can be established to remove the threat of its logic. It is an example of a “crisis that denies all human thought.”⁵ Arrow is typically ‘resolved’ through so-called ‘management intervention’, that is dictatorial imposition of a choice, the eradication of the Many by the One. This resolution destroys the corporate relationship, however, and has severe adverse practical consequences for corporate

³ I use this term to refer to any non-corporate group. Cf. Brunner [1947 p27, 104]: “‘Natural’ knowledge which we can acquire for ourselves does not create *any form of community*... The knowledge of God creates community...and indeed community is precisely the aim of divine revelation...the Messiah, the Christ, the personal presence of the God who creates community.” I take Brunner to mean *corporate* community by his context which is ecclesial. In a sense this entire essay is an attempt to substantiate Brunner’s bare assertion. The ‘announcement’ of the perichoretic system in revelation has resulted in the ‘event’ of the corporation. Even at this level of generality, the Word is a miracle, a breaking in to the world of man. Cf. 2 Cor 3:18.

⁴ Cf. Matt 11:26. Knowledge of another requires the kenotic/perichoretic relationship such as that between the Father and the Son. We do not have the knowledge to do this, nor can we according to Arrow. Some scholars (e.g. Scott [1935 p21]) refer to reason being inherently incapable of ‘attaining to the higher reality’ or its metaphysical equivalent. I don’t think it is necessary to posit a metaphysics like this to make the behavioural case in Arrow. The fact is that the ‘subject’ is simply impenetrable, whether she is God or human. Nevertheless Scott’s observations on the ‘higher knowledge’ or in my terms ‘knowledge of the other in relationship’ are consistent with the view taken here [Cf. p161]: this type of knowledge is not logical and it is only available in complete self-surrender. Cf. Acts 2:42 wherein the ‘common object’ is the gift of the Holy Spirit. It should be noted that Paul in Rom 7:15 points out from his personal experience that the ‘social’ impasse of Arrow also applies to individuals: Left to myself, *αυτος εγω*, he notes that he is effectively in a state of contradiction or original sin. We can say that Arrow is simply a manifestation of the same phenomenon of sin.

⁵ Barth [1935 (1920) p 80]. This might be considered an overstatement except that the paradoxes of purpose represented by Arrow affect every social aspect of human life from family to inter-governmental relations and from highly organized interactions to casual ‘market’ transactions. It is of course possible that the reason betraying reason in these paradoxes will eventually be shown as false reasoning. But such an eventuality seems remote at best.

participants. My intention here is to merely outline the basics of Arrow and related situations so that their import can be considered in the main text.

The potential paradoxes of group choice have been known since the late 18th century. Condorcet (1743-1794) formulated the logic of the paradox for a small number of participants and a small number of choices.⁶ Arrow's work expanded the mathematics to include any number of these.⁷ A simple example of three individuals choosing among three alternatives (a,b,c) illustrates the general problem. If the rankings by each individual of the three choices are abc, bca and cab, then it can be shown in the Arrow analysis that there is a majority of two to one *against* every option. There is therefore no way to choose among the alternatives. The group is in permanent impasse unless a choice is imposed. More generally, under the rather generous conditions assumed by Arrow, there is no way to construct a group preference function that reflects individual preferences. This is the normal, not the exceptional, condition and puts into question all collective decision-making including the electoral decisions of democratic societies. Goodchild echoes the Arrow situation:

*...[D]emocratic discussion is doomed to fail – not because people are insufficiently ascetic to pursue truth at the expense of their own interests, but because there are already interests of reason that determine the conditions of representation.*⁸

The Abeline Paradox

⁶ Condorcet [1994].

⁷ Arrow [1951].

⁸ Goodchild [2007 p56].

Arrow is actually only one of a range of paradoxical situations, and by no means the most awkward.⁹ In Arrow for example, the preferences of all the participants are known exactly. This is not the case however for the so-called Abilene Paradox.¹⁰ In Abilene, the situation is a bit more complex (and real) in that no participant knows precisely what the others want. The intention of at least some of the participants is to meet the (unexpressed) wishes of others in the group. The result is a decision which all accept but which no one wants.

The Olson Paradox

Mancur Olson (1932-1998) has investigated yet another class of paradoxical choice wherein the participants have precisely the same intentions, that is they are agreed as to intended outcomes. Olson shows that even in this 'ideal' situation, unless there is coercion or some other special device to make individuals act in their common interest, "rational, self-interested individuals will not act to achieve their common or group interests."¹¹

The above situations do not describe *actual* group decision-making because they are highly simplified, assume perfect information, complete integrity and unlimited resources available to reach a decision. In practice the criteria of choice are not stable, nor is there any method by which real agreement can be distinguished from false, nor is it likely that individuals have exactly the same intentions, nor is an infinite amount

⁹ I exclude the very basic *Prisoner's Dilemma* and its variations here. But these too are indicative of the limits of human ability.

