

The Central Distinction in the Theory of Corporate Moral Personhood*

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ABSTRACT. Peter French has argued that conglomerate collectivities such as business corporations are moral persons and that aggregate collectivities such as lynch mobs are not. Two arguments are advanced to show that French's claim is flawed. First, the distinction between aggregates and conglomerates is, at best, a distinction of degree, not kind. Moreover, some aggregates show evidence of moral personhood. Second, French's criterion for distinguishing aggregates and conglomerates is based on inadequate grounds. Application of the criterion to specific cases requires an additional judgment of a pragmatic nature which undermines any attempt to demonstrate French's thesis that actual conglomerates are moral persons and aggregates are not. Thus, French's theory is seriously lacking both empirical basis and empirical relevance.

The theory of the corporation as a moral person originated by Peter French (1979) and now accepted in part by Jere Surber (1983), Paul Thompson (1986), Brent Fisse (1982) and Kurt Baier (1986) is based at its heart on a distinction between two types of human collectivities: aggregates and conglomerates. French has argued that the two types have sharply and importantly different characteristics. He maintains that conglomerate collectivities such as business corporations are properly moral persons as much as human beings, but that aggregate collectivities such as lynch mobs are not.

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The thesis that corporations are moral persons has brought considerable discussion, but inconclusive results. Critics have argued that corporations cannot be described literally as moral persons (Velasquez, 1983; Ladd, 1986; Donaldson, 1986; May, 1986; May, 1987). French has countered by arguing, in part, that the concept of a moral person is logically independent of the concept of a human being (1986). The debate over French's controversial thesis has taken place without serious examination of the distinction which lies at its core. French has drawn that distinction with care, by use of a single criterion and extensive argument to show that it has normative implications. The distinction is, however, seriously flawed as a means of distinguishing collectivities.

The problem with French's thesis is illuminated by two empirical inadequacies of his distinction. First, there are examples of aggregates which possess the characteristics French claims are typical of moral persons and unique to conglomerate collectivities. Second, the corporations which French claims are conglomerates show evidence of being aggregates. These two inadequacies reveal that the distinction between aggregates and conglomerates is best viewed, first, as a distinction of degree, not kind. Second and more important, the inadequacies point to a fundamental flaw in French's analysis of collective moral responsibility. They reveal that the distinction between conglomerates and aggregates fails to differentiate actual human collectivities. Consequently, the distinction is, in the end, of no help in determining whether some collectivities are moral persons and some are not.

I

French offers what one may refer to as the "membership criterion" to distinguish aggregate from

conglomerate collectivities. He defines an aggregate as a collection of people such that a change in its membership is sufficient to change its identity. "A change in an aggregate's membership will always entail a change in the identity of the collection" (1984, p. 5). One's neighbors, teenage gangs and mobs are cited as examples of aggregates. Claims that the mob lynched the suspect assert that the group comprised of a specific list of people performed the lynching. The nature of that group is defined, French explains, by the combined identities of its individual members (1984, pp. 5, 21–26). French defines a conglomerate collectivity, on the other hand, as "an organization of individuals such that its identity is not exhausted by the conjunction of the identities of the persons in the organization. The existence of a conglomerate is compatible with a varying membership" (1984, p. 13). He cites clubs, political parties, universities, corporations, and armies as examples of conglomerates, and argues that "what is predicable of a conglomerate is not necessarily predicable of all of those or of any of those individuals associated with it . . ." (1984, p. 13).

It is important to recognize that French offers the membership criterion as the single mark which distinguishes aggregates from conglomerates. Referring to it as an "identifying characteristic," he finds it wholly adequate to determine whether particular collectivities are aggregates or conglomerates (1984, pp. 13, 26–27). The membership criterion does not alone, however, reveal that conglomerates are moral persons while aggregates are not. French establishes the moral distinction by adducing a further set of characteristics.

French claims that all conglomerates have "three significant characteristics" which "are not found in the case of aggregates." They have, first, internal organizations and decision procedures; second, enforced standards of conduct which are more stringent than standards which apply outside the conglomerate; and third, the presence of defined roles by virtue of which some members of the conglomerate "exercise certain powers over other members . . ." (1984, pp. 13–14). These three will be referred to as the "three significant characteristics."

