

IMAGINING THE BODY CORPORATE: ALTERNATIVES TO THE ORTHODOX LEGAL CONCEPTION OF THE COMPANY

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Different disciplines conceive companies in different ways. In the orthodox legal view, the company is imagined as a full, rights-bearing person; although the many and varied ways in which the courts have ‘pierced the corporate veil’ indicate juridical tensions in this area. Ambivalence among lawmakers about the nature of companies is also indicated by human rights charters: unlike the New Zealand bill of rights, the more recent Australian Capital Territory and Victorian charters reserve human rights (and responsibilities) to individuals. In contrast to the orthodox legal conception, classical economics imagines the company as a simple conduit for optimising shareholders’ utility. Tax law tends to manifest a floating conception of the company, whereby it is treated in some areas as a person and in other areas as a mere conduit. This indicates that neither the orthodox legal nor classical economics approaches to the company have fully captured the imaginations of tax policymakers.

This article outlines different ways in which the company is imagined, and critically analyses the orthodox legal conception of the company in the light of these potentially competing conceptions. It is concluded that the occasional failure on the part of judges to imagine one-person companies and subsidiaries as separate legal persons is consistent with extra-legal theory and the general expectations of society. If the social advantages of the corporation and the imaginative plausibility of that model are not better established, the long-term future of certain forms of the company may be in doubt.

I. INTRODUCTION

‘A legal system can personify whatever being or objects it pleases.’¹ ‘It can withhold legal personality from human beings, thus demoting them from “persons” to “things”; and it can extend legal personality to beings or objects other than human beings thus promoting them from “things” to “persons”.’² Since this power to personify vests principally in the legislature,³ the modern company is a creature of statute.⁴ However, despite the common law having no conception of a trading corporation as a legal person,⁵ the courts are required to engage with

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1 G W Keeton, *Elementary Principles of Jurisprudence* (Sir Isaac Pitman, 2nd ed, 1949) 150.

2 H R Hahlo and Ellison Kahn, *The South African Legal System and Its Background* (Juta, 1968) 103 (citations omitted).

3 Lord Hoffmann’s explanation of the company, given in *Meridian Global Funds Management Asia Limited v Securities Commission* [1995] 3 NZLR 7, 11 (PC) (‘Meridian’), refers to companies usually being created by statute. It is assumed that Lord Hoffman had the Royal Charter in mind as an alternative means of establishing a company.

4 Andrew Beck, ‘The Two Sides of the Corporate Veil’ in John H Farrar (ed), *Contemporary Issues in Company Law* (Commerce Clearing House, 1987) 69, 82 observes: ‘[a]lthough it has been said that the corporate veil is “statutorily drawn” there is in fact no conclusive explanation of this concept in the Act and it has been developed by judges’ (citations omitted).

5 Inherence or natural entity theory (that people enjoy a natural right to form companies, with positive law merely recording that right) may be dismissed as a Lockean fantasy. David Millon, ‘The Ambiguous Significance of Corporate Personhood’ (2001) 2(1) *Stanford Agora: An Online Journal of Legal Perspectives* 1, 10–11 provides an illuminating explanation of the political goals underlying inherence theory. There is no support in Blackstone for a common law right to incorporate.

the practical implications of separate legal existence.⁶ Not only have judges shown significant disunity on the issues that inevitably arise,⁷ they have on occasion indicated difficulty with the very idea of a company as a separate person from its controllers.⁸ It is submitted that such inconsistency in approach can be seen as a failure to imagine a company as a person. Benedict Anderson argues that, to survive, discrete, national political communities must be imagined as such by their constitutive populations. By analogy, it is submitted that companies must be generally imagined as persons, not merely declared to be such by legislation.⁹

Different disciplines imagine and seek to explain phenomena in different ways. We may, for example, ask which system of thought most plausibly explains madness. Law, philosophy, theology and other disciplines may lay claim to madness, but it seems that, currently, the psychiatric branch of medicine most persuasively explains and, therefore, governs madness. Society, it may be said, imagines madness as a problem for psychiatry to solve.¹⁰ Generally, while other disciplines will have some interest, the principal, explanatory claimant to a phenomenon, such as the company, is likely to show the most interest and develop the deepest and most complex body of analysis. ‘A company exists because there is a rule (usually in a statute) which says that a *persona ficta* shall be deemed to exist and have certain of the powers, rights and duties of a natural person.’¹¹ Consequently, the law can be expected to provide the predominant explanation of the company, but may not do so.¹² However, despite the existence of the orthodox approach, which conceives the company as a fully independent legal actor, no unified juridical explanation of the company prevails.¹³ Furthermore, the judicial intervention known as a ‘lifting’ or ‘piercing the veil of incorporation’ directly challenges the principle of

