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## Pleasure in Atrocity

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**ABSTRACT:** As Foucault says, genealogical work can be tedious and gray, but it is also pleasurable, even when the archives one delves into are filled with hatred, violence, and injustice. This article explores that pleasure, both its dangers and its possibilities, and in the process offers a partial genealogy of corporate personhood in U.S. legal history.

**KEYWORDS:** corporate personhood, Foucault, genealogy, Fourteenth Amendment, pleasure

On the morning of February 11, 2015, the lead editorial in the *New York Times* was entitled “Lynching as Racial Terrorism.” I took great pleasure in it.

I did not actually read the editorial. What gave me pleasure was the title, which affirmed the analytic and genealogical position I took on lynching in my last book: Lynching in the early twentieth century in this country, I argued, was a technique not of sovereign power (despite its resemblance to the spectacle of public execution in the *ancien régime* and elsewhere) but of disciplinary power; its exercise was decentralized, and its terrifying effects were felt in the bodies of entire populations who regulated their conduct accordingly—such is terrorism. Voilà, I felt the pleasure of intellectual affirmation. But there was another pleasure as well: recognition, the sort of pleasure you have when you come across a photograph of a place you once

went on vacation. Oh, yes, the lynching archive! I spent many happy hours there.

Genealogical work may look tedious and gray, but if it really were, why would anyone keep doing it? One of the hardest things about the work is extracting oneself from the archive in order to move on with the project. I spent many happy hours not only in archives on lynching but also in archives on yellow fever epidemics, sexual monomania, and case studies of children turned idiotic when horses kicked them in the head.

All of that was for my last book, which admittedly was about sexuality. But this sort of pleasure occurs in research on much less sexy topics as well. For my current book project, I have been reading a lot of history of economic theory and corporate law, and I find that there is just as much pleasure in that. In this essay, I will not attempt to account for all this pleasure, but I do want to sort through it a bit because there is in it, I think, both a danger and a possibility.

Reflecting on this pleasure, I realize that a big part of it is just what I will call the benign pleasure of assemblage. As a child, I spent many hours, months, and years immersed in processes of assemblage involving everything from Legos and Lincoln Logs to blocks of Styrofoam, wooden spools, Prince Albert cans, toothpicks, egg cartons, bits of Kleenex, and toilet paper dowels. I kept cigar boxes of interesting things—buttons, bottle caps, popsicle sticks, lone shoestrings—that I would eventually assemble into something—dollhouse furniture, a truck, a Christmas ornament. If I could not be a philosopher, I would want to be one of those people who build dioramas for history museums.

Assemblage is all-absorbing. There is no thought but connecting, pieces moving together and apart, the emerging properties of adhesives and edges and textures and hues. Connecting and connecting and connecting and connecting. There is no knowing, only touching and joining and coming into view. Fascinating, fastening, unfastening, refastening, fashioning, fascinating.

An archive is a cigar box.

One does not know this about archives prior to entry. One enters with an agenda. And here lurks the danger. I entered the archive of the history of corporate law against the background of *Citizens United v. Federal Election Commission* (2010), which I view as a very bad Supreme Court decision that has enabled much evil and has delegitimized whatever claim the United States had to representative democracy. Now anyone with a corporate front,

even citizens of other countries, can pour millions of dollars into American elections, which we know means they can affect, if not wholly determine, the outcome of those elections. All of this because the U.S. Supreme Court holds that corporations are persons entitled to civil rights under the Constitution through the Fourteenth Amendment. I entered the archive hoping to find a way to unthink corporate personhood, to cast the whole notion into question, to undermine it.