French goes on to argue that the three significant characteristics reveal that moral responsibility cannot be "legitimately ascribed" to an aggregate (1984, p. 10). He holds that moral responsibility can only be

legitimately ascribed to an individual person, and that an aggregate is not a person. Statements which appear to ascribe blame to an aggregate must be understood as a shorthand device summarizing the blame attributable to each member of the aggregate (1984, pp. 10–13, 25–26). French argues, on the other hand, that an attribution of moral responsibility to a conglomerate does not require the possibility of ascribing responsibility to any of the individuals associated through it (1984, p. 13). This raises the question of how one could attribute moral responsibility to a human collectivity if none of the individuals associated through it are morally responsible for the matter at hand. If moral responsibility is attributed only to moral agents, and it need not be attributed to any in a conglomerate, then how could it be attributed to the conglomerate? French answers that one can attribute moral responsibility to conglomerates because they are in fact moral agents which he calls "persons" (1984, pp. 38–47; 1986, p. 36).

The three important characteristics of conglomerates reveal that they are, he argues, intentional systems, and their intentionality is logically independent of the intentions of the individuals associated through the conglomerate (1984, pp. 43–47). That is, the conglomerate may have an intent of its own which differs from that of any of its personnel. This intentionality is evidenced by the functioning of an internal decision structure. The structure, characterized by the three significant characteristics, is what French calls a "redescription license." It allows one to redescribe the functions of the conglomerate as its intentional actions. The internal decision structure is thus the metaphysical basis of the personhood of a conglomerate collectivity.

An internal decision structure is a complex of rules, procedures, roles and customs by which individuals associated through the conglomerate arrive at decisions which constitute the policies of the conglomerate. By exercising the powers of their offices according to the established procedures of a corporate conglomerate, the individuals in those offices contribute to the making of corporate decisions and the carrying out of corporate policy. The presence of an internal decision structure permits "both redescriptions of events as corporate and attributions of corporate intentionality . . ." and thus corporate moral responsibility (1984, p. 46).

To argue merely that claims of moral responsibility have different meanings when attributed to conglomerates and aggregates would be a modest position. French, however, is not content with such fare. He concludes that conglomerates may be the subject of moral predicates attributable to persons, and that they are literally moral persons as much as humans, while aggregate collectivities are not. The strategy of French's argument is important. First he argues that aggregates and conglomerates can be distinguished by the membership criterion. Next he argues that conglomerates have three important characteristics which are sufficient to establish that they are intentional systems in a typically personal sense. Since aggregates do not have the three characteristics, conglomerates are moral persons and aggregates are not. Thus, the distinction between aggregates and conglomerates turns out to be a moral distinction.

II

The distinction between conglomerates and aggregates is empirically inadequate on two levels. First, the three significant characteristics fail to demonstrate that all aggregates have a different moral status from conglomerates. Aggregates which French presents as paradigm cases may well possess the three significant characteristics despite French's disclaimer. Second, the membership criterion does not successfully distinguish two types of collectivities. The examples which French offers as paradigm cases of conglomerates show evidence of being aggregates.

The empirical inadequacy of the three significant characteristics is clearest if one assumes, temporarily, that the membership criterion successfully distinguishes aggregates from conglomerates. The problem is that the three significant characteristics often fail to reveal that aggregates are not moral persons. Aggregate collectivities may have the three significant characteristics which French holds are unique to conglomerates. Aggregate collectivities may thus have, on French's grounds, moral personhood.

The group of neighbors who watched passively as Kitty Genovese was assaulted and murdered is a case in point. French views the group as an aggregate, holding that its identity would change if any of its members were different (1984, pp. 7–12). For that

group to lack moral personhood according to the three significant characteristics, the group must lack either an internal decision structure, enforced standards of conduct, or defined roles by which power is wielded over others. That it is lacking in any such characteristics is not clear.

It is certainly true that none of the three are present in the group of Kitty Genovese's neighbors in a way as well defined as they are in a corporation. But this is not to grant that they are wholly absent. Sociological investigation might well reveal significant elements of the three characteristics in the group of neighbors.

