

## **Rejoinder to Veldman's review of *Capitalism, Corporations and the Social Contract: A Critique of Stakeholder Theory*<sup>1</sup>**

In his review of *Capitalism, Corporations and the Social Contract* (Mansell, 2013a) Jeroen Veldman argues that the book fails to engage critically with the 'synthetic construct' of the corporation. While Veldman is in agreement with the book's conclusion that 'claims in stakeholder theory remain little more than inconsistent and untenable moral claims to entitlement', he nonetheless objects that my argument reinforces 'the neoclassical framework of capitalist relations' by omitting any scrutiny of the corporate form itself. Veldman does not engage directly with the book's central argument that 'stakeholder' conceptions of the corporation are inconsistent with ethical principles that necessarily underpin the working of all market economies. Instead, he criticises the book for what it apparently ignores: the 'severe ontological and methodological problematics' of the corporate form. In this rejoinder, I consider whether it is as serious an omission as Veldman suggests. In so doing I explore the implications of his own position concerning the 'double ontology' of the corporation and advocate an alternative approach to the question of the corporate purpose.

However, at the outset a clarification is necessary. Veldman presents my book as a defence of 'shareholder value maximisation' and the superior social and economic 'efficiency' of the latter. He conflates my position with the consequentialist critiques of stakeholder theory (exemplified by Michael Jensen) that identify long-term profit maximisation with optimal 'social utility'. I consider and ultimately reject this line of argument. Instead, I contend that even though managers are answerable for the pursuit of the corporate purpose ultimately to shareholders alone, this purpose

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<sup>1</sup> Published final version is forthcoming in *Organization: the critical journal of organization, theory and society* (Sage).

involves a categorical imperative to further the well-being of non-shareowning stakeholders.<sup>2</sup> My book is not therefore an unqualified defence of ‘shareholder value maximisation’ and nor does it endorse the assumption of self-interested economic behaviour characteristic of neo-classical economics.

Regarding the broader debate about the corporate purpose, what is perhaps of greater relevance than the exegetical aspect of Veldman’s review is the significance he attaches to the corporate form itself. In recent years, Veldman and various co-authors have made a sustained attempt to persuade organisation theorists to attend to the question of what a corporation is and the consequences that are particular to this organisational form (Veldman, 2011; Veldman and Parker, 2012; Veldman, 2013; Veldman and Willmott, 2013). This work is part of a stream of research that challenges the ‘nexus-of-contracts’ theory of the firm and, by emphasising the legal independence of corporations from shareholders, convincingly undermines the orthodox view that a corporation’s purpose is the maximisation of shareholder value (Ireland, 1999, 2003; Stout, 2002, 2012; Robè, 2011, 2012; Deakin, 2012; Ciepley, 2013). However, Veldman in his review departs significantly from the assumptions made by these other critics of ‘shareholder primacy’ and advances a radical position that requires closer inspection.

The target of his criticism is the idea of the corporation as an ‘individual’ with ‘agency, ownership, and rights’. This is what he calls the ‘double ontology’ of the corporate form. His argument is not aimed at the notion of corporate *moral* agency, a topic on which much debate has ensued in business ethics journals from the

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<sup>2</sup> The Kantian argument for this position is developed in Mansell (2013b).

publication of French (1979). Instead, he appears to call into question whether the corporation should be granted any legal agency at all. To strip the corporation of all its legal rights, including the right to enter contracts and own property, would be to deprive it of legal personality. Indeed, in an earlier article he recommends a ‘full return to partnership law’ as an alternative to the contemporary theory of incorporation:

‘...This position would entail the abdication of the attribution of agency, ownership, and rights to a reified representation and therefore the loss of the perpetuity, the holding company and the attribution of agency, rights, and ownership. In practice, this would do away with the specifics of incorporation for business representations altogether...’ (Veldman and Parker, 2012, p. 434)

Ironically, it is an insistence upon the ‘specifics of incorporation for business representations’ that underpins the ‘wider critiques’ of shareholder primacy that he defends in his review. If the privileged position of shareholders in corporate governance derives from a claim to be the ‘owners’ of corporate assets (Friedman, 1970), then the ‘agency, ownership and rights’ of the corporation as an independent person are incompatible with shareholder primacy. Robè (2011, pp. 3-4) argues: ‘In their role as managers of the corporation’s assets, the officers are the agents of the assets’ owner – the corporation itself. They are appointed by the board of directors but neither directors nor officers are the shareholders’ agents because the shareholders own neither the firm nor the assets controlled by the managers...’. Stout (2012, p. 37) also remarks that ‘from a legal perspective, shareholders do not, and cannot, own corporations. *Corporations are independent legal entities that own themselves*, just as human beings own themselves’ (emphasis in original). Furthermore, Ciepley (2013, p. 146) contends that ‘*no* natural person or group of persons owns the assets of the corporation. The corporation owns corporate assets... just as the state owns state

assets and the church owns church assets. It is *corporate* property' (emphasis in original). Veldman's critique of the 'synthetic construct' of the corporation is by implication a challenge not only to the corporate status of business firms but also to states, churches, universities and any other 'corporate' legal person. His comments apply equally to my argument and to the 'wider critiques' that he advocates.

