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6

Incorporating Embodiment

Jeroen Veldman

The history of the corporate form shows that it is a problematic construct, which allows for the simultaneous use of multiple referents. The necessary use of these multiple referents, particularly in the construction of the economic 'agent' with contractual agency, provides the background for the necessary ontological understanding of all economic 'agents' and legal 'subjects' as 'homo economicus'. The continued use of the corporate form, therefore, leads to the necessary evacuation of ontological content from the category of the legal 'subject' and the economic 'agent'. I will show how this structural evacuation of embodied content relates to and affects the status of embodied human beings in these domains.

6.1 Introduction

'Corporations have a life, and even citizenship, of their own, with attendant rights and powers. Corporations are "persons" within the meaning of the United States Federal Constitution and Bill of Rights' (Monks and Minow, 2009, p. 14). As Monks and Minow show, it has become commonplace to think and speak of corporations as if they were legal 'persons' that can be endowed with such properties as 'citizenship' and even 'life'. Cautious observers might warn that corporations are not

actual 'persons', but rather 'legal entities' or rather legal 'subjects'. However, such cautious approaches do not explain why it has become commonplace in the legal imaginary (see Veldman and Willmott, 2013) to project an organizational form like the corporation with a singular status ('person', 'subject', 'entity') and why this organizational form has invited such widespread attributions of agency, ownership and (citizenship) rights in the course of the 20th century. Such cautious approaches also do not tell us why this organizational form appears as a very different construct in the economic imaginary, for instance in the words of Jensen and Meckling, who argue that 'Stripped to its essentials, the corporation is simply a legal fiction which serves as a nexus of contracts' (Jensen and Meckling, 1983, p. 7). Between such differing imaginaries of the corporate form, the contemporary status of this construct ultimately remains undecided: 'Despite a solid half century of dealing with new entities, we seem no closer to understanding these mysterious man-made objects, which seem to play a large part in our lives even as they cannot be located in space and time' (Litowitz, 2000, p. 420).

In this chapter I will show how the corporate form came to function as a point of attribution for agency, rights, and ownership in the legal and economic imaginaries (Veldman and Willmott, 2013). Subsequently, I will show how this development has led to multiple ideas about the status of the corporate form as a conceptual construct and how it allows for the simultaneous use of multiple referents. Then, I will show how the status of this construct with multiple referents is explained differently between the legal and the economic imaginaries, leading to further confusion about its conceptual status.

In the discussion and conclusion I will argue that these historical developments have turned the corporate form into a highly problematic construct, which is inserted into the category of the legal 'subject' with multiple referents. Legitimizing the ongoing use of this problematic construct

form and stabilizing the conceptual relation of this construct as a nominally equal construct to embodied, natural persons in the category of the legal subject relies on the insertion of ideal-typical ontological assumptions relating to the neoclassical economic 'agent' in both the legal and economic imaginaries. The insertion of these ideal-typical assumptions directly affects the natural, embodied person in three ways: it affects the relative capacity for the attribution of responsibility and liability to embodied natural persons and corporations; it affects the basis for contracting between these constructs in the legal domain; and, overall, it increasingly inserts the embodied, natural person into a highly abstract domain of market relations, in which it appears as nominally equal to the corporate form as a legal and economic construct. More fundamentally, stabilizing these ideal-typical ontological assumptions relies on the use of entirely self-referential assumptions about the ontological status of the category of the 'subject', 'individual', 'person' or 'agent' in the legal and economic domains. For this reason, the use of the contemporary corporate form comes at the price of transforming the conditions of possibility for the acknowledgement of embodied characteristics to the construct of the 'person', 'subject', 'individual' or 'subject' in relation to the category of the legal 'subject' and the economic 'agent'.

6.2 Subject-positions

6.2.1 A short history of the legal construct

The notion that the corporation presents a legal 'subject' or 'person' is not self-evident. By the end of the 19th century corporate charters were still conditional and limited liability was a feature that was only sparingly attributed to corporations (Handlin and Handlin, 1945; McLean, 2004; Avi-Yonah and Sivan, 2007; Djelic, 2013). Under these conditions corporations were treated as

partnerships (Ireland, 1999; Perrow, 2002), that is as aggregations of individuals, not as singular 'subjects' or 'persons' in terms of how they related to other legal 'subjects' (Dewey, 1926).

By the middle of the 19th century, an increasing separation between the shareholders and 'the company' necessitated the creation of a formal separate legal entity, which would hold ownership over corporate assets and liabilities in its own name, rather than in the name of the owners or the managers. By creating 'a body, which by no fiction of law, but by the very nature of things, differs from the individuals of whom it is constituted' (Dicey, 1894-1895 in Maitland, 2003, p. 63) the corporate form provided a construct next to the aggregation of individuals. The concrete status of this reified separate legal entity with attributions of ownership would remain unclear in legal scholarship (Dewey, 1926; Hallis, 1978; Harris, 2006; Avi-Yonah, 2010).