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- 6 *Salomon v Salomon & Co Ltd* [1897] AC 22 (HL) (*‘Salomon’*) is generally considered to be the starting point. *Lee v Lee’s Air Farming Ltd* [1961] NZLR 325 (PC) represents a landmark for the doctrine in New Zealand law. Beck, above n 4, 79 identifies the:
- authorised lineage of the corporate personality doctrine as: *Salomon* [1897] AC 22, *EBM Co Ltd v Dominion Bank* [1937] 3 All ER 555, *Tunstall v Steigmann* [1962] 1 QB 593, *Woolfson v Strathclyde Regional Council* 1978 SC (HL) 90 and *Williams and Humbert Ltd v W & H Trade Marks (Jersey) Ltd* [1986] AC 368.
- 7 L S Sealy, *Cases and Materials in Company Law* (Cambridge University Press, 1971) 58 observes that, in *Salomon* [1897] AC 22, the judges in the lower courts were ‘outstanding company lawyers of considerable experience’ and, in *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd* [1916] 2 AC 307 (*‘Daimler’*), the Court of Appeal had been ‘greatly enlarged’, and yet the House of Lords disagreed with it.
- 8 The following decisions are particularly relevant to this article: *Daimler* [1916] 2 AC 307; *Ebrahimi v Westbourne Galleries Ltd* [1972] 2 All ER 492; *DHN Food Distributors Ltd v London Borough of Tower Hamlets* [1976] 3 All ER 462; *R v Hammersmith and Fulham London Borough Council; Ex parte People Before Profit Ltd* (1981) 80 LGR 322; *Re Wiseline Corporation Ltd* (2002) 16 PRNZ 347 (*‘Re Wiseline’*).
- 9 Benedict Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism* (Verso, 1991).
- 10 Every dominant imagining is an exercise of power. Thus, in Michel Foucault’s critique of madness, the psychiatric branch of medicine is a particular manifestation of the power–knowledge complex. See generally Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Random House, 1979) [trans of: *Surveiller et Punir: Naissance de la Prison* (first published 1975)]; Michel Foucault, *History of Madness* (Jean Khalifa and Jonathan Murphy trans, Routledge, 2005) [trans of: *Histoire de la Folie à l’Age Classique* (first published 1961)].
- 11 *Meridian* [1995] 3 NZLR 7, 11.
- 12 See, eg, Roberta Romano, ‘After the Revolution in Corporate Law’ (2005) 55(3) *Journal of Legal Education* 342 on the contemporary dominance of economics in the theory of the corporation.
- 13 Brian Cheffins identifies 18 theories, including fictionalist, organic, concession, entity, bracket, realist, contractual, law and economics, and enterprise theories. See generally Brian R Cheffins, *Company Law Theory, Structure and Operation* (Clarendon Press, 1997). See also George Gilligan, ‘Company Law and the Regulation of Financial Services in the Twenty-First Century: A Socio-Legal Perspective’ (2001) 3 *International and Comparative Corporate Law Journal* 33, 36–7.

corporate personality.¹⁴ Given the dominance of the company as an organisational form in contemporary society, conceptions of the company derived from other systems of thought, notably economics, deserve consideration. This is especially the case since, outside the law, companies are not usually attributed legal personhood.

This article outlines different ways in which the body corporate is imagined and critically analyses the orthodox legal approach to the company in the light of these potentially competing conceptions. First, an orthodox legal conception of corporate personality is sketched. In contrast, judicial scepticism about separate legal personality, discernible in piercing of the corporate veil cases, is identified. Second, certain extra-legal conceptions of the company, including that of classical economics, are outlined. The aim here is to demonstrate that the orthodox legal imagining of the company is not universally accepted outside the law. Third, certain implications of companies being included or excluded from human rights charters are discussed.¹⁵ It is concluded that the occasional failure on the part of judges to imagine one-person companies and subsidiaries as separate legal persons is consistent with extra-legal theory and the general expectations of society. If the social advantages of the corporation and the imaginative plausibility of that model are not better established, the long-term future of certain forms of the company may be in doubt.

II. LEGAL IMAGININGS

A. *Legal Personality in Historical Context*

The idea of corporate personhood owes much to the liberal philosophies of the Enlightenment.¹⁶ According to positivist theory, which dominated early 19th century British jurisprudence,¹⁷ rights exist to the extent that the law, supported by social customs, secures them. Law is validated by the presence of particular legal structures and systems — not because of ideals of justice, democracy or the rule of law.¹⁸ Legal personality by right emerged at the time when Adam Smith's *Wealth of Nations* was revolutionising economic thinking by expressing economic

14 See, eg, S Ottolenghi, 'From Peeping behind the Corporate Veil, to Ignoring It Completely' (1990) 53(3) *Modern Law Review* 338; Stephen M Bainbridge, 'Abolishing Veil Piercing' (2001) 26(3) *Journal of Corporation Law* 479; Vincent M Roche, 'Bashing the Corporate Shield: The Untenable Evisceration of Freedom of Contract in the Corporate Context' (2003) 28(2) *Journal of Corporation Law* 289; David Millon, 'Piercing the Corporate Veil, Financial Responsibility, and the Limits of Limited Liability' (2007) 56 *Emory Law Journal* 1305. See also Beck, above n 4, 71; Hahlo and Kahn, above n 2 for older articles on the subject.

15 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 8(4) and *New Zealand Bill of Rights Act 1990* (NZ) s 29 confer rights on juristic persons; whereas *Human Rights Act 2004* (ACT) s 6 and *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(1) confer rights only on natural persons.

16 But see John H Farrar, 'Frankenstein Incorporated or Fool's Parliament? Revisiting the Concept of the Corporation in Corporate Governance' (1998) 10 *Bond Law Review* 142, 144–5 on the development of the concept of the body corporate as a separate legal person from Roman times.

17 As R W M Dias, *Jurisprudence* (Butterworths, 4th ed, 1976) 457 observes, in the British tradition, '[a]nalytical positivism ... will be associated to posterity with names of Jeremy Bentham (1748–1832) and John Austin (1790–1859)'. See generally Jeremy Bentham, *Of Laws in General* (H L A Hart ed, Athlone Press, 1970); John Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law* (Robert Campbell ed, John Murray, 3rd ed, 1869).