I knew, of course, that I would find nothing in the archive that could undo the Supreme Court's decision or prevent Charles and David Koch and their cronies from spending \$889 million to stack the next Congress, buy the next president, and indirectly appoint the next Supreme Court (Confessore 2015, A1). Against those forces—the present and future victors, as it were—I am impotent. But at least I could take a small share of “spiritual revenge” (Nietzsche 1993, essay 1, sec. 7). And I could take great pleasure in that. For, in the archive, I can call the shots. I can accuse, indict, prosecute, judge, and condemn—all from the comfort of my own carrel and my little bytes of cyberspace. My books, my photocopies, my Internet connection—all so many lovely “hiding places, secret paths and back doors,” *my* world, *my* security, *my* refreshment (Nietzsche 1993, essay 1, sec. 10). I can play at politics, play at transformation; nothing will really change, but in my little nook I can forget all that. I can indulge in both fantastic violence and “self-narcosis” (Nietzsche 1993, essay 1, sec. 27). And anyone who has had back trouble or chronic anxiety or any kind of debilitating and persistent pain knows that there are few pleasures as pure as a deep, hard sleep: the archive as spiritual Tempur-Pedic.

All the better if one discovers truly embarrassing information about the current victors, if the record shows that corporate personhood entered American law as the result of an error or a lie—or both—which it did. Who does not love a story of scandalous birth?

For a long time in American law, corporations were what Chief Justice John Marshall and a unanimous Supreme Court said they were in 1809, “a mere creature of the law, invisible, intangible, and incorporeal” (Blumberg 1990, 54). Corporate “persons” were legal fictions, bearers of only those rights specifically granted to them at charter by the various states. They were referred to, legally, as “persons” only because, legally speaking, rights are only attributable to persons (a practice going back to ancient Roman law, which designated some collectives as persons and many people as nonpersons). If corporations were to have any rights at all, they needed

to become persons under the law over and above those individual people who owned shares in them. This was necessary not only to render business transactions less cumbersome (imagine if every shareholder had to sign every contract!) but also to secure limited liability for those individual shareholders. No one supposed that corporations deserved rights because they were persons; they were declared persons only so that they could be granted rights.

In the first decade of the nineteenth century, when Chief Justice Marshall made this assertion, there were barely more than three hundred corporations in the whole country. By today's standards they were small. Most did only one kind of business, which was confined to one state. Although many were profit-seeking ventures, states chartered them (and gave shareholders limited liability) because they were believed to be contributing to some public good in addition to merely expanding the economy. This situation changed at mid-century with the coming of the railroads.

Railroads obviously contributed greatly to the public good. And building and running a railroad required a lot of capital, best raised by selling shares to many investors. For these reasons, it made good sense for states to charter them as corporations and to allow them to take land for tracks through eminent domain. But railroads also tended toward what some economists called a "natural monopoly"; the company that built the track more or less owned the route and could charge whatever it liked for fare or tonnage.<sup>1</sup> States, seeking to maximize the railroads' contribution to the public good, wanted to contain rail costs to citizens and other businesses. From very early on, then, states began to find themselves at odds with their own creatures, the corporate railroads. And railroads as corporations increasingly took on a less and less fictive life of their own.

The Fourteenth Amendment was passed in 1868, declaring that all persons born or naturalized in the United States are U.S. citizens, that no state can enforce any law abridging citizens' privileges and immunities, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." In effect, the Fourteenth Amendment forced the states to recognize that the Bill of Rights protected everyone, including African Americans. Within the next two decades, railroad corporations took advantage of the legal ambiguity of the word *person* in the last two clauses of the Fourteenth Amendment's section 1 and claimed for themselves the civil rights that Congress had sought to establish for former slaves.

Many scholars have seen the decisive moment as 1886, when the U.S. Supreme Court heard the case of *Santa Clara County v. Southern Pacific Railroad*. The case concerned efforts by Santa Clara County, California, to collect property taxes from railroads. Under California law, individuals could deduct the value of a mortgage from the value of their property for tax purposes—paying tax only on the difference—but corporations were taxed on the entire value of the property regardless of an outstanding mortgage. Southern Pacific Railroad had refused to pay property taxes to the county for nearly two decades, contending among other things that discriminating between individual and corporate property-holders for the purpose of taxation was a violation of the Fourteenth Amendment’s due process and equal protection clauses. Lower court opinions did discuss the due process clause, but when the case reached the U.S. Supreme Court, it was decided on a basis other than the Fourteenth Amendment. In other words, the Supreme Court rendered no opinion on the question of corporate personhood under the Constitution.