The group may well have a rudimentary sort of decision procedure by which it functions. It might be, for example, that the lady on the second floor glanced up at the man on the third to note his reaction, and was cued to do nothing by his complacency. Had he made some sign, yelled to her, or yelled to the attacker, she might well have done something. It might be that every person who witnessed the murder would have gone running to Kitty's aid if the muscle man on the top floor had bellowed "Let's get 'im!" The mere fact that there was no coordinated action that fateful day is no evidence that the neighbors totally lacked a decision-making network or structure. Nor is the fact that there is no such procedure in writing. Decision structures can develop spontaneously when people get together, for even very short times, and in the presence of weak relationships among them. Indeed, it is this very kind of thing which sociologists and social psychologists report in their studies of group dynamics.

In regard to the second of the three significant characteristics, there may well have been, among Kitty's neighbors, a relevant kind of enforced standard of conduct. The people in the apartment complex may all be familiar with the ideas of the talkative pacifist on the second floor, like and respect him, and avoid any behavior which would make them the brunt of his acid tongue. They may all seek to remain in the good graces of the apartment manager who has the absolute power to choose who among their friends are admitted to the apartment, and which of them lose their leases. Enforcement of conduct takes place in varied and subtle ways, and there is no reason to think it was totally absent in Kitty Genovese's neighbors.

Finally, it is quite likely that there was in the group the presence of defined roles by which certain powers are exercised over others. Perhaps there was a matronly lady on the fourth floor who bakes cookies for her neighbors, a man who is revered for his annual "open house" party, or a young woman who is a lawyer downtown, who once called a meeting of residents to discuss a problem with the landlord. Any such descriptions bespeak roles by which certain subtle kinds of power are wielded, and goals are achieved.

There are no realistic grounds to deny that the people in the apartment are united by common interests and directed toward common ends. They have much in common. In comparison to a corporation they are certainly less structured. The point here is that they differ from a corporation mainly in degree of structure, common purpose and cohesion.

Similar points can be made even about mobs which assemble for limited periods of time. They are the objects of detailed sociological investigations which turn up varying degrees of structure. The three significant characteristics do not sort actual collectivities into discreet groups. They reveal, at best, differences of degree.

That some aggregates may have the three significant characteristics contradicts part but not all of French's analysis of collective moral responsibility. One might retreat from French's initial position by admitting that some aggregates may possess the three, but still argue that no conglomerates lack them. One might attenuate French's thesis and admit some aggregate collectivities to the ranks of moral persons. Even if the distinction between aggregates and moral persons is not as sharp as French indicates, there may be a clear and useful distinction among two types of human collectivities.

III

There is, however, an empirical inadequacy of the distinction between aggregates and conglomerates which leads to further and more serious troubles for French's analysis of collective moral responsibility. This second inadequacy is independent of the question of moral personhood. It is an inadequacy of the membership criterion by which French distinguishes aggregates and conglomerates. There is evidence that

there may not be any distinct, unequivocal examples of either category. Beyond the view that the moral distinction between aggregates and conglomerates is one of degree, this is evidence that the two are not empirically distinguishable at all.

The empirical weakness of the membership criterion is apparent in French's treatment of business corporations. French argues that corporations are typical conglomerates for which changes in their personnel do not change their identities. He argues that company employees have confirmed this view by denying that their absence from the company would alter the company in any "essential" way. He points out that the component membership of Gulf Oil Corporation, for example, is so large that it is difficult to list, and that it is always in a state of flux (1984, pp. 27, 28). He concludes that the identity of Gulf Oil is consistent with changes in its component membership, that its identity is not determined by its membership, and that it is a conglomerate as shown by application of the membership criterion.

Such reasoning ignores a counter-argument showing that Gulf Oil may qualify as an aggregate by the membership criterion. The fact that the corporation continues to be labelled "Gulf Oil" when some of its personnel change does not prove that a change in its personnel cannot change its identity. Our legal, social and linguistic convention of using the name "Gulf Oil" to label a corporation in 1990 and to label one 1980 is, by itself, little proof that the two things have the same identity. For French to assert that the label "Gulf Oil" is a rigid designator which picks out the same object in every world (1984, pp. 29–30), simply begs the question at issue. The question concerns the nature of the referent of "Gulf Oil." The question is whether any changes in its membership list are sufficient to justify the claim that the identity of the thing named "Gulf Oil" at one time is different from the identity of the thing named "Gulf Oil" at another time.