18 Marvin Perry et al, *Western Civilization: Ideas, Politics, and Society* (Cengage Learning, 7th ed, 2008) 351. Herbert Hart's positivism continues in this tradition. See generally H L A Hart, *The Concept of Law* (Clarendon Press, 1965).

individualism as ‘the obvious and simple system of natural liberty’.¹⁹ These ideas were the foundational values for the industrial and capitalist revolutions. This period also witnessed the evolution of democracy, the rise of mercantilism and the market economy along with a focus on the individual, property rights, the private accumulation of capital, and its protection by the state through law.²⁰ Material goals and ownership rights predominated in this arrangement, with the state an active participant in protecting property, promoting the private creation of wealth, and accessing its surplus through taxes to fund state institutions.²¹ Against this background, the legislature conferred corporate personality by registration²² — the validity of which was later confirmed in *Salomon*²³ — and the corporation began its tenacious hold on legal legitimacy, both in company law and in the wider legislative domain.²⁴

The power of the legislature, in the positivist conception, to confer or withhold any rights to anyone or anything is consistent with a company being perceived as a discrete legal actor. It is, however, a far more straightforward matter to create a *persona ficta* by statutory provision than it is to practically incorporate that idea into the common law that has developed to regulate human interactions, interests and behaviour. As a contemporary commentator observed of *Salomon*: ‘[o]ur Legislature ... delivered itself on the *Companies Acts* in its usual oracular style, leaving to the Courts the interpretation of its mystical utterances.’²⁵ But, if Parliament was vague in its expectations, so too have been the courts. Thus, Michael Whincop argues that the fundamental problem with *Salomon* is not the principle of separate legal entity, but the fact that the House of Lords gave no indication of: ‘what the courts should consider in applying the separate legal entity concept and the circumstances in which one should refuse to enforce contracts associated with the corporate structure’.²⁶

B. Judicial Engagement with the Company

1. Separate Legal Existence

John Farrar identifies the ‘heuristic inadequacy of the concept’ of separate legal personality and ‘how courts have attempted to deal with manifest injustices in its application, inevitably resulting from the lack of coherent principle and policy behind its adoption as orthodox legal doctrine’.²⁷ There is no lack of controversy surrounding the doctrine, and there have been numerous efforts to give it theoretical cogency.²⁸ The judicial and statutory preference is to characterise the

19 Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* (Encyclopaedia Britannica, first published 1776, 1952 ed) 300. But see Adam Smith, *The Theory of Moral Sentiments* (J Beatty and C Jackson, 1778) 132 on the necessity of reciprocity among its members for society to flourish.

20 See Perry et al, above n 18, 257.

21 Ibid.

22 *Joint Stock Companies Act 1844*, 7 & 8 Vict, c 110; *Joint Stock Companies Act 1856*, 19 & 20 Vict, c 47, and emulated in the British colonies.

23 *Salomon* [1897] AC 22.

24 For example, *Interpretation Act 1999* (NZ) s 29 definition of ‘person’ ‘includes a corporation sole, a body corporate’ but also ‘an unincorporated body’.

25 Note (1897) 13 *Law Quarterly Review* 6, cited by Farrar, ‘Frankenstein Incorporated or Fool’s Parliament?’, above n 16, 145. It lies beyond the scope of this article to analyse whether modern company legislation is closer to judicial thinking on corporations. The role of Law Commissions in performing the groundwork for changes in company legislation may lead to greater consensus; but, say, equitable conceptions of unconscionable behaviour in relation to minorities may be different from government goals of attracting direct foreign investment.

26 M Whincop, ‘Overcoming Corporate Law; Instrumentalism, Pragmatism and the Separate Legal Entity Concept’ (1997) 15 *Company and Securities Law Journal* 411, 420.

27 Farrar, ‘Frankenstein Incorporated or Fool’s Parliament?’, above n 16, 144.

28 See Cheffins, above n 13, 36–7.

company as a legal fiction.²⁹ Thus, in *Northside Developments Pty Ltd v Registrar-General*, Brennan J observed that '[a] company, being a corporation, is a legal fiction. Its existence, capacities and activities are only such as the law attributes to it'.³⁰ This view is consistent with the provisions of the *Companies Act 1993* (NZ) and the *Corporations Act 2001* (Cth), which deal with the creation of a new legal entity in the form of a registered company.³¹ However, this positivist approach to corporate personality reveals little about how judges imaginatively engage with the legal fiction. Problematising the issue further, if separate legal existence is a legal fiction, '[l]ike most legal fictions, it is artificial and has something of the absurd about it'.³²

Conceiving corporate personality, and when it may be disregarded in metaphorical terms, is a principal means of judicial engagement with these difficult issues.³³ A 'web or nexus of contracts',³⁴ 'the veil of incorporation',³⁵ 'cloak' and 'facade',³⁶ 'shield',³⁷ 'dummy'³⁸ and 'alter ego'³⁹ are metaphors commonly employed in this area. Indeed, the doctrine of piercing the corporate veil is 'enveloped in the mists of metaphor'.⁴⁰ The use of metaphor is a common and a longstanding practice in English law.⁴¹ However, as Justice Cardozo observed, 'metaphors in law are to be narrowly watched, for starting as devices to liberate thought, they often end by enslaving it'.⁴² The corporate personality metaphor emphasises the external, rather than internal aspects of the corporate entity, and makes an individualist assumption about legal personality. This raises a number of issues about the logic and rationality of the device, particularly in relation to corporate groups.⁴³

