

2022

The Corporate Monster Metaphor

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Recommended Citation

Crofts, Penny, The Corporate Monster Metaphor, *Law Text Culture*, 26, , 73-96.

Available at: <https://ro.uow.edu.au/ltc/vol26/iss1/5>

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The Corporate Monster Metaphor

Abstract

The metaphor of corporations as monsters is a feature of academic and judicial writings. Like monsters, corporations are creatures of fiction that problematize and challenge order. Corporations do not fit neatly into common law criminal legal doctrine, which was conceived and structured around the classic legal subject, that is, the individual human being. Corporations are amoral immortals, which 'have no conscience and feel no pain'. They have superhuman strength, growing exponentially in size and wealth in accordance with the dictates of capitalism, and are capable of doing great harms and evil. Like monsters, corporations are contaminated and contaminating; in the process of becoming legal subjects corporations have become dehumanised and dehumanising. Despite the dominance of the corporate monster metaphor, there is slippage around the conception of which type of monster best represents corporations, and this slippage has implications for how the law regards and regulates (or not) corporations. This article takes the metaphor of the corporation as monster seriously. Descriptively, this analysis asks us to think more specifically about the different metaphorical implications of different kinds of monsters. Normatively, the argument considers the implications of these distinctive framings for criminal legal understandings of the corporation. Calling corporations monsters places us within the horror genre. We therefore need to read and understand these metaphors within that genre. A central insight of the horror genre is that monsters justify and require extreme responses. Rather than stopping at the argument that corporations have no body to kick, we need to find more imaginative and specific responses to corporate crime.

The Corporate Monster Metaphor

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1 Introduction

There has been a great deal of judicial and academic reliance upon, and analysis of, the metaphor of the corporation as a person (Iwai, 1999; Pollman, 2011; Wright, 2015). The personification metaphor has been a dominant way of conceptualising and anchoring the disembodied corporation in order to ascribe to it legal rights and responsibilities.² The recognition of corporations as organisational entities with rights and responsibilities by endowing them with ‘legal personality’ is not controversial (Orts, 2013: 2). After all, the granting of legal personality is a constitutive role of law (Deakin et al., 2017). Difficulties arise rather because criminal legal doctrine has been constructed around the ‘ideal legal actor’ (Naffine, 2009: 67), the responsible human being.³ To state the obvious, there are, however, vast differences between corporations and people. Corporations do not fit neatly into pre-existing criminal legal categories that were constructed around the classic legal subject. There are difficulties in establishing fundamental elements of criminal offences – the *mens rea*, *actus reus* and temporal coincidence. This results in awkward efforts to either anthropomorphize corporations to slot into pre-existing legal doctrine (such as the directing mind doctrine discussed below), or to undermine it, the better to reflect the reality of corporate existence (such as the reversal of the burden of proof and/or assumptions of fault (Braithwaite, 2001; Crofts, 2020a)).

This in turn raises disturbing questions about what precisely is required to establish the blameworthiness of a legal subject. Corporations transgress cherished criminal legal categories constructed around the paradigmatic legal subject, that is, they disrupt, collapse or threaten the taxonomic logics and distinctions of criminal law.

These transgressions have contributed to an accompanying metaphor of the corporation as monster.⁴ A key attribute of monsters is that they transgress cherished categories and boundaries – for example, vampires and zombies are both/neither living and/or dead. The monster ‘undoes our understanding of the way things are and violates our sense of how they should be’ (Weinstock, 2013: 2). Foucault offers a quasi-judicial framing of monsters (Shildrick, 2005), asserting that the production of monsters should be understood as a breach of nature and law; they ‘combine the impossible and the forbidden’ (2003:64–65). The hybrid is monstrous ‘only because it is also a legal labyrinth, both transgression and undecidability at the level of the law... the monster is a juridical-natural complex’ (Foucault, 2003: 65). On this account, the irregularity of monsters calls law into question, challenging its limits and legitimacy, resulting in anxiety.

Criminal legal narratives produce corporations as monsters—artificial, strange and foreign, both/neither the same as and/or different from the classic legal subject. In addition, corporations have other characteristics of monsters. Corporations are ‘not natural living persons, but artificial beings, *corpora ficta*’ (Wormser, 1931: v-vi). They have superhuman strength, growing exponentially in size and wealth. They are capable of doing evil (*Louis K Liggett Co et al v Lee, Comptroller et al*: 567). They can live forever. As a consequence, monstrous metaphors of corporations abound in legal and academic writing, comparing corporations with Frankenstein’s monster (Bakan, 2004; Chen and Hanson, 2004; Gabaldon, 1992; Peters, 2017; Thoennes, 2004; Wormser, 1931), Godzilla (Duruigbo, 2004: 33), aliens (Crofts, 2022; French, 1995), hydra (Barkan, 2013: 54–55), and ‘wormes in the entrayles’ of the body politic (Hobbes, 1651: 230).

This article takes the metaphor of the corporation as monster

seriously. Metaphors have traditionally been viewed and defined as decorative, figurative use of language in which one thing is described in terms of another. However, this is an inadequate account of the broader and more significant role of metaphor. In *Metaphors we live by*, Lakoff and Johnson (1980) argue that metaphors shape not just our communications but also how we relate to the world, what we perceive, and how we get around. Yet we may be unaware of the role they play in defining our everyday realities (Lakoff and Johnson, 1980: 30). Lakoff and Johnson use the example of the metaphoric conception of ‘argument is war’. They argue that this structures what we do and how we understand what we are doing when we argue – for example, we defend a position, win or lose, shoot someone down, or destroy an opponent. Lakoff and Johnson suggest that we imagine an alternative metaphor, such as, ‘argument is dancing’, with the idea that a different metaphor might work differently. Many legal theorists have drawn upon these ideas to identify metaphor in law and think through their implications.⁵ Pierre Schlag argues in favour of a closer analysis of metaphorical legal structures because the ‘aesthetic structures or our own legal thinking are far less coherent, far less stable, and far less advanced than we legal thinkers typically represent them to be’ (Schlag, 1990: 810).