By the end of the 19th century, multiple theories had been developed to present a rationale for the corporate form as a singular kind of representation in the legal domain. Some would argue that the retreat of the state in granting a concession meant that it was the group itself that could be seen to provide the emergent basis for the corporate entity as a 'body' (Avi-Yonah and Sivan, 2007). In this capacity, it was argued that the corporate form became a 'natural' representation of a group, which was in turn translated into a 'natural entity' (see Harris, 2006). Others would highlight the 'fictional' aspect of the corporate form. In 1897 Freund argued that the idea of a 'corporate personality' was merely a convenient conceptual shortcut – 'in most cases in which we speak of an act or an attribute as corporate, it is not corporate in the psychologically collective sense, but merely representative, and imputed to the corporation for reasons of policy and convenience' (Freund, 1897, p. 39). It was a matter of common sense to him that the idea of 'personification' was a tool, not a concept to be taken seriously as a full personification of the legal fiction: 'it is also extremely convenient and helpful to operate with the notion of corporate personality, and there is no danger in

this as long as we remember that the bond of association operates only upon and through individuals placed in a certain position' (Freund, 1897, p. 39; see also Horwitz, 1985).

During the 19th century, multiple conceptions of the corporate form were developed, which ranged from a pragmatic rejection of the separate legal entity and its projection as an internal legal 'fiction'; an artificial, state-created and state-controlled entity; to a 'natural entity' that could be attributed with the roles and rights of a group of individuals in the legal and political domains (Ciepley, 2013; Harris, 2006). Underlying all these approaches was the recognition of the corporate form as a special kind of legal construct, which was qualitatively different from the partnership. Increasing attributions of agency, ownership, and rights to this special kind of construct led to an increasingly strong conceptual separation between this construct as a legal 'entity' and the aggregation of individuals that constituted 'the corporation' as an organization.

6.2.2 Personification and anthropomorphization

During the 19th century the corporate form became firmly established as an 'entity' separate from the body of shareholders and 'the corporation' in the legal and economic imaginaries (Veldman and Willmott, 2013), as Hallis (1978, p. xliii) illustrates: 'As legal subjects they are distinct and in kind different from the visible aggregate of their individual members. These individuals do not constitute the substance of that entity to which the law ascribes personality when it recognizes a corporation aggregate as a legal subject'. The exact ontological status of the corporate form as an 'entity', which 'by no fiction of law, but by the very nature of things' constituted 'a body' (Dicey, 1894-1895 in Maitland, 2003, p. 63) in the legal imaginary remained fundamentally unclear.

Applications of concepts like a 'body' and 'personality' to this legal construct in the category of the legal 'person' attracted increasingly literal translations of this construct as a legal

'subject' or 'person' in and by itself. In Britain the Salomon case (Salomon vs. Salomon & Co [1897] AC 22) stated that 'The company is at law a different person altogether from the [shareholders] …', while the 1889 Interpretation Act in the U.K. stated: 'In this Act and in every Act passed after the commencement of this Act the expression "person" shall, unless the contrary intention appears, include any body of persons corporate or unincorporated' (Interpretation Act, 1889, sec. 19 in Maitland, 2003: 125). What we see in these two expressions is that the definition of the 'person' in U.K. legal discourse came to include the corporate form by default toward the end of the 19th century.

In the U.S., the word 'person' came to officially designate a corporation from 1886 (Bowman, 1996, p. 56). In 1888 Williston (p. 117) wrote: 'the fictitious person of the corporation shall have, in general, the capacity of acting as an actual person, so far as the nature of the case admits … for the conception of a corporation as a legal person … involves necessarily the consequence that before the law the corporation shall be treated like any other person.' In this quote the concept of the 'person' was expanded even further than in the U.K. context to attain the attendant expectations of rights and legal treatment that come with the status of a person.

The use of metaphor and analogy incrementally expanded the conflation of the concept of the 'person' in relation to the corporation. In *Daimler*[1] the verdict ruled that Continental Tyre and Rubber Co., Ltd. was 'a living thing with a separate existence, … an English company with a personality at law distinct from the personalities of its members and could therefore sue in the English courts as a British subject' (Hallis, 1978, p. lix). In his dissenting opinion Lord Buckley stated that the artificial personality was 'swayed by the enemy': 'He is German in fact although British in form.' Through such anthropomorphical and personified notions the corporate form became attributable with gender, nationality, as well as a personality that could be 'swayed'.