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- 29 R Austin and I Ramsay, *Ford's Principles of Corporations Law* (LexisNexis, 12th ed, 2005) [2.080].
- 30 *Northside Developments Pty Ltd v Registrar-General* (1990) 170 CLR 146, 171. It might be more plausibly argued that the company is a legal reality but a fiction in the eyes of society: see *Re Humes Ltd* (1987) 5 ACLC 64, 67 for an example of judicial disbelief in the fiction, cited in Jennifer Hill, 'Changes in the Role of the Shareholder' in Ross Grantham and Charles Rickett (eds), *Corporate Personality in the 20th Century* (Hart Publishing, 1998) 175, 178.
- 31 See, especially, *Companies Act 1993* (NZ) ss 14, 15; *Corporations Act 2001* (Cth) s 119.
- 32 *Ajinomoto Sweeteners Europe SAS v Asda Stores Ltd* [2010] 4 All ER 1029, 1038. In this case, the Court of Appeal was not referring to separate legal personality; nevertheless, the generalisation is pertinent.
- 33 See, eg, Roman Tomasic, James Jackson and Robin Woellner, *Corporation Law: Principles, Policy and Process* (LexisNexis, 4th ed, 2002) 5.
- 34 See generally William W Bratton Jr, 'The "Nexus of Contracts" Corporation: A Critical Appraisal' (1989) 74 *Cornell Law Review* 407.
- 35 Douglas C Michael, 'To Know a Veil' (2000) 26(1) *Journal of Corporation Law* 43, 43 suggests that the analogy of a 'veil' arose from an early United States Supreme Court case. Roche, above n 14, 289, analogising still further, suggests that 'piercing the corporate veil' 'evokes an image of a surgical, well-defined procedure'.
- 36 See, eg, *Adams v Cape Industries plc* [1991] 1 All ER 929, 1022.
- 37 See, eg, Roche, above n 14, 290.
- 38 Implying a ventriloquism analogy, in *S Berendsen Ltd v IRC* [1957] 2 All ER 612, the Court of Appeal held that where a subsidiary company is concerned it was permissible to 'ask, since the company cannot speak, whose is the voice that you hear'.
- 39 See Bainbridge, above n 14, 485.
- 40 *Berkey v Third Avenue Rly Co*, 244 NY 84, 94 (1926), cited in Bainbridge, above n 14, 506.
- 41 See, eg, *Sir James Smith's Case* (1691) Carth 217.
- 42 *Berkey v Third Avenue Rly Co*, 244 NY 84, 94 (1926), cited in John H Farrar, *Farrar's Company Law* (Butterworths, 3rd ed, 1991) 72. Likewise, Gareth Morgan, *Images of Organization* (Sage, 2006) 13 observes: '[m]etaphor is often just regarded as a device for embellishing discourse but its significance is greater than this. For the use of the metaphor implies a way of thinking and a way of seeing that pervade how we understand our world generally ... and always produces this kind of one-sided insight.'
- 43 Gunther Teubner, 'Unitas Multiplex: Corporate Governance in Group Enterprises' in David Sugarman and Gunther Teubner (eds), *Regulating Corporate Groups in Europe* (Nomos Verlagsgesellschaft, 1990) 67, 87–92.

2 *Piercing the Corporate Veil*

The Courts have developed different models for disregarding separate legal existence, ostensibly framed around a broad and pragmatic discretion. In *Savill v Chase Holdings (Wellington) Ltd*,⁴⁴ Justice Tipping discussed then recent authorities in New Zealand and the United Kingdom dealing with the circumstances under which it might be legitimate for the Court to lift the corporate veil and deal with the true situation thus revealed. He concluded:⁴⁵

The essence of the matter in my view is that the Court should not lift the corporate veil unless a refusal to do so would, in the words of Richmond P, lead to a result so unsatisfactory as to warrant some departure from the normal rule. That normal rule is of course that each company involved in a transaction is a separate legal entity and also that a subsidiary is a legal entity separate from the company which holds in substance all its shares. ... the fact that one company has complete control of another is not a sufficient reason on its own for the lifting of the veil and treating of the two as being the same legal entity.

However, in *Chen v Butterfield*,⁴⁶ Justice Tipping emphasised justice over pragmatism, saying:⁴⁷

The corporate veil should be lifted only if in the particular context and circumstances its presence would create a substantial injustice which the Court simply cannot countenance.

An element of equity-based intervention is, then, evident in these decisions, together with pragmatism in the form of a discretion to pierce the veil. Certain commentators have identified courts taking a rigid view, sacrificing substance for form, adopting an overly formalistic approach;⁴⁸ whereas others have identified an underlying coherence. Thus, Helen Anderson argues:

there is a unifying theme underlying the arguments in favour of veil-piercing. It is that some or all of the elements which are used to justify limited liability and the veil of incorporation are not present either because there is effective control of the operations of the company by the directors or the shareholders (leading to some action on the part of the company which is deemed unacceptable) or because there is an inability by the creditors to self-protect ex ante against the risk of loss. In these circumstances, the balance between the objective of shareholder wealth maximisation and the protection of those adversely affected by a corporation's activities arguably tips back in favour of creditors.⁴⁹

Despite such attempts to give the disparate cases coherence, empirical studies show that judges apply the doctrine inconsistently. For example, in their analysis of intervention by the Australian courts, Ian Ramsay and David Noakes conclude⁵⁰ that courts are more prepared to pierce the corporate veil of a proprietary company than a public company; piercing rates decline as the number of shareholders in companies increases; courts pierce the corporate veil less frequently when piercing is sought against a parent company than when piercing is sought against one or

44 *Savill v Chase Holdings (Wellington) Ltd* [1989] 1 NZLR 257.

45 *Ibid* 279. Tipping J continued:

It is neither possible and nor desirable to categorise the sorts of circumstances which might be regarded as leading to a result so unsatisfactory as to warrant some departure from the normal rule. In a contractual context when it is sought to lift the corporate veil against a party I would have thought that the qualifying circumstances should be confined to situations where there is some element of fraud or sharp practice in that party's conduct or where it would otherwise be unconscionable if strict adherence to the principle of separate corporate entity were maintained.

46 *Chen v Butterfield* (1996) 7 NZCLC 261,086.