I draw upon these insights about the power and inconsistencies of metaphors to analyse the corporation as monster. I unpick the metaphor and its underlying assumptions in order to elaborate the legal conceptualisation of the corporation in detail. The metaphor highlights some aspects of the legal conceptualisation of corporations whilst hiding others (Lakoff and Johnson, 1980: 61). Descriptively, this analysis asks us to think more specifically about the different metaphorical implications of different kinds of monsters. Normatively, the argument considers the implications of these distinctive framings for criminal legal understandings of the corporation. This approach is inspired by Lakoff and Johnson’s proposal of the alternative metaphor of ‘argument is dancing’. This metaphor is ostensibly enchanting but on closer examination it raises new questions. There are many different ways of dancing which have implications for how the metaphor works.

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Ballroom dancing, for example, assumes a male leader and a female follower, entrenching heteronormative and sexist paradigms. Tango implies a more sensual and a less formal mode of discourse.

The monster metaphor tends to be drawn upon as a form of critique of corporations and/or corporate law. But this article argues that we can take the corporate monster metaphor seriously. Calling corporations monsters places us within the horror genre. We therefore need to read and understand these metaphors within that genre. A central insight of the horror genre is that monsters justify and require extreme responses. Rather than stopping at the argument that corporations have no body to kick, we need to find more imaginative and specific responses to corporate crime. Additionally, part of the threat and promise of monsters is that in challenging fundamental categories they enable and require change. It may be possible to rewrite the corporation so that it is not so monstrous in its pursuits, or to rewrite legal categories so that corporations are no longer categorized and conceptualized as transgressive monsters.

In the following section, I consider specific corporate monster metaphors and analyse their implications in terms of criminal law and corporate responsibility. I detail the prevalent trope of each monster metaphor but draw upon the horror genre to articulate aspects of the monster metaphor that are inconsistent with or challenge legal assumptions. I conclude by considering the insights and implications of the horror genre for legal conceptualisations and responses to corporate culpability.

2 Which Corporate Monster?

Despite the prevalence of the corporate monster metaphor, different monsters have very different implications in terms of how the law constructs the legal subject and the legal responses available to it. Each metaphor operates in a subtly different way, enabling and obscuring our understanding.

A Frankenstein's Creature/Monster

The most common contemporary conceptualisation of the corporation as a specific monster is that of Frankenstein's creature (Bakan, 2004; Chen and Hanson, 2004; Gabaldon, 1992; Peters, 2017; Thoennes, 2004; Wormser, 1931).⁶ The metaphor is based on the novel by Mary Shelley (and countless film and play adaptations), in which a creature is created by Victor Frankenstein who then turns on its creator.⁷ The story of Frankenstein's creature is one of human invention and ingenuity, but also a cautionary tale (Dorf, 2012).

The Frankenstein monster metaphor is commonly applied explicitly or implicitly in legal analysis of corporations.⁸ Like Frankenstein's monster, corporations are uncannily made up of an amalgam of individuals. The idea is reinforced in the etymology of corporation as 'a body of persons' (Hoad, 2003). The conceptualisation of the corporation as an amalgam of bodies predated *Frankenstein*:

That a corporation is an artificial body composed of divers constituent members ad in star corporis humani [within or near the likeness or image of a human body] and that the ligaments of this body politick or artificial body are the franchises and liberties thereof, which bind and unite all its members together, and the whole frame and essence of the corporation therein (*Sir James Smith's Case*, 730).

Frankenstein's creature is particularly appropriate for the dominant approach for ascribing corporate liability in the United Kingdom and Australia, that of identification theory, which holds a company liable only when a director or senior officer has acted with the requisite fault, expounded in *Tesco v Natrass* and finessed by *Meridian Global Funds*.⁹ The 'state of mind' of the directing mind of those invested by proper authority with managerial powers and responsibility are treated by law as that of the organisation. This principle permits criminal liability to be imposed on a corporation for an offence that requires *mens rea*. Identification theory requires that any successful prosecution of a corporation needs to demonstrate that the controlling mind or brain of the corporation (usually the board of directors) was aware of the criminality of its actions and possessed the necessary *mens rea*. A

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major difficulty of the directing mind doctrine is ‘determining who the directing mind is and whether she controls what the organisation does’ (Campbell, 2018: 58). In the case of Frankenstein’s monster it is straightforward – although made up of (parts of) multiple people the creature is controlled by a single brain. The metaphor seeks to grapple with group agency and the granting of rights to an artificial body, but the metaphor is overly simplistic because Frankenstein’s monster is an amalgam of body parts, rather than individuals, so unlike corporations, there is only one brain, and problems of who intended what do not arise.

The Frankenstein’s monster metaphor works almost too well in confirming identification theory. It does not, however, reflect the proliferation of corporations, nor their increasing complexity and size. Although Frankenstein’s monster is freakishly large, an essential plot line is that he is on his own. Frankenstein’s monster metaphor veils the difficulties and shortcomings of identification theory by confirming and reflecting the model of the individual legal subject – one mind controlling one body. Judicial use of the metaphor does not extend this far but given the proliferation of corporations it is as though Victor made another creature, they bred, and the world is now populated with Frankensteinian corporate monsters. Even this extension of the metaphor does not capture the difficulties of identifying a single mind controlling complex and separate bodies and actions.

B Zombies

Zombies have some similarities with Frankenstein’s monster (they are both back from the dead), but they have very different historical precedents (Christie and Lauro, 2011; Crofts and Vogl, 2019). In the horror genre, zombies are frequently depicted as a critique of capitalism and rampant consumption (Wood, 1980). In recent years, however, and particularly following the GFC, as Chris Reitz elaborates elsewhere in this volume, the ‘zombie corporation’ expresses the idea that businesses are operating while effectively dead but are buttressed by governmental supports and bailouts. This metaphor draws upon and emphasises the

attribute of zombies as the living dead (Datta, 2018; Harman, 2010).¹⁰ The metaphor has been extended to zombie capitalism: ‘legions of ‘living-dead’ firms and households [are] so indebted they are unlikely to ever become solvent’ (Datta, 2018: 87). Indebted socioeconomic entities which would normally be left to die (insolvent, liquidated) are given a second undead life (Datta, 2018: 89).