Two *individuals*, however, did. As the justices took their seats, before Justice Harlan delivered the majority opinion, Chief Justice Morrison Remick Waite reportedly turned to one of the attorneys and said, “The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws, applies to these corporations. We are all of opinion that it does.” Waite’s comment was not part of the official proceedings, and it may or may not have been true. But the court reporter, J. C. Bancroft Davis, inserted the comment into his headnote at the top of the opinion. Not only that, but he began the headnote thusly: “The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deny any person within its jurisdiction the equal protection of the laws” (Hartmann 2010, 30–31). Headnotes are decidedly neither law nor the basis for legal precedent, yet Davis’s commentary has been cited as precedent for a number of important decisions in which corporate rights were expanded.<sup>2</sup>

Decisions in cases according corporations freedom of speech (now including freedom to use corporate money to “express” political preferences via campaign financing), freedom from unwarranted search and seizure, freedom from double jeopardy, and most recently freedom of religious expression (for closely held corporations at least) hark back to that

headnote. In other words, they hark back to an error—or perhaps to a deliberate attempt to confuse the issue and build a future case for expansive corporate rights.

More than one legal historian has argued that the presumed “decision” in *Santa Clara* was not as far-reaching as most legal scholars have believed. The so-called entity theory of corporate personality had not yet been articulated in 1886, at least not in print and certainly not in English; Marshall’s account of corporate existence as fictive still held sway. If the Court had actually decided that corporations were persons under the Fourteenth Amendment, it would have had to have meant, says Peter D’Errico (1996/7, 103), that just as it is wrong to discriminate between black and white men, it is wrong to discriminate between natural and fictive, or artificial, persons and that the Fourteenth Amendment logically prohibits both. Morton Horwitz (1985–86) argues, to similar effect, that the entity theory—the idea that the corporation is a naturally arising agent that preexists “recognition” by charter—had no influence on American legal theory and practice until the very end of the nineteenth century. It was first proposed by the German theorist Otto Gierke in his 1887 book, which was not translated into English until 1900 (and then only partially and in England by William Maitland), and the first mention of Gierke’s ideas in the United States came in 1897 in Ernst Freund’s *The Legal Nature of the Corporation*.

By the 1890s, American corporations were no longer few and small. They controlled an estimated three-quarters of the country’s wealth.<sup>3</sup> They operated across state and even national lines. They were clamoring for latitude in their charters to diversify their holdings. They were inventing new institutional forms—such as trust companies—to get around laws against holding shares in each other. And the petroleum industry, with Standard Oil and its financier J. P. Morgan at the forefront, was inventing vertical integration to maximize control over supply chains and thus over price. As President Cleveland had put it in his December 1888 State of the Union address, “Corporations, which really should be the carefully restrained creatures of the law and the servants of the people, are fast becoming the people’s masters” (Hartmann 2010, 25). By this time, it should be noted, major corporations included not only railroads but also the big steel corporations that supplied tracks and huge insurance companies such as the Equitable, New York Life, and Mutual Life, which were heavily invested in mortgage-backed securities mainly drawn from the debt of western farmers. In addition, Standard Oil was chartered in 1882 and was already

enormous and growing. These corporations were tremendously influential in the U.S. economy as well as in ordinary people's lives. It no longer made sense to treat such entities as mere "fictions," nor could it be held, as legal theorists had tried to do in previous decades, that corporations could be reduced to the persons of their shareholders. Corporations were real entities of some sort acting in the world both within and beyond the framework of traditional corporate law. The turn of the twentieth century saw a crisis in legal theory that paralleled the political crisis that produced antitrust law and the creation of the Federal Reserve. What were these things that were eating up wealth and manipulating the economy? They were not simply fictive rights-bearers; they were real actors. It was in this climate, Horwitz maintains, that courts and legislatures looked back at the *Santa Clara* decision and saw affirmation that corporations are indeed real persons under the law.<sup>4</sup>

The theoretical debate over corporate nature raged for more than a quarter century, and the courts were somewhat erratic in their decisions, but the long-term trend was toward granting corporations more and more civil rights while giving states less and less authority to dictate the terms of their existence. This process did result in some setbacks for corporate interests, such as the unprecedented application of criminal law to corporations; in addition to their officers, corporations themselves can be convicted of crimes and punished for them. (The theoretical debate over *mens rea* is especially delightful!) But on the whole, corporations gained many more legal rights than legal liabilities.

