

# *Corporations and the Lateral Obligations of the Social Contract\**

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## **I Introduction**

A recent string of events has stirred great interest in the area of Business Ethics. The names Enron, Worldcom and Adelphia have become household names and not on the basis of their good deeds and general benefit to society. Each of the companies has contributed to an unprecedented spectacle of corporate malfeasance and consequently, a greater public awareness of the nature and power of corporations in the modern world.

I wish to suggest that this series of recent scandals is not something particularly unusual in the sense that such behaviour is atypical for the actors concerned. Although the actions may have been notable because of the size of the transactions involved, or because of the novelty of the legal issues, I believe these actions are consistent with the way the rules of the game are currently interpreted by the players.

As much as we may wish to ascribe these scandals to individual executives, I believe it is more a case of one type of citizen of our society being designed more or less for the purpose of amassing as much wealth as possible for itself. This series of scandals has done us the service of drawing our attention to these actions and the broader issue of corporate behaviour in the early 21<sup>st</sup> century. More importantly, the scandals serve to make us question and re-evaluate the role of corporate persons in a society of human persons.

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## II Broader Context

Corporations, with their increasing control over resources, now comprise 51 of the world's largest 100 economies.<sup>1</sup> As a corollary, it is decreasingly necessary for them to listen to the concerns of the less powerful governments and other private citizens.<sup>2</sup> One sees, for example, the great power of corporations like Wal-Mart, which are able to externalise enormous costs onto society and hence onto the average member of society.<sup>3</sup> This power imbalance has become an increasing menace to many values human beings hold dear, from such ethereal notions as democracy, human dignity and the environmentalism<sup>4</sup> to more tangible values such as retirement savings and personal service.<sup>5</sup>

With regard to intangible values, we see democracy trammelled by corporate entities through industry lobby groups and international trade agreements which prohibit democratically elected governments from pursuing policies in favour of their human citizens.<sup>6</sup> Rather, governments surrender their powers and wealth to the interests of large publicly traded corporations.

With regard to intangible values, we find that corporate structures, laws and policies have permitted, (or at least not restrained) corporate executives from transferring vast sums of lower and middle class wealth to a few already wealthy executives.<sup>7</sup> We find a complete disregard for the consumer who must listen to recorded messages by the hour to get service, yet receive impatience or impertinence in return. Any notion of

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<sup>1</sup> Sarah Anderson and John Cavanagh, *Of the World's 100 Largest Economic Entities, 51 are now Corporations and 49 are Countries* (2000) Institute for Policy Studies <<http://www.corporations.org/system/top100.html>> at 29 November 2005.

<sup>2</sup> See D Korten, *When Corporations Rule the World* (2<sup>nd</sup> ed, 2001).

<sup>3</sup> See B Sheehy, 'Corporations and Social Costs: The Wal-Mart case study' (2004) 24 (1) *Journal of Law & Commerce*.

<sup>4</sup> Ibid 3; M Mizruchi, 'Berle and Means Revisited: The Governance And Power Of Large US Corporations,' (2004) 33(5) *Theory and Society* 579–617; See also discussion in S Dunn and S Pressman, 'The Economic Contributions of John Kenneth Galbraith,' (2005) 17(2) *Review of Political Economy* 161–209.

<sup>5</sup> Ibid. Where humans interact with one another on a human scale, the power imbalance rarely gets so far out of line; however, in our dealings with corporations we see all of these values, both the tangible and intangible, transgressed with not so much as a word of apology or excuse.

<sup>6</sup> This concern is evident in many Free Trade Agreements which permit a free flow of goods and capital but prohibit the same freedom to citizens. See, eg, the discussion in the recent Oxfam study, *Rigged Rules and Double Standards: Trade, Globalisation and the Fight Against Poverty*, Make Trade Fair <<http://www.maketrade-fair.com/en/index.php?file=26032002105641.htm>> at 10 August 2004.

<sup>7</sup> Sixty-seven percent of investors in American equity markets earned less than \$75,000 including some nine percent who earned less than \$25,000. Discussed in an engaging narrative in W Flanagan, *Dirty Rotten CEO: How Business Leaders are Fleecing America* (2003) 219. This issue drew attention as a result of the many recent corporate collapses such as Enron, Worldcom etc where share based executive compensation schemes resulted in executives selling in advance of markets receiving information, effectively transferring the value represented by broader publicly held shares to themselves (Discussed Ibid). Such effects are evident in the HHH collapse in Australia, discussed in A White, *Collapse Incorporated* (2001) 45.

a negotiation with a large corporation is dismissed with the fine print of a pre-drafted form.<sup>8</sup> Essentially, the individual human being has dropped off the corporate radar, as demonstrated by the corporation's utter disregard for individual wellbeing.

### III Outline of the Discussion

In this paper, I will suggest that society is held together by its agreement to follow certain norms which we call ethics. These ethics are found to a certain extent in the Social Contract. I will briefly examine the ethics put forward by, or foundational to, the Social Contract and I will do so, particularly in terms of rights. Rights, among other things, have to do with expectations members of society have of one another. The argument is then made that corporations as members of society have responsibilities pursuant to the Social Contract.<sup>9</sup>

I will then turn my attention to determining what constitutes a breach of rights, using as examples the current scandals and finally turn to ethical responses to these breaches. In light of the foregoing, I will suggest that the shock of these scandals is really the human response to the discovery that we are living in a post-ethical world. The recent corporate malfeasance is but one type of anti-social behaviour which has made these artificial persons a danger to human society.

### IV The Social Contract

The theory of the Social Contract took hold in the Western intellectual tradition of the 16<sup>th</sup> and 17<sup>th</sup> centuries, a time of the great tyrannical monarchies. Intellectuals interested in political philosophy such as Hobbes, Locke and Rousseau, found their thoughts organised around issues such as what permits a society to function? What form of organisation is legitimate? What form of government is justifiable;

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<sup>8</sup> The Battle of the Forms is a thin solution to the issue of companies preparing highly prejudicial contracts for consumers to sign. *Butler Machine Tool Co v Ex-Cell-O Corporation (England) Ltd* [1979] 1 WLR 401. Consumers usually have neither the resources in terms of time or money, nor the insights to negotiate their way through the myriad of terms and conditions in the majority of contracts and litigate. In the rare instances where the contract is litigated, the consumer may be relieved of the most onerous of terms; however, it must be remembered that in the interim, the company has benefited from the thousands of consumers who took no action and simply submitted to the terms. See Discussion of contracts in Alan Thomson, *The Law of Contract*, The National Critical Lawyer's Group <[http://www.nclg.org.uk/book1/2\\_5.htm](http://www.nclg.org.uk/book1/2_5.htm)> at 28 November 2005.

<sup>9</sup> My argument is not a new one. See, eg, D Donaldson, 'Constructing a Social Contract for Business' in T Donaldson, *Corporations And Morality* (1982) 18, 18–35; S Waddock, *Leading Corporate Citizens: Vision, Values, Value Added*, (2<sup>nd</sup> ed, 2006); Ben Wempe, 'On the Use of the Social Contract Model in Business Ethics' (2004) 13(4) *Business Ethics, A European Review* 332, 332–341.

what rights should it hold? In some instances their thinking was used to justify the common sentiment that the monarchies were illegitimate and to provide a justification for the overthrowing of those monarchies on the basis of Social Contract.