Frankenstein’s monster primarily kills or maims. In contrast, zombies (and the other monsters considered below) contaminate and are contaminated (Douglas, 2002). They pollute those that they come in contact with. If a person is bitten by a zombie they become a zombie.¹¹ In terms of the zombie corporation metaphor, those who are unfortunate enough to trade with an insolvent corporation will suffer loss and may themselves be tainted. The concept of zombie corporations is based on an implicit assumption that these living-dead corporations are exceptional and that state intervention is due to emergency or necessity. This confirms the misleading belief in a ‘free market’ and fails to illuminate the extent to which corporations require and are provided with state support across time and place (Farnsworth, 2013; Tombs and Whyte, 2014).

The metaphor of the zombie corporation deploys only one aspect of zombies – the living-dead. However, a further attribute of zombies lies in their monomania. Zombies, like for-profit corporations, are created and constructed to want only one thing (brains or profit) (Friedman, 1970). Zombies thus provide an over-the-top apocalyptic depiction of the worst harms of corporations, obsessively profit-seeking with no concern for the harms that they are inflicting in the pursuit of their goal. Zombies have a common goal to eat brains, however; unlike the employees and management of a corporation, they do not work as a collective.¹² Zombies remain as separate individuals and are not under the command of one mind as required by identification theory. This is an extreme example of the theory of corporate nominalism. That is, that corporations do not have a separate identity over and above the individuals that comprise it (Iwai, 1999).

C Vampires

In contrast, vampires are frequently depicted as working as a collective, albeit a fractured, bickering collective. Like Frankenstein's creature, vampires are creatures of the industrial revolution. Much of our modern understanding of vampires draws from Bram Stoker (1897), but Stoker was not the first author to write about them (e.g. Goethe, 1797; Polidori, 1819). Thirty years earlier, Marx had already recast capitalism as a form of economic vampirism. In *Das Kapital* (1867/2008: 149) he described capital as 'dead labour, that, vampire-like, only lives by sucking living labour, and lives the more, the more labour it sucks.' This vampire metaphor was more than just a rhetorical device but was fundamental to Marx's conception of capitalism as founded on dead labour (Neocleous, 2003). Corporations are still described as bloodsuckers—rapacious, insatiable, and corrupt (Sutherland, 2006: 150). The vampire metaphor expresses the idea of corporations that are so avid in their pursuit of profit that they do not care what harm they inflict – this is commonly expressed as putting money before people.¹³ But the metaphor of the corporate vampire implies that such an approach is exceptional and monstrous. This is incorrect – wealth maximisation is the default norm in public-traded companies (Page and Katz, 2010).

An underlying resonance of the corporate vampire metaphor is that corporations, like vampires, have 'no soul to damn' (Coffee Jr, 1980). They 'have no conscience and feel no pain' (Thoennes, 2004: 204). Vampire stories like *True Blood* and *Twilight* emphasise the 'otherness' of vampires, with distinct cultures and norms. Like vampires, corporations are made up of humans, but in the process of incorporation they have lost their human values (Goforth, 2010). Indeed, legal principles uphold and require the dehumanisation of those involved with corporations. For example, the principle of limited liability for shareholders means that investors can only lose the capital that they choose to invest. If the company incurs losses greater than the value of the sum invested, its shareholders bear no further responsibility for this loss. Accordingly, there is no legal requirement for investors to care about harms caused by

the corporation in its quest for profit (Bakan, 2004). Similar arguments have been made about the contaminating dehumanising effects of the corporate form on employees (Gobert and Punch, 2003: 17-18). We act differently at/for work than we do at home. We might step up and intervene as a private individual, but at work we have clearly delineated roles within a specific organisational culture.

Vampires must drink blood, and though perverse, this is a comprehensible motive. They are frequently portrayed as distracted, flawed, and bickering.¹⁴ Unlike zombies, they blend into and reflect the cultures, values, and desires of the world they inhabit. Accordingly, vampires tend to retain a common goal – blood – but they can work against each other. The metaphor may thus reflect the ways in which departments in large corporations may act against each other whilst simultaneously aiming to achieve a common goal.

The vampire metaphor reflects the longevity of corporations. Both vampires and corporations are arguably amoral immortals (McCutcheon, 2011: 731). The metaphor highlights the ongoing existence of corporations. Despite corporations cycling through employees and management across time, the identity of the corporation remains the same. Thus, claims by employees and members of a Board that not only did they not personally cause past wrongs, they did not know about them, should not be an argument against corporate responsibility.¹⁵ But what of the situation where the corporation or vampire has a change of heart? For example, the character Angel in *Buffy the Vampire Slayer* regained his soul and as a consequence wished to atone for past wrongs. The immortality of vampires and corporations raises questions about responsibility for past harms, particularly where the corporation has tried to ensure such harms do not recur and to provide compensation for past wrongs (Fisse and Braithwaite, 1993).

Despite their potential immortality, vampires are actually surprisingly vulnerable – they must sleep in their coffins, sunshine can destroy them. They are afraid of silver crosses and garlic. Likewise, although we tend to think of corporations as robust, corporations are surprisingly vulnerable. They appear to require continuing high levels

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of government (and community) support to ‘survive’, to the extent that Farnsworth has argued that there should be a concept of ‘corporate welfare’ (Farnsworth, 2013). As the living dead, both zombies and vampires cannot be killed. They can only be resolved with extraordinary measures specific to each monster. Unlike zombies, according to (some portrayals of) vampire lore if the head vampire is resolved (with a stake through the heart) – all other vampires are resolved.¹⁶ This reflects an assumption of the common law principle of the directing mind, that identifying and punishing or removing the culpable directing mind will result in complete change throughout the corporation.

