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Liability Exemptions–A Fiasco

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Introduction

Recent unprecedented accumulations of economic power residing in a few corporate giants[1] should alert us to the possibility of a structural defect in the operation of our economy. A robust capitalist system requires a corporate model with a wide range of freedom of action governed by proven common law restraints.

However, actions that breach other's rights should result in jeopardy to those individuals responsible, whether they act individually, alone, or collectively in a corporation. In a world where money can influence political means of breaching peaceful individual and social life corporations should be especially subject to a check on wrongful activities, including complicity in government misdeeds. Impairment of such strictures can lead to growth of power that dangerously compounds over time. And this impairment in part results from State-granted privileged exemptions in the institution of corporate limited liability.

Corporate personhood status has been cited as the root cause of abuse of power by corporations. However this is overstated. Personhood in itself can be a practical simplification for organizations interacting in the economy. The relevant issue arises in the chartering agreements for corporations that transcend the mere recognition of a collective form of ownership in business. Specifically, the granting of limited liability.

There is no need to deny people rights, whether acting individually or jointly. Denying them the ability to fund or support those engaging in, or threatening to engage in, violating basic rights of others, common on the part of politicians, has merit. Ideally government programs violating individual rights should be curtailed–obviating concern regarding private support for bad policies. Unfortunately too little of this curtailment occurs, yet restricting all support of all political activities is

unwarranted. The 2010 Supreme Court decision in Citizens United vs. FEC recognized this.

Behind the capitalism paradigm resides a legal landscape that nurtures errant corporate entities that have grown incompatible with true capitalism. It was not a license to act, but a legal shield from long evolved common law customs that overturned this underpinning of civil society. Corporate malefactions, often dismissed as unavoidable, have for several generations escaped redress. Parties affected have been denied due-process recompense for damages incurred.

The ramifications are serious: such outcomes have emboldened top-heavy domestic and trans-national financial firms to go beyond capture of legislative and regulatory agendas to blatantly felonious global control at the highest echelons of sovereign governments world-wide.

Capitalism and the Corporation

Apprehension over the economic impact of trusts or large economic conglomerates is not new. Metrics traditionally employed in the study of Industrial Organization include *market share* and *concentration ratios* (for instance: the share of total shipments controlled by the four largest firms in an industry). Such tools, however, fail to reveal what more directly impacts society—the legal infrastructure specially crafted to protect the errant corporation. And that is State granting of liability exemptions. Such protection ostensibly encourages capital formation. However, no net loss need result for the same funds channeled differently.

The mercantilist economic model included exclusive rights to engage in commerce granted to favored companies. The 18th Century saw chartered monopoly control by the British East India Company. That company threatened a take-over of commercial activities around the port of Boston, thereby motivating the Boston Tea Party's ardent reaction against the company in 1773. Now in the 21st Century, corporate interlocks of Big Tech and Big Pharma have, in this environment of special privilege, come to exhibit domination of not only the public health sector, but also social media, broadcast media, academia, even medical journals

and licensing. More recently we have had a further unprecedented capture of the Public Sector itself.[2]

As a consequence, the pace of the loss of fundamental liberties threatens to exceed that experienced under Nazism and Bolshevism between the World Wars, and even more so due to its global nature. On top of this is the damage to capitalism ideologically. The palpable excessive corporate overreach into social and political spheres supplies ammunition to Nihilist and Marxist condemnation of capitalism.

Since the early 19th Century, what has passed for a free-market capitalist system has been only an attenuated system. Pure capitalism holds sway wherein capital, as means of production, is employed productively in a market system devoid of politically derived economic privilege. Government is seen as ancillary to capitalism. Capitalism need not require, nor does it benefit, from State imposed interference with traditionally viable dispute resolution under common-law.[3]

In short, the climate under which corporations operate has been distorted by negation of time-tested powerful juridical precepts necessary for civil life. Civil suits proffer an essential means of protection against organized maleficence. The degree of indemnification of private firms through recent special legislation has become too commonplace. Less evident has been the outfall from long-practiced public offering of corporate stock as a source of finance that, with limited liability, lacks the need for investor scrutiny. Normally, participation in group activity that might include egregious behavior elicits caution. Why should owners (shareholders) get a pass? State requirements regarding articles of incorporation and oversight by the Securities Exchange Commission regarding stock offerings indicate a recognition of the challenges implicit in the current corporate model.

A free-market capitalist template rules out disruptive interference from political forces in markets or market activities and allows for a standard to evaluate both the corporate form of business and its market setting. The corporation as constituted must be seen as artificial rather than natural as a form of business organization.

In sum, customary belief incorrectly pictures the corporate form to be a necessary and proper element of modern capitalism.