According to theorists, such as Hobbes, Locke and Rousseau, such a Social Contract forms the basis of any society and provides legitimacy to the ruler. The original Social Contract theorists imagined an initial 'State of Nature' (a state in which no government existed) and from that initial position formulated what they believed to be the justification for and ideal form of social organisation or government. The state of nature envisioned by these theorists was not uniform. In some instances, it was wild in nature. Hobbes for instance believed that 'the life of people, [is] poor, nasty, brutish, and short.'<sup>10</sup> The law of the jungle ruled: 'might is right'. Rousseau, by contrast, considered the natural condition to be ruled in accordance with a general will coordinating not individual interests but a common interest.<sup>11</sup> Locke, like Rousseau, had a more benevolent view of humankind. He wrote: 'all being equal and independent, no one ought to harm another in his life, health, liberty or possessions'.<sup>12</sup> Locke, in dramatic contrast to Rousseau (who viewed private property as theft),<sup>13</sup> added a concern for private property as part of his view of the state of nature and a justification for the Social Contract.

Whatever the view, the Social Contract sets out the terms of surrender as it were – or at least the compromise by individual citizens of their rights, granting certain aspects of control to a government. In other words, the Social Contract theorists asked: what must a society offer or a government offer, or what conditions must it create and what rights must it respect in order for citizens to agree to accept its authority? Each had a different view although all accepted that to some degree; it required a minimal level of protection for the individual.<sup>14</sup>

A further difference among the theorists occurred regarding the extent of the rights surrendered and the nature of the transfer to government of those rights. Hobbes argued for a complete non-rescindable grant of rights to an absolute sovereign.<sup>15</sup> Locke, by way of contrast, held that the government held the powers in trust in a fiduciary capacity, granting rights to the people and leaving duties resting with the government.<sup>16</sup> Rousseau's view of the Social Contract was a complete surrender by

<sup>10</sup> Thomas Hobbes, *Leviathan* (1660) in R Tuck (ed) (1991) 62.

<sup>11</sup> P Riley, 'A Possible Explanation of Rousseau's General Will' in C W Morris (ed), *The Social Contract Theorists: Critical Essays on Hobbes, Locke, and Rousseau* (1999) 167, 177.

<sup>12</sup> J Locke, *Second Treaties of Government* (1690) ch 2, s 8.

<sup>13</sup> Jean-Jacques Rousseau, *Discourse on the Origins of Inequality* (F Philip trans, 1994) 55.

<sup>14</sup> Although there was no agreement, however, on who counted as an individual deserving of protection.

<sup>15</sup> See discussion of Hobbes's view in J Hampton, *Political Philosophy* (1997) 41–52 and critique of Hampton in D Gauthier, 'Hobbes's Social Contract' in C Morris (ed), *The Social Contract Theorists: Critical Essays on Hobbes, Locke, and Rousseau* (1999) 59–72.

<sup>16</sup> See J Gough, *The Social Contract* (1936) 143.

individuals to a notion he referred to as the 'General Will'. This General Will was the will of the community which obligated the government to serve the desires and well-being of the general population.

All three Social Contract theorists placed a high value on human freedom and dignity. Rousseau noted in the opening of his first chapter that 'Man is born free'. Locke consistently stated that humans are free and equal in nature. Hobbes began from the same premise. These thinkers drew on what they believed it meant to be a human being in the first place. They considered that humans are moral, rational, spiritual and social beings, with concern and respect for others.<sup>17</sup> In essence, in all its forms, the Social Contract addresses the organisation of society; it is based on the rights of individuals and acknowledges the necessity of cooperation and mutual respect. At a most basic level, the Social Contract suggests that society can only exist where the ethic is something other than 'might is right'. It is an agreement to live by an ethic which recognises that individual power is not a satisfactory organising principle for a society, for as various theorists have realised, the differences between individuals are not sufficient to justify or sustain the 'might is right' organisation of society. Broadly speaking, people are members of society for the potential benefit of an improved life and they recognise that to achieve this potential, some rights must be surrendered to a government of some type for the purposes of coordinating and protecting their rights.

The notion of the Social Contract has been extended in more recent thinking. It is no longer limited to the demarcation of rights and obligations as between government and citizens, but also as between citizens themselves. In his landmark work, *A Theory of Justice*, John Rawls provides the following analysis:

Society is a cooperative venture for mutual advantage ... [but] is marked by a conflict as well as by an identity of interests. There is an identity of interests since social cooperation makes possible a better life for all than any would have if each were to live solely by his own efforts.<sup>18</sup>

In other words, uniting has permitted the members of society to create a greater pool of resources. This is not, however, the end of the discussion. This greater pool of resources leads to conflict.

'There is a conflict of interests,' continues Rawls, 'since persons are not indifferent as to how the greater benefits produced by their collaboration are distributed, for in order to pursue their ends they each prefer a larger to a lesser share'.<sup>19</sup> From Rawls' perspective, it would seem that what permits a society to continue to function with this on-going conflict is justice and in its institutionalised form, Law.

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<sup>17</sup> *Leviathan* above n 10, [1].

<sup>18</sup> J Rawls, *A Theory of Justice* (1971) 4.

<sup>19</sup> *Ibid* 4.

Each of these theorists recognises the importance of the individual's role in creating society. In that vein, to a greater or lesser extent, each thinker grants some rights to the individual *vis-à-vis* others and society. Rawls moves beyond the earlier thinkers in this tradition by making the case that justice – the correct recognition and disposition of rights – is what holds a group together.

A society perceived to be unjust by its members is a society set up for insurrection, revolution and civil strife. One need look no further than any of the current hotbeds of civil strife such as the Middle East; where American support for oppressive regimes goads civil retaliation, or IMF-imposed conditions that ensure cash flows to wealthy investor while the poor go hungry.<sup>20</sup>

## V What are the Terms of the Social Contract?

While the Social Contract is certainly not an actual contract, but a hypothetical one envisaged as a means of legitimating various forms of government, there are arguably some instances of explicit efforts to create such a contract in reality. In particular, the Constitution of the United States of America is based at least in part on Locke's model of Social Contract. It is instructive to examine the specific terms of such a Social Contract in practice, as opposed to staying in a Rawlsian or Lockean theoretical realm. Its clear statement of objectives sets out the reason for organising society. In its preamble, the United States Constitution reads:

We, the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this Constitution for the United States of America.

The terms are set as follows:

- 1 We, the people – for the benefit of humans;
- 2 A more perfect Union – cooperation among state governments;

And then goes on to set out the basic requirements of a Social Contract, to:

- 3 Establish justice (dispute resolution mechanism);
- 4 Insure domestic tranquillity (peace is the objective);
- 5 Provide for the common defence (security of life from attack);
- 6 Promote the general welfare (good of all);
- 7 Secure the blessings of liberty to ourselves and our posterity (dignity is based on grounds of; freedom of will, human action).

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<sup>20</sup> J Stiglitz, *Globalization and its Discontents* (2002) 77.

Admittedly, these objectives were very limited in their application, namely to that specific class, race and gender of people who recognised one another as people.<sup>21</sup> This failure in universality, however, does not detract from the Constitution's contribution in providing an example of the 'look and feel' of a real Social Contract.

To understand and evaluate the American Constitution one should consider its historical context. At its inception, the citizens of the individual states were living in a condition close to Hobbes's idea of a State of Nature. They lived in a world in which they were constantly at war with the Native Americans. At the same time, they were refugees from Britain's oppressive laws.<sup>22</sup> In the American Revolution, they chose to fight rather than endure the continued indignities of that oppression.<sup>23</sup> The society they wished to create and to which they were willing to surrender their individual power was the society set out in their Social Contract, the American Constitution.

The Constitution did not arise in a vacuum. It was drafted with Social Contract theories in mind, showing a great respect for individual rights and restrictions on the government's exercise of power. It reflects Locke's argument in his *Two Treatises* of 1690 that the government's job under the 'Social Contract' is to protect 'natural rights,' including what he calls 'the right to life, liberty, and the ownership of property'<sup>24</sup> – words mirrored in the Constitution itself. Locke envisaged independent rights and a government subject to the people, a government that received a limited grant of rights for the purpose of advancing human interests.<sup>25</sup>

In a sense, the Constitution is a Lockean Social Contract *par excellence*. It is an explicit rejection of an absolutist government. The humans have refused to alienate their right to be governed in their own interest to government or any other party.<sup>26</sup> A Social Contract is therefore a human manifesto against a tyranny that fails to recognise human rights.