The vampire metaphor also highlights the dangerous attraction of corporations. Unlike Frankenstein’s creature and zombies,¹⁷ vampires are depicted as seductive and glamorous. This reflects Tombs and Whyte’s (2014) use of the concept of the synoptic, that is, viewer society. The synopticon disciplines us into a particular way of thinking about power when *we* watch the powerful (Tombs and Whyte, 2014: 2–3). Despite awareness of widescale harms inflicted by corporations, the corporation and its brands are ever-present and the focus of our attention and desires. Seduced by the capitalist’s spell we suffer a “loss of self” and emerge as little more than a walking corpse (Morrisette, 2019). The seductive spell of the vampire produces zombies in us.

D Alien invaders

The idea of corporations as aliens was explored by the corporate ethicist Peter French (1995) to make his argument that corporations be regarded as moral entities of a different kind. Like the fictional aliens in *War of the Worlds*, he argued, corporations have taken over the world, stating ‘[t]he world has been radically changed but the requisite morality to deal with those changes has not been worked out’ (1995: 3). These insights can be made in relation to the failure of legal doctrine to adapt to the corporate invaders (Crofts, 2021).

The original film in the Alien franchise (of the same name) had only one alien. The sequel, *Aliens* (1986) directed by James Cameron, has multiple aliens of the same species, which provides a means to tease

out our ways of thinking about corporate criminal responsibility. In *Aliens*, it is difficult to ascertain the directing mind of the aliens. There are many different aliens at different levels of development and none of them are represented as communicating in a way that is comprehensible to the characters or the audience. The audience (and Ripley) assume that the directing mind is the Queen – she is the biggest, appears capable of making a deal with Ripley (e.g. I won't kill your offspring if you don't kill mine) and much of the activity of the other aliens is directed towards protecting her. But it is never made clear if she is in charge of all operations, or solely in terms of reproduction. It is apparent however that all the aliens are working together towards a common goal.

The corporations as aliens metaphor suggests an alternative to the nominalist approach which regards corporations as nothing more than collectives of individuals. In contrast, the so-called 'realist' approach attempts to grapple with the corporation as a legal agent in and of itself. According to this perspective, corporations can act and be at fault in ways that are different from that of its constituent members (Campbell, 2018; Colvin and Argent, 2016; Field and Jorg, 1991; Woolf, 1997). This perspective asserts that corporations are more than just the sum of their parts (Dan-Cohen, 2016; Kim, 2000). It is informed by studies that suggest that organisations, like other collective bodies, often develop an identity independent of and transcending the specific individuals who control or work within them.¹⁸

A key argument against realist approaches in criminal law is that it is farcical to suggest that a corporation can have any intention which is separate from the human beings that make up the corporation. This argument is consistent with a key (assumed) characteristic of monsters, that is, that monsters are beyond human comprehension. It is this very inability to explain monsters that leads to the concept of monstrous wickedness (Cole, 2006; Crofts, 2012). But even in *Aliens*, motivation and action comes across as knowable and comprehensible. It feels inappropriate to apply realist corporate criminal law concepts to the aliens because they are so strange and foreign. However, although, alien communications are never portrayed in the film and we can assume

that we would not be able to understand them anyway, it is clear that they are working together toward the specific goals of the survival and reproduction of the species. Unlike *Alien*, which featured only one alien, *Aliens* portrays innumerable species at various stages of life development, sizes and function. Nevertheless, they are understood throughout the film as capable of common intentions, joint actions and shared goals. If we apply this insight to corporations, it suggests that rather than complicated methods of attributing criminal responsibility such as by identifying the ‘directing mind’ and figuring out its *mens rea*, we might be better placed to look at how the corporate state of mind is manifested in its systems, policies and patterns of behaviour (Bant 2021).

3 Responding to horror

By taking the metaphor of corporate monsters seriously, this article has demonstrated that the metaphor can yield insights and critique into legal conceptualisations of the corporation. A feature shared by all the monsters explored in this article is that they cause, each in their own way, widespread and systemic harm. A further common feature is that these harms are consistent and comprehensible. Although one theory of monsters suggests that they represent pure malevolence, wishing only to harm,¹⁹ this article has highlighted a third feature of monsters, that is, that they inflict this harm for instrumental reasons. Suffering is not the goal of the act, just a necessary means towards achieving something else (Cole, 2006: 16–17). The same arguments can be made for most corporations – the harms they inflict are not malicious but collateral damage to the purpose for which they are created – the maximisation of profit (Stephens, 2002). Legal principles operate to enshrine this logic and indeed to protect investors and executives from its consequences. The effect of this legally enshrined irresponsibility has led Bakan (2004) to argue that corporations are externalizing machines. Accounting practices privilege certain costs and benefits and exclude others. Harms (like those to people and the environment) are externalised by the corporation and there is accordingly no requirement

to protect against them.