¹⁰ Popularized by Jerry Harvey [1988].

¹¹ Olson [1965 p2].

of time available to consider choice and its impact.¹² Just as significant, these paradoxes occur in those situations where one is seeking only majority votes, not unanimity. While the conditions for achieving the former, however unlikely, can be defined,¹³ those for the latter have not even been described.¹⁴ Consequently it is reasonable to conclude that the situation prevailing among any group seeking such unanimity is one of fundamental irrationality in the specific sense that it is beyond human power to ensure the desired result.

The Liberal Paradox: Sen

Perhaps most dramatically in terms of our democratic ambitions, we are stuck in the so-called Liberal Paradox: we cannot ensure even a minimal demand for personal freedom if we also demand that everyone is at least no worse off than they are at present in any community or society.¹⁵ The ‘rational’ response is one of fundamental suspicion. We may not be conscious of this suspicion whenever a group decision is called for because it has become part of the culture in which we operate. To recognize the chaos created by the acceptance of this situation would be to undermine the foundations of that culture which is built upon the presumption of group rationality – in democratic procedures, in liberal market operations, and in corporate organisation.

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Coping with Corporate Paradoxes: Simon

¹² These findings are in fact the same as theological conclusions reached somewhat earlier in history. For example by Cardinal Newman (cited in Chadwick [1957 p90]): “One man’s conscience cannot communicate with another man’s conscience in such a way as to convince.”

¹³ Cf. Sen [2002 p75f].

¹⁴ Buchanan and Tullock [1962] make a proposal for unanimity in all ‘public’ decision-making. However they make no claim about either the ability to make decisions at all under this criterion or on its Pareto optimality. Therefore the use of the criterion would have no effect on the argument here.

¹⁵ Sen [2002 p92].

The shock of this conclusion has been blunted over the last half-century by the work of management scientists and sociologists who periodically claim to have discovered a method for dealing with (limited aspects of) the situation. Herbert Simon's (1916-2001) 'satisficing', or 'bounded rationality', the most well-known and developed of these, is essentially a way to make the best out of a bad situation in the interests of a dictatorial leader.¹⁶ 'Game theory', originally developed by von Neumann (1903-1957) and Morgenstern (1902-1997) and applied extensively in military contexts, reflects the degree of suspicion, which has come to be considered as normal, about the ability of any group to reach a rational choice by any standard of the term.¹⁷

Temporizing with Corporate Paradoxes: Stiglitz

The Arrow condition seems too great an intellectual burden to bear in light of the fact that even outstanding social scientists choose to 'play for time' rather than acknowledge the impasse that is created. The prominent economist, Joseph Stiglitz, for example, can admit that "Today, there is no respectable intellectual support for the proposition that markets, by themselves, lead to efficient, let alone equitable, outcomes."¹⁸ This conforms with Arrow. However, what Stiglitz, as well as most other economists, implies by this is that economic action by government is sufficient to correct the absurdities that might be reached by the market. Under Arrow, however, no such implication is justified. Government action in the economy is also a group decision subject to the same likely incoherence as that of the market.

¹⁶ Simon [1957, 1982, 1987].

¹⁷ Von Neumann and Morgenstern [1944].

¹⁸ Cited in his introduction to Karl Polanyi's *The Great Transformation* [1944 pviii].

Theological Recognition of the Corporate Paradoxes

These paradoxes and contradictions represent the real conditions in which we live. Arrow reflects not the temporarily inexplicable but the permanent logic of social existence. This logic is explanatory not a challenge to be overcome. Arrow is reason discovering the limits to reason, not a gap in current knowledge. Arrow and his epigones demonstrate that St. Anselm was right in his view that there is a limit to the expressiveness of human expression. No degree of good will, discussion, negotiation or learning can overcome the fundamental fact that intentions about purpose, consistency of unaided human wills, cannot be the source of the corporate bond. Such a bond cannot be legislated certainly; but neither can it be created by formal agreement, contractual or otherwise, among corporate participants. St. Paul recognized explicitly that corporate unity is a divine gift.¹⁹ And the early history of the church is replete with references to such unity as achieved only through submission to God in prayer.²⁰

The 19th century corporate ‘organicist’ theorists were correct in their recognition that unity was a pre-requisite for shared purpose not a result. But they were incorrect in the presumption, shared by 20th century management theorists and sociologists, that such a bond is ‘natural’, that is, occurs through the human creation of some sort of group spirit, an instinctive or even negotiated ‘alignment’ among participants. As human beings we are not capable of creating this bond by ourselves. Arrow is thus a permanent reminder of the limits of human rationality, and of the need for the supernatural in everyday life. This is the point at which theological development

¹⁹ Rom 15: 5, 6.

