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Personification in Three Legal Cultures: The Case of the Conception of the Corporate Unit

Gregory A. Mark*

Do ideas matter? Does history matter? Does the history of ideas matter? Ron Harris presents us with a paper that engages all three of these questions. Addressing a paper that deals with questions of such magnitude requires taking seriously the intellectual plane on which they are presented, while simultaneously avoiding becoming ensnared in the question of the legitimacy of such meta-questions. To engage the paper then, we must ask a seemingly simple set of questions about influence—why would (or, of course, why wouldn't) ideas, history, or, most appropriately, the history of ideas, have influence?

Harris begins with the assumption that ideas have consequences. His paper, unsurprisingly, requires us to refine that assumption considerably. Looming above all other refinements is the issue of proportion: Do meta-ideas necessarily have meta-consequences? Do mid-level ideas necessarily have mid-level consequences?¹ In Harris's case the meta- and mid-level ideas grow out of the seemingly political problem of intermediary associations, that is, the organized bodies that lie between the individual and the ultimate authority. The political problem is not a necessary problem of existence, of course, but a problem of intellect. In this case, it is the relentless logic of authority and power expanding until it is all-encompassing, tolerating no other organized

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1. Pessimists, or at least the cautious, might well suggest that we may easily be misled by the appearance of words masquerading as ideas, especially ones purporting to have consequences. In any conference dealing with the modern corporation, such as this one, such caution could be quite instructive, and examples warranting such caution abound. For instance, nearly all modern corporations have mission statements. Despite their high tone and solemnity, and to the extent they are even remembered, one might ask whether those statements have any consequences whatsoever, much less intellectual influence. When being nakedly truthful with themselves, breathes there a lawyer or executive who, when faced with a difficult decision (or any decision, for that matter), turns to the corporate mission statement for inspiration, for insight, or for guidance? If not, how should we understand the purported significance of such words?

body that might claim the allegiance, however partial, of the individual. Now, this problem is one of the intellect, and not a necessary problem of existence, because intermediary associations have always existed, and were certainly antecedent to the modern state.²

The relentless logic of authority—the nature of sovereignty—is one that has long bewitched theoreticians and historians. Harris does not tackle the entire issue, but does take on one very powerful aspect of the intellectual problem: the evolution of the idea of personification of entities in nineteenth and twentieth century Germany, England, and the United States. Personification is, simply put, conceptualizing an organized body of individuals as a person, a legal person, or a legal entity, so that it might be treated at law as if it were an individual rather than an amalgamation of individuals akin to the sovereign state.³ This paper, then, is a kind of intellectual history. Harris tells three stories whose content is delimited by geography, argues that the stories are interwoven, and seeks to spell out the connections among them. The stories are intellectual history in the sense that he is concerned centrally with the ideas themselves, rather than their impact on the social, political, or economic milieu in which they operated. He does not attempt to assess, for example, whether personification increased the efficiency of an economic organization, the transparency or responsiveness of a civic body, or the power of any association. His method is not unlike an older school of literary criticism that sought to discover how one author or school influenced or begot another. Moreover, given that so few authors are involved in thinking about personification, the stories, especially to the extent that they are interwoven, take on a prosopographical quality. What Harris does, and does magnificently, is trace the timing of intellectual events. Having worked in the American sources for many years, I have wondered which theorist outside of the United States made which point and who might have been aware of such authorship. Harris provides such nuggets, suggesting in many cases the reasons why an insight was well-received by other theorists. Even if one puts aside for the moment the intractable difficulties of causation, such juxtapositions have a compelling quality.

2. That the intellectual problem becomes a real problem as institutions assert power is obvious, but the mere assertion of power is different from the assertion—as the logic of authority suggests—of complete authority. The former is a problem of politics, the latter a problem of intellect and the legitimacy of the intermediary association.

3. The state, too, may be personified, but that aspect of personification presents somewhat different difficulties, especially anthropomorphic, than the personification of intermediate associations.

What level of idea is it that he traces through the alleys of western thought? If culture is a meta-idea, similar to authority or sovereignty, then personification is a mid-level idea. It derives meaning from larger concepts, but it has its own consequences. It assists us, and assisted generations past, in thinking productively and imaginatively about intermediary associations; it can also seduce us into unconscious anthropomorphism. Harris seeks to unpack just how we have been assisted (or not) by asking about the consequences in a very concise and particular manner. Do concepts of the organization of human activity make a difference? Specifically, do they help legitimate such organized activity? Most particularly, for whom do such concepts assist in legitimation and why? Do such concepts assist in understanding the differentiation among cultures in the nature of such organized activity? Do they make a difference in the nature of the organized activity? Does a theory of personification explain or express a culture's unique qualities in its organized activity?