Such analogies have been criticized in legal and wider scholarship (Veldman, 2010a). However, the underlying acceptance of the corporate form as a construct that related to the category of the 'legal subject' was never relinquished. For instance, in a summons (Boehler et al., 2005) against Royal Dutch Shell (RDS) concerning pollution in the Niger Delta, Shell Nigeria and Shell PLC are depicted as 'defendants', while Shell PLC is considered as a 'bearer of obligations'. Furthermore, it is stated that 'Shell Nigeria acted', 'Shell Nigeria inspected the oil spill' and 'Shell Nigeria did not bring materials along in order to stop the spill or limit the damage because of the spill, and left again' (Boehler et al., 2005, p. 12). Also, RDS 'reacted' with 'a refusal to accept liability' (Boehler et al., 2005, p. 5) and 'Royal Dutch Shell PLC … refrained from seeing to it … whereas … it was capable and obliged to do so.' Similarly, when Union Carbide was charged in 1992 for the Bhopal disaster it was stated in the summons that 'Union Carbide has committed the offence of culpable homicide' and was later depicted as an 'absconder', which retracted 'its' operations as an American company from India. Such depictions accept and reinforce the conception that the corporate form presents as a singular legal entity with a highly anthropomorphized acting capacity both inside and outside the legal sphere (Naffine, 2003; Wells, 2005).

Incremental discursive shifts (Veldman and Parker, 2012) with regard to a singular and anthropomorphical status for the corporate construct in the legal imaginary provided the basis to expand the 'legal subject' status to include 'citizenship' status and attendant rights (Nace, 2003; Monks and Minow, 2009; Veldman and Parker, 2012). This provided the basis for British and American courts to continuously expand the attribution of agency and amendment rights (Mayer, 1989, p. 582) to the corporate form during the 20th century. In the U.S. the corporate form has come to enjoy Bill of Rights protections under the First, Fourth, Fifth and Seventh Amendments, giving it the right against double jeopardy, the right to jury trial in a civil case (Ross vs. Bernhard, 1970), the

right of 'commercial free speech' (Virginia Board of Pharmacy vs. Virginia Citizens Consumer Council, 1976, and Central Hudson Gas, 1980), the right to avoid unwarranted regulatory searches (Marshall vs. Barlow, 1978), and the right to spend money to influence a state referendum (Citizens United, 2011). Bowman notes that 'This [the personification of the corporate form] constitutes the most important development affecting the constitutional rights of the corporate entity – and hence the legal basis of the external dimension of corporate power – during the rise of the large corporation in the nineteenth century' (Bowman, 1996, p. 57).

From the mid-19th century onwards, the corporate form shifted from a legal construct that would hold ownership in lieu of the shareholders to a construct that confers the status of a singularized legal 'subject' with strong allusions to anthropomorphic and personified characteristics. Such allusions gave increasing conceptual substance to the idea of the corporate form as a singular construct, which was ontologically separable from the aggregation of individuals and which could be attributed directly with (legal) agency in the slot of the legal 'subject' and were constitutive for a steadily increasing set of attributions of agency, ownership, and rights (Bowman, 1996; Ireland, 1999; McLean, 2004; Harris, 2006).

However, these increasing attributions of agency, ownership and rights were made to a legal construct, which was fundamentally based on multiple assumptions about its ontological status and nature as a social construct (Avi-Yonah and Sivan, 2007). The resulting elusive status as a legal 'subject' and the attributions made on the basis of this status turned the corporate form into a highly successful (Guinnane, 2007) and dominant (Butler, 1989) kind of organizational representation. However, the ontological basis for this status and these attributions remained unclear. An explanation for the lack of critical examination with which this elusive ontological status was treated can be found in the methodological assumptions underlying common law.

6.2.3 A synthetic legal subject

Methodological premises of positive conceptions of common law (see Hallis, 1978; Hart, 1989) are explicitly based on the idea that legal scholars can 'produce legal realities – that is, realities from the legal point of view' (Hallis, 1978, p. 41). As Lawson (1957, p. 7) states: 'It is indeed easy to see that all legal relations are abstract and exist not in fact but only in contemplation of law.' An external referent is not necessary, because there is no ultimate 'reality' of the legal subject or the corporate form, but only the pragmatic effects of a legal construct (Dewey, 1926, p. 659) devised by legal scholars: 'juristic concepts are ideal expressions of social facts, and … their ideality is possible only by means of the abstraction which the jurist deliberately makes in his account of society' (Hallis, 1978, p. 163). Both the category of the 'person' and of the 'organization' (Hallis, 1978, p. 9) are thus conceived as constructs that exist as pure representations within a legal domain that is self-enclosed and self-referential (Dewey, 1926). In this reasoning, the content of the category of the 'legal subject' remains fully internal to a legal system of representations: 'put roughly, "person" signifies what law makes it signify' (Dewey, 1926, p. 655).