There is empirical evidence to show that a large enough change in membership alone can produce a change in the identity of a corporation such as Gulf Oil. Consider the retirees of ten years ago who shake their heads and say "It just isn't the same company." Are they merely speaking elliptically? Suppose Gulf is convicted in court of some illegal (and morally repugnant) practice which originated after they retired, and that there have been no other major

changes in company policies or procedures since their retirement. The retirees might still insist that it is now in important respects a different company because of extensive personnel changes alone.

Any effort to refute the retirees' claim requires evidence that personnel changes cannot change the identity of the corporation. The question arises as to what such evidence might be. One might, at this point, be tempted to adduce the three significant characteristics to help make the case. One might argue that even though all the personnel changed, the policies, procedures and corporate culture remained the same. It is important to understand that in the present context, such reasoning cannot succeed.

Sameness of policies, procedures and culture is not *ipso facto* sameness of corporate identity. The three significant characteristics cannot be used to demonstrate sameness of corporate identity unless they are adopted as *the* sufficient condition for the identity of a corporation. However, if one holds that they are, one has *replaced* the membership criterion as the necessary and sufficient condition of corporate identity and thus made a self-defeating move.

French offers the membership criterion as the single, necessary and sufficient condition for determining whether a corporation is an aggregate or a conglomerate. To use the identity of policies, procedures and corporate culture as sufficient to draw the distinction in a given case is to shift ground. It is to set aside the membership criterion and replace it with the three important characteristics as the determining factor in drawing the distinction.

The lesson at hand is that appeal to any properties (other than membership) to demonstrate sameness of identity is to grant that membership is not in fact a sufficient condition to distinguish actual aggregates from actual conglomerates. However, any challenge (such as that of the retirees) to the verdict of the membership criterion requires one to adduce further properties. That is, one must argue that other properties of the collectivity in question show that it is an aggregate or conglomerate. In doing so, one tacitly admits that membership does not suffice to establish identity. Therefore, admission of the mere plausibility of such challenges demonstrates the incapacity of the membership criterion to categorize actual collectivities.

The retirees' objection reveals that determinations of sameness of identity depend in part on social

conventions. It is for purposes of investment, taxation, debt, inheritance, legal redress, reputation, public relations, etc. that Gulf Oil is considered the same corporation today as it was years ago. It is for these reasons, due not just to the inner metaphysical structure of a corporation, that the name, "Gulf Oil," is used as a rigid designator. French ignores the possibility that there may be strong reasons to question the value of such purposes, the identity of a given collectivity, and the ongoing use of its name as a rigid designator. Thus, whether or not Gulf Oil is a conglomerate by the membership criterion is not a categorical matter. Rather, it depends upon the priorities and purposes adopted in a given context.

The membership criterion is empirically inadequate in the sense that it does not in fact apply to collectivities on purely empirical grounds. To defend application of the criterion to specific collectivities requires consideration of one's purposes for holding that a change in membership does or does not change the identity of a collectivity. If a corporation is now charged with a serious crime for which the retirees feel innocent, they may claim that the extensive change in the corporation's personnel since they retired has been sufficient to change its identity. If, on the other hand, they are proud of the record it continues to build after they retire, they may argue that the corporation has changed membership but not identity. Moreover, one might argue that the identity of any human collectivity would change given a large enough change in its membership, and given an appropriate purpose to attribute such a change. Thus, the membership criterion, alone, is insufficient to distinguish any actual instances of conglomerate collectivities.

The empirical inadequacy of the membership criterion is no mere line drawing problem. It is not merely an issue of a few unclear cases. It is a question of whether the examples French offers are genuine, and thus whether, in the end, there are any clear cases at all. If not, the criterion is in an important sense conceptually as well as empirically inadequate.

One might, of course, point out that the membership criterion is conceptually unproblematic because it is consistent and intelligible to imagine a distinction between aggregates and conglomerates as drawn on the basis of the criterion. But if every case adduced as an example is open to question on pragmatic grounds, the criterion is of doubtful value.