Harris's answer is that personification does make a difference, but perhaps not in all those ways. One way to conceive of these influences and differences is by way of analogy. Think of intellectual *terroir*. *Terroir* is a French oenological term. To the believers, it is a fundamental tenet of fine wine making that great wine is an expression of the unique qualities of soil and culture in a given area right down to, for example, the micro-plots that characterize legendary Burgundian vineyards. To skeptics, it is at best a notion or a cultural affectation that enervates creativity, calcifying both thought and practice. There is, of course, much to the notion that soil and location affect what a wine tastes like. The cabernets of Bordeaux are of variegated appearance and taste and yet are still different from the cabernets of Napa Valley. And so on. The wines appear and taste different unless knowledgeable and talented vintners deliberately try to mimic each other's style, or try to cater to a particular perception of market desire. They then become terrifically difficult to identify by location. What then to make of *terroir*? So with ideas. So with personification.

Harris begins with Germany. From German thinkers came, at least in its modern form, the concept of personification.⁴ It was but one example of thought that grew from the intellectual battles going on in nineteenth century law and philosophy. One interesting question is why the flow of ideas appears to have been unidirectional. Harris notes, but bypasses, this question. As he writes:

4. See Ron Harris, *The Transplantation of the Legal Discourse on Corporate Personality Theories: From German Codification to British Political Pluralism and American Big Business*, 63 WASH. & LEE L. REV. 1421, 1427–1430 (2006) (providing a thorough and complete discussion of corporate personification and its roots in German thought).

While every intellectual relationship is likely to be reciprocal, my interest is in the flows of influences from Germany to Britain and the United States. This was the main direction of flow of ideas in this specific discourse because the discourse originated in Germany, which was at that time at the zenith of its legal-intellectual prestige. A study of the import of Anglo-American influences to Germany is beyond the scope of the present project.⁵

Although Harris eschews an explicit answer,⁶ the intellectual question remains. Why were the British and American scholars the ones attuned to German developments, and not the other way around? Or why was the interest not mutual? Nonetheless, and notwithstanding his disavowal that he might explore the reciprocal nature of jurisprudential discourse, he says little about why British and American legal culture do not penetrate German discourse.⁷ The speculation whets our appetites. Allow me to speculate. England and the United States absorbed German ideas. Germany—more precisely, German academics and jurists—sought no insight from Anglo-American legal culture, or at least we are told of no such intellectual expeditions. Even at the humorously vulgar level, there were no actual expeditions. Why is it, for example, that we learn of English academics and jurists making the grand tour of the United States, but few if any similar journeys by German academics and jurists? It is misleading to conceive of the academic influence as anything but uni-directional, at least on the evidence we have.

An explanation might lie in the culture of the various academic and juridical communities, especially an explanation that posits a kind of fellowship (*genossenschaft*) to explain German intellectual insularity. If, however, German juridical ideas were well-received, they were selectively well-received. Personification may have traveled well; *genossenschaft* did not. The idea of personification also grew differently in different juridical cultures—different *terroirs*—as Harris is at pains to explain. In Germany personification was explanatory of political culture.⁸ What would be interesting, however, would not be simply to explore the different ways the personified entity manifested itself most powerfully in these different cultures, but also to compare the vehicles across cultures. In the United States, for example, the personified

5. *Id.* at 1425 (citing Mark H. Hager, *Bodies Politics: The Progressive History of Organizational "Real Entity" Theory*, 50 U. PITT. L. REV. 575, 580 (1989)).

6. In delivering this paper Harris suggested that the discourse "bridged" the legal cultures. He has pulled back from that metaphor, perhaps in response to the discussion that the bridge metaphor suggested too much.

7. See Harris, *supra* note 4, at 1437 (discussing how Gierke saw the Anglo-American culture not as a threat, but as a source of inspiration).

8. See *id.* at 1437–40 (explaining the German roots of personification).

business corporation leads as the example of the personified entity, whereas in Germany its main utility came in political theory. Why were business entities not similarly personified in Germany, which, after all, arguably began its Industrial Revolution before or at least contemporaneously with the United States? Or were they? Were German business corporations relatively—by comparison with American corporations—autonomous? Were they genuinely private? Does the German manifestation of personification in political theory suggest that business corporations were not conceived of as a threat to the state, that is, the personified state? In this most theoretically conscious of juridical communities, why not? (All the more so because, as business historians remind us, German businesses remained family owned or controlled into the twentieth and, in many instances, the twenty-first centuries. Familial interests have been, of course, at the core of political intrigue forever.)