With the category of the 'person' signifying merely that 'what law makes it signify' (Dewey, 1926, p. 655), ontological assumptions do not refer to a referent external to the legal system of representations and are, therefore, not verifiable by any empirical test. The concept of the 'legal subject', therefore, becomes a highly pliable construct, to be defined exclusively in relation to the ontological assumptions set by legal scholars. With these methodological assumptions it is perfectly acceptable for positive conceptions of common law to present the corporate form as a *synthetic construct*, which can function *both* as a reified singular 'entity', 'subject', or 'person' *and* as a representation of 'the corporation' as a group representation or a representation of an aggregation of individuals at one and the same time. With both a singular and an aggregate referent in place,

attributions of agency, ownership and rights can also be made to this construct in both capacities. The synthetic notion of the corporate form with multiple referents results in a construct that is inserted into the category of the 'legal subject', but which in theory as well as in practice can be deemed to hold 'powers and privileges … which individuals do not possess'. (Jones in Horwitz 1985, p. 205; see also Harris, 2006, p. 1468).

The methodological assumptions underlying positive conceptions of common law create a self-referential system of representations in which the precise qualities of legal constructs are defined only by legal reasoning. As such, the status of the corporate form only needs to be specified in relation to other legal constructs. Given these methodological assumptions, positive conceptions of common law allow for the attribution for agency, ownership, and rights to the corporate form as a synthetic construct with both singular and aggregate referents. It is this synthetic construct, understood as a 'body', separate from the aggregation of individuals, which provides enough 'substance' as a singularized point of attribution, to enable the attribution of ownership over assets and liabilities; a separate accounting sheet; limited liability (Salomon vs. Salomon & Co [1897] AC 22); legal liability for any valid legal or economic actions undertaken by the corporation (Guinnane et al., 2007; Law Commission (Ireland), 2005); contracting agency with internal and external constituencies (Maitland, 2003); the attribution of individual as well as group rights; and pyramidal ownership structures with separate attributions of limited liability and transjurisdictional operations.

6.3 Negating the corporate form

Although the corporate form presented little more than a synthetic legal construct, the attributions of agency, ownership and rights based on its insertion into the category of the 'legal subject' attracted musings, both inside and outside legal scholarship, about the capacity for this construct to

be attributed with ‘intent’ (Dan-Cohen, 1986; French, 1984), ‘conscience’ (Kaysen, 1957), and, more broadly, ‘responsibility’ (Carroll et al., 2012; Scherer and Palazzo, 2011). In response to such anthropomorphical allusions and the broader claims about ‘corporate responsibility’ it invoked, the Law and Economics movement in the University of Chicago (see Foucault, 2008[1979]; Davies, 2010; Mirowski and Plehwe, 2009) invoked methodological individualism (Hodgson, 2007; Schrader, 1993, p. 159) to argue that ‘corporations, whatever they are, are not individuals and do not act as unitary individuals’ (Wells, 2005, p. 147). Arguing that in organizational analysis we should make the ‘individual agent … the elementary unit of analysis’ (Jensen, 1983, p. 15), the corporation was decomposed into an aggregation of individuals: ‘Individuals are ontologically prior to corporations, which, as fictions, have significance only because of the freely contracted arrangements of their human constituents’ (Scruton and Finnis, 1989, p. 254).

Based on the view that no type of organizational representation, whether corporations or states, could be meaningfully attributed with agency beyond the individuals that constituted such an organization (Bratton, 1989, p. 423), the notion of the ‘individual agent’ was explicitly not extended to the corporate form, whether in law or in economics (Jensen and Meckling, 1976, pp. 310–11). On the basis of this view, the corporate form did not present a legal ‘subject’ or ‘person’ in any meaningful sense (Friedman, 1970; Jensen and Meckling, 1994) and any imputation of responsibility (Friedman, 1970, p. 1), intention (Jensen and Meckling, 1976, pp. 310–11), consciousness (Lederman in Fisse and Braithwaite, 1993 p. 488), intent (Cressey in Fisse and Braithwaite, 1993 p. 490), agency (Fisse and Braithwaite, 1993 p. 475) or liability toward a corporate entity as such should be rejected and redirected toward individual members of the corporation (Clarkson, 1996; Wells, 2005). Based on methodological individualism, all attributions of agency were thus limited to the individual members of the firm, who were typically imagined as

human individuals (Friedman, 1970; Jensen and Meckling, 1994). What was left of the corporate form was nothing but a 'purely conceptual artifact' (Jensen and Meckling, 1994, p. 24).

6.3.1 A synthetic ideal-type economic 'agent'

However, the ontological and methodological assumptions of the Law and Economics movement in the University of Chicago imposed an idea of 'individuals' that was beside the point in relation to the conception of the 'legal subject' in positive methodological assumptions of common law. As noted above, positive conceptions of positive law had never been concerned with applying methodological individualism or with the precise ontological status of 'persons' or 'individuals' that were inserted into the category of the 'legal subject'. The invocation of methodological individualism, the imposition of strong ontological and methodological assumptions, and the reduction of the separate legal entity to a 'conceptual artefact', therefore, evaded the underlying problematic of the status of the corporate form as a conceptual construct in common law. Beyond introducing further confusion about the status of this construct, these assumptions became particularly problematic when the Law and Economics movement in the University of Chicago subsequently applied an about turn on the strong ontological and methodological assumptions they had introduced into the debate.

