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Foreword: Shape Shifting in the Law

Abstract

As this issue of the William Mitchell Law Review reflects, a significant dislocation is occurring in the law of business organizations. Something far more fundamental than a legal definition or any similarly specific concept is in flux. The legal and philosophical question is not whether a business organization should be able to engage instrumentally in non-profit activities but rather whether a business organization's purpose may include something in addition to (and likely prejudicial to) the purely pecuniary interests of the organization's owners.

Keywords

business organizations, non-profit, "social value" enterprise

Disciplines

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FOREWORD:
SHAPE SHIFTING IN THE LAW

Daniel S. Kleinberger[†]

It has been said that Hegel teaches us that “*something is what it is and not another thing*,”¹ but the idea traces back at least to Aristotle.² Known as the Principle of Identity, this proposition is fundamental to logic.

The proposition is not, however, equally integral to our system of law. Despite *stare decisis*, “The life of the law has not been logic - it has been experience.”³ In the common law, legal labels can morph over time, with the label remaining the same while the meaning slowly changes. Sometimes the change is almost organic—that is, the alterations comprise embellishments or refinements to an essentially unchanged core. Sometimes the alternations turn the core concept on its head, producing a “legal fiction.” As Professor Maine once explained, that term signifies:

any assumption which conceals, or affects to conceal, the fact that a rule of law has undergone alteration, its letter remaining unchanged, its operation being modified. . . . It is not difficult to understand why fictions in all their forms are particularly congenial to the infancy of society. They satisfy the desire for improvement, which is not quite

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1. STEPHEN HOULGATE, THE OPENING OF HEGEL’S LOGIC 364 (2004) (emphasis added).

2. ARISTOTLE, METAPHYSICS, Book VII, Part 17, 117–18 (NuVision Publications 2005) (“Now ‘why a thing is itself’ is a meaningless inquiry (for—to give meaning to the question ‘why’—the fact or the existence of the thing must already be evident—e.g., that the moon is eclipsed—but the fact that a thing is itself is the single reason and the single cause to be given in answer to all such questions as why the man is man, or the musician musical, unless one were to answer, ‘because each thing is inseparable from itself, and its being one just meant this.’ This, however, is common to all things and is a short and easy way with the question.)”).

3. OLIVER W. HOLMES, JR., THE COMMON LAW 1 (1881).

wanting, at the same time that they do not offend the superstitious disrelish for change which is always present.⁴

In contrast to judge-made law, a statute can divorce a label from its traditional meaning suddenly, often with an oxymoronic result (as when the Uniform Electronic Transactions Act refers to a computer program as a type of agent⁵). The same is true for regulations.⁶ Such “tours de force” even have a nickname—Humpty Dumpty definitions⁷—in honor of the egg who considered words infinitely malleable.⁸

One need not be a legal formalist to believe that conceptual continuity has practical advantages. In addition to causing “intellectual confusion,”⁹ dislodging concepts from their traditional moorings carries a heavy risk of unintended consequences. Likely, the more fundamental the conceptual discontinuity, the more difficult it is to foresee all the ripples.

As this issue of the *William Mitchell Law Review* reflects, a

4. HENRY S. MAINE, ANCIENT LAW 21–22 (17th ed. 1901), *quoted in* BLACK’S LAW DICTIONARY (9th ed. 2009) (“Legal fiction”).

5. UNIF. ELEC. TRANSACTIONS ACT § 2(6) (1999) (“‘Electronic agent’ means a computer program or an electronic or other automated means used independently to initiate an action or respond to electronic records or performances in whole or in part, without review or action by an individual.”).

6. *See, e.g.*, *Thompson v. State Farm Mut. Auto. Ins. Co.*, 9 A.3d 112, 118 n.13 (Md. Ct. Spec. App. 2010) (noting that the Commission to Revise the Administrative Procedure Act had by rule defined “de novo” judicial review as “review upon an administrative record with the limited additional evidence mechanisms”).

7. Thomas Haggard, *Definitions*, 8 SCRIBES J. OF LEGAL WRITING 165, 165 (2001-2002) (“This kind of definition is sometimes labeled as a Humpty Dumpty definition, after the Lewis Carroll character who claimed that he was the absolute master of all the words he used.”).