In England, by contrast, personification had immediate traction.⁹ Consciously deployed not by the historian and incidental translator (Maitland) of the greatest German theorist (Gierke), but by his "disciples,"¹⁰ personification was a strategy designed to create some room between the state and the individual for collective behavior, especially collective behavior by laborers in the face of the collective behavior of capitalists. These disciples hoped that personification could protect organized labor, especially in confrontations with organized capital, without resort to the ultimate authority of the state.¹¹ In England, then, the key question is personification's legitimating function for association when trying to understand the view of sovereignty prevalent (and pervasive) in English political thought. Little imagination would have been required—none really, a backwards glance across the Channel was all that was necessary—for a concerned member of the English elite to be alarmed at the prospect of legitimated organized labor. Here was an entity that might actually—though such thoughts were usually spoken softly, and only occasionally coming out as political calls to arms—threaten the aims of the sovereign. Thus, I believe Harris is exactly right in his understanding of the back and forth rhetoric of personification in *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*.¹² Claims for the importance of juridical rhetoric, however, need more than one example, albeit a powerful one,

9. See *id.* at 1440–42 (explaining personification in the English context).

10. See *id.* at 1441 ("[I]n the context of political theory we should focus our attention on Maitland's disciples and not on him.").

11. See *id.* at 1446 (discussing how the disciples hoped to build on the cultural occurrences).

12. *Taff Vale Ry. Co. v. Amalgamated Soc'y of Ry. Servants*, [1901] 1 A.C. 426; see Harris, *supra* note 4 at 1446–50 (providing an extensive discussion of *Taff Vale Railway*).

before we should take as a given that the rhetoric has grounded a way of thinking. Before accepting Harris's full claim, then, English juridical discourse would need to have moved beyond Maitland, beyond his disciples, and influenced discourse more generally. While interesting, Harris's chief example of how the personification rhetoric entered the English juridical mainstream comes in a curious way. He cites Louis Brandeis, who discusses *Taff Vale* in the context of American law in a debate with Samuel Gompers on the law and legal concept of trade unions in the United States.¹³ I have my doubts that a reference to a single case by an American jurist establishes that English jurisprudence took personification as the theoretical basis for the legitimacy of associations or of "real entity" theory.¹⁴ Ubiquity, not prominence, establishes influence. One might as easily read the importance of *Taff Vale* somewhat differently. It could just as easily be said to be a prominent case with a powerful political content in search of a rationale. The legacy of the case, not its prominence, should be the basis on which the importance of personification rests.¹⁵

The westward movement of theory took personification across the Atlantic to the United States where it flourished. Given some of the criticism that has been leveled at my own work on personification of the business corporation in the United States, I really ought to be a great cheerleader for Harris's work. That criticism, however, leaves me with some questions about my own claims for the influence and importance of personification, even simply among lawyers, forgetting for a moment whether it made a difference in the actual growth and treatment of business. Let me make a few simple points that, while not addressing the issues of movement of ideas that are at the core of Harris's work, do get at the larger question of whether the ideas had consequences.

13. See Harris, *supra* note 4, at 1451–52 (presenting the famous debate between Louis Brandeis and Samuel Gompers over the corporate status of trade unions).

14. See *id.* at 1447 (stating that "[t]his is a clear adoption of real entity theory").

15. The question of influence beyond a single case becomes all the more acute in the English context given Harris's rather broad assertion of the anti-theoretical bent of the English bar. In discussing a different understanding of personification, the grant theory, or "artificial entity" theory, Harris suggests that it survived the free incorporation of business entities for no better reason than "because most English lawyers did not care much about legal theories and believed that whatever new problems arose in the world of free incorporation could be dealt with successfully using conventional doctrinal legal tools." *Id.* at 1464. Why theory should be useful—that is, legitimating—in one context and not useful in the other seems to require a more detailed explanation than simply asserting the prominence of juridical pragmatism in one era and then suggesting its efflorescence in the one that followed, when the only thing that changed was the appearance of Maitland—who did not use personification, at least according to Harris, instrumentally—and his disciples.

First, and unique to the United States, is federalism. No other country of industrial or commercial importance in the nineteenth and early twentieth centuries had a federal structure, or at least, none with anything close to the robust structure of the United States. Notwithstanding the Civil War and the triumph of the national government over the breakaway states, American federalism helped to legitimate intermediary institutions in this country, even in its political discourse and culture, in ways unknown elsewhere, even in Germany. What the experience of that war suggested was that even an intermediate institution of great strength and actual political power, one which in fact commanded the loyalty of individuals—an American state—did not ultimately undermine the legitimacy of centralized authority, the national state. If, even in triumph, the national state allowed the continued existence of the American states, then the existence of private entities could hardly be seen as presenting a challenge to the national state of nearly the same magnitude. The question of the challenge to sovereignty posed by private entities simply got bypassed.