All of this was set in motion—though the outcome was not determined—by Chief Justice Waite and court reporter Davis. Was that happenstance? Or was something more intentional going on? The stories the archives tell are fascinating, full of intrigue, greed, corruption, perjury, and fraud. There were congressional hearings revealing, supposedly, that the framers of the bill that became the Fourteenth Amendment intended to cover corporations all along (justifying the courts' decisions under the interpretive doctrine of original intent), but subsequent evidence (posthearings) showed that the testimony presented was falsified. Over the decades historians have put forth conspiracy theories involving Davis, Supreme Court Justice Stephen Field, Senator Roscoe Conkling and Congressman John Bingham (members of the committee that drafted the amendment), and even President Ulysses S. Grant (whose own party refused to nominate him for a second term because of



his close association with the railroads).<sup>5</sup> Whether the result of conspiracy or merely repeated opportunism, however, corporate personhood as it now exists is of highly dubious origins, issuing forth not from legislation enacted by duly selected representatives but via judges, attorneys, clerks, and the editors of American law reviews, many of whom had huge stakes in corporate power and profit. The origins of modern corporate personhood are dripping with the slime of a miscarriage of justice. And it gives me great pleasure to know so and to proclaim so.

There is great pleasure to be had in evil, or at least in discovering and exposing past evil to explain much of the very unpleasant evil I experience today—such as a recent run-in with a credit card company that is charging us a \$111 late fee because, although our check likely arrived at their offices three days before it was due, they require up to ten business days for processing, a fact they do not bother to share with their customers under routine circumstances. Thus they incentivize electronic payment, giving them direct access to their customers' bank accounts. This infuriates me. I will nail them to the genealogical wall. Sweet spiritual revenge!

How different, really, is this pleasure of mine from the pleasure Tertullian takes in describing his vision of the day of judgment when Christians will be able to “see so many illustrious monarchs . . . groaning now in the lowest darkness . . . ; governors of provinces, too, who persecuted the Christian name, in fires more fierce than those with which in the days of their pride they raged against the followers of Christ” (in Nietzsche 1993, essay 1, sec. 15)<sup>6</sup> Is it different at all? These are the fantastic pleasures of the vulgar and sick, the pleasures of slaves.

They are also, of course, creative pleasures. Tertullian's pleasure fathered a church. A genealogist's pleasure can birth a counterhistory. There is no point in defending myself against the charge of pettiness. I *am* petty, small, a product of a slave revolt in morality. I cannot command the world or even my little nook of it. Hence, I cannot afford to be fastidious. I must take my pleasure where I can. And so I spin stories from fragments I dig up in archives. I love telling stories.

This pleasure is dangerous in a variety of ways, but I will mention only one, which is that it may intensify my pettiness and close off any transformation, any creativity, beyond its own enactment. Giving the reins to my vengeance like this could trap me forever inside my slavish little self. That would not be a tragedy—after all, nothing that happens to a *little* self is—but it might be sad, a waste of whatever tiny bit of vitality I have.

But I have also asserted that this pleasure holds out a possibility; indeed, genealogy always holds out a possibility that a new story will take hold and shape more than the genealogist's fantasies, that it may be transformative, that it may have its own material effects. And in this particular case—my spiritual revenge against corporate persons—the possibility looks unusually promising. In fact, a large part of the pleasure I take in this work comes from this looming possibility; I take pleasure in the uncertain process of possible actualization.

The archive changed my mind. Yes indeed, I came to believe, corporations *are* persons! John Dewey was right! A person is just whatever the law designates as a person, and that is as true of us “natural” persons as it is of those formerly “fictive” ones (Dewey 1926, 657). What is the difference, really?