47 *Ibid* 261,092.

48 Ian M Ramsay and David B Noakes, 'Piercing the Corporate Veil in Australia' (2001) 19 *Company and Securities Law Journal* 250, 250–71.

49 Helen Anderson, *Piercing the Veil on Corporate Groups in Australia: The Case for Reform* (2009) 13 *Melbourne University Law Review* 333, 341. See also Beck, above n 4, 72 n 7 on commentators' classification of veil piercing into distinct categories.

50 Ramsay and Noakes, above n 48, 260.

more individual shareholders; and courts pierce more frequently in a contract context than in a tort context.⁵¹ In short, Douglas Michael is persuasive when he argues that piercing the veil is ‘jurisprudence without substance’.⁵²

In traditional terms, divergence from legal orthodoxy is likely to be expressed as pragmatism or equity, but can also be seen in terms of imaginative disbelief. Thus, notwithstanding the statutory establishment of separate personality, in certain veil-piercing decisions, judges, it seems, have simply ceased to imagine the company as a discrete legal actor. *Daimler Co Ltd v Continental Tyre and Rubber Co (Great Britain) Ltd*⁵³ is arguably the most notorious example of piercing the corporate veil. In that case, the House of Lords famously held that a company incorporated in the United Kingdom took the nationality of its German shareholders. It may be inferred that, in wartime, the socially unaccepted proposition of funds flowing to enemy shareholders was sufficient to suspend belief in separate legal personality. Although *Ebrahimi v Westbourne Galleries Ltd*⁵⁴ was decided on the grounds of justice and equity, Lord Wilberforce’s observation, on the path to finding the company to be akin to a partnership, that a certain decision ‘was a case where again the company was held to *resemble* a partnership’ is significant.⁵⁵ It seems that their Lordships envisaged the arrangement, despite its legal form, as a partnership and, in doing so, failed to imagine it as a company. But, even if the express grounds for the decision were determinative, Stephen Bainbridge is plausible when he suggests: ‘[c]ourts likely have a vague, intuitive sense of what constitutes a fair outcome, but which they cannot easily articulate’.⁵⁶ In *DHN Food Distributors Ltd v London Borough of Tower Hamlets*,⁵⁷ Lord Goff observed that, in certain situations, ‘one is able to look at the realities of the situation and pierce the corporate veil’.⁵⁸ Likewise, in *R v Hammersmith and Fulham London Borough Council; Ex parte People Before Profit Ltd*,⁵⁹ ‘first principles’ were enough to convince Justice Comyn ‘that commonsense must prevail and one must look at the realities’.⁶⁰ These ‘realities’ and ‘commonsense’ are, of course, how the particular judge perceives or imagines them.

This brief analysis indicates how judges imagine the body corporate. The ‘true’ company is envisaged as a widely-held corporation with a separation of ownership and control. This conception is wholly consistent with the idea of the corporation that developed in the 1930s.⁶¹ As David Millon observes:⁶²

operating on an unprecedented scale, the public owned corporation had become a complex, far-flung organization under the supervision of a cadre of professional managers. It no longer resembled the small, locally owned partnership. With the advent of this separation between ownership and control, rendering managers accountable to the shareholders became corporate law’s primary objective.

51 However, as Bainbridge, above n 14, 512, argues, as a rule, contract creditors ‘should not get relief’ through veil piercing.

52 Michael, above n 35, 41. Furthermore, as Meredith Dearborn, ‘Enterprise Liability: Reversing and Revitalizing Liability for Corporate Groups’ (2009) 97 *California Law Review* 195, 202 observes, piercing the veil has shortcomings from both normative and efficiency standpoints.

53 [1916] 2 AC 307 (HL).

54 [1972] 2 All ER 492.

55 Ibid 499 (emphasis added).

56 Bainbridge, above n 14, 515.

57 [1976] 3 All ER 462.

58 Ibid 468.

59 (1981) 80 LGR 322.

60 Ibid 333.

61 See generally Adolf A Berle and Gardiner C Means, *The Modern Corporation and Private Property* (Harcourt, Brace World, first published 1932, 1968 ed).

62 Millon, above n 5, 11.

In contrast, the single shareholder-director company, or the wholly owned subsidiary, being inconsistent with this concept of the corporation, will, it seems, always be vulnerable to judicial disbelief.

III. EXTRA-LEGAL CONCEPTIONS OF THE COMPANY

In the preceding part, it was argued that, notwithstanding the orthodox legal conception of the company as a legal actor separate from its members, there is considerable judicial disbelief in the idea of corporate personality. The complex and often confused doctrine of piercing the veil can be seen as a failure to maintain the company as a person in the imagination, and is equally problematic in terms of coherent principle. In this part, reference is made to ways in which the body corporate is imagined by other disciplines. The aim here is to highlight extra-legal challenges or disbelief in the concept of a company as a person.

A. *Classical Economics*

Economic theory tends not to recognise the corporation as an entity distinct from its members.⁶³ In the dominant view, expressed by Daniel Fischel, the corporation ‘is nothing more than a legal fiction that serves as a nexus for a mass of contracts which various individuals have voluntarily entered into for mutual benefit’.⁶⁴ And so, welfarist economic theory,⁶⁵ arguably the hegemonic discourse of contemporary society,⁶⁶ simply disbelieves the proposition of a company as an entity or economic actor separate from its constituent members. If, in the orthodox legal imagination, companies enjoy an independent jural existence — albeit one fraught with scepticism — for economists, they are a fiction which can be discounted. Economic and legal systems can exist without direct conflict — they may even hybridise — but, in certain areas, one is likely to prevail⁶⁷ and usurp the other.⁶⁸

Corporate income taxation provides examples of conflict, coexistence and hybridisation between legal and economic theories of the company. Three basic ways of taxing company profits can be identified: the classical, flow through and imputation methods. The classical method treats companies as legal persons wholly separate from their shareholders. Profits are taxed in the hands of the company and dividends are also fully taxed when distributed to

63 See generally William W Bratton Jr, ‘The New Economic Theory of the Firm: Critical Perspectives from History’ (1989) 41 *Stanford Law Review* 1471.