²⁰ Cf. Acts 1:14; 2:46; 4:24; 5:12; 15:25-28.

starts – with the presumption of a fallen world in need of grace, expressed in a variety of ways:

H.R. Niebuhr: Invincible but Culpable Ignorance

This situation is in fact well-known in theology as a sign of the presence and magnitude of sin.²¹ H.R. Niebuhr summarizes the situation with considerable skill.²²

We have no pattern of personal thought inclusive and clear enough to allow us to discern any orderly connection between the wild and disturbed actions of men and nations²³ ... In our smaller communities, in our families and with our friends the same ignorance is our portion. We do not know as parents, save in fragmentary ways, what we are doing to our children. We do not understand what our most intimate friends, or our husbands and wives are doing to us and neither do they know.²⁴

This ‘ignorance’ is permanent as long as we recognize that the others who affect our lives and whose lives we affect are *subjects* just as we are. They, and we, are not mechanical objects which react predictably to events. We observe, consider, change our minds and become generally unreliable. Even if we all desire and agree to openness and complete honesty, we are stymied by not just inarticulate fears and desires but by the fact that these change in both content and strength in the articulation itself. In making a considered disclosure, we are making a new beginning

²¹ And it is well known of course biblically. Ps 104:29 perhaps captures the biblical witness in its entirety: “When thou hidest thy face, they are dismayed.” God’s revelation of ‘covenant’ is simultaneously the revelation of ‘sin’. Cf. Barth [1938 p 46]. Cf. Thornton [1915 p 189]: “Society lives not by means of but in spite of, the conflict of natural powers and forces which is ever-active upon the earthly plane.”

²² In this he contradicts his previously stated position on ‘revelation as rationality’.

²³ It is important to note that the presumption that there is an underlying coherence in these actions is a critical aspect of revelation itself. At the individual level this revelation presents each of us with a very concrete choice: Does my disagreement with another about the action he is taking originate in (his) error of judgment or in (my) misapprehension of his intention? No matter which choice I make, it will produce a self-fulfilling situation. If I presume error, I will find ignorance, incompetence and ill-will. If I presume misapprehension I will find purpose, skill and information different from my own. However the former presumption blocks all hope of revelation. The latter presumption opens up the possibility of revelation.

²⁴ Niebuhr [1960 p87].

thus creating a discontinuity, an unexplainable jump into a new universe. We, in fact, make ourselves less rather than more rational to the 'other' the more we act as subject, that is, the more we consider the criterion of action we employ, since we may not appear as 'consistent', 'rational', or 'predictable' as when we simply avoid the issue entirely.

Johannes Metz: Crisis of the Subject

Metz alludes to the same phenomenon as the 'crisis of the subject'.²⁵ Public consensus of any sort is therein a-rational and is reduced to a formalized will to power in which means become ends.²⁶ Essentially we deprive each other of the means to become subjects, even under condition of complete good will.²⁷ Ackoff makes this Weber-like move explicit in his work when he claims that the only rational thing which everyone would desire given 'three wishes' of limited power is 'unlimited wishes' on the first wish.²⁸ As Milbank notes: This is "purposeless power, power for its own sake, which is another definition of what constitutes violence."²⁹ Essentially the measures used by the members of a collective to define not just the good, the true and the beautiful but the better, the more correct and the more pleasing will be based on personal preferences. Within the collective there is no rational method for comparing or reconciling these since each measure and preference defines its own rationality with

²⁵ Metz [1980 p69f].

²⁶ This can be extremely subtle. For example John Dewey's [1923] criterion of personal 'growth' is actually 'power'.

²⁷ Cf. Niebuhr [1960 p 187]: "Revelation is the beginning of a revolution in our power thinking and our power politics."

²⁸ Ackoff [1999]. The Epistle of James is arguably the best criticism that can be made of such a move, particularly Chap.3:16 to 4:3.