There are three things that should be noted about the Constitution:

- 1 it is oriented towards human persons,
- 2 it is based on law and
- 3 the implicit assumption of it merely being a framework for a functioning society. It is not creating all the rules necessary for a society to exist.

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<sup>21</sup> The argument is not to be taken as any indication that the Constitution was a true Social Contract as among other reasons, it excluded those without property, women, slaves, and indigenous – obviously more than fifty percent of the people to be subjected to the contract! For a fuller discussion of the problem see P Carroll and D Noble, *The Free and the Unfree: A Progressive History of the United States* (3rd ed, 2001).

<sup>22</sup> The religious were oppressed by the Anglican church, the poor in England were oppressed by their limited means of subsistence, and the wealthy were oppressed by Britain's restrictive trade regime and taxes.

<sup>23</sup> This facile explanation of the revolution is obviously not intended to be taken as an historical truth or exposition of the underlying complexities. See H Zinn, *A People's History of the United States* (1980).

<sup>24</sup> Locke, above n 13.

<sup>25</sup> Hampton, above n 15, 65–67.

<sup>26</sup> Hampton, above n 15, 41–67. Hampton argues that inalienability is one of the distinctive differences between Lock and Hobbes' view of the Social Contract.

## VI Citizen Agreements: Laws, Rights and Ethics

### A Law

In some views at least, law is merely the institutionalisation of justice,<sup>27</sup> the codification of society's norms, (or perhaps more accurately, the codification of the norms of those with power) which will be enforced by the civil authorities.<sup>28</sup> Nevertheless, without some sort of law or custom, society would not function.<sup>29</sup> Failing to attain unity of ethnicity, religion or language, we rely on rights.<sup>30</sup> From the creation of the corporation to the regulation of activities among people, we look to law as an integral part of the foundation of society.

Law however, cannot create a society. Law is usually drafted in the least restrictive means and with a bias in favour of negative obligations in the interest of preserving the greatest freedom. Social Contract theorists would hold that an agreement to follow the law is a basic tenet of the Social Contract.<sup>31</sup> This does not suffice, however, to make a society. One need only look at the many countries around the world that have fine laws and ruinous societies. In such societies, people fear for the very things Social Contract theorists suggest would lead to the formation of the Social Contract; namely, their very lives, the means to survive and the possibility of attaining this through one's labour.<sup>32</sup>

Social Contract theory holds that once humans have surrendered to the Social Contract in a civil society, citizens expect other citizens to respect rights and justice by acting within the bounds of the Law. But this is an inadequate explanation of society. No one would want to live in a society in which the citizens acted only in accordance with the Law. No one would argue that merely obeying the law creates a society.

This reasoning leads us to consider what else might be needed to create the society hoped for by the Social Contractarians. At this point, Social Contract theorists begin the discussion about rights.

<sup>27</sup> See, eg, Karl Llewellyn's thought in M Freeman, *Lloyd's Introduction to Jurisprudence* (7<sup>th</sup> ed, 2001) 805.

<sup>28</sup> The view of H L A Hart and positivists generally, cf M Davies, *Asking the Law Questions: The Dissolution of Legal Theory* (2<sup>nd</sup> ed, 2002) 94–96.

<sup>29</sup> H P Glenn, *Legal Traditions of the World*, (2<sup>nd</sup> ed, 2004) 44–48.

<sup>30</sup> M Ignatieff, *The Rights Revolution* (2002).

<sup>31</sup> See Hampton, above n 15.

<sup>32</sup> See, eg, Glenn, above n 29. Discussion of the divide between black letter law and chaos on the ground in post-colonial Africa. Consider also anti-corruption legislation in The Philippines, which is also considered one of the most corrupt countries in the world.



## B Rights

Viewed from a consequential perspective,<sup>33</sup> rights are restrictions placed on members of a group in dealing with each other. The corollary of the restrictions is the element of expectation. In light of the restrictions, one expects to be able to do certain things without interference. It may be said that my membership in a group lies in my agreement to restrict my freedoms and that my restriction is a grant to someone else of 'the right' to count on me not acting in particular way. So too, another's agreement to restrict his or her freedom is a grant to me of a right to predict his or her behaviour in one manner or another. Rights, then have this reciprocal aspect.<sup>34</sup> To live in a society is to have rights – or, for society to exist, rights (which I shall define as predictable restrictions giving rise to expectations) must exist.

Fortunately, our cave-dwelling ancestors did not need to solve the problems of rights theory in order to organise themselves into some resemblance of a society. The simple idea of rights set out above will suffice for our purposes.

The rights necessary for a simple society to exist can be easily broken down into two expectations of reasonable restrictions much like those offered by Hobbes: first, the reasonable expectation that I will not be killed by fellow community members and second, that my means of survival will not be interfered with; that I will have access to community resources necessary for my survival. Each society creates its own 'goods', establishes its own hierarchy of values and its own socio-political organisation. The combination of these three facets of society justifies a particular distribution of 'goods' and bonds' and establishes a certain sense of justice.<sup>35</sup> Thus from the perspective of that community, communal resources will be shared justly, for a fundamental failure of justice can ultimately only lead to civil unrest.

What permits a society to continue to function with the natural conflict concerning means of survival and communal resources are justice, and its institutionalised form, Law. Law serves as the recognition of rights, the mode of resolving conflicting rights and the means of enforcement of rights. As Michael Ignatieff puts it, the relation of rights to justice lies in the definition of justice as that which balances competing rights.<sup>36</sup>

These rights form the foundations of justice and of a just and fair society. Rawls argues that the very first principle of a just society is that

<sup>33</sup> For purposes of this discussion it is only the social consequences manifested that I am interested in, not the broader theoretical discussion carried on voluminously by numerous scholars following on the work of Hohfeld, Dworkin and others, discussed in Davies, above n 29.

<sup>34</sup> Although we have only spoken of rights in the individual sense, groups also can have rights. Obviously, this idea of rights is highly abbreviated, incomplete and stated in non-technical discussion. Rights theory is a minefield in terms of political agendas and swamp in terms of its fundamental problems as raised by the introductory questions.

<sup>35</sup> M Walzer, *Spheres of Justice: A Defence of Pluralism and Equality* (1983).

<sup>36</sup> Ignatieff, above n 31, 30.

‘each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others’.<sup>37</sup> But is not the imperative implicit in this statement that one also do more than merely refrain from interfering with others? Must not one also preserve the enabling conditions for the very existence of those liberties? Even Locke, often considered to be the champion of private property rights (although he placed the right to subsistence ahead of private property) offers that private property may be created by taking from the commons provided that ‘enough and as good’ is left.<sup>38</sup> In other words, the condition that enabled Locke’s gentleman farmer to create private property in the first place must be protected and in this case there was sufficient for everyone.

Locke’s is a delightful idea, but as Rawls indicates, it is as a first principle of justice that we live in a world of limited resources. A just resolution to the conflicts concerning contemporary society’s distribution and use of resources is necessary for the continuation of a society.<sup>39</sup> This just resolution is the enabling condition. Rawls goes on to state that the primary goods available in a society include; health, intelligence and imagination. He suggests that the free use of these ‘goods’, uninterfered with, is the fundamental right that form the basis of respect and justice in society.