There are, of course, good reasons to be critical of the modern conception of the corporation. The fact that the corporation is an independent legal person, with its own rights and duties in law, can be taken to imply a *purpose* that is likewise its own and independent of any natural person. If the interests of the corporation and the shareholders are 'meaningfully distinct' (Phillips, 2003, p. 20), because the latter have no claim upon corporate assets, then the same logic holds for other stakeholder groups too. As Phillips (2003, p. 19) puts it: 'If managers are agents or fiduciaries at all, it is to the *organization* and not to the shareowners. The corporation... is an entity unto itself' (emphasis in original). If this is indeed the case, then which natural persons have authority to hold managers accountable for acting in the independent interest of the *corporation*? What would give any person or group the right to determine what these interests are? In resting their case on the independence of the corporation from its shareholders and other stakeholders, the critics of shareholder primacy do not provide obvious answers. Indeed it is arguable that a major cause of the irresponsible behaviour associated with large corporations today is the lack of accountability of top management to *any* particular stakeholder group (the attenuated powers of shareholders notwithstanding) with managerial behaviour influenced primarily by the external pressures of financial markets.

Rather than arguing for the abolition of corporate legal status altogether or taking for granted the corporation in its current legal form, company law might be reformed on the basis of an older tradition that conceives of corporations as group agents.<sup>3</sup> Corporations can be envisaged as communities that enable the pursuit, through the corporate legal person, of the common interests of their members. Corporate legal personhood would then be granted only to genuine group agents; that is, to groups whose interests could be represented as if they belonged to one person. Directors' duties would be owed neither to individual shareholder 'owners' nor to an independent and impersonal corporation, but to the group agent incorporated in law (the 'principal'). In this case the interests and purpose of the corporation are identical to those of the incorporated agent, and senior management is properly accountable for its pursuit of this purpose.<sup>4</sup>

Clearly the challenge for this argument, in the case of a modern business organisation, is to establish *who* this group agent might be and *how* they are to be identified.<sup>5</sup> My book engages critically with the idea that a business corporation can stand for the interests of *all* its primary stakeholders. Attempts have been made to describe the corporation as a 'social contract' between suppliers, customers, employees, financiers and communities. I argue that these attempts fail largely because these groups do not act together through the corporate form as a unified group agent. A more promising strand of work can be found in Aristotelian theories of organisational 'citizenship' and

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<sup>3</sup> Medieval conceptions of corporations as autonomous communities and their gradual disappearance with the rise of the modern state are expounded in Gierke's *Political Theories of the Middle Age* (1968).

<sup>4</sup> This position would entail the revision of various parts of company law: e.g., Section 7 of the UK Companies Act 2006 which states that '[a] company is formed under this Act by *one* or more persons' (emphasis added).

<sup>5</sup> Perhaps the most sophisticated recent attempt to answer the latter question is that of List and Pettit (2011).

the ‘common good’ of the firm (O’Brien, 2009; Sison and Fontrondona, 2012; Timming, 2014). Another productive approach is to consider existing theories of the purpose of non-commercial corporations (states, churches and public universities, for example). Should the interests of a university be identified with those of its students, its staff, the ‘public interest’ or some combination of its stakeholders? Are the rightful interests of a state those of its government, its ruling party, its legislature, all its citizens or every person resident in its territory?<sup>6</sup> The answers to these questions matter because they shape the expectations we have of the leaders of universities, states and other corporate persons, and the answers depend on what we think a corporation is.

Of course, the concept of states, churches and universities as legal persons is far older than the incorporation of modern business firms. Attempts by business ethicists to theorise a more ‘socially responsible’ form of business (of which stakeholder theory is a prominent example) would be enriched by an engagement with those disciplines in which theories of incorporation already have a long history.<sup>7</sup> On these points Veldman and I are in agreement. Any critical enquiry into the moral consequences of the corporate capitalist economy necessarily entails an account of the kind of entity that a corporation is and how its legal privileges relate to the real interests of persons with a stake in its activities. The key question is: which stakeholders have a right for their particular interests to be represented by a corporation and to hold its management to account? The aim of my book is to survey and analyse critically the range of responses advanced so far.

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<sup>6</sup> The corporate status of the state is an increasingly examined topic in political theory: for example, it is a salient issue in determining to what extent citizens have ‘collective responsibility’ for the actions of their governments (Parrish, 2009; Stilz, 2011; Pasternak, 2013).

<sup>7</sup> For example, Quentin Skinner (2009) provides a history of theories of the state from the 17<sup>th</sup> century to the present day in which the ‘person’ of the state is a central motif.

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