Unfortunately entitlements such as limited liability granted to corporations constitute privileges producing socially disparate outcomes and corporate overreach. The granting of limited liability, while unnecessary is also inimical to pure capitalism.

A propensity to gain market share is manifest by corporate behavior. We have witnessed unscrupulous blocking of competitors through supporting rather than opposing new regulatory and anti-trust policy. Such an anti-competitive result has been assiduously detailed by Murray Rothbard in his posthumous work: *The Progressive Era.* Throughout the 20th Century business sectors performed sub-optimally due to unnecessary crony protection in the name of regulation. We now have a corporate-government symbiosis, or what Mussolini termed *Corporatism*. Further license to avoid responsibility through liability limitations exacerbates performance.

Unobjectionable aspects of the corporation

We have seen how some critiques of the corporation center on the legal status of personhood. Not all of the attributes of the corporate form of business conflict with our free-market template. Businesses employ contractual means of organizing collective action. They coordinate disparate ownership of wealth to a common business goal by marshalling shareholder capital. The right of individuals to freely associate and to employ managers to such ends is merely an extrapolation of individual rights to privately undertake needed business activities. Ludwig von Mises uses the term *methodological individualism* in describing how the meaning of "collective action" derives wholly from that of individual actions. This applies to business firms whether or not of corporate form. In other words, rights retained by individual members (persons) of such groups apply appropriately to corporations. Businesses might be better protected from legislated and judicial overreach when seen in this light. As with individuals they should retain all the rights retained by citizens.

Examples of breach of these rights, among many, include disruptive regulatory reporting requirements. IRS intrusions violating Fourth and Fifth Amendment protections are even more onerous than those imposed on individuals. There are uneconomic subsidies. There are anti-trust laws in defiance of

simple logic, such as laws against restraint of trade that arbitrarily apply penalties for either raising, lowering or maintaining a product price profile. There are insider-trading laws that are a perfect example of confusing the necessary coordination of informed valuations with game-table cheating. Recently we have had lockdowns and mandates that disproportionately impacted mostly small businesses while often exempting the giants (who have more clout with authorities).

Modern civilization has seamlessly accommodated scale disparities: Freight trains cannot be stopped at each intersection as could donkey carts. Both are vehicles of transport, but exceptions have been instituted for giving trains the right-of-way.

Corporations have been granted personhood in legal standing for a variety of situations. Of course personhood is a fiction, but for practical reasons in law it has some valid applications. As a rule, it would be impracticable to litigate every matter involving a corporation by creating separate cases for each shareholder and/or employee. Personhood also allows for the unique attribute of continuity, where the corporation can have indefinite life, exceeding any of its owners. This application yields more conveniences than difficulties.

Incorporation has merit for the small enterprise subject to incongruities in various government legal venues. For instance, courts have assigned joint liability (sometimes for the cost of the full award) to those corporations involved in unproductive or even negative outcomes although only marginally responsible. Close corporations and corporate general partnerships have allowed innovative entrepreneurship. Injudicious handling of lawsuits more easily avoided by more substantive joint stock companies should be acknowledged.

Liability limits are a plausible for smaller-size enterprises. Owners are often officers who, while not personally liable for financial obligations, do have exposure in actions of malfeasance as a restraint.[4] Indemnities provided by increased use of insurance point to a solution. Reducing emphasis on the collective term *corporate personhood*, i.e. seeing firms or businesses as owned by identifiable individuals, comports more comfortably with methodological individualism. Losses to creditors or injured

parties due to bankruptcy or corporate dissolution would be diminished by this simplification.

Lack of full corporate form in history

For the most part the Nineteenth Century saw the rise of the general partnership. The U.S. Constitution notably excluded any avenue for Federal chartering of corporations. The founders had good reason to be wary after experiencing the monopolistic intrusions of the Hudson Bay Company and especially the British East Indian Company. Chartering was left up to the States. Ultimately, corporations gained limited liability standing as States competed for reciprocal economic benefits in granting them this privilege.

Were these State concessions necessary? The unprecedented growth rates of the economy in the Nineteenth Century occurred with business organized under the general partnership model absent limited liability until the latter part of the Century. Ted Nace notes: "The volume of manufactured goods grew by an average of 59% per decade from 1809 to 1839, then by 153% in the 1840's and 60% in the 1850's."[5] …"Limited liability… wasn't a widespread feature of the corporation until about 1875…"[6] Hence, lack of the limited liability corporate model appears not to have stymied economic performance in the American experience.

Limited liability not needed

This impressive growth supports the thesis that shareholders in joint stock companies need not be granted the privilege of limited liability under tort law (see commentary by J.S. Miller). Alternatives to stock offerings such as bond issues and loan market funds exist. Again, the market has mechanisms to indemnify participants from liability such as insurance. Arbitration provisions can clarify and expedite litigation. Professionals routinely procure malpractice or errors and omissions insurance, an appropriate expense to those participating in activities that involve risk. Changes in bankruptcy protections for insolvency could be explored, but would need careful restructuring to include exceptions.