8. *See, e.g.*, *Umpqua Watersheds v. United States*, 725 F.Supp.2d 1232, 1237 n.4 (D. Or. 2010) (observing that “the Forest Service’s definition of ‘trail’ – ‘a route 50 inches or less in width or a route over 50 inches wide that is identified and managed as a trail,’ is reminiscent of the words of Humpty Dumpty in Lewis Carroll’s classic *Alice’s Adventures in Wonderland and Through the Looking Glass*”) (emphasis added) (emphasis in original omitted) (citation omitted). The *Umpqua* opinion quotes Lewis Carroll, *ALICE’S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS* 188 (Penguin Books 1998) (1865): “When I use a word, Humpty Dumpty said, in rather a scornful tone, it means just what I choose it to mean—nothing more nor less.” *Umpqua*, 725 F. Supp. 2d at 1237 n.4 (internal quotations omitted).

9. MORRIS R. COHEN, *LAW AND THE SOCIAL ORDER* 126 (1933), *quoted in* BLACK’S LAW DICTIONARY (9th ed. 2009) (“Legal fiction is the mask that progress must wear to pass the faithful but bleary-eyed watchers of our ancient legal treasures. But though legal fictions are useful in thus mitigating or absorbing the shock of innovation, they work havoc in the form of intellectual confusion.”).

significant dislocation is occurring in the law of business organizations. Something far more fundamental than a legal definition or any similarly specific concept is in flux. For centuries, business organizations have served as the legal structures to house capitalist activity. Recently, advocates of “social justice” have begun pushing to use business organizations for something other than unalloyed business purposes.¹⁰ Others have succeeded in disconnecting the limited liability company (LLC) from necessarily having *any* business purpose.

The contributors to this symposium issue view these developments optimistically, and perhaps they are correct. Certainly, the debate is longstanding as to whether a business organization must purely pursue profits. For example, in 1919, the Michigan Supreme Court ordered the Ford Motor Company to pay a dividend.¹¹ For the most part, the decision resulted from Henry Ford’s own testimony:

His testimony creates the impression . . . that he thinks the Ford Motor Company has made too much money, has had too large profits, and that, although large profits might be still earned, a sharing of them with the public, by reducing the price of the output of the company, ought to be undertaken. We have no doubt that certain sentiments, philanthropic and altruistic, creditable to Mr. Ford, had large influence in determining the policy to be pursued by the Ford Motor Company¹²

In contrast, in 1932, the *Harvard Law Review* published an article by E. Merrick Dodd, Jr., entitled *For Whom Are Corporate Managers Trustees?*¹³ After acknowledging that “it is undoubtedly the traditional view that a corporation is an association of stockholders formed for their private gain and to be managed by its board of directors solely with that end in view,”¹⁴ Dodd stated his own view:

The present writer . . . nevertheless believes that it is undesirable, even with the laudable purpose of giving stockholders much-needed protection against self-seeking

10. This term is intended to cover a waterfront of causes, principles, and values.

11. See *Dodge v. Ford Motor Co.*, 170 N.W. 668 (Mich. 1919).

12. *Id.* at 683–84.

13. *E.g.*, E. Merrick Dodd, Jr., *For Whom Are Corporate Managers Trustees?*, 45 HARV. L. REV. 1145 (1932).

14. *Id.* at 1146–47.

managers, to give increased emphasis at the present time to the view that business corporations exist for the sole purpose of making profits for their stockholders. He believes that public opinion, which ultimately makes law, has made and is today making substantial strides in the direction of *a view of the business corporation as an economic institution which has a social service as well as a profit-making function*, that this view has already had some effect upon legal theory, and that it is likely to have a greatly increased effect upon the latter in the near future.¹⁵

The legal (and philosophical) question is not whether a business organization should be able to engage instrumentally in non-profit activities,¹⁶ but rather whether a business organization's ultimate purpose may include something in addition to (and likely prejudicial to) the purely pecuniary interests of the organization's owners. As the Michigan Supreme Court stated in *Ford*:

A business corporation is organized and carried on primarily for the profit of the stockholders. The powers of the directors are to be employed for that end. The discretion of directors is to be exercised in the choice of means to attain that end, and does not extend to a change in the end itself, to the reduction of profits, or to the nondistribution of profits among stockholders in order to devote them to other purposes.¹⁷

When we abandon this paradigm, the “ripples” of consequences are substantial. For example, the liability shield for owners of business organizations is justified as necessary for entrepreneurial activity. What policy or principle supports the shield for owners of a family vacation home?¹⁸ According to the

15. *Id.* at 1147–48 (emphasis added).