Rights go beyond law however. We claim rights that the law does not recognise and we condemn the Law on the grounds that important moral rights are not being recognised.<sup>40</sup> Indeed, one of the morally accepted justifications for not obeying the Law – civil disobedience – is founded on the basis of moral rights.<sup>41</sup>

Mutuality of rights of coordination, however, calls upon the individuals participating in the society to refrain from doing certain things. In terms of rights as discussed in this paper this includes living up to others’ expectations and restraining ourselves from certain actions which we may perceive as being in our interests.<sup>42</sup> This restraint is spoken of in terms of sacrifice. Ignatieff, for example, observes:

All rights cost us something. Even when we don’t avail ourselves of our entitlements, others do, and we pay for their use. Belonging to a rights community implies that we surrender some portion of our freedom to sustain the collective entitlements that make our life possible. This idea of sacrifice is the very core of what it means to belong to a national community: paying taxes, obeying the law, submitting disputes to adjudication and abiding peacefully by these decisions. Sacrifice does not stop there.<sup>43</sup>

<sup>37</sup> Rawls, above n 18, 61.

<sup>38</sup> J Locke, *Second Treatise on Government* (1690) II vol 33.

<sup>39</sup> The injustices of current trade rules, for example, threaten to undermine the WTO, OXFAM, *Rigged Rules Rigged Rules and Double Standards: Trade, Globalization, and the Fight Against Poverty*, Make Trade Fair <<http://www.maketrade-fair.com/en/index.php?file=26032002105641.htm>> at 28 November 2005.

<sup>40</sup> R Dworkin, *Taking Rights Seriously* (1999).

<sup>41</sup> Ibid.

<sup>42</sup> See Hampton’s discussion of the prisoner’s dilemma in this context, above n 15, 43–48.

<sup>43</sup> Ignatieff, above n 31, 126.

Rights theorists, however, are quick to admit that rights are insufficient in terms of creating a community. Ignatieff goes on to say, 'Rights alone cannot create a community feeling, you need a common history and shared experience for that.'<sup>44</sup> and elsewhere '... rights alone are not enough... we need extra resources, especially humour, compassion and self-control.'<sup>45</sup>

In other words, while rights and law are fundamentally important (indeed they form the basis of societal cooperation) we cannot form an acceptable society if people act on the basis of rights or law alone. If we do no more than observe legal rights we will not have 'society'. In other words, in returning to our Social Contract, there must be what lawyers call an 'implied term' to the contract: a term not set out explicitly but understood by all in order for the contract to have the effect intended. This implied term in the Social Contract is ethics – the demonstration of respect for dignity. It may be further argued that the Social Contract is premised on pre-existing egalitarian rights and on offering a theory that provides for the mutual recognition of a human being's dignity. It is a consequence of rights and the aspiration of ethics.<sup>46</sup>

### C Ethics and the Expectations of Society

The term 'Ethics' can be historically defined as the 'ethos' of a people; that is, the accepted norms, customs, or habits of a society. The ethos determines who one is, what one is and where in a society a person belongs. In the course of its development Ethics has come to be understood as the discussion of right and wrong (or good and evil) in a society. Ethics, by this definition then, is what the people of a community determine to be good, expected and acceptable behaviour (and its opposite).<sup>47</sup>

Perhaps no better or more broadly accepted contemporary statement of human expectations (or good) can be found than in the UN Declaration of Human Rights. Article 1 reads in part: 'All human beings are born equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in the spirit of brotherhood'. It is hard to imagine any instance in which a culturally sensitive, rational person acting with this Article in mind could be accused of acting unethically.

As humans we expect some sacrifice; we share some idea that there is a larger good to contribute to than earning a daily wage to feed ourselves.<sup>48</sup> We expect to contribute to the fabric of society that permits

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<sup>44</sup> Ibid 33.

<sup>45</sup> Ibid 39.

<sup>46</sup> In this case, at least deontological ethics.

<sup>47</sup> Consider argument for this view in M Nussbaum and A Sen (eds), *The Quality of Life* (1993) and M Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (revised ed, 2000).

<sup>48</sup> The exception of course being the neo-liberal community which does not see itself.

us to live together and to give us greater resources than we would have living on our own. Grudging though we may be about paying our taxes, surveys indicate that we are not so grudging about helping other people out – even through taxes. Surveys indicate that most people are willing to pay taxes for this larger good.<sup>49</sup>

Furthermore, we regularly and voluntarily curb our behaviour to afford dignity to someone else. For example, we permit another driver to enter the road in front of us, hold open a door, smile at a stranger or simply answer the telephone with the courtesy of a ‘Hello’. We set down our work for a second to acknowledge someone and do not make them wait outside our door for twenty minutes before speaking to them. In this way we create society: through our cooperation and sacrifice, through actions recognising one another’s human dignity. We don’t identify ourselves as members of the human race – we identify ourselves by our individual identifying features or characteristics. We think of ourselves as belonging to a country,<sup>50</sup> a profession and a family. We think of our own individual physical, intellectual and emotional make-ups.

The ethos of a society requires these acknowledgements. A society of homogenous individuals is a Communist ideal, an Orwellian nightmare and a corporate marketing department’s dream. It is nothing we recognise as a humane, liveable society.

## VII Corporate Citizens

Although using the term ‘people’ to describe corporations is an uncommon usage, the law does in fact recognise corporations as ‘juridical persons’.<sup>51</sup> By the mid-19<sup>th</sup> century, corporations had the status at law of human beings.<sup>52</sup> This denomination is interesting as it reveals in part how the powers of the 19<sup>th</sup> and early 20<sup>th</sup> century understood corporations and what was expected of them in their participation in civil society.

From the inception of commercial corporations in the 16<sup>th</sup> century under a charter granted by the Crown,<sup>53</sup> corporations were seen to be, among other

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<sup>49</sup> For a recent nuanced discussion of the factors affecting acceptability of different levels see the cross-cultural study, M Cervellati, J Esteban and L Kranich, ‘Redistributive Taxation with Endogenous Sentiments’ (Working paper 02–12, Department of Economics, The University of Albany, 2004). An interesting study examining the willingness to contribute to environmental protection in twelve developing and three developed countries indicates the importance of such protection as evidenced by willingness to contribute significantly in the form of taxation for such projects. D K Israel, ‘International Support for Environmental Protection’ (2004) 9(6) *Environment and Development Economics* 757.

<sup>50</sup> R Winston, *Human Instinct*, (2002) 202.

<sup>51</sup> *Corporations Act 2001* (Cth) s 124. A leading Australian company law text reads: ‘A company is an artificial person created by law.’ P Hanrahan, I Ramsay and G Stapledon, *Commercial Applications of Company Law* (2004) 4.

<sup>52</sup> See R Tomasic, J Jackson and R Woellner, *Corporations Law: Principles, Policy and Process* (4<sup>th</sup> ed, 2002) 126–7.

<sup>53</sup> W S Holdsworth, *A History of English Law* (5<sup>th</sup> ed, 1942) 475 ff.

things, contributing to and participating in greater society by advancing economic and political objectives subject to two restrictions. First, they were restricted to act within the limitations set out in corporate charters. The doctrine of *ultra vires* arose to describe actions which went beyond those restrictions<sup>54</sup> and secondly, they existed in their limited capacities as legal fictions created for and restricted to, commercial ends.<sup>55</sup>

These specially-created citizens were originally given very carefully circumscribed rights. A certain amount of money was to be put at risk to ensure that other members of society who dealt with the corporation would know the level of risk associated in doing business with that person. Over time and through the development of corporate law, this gave rise to such things as ‘par value’ shares – shares traded at set prices that traded at face value, much like currency.

Furthermore, the activities that these fictional citizens were permitted to engage in were set out in precise detail. In fact each of these ‘citizens’ (as corporations were known) originally had to apply individually, specifically and particularly to the popularly elected government for the right to exist. Initially, it required an Act of Parliament to create a corporate citizen. By so carefully regulating the creation and activities of the corporation, the government could exercise considerable control over its corporate citizens, just as a government had considerable control over its human citizens. Indeed, the government reserved the right of capital punishment for corporations; it reserved the power to withdraw the corporate citizen’s right to exist. At law, this corporate capital punishment is called the revocation of charter. By grant of legal status, corporations were recognised as contributing to the social good. They were expected to participate in the civil society in which they were created.