64 Daniel R Fischel, ‘The Corporate Governance Movement’ (1982) 35 *Vanderbilt Law Review* 1259, 1273; M B Metzger and D R Dalton, ‘Seeing the Elephant: An Organizational Perspective on Corporate Moral Agency’ (1996) 33(4) *American Business Law Journal* 489, 497 observe that the nexus of contracts theory, proposed by Ronald Coase, ‘Nature of the Firm’ (1937) 4 *Economica* 36, but not taking off until the 1980s, is essentially a resurrection of the 19th century aggregation theory that had long fallen into obscurity.

65 Welfarist economics is predicated on the assumption that individuals make independent, economically rational choices that maximise their utility. See G D Myles, *Public Economics* (Cambridge University Press, 1995) 4.

66 See Chantal Mouffe, *On the Political* (Routledge, 2005) 70.

67 On the clash of social systems, see generally Niklas Luhmann, *Law as a Social System* (Klaus A Ziegert trans, Oxford University Press, 2004) [trans of: *Recht der Gesellschaft* (first published 1993)].

68 See Thomas W Joo, ‘Contract, Property, and the Role of Metaphor in Corporations Law’ (2002) 35 *University of California Davis Law Review* 779 for an argument that the economic model of the firm has undesirably come to dominate legal thinking on the subject. For a somewhat boosterist account of economics influence on company law, see Romano, above, n 12, 342–59.

shareholders.⁶⁹ This system reflects a legal conception of the company as a discrete person. In contrast, companies may be treated as mere conduits so that profits and losses simply flow through to shareholders.⁷⁰ This system reflects an economic conception of the company as a nexus of contracts so that dividends paid to shareholders are, in substance, indistinguishable from the profits shared between partners. In other words, the legal existence of the company is disbelieved for the purposes of taxing profits — but not for other purposes, such as reporting obligations. The imputation method, based on a hybrid system, compensates shareholders for economic double taxation by permitting dividends to carry an imputed tax credit for the benefit of the shareholder.⁷¹ This system may be said to respect legal personality; but, significantly, it allows claims for double taxation which are alien to the legal concept of the company.

The legal imagination generally informs income taxation, notably in that contractual obligations are normally respected. For example, when a one-person company borrows funds from its sole shareholder, the company is permitted to deduct interest charged.⁷² However, as noted, in the important area of taxation of dividends, the economic conception of the firm has assumed greater influence.⁷³ Furthermore, under goods and services tax, the legal personality of a supplier may be ignored. Thus, groups of companies may be treated as a single taxable entity⁷⁴ and, conversely, branches of a single company may register as different taxpayers.⁷⁵ Here, it may be inferred that economics or accounting imaginings of the company have taken precedence, and the legal conception disbelieved.⁷⁶

B. *Other Conceptions*

Drawing on organisational theory, Michael Metzger and Dan Dalton argue that ‘corporations are not *just* fictions, aggregates, or contractual nexi. They are also real entities that produce real behavior ... that has a real impact on the quality of the lives that all of us lead’.⁷⁷ However, asserting that a company is a real entity is not the same as accepting the orthodox legal conception of corporate personhood. A company is real inasmuch as the aggregate behavioural outcomes resulting from the existence of the organisation are greater than the sum of the individual behaviours. The organisation acts as a catalyst or magnifier of human behaviour. But the legal form of the organisation, and whether it has been conferred with legal personality, may be irrelevant. Positive law could have created a legal arrangement different from the modern

69 See James Meade, *The Structure and Reform of Direct Taxation: The Report of a Committee Chaired by Professor J. E. Meade* (Allen and Unwin, 1978) 245. Ireland is the only European country that retains the classical system. See Cristoph Spengel, ‘Concept and Necessity of a Common Tax Base — An Academic Introduction’ in Wolfgang Schön, Ulrich Schreiber and Cristoph Spengel (eds), *A Common Corporate Tax Base for Europe* (Springer, 2008) 1, 14.

70 On the flow through taxation of limited liability companies (LLCs) in the United States, see, eg, Michael Spadaccini, *Ultimate LLC Compliance Guide* (Entrepreneur Press, 2011) 5. New Zealand has recently introduced the concept of ‘look-through companies’ for income tax purposes: *Income Tax Act 2007* (NZ) pt HB.

71 See Meade, above n 69, 246. Australia and New Zealand operate imputation systems.

72 John Veal, Therese Turner and Craig Macalister, *Staples Tax Guide 2011* (Thomson Reuters, 71st ed, 2011) [830.45].

73 Financial arrangements, such as zero coupon bonds, tend to be taxed on the basis of their economic substance: see, eg, *Income Tax Act 2007* (NZ) s CC 3. This approach also indicates the hegemony of economics over law in income taxation.

74 See *Goods and Services Tax Act 1985* (NZ) s 55.

75 *Ibid* s 56.

76 Accounting may be said to imagine groups of related companies as a single entity: see Robert Kirk, *International Financial Reporting Standards in Depth* (Elsevier, 2005) 207 for when consolidated group accounts must be produced in terms of international financial reporting standards. This idea is recognised in company law: see, eg, *Financial Reporting Act 1993* (NZ) s 13.