If it draws a distinction without a clear referent, it is of no clarificatory value in the making of individual moral judgments about corporations.

The purpose of the membership criterion is to assist us to draw a line between human collectivities which are moral persons and those which are not. French holds that once we understand that all conglomerates have the three significant characteristics, we can merely identify a particular conglomerate, concluding that it is a moral person and that it is morally responsible for whatever it may have done. The objection is that the membership criterion offers no clear basis to facilitate positive identification of any particular conglomerate. Whether a corporation is a conglomerate (as indicated by the membership criterion) is not discernible by examination of its empirical characteristics. Such categorization requires, in addition, a claim about the relevant purpose of those whose judgment is accepted as the basis for applying the membership criterion. It is the purposes of those who claim that change in its membership does or does not change its identity which is at issue. That various parties have different purposes and thus give different answers to the question is clear. The point is that the membership criterion alone draws no clear line, either in actual or hypothetical cases. It draws a distinction without a referent, and is therefore unhelpful in clarifying moral discourse.

IV

One might defend French's analysis by maintaining that the present arguments prove only that the distinction between aggregates and conglomerates is a distinction of degree. Perhaps the distinction is not razor sharp. But it is nevertheless significant. Corporations are conglomerates and mobs are not. Corporations survive massive layoffs and retirements to maintain their corporate identities, while mobs which lose their members take on different identities. Although lacking empirical precision, the distinction between aggregates and conglomerates does not violate common sense, common language usage, or conceptual norms. It is a plausible theory which explains our inclination to say that a corporation is morally responsible even when none of its personnel are. This inclination is based on its characteristics as a conglomerate, not an aggregate.

Such a defense misconstrues the import of the above arguments. Whether a corporation is a conglomerate or an aggregate is determined not by its characteristics alone, but by additional consideration of human purposes. The verdict in specific cases depends on which purposes one adopts. Depending on what they are, use of the membership criterion could support the judgment that a given corporation is an aggregate. Moreover, an aggregate which is not a corporation might possess the three significant characteristics to a degree warranting the claim that it is a moral person and morally responsible. Either case reveals that whether a collectivity is a conglomerate or aggregate is irrelevant to the question of whether it can be properly claimed to be morally responsible.

One might respond that to be a conglomerate is morally significant because any such collectivity has the three significant characteristics and thus an internal decision structure. Such a claim could mean either of two things. First, it could mean that because the collectivity in question is a conglomerate, it has the three significant characteristics and thus an internal decision structure. Or, second, it could mean that the collectivity in question in fact has them. However, neither construal successfully establishes that all conglomerate collectivities are moral persons.

Consider a corporation which is in a state of anarchy, with its decision procedures askew, its personnel confused and demoralized, and its organizational structure and policies wantonly violated by an indeterminate number of its personnel. Such a state of affairs might only last a short time. But while it lasts, there is good reason to continue describing this disorganized mess as a corporation. And there might also be reason to describe it as a conglomerate (by application of the membership criterion). However, one might argue that it lacks the three significant characteristics and thus an internal decision structure. Such a corporation might be best described as a conglomerate without an internal decision structure and without a basis for a claim of moral personhood. It simply is not clear either that conglomerates must have the three significant characteristics and thus an internal decision structure or that they in fact do.

The very criteria French defends reveal that the status of a collectivity as a conglomerate is irrelevant to its status as a moral person. Moral personhood is

determined, for French, by the presence of the three significant characteristics, while it is the membership criterion which determines whether a collectivity is a conglomerate. These two sets of criteria are neither coextensive nor logically or conceptually connected.

A weakened version of French's position might claim that almost all conglomerates are moral persons and that most aggregates are not. Such a position does not, however, escape the problem of the membership criterion. That problem is not merely a problem of gray areas or borderline cases. The problem is one of indeterminacy. There are no empirical properties which can distinguish aggregates from conglomerates. They are distinguished only on the basis of the membership criterion, which depends on the purposes one adopts as decisive. If those purposes vary from corporation to corporation, so does the verdict of whether a particular collectivity is an aggregate or conglomerate.

