Culture as Keystone

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Gwendolyn Gordon, *Culture in Corporate Law or: A Black Corporation, a Christian Corporation, and a M?ori Corporation Walk into a Bar ...* , 39 **Seattle U. L. Rev.** 353 (2016).

Recent Supreme Court decisions that embrace corporate personhood in rights-bearing contexts have caused broad public debates. Non-lawyers have long accepted the view that a corporation is a legal entity separate from its owners and managers and that this entity should be treated by the law like a person sometimes, like for tax purposes, liability for injuries, and property ownership, for example. The idea that corporations might have some "rights" linked to those situations, like those that attend to property ownership, is also fairly well accepted. Despite that widespread acceptance, many balked when the Supreme Court held that corporations had additional rights that we tend to consider limited to humans, like the right to engage in political speech and practice religion. Complicating the debate, the Court provided little guidance on why corporations are like people in these situations, and why they might not always be in future cases.

Although the high-profile cases are not centrally about employment, they have serious worklaw overtones. If corporations have exactly the same speech rights as individuals, are they free to silence employees, like public employers often may? Do corporations have a substantive due process right not to pay minimum wages or privacy rights that could limit OSHA inspections or protect against disclosure of EEO or safety data to federal regulators? If corporations have religious beliefs and practices, can they insulate employment decisions from limits imposed by civil rights laws? Can they avoid paying minimum wages by designating some or all employees ministers? If corporations have a racial identity, does that affect their ability to engage in different kinds of affirmative action? These normative questions about the rights and responsibilities corporations have to their employees and, because of the way we use work to distribute social goods, to society, are central to the work of most worklaw scholars. Yet the ordinary tools of legal doctrine have not provided answers.

In *Culture in Corporate Law*, Gwendolyn Gordon explains how cultural anthropology provides the tools for keeping corporate law connected to social reality that worklaw scholars focus on. By using the concept of culture as an analytical tool, anthropologists can "analyze complexities of human communal behavior otherwise hidden from view" through the empirical method of ethnographic analysis, a long-term, in-depth qualitative study of group dynamics. Using these tools, the law can do a better job of laying out the rights and duties of corporations in our society.

The article compares how the concept of culture is used in legal scholarship and anthropology. As in many other areas, the legal concept of corporate culture as a static, single thing, is out of date. As a result, courts fail to take into account the relational aspects of the forces that make up the corporation in setting policies about corporations' effects on human lives.

The article then uses the anthropological idea of culture to analyze changes to the jurisprudence of corporations based on the courts' theories of the nature and dynamics of social groups in three cases: *Citizens United*; *Carnell Construction Corp. v. Danville Redevelopment and Housing Authority*, a recent Fourth Circuit case deciding that corporations could claim racial identities; and *Hobby Lobby*. These cases view corporations as deriving socially oriented characteristics from their associated individuals but remaining separate entities capable of singular "actions." Corporations in *Citizens United* are individual speakers. In *Hobby Lobby*, they have beliefs, a concept usually limited to ensouled individuals. Gordon traces this view of the corporation-as-entity with the characteristics, social ties, civic commitments, and internal lives of the aggregated humans involved with it to earlier concepts of the socially entangled

corporatist bureaucracies of Émile Durkheim and Adolf Berle. Gordon uses this prior work to show how the concept of the corporation "lends itself both to a salutary elasticity and toward particular conceptions of its place in society" (P. 358).

The article goes on to address the normative implications and theoretical challenges of using the lens of culture to examine corporate law and practice. Using an example from Gordon's long-term fieldwork with a New Zealand corporation owned by M?ori people, the article shows how the organic, internal relationships and dialogue among directors, managers, employees, shareholders, and other stakeholders combined with the external forces exerted on the corporation by the law combine to create a culturally M?ori corporation rather than a corporation simply owned by M?ori people. Using this work as an example, the article demonstrates how the courts' thinner view of corporate personhood (as mostly conflated with the personal attributes of a small group of owners) lacks the attentiveness to social consequences that is vital in cultural analysis. Without that attentiveness, the doctrine is likely to cause the kinds of problems some worry about: for example, all of the freedom to act with none of the responsibility for the consequences of those actions.

In the conclusion, Gordon exhorts courts to engage in deeper analysis in cases involving corporations that claim personal rights. Although that deeper analysis is messy and ill-suited to creating broad rules of general applicability, Gordon argues that it is necessary. As she puts it,

> The stakes here are high. Cultural theory does not merely allow us to describe more accurately the life and the law of corporations; it also contains normative implications. The Supreme Court's simplified conceptualization of corporations supports doctrine that hurts important human interests, obscuring or enervating what should be rich conversations about heterogeneity, responsibility, and the admixture of business and social values. Serious attention to cultural analysis within corporate law will help us to identify better legal rules and build better institutions.

(P. 396.)

The conclusion could easily have been written by just about any worklaw scholar critical of the current legal approach to employment law. Gordon's article suggests that we ought to engage more with the literature on cultural anthropology, and provides an accessible way in.

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