77 Metzger and Dalton, above n 64, 555.

company — say, a limited liability partnership with venture property held by a fiduciary.⁷⁸ Nevertheless, such an arrangement, as an organisation of people, might have given rise to the same types of behaviour that critics condemn in corporations.⁷⁹ This is because the offensive behaviour is attributable to the human collective, not the legal fiction of the corporation.

Groups within society may be attributed or take on an identity separate from their constituent members so that individual autonomy and responsibility become compromised, whatever the legal status of the organisation. Generally, people can become detached from the political community in which they are embedded when they give allegiance to a smaller, tighter social group; for example, a motorcycle gang. When assigned roles of authority, members of groups may behave unethically, even atrociously.⁸⁰

In psychological terms, corporations may be imagined as sociopaths. Sociopathy refers, in essence, to an individual's inability to function as a member of human society.⁸¹ Since a company is not a human being, it might be no less illogical to accuse a company of sociopathy than it would be to accuse a shark that menaces bathers of the same. But, unlike a shark, a company is a human creation and an instrument for achieving human ends. And, this is, it seems, the real purport of arguments that the company is a sociopath — not to anthropomorphise the corporation, but to recognise that company controllers (sheltering behind the corporate veil) may behave in a sociopathic manner. Acting in a particular social group, these individuals may become abstracted from the greater society to which they belong and its norms. Otherwise law-abiding businesspersons have long been observed to adhere to their own group codes of behaviour.⁸² Geographical distance from home communities may lead to a greater divergence from accepted norms. Thus, Eugen Ehrlich noted a propensity to atrocity in European troops in their colonies.⁸³ The poisoning by Union Carbide, an American-owned company, of the Indian city of Bhopal provides an example of comparable corporate malfeasance.⁸⁴

Since the company is the dominant form of business organisation, society is likely to feel antagonism towards apparently amoral corporations, rather than disbelief in legal personality. Nevertheless, a groundswell of antagonism towards companies may lead to popular calls to remove legal personality and curtail the scope of limited liability.

IV. EXCLUSION FROM HUMAN RIGHTS

The *New Zealand Bill of Rights Act 1990* (NZ) ('BORA') s 29 provides:

Except where the provisions of this Bill of Rights otherwise provide, the provisions of this Bill of Rights apply, so far as practicable, for the benefit of all legal persons as well as for the benefit of all natural persons.

78 See David Wishart, *Company Law in Context* (Oxford University Press, 1994) 53 on pre-1856 business structures.

79 See, eg, *The Corporation* (Directed by Mark Achbar and Jennifer Abbott, Big Picture Media Corporation, 2003).

80 See, eg, Drew Westen, *Psychology: Mind, Brain, and Culture* (John Wiley, 1996) 730–1 for a description of Philip Zimbardo's infamous student guards–prisoners experiment.

81 American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (4th ed, 1994) ('DSM-IV'), cited in *ibid* 586.

82 See, eg, Torstein Eckhoff, 'Sociology of Law in Scandinavia' (1960) 4 *Scandinavian Studies in Law* 31, 43 observes how otherwise law-abiding businessmen might break price restrictions when they consider their duty to their associates outweighs the law. See generally Joel Bakan, *The Corporation: The Pathological Pursuit of Profit and Power* (Free Press, 2004).

83 See generally Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Harvard University Press, first published 1936, 1975 ed).

84 See generally Kent Greenfield, 'The Disaster at Bhopal: Lessons for Corporate Law?' (2008) 42 *New England Law Review* 755.

In contrast, the *Human Rights Act 2004* (ACT) s 6 provides '[o]nly individuals have human rights' and the *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 6(1) provides '[o]nly persons [individuals] have human rights'.

A discussion of corporate claims to human rights lies beyond the scope of this article, but it is critical to note that universal human rights are derived from 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family'.⁸⁵ It is convenient for investors' property interests to be collectively represented by a corporate vehicle, and it would be wrong to deny procedural justice to any litigant; but, since companies do not have human dignity,⁸⁶ they should not be accorded rights that arise from being human.⁸⁷

New Zealand's Court of Appeal considered the issue of companies qualifying for human rights in *Re Wiseline Corporation Ltd.*⁸⁸ The matter to be decided was whether a company was a person for the purposes of certain regulations which referred to 'he or she'.⁸⁹ On a general point of statutory interpretation, Justice McGrath held 'unless the enactment provides otherwise or the context of the enactment requires a different interpretation ... the starting point is that there is a presumption that bodies corporate are included whenever the word "person" is used in a statute'.⁹⁰ While the immediate grammatical context of the regulation favoured a narrow interpretation,⁹¹ the broader context of the *Judicature Act 1908* (NZ),⁹² and 'the important constitutional purpose of promoting access to justice',⁹³ led the court to conclude that 'he or she' should include the neuter gender.⁹⁴

The *Wiseline* decision can be seen as a stark example of a superior court failing to imagine a company as a discrete legal actor. Justice McGrath observed that, if a broad meaning were placed on the term 'person':

That meaning would enable a trader who incorporates his or her business to have the same right to be eligible to seek dispensation under the regulations from the fees of the Court as someone who prefers sole trader status. To interpret 'person' to exclude a corporate litigant from applying would plainly impede the access to justice of a number of members of that class.⁹⁵

Thus, the one-person company is simply envisaged as a convenient way for a sole proprietor to manage her business: the interests and identity of the two may be conflated. The company is not imagined as an entity with separation of ownership and control in the way envisaged by the *Companies Act 1993* (NZ), which does not distinguish between proprietary and public companies. This imago fits the New Zealand corporate norm,⁹⁶ but equality before the law surely

85 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948) preamble.