16. *See, e.g.,* A. P. Smith Mfg. Co. v. Barlow, 98 A.2d 581, 586 (N.J. 1953) (“[T]here is no difficulty in sustaining, as incidental to their proper objects and in aid of the public welfare, the power of corporations to contribute corporate funds within reasonable limits in support of academic institutions. But even if we confine ourselves to the terms of the common-law rule in its application to current conditions, such expenditures may likewise readily be justified as being for the benefit of the corporation; indeed, if need be the matter may be viewed strictly in terms of actual survival of the corporation in a free enterprise system.”); *see also* MINN. STAT. § 302A.251, subdiv. 5 (“In discharging the duties of the position of director, a director may, *in considering the best interests of the corporation*, consider [*inter alia*] the interests of the corporation's employees, customers, suppliers, and creditors, the economy of the state and nation, community and societal considerations”) (emphasis added).

17. *Ford*, 170 N.W. at 684.

18. *See* J. William Callison, *Nine Bean-Rows LLC: Using the Limited Liability*

Revised Uniform Limited Liability Company Act: “A limited liability company may have any lawful purpose, *regardless of whether for profit*.”¹⁹ This language certainly permits non-profit limited liability companies, but is it wise to use the LLC for such purposes?²⁰ As to hybrid business/social organizations, the issues are myriad. For example, managerial accountability is difficult enough in an unabashedly for-profit enterprise. How will owners hold managers liable when a purportedly value-driven decision produces financially crippling results?²¹ From a broader perspective, should the government perform a branding function, creating a special form of quasi-capitalist enterprise, or should such “social value” enterprises look to private sources to establish their brand?²²

Company to Hold Vacation Homes and Other Personal-Use Property, 38 WM. MITCHELL L. REV. 592 (2012).

19. REVISED UNIF. LTD. LIAB. CO. ACT, § 104(b) (2006) (emphasis added).

20. See generally Callison, *supra* note 18 (examining the use of LLCs for vacation homes and personal-use property); David S. Walker, *A Consideration of an LLC for a 501(c)(3) Nonprofit Organization*, 38 WM. MITCHELL L. REV. 627 (2012) (considering the use of an LLC for nonprofit tax-exempt organizations). The Revised Uniform Limited Liability Company Act’s Comment cautions care:

The subsection does not bar a limited liability company from being organized to carry on charitable activities, and this act does not include any protective provisions pertaining to charitable purposes. Those protections must be (and typically are) found in other law, although sometimes that “other law” appears within a state’s non-profit corporation statute.

REVISED UNIF. LTD. LIAB. CO. ACT § 104(b) cmt.

21. See generally William H. Clark, Jr. & Elizabeth K. Babson, *How Benefit Corporations are Redefining the Purpose of Business Corporations*, 38 WM. MITCHELL L. REV. 817 (2012) (discussing the increasing adoption and utility of benefit corporations).

22. See generally Ann E. Conaway, *The Global Use of the Delaware Limited Liability Company for Socially-Driven Purposes*, 38 WM. MITCHELL L. REV. 772 (2012) (providing background information regarding the creation and use of low-profit limited liability companies (L3Cs) and explaining “The Truth About L3C Legislation”). This criticism is only one of many this author and others have made of the L3C. See, e.g., Carter G. Bishop, *The Low-Profit LLC (L3C): Program Related Investments by Proxy or Perversion?*, 63 ARK. L. REV. 243 (2010); J. William Callison & Allan W. Vestal, *The L3C Illusion: Why Low-Profit Limited Liability Companies Will Not Stimulate Socially Optimal Private Foundation Investment in Entrepreneurial Ventures*, 35 VT. L. REV. 273 (2010); Daniel S. Kleinberger, *A Myth Deconstructed: The “Emperor’s New Clothes” on the Low Profit Limited Liability Company*, 35 DEL. J. CORP. L. 879 (2010).

Nonetheless, progress typically involves a dialect, and the thesis and theme of this symposium issue are largely optimistic and often quite pragmatic. I believe you will learn from the articles. I have.

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