The problem, then, is that the categories of aggregates and conglomerates lack a fixed extension. Their extensions are indeterminate. There is no way of knowing or deciding, from minute to minute, which collectivities are properly characterized as conglomerates and which as aggregates. If we adopt one set of purposes at one time as determining whether membership changes alter identity, these purposes may differ at the next, as the circumstances differ (depending, for example, on whether we are proud or disgruntled retirees).

Finally, it can, as a consequence, make no clear sense to assert that most conglomerates are moral persons. Lacking a clear method of sorting conglomerates from aggregates, we have no basis on which to assert anything about *most* conglomerates. We can, certainly, identify a collectivity and make a relatively plausible case for categorizing it as a conglomerate. We could argue at length, as French does, that it is unjustifiable at present to view a change in its membership as changing its identity. But our case would be based not simply on the application of criteria or certain characteristics of the collectivity, but on agreement regarding purposes relevant to deciding whether membership changes identity. There is no basis here for generalizations about conglomerates because conglomerates do not comprise a category determined by empirical properties.

The strategy of French's argument is revealing. To identify a distinction between two kinds of collectivities and then argue that it is a moral distinction is

in itself not promising. Consider as an analogy the distinction between cats and humans. That such a distinction can be drawn with biological criteria is clear. That such a distinction is a moral distinction is not. It is not clear that all and only humans are persons. There is a strong case to be made that neither brain dead humans nor anencephalic humans are persons in the moral sense. And it is theoretically possible that one could use genetic engineering to create critters which are biologically felines but are so intelligent that they are persons in the moral sense. In short, it seems unlikely that any distinction between two kinds of empirical objects will be coextensive with the distinction between persons and non-persons.

Any attempt to demonstrate that the cat-human distinction is a moral distinction would require two sets of criteria. It requires one set to distinguish cats from humans, and another to distinguish persons from non-persons. It also requires an argument demonstrating that the two sets of criteria are either coextensive, applying to all empirical cases in the same way, or that they are conceptually connected. That they are neither comes as no surprise. That the aggregate-conglomerate distinction and the person-non-person distinction are neither conceptually connected nor coextensive is no less surprising.

There is, however, a difference between the cat-human distinction and the aggregate-conglomerate distinction which illuminates the problem with the latter. Although cats and humans can be empirically distinguished, aggregates and conglomerates cannot. They are distinguished on pragmatic grounds. To claim anything about conglomerates is therefore to make a claim based on pragmatic, not empirical considerations. It is to say that there is a category of collectivities called "conglomerates" such that all of them are moral persons, although we have no empirical properties for identifying any actual examples of such a category. The lack of empirical properties for the aggregate-conglomerate distinction is a major stumbling block. It is a reason to think that there is less hope of establishing aggregates and conglomerates as a moral distinction than cats and humans.

To assert that humans are persons is a statement whose accuracy can be determined by empirical investigation. One first uses empirical criteria to identify humans, and then determines whether they possess the criteria of personhood. It is impossible, as

we have seen, to identify conglomerates on empirical grounds. Such attempts will produce an indeterminate number of undecidable cases. If a number of clear cases could be found, one could then apply the three significant characteristics to determine which are moral persons. But in the absence of clear cases, there is no basis for any judgment at all about the makeup of actual conglomerates. Just what counts as a conglomerate and as an aggregate is indeterminate. Therefore, the distinction can be of no help in determining whether some human collectivities are moral persons and some are not.

The argument here allows the possibility that corporations may be moral persons. The three characteristics might indeed serve as criteria of moral personhood in human collectivities. However, they do not divide such collectivities into two distinct groups. Such bifurcation was the premise of the membership criterion. Without it, the three significant characteristics can establish no more than degrees of collective moral personhood and thus degrees of moral responsibility.

There is, however, no proof either that all disorganized collectivities lack moral personhood and thus moral responsibility of the kind possessed by corporations nor that all corporations are moral persons. This raises the troublesome question of how to determine which corporations have the three significant characteristics to a sufficient degree to warrant treatment as moral persons. And this might well lead one to ponder the possibility that that line is best drawn on the basis of one's purposes in blaming or punishing, not on a supposed sharp metaphysical boundary between two categories of collectivities.

Note

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