As we saw above, the Law and Economics movement in the University of Chicago rejected attributions of agency and responsibility to the corporate construct interpreted as an 'entity', 'person', 'subject', ' individual' or 'agent' as nothing but the attribution of anthropomorphic properties to a 'legal fiction' (Friedman, 1970) and a 'conceptual artifact' (Jensen and Meckling, 1994, p. 24). This negation of a substantive ontological status for organizations in general, and the corporate form more specifically, was based on the assumptions that all organizations, including

corporations, could be seen as nothing but generic aggregations of 'individuals' (Jensen and Meckling, 1976, p. 310).

However, rather than a generic concept of 'individuals', the Law and Economics movement in the University of Chicago invoked the ideal-type 'agents' of neoclassical economics (Veldman, 2010b). As such, the reconstitution of the corporate form did not merely project it as a generic organizational form, which was stripped of its distinctive legal characteristics. Instead, the corporation was reconstructed to become nothing but a reflection of the contractual relations of an aggregation of 'individuals'. Within this 'nexus of contracts', the corporation did not produce an ontologically separable type of organizational representation. Therefore, the agency of the 'individuals' that contracted within the corporation became nothing but an extension of contractual agency of agents in a broader concept of 'the market'. Contracting *inside* the corporation, therefore, became qualitatively similar to contracting *outside* the corporation (Bratton, 1989).

These ontological assumptions about 'individuals' were problematic in themselves (Sen 1977; Schrader, 1993; Ghoshal, 2005), but they were exacerbated in the context of the corporate form. In spite of the outspoken methodological and ontological assumptions that led the Law and Economics movement in the University of Chicago to present the corporation as a generic representation of organization, Friedman argued that the 'convenience' of the corporate construct (Friedman, 1970) meant that it should not be fully rejected. However, rather than as a broad legal construct with anthropomorphic assumptions, the corporate form would be allowed to further provide a point of attribution for legal properties and perks and for contractual agency as a neoclassical economic 'agent'. As a result, the legal assumptions pertaining to the corporate construct were retained and reimported, but projected upon a singular neoclassical 'agent' and expanded with ideal-type contractual agency as such an economic 'agent' (Veldman, 2010a).

The Law and Economics movement in the University of Chicago reconstituted the corporate form as a singular economic 'agent'. As such, attributions of contractual agency to the corporate form were not directed to the individuals that made up the corporation as an aggregation of individuals, as methodological individualism would have. These attributions would also no longer be made to the corporate construct as a broad 'legal subject'. Instead, attributions of agency to this construct would typically be governed by the ideal-type behavioral and ontological characteristics of neoclassical market agents (Crouch, 2011, p. 140; Schrader, 1993). Effectively, this meant that the corporate construct was reimagined as a larger-than-life market agent (Bratton, 1989), with contracting agency in and for itself, both inside and outside the corporation, which was capable of contracting with the individuals inside and outside the aggregation as an ideal-type contractual 'agent'. As such, the corporate form continued to provide a synthetic construct that related to singular as well as aggregate referents, while gaining the capacity to operate in an extended conception of a market consisting of nominally equal ideal-type 'market agents'.

Apart from introducing further theoretical and practical confusion about the status of the corporate form, and apart from introducing yet another conceptual understanding of the corporate form as a point of attribution for legal and economic properties and agency, these assumptions projected highly ideal-typical ontological assumptions onto the corporate form. Because this construct continued to operate as a 'body', 'entity', 'subject', or 'individual' with contractual agency within the pliable category of the 'legal subject', these projections would have consequences for the way different kinds of 'legal subjects' came to relate to that category.

6.3.2 Homo economicus: A legal subject

Far from applying methodological individualism with rigor, Law and Economics movement in the University of Chicago retained and reimported the corporate form with all its properties and attributions through the backdoor. The presence of the corporate form as a singular construct with contractual agency in the category of the 'legal subject' introduced quite a problematic theoretical background in situations where the corporate form had to interact directly with embodied natural persons in this category. In order to make such ontologically different constructs function as nominally equal legal 'subjects' as well economic 'agents', the ideal-typical notions of 'individuals' and 'agency' had to be stabilized. This stabilization necessitated the reduction of the concept of contracts and of contractual 'agents' to the lowest common denominator between the natural person and the corporate form, that is, the ideal-type neoclassical 'agent'.