In their transgression of cherished categories and taxonomies monsters are contaminated and contaminating, arousing horror – a combination of fear and disgust (Carroll, 1987). However, despite public acknowledgment and interrogation of massive harms caused by corporations and cries of ‘never again’ – there is a failure to translate this horror into action. We are left instead with a dull apathetic dread. The damage corporations cause is well known and yet the criminal legal system fails to respond in any meaningful way (Garrett, 2020, 2014). This dread may be more consistent with Cavarero’s conception of horrorism as a state of paralysis, in which we become frozen with repugnance and fear (Cavarero, 2010). The absence of any persuasive coherent account of corporate responsibility is itself horrific and paralyzing. The problems are too big for us as individuals to solve. A central insight of the horror genre is that monsters justify and require extreme responses. It is not possible to just kill a vampire, it necessary to put a stake through its heart. These measures are specific to the monster type; for example, unlike vampires, zombies require their brains to be destroyed. If the legal system continues to construct and regard corporations as monstrous, incomprehensible and capable of systemic harms, then the legal system can and should import the insights of the horror genre and use extreme measures to resolve the corporation. Rather than stopping at the argument that corporations have no body to kick and ‘innocent’ shareholders may suffer if the corporation is fined, we need to find more imaginative and specific responses to corporate crime.²⁰

Yet the measures required to take effective action may appear so extreme as to be undesirable (Munger and Salsman, 2013). The idea of ‘too big to fail’ connects monsters and corporations. For example, in *Aliens*, Ripley suggests that they destroy an entire planet to make sure that the alien is destroyed. This failure of the horror genre to proffer any meaningful resolution of monsters may be because monsters themselves are a corrupted metaphor. Monsters are creatures of the imagination, they are particularly associated with the film industry,

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and 'good' monsters are frequently an essential component of highly profitable franchises that cannot be fully resolved because of the need for a sequel (Nowell, 2014). Monsters, like corporations, are an integral part of the capitalist environment. A quest to resolve corporate monsters may result in harms beyond those inflicted upon the monster.

An alternative approach is to emphasize that a further characteristic shared by monsters and corporations is that they are fictions – corporations, like monsters, are creatures of our own making. Monsters are created in the minds of writers and expressed in special effects and animation. Likewise, a central trope in law is that corporations are a legal fiction (Lind, 2015; Schane, 1987; Schauer, 2015). They only exist through a creative act of the state (Hallis, 1930). This trope is well rehearsed. As long ago as the seventeenth century Coke asserted that the corporation is 'invisible, immortal and rests only in intendment and consideration of the law' (Coke, 1612). Central to this emphasis upon fiction is that of imagination. Rather than turning away in disgust like Victor Frankenstein from the creature that we created, and possibly in the process creating a monster, we should take responsibility for our creation. Corporations, like monsters, can be rewritten and reconceptualised. Although horror films often portray a deterministic, teleological concept of monsters that are trapped within the logic of a specific motive and an unchanging pattern of behaviour, evolution is possible. For example, instead of a mindless quest for brains, the zombie company Fillmore-Graves in *iZombie* manufactures synthetic brains. Perhaps we can rewrite the genre of the corporation, expanding its purpose beyond that of profit.²¹ Monsters not only break rules but challenge them. Rather than seeking to destroy these threats, our response to transgression can be positive. We can rewrite our systems of meaning, develop new metaphors, and honour the abject. In films such as *Girl with all the Gifts*, *Shaun of the Dead*, and *Warm Bodies*, monsters are incorporated and included as part of new world order. It may yet be possible to reimagine criminal legal doctrine, engaging with corporations as legal subjects in their own right, rather than as monstrous deformations of stereotypical forms.

Endnotes

- 1 Doctor Penny Crofts is a Professor of the Faculty of Law, University Technology Sydney. The research for this article was funded by an Australian Research Council Grant: Rethinking Institutional Culpability: Criminal Law, Philosophy and Horror (DE180100577).
- 2 *Trustees of Dartmouth College v Woodward* 17 US 518 (1819). The court recognised the legitimacy of Dartmouth's corporate charter, granted by the British Crown before the US won its independence. The charter permitted the college to purchase property and enter into contracts without requiring natural persons to intervene. 'Corporate personification was indirect and merely served as an analogy to preserve property and contract interests.' (Wright, 2015: 893). *Santa Clara County v Southern Pacific Railroad Co* 118 US at 369 (1886) included a headnote documenting the Court's unanimous stipulation that corporations are persons within the purview of the Fourteenth Amendment.
- 3 I am using the term 'responsible human being' in recognition that the granting of legal personality is not automatic for human beings, but is, like the corporate personality, constituted by law (Gindis, 2016; Vining, 1978), and one of the key questions for criminal law is whether a person has the legally recognised capacity to be held responsible for their actions. For example, the presumption of *doli incapax* is that children lack the moral and intellectual development to have the capacity to be guilty of crime (Crofts, 2018). Theorists such as Grear (2015) have interrogated the paradigmatic legal subject, arguing persuasively that the corporation may well be the epitome of liberal legal personhood. Esposito (2012) has enunciated the genealogy of personhood itself which disembods the 'human' broadly as the presupposed subject.
- 4 For a lovely analysis of early modernist conceptions of corporations, see (Siraganian, 2020). Popular culture depictions of the corporation as monster include: Depiction of corporation as monster - R.R. Anderson, Corporate Personhood Must DIE!, CARTOON MOVEMENT (Jan. 4, 2011), <https://cartoonmovement.com/cartoon/corporate-personhood-must-die>; R.S. Janes, The Thing that Ate America, Our End of the Net (Feb. 25, 2010), <http://endofthenet.org/archives/5615>; Brian McFadden, The Strip: Mitt Romney Corporate Monster, N.Y. Times (Aug. 21, 2011), <https://cartoonmovement.com/cartoon/mitt-romney-corporations-are-people>. Newitz argues that monster stories are 'one of the dominant