Second, on a historiographical and not a grand level, Naomi Lamoreaux, an economic historian at UCLA, in an as yet unpublished work, has suggested that the debates about the meaning of personification of the corporation do not match up well with the actual rise of big business, at least insofar as big business is equated with dispersed shareholding. (That meaning is key because the personified corporation that is real, or natural, like the unions of laborers in England championed by Maitland's followers, depends on seeing human organization as a product not of forces of the state—the grant theory—but as a product of the collective desire of a group to take action that as individuals would be impossible.) Thus, whatever the effect on each other, the intellectuals—the jurists and the academics who participated in the debates—appear to have had little influence on the work-a-day world.

While the timing may be off, influence may be manifest in other ways. For example, one theory may have greater explanatory power than another, illuminating the problems of organized entities in a manner that leads to more cogent understandings and, therefore, development. With organized entities, autonomy was only one aspect of the implications of different theoretical constructs. Another was governance. Ernst Freund's work is about nothing but the nature of hierarchy and order within the corporation, anticipating the classic Berle and Means discussion of the separation of ownership and control by several decades. It is a powerful extension of the real or natural entity school and involves an author who was educated in Germany and made his intellectual

home in the United States.¹⁶ Moreover, the implications of the work are not limited to the business corporation, so it ought to fit better into Harris's capacious understanding of personified entities.

This is a paper much to be admired for its ambition. Its learning is prodigious and very suggestive. Nonetheless, the very large questions it seeks to address, both directly and by implication, require a bit more. What do we learn from the literary notion of influence? We learn who communicated with whom, and sometimes we learn why. We learn, by way of debates, what the intellectual players thought was important. But a compelling distinction exists between literary analysis of influence and its application outside literature. In literature the story is the end in itself, an ultimate aesthetic expression. This is not so, or at least rarely so, in law or philosophy. Law, especially, is an institution that expresses power. Harris recognizes this distinction between his method of inquiry and the nature of influence. But to do real justice to the topic, beyond the excellent and provocative, but ultimately speculative, beginnings embodied in this work, he needs to examine the institutions the theory(ies) of personification hope to explain or illuminate. For example, if, as Harris suggests, personification had a greater role in Germany than in England or the United States in explaining or illuminating the culture of the state, we ought to have some suggestions about why that might be. If, as I earlier suggested, the theory had implications for explaining the autonomy of the business corporation in the United States, then we ought to have some kind of explanation about the role it played in Germany (really, the German states), since the growth of industrial and commercial enterprises occurred at roughly the same time in both areas. Again, Harris understands the issue—he attempts exactly such a comparative approach in dealing with the status of labor unions in England and the United States.¹⁷ In this paper he has identified several institutions in individual countries—the state, labor unions, and corporations—for which personification has served to enhance legal legitimacy. That list could, and should, be added to, and then it should be studied comparatively.

16. Harris recognizes, in one section of his paper, Freund's contribution, but dismisses him as a "relatively marginal figure, practically a new immigrant, holding a position outside a law school and in a minor university." *Id.* at 1435. This assessment strikes me as curious in several ways. Granting a pretty wide range to the meaning of "marginal," Freund nonetheless held degrees from prestigious institutions, was able to secure an American appointment, and while the University of Chicago might well have been a fledgling place, since inception it has been an important American university and recognized as such. Moreover, it was precisely the law school's willingness to allow him to teach that precipitated the rancorous split between its faculty and that of Harvard Law School, who had lent a faculty member to be dean.

17. *See id.* at 1446–56 (providing a comparative approach in discussing labor unions in England and the United States).

The church, of course, heads the list, along with educational institutions, for which autonomy and self-governance have been issues which antedated the liberal state. Charitable institutions, political parties, clubs, and even sports teams are other examples.

Harris has tapped a rich vein. His approach is one that has several virtues, the least of which is tracing the story of influence. That story has rich meaning for the sociology of knowledge, something he hints at but is too modest to claim. This story of influence suggests not just that ideas might have consequences, but that their development is a much more layered and richly textured process than has heretofore been assumed by many, really most, scholars who have examined the development of legal thought and institutions within a single political culture. Personification has such a history and we should be profoundly grateful to Ron Harris for having taken an important step to explain just how a concept such as institutional personification can have trans-cultural meaning that might be embodied in explanations of disparate entities. It would be churlish to complain that the work is incomplete. Better to applaud the scholar whose imagination first ventures down the line of inquiry with such promise.