To keep the notions of the corporate 'agent', the legal 'subject', the 'individual' and the 'natural person' subsumed under the ontological, behavioral, and relational assumptions of neoclassical economics the category of the 'legal subject' had to reflect the notion of the 'subject' as a 'purified subject of interest' (Foucault, 2008[1979], p. 273), who would exist by the grace of an earnings stream (Foucault, 2008[1979], p. 224) and would only exhibit agency as a neoclassical 'agent' (Bratton, 1989; Foucault, 2008[1979]; Schrader, 1993). To perform this 'anthropological erasure' (Foucault, 2008[1979], p. 258) the category of the legal subject had to be emptied of the moral, legal, and political specificity (Foucault, 2008[1979], pp. 253, 256; see also Ghoshal, 2005, p. 83) that clung to the passive, receiving economic 'man' with the 'needs' of classical liberalism (Foucault, 2008[1979], p. 225), and the anthropological and sociological moorings of the concept of the 'individual' and of 'work' (Foucault, 2008[1979], p. 252) that historical concept had brought. Therefore, ontological qualities that related to the natural, embodied person, such as frailty, weakness, spontaneity, unpredictability, selflessness, plurality of values, reciprocal influence, and resentment of domination (Perrow, 1986, p. 41; Ellickson, 1989) had to be erased from the category

of the legal 'subject'. As Perrow noted: 'human forms are retained but all that we value about human behavior – its spontaneity, unpredictability, selflessness, plurality of values, reciprocal influence, and resentment of domination – has disappeared.' (Perrow, 1986, p. 41). What was left as the ontological content for the category of the legal subject was the notion of a 'rational economic actor … denuded of significant human characteristics' (Bratton, 1989, p. 462).

The shift toward these new ontological assumptions came together with a move in the notion of contracts in company law. Historically, the notion of 'incomplete' contracts had left room for unspecified future occurrences (Bratton, 1989, p. 446; Ireland, 1999, p. 478). The insertion of the corporate form as an ideal-type contractual agent necessitated a shift to a notion of 'complete' contracts, which are 'famously empty at their cores omitting important future variables due to the difficulty or impossibility of ex ante description or ex post observation and verification' (Bratton and McCahery, 1999, p. 5). With the concept of complete contracts in place, the contractual relation could be reimagined as taking place between ideal-type agents on a voluntary, consensual, and fully informed basis (Bratton 1989, p. 455) allowing the 'individual', 'subject' or 'agent' entering into contract to provide full voluntary and *ex ante* consent (Bratton, 1989, p. 459; Williamson and Winter, 1991, p. 202).

With these assumptions in place, it becomes logical to assume that contracting between such 'agents' takes place in perfectly efficient labor markets in which 'agents' that contract are always free to change occupations immediately and costlessly (Ghoshal, 2005, p. 80; Bratton, 1989). Moreover, with contractual relations seen as an extension of broader market contracting and the corporation a negligible nexus of contracts, the corporation becomes nothing but 'a highly specialized surrogate market' with 'no power of fiat, no authority, no disciplinary action any different in the slightest degree from ordinary market contracting' (Alchian and Demsetz in Bratton,

1989, pp. 476-77). From this perspective, hierarchical relationships within the corporation can be denied (Perrow, 1986, p. 15; Bratton, 1989): ‘The hierarchical structure exists, but on a foundation of perfect consent of participants without human weaknesses’ (Bratton, 1989, p. 455).

Inserting the corporate form as a legal and economic construct in the category of the ‘legal subject’ (Bratton, 1989; Schrader, 1993; Zey, 1998; Foucault, 2008[1979]) thus enabled a contractual relation between nominally equal ‘legal subjects’, taking place in an abstracted environment, in which ontological differences and power asymmetries could be denied. To keep the ontological assumptions that sustained these conceptual relations stable, the notions of the corporation, the ‘legal subject’, the contract, and the market had to be fundamentally reconstituted to reflect only the assumptions that would fit the neoclassical *homo economicus*.

6.4 Discussion and conclusions: The political economy of the synthetic subject

Some critics have argued that the centrality of the neoclassical ‘agent’ to understandings of individuals and organizations is problematic, because of its ontological content. Rather than being ‘amoral’ (Crouch, 2011, p. 140), the ‘*homo economicus*’ (Foucault, 2008[1979], p. 147) of neoclassical economics is self-serving, opportunistic, and prone to ‘opportunism with guile’ (Perrow, 1986, p. 13). As such, the neoclassical agent provides a view of ontological content in which ‘The true human nature and needs of men comprise just those attitudes and values which fit them ideally for a loyal, subordinate role in a free enterprise system’ (Carey, 1977).