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- allegorical narratives used to explore economic life in the United States' (Newitz, 2006, p. 5).
- 5 E.g. the clean hands metaphor in equitable jurisdiction is a way to express in concrete terms of daily human life the abstract legal reasoning about denial of relief to a plaintiff whose own conduct has been improper. PERSON IS PROPERTY metaphor in slavery (Williams, 1988). See also, (Bartlett, 1988; Foster 2006; Greenwood 2005; Hibbitts, 1994; Loughlan, 2006; Solove, 2000; Tushnet, 1982; Winter, 1988, 1987).
 - 6 Justice Louis Brandeis' 1933 Supreme Court judgment cited Wormer's account of corporations as Frankenstein's monsters. *Louis K Liggett Co et al v Less, Comptroller et al* 288 US 517 (1933) 548, 567.
 - 7 (Shelley, 1818). The comparison of corporations with Frankenstein's monster are apposite because Shelley was writing at the time of the industrial revolution and the increasing use of joint-stock companies for business enterprise. (Peters, 2017: 434).
 - 8 In oral arguments in *Citizen United v Federal Election Commission*, Justice Sotomayor remarked in Shelley-esque terms that the US Supreme Court 'gave birth to corporations as a person, and ... imbued a creature of State law with human characteristics'. *Citizens United v Federal Election Commission* 130 S Ct 876 (2010).
 - 9 These general principles have been adopted in Australia (see *Hamilton v Whitehead* 166 CLR 121, 127). The UK has largely reaffirmed the directing mind approach in *AG's Reference (No 2 of 1999)* [2000] EWCA Crn 90. In *Bolton's* case, Lord Justice Denning compared the company to a human body with a brain (the 'directing mind') and hands (the servants or agents): *H. L. Bolton (Engineering) Co. Ltd v T. J. Graham & Sons Ltd* [1957] 1 QB 159. The idea of finding the 'brain' of a corporation is based on the idea that the brain is the control centre of a person. *Tesco* was constrained in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500 which effectively extended the class of person who might be identified as the company by relaxing the strictness of the directing mind and will test.
 - 10 <https://www.smh.com.au/politics/federal/thousands-of-zombie-firms-set-to-march-into-september-reckoning-20200612-p5522b.html>. First applied in 1990s to Japanese firms that were propped up by banks: <https://www.theguardian.com/business/2002/nov/20/japan>.

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[internationalnews](https://www.ips-journal.eu/regions/global/article/show/zombie-capitalism-must-die-4008/#:~:text=Zombie%20capitalism%20regularly%20becomes%20rattled%20by%20financial%20crises,cataapult%20their%20digital%20platforms%20into%20profitable%20quasi%20). Also extended to zombie capitalism: <https://www.ips-journal.eu/regions/global/article/show/zombie-capitalism-must-die-4008/#:~:text=Zombie%20capitalism%20regularly%20becomes%20rattled%20by%20financial%20crises,cataapult%20their%20digital%20platforms%20into%20profitable%20quasi%20>.

- 11 Some films suggest that immediate amputation of an infected limb can stop infection, but this is not consistent.
- 12 The film *Land of the Dead* (2005) does present the idea of the evolution of zombies to enable collective action (Hughes, 2021).
- 13 It is also a source of lawyer jokes e.g. Question: What's the difference between a lawyer and a vampire? Answer: A vampire only sucks blood at night.
- 14 See for example, *The Passage*, *Twilight* series, *The Strain*.
- 15 This was done very effectively by CommBank in the Banking Royal Commission. For an analysis see Penny Crofts, 2020b.
- 16 Eg. *Bram Stoker's Dracula*, *Salem's Lot*, *The Passage*. There are exceptions to the rule including in *Twilight* and *True Blood*. The Army of the Dead (who are more reminiscent of zombies than vampires) in *Game of Thrones* are resolved through the slaying of their leader.
- 17 Attractive zombies do exist but are rare. Examples include the series *iZombie* and the romantic horror *Warm Bodies*.
- 18 (Christoff, 2014; Dan-Cohen, 2016; Gilbert, 2006; Robbins, 2016; Whetten and Godfrey, 1998). For example, Australia has enshrined a realist approach in its corporate culture provisions, which can attribute *mens rea* to corporations based on their corporate culture.
- 19 (Cole, 2006). The 'monsters' in slasher horror are most likely to portray pure malevolence, where they wish only to harm and there is little to no explanation for why. Examples include the *Halloween*, *Friday 13th* and *Nightmare on Elm Street* franchises. Even in these slasher horrors the violence tends to be explained as due to vengeance (Dika, 1990). For classic monsters like vampires, we know that they need to drink blood to survive, which is an example of instrumental evil rather than unexplained malevolence.

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- 20 For some proposals on imaginative punishment for corporations see the Australian Law Reform Commission, *Corporate Criminal Responsibility: Final Report* (2020).
- 21 There is a significant debate occurring around rewriting or amending the purpose of the corporation to enable more socially responsible corporations or for stronger stake holding (Grantham 2021). See for example, <https://www.weforum.org/agenda/2019/12/davos-manifesto-2020-the-universal-purpose-of-a-company-in-the-fourth-industrial-revolution/>.

References

- Burwell v Hobby Lobby Stores, Inc* 134 S. Ct 2751 (2014)
- Citizens United v Fed. Election Commission* 558 US 310 (2010)
- Louis K Liggett Co et al v Lee, Comptroller et al* 288 US 517 (1933) 548, 567
- Sir James Smith's Case* (1691) 77 Eng Rep 730 (KB) 730-731; Carthew 217, 217-218
- Tesco v Natrass* [1972] AC 153
- The Case of Sutton's Hospital* (1612) 10 Co. 23a
- Bakan J 2004 *The Corporation: The pathological pursuit of profit and power* Simon and Schuster New York
- Bakan J 2013 *Corporate sovereignty: Law and government under capitalism* University of Minnesota Press Minneapolis
- Bant E 2021 'Culpable corporate minds' *University of Western Australia Law Review* 48: 352-88
- Bartlett K T 1988 'Re-Expressing Parenthood' *Yale Law Journal* 98: 293-340
- Braithwaite J 2001 'Intention versus reactive fault' in N Naffine R Owens J Williams eds *Intention in Law and Philosophy* Ashgate Aldershot
- Campbell L 2018 'Corporate Liability and the Criminalisation of Failure' *Law and Financial Markets Review* 12: 57-70
- Carroll N 1987 'The nature of horror' *Journal of aesthetics and art criticism* 46: 51-9
- Cavarero A 2010 *Horrorism: Naming contemporary violence* Columbia University Press New York
- Chen R & Hanson, J 2004 'The illusion of law: The legitimating schemas of modern policy and corporate law' *Michigan Law Review* 103: 1-49