This fictional citizen, the corporation, was created for the purpose of carefully limited participation in the economic life of civil society. More particularly, its purpose was twofold: 1) to earn a profit for its shareholders and 2) to limit shareholder liability – nothing more, nothing less. This original and initial intent set it apart from the rest of the people participating in civil society. All the other members of society were motivated by the desire to earn a wage plus ‘something else’, that something else being whatever it is that makes a human something other than an inanimate thing; a mere consumer or producer of goods and services. Such additional motivations included; emotions, ethics, or a simple need for social interaction.<sup>56</sup> But the corporation, this artificial being, created with profit as its sole motive, object, end or good, fundamentally changed the ethics of socio-economic interactions and

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<sup>54</sup> It is noted in Ford’s *Principles of Company Law*, for example, that early trading corporations were restricted to activities outside of England. H Ford, R Austin and I Ramsay, *Ford’s Principles of Corporations Law* (11<sup>th</sup> ed, 2003) 34.

<sup>55</sup> *Ibid.*

<sup>56</sup> Winston, above n 51.

hence the ethics of business. Now, there was a citizen dedicated solely to the acquisition of wealth to the exclusion of all other values and to the exploitation of other citizens to achieve that end.

The corporation achieves these legal ends in the time-honoured way of appropriating more of the goods and wealth of society. Really, that's all wealth is; having more of what others have less of. In the analysis that follows, I wish to focus on publicly-traded corporations, and not the privately held corporations that on the whole function reasonably well in terms of the issues under discussion.

How then to analyse corporate participation in that society? We can analyse the corporation as a legal entity, as an economic contributor, or as a citizen. I think the corporation's economic contribution is self-evident.<sup>57</sup> Corporations have served to maximise wealth. To that end, corporations have served humankind well. Nevertheless, there are other even more important standards by which it should be evaluated. Corporations have not sought to minimise evils<sup>58</sup> and indeed it could be argued, are designed to maximise evils or 'externalities' to a broad sector of society. In other words, they increase and concentrate wealth while reducing the costs of wealth maximisation and distributing the costs upon others as much as possible.<sup>59</sup>

Interestingly, that odd mix of ideas discussed above termed the Social Contract, may be the means best suited to evaluate the corporation's existence in society, as it includes ideas of law, political theory, ethics and society. It is important to keep in mind that the Social Contract was (at least to Lock and Rousseau) a means of justifying the overthrow of tyrannical rulers. In their assumptions of equality, they implicitly argue that no persons should rule over the other equal citizens without agreement. Accordingly, there is a lateral implied term to the contract not to wield one's power or exercise one's rights so as to oppress or harm fellow citizens. This desire for mutual restraint from harming others then forms the basis for the Social Contract.

## VIII Corporation as Member of Civil Society

Having already acknowledged the economic contribution of the corporation, let us examine its other participation in other areas. Let us return briefly to Article 1 of the UN Declaration of Human Rights: 'All human beings are born equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in the spirit of brotherhood.'

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<sup>57</sup> The benefit of the corporation must be restricted to wealth as most of our greatest inventions and innovations have been the result of personal initiative and government funding.

<sup>58</sup> See D Litowitz, 'Are Corporations Evil' (2004) 58(3) *University of Miami Law Review* 811.

<sup>59</sup> See Sheehy, above n 4.

Where does the corporation fit into this schema? What we find is not a 'human being'; it is an artificial person. It does not have 'dignity, reason and conscience' and nor does it act 'in the spirit of brotherhood'. Is this a categorical error or is it a fair evaluation of the corporation? I would suggest that it is not a categorical error because it has the legal 'rights' of a human and operates within the context of human society.

The corporation lives by strict adherence to the Law, living (that is functioning, acting, making decisions) as if law were all there is to society. It is a soulless, mindless, thoughtless citizen quaintly described as 'having no body to jail or soul to damn' operating with only one ethic and that being an anti-social ethic: to exploit others to achieve a profit.

## **IX What Constitutes a Breach of the Social Contract and what are the Punishments, Remedies and Consequences?**

From the foregoing discussion, we see that the Social Contract theory explains certain mutual covenants that permit society to function and that they are analysable at three distinct levels. The Social Contract works at the level of law, the level of rights and the level of ethics. Each of these levels has a parallel in terms of implications of the Social Contract theory and which reflect what we humans value: individual dignity, civil society and the just use of resources.

In their respective historical contexts, Social Contract philosophers such as Rousseau and Locke were fighting tyrannical rulers who controlled the nation's wealth (the common resources, natural inheritance, or whatever one may prefer to call it) and exploiting it for the benefit of a wealthy few. These rulers did without regard for the development of society, the good of the people, or individual dignity. The challenge those philosophers faced (and which we continue to face) is: how does a Social Contract operate in a society in which the power of individual citizens is radically mal-distributed resulting in a loss of dignity, the damage to social networks and concentration of wealth? Is it possible to speak of an undermining of the Social Contract as between citizens? If so, how does society deal with the breach by its most powerful members? What is ethical under the Social Contract in these circumstances?

Unfortunately, ethics discussions seem to stop once they have identified the Good, and developed an answer to the question: 'How should we then live?' To the extent that the issue of failure to fulfil ethical obligations is dealt with, it is delegated to law and in general it is assumed to be a question for philosophers of law,<sup>60</sup> which we will turn to in a moment. No

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<sup>60</sup> See, eg, H L A Hart, *Punishment and Responsibility* (1968).

one would argue, however, that a person's only ethical obligations are the obligations created by law. We have seen that the Social Contract demands more than the fulfilment of legal obligations by its implied terms. So we have to ask, what are the extra-legal consequences of unethical behaviour when such behaviour is not prohibited by law?

Consider the ethos of corporations.<sup>61</sup> We have looked at the Social Contract as an alternative to 'might is right' ethics. As members of the global community, we humans expect participation in decisions concerning the division and distribution of goods, the common goods of humankind and the resources of the world. This view, however, is at odds with the 'might is right' ethic of large-scale corporate capitalism.<sup>62</sup> The idea that a corporation that has enough money can purchase whatever it desires is, at a fundamental level, ethically offensive. From Rawls' perspective, this unilateral determination of the division and distribution of the world's resources is unjust. He writes: 'Social and economic inequalities, for example, inequalities in wealth and authority, are just only if they result in compensatory benefits to everyone.'<sup>63</sup> Economists claimed that the trickle down effects of economic growth would indeed benefit all. In other words, if the economy grew, those at the bottom as well as those at the top would benefit – as put quaintly 'a rising tide lifts all boats'.<sup>64</sup> The trickle down effect has now been thoroughly discredited.<sup>65</sup> Using Rawls' test here, we find that the corporation fosters an increase in injustice.

If we return to Rawls' position that the primary goods available in a society include health, intelligence and imagination and that the free use of these 'goods' uninterfered with, the fundamental rights that form the basis of respect and of justice in society, I believe the argument can be made that these rights have been compromised by corporate impact upon the natural and built environments. From global warming to the highly visible smog from corporate promotion of Consumerism to the visual pollution created by advertising, the detrimental effects of corporate malfeasance can hardly be overstated. With respect to the built environment, one cannot live without regularly being confronted with corporate communication, or perhaps more accurately, emotional manipulation.<sup>66</sup>

Participation in all aspects of Social Contract obligations becomes increasingly critical as some members gain in wealth and power, thus creating an imbalance. This imbalance departs from the fundamental equality that is the premise of Enlightenment Social Contract theory. Indeed

<sup>61</sup> In considering the effect and implications of corporations see D Litowitz, 'Are Corporations Evil?' (2004) 58(3) *University of Miami Law Review* 811.