86 Langa DP, delivering a unanimous decision of the South African Constitutional Court in *Investigating Directorate: SEO v Hyundai Motor Distributors (Pty) Ltd* [2001] 1 SA 545, [18] said: '[j]uristic persons are not the bearers of human dignity'.

87 On the exclusion of corporations from enjoying Fifth Amendment immunity from self-incrimination in the United States, see, eg, *Hale v Henkel*, 201 US 43 (1906); *Wilson v United States*, 221 US 361 (1911); *Essgee Co v United States*, 262 US 151 (1923).

88 (2002) 16 PRNZ 347.

89 *Court of Appeal Fees Regulations 2001* (NZ) reg 5, in relation to *Judicature Act 1908* (NZ) s 100A.

90 *Re Wiseline* (2002) 16 PRNZ 347, [14].

91 *Ibid* [16].

92 *Ibid* [17].

93 BORA s 27.

94 *Re Wiseline* (2002) 16 PRNZ 347, [18]–[19].

95 *Ibid* [20]. On the other hand, it might be argued that the privilege of limited liability conferred by the *Companies Act* is unfairly denied a person who chooses to trade as a sole proprietor.

96 In New Zealand, 97 per cent of firms are small or medium enterprises: see Ministry of Economic Development, *SMEs in New Zealand: Structure and Dynamics* (July 2010) <http://www.med.govt.nz/templates/MultipageDocumentTOC___44529.aspx>.

requires all companies to be treated similarly. Without separate legislation for closely-held companies,⁹⁷ courts can be expected to apply a unified conception of the company. However, while courts seem to have no difficulty in imagining widely-held companies as legal persons separate from their shareholders, one-person companies and corporate groups may present imaginative difficulties.

V. CONCLUSION

This article has argued that, despite the statutory conferral of full legal rights on the company, a significant degree of doubt and disbelief about separate corporate existence is evident in judicial thinking. Naturally, judges are reluctant to resist the apparent will of Parliament, and yet, from time to time, they do find ways to pierce the corporate veil. And, of course, the legislature itself may choose to sidestep corporate personality when it is inconvenient — such as, for tax purposes — or, indeed, overtly lift the corporate veil.⁹⁸ Despite these examples of disregard for separate corporate existence, it is implausible to propose that the concept of the company faces immediate danger. The listed company is simply too important and useful to modern economies to abandon, and judges are highly unlikely to pierce the veil of Berle and Means-type corporations.⁹⁹ But, at the extremities of corporate existence — one-person companies and under-capitalised subsidiaries in multiple-entity groups — both the judiciary and members of broader society may disbelieve separate legal existence.

Ideally, the legislature will recognise small and medium enterprises as incorporated partnerships, which they typically are in substance,¹⁰⁰ or provide a simpler corporate form for them.¹⁰¹ This would bring legal fact in line with judicial imaginings of closely-held companies, and, indeed, the needs and expectations of entrepreneurs. The issue of under-capitalised subsidiaries, particularly within multinational groups, is more problematic. Incidents such as the Bhopal tragedy highlight the role of corporations within society and the legal protections their shareholders enjoy. In particular, it is pertinent to question whether the Anglo-American model, which not only holds shareholders' presumed interests supreme but also shields them from voluntary and involuntary creditors, is justifiable or sustainable.¹⁰²

Outside the law, disciplines such as economics and organisational management look behind the corporate veil to shareholders and their interests, and directors' and managers' behaviour. The formulation of universal expectations for corporate behaviour is now on the agenda¹⁰³ and, in a globalised and connected world, people can readily and widely share their experiences of corporations in their communities.¹⁰⁴ In that context, maintaining the veil of incorporation

97 For arguments why New Zealand should adopt close corporations legislation, see Matthew Farrington, 'A Closely-Held Companies Act for New Zealand' (2007) 38(3) *Victoria University of Wellington Law Review* 543; Jean J Du Plessis, 'Reflections and Perspectives on the South African Close Corporation as Business Vehicle for SMEs' (2009) 15 *New Zealand Business Law Quarterly* 250.

98 See, eg, *Companies Act 1993* (NZ) s 271 on pooling of group assets on liquidation.

99 See Ramsay and Noakes, above n 48, 260.

100 Cf the look-through companies regime under *Income Tax Act 2007* (NZ) pt HB.

101 See, eg, the concept of the South African close corporation in H S Cilliers et al, *Corporate Law* (Butterworths, 2nd ed, 1992) 570.

102 See Farrar, 'Frankenstein Incorporated or Fool's Parliament?', above n 16, 144 on the approach of Japanese corporation law, which 'gives low priority to shareholders but high priority to social, employee and consumer interests'.

103 The United Nations Global Compact introduced 10 principles as the foundation for an international framework to guide the business behaviour of corporations in the twenty-first century: United Nations Global Compact, *The Ten Principles* (2000)

<<http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>>.

104 See, eg, Naomi Klein, *The Shock Doctrine: The Rise of Disaster Capitalism* (Allen Lane, 2007) 56–7 for an anti-globalisation analysis of corporate interests.

becomes an ever more challenging imaginative feat. Furthermore, the specific reservations of justiciable human rights to individuals in the Australian Capital Territory and Victorian bills of rights are a significant rebuttal of the assumption that the law should treat companies in the same way as natural persons. Richard Sennett urges us to ask ‘what value is the corporation to the community, how does it serve civic interests rather than just its own ledger of profit and loss?’¹⁰⁵ If those questions cannot be answered in a positive way, the long-term viability of the company, in some of its forms at least, must be in doubt.

¹⁰⁵ Richard Sennett, *The Corrosion of Character: The Personal Consequences of Work in the New Capitalism* (Norton, 1998) 140.