Others have argued that it is the lack of ontological content that is problematic. The neoclassical agent strips the concept of the ‘individual’ from most of its human properties (Sen,

1977, p. 324; Bratton, 1989; Ghoshal, 2005) and thereby produces 'rational fools' at the heart of social theory (Sen, 1977: 336). Using the concept of the *homo economicus* therefore leads to bad social science (Ghoshal, 2005, p. 78), vacuous theory, and circular reasoning (Sen, 1977, p. 325). Based on such critiques it has been argued that identifying the ontological and methodological problematics of the neoclassical 'agent' would lead to better conceptions of the ontological assumptions at the heart of the social sciences (Ghoshal, 2005, p. 80), towards more comprehension of the double hermeneutic (Ghoshal, 2005, p. 77) or towards more and better empirical falsification (Ghoshal, 2005; Sen, 1977). What emerges from the discussion of the corporate form is that the problem with the neoclassical 'agent' may well stretch beyond the (absence of) ontological content, or theoretical and methodological aberrations on the basis of self-referential assumptions.

Proponents of law and economics explicitly argued that the ontological assumptions relating to *homo economicus* provided an economic conception of the 'agent' that would function as the model 'building block' for the understanding of all attributions of agency, rationality and morality to individuals and organizations in the wider legal, economic and social system (Meckling, 1976; Jensen and Meckling, 1994; Foucault, 2008[1979]). The ideal-typical ontological assumptions relating to this economic 'agent' were central to a broad program in law and economics and have had a broad influence, not just in legal and economic scholarship (Bratton, 1989), notably in regulatory changes and court decisions (Becker, 1974; Ghoshal, 2005, p. 81), but also in sociology and psychology (Ghoshal, 2005, p. 82), and in corporate governance theory (Daily, Dalton and Cannella, 2003; Aglietta and Rebérioux, 2005). Overall, these assumptions have facilitated a wide reconstruction of assumptions regarding the ontology of constructs in the legal and economic domains, such as citizens, organizations, states and markets (Perrow, 1986, p. 15; Ghoshal, 2005; Veldman, 2013; Beverungen, Hoedemaekers and Veldman, 2014).

In relation to this broad program of ontological reconstruction the corporate form presented a central conceptual problem. As shown in this chapter, the corporate form relates to multiple historical frameworks, which provides the corporate form with an inconclusive ontological status in the category of the legal 'subject'. As a construct that relates to multiple referents and is explained differently between the legal and the economic imaginaries, the corporate form presented an anomalous and highly problematic construct in the legal, economic and political systems of representation (Schrader, 1993; Bowman, 1996; Zey, 1998). In order to preserve the outcomes of this construct, and yet to retain nominal adherence to the assumptions of their ontological program, the Law and Economics movement in the University of Chicago applied an about turn by projecting the corporate form as an ideal-type economic 'agent', while at the same time retaining this construct in the legal and economic systems of representation as an enterprise 'unit' with its singular and aggregate referents (Foucault, 2008[1979], pp. 173, 225, 230, 241) and with the properties attributed on the basis of these multiple referents (Jones in Horwitz 1985, p. 205; see also Harris, 2006, p. 1468). In order to support the double take that would safeguard both the legitimacy of the corporate form as a construct with multiple referents and the legitimacy of the program of ontological reconstitution set in motion by the Law and Economics movement in the University of Chicago, the projection of ideal-type ontology, agency and 'rationality' (Foucault, 2008[1979], p. 268) and the evacuation of the ontological content of the embodied, natural person from the category of the 'legal subject' were no longer incidental or external: both became *necessary*.

The concept of embodiment provides an excellent point of departure to provide an antidote to this program of ontological reconstruction. Starting with the concept of embodiment, it becomes easy to recognize that the contemporary corporate form with its multiple referents is not a self-evident or 'natural' kind of construct in the legal and economic domains. Rather, legal and economic scholars have bestowed an unclear ontological status (see Berger and Pullberg, 1965, p.

206) on the corporate form as a conceptual construct, which allows this construct to function as a point of attribution for agency, ownership and rights in the legal, economic and political systems of representation. Insofar as the conditions under which the affordance of these attributions of agency, ownership and rights on the basis of both singular and aggregate referents in the legal, economic and political systems of representation (Veldman and Parker, 2012), and the affordance of the status of a construct that functions as a legal, economic and social institution have become unconnected from 'the human activity by which it has been produced' (Berger and Pullberg, 1965, p. 199), the status of this construct has become reified.[2]

With the corporate form identified as a reified construct, the concept of embodiment also provides an excellent point of departure to start 'identifying and questioning the models of selfhood and human nature' (Litowitz, 1999, p. 419). In relation to the category of the legal 'subject', two nested subpositions can be identified: the juridical person and the natural person (Lawson, 2015). As a concept, the natural person can only be distinguished conceptually from the juridical person by virtue of their embodied qualities. Similarly, it is in relation to these singular and embodied qualities that the concept of the natural person provides a stable referent for the category of the 'legal subject' to relate to wider concepts of the category of the 'person', 'individual', or 'subject' in dominant political (Bowman, 1996), legal (Wells, 2005) and methodological assumptions in the social sciences (Elster, 2007), as well as in direct relation to other (supra-)individual constructs, including individuals, states and organizations (Gierke, 1968; Bowman, 1996; Maitland, 2003; Veldman and Parker, 2012; Veldman, 2013; Wilks, 2013; Beverungen, Hoedemaekers and Veldman, 2014).