<sup>62</sup> Corporations such as Microsoft are anti-government and monopolistic.

<sup>63</sup> Rawls, above n 18, 12.

<sup>64</sup> J Hines Jr, Hoynes, Hilary Williamson and Krueger, B Alan, 'Another Look at Whether a Rising Tide Lifts All Boats' (Working Paper No W8412, National Bureau of Economic Research, 2001).

<sup>65</sup> Stiglitz, above n 20, 80–82; Ibid.

<sup>66</sup> P Kotler, S Adam, L Brown and G Armstrong, *Principles of Marketing* (2<sup>nd</sup> ed, 2003) 574–602.



the corporate members of society increase in wealth and power, so too they have a correlatively increasing responsibility to participate scrupulously, following the rules (or in legal terms, fulfilling the terms of the contract). As their power increases, they have increasing control over the resources of the community, and with that comes an increasing obligation of attention to just distributions including appropriate distributions of dignity.

Corporate influence on government through lobby groups and industry involvement in international trade has grown dramatically as corporations have increased their wealth. Corporations have not used this influence for the betterment of society. One need go no further than the recent vocal protest by the makers of SUV's in North America against California's initiative to improve gas mileage and air quality.<sup>67</sup> Here again, we find corporate breach of the Social Contract. Instead of using its position as a powerful member of society for the betterment thereof, the corporation has breached that obligation by seeking only to improve its profits without regard to the effects on society.<sup>68</sup>

As controller of a disproportionate quantum of the planet's resources necessary to sustain human and other life, if one accepts the view that with rights come responsibilities, the corporation has an obligation to espouse and follow values that benefit humans. Instead, as required by law, the corporation has glorified the acquisition of wealth and benefits for the individual as the sole good of society.<sup>69</sup> Advertising campaigns are not about sharing good things to make a more just society. They are about improving one's material lot and addressing one's immediate concerns without regard for anyone or anything else.<sup>70</sup> It would seem that this too is a breach of the Social Contract. Each of us requires the benefits of, and is obligated to work towards renewing the enabling conditions society provides us with in the first place.

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<sup>67</sup> See the Automotive lobby group, Coalition for Vehicle Choice at <<http://www.vehiclechoice.org/main.html>> at 29 November 2005; For discussion see Paying Campaign, *Paying – And Polluting – More at the Gas Pump: Campaign Contributions Prevent Tougher Fuel Efficiency Standards* (2000) <<http://www.publiccampaign.org/publications/studies/payingatthepump/payingatthepumbfull.htm>> at 28 November 2005; See, eg, Toronto Star Op-Ed, *Automakers Must Change Their Ways* (2004) and other articles available on Public Domain website <<http://www.publicdomainprogress.info/2005/03/automotive-industry.html>> at 28 November 2005.

<sup>68</sup> By benefit or public good, the objective in mind is the generally uncontroversial good of survival of the species. Certainly, some would argue that as individual neo-liberals, there is no such thing to sustain as it is only individual survival that counts; however, it is obvious that very few individuals can survive alone without the company and other benefits society provides and it is certain that no urban westernised person, neo-liberal or otherwise, would be among those who could. There also is the alternative view that the rest of the planet's species would have greatly improved chances of survival were humans not on the planet. This view is uncontroversial from a biological perspective but unlikely to attract a significant sustained following for obvious reasons.

<sup>69</sup> See discussion of the rise of consumerism in Korten, above n 3. Also, see C Hamilton, *Growth Fetish* (2004).

<sup>70</sup> Consider for example the 'You deserve it' slogan enticing people to believe they are entitled to luxury.

As Ignatieff notes, in terms of rights, everyone pays for the use of rights by others. When one party uses more than its share, others in the society must make a sacrifice. Where Ignatieff sees sacrifice as a necessary requirement for individual participation in a rights community, we see the corporation existing as a citizen of a rights community but a citizen without sacrifice, without sacrifice of freedom, living amongst human beings who have made those sacrifices. I would argue that when one party continues to use and overuse its rights, one is in a situation where the rules of the game have changed fundamentally. Research indicates that 'tit-for-tat' or some type of reciprocity is the fundamental common norm in all societies.<sup>71</sup> From another perspective one has a parallel to the Tragedy of the Commons. G Hardin's essay on the Commons suggests that everyone will exploit a common resource to the point of exhaustion unless there is some regulatory mechanism – in Harding's essay it was private property.<sup>72</sup> Subsequent research indicates that this is only the case where such commons can be exploited for profit. Where human society provides the good will, cohesion, respect and dignity, corporate activity exploits and does not renew those things provided by society, the situation amounts to a breakdown of the Social Contract.<sup>73</sup>

The Corporation abuses the human right to dignity; to be something other than a generator of revenue or loss. As Joseph de Maistre observed, we see ourselves as Britons, French, Canadian and Mexican, not simply as members of the human race.<sup>74</sup> I would add that even further we see ourselves as mothers, lawyers, workers, sons, professors and students. Even more importantly and beyond that, we see ourselves as trustworthy, or compassionate, or honest, or loyal and responsible humans. We see ourselves as humans – not as *homo economicus*.<sup>75</sup>

Corporations see people as credit risks, consumers, marketing targets, excessive overhead, revenue generators, human resources (as opposed to other kinds of resources), brand loyalists—essentially, nothing more than pawns in the game of greater profit. We are treated accordingly. Corporations subject us to innumerable indignities, most of which we are powerless to deal with.

For example, we humans are expected to spend ten minutes on hold after punching through countless menus on a telephone. We humans are

<sup>71</sup> A Gouldner, 'The Norm of Reciprocity: A Preliminary Statement.' (1960) 25 *American Sociological Review* 161–78. Corporations do not act reciprocally. CSR and economic contributions notwithstanding. These contributions are not the required contributions for society's existence.

<sup>72</sup> For a different perspective see S Andreasson, 'Stand and Deliver: Private property and the Politics of Global Dispossession.' (Draft papers for the Political Studies Association conference, Lincoln, Eng, 6–8 April 2004).

<sup>73</sup> Cf F Fukuyama, *The Great Disruption* (1999).

<sup>74</sup> Ignatieff, above n 31, 38.

<sup>75</sup> Richard Thaler, 'Homo Economicus,' (2000) 14(1) *Journal of Economic Perspectives* 133–141.

swamped with spam email. We humans in seeking entertainment receive 20 minutes of commercials in 60 minutes of television entertainment. We humans are subjected to 3000 commercial messages daily<sup>76</sup> for the benefit of corporations even though it is known that commercial messages are annoying to the majority.<sup>77</sup> We humans receive a mindless rejection of credit without regard to an excellent longstanding relationship because of some new circumstance. We humans suffer unresponsiveness to our needs to the extent that we require a class action to recover what should be a two minute adjustment on improper billing by a corporate agent. Human culture is subverted- indeed corporations are no longer satisfied with obtaining 'market share' but now wish to inhabit the human psyche with the pursuit of 'mind share'.<sup>78</sup> We humans are hired, promoted and fired by corporations without regard to the human consequences. It seems to me that these indignities support the view that corporations regularly breach the Social Contract at the level of rights.

We divine this perspective when we examine how corporations interact with us. We are no more personal to the corporation than we are to a nation's military. We are expendable and expended—except to no higher purpose than corporate profit. Our lives, our planet and our society are sacrificed in this ruthless pursuit.<sup>79</sup>

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<sup>76</sup> Media Awareness Network, *Advertising: It's Everywhere* <[http://www.media-awareness.ca/english/parents/marketing/advertising\\_everywhere.cfm](http://www.media-awareness.ca/english/parents/marketing/advertising_everywhere.cfm)> at 28 November 2005; On the general problem of the ubiquity of advertising see M McCarthy, *Critics Target 'Omnipresent' Ads* (2002) USA Today <<http://www.usatoday.com/money/advertising/2001-03-16-omnipresent.htm>> at 28 November 2005.