However, the waiver of risk for corporate shareholders (beyond their investment) granted through present law unnecessarily relieves large-scale corporations of an important measure of

responsibility. Exempting shareholders removes a strong disincentive for engaging in predictable risk to harm. Criminal behavior; reckless, negligent, or tortious behavior, should subject more than just the balance sheet of the corporation to exposure. Appropriate shareholder exposure would increase investor insurance needs and should lessen gross under-compensation of injured parties. No longer would shareholders entirely escape liability through corporate dissolution, bankruptcy, or layering of corporate ownership.

Malfeasance, where the threat of treble damages arises, would extend possible liability beyond corporate assets and shareholder equity to the shareholders themselves, especially if loss of life were at issue. Even if only to a set percentage pro-rata to shareholdings, such reduced liability protection would furnish incentive for circumspection by the investor prior to helping fund enterprises engaged in activities risking moral turpitude. For instance, a medical procedure or medication may see damages in the U.S. at $10 million or more per wrongful death. A hypothetical case of 25,000 fatalities from a vaccine, not to mention injuries, would amount to $250 billion in damages and perhaps three times that for deliberate malfeasance (treble damages) or punitive damages far exceeding this.[7] Such exposure would promise significant corporate behavior modification.

Corporate power overreach

Employees or management (unless as deliberate participants in fraud or wrongdoing) are not the ultimate responsible party. Owners are.

What is the difference between individuals conspiring to violate others' rights and owners exposing an enterprise to complicity in wrongdoing? Consider contractors or NGO's (Non-Government Organizations) engaged in operations with proven violation of domestic or international law and human rights shielded by directives from the Defense Department or other agencies. Culpability in a conspiracy is individual. Under the law of agency (the doctrine *respondeat superior*-"let the master answer") vicarious liability rests with the employer. Shareholders are the employers. Should not each shareholder face personal culpability that might exceed loss of such shareholder's investment, at least financially? [8]

When governments escape consequences of wrongful acts, would not refusal by corporations to be complicit help to inhibit them? Why not? We should note that other critics of corporate power point to relevant concerns often arising with increases in scale.[9]

All too often, government courts look at the limits set by law as sanctioning pollution or other environmentally negligent activities that stay within the regulatory bounds, even though without such statutes more stringent limits would likely have resulted from tort action. This is particularly true in environmental protection legislation where it has been a primary reason for lack of adequate corporate water and air pollution abatement.

Additionally, under influence from growing industrial interests over the last two centuries, tort law remedies previously allowing victims to enjoin polluters for damages were removed: no longer could an individual sue for individual damages if the damage was not different in kind or significantly more than that suffered by others in society. A "Public" nuisance (affecting the general public) could only be addressed by public authority.[10]

One attribute of progress easily overlooked is the principle of spontaneous organization. Under civilized market environments institutions of emergent order arise where the planning is decentralized yet coordinated. By the same token, under environments lacking customary respect for free choices in markets, retrogressive or anti-social attributes of tyranny emerge spontaneously and inexorably, no master plan needed. In these environments latitude exists for purposeful wrongdoing sometimes known as the *Iron Law of Oligarch*y. When we add to this the fact of regulatory capture by private factions, and perverse incentives made possible through legislation, the resulting constant tendency toward unsavory politicized outcomes should be no surprise. Of this the founders were clearly aware.

The granting of immunities to corporations through concerted government policy contravenes good jurisprudence. It interrupts common-law remedies requisite to functioning market economies. Especially onerous is the practice of exempting certain industries from liability altogether through legislation such as the *Price Anderson Act* for the nuclear power industry; the various vaccine damage acts including PREP (*Public Readiness and*

Emergency Preparedness Act) that exempt medical industry and medical profession participants; and the various bailout and bankruptcy protections for banks and financial institutions.

Even more economically insidious are quasi-government entities such as the FED (Federal Reserve System) with monopoly privileges such as granted by legal tender laws. Where was the Constitutional authority to charter the FED? Acceleration of wealth disparity of the 1% over the 99% can be easily attributed to the influence of the financially dominant corporations virtually in league with the Fed, controlling the Fed's flow of funds from quantitative easing, See here.

Of immediate urgency is evident malversation (misbehavior and esp. corruption in an office, trust or commission) most notable in the FDA's, CDC's, and WHO's deceptive handling of the Covid "pandemic" in complicity with Big Pharma (especially Pfizer, Moderna, and Johnson and Johnson). Corporate arrogance regarding deliberate media disinformation; widespread shadow banning; and corporate social media censorship was associated with the recent contrived global pandemic. Instead of shareholder inhibition we witnessed a culture of shareholder proprietorship in ill-gained profiteering.