²⁹ Milbank [2003 p37].

its own unique history.³⁰ The real crisis is that in this situation under the ethic of purposeless power, everyone is under threat. Any disclosure which makes one vulnerable is therefore dangerous. One does not give up one's preferences, hopes, ambitions, intentions, aspirations; one simply gives up expressing them, or at least expressing them fully. They atrophy, decay and poison their host, and ultimately the corporate relation as well. The continuity of the corporation – both as institution and as concrete relationship – therefore cannot be assured by 'purpose' or 'intention' but depends on the something else, something from not just outside the human mind but outside of collective human capability. My hypothesis is that this 'external factor' is the presence of the Spirit, that is, it is a matter of, a sequel to, a product of, a correlate of... faith.³¹ I pursue this hypothesis throughout the substantive chapters of this essay.

³⁰ My professional experience is that the more we investigate each measure, each set of individual preferences, the more we find that each is itself ultimately contradictory in the sense of not being consistent. So there is a double level of irrationality which cannot be penetrated by 'talking things out'

³¹ Cf. R. Niebuhr [1949 p115]: "In Biblical thought, the grace of God completes [the] structure of meaning beyond the limits of rational intelligibility..." It may be noted that MacIntyre [1981] paraphrases the Arrow condition as one of 'incommensurability' and argues that we have no *rational* way of reaching moral agreement in our culture. He argues that unity can only be achieved through shared Western tradition. I agree but note that MacIntyre uses a criterion of intellectual orderliness not dissimilar to that of H.R. Niebuhr. That is, he presumes there is agreement that what is needed is an explanation of differences in the criteria of action. This is certainly a laudable intention, but certainly not the only one that is so, and not necessarily what God considers as centrally important. I also note that MacIntyre does not claim to be doing theology but philosophy and therefore is not prevented from making this move. To the extent that 'Western tradition' recalls the Spirit and invites it to participate MacIntyre's proposal for an 'explanatory' criterion (not necessarily the one he proposes however) could be *temporarily* accepted by that tradition. It remains my contention however that there can be no fundamental agreement without the Spirit, no reliable connection among subjects, no revelation, no fundamental disclosure upon which we may create unity of purpose. We effectively remain as closed monads without God. It may also be noted that although H.R. Niebuhr uses 'rationality' as his criterion of revelation, even to the extent of considering it as a main test of its 'validity' [p138], he seems to mean by this either 1) *not* a fixed criterion of 'orderliness' but one that has changed to accommodate the new facts revealed or 2) a non-rational intervention which calls into question the criterion currently in use. In either case he makes his case less secure by insisting that revelation is what makes things intelligible. Such intelligibility could be obtained for example by simply labelling inconvenient facts, such as revelation itself, as illusory. Revelation must be irrational, or at least a-rational because it shifts the criterion of rationality. The world may indeed look different as a result but this is not necessarily because it didn't look rational before revelation. One of the effects of his subtle utilitarianism is to make it appear that God solves intellectual problems, mainly by providing a better theory of the world in a rather Kuhnian manner. It is possible to accept that a new criterion of rationality is the result of revelation without the need to accept that it fills an intellectual gap. The issue is existential in all its aspects not just intellectual. Improved explanation or understanding may be important in some circumstances but not all. In others, revelation may affect individuals and groups in an entirely inexplicable manner. My position is that God does use the criterion of rationality, particularly in the corporation, to unify human endeavour or to improve our understanding of the world or each other but

Karl Barth: The Depth of Sin

“Sin is not taken in deadly earnest when it is regarded as something that can be radically overcome by the enthusiasm of ‘good intentions’ and then, by and by, can be removed by practical activity.”³² In other words, sin is as debilitating as it is banal. It overcomes even the best intentions in the manner of Arrow. One cannot think or act one’s way out of it. Any attempt to do so simply makes the hole in which we are stuck deeper. But unlike the decision-theory of Herbert Simon, the theological implication is ‘stop striving’.

Dietrich Bonhoeffer: The Failure of Parallel Intentions

Bonhoeffer, along with St. Paul as well as Barth, recognizes the fractured nature of decision even within the individual:

*The concept of direction does not guarantee the unity of the concept of the person...direction is subject to dissection into individual acts and whatever interpretation may be imposed....Nobody knows his own motives, nobody knows his own sin...only in faith is the unity of the ‘being’ of the person disclosed.”*³³

This is why management ‘alignment’, as the creation of consistent criteria of choice, is an unaided impossibility within the corporation.

for his own purposes of human salvation. He does this by breaking and re-directing human purpose not by fulfilling it. Cf. Niebuhr op. cit [p94f]. Cf. Anger [1932 (1910) p29]: “To share in the Word of God, Who has become ours through the Incarnation is the true way for man to perfect his knowledge...”

³² Barth [1938 p36].

³³ Bonhoeffer [1962 p106,107].