- Christie D & Lauro SJ 2011 *Better off Dead: The evolution of the zombie*, Fordham University Press New York
- Christoff K 2014 'Dehumanization in organizational settings: Some scientific and ethical considerations,' *Frontiers in Human Neuroscience* 8: 748–52 <https://doi.org/10.3389/fnhum.2014.00748>
- Ciepley D 2019 'Can Corporations Be Held to the Public Interest, or Even to the Law?' *Journal of Business Ethics* 154: 1003–18 <https://doi.org/10.1007/s10551-018-3894-2>
- Coffee Jr J 1980 'No Soul to Damn: No Body to Kick: An Unscandalised Inquiry into the Problem of Corporate Punishment' *Michigan Law Review* 79: 386–459
- Cole P 2006 *The Myth of Evil* Edinburgh University Press Edinburgh
- Colvin J.H. & Argent J 2016 'Corporate and personal liability for “culture” in corporations?' *Company and Securities Law Journal* 34: 30–47
- Crofts P 2022 'Aliens: Legal conceptions of the corporate invasion' *Law and Literature* 34: 387–415. <http://dx.doi.org/10.1080/1535685X.2020.1862521>
- Crofts P 2020a 'Three recent royal commissions: The failure to prevent harms and attributions of organisational liability' *Sydney Law Review* 42: 394–422
- Crofts P 2020b 'Strategies of Denial and the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services' *Griffith Law Review* 29: 21–42. <https://doi.org/10.1080/10383441.2020.1819266>
- Crofts P 2012 'Monstrous Wickedness and the Judgment of Knight' *Griffith Law Review* 21: 72–100
- Crofts P & Vogl A 2019 'Dehumanized and demonized refugees, zombies and World War Z' *Law and Humanities* 13: 29–51. <https://doi.org/10.1080/17521483.2019.1572290>
- Crofts T 2018 'Prosecuting child offenders: Factors relevant to rebutting the presumption of doli incapax' *Sydney Law Review* 40: 339–66
- Dan-Cohen M 2016 *Normative subjects: Self and collectivity in morality and law* Oxford University Press Oxford
- Datta RP 2018 'Theorizing fiscal sacrifices in zombie capitalism: A radical Durkheimian approach' in ME Tombs et al eds *Revisiting Crimes of the Powerful: Marxism, Crime and Deviance* Routledge New York: 87–110

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- Deakin S et al 2017 'Legal institutionalism: Capitalism and the constitutive role of law' *Journal of Comparative Economics* 45: 188–200
- Diamantis M 2019 'Functional Corporate Knowledge' *William and Mary Law Review* 61: 319–396
- Dika V 1990 *Games of terror: Halloween, Friday the 13th, and the films of the stalker cycle* Dickinson University Press New Jersey
- Dorf M 2012 'Spandrel or Frankenstein's monster? The vices and virtues of retrofitting in American Law' *William and Mary Law Review* 54: 339–369
- Douglas M 2002 *Purity and Danger: an analysis of the concept of pollution and taboo* Routledge London
- Duruigbo E 2004 'The Economic Cost of Alien Tort Litigation: A Response to Awakening Monster: The Alien Tort Statute of 1789' *Minnesota Journal of Global Trade* 14: 1–42
- Esposito R 2012 'The *Dispositif* of the Person' *Law, Culture and the Humanities* 8: 17–30
- Farnsworth K 2013 'Bringing Corporate Welfare In' *Journal of Social Policy* 42: 1–22
- Field S & Jorg N 1991 'Corporate manslaughter and liability: Should we be going Dutch?' *Criminal Law Review* 156: 159–71
- Fisse B & Braithwaite J 1993 *Corporations, Crime and Accountability* Cambridge University Press Cambridge
- Foster N 2006 'Perception, language and reality in corporate law theory' *King's College Law Journal* 17: 299–324
- Foucault M 2003 *Abnormal: Lectures at the College de France 1974–1975* Picador New York
- French PA 1995 *Corporate Ethics*. Harcourt Brace College Publishers Fort Worth
- Friedman M 1970 'The social responsibility of business is to increase its profits,' *New York Times Magazine*
- Gabaldon T 1992 'The lemonade stand: Feminist and other reflections on the limited liability of corporate shareholders' *Vanderbilt Law Review* 45: 1387–1456
- Garrett BL 2020 'Declining Corporate Prosecutions' *American Criminal Law Review* 57: 109–56

The Corporate Monster Metaphor

- Garrett BL 2014 *Too big to jail* Harvard University Press Austin
- Gilbert M 2006 “Who’s to blame?” Collective moral responsibility and its implications for group members’ *Midwest Studies in Philosophy* 30: 94–114
- Gindis D 2016 ‘Legal personhood and the firm: avoiding anthropomorphism and equivocation’ *Journal of Institutional Economics* 12: 499–513
- Gobert J & Punch M 2003 *Rethinking Corporate Crime* LexisNexis Sydney
- Goethe J 2018 [1797] ‘The Bride of Corinth’ in *The Essential Goethe* Trans M Bell Princeton University Press Princeton
- Goforth C 2010 “A corporation has no soul” - Modern corporations, corporate governance, and involvement in the political process’ *Houston Law Review* 27: 617–664
- Grantham R 2021 ‘People, Planet, and Profits: Re-purposing the Company’ *Company & Securities Law Journal* 38: 250–273
- Grear C 2015 ‘Deconstructing *Anthropos*: A critical legal reflection on “Anthropocentric” Law and Anthropocene “Humanity”’ *Law Critique* 26: 225–249
- Greenwood JH 2005 ‘Introduction to the metaphors of corporate law’ *Seattle Journal of Social Justice* 4: 273–304
- Hallis F 1930 *Corporate personality* Oxford University Press Oxford
- Harman C 2010 *Zombie capitalism: Global crisis and the relevance of Marx* Haymarket Books Chicago
- Hibbitts B 1994 ‘Making Sense of Metaphors: Visuality, Aurality and the Reconfiguration of American Legal Discourse’ *Cardozo Law Review* 16: 229–256
- Hoad TF 2003 *The Concise Oxford Dictionary of English Etymology* Oxford University Press Oxford
- Hobbes T 1991 [1651] *Leviathan* Tuck London
- Hughes W 2021 “The evil of our collective souls”: Zombies, medical capitalism and environmental apocalypse’ *Horror Studies* 12: 7–25 https://doi.org/10.1386/host_00026_1
- Iwai K 1999 ‘Persons, Things and Corporations: The Corporate Personality Controversy and Comparative Corporate Governance’ *American Journal of Comparative Law* 47: 583–632