As shown above, the ongoing reification of the corporate form rests on the projection of an ideal-type ontology and the evacuation of the ontological content that relates to the embodied status

of the natural person. As such, the ontological program of law and economics effectively reconstitutes the category of the 'legal subject' by removing the ontological content that relates to the natural person. This has had three kinds of direct consequences for the relative position of the embodied, natural person in relation to the corporate form.

First, the embodied, natural person provides a tangible and identifiable referent in relation to the category of the 'legal person'. As a result, there is no real conceptual difficulty in establishing a relation to such an embodied, natural person when liability and responsibility need to be attributed. In contrast, the multiplicity of referents, as well as the multiplicity of ontological, behavioral and methodological assumptions this multiplicity evokes, confer on the corporate form a theoretical 'elasticity', which makes the construct 'notoriously nimble' (Dewey, 1926, p. 669) and allows corporate lawyers to strategically exploit a 'metaphysical gap' (Wells, 2005) in a 'corporate vanishing trick' (Ireland, 1999, p. 56) when it comes to attributing responsibility or liability (Veldman, 2010a). Some have characterized the ontological status of this slippery and elusive kind of construct, which provides a highly unstable point of attribution for agency, ownership and rights, as very similar to the Cheshire cat (Allen, 1992; Naffine, 2003). As a legal construct, the embodied, natural person thus presents a far more directly identifiable construct when it comes to the attribution of liability and responsibility then the evasive construct with ideal-type attributions of agency presented by the corporate form.

Second, as shown in the previous section, the insertion of the corporate form into the notion of the contract changed the notion of the contract itself (Bratton, 1989) and created the assumptions that the corporate form would contract as a nominally equal legal 'subject' with embodied natural persons. Arguably, these moves have led to a highly unequal basis for the conceptualization of contractual relations between the corporate form and the natural person in the legal and economic

domains, notably by reconstituting the basis for the employment relation (Bratton, 1989; Williamson and Winter, 1991).

Third, the ontological assumptions that allow the corporate form to contract as a legal 'subject' project the contractual relation as taking place in a highly abstract concept of a 'market', populated solely by ideal-typical 'agents'. Arguably, this conceptual 'market' in which 'subjects' come to contract on the basis of ideal-type assumptions of ontology and agency is based on the removal of the ontological properties of the singular embodied natural person, while it augments the potential to use the corporate form in the legal and economic domains. The projection of economic relations taking place in this ideal-type setting, therefore, is geared completely towards the needs of economic operations that take place through the corporate form and comes at the cost of the status of the embodied, natural person in relation to the category of the 'legal subject'.

Beyond these direct consequences, the evacuation of the category of the 'legal subject' from the ontological qualities relating to the embodied natural person allowed for a wide reconstitution of related concepts, including contracts, the market, individuals, citizens, organizations, states and corporations (Veldman, 2010a, 2013). Removing the embodied ontological content from the natural person in the category of the 'legal subject' allowed all these constructs to be pictured as nominally equal 'agents' with the same ideal-type ontological assumptions, the same ideal-type contractual agency, and operating in an ideal-type, abstract and frictionless concept of the 'market'.

The concept of embodiment makes clear how the program of ontological reconstitution set in motion by the Law and Economics movement in the University of Chicago transformed the conditions of possibility for the acknowledgement of ontological content based on embodied properties of the natural person in relation to the category of the 'legal subject' and the economic 'agent' and how this transformation is linked to the problematic status of the corporate form. Given

the fundamental nature of this program of ontological reconstitution and the political economy it sustains, it seems unlikely that a more informed application of methodological individualism, or a critique of the self-referential ontological assumptions between legal and economic scholarship, will provide sufficient leverage to reconstruct the category of the 'legal subject'. However, with the concept of embodiment as the point of departure it is possible to grasp the reification of the corporate form and to relate this to the relative position of the natural person with embodied properties within the category of the 'legal subject'. From this perspective it becomes possible to question the wide and unequal reconstruction of ontological assumptions in the legal and economic systems of representation brought about by the Law and Economics movement in the University of Chicago; to question the way in which these reconstructions affect the natural person in theory and in practice; to question the self-referential quality of the systems of representation that sustains these assumptions; and to question what kind of political economy these reconstructions serve.

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Notes

[1] Daimler Co Ltd vs. Continental Tyre and Rubber Co (Great Britain) Ltd (1916) 2 AC 307.

[2] Reification relates to the treating of a '*non-thing*, such as an institution, social role, or relationship, as a *thing*, an immutable part of the natural world' (Litowitz, 2000, p. 401). Reification thus presents 'A phantom of objectivity, a mystification that blinds people to alternative legal arrangements by "naturalizing" the existing legal system as inevitable' (Litowitz, 2000, p. 413).