But Bonhoeffer also recognizes that even without sin, that is within the order of grace and divine assistance, corporate communion does not result from unanimity of purpose. Thomas Day captures Bonhoeffer's thought:

*Each person responds to and serves God in his own different way, so conflict arises from the common love of God... Communion is not the harmonious 'spiritual communion' of like-minded people which serves as utopia for most seekers after community. The parallel intentions of like-minded people never meet. They fail to encounter one another.*³⁴

In other words the clash of intentions is in fact essential to the corporate bond because each member wills the good of the other. This is not a 'common' good but one in which the good of each is distinct. It is through this conflict that the 'corporate good' becomes visible.³⁵ As it is for Luther, sin for Bonhoeffer is in essence a form of isolation, a monadic separation from others.³⁶ The only antidote for such isolation is the good of neighbour accepted as one's own – submission. For Bonhoeffer submission to God and to neighbour is a single act; and it is this act that overcomes alienation and creates community.

The presumption therefore that the corporation is based on, or has its prerequisite in, some sort of pre-corporate unity of intention is highly suspect, not just for pragmatic but for theological reasons. Putting the cart of corporate purpose before the horse of corporate community implies an instrumental attitude toward human beings through which their participation in the Spirit is turned against them:

The Christian insistence upon the spiritual element as the ultimate reality of human existence includes, therefore, insistence upon the right of men, by their very nature, to pursue scientific, artistic, and cultural purposes which,

³⁴ Day [1982 p14].

³⁵ Cf. Bonhoeffer *Collected Works V:288, I:174*: "I learn what I should do from the other[s] who tell me."

³⁶ Bonhoeffer [1962 p89]: "Godless thought –however ethical – remains self-enclosed...*cor curvum in se*."

*though they may contribute to, are not to be regarded as means to social solidarity.*³⁷

And with that suspect presumption, the Lockean analysis that the pursuit of private good results ultimately in the public good also becomes suspect. A partnership can remain 'stable' because its rationality is determined by the common denominator of interests shared by all the participants. A corporation, however, cannot rationally determine the corporate interests under the conditions of the Arrow Theorem. Mere awareness of the largely implicit and almost certainly irrational criteria that we may be using in our communal life does not lead to any change in the basic situation of impasse. It is a situation from which we are constitutionally unable to extract ourselves. The more we attempt to do so, the worse the situation becomes since we end up being either dictatorial or subservient. There is no way in which we can negotiate our way out of Arrow. The problem is not epistemological in the sense that more or better information would change the situation. Nor is it a matter of organisational 'good manners' which can be resolved by some form of procedural etiquette. Rather the problem is one of ontology. Each of us has our unique history of being through which we have developed not just various personal and professional *habitus* but attitudes about what is intrinsically and instrumentally important. To the extent that we assess that history as our being, any corporate encounter becomes a test of integrity. The best we can hope for is a sort of cyclical reversal of decisions through which we occasionally get what we want at the expense of what others want and vice versa.

³⁷ Demant [1941 p114]. Pace Dewing [1929 Vol I p4]: "The association of human beings, bound together in order to achieve a purpose, is the fundamental and teleological basis for the coming into existence and the continuing existence of the corporation." My criticism of this position would add that 'pre-existing purpose' would prevent any sort of change in corporate intention.

We are led, consequently, to theology not out of methodological fideism or disciplinary preference but through the logic of the corporate situation itself. The supernatural does not 'supplement' natural deficiencies to create the corporation. The corporation is beyond natural human abilities entirely. As in the prophecy of Joel, it is the Spirit which creates any new order within humanity. And on a somewhat smaller scale in the text of Mk 3:14-16, Christ does not just appoint the Twelve as like-minded individuals, He *creates* (Gr: *poiein*) them as one entity within which both the taxman and the zealot will find their purpose. Theology is well-acquainted, therefore, with the issues that disciplinary theories ignore or against which they recognize their own impotence. Community arises out of obedience to the will of God, not out of strivings for community or through common intentions or through an intellectual and moral eclecticism which makes a pretence of universality and unity. V.A. Demant summarizes the central proposition of the Arrow theorem in theological terms: "There is no way of resolving the conflict [among productive, financial and political interests in modern society] by the natural means at the disposal of man."³⁸ The problem as he sees it "...is larger than the problem of the behaviour of men to one another, either in individuals or groups."³⁹ The corporation in other words is not simply the product of human interaction. And corporate community comes at the beginning not at the end of the quest for corporate purpose.⁴⁰

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³⁸ Demant [1936 p69,70].

³⁹ Ibid. [p43].

⁴⁰ Cf. Demant [1947 p24].

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Chapter 5: Sanctifying the Cosmos

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