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- Kim SM 2000 'Characteristics of Soulless Persons: The Applicability of the Character Evidence Rule to Corporations' *Illinois Law Review* 2000: 763–812
- Lakoff G & Johnson M 1980 *Metaphors We Live By* University of Chicago Press Chicago
- Lind D 2015 'The pragmatic value of legal fictions' in Del Mar M and Twining W (eds) *Legal Fictions in Theory and Practice* Springer Switzerland: 83–112
- Loughlan P 2006 'Pirates, Parasites, Reapers, Sowers, Fruits, Foxes... The Metaphors of Intellectual Property' *Sydney Law Review* 28: 211–26
- McCutcheon M 2011 'Frankenstein as a figure of globalization in Canada's postcolonial popular culture' *Continuum* 25: 731–42
- Morrisette J 2019 'Marxferatu: Introducing Marx through the Vampire metaphor' in BW Sculos & M Caputi eds *Marx and Critical Theory in the 21st Century* Brill Leiden: 90–101
- Munger M & Salsman RM 2013 'Is Too Big to Fail Too Big? The Implications of Bailouts' *Georgetown Journal of Law and Public Policy* 11: 433–456
- Naffine N 2009 *Law's Meaning of Life: Philosophy, Religion, Darwin and the Legal Person* Hart Oxford
- Neocleous M 2003 'The political economy of the dead: Marx's vampires' *History of Political Thought* 24: 668–84
- Newitz A 2006 *Pretend we're dead: Capitalist monsters in American pop culture* Duke University Press Durham
- Nowell R 2014 *Merchants of Menace: The business of horror cinema* Bloomsbury London
- Orts EW 2013 *Business persons: A legal theory of the firm* Oxford University Press Oxford
- Page A & Katz RA 2010 'Is Social Enterprise the New Corporate Social Responsibility?' *Seattle University Law Review* 34: 1351–1384
- Peters T 2017 'I, Corpenstein: Mythic, Metaphorical and Visual imaginings of the Corporate form in comics and film' *International Journal for the Semiotics of Law* 30: 427–454
- Polidori JW 2008 [1819] *The Vampyre* Oxford World Classics Oxford
- Pollman E 2011 'Reconceiving corporate personhood' *Utah Law Review* 1629–1676

The Corporate Monster Metaphor

- Robbins S 2016 *Essentials of Organizational Behaviour* Pearson Boston
- Schane SA 1987 'Corporation is a Person: The Language of a Legal Fiction' *Tulane Law Review* 61: 563-610
- Schauer F 2015 'Legal Fictions Revisted' in Del Mar M & Twining W (eds) *Legal Fictions in Theory and Practice* Springer Switzerland: 113-130
- Schlag Pierre 1990 'Normativity and the Politics of Form Symposium-The Critique of Normativity' *University of Pennsylvania Law Review* 139: 801-932
- Shelley M 2018 [1818] *Frankenstein: or, the Modern Prometheus* Penguin, Harmondsworth
- Shildrick M 2005 'Transgressing the law with Foucault and Derrida: some reflections on anomalous embodiment' *Critical Quarterly* 47: 30-46
- Siraganian L 2020 *Modernism and the meaning of corporate persons* Oxford University Press Oxford
- Solove DJ 2000 'Privacy and Power: Computer Databases and Metaphors for Information Privacy' *Stanford Law Review* 53: 1393-1462
- Stephens B 2002 'The amorality of profit: Transnational corporations and human rights' *Berkeley Journal of International Law*: 20: 45-90
- Sutherland S 2006 'Piercing the corporate veil - with a stake? Vampire imagery in American caselaw' in: Day P (ed) *Vampires: Myths and Metaphors of Enduring Evil* Rodopi Amsterdam New York: 143-58
- Thoennes K 2004 'Frankenstein Incorporated: The rise of corporate power and personhood in the US' *Hamline Law Review* 28: 203-236
- Tombs S & Whyte D 2013 *The corporate criminal: why corporations must be abolished* Routledge, New York
- Tushnet M 1982 'Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles' *Harvard Law Review* 96: 781-827
- Vining J 1978 *Legal Identity: The coming of age of public law* Yale University Press, New Haven
- Weinstock JA (ed) 2013 *Encyclopedia of Literary and Cinematic Monsters* Ashgate, Farnham
- Whetten D & Godfrey P 1998 *Identity in Organizations* Sage, London
- Williams P 1988 'On Being the Object of Property' *Signs* 14: 5-24

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- Winter SL 1988 'Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law' *University of Pennsylvania Law Review* 137: 1105-1237
- Winter SL 1987 'The Metaphor of Standing and the Problem of Self-Governance' *Stanford Law Review* 40: 1371-1516
- Wood R 1980 'Neglected nightmares' *Film Comment* 16: 24-32
- Woolf T 1997 'The Criminal Code Act 1995 (Cth) - Towards a realist vision of corporate criminal liability' *Criminal Law Journal* 21: 257-272
- Wormser M 1931 *Frankenstein, Incorporated*, Whittlesey House New York
- Wright JG 2015 'A Step too Far: Recent Trends in Corporate Personhood and the Over-expansion of Corporate Rights' *John Marshall Law Review* 49: 889-923