<sup>77</sup> Kotler, above n 65, 576.

<sup>78</sup> For a brief discussion of mindshare see *Mind share* (2005) Wikipedia <[http://www.en.wikipedia.org/wiki/Mind\\_share](http://www.en.wikipedia.org/wiki/Mind_share)> at 4 August 2005; see the interesting overview of these issues at Advertising Four, *Advertising Statistics* <<http://www.advertisingfour.info/advertising-statistics.htm>> at 4 August 2005.

<sup>79</sup> Whereas the consumer is a utility maximiser, the firm is characterised as being a profit maximiser to the exclusion of all other possible reasons for being. An organisation such as World Vision therefore has no place in neoclassical economic theory, since its purpose for being cannot be characterised as profit maximising (one would hope!). What are the neoclassical assumptions about the consumer? Consult any modern introductory economics text and you will find something along the following lines.' ... (E)conomic theory is inhabited by adult individuals who earn income by selling factor services (the services of their labour, land or capital) and spend this income purchasing goods and services ... Economists assume that each individual consumer seeks maximumsatisfaction, or well-being, or utility, as the concept is variously called. The consumer does this within the limits set by his or her available resources' – R G Lipsey and K A Chrystal, *An Introduction to Positive Economics* (8<sup>th</sup> ed, 1995) 65. Such people have' ... complete, fully ordered preferences ... perfect information and immaculate computing power'. S Hargreaves-Heap and M Hollis, *The New Palgrave: A Dictionary of Economics* (1988) vol 2, 54 provides an entry on 'economic man' – cited in C Hamilton, *The Mystic Economist* (1994). Neoclassical economic theory assumes away any motivation other than utility maximising. There are no social notions such as 'community' or 'teamwork', while the Christian notions of 'body life' and 'sacrificial love' are most decidedly absent. George Akerlof, an economic theorist, has noted that '... absence of psychological, anthropological, and sociological factors in economic theory ...' – G A Akerlof, *An Economic Theorist's Book of Tales* (1984) 3.

Let us now examine the legal level. In addition to the idea that law is established by and for humans, the Social Contract offers legal protection to humans for the betterment of human society. At a basic level, the Social Contract finds expression in such documents as the Constitution of the United States. Corporations have used these legal protections for their own purposes as set out above. I would suggest that corporate use of the legal system (and by implication that system's bias in favour of corporations)<sup>80</sup> has facilitated the breaches of the Social Contract set out above.

The legal system has facilitated the transfer of wealth, those communal resources, to the few. The legal system has failed in this regard as the guardian of justice for the overall good of society. And the Corporation has taken advantage of that bias to create legal enforcement of its breach.

## X Consequences of Breach

What are the consequences of a breach of the Social Contract? A quick perusal of a text on contracts will allow us to infer that the main remedies are damages for breach,<sup>81</sup> rescission and damages for misrepresentation<sup>82</sup> and equitable remedies including restitution.<sup>83</sup> Restitution would require the return of parties to their pre-contractual positions. Restitution in this context is not possible and likely not desirable. It is not possible to restore the environment or social organisation to a pre-industrial form. Furthermore, as may be inferred from the revolutions overturning that form of social organisation, it was a less desirable state of affairs.

The second remedy of damages, however, is more interesting. Is it possible to correct some of the wrongs resulting from the breach of the Social Contract by an award of damages? Is this too general or broad a claim? We can see examples of such claims in cases where the Social Contract was breached. For example, where African-Americans have made claims for the injustices perpetrated on them when they were held

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<sup>80</sup> Law's preference for economic interests is one of the many criticisms of law launched by Marx. Corporations as the leading economic actors are the main beneficiaries and advocates of this bias. See, eg, Michael Scherer, 'The Making of the Corporate Judiciary: How Big Business is Quietly Funding a Legal Revolution,' (2003) Nov-Dec *Mother Jones* 72, 74-5, 100. Corporate use of the courts for such matters as silencing consumer protests (McDonalds), abuse of process such (Dalkon Shield litigation *In re AH Robins Co*, 575 F. Supp. 718 (D.Kan.1983). See chronicle of M Mintz, *At Any Cost: Corporate Greed, Women, and the Dalkon Shield* (1985)), and having much deeper pockets to prosecute litigation leave them in a much better position to 'obtain all the justice money can buy.' Of course, this bias is also the implication of Anatole de France's famous comment that the law forbids the rich and the poor equally from sleeping under bridges.

<sup>81</sup> N Seddon, M Ellinghaus, *Cheshire and Fifoot's Law of Contract* (8<sup>th</sup> Australian ed, 2002) Pt.IV Remedies, ch. 23, 'Damages', 973-1020.

<sup>82</sup> Ibid ch. 11, 'Misrepresentation', 470-531.

<sup>83</sup> Ibid 1041-3.

as slaves in a sub-human status the claim could be framed as a breach of Social Contract claim.<sup>84</sup> Other examples would include the remedies paid by Germany<sup>85</sup> and Japan<sup>86</sup> to prisoners enslaved in factories in the Second World War.<sup>87</sup> More recently and closer geographically, in 2003 the Scottish Parliament enacted legislation permitting the Crofters to buy the land of the estates on which they have lived, essentially redressing what was originally a mere acquisition of the Commons.

The third remedy of specific restitution also provides some interesting avenues. Should there not be a restitution to people harmed by corporate activities, to people deprived of such goods as a clean environment, hours wasted by corporate marketers, disappointment and disillusion from products that fail to deliver the promised happiness, cynicism concerning humans resulting from too often deceived and manipulated for purposes of economic exploitation? How would such a remedy be fashioned?

One rather radical solution could be a broad 'corporate holiday' for everyone<sup>88</sup> which would be paid for from certain CEO's private funds and trusts where those CEOs have been paid in excess of some established benchmark such as 40 or 50 times average earnings<sup>89</sup> or shareholder

<sup>84</sup> A seminal work on the topic is the well argued work of R Robinson, *The Debt: What America Owes to Blacks* (2000); C Ogletree 'Repairing the Past: New Efforts in the Reparations Debate in America' (2003) 38(2) *Harvard Civil Rights-Civil Liberties Law Review* 279; See Sundiata Cha-Jua, *Slavery, Racist Violence, American Apartheid: The Case for Reparations* (2001) *New Politics* 46, 46–64. There have been calls at an international level for reparations, ABC Television 'African-Americans call for Slavery Compensation at Racism Conference' *The World Today (Archive)*, 4 September 2001 <<http://www.abc.net.au/worldtoday/stories/s357803.htm>> at 2 August 2005.

<sup>85</sup> R Billstein, K Fings, A Kugler, N Levis, and L Billstein, *Working For The Enemy: Ford, General Motors, and Forced Labor in Germany during the Second World War* (2004).

<sup>86</sup> *In re World War II Era Japanese Forced Labor Litigation* 114 F. Supp. 2d 939; K Tokudome 'POW Forced Labor Lawsuits Against Japanese Companies' (Working Paper No 82, Japan Policy Research Institute (JPRI), 2001).

<sup>87</sup> Evidence to Senate Judiciary Committee, Senate Hearing, *WW II Slave Labor, Former US World War II POW's: A Struggle for Justice* (2000) 106, 106–585.

<sup>88</sup> An amusing counterpart to this suggestion can be found in Chinese author, Shen Rong, *"Ten Years Deducted"* (1987). The title is based on the story's premise – that since the Chinese government wasted ten years of people's time by its Cultural Revolution, the government corrected things by returning the ten years by deducting ten years from everyone's age.