Conclusion

Our economic system has succumbed to the corruption of an irresponsible financial and political plutocracy. This calls for less, not greater, governmental engagement in funding, protections, and bailouts in the private sector.

Emergent corporatism presents no paradox for capitalism, it need not be the outcome of mature capitalism; rather it constitutes an aberration of free market capitalism. As such, it constitutes an unnecessary compromise of the Founders' conception of a just society. They eschewed chartering corporations in favor of fundamental principles of common law and free markets.

Unnecessary privileges bestowed to corporations have produced an aberrant capitalism inimical to a prospering free economy. Now, under limited liability, Big Tech and Big Media, in concert with Big Pharma, Wall Street, and the Security State have

breached historic limits of power. They are in the process of eroding Western individual civil protections in the guise of safety measures against unsubstantiated and manufactured menaces.

Shareholder culpability for corporate breach of conduct deserves consideration. Absent such acknowledgement Capitalism risks mistaken portrayal as a failed system, and Western civilization risks irreversible descent into tyranny.

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[1] For example Blackrock, Vanguard, and State Street. BlackRock Corporation is the world's largest asset manager, with US$9.5 trillion in assets under management as of October, 2021. Vanguard, with about $7 trillion in global assets under management, as of January 13, 2021, is the largest provider of mutual funds and the second-largest provider of exchange-traded funds in the world after BlackRock's iShares. State Street has custody of, or administers, over $40 trillion in investments. These giants dominate shareholder control in major industries.

[2]2021 saw government vaccine mandates become a reality. It seems beyond preposterous to coerce an individual, through executive order or otherwise, to commit to irreversible medical procedures that have the potential for harm– and even more egregious where providers have been legally exempted from any fair adjudication to compensate for harm inflicted. Such a distortion of justice includes financial subsidies as incentives (expensed to the populous so affected).

We are witnessing the culmination of Statist separation of control of financing away from the public to the corporate elite as a result of unprincipled taxation and monetary infusions, as well as acquiescence to what is simply an illicit counterfeit (fiat) money scheme resting on the 20th Century co-optation of our socially-evolved medium of exchange. (See Rothbard, *What Has Government Done To Our Money*.)

[3] The framers trusted in jurisprudence apart from government instituted officialdom. "*In Suits at common law…the right of trial by jury shall be preserved…"* Amendment VII. U.S. Constitution. Note that the jury constitutes an extra-governmental institution.

[4] Ideally, reforms such as pre-arranged arbitration agreements, justice centered on tort rather than criminal law, and even private provision of judicial services would be considered. See here, and Rothbard, Murray N. 1973. *For a New Liberty* New York, Macmillan Co., pp. 228-274

[5] Nace, Ted. 2005. *Gangs of America*, San Francisco, BK Publishers, Inc., pp.54-5

[6] Ibid. p.52.

[7] Currently the VAERS (vaccine adverse event reporting system) indicates a far higher number for the mRNA vaccines.

[8] The Founders included a Commerce cause: *"The Congress shall have Power…..To regulate Commerce with foreign Nations and among the several States….To establish uniform laws on the subject of Bankruptcies throughout the United States;*" The U.S. Constitution.Art.1 Sec.8

[9] Some concerns involve unwarranted legal advantages accruing to corporate entities. These include acquisition of various property rights through excessive patent law protections; property titles including acquisition of broadcast spectrum rights; subsidies; local property tax forgiveness incentives; natural

resource and mining claims; and even exploitation of valuable property site ownership that can be perpetuated through duplicated accelerated tax depreciation allowances on buildings that far exceed long-term costs. The latter, rightly or wrongly, allow avoidance of otherwise normal tax liabilities on site value, all under publically expensed law enforcement protections–of which could be simply remedied through permanent elimination of taxes on buildings and improvements (and removing disincentives to upgrade buildings).

More than this, international treaties such as NAFTA, MAI (Multilateral Agreements on Investments), and policies of the World Bank and IMF often slant recovery for damages from legitimate claims by sovereign nations to favor offending trans-national corporations–evidence of undue influence by these interests.

Other policies inadvertently favor larger firms. R.H. Coase reminded us that, unavoidably, firms may be more vertically integrated due to tax policies: "Another factor that should be noted is that exchange transactions on a market and the same transactions organized within a firm are often treated differently by Governments or other bodies with regulatory powers…to the extent that firms already exist, such a measure as a sales tax would merely tend to make them larger than they would otherwise be."– Coase, R.H. "The Nature of the Firm", *Economica*, Nov. 1937, (p.492).

[10] Amador, Jorge (1987). Take Back the Environment, The Freeman, Foundation for Economic Education, (pp.19, 22), Fee.org.