Well, there are big differences, obviously, between me and IBM, but consider: Some persons are male and others are female; some are for-profit and others are not-for-profit; some employ ten other persons and others employ ten thousand; some have the right to vote and marry and others do not. There are perhaps as many differences among human persons and among corporate persons as there are between the two categories. The point is that all persons are individuated agential entities bearing rights and responsibilities, both legal and (many would argue) moral. Instead of decrying corporate personhood, what we need to do, as Dewey pointed out in 1926, is study “the change which took place in the eighteenth and nineteenth centuries in the concept of the ‘singular person,’ now become the full-fledged individual in his own right” (1926, 668). The genealogical target should be personhood *per se*.

For more than three centuries, since John Locke published the second edition of *An Essay Concerning Human Understanding* in 1694, personhood has been bound to juridical concerns—both human and divine. People must be judgeable. Their conduct must be pinned to them as actions, discrete actions of individuated actors who can be called to account. A person is always the correlate of a judge, actual or potential, reflexive or alter, human or divine. A person is a free and responsible agent, responsible because free, free because responsible. A person is neither a soul nor a body, although it may be correlated with entities of these sorts. It is an agent aware of its actions over time.

This concept of person, with variations over the centuries, underwrites vast configurations of power in contemporary society, including the

neoliberal configurations that structure many international relations and the global economy. In the name of this person's freedom, militaries have been mobilized, national assets have been privatized, environmental regulations have been relaxed, and labor unions have been broken and destroyed. In the name of this person's responsibility, social services have been gutted, pension funds have been decimated, consumer protections have been eliminated, and communal bonds have been weakened and destroyed. There is no such thing as society, neoliberal Margaret Thatcher proclaimed; there are only individuals. There is no such thing as a collective, only aggregates. There is no such thing as solidarity, only individual interest and personal loss and gain.

Except—there are corporations. And try as they might to give an account of corporations as unitary agents or as aggregates of unitary agents, the theorists have failed. Corporate personhood—corporate agency and awareness through time, which *does* exist—is very clearly a historically emergent effect of a network of forces. And this is a good departure point for a new story, a site where a genealogist might begin to assemble a counterhistory of this neoliberal world we live in now. Indeed, corporate personhood may well be one of the most useful of archival facts for the assemblage of a very different account of human agency and selfhood; it holds out the genealogical promise of self-transformation of the most literal sort.

For as long as I can remember I have found the experience of a new idea to be pleasurable. It does not matter what the idea is; its newness, along with its coherence with other ideas already held, is pleasant in and of itself. This is the pleasure of unperturbed surprise: Oh, that was not in view before! And the pleasure of jigsaw puzzle solving: Oh, this fits here! This particular new idea—that corporate personhood may be the key to undermining modern selfhood—brings pleasure in its specificity, however, in great part because of its glaring perversity. Would it not be funny/ironic if the very engine of neoliberalism's take-over turned out to be one key to its conceptual and perhaps literal undoing?

Finally, though, there is the pleasure of possibility itself, the possibility that things really might become otherwise, that the world is underdetermined, that there is a future that no force dictates and no thinker knows. Ultimately, I think, one of the greatest pleasures in life is the experience of ignorance in the face of the future: the pleasure of the abyss, also known as freedom.

## NOTES

1. There were cases of parallel tracks and companies in competition with each other, but the inefficiency was not conducive to low costs to consumers either. J. P. Morgan stepped in to eliminate this inefficiency near the end of the nineteenth century.
2. See Horwitz 1985–86 for discussion of *Santa Clara* as precedent. Horwitz does not comment on the fact that the relevant assertion appeared only in a headnote. For a discussion of that, see Hartmann 2010, chap. 3.
3. Horwitz (1985–86, 180) cites Justice Stephen Field on this point. Field was a contemporary proponent of corporate rights, so the estimate might be inflated.
4. For a very detailed and interesting account of the rise of U.S. Steel and International Harvester and the way finance capitalists handled the Panic of 1907, see Levy 2012, chap. 8.
5. Hartmann covers the main conspiracy theories in chap. 1 of his 2010 book.
6. Nietzsche quotes this and much more from Tertullian.

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