<sup>89</sup> Peter Drucker raised concerns about the multiple of CEO earnings over labour rates in the early 1980's when CEO compensation was approximately 40 times the labour wage. Particularly since the 2001 market down turn, the issue of CEO compensation has become a particularly important indicator of proper operation of a corporation (corporate governance). Between 1980 when CEOs earned 42 times the average worker's pay (not the lowest paid worker) and 2000 CEO's compensation increased exponentially with some CEO's being paid more than 530 times the hourly paid employee in the same company. For an engaging narrative account, see Flanagan, above n 8, 16. Academic literature on the topic is growing rapidly. Considering evidence and arguments for and against see Marc Zenner and Tod Perry, *CEO Compensation in the 1990s: Shareholder Alignment or Shareholder Expropriation?* (2000) Social Science Research Network <<http://ssrn.com/abstract=205588>> at 29 November 2005. A recent survey of the USA debate can be found in L Bechuk and Jesse Fried, *Pay Without Performance* (2004). For a critique of the work see, J Core, W Guay and R Thomas, 'Is US CEO Compensation Inefficient Pay Without Performance?' (Working Paper No 05-05, School of Law and Economics, The University of Vanderbilt, 2004).

value, as it has been shareholder value created in part by such practices in response to shareholder demands that took from the public in the first place. Another set of solutions involve employee ownership of corporations. In other words, some type of cooperative may be ideal in compensating employees for the losses they have suffered. A lesser step, used in Germany, is co-direction of corporate activity by employees.<sup>90</sup> A broader vision of the corporation is also evidence in Japan where a commitment to keeping employees has driven corporate strategies for decades.<sup>91</sup> There is no reason the model of the Corporation could not include local representation wherever it may have operations. Local involvement and response to corporate wrongs seem to be critical to limiting corporate power to harm society. Another form of redress would require corporations to provide local councils with funds matching their own expenditures for lobbying politicians. In each of these solutions corporations are required to give back to society at least some of what they have taken.

## XI Conclusions

Turning from general contract remedies, let us now examine the consequences of breaching the Social Contract supplied by Social Contract philosophers. Rousseau argues that the appropriate civil response to a tyrannical power is insurrection. In his, Rousseau asserts that if a government fails to serve its subjects well, they have the right to overthrow it and create a new one. Again, we see there is no power, wealth, right of property greater than the right of humans to be treated as humans. We are not talking about governments, however, and so the idea of overthrowing a corporation does not make sense.

But if we wish to put together all of the foregoing argument, does it not follow that the corporation's right to citizenship should be in the balance? This solution seems to me to be the logical conclusion of the discussion. The problems set out have resulted from the corporation's legal status as a legal person, equivalent to the human person. This error and its consequences have led to much of the problem we are experiencing in our society.

It may be argued that the corporation was set up for failure as a citizen. It is a fish out of water, an artificial person in a society of human persons. Its legal limitations, including limited liability, undermine its ability to act as a responsible citizen—paying its dues in case of failure. Who is the supplier who is not paid in cases of corporate failure but the rest of society? Who is the supplier of the additional social goods

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<sup>90</sup> Discussed in B Sheehy, 'The Importance of Corporate Models: Economic and Jurisprudential Values and the Future of Corporate Law' (2004) 2(3) *DePaul Business & Commercial Law Journal* 463, 506–512.

<sup>91</sup> *Ibid.*

prerequisite to the existence and success of the corporation but the rest of society? Furthermore, the corporation's strict legally enforceable focus on profit generation makes it a parasite apart from normal human relations. Corporations are neither moral, rational, spiritual, nor social beings and they function without concern or respect for others.

Our business leaders will be telling us that the whole purpose of focus groups, surveys and studies is to collect the thoughts and sentiments of people: to make the corporation more responsive to human desires. This reply, however, fails to identify the heart of the problem. The purpose of a corporation listening to people is to find ever better and smoother ways to perpetrate its indignities to increase its concentration of wealth.

These corporate values are epitomised in the actions undertaken and revealed by the ever-growing list of scandals. Corporations, as vehicles for executives who embody these corporate mores, have further facilitated the unjust transfer of wealth from the general populace. From Bernard Ebbers of Worldcom and Deutsche Bank AG Chief Executive Officer Josef Ackermann being charged, to scandals such as Royal Ahold's recently discovered overstatements of earnings, the latter two being events of this year, we see corporate executives whose main idea is to exploit their position for their own wealth. Corporate vehicles are the finest vehicles for doing so. With respect to at least the North American executives, it seems most likely that they will suffer no more than a bit of public humiliation while keeping their billions of dollars of other people's money.

The service these scandals perform lies in drawing attention to the fundamental ethical problems that corporate existence, as expressed in publicly-traded corporations, pose for our society. We are living in a world where the largest, most influential, wealthiest individuals are designed and aimed specifically at fundamentally anti-social behaviour. In this sense, we are living in a post-ethical world. Perhaps we are coming to a point where we are realising that corporations in society are like pesticides in the ecology in that they create as many problems as they resolve, and need to be much more carefully regulated?

We must ask, are there yet further consequences to the breach of the Social Contract? Normally, in a microcosmic Social Contract, that of friendship, where one has broken its unspoken rules (including loyalty, amiability, respect) the relationship is broken off. Where that is not possible for reasons of practicality, the friendship is cooled off and the relationship becomes cold and stand-offish. The nature of the relationship is radically changed and the emotional element, always a significant element in a relationship, takes on a completely new tone. Instead of mutual respect or kindness, we find anger, vengefulness, and often hostility. Using terms which straddle boundaries between ethics and rights, when we do not feel our dignity has been honoured, for example, we feel 'indignant'.

How can we human persons deal with the indignities visited on us by corporate persons? Some may point to the need to continue with dignity, as exemplified in the lives of such great humans as Gandhi and Mandela. Yet even these great humans did not simply ignore the indignity they were dealt. They addressed it head on. They addressed very directly and specifically those who perpetrated the indignities, and with the support of the rest of the human community, ultimately put an end to the indignity. Justice and human dignity won out over prejudice and injustice.

How will the next round of the battle between humans and systemic indignity be fought? Must we adopt guerrilla tactics, but instead of attacking humans attack corporate life-blood (its finances) and threaten its tranquil existence until it turns an ear to human dignity? We could do so by robbing a corporation, subverting its resources<sup>92</sup> and limiting the usefulness of its non-human communications devices with such tools as computer viruses.

It could be fought (and this would be my suggestion) by a radical revision of corporate law. The law could and should be re-drawn to include the values of human society. It should be drafted to protect humans from indignity both within and without the corporation. Current legislation does so only outside of the body of corporate law. Legislation governing such rights as labour and workplace health and safety addresses the problem but does not threaten the corporation's legal personhood, it should.

Current alternative efforts have included such things as the human demonstration against what is believed to be the corporate agenda at such sessions as the World Trade Organisation and International Monetary Fund. Nevertheless, the invitees to most of these meetings continue to be corporations advancing corporate agendas. Governments in attendance seldom represent the interests or opinions of the people. Who is listening? When will the human agenda be brought back to the table?

Our early Social Contract philosophers could not have imagined the problems which the 21<sup>st</sup> century faces, namely, ungovernable corporations controlling the wealth of nations.<sup>93</sup> Nevertheless, we and they face the same fundamental challenge to our rights under the Social Contract. These rights are the right to be recognised, included in the decisions concerning the use of our communal resources and respected as individuals. It is time to reconsider the legal personality of large corporations.

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<sup>92</sup> G Monbiot takes this idea a step further in his interesting discussion of third world debtors banding together to change international finance. G Monbiot, *The Age of Consent* (2004) 139–180.

<sup>93</sup> See Sheehy, above n 4.