Errant Corporations–Aberrant Capitalism

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> *The great vice is over-simplification, and the leadership which gets attention is as much addicted to it as the inarticulate public.*
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> Frank H. Knight

By James Alex Webb

Recent unprecedented economic power concentrated in a few corporate giants[1] should alert us to the possibility of a defect in the corporate model we have assumed to be a stalwart of Capitalism. We will see this outcome as an impairment of common law restraints intrinsic to functional free-market societies. We will focus on the institution of corporate limited liability.

Behind the capitalism paradigm resides a legal landscape that nurtured errant corporate entities incompatible with true capitalism. It was not license to act, but a shield from justice originating in the negation of long evolved customs underpinning civil association. For several generations parties affected by organized malefaction have been denied due process recompense for damages incurred by corporations. The ramifications are serious, such outcomes have emboldened top-heavy trans-national financial firms to cross the line from mere capture of legislative agendas to an evident brash felonious global arm twisting at the highest pinnacles of sovereign power.

Capitalism and the corporation

Apprehension over the economic impact of trusts or large economic conglomerates is not new. Metrics employed in the sub-field of Industrial Organization include *market share* and *concentration ratios* (the share of total shipments controlled by the 4 largest firms in the industry). Such tools, however, fail to reveal what more directly impacts 21st Century society—the legal or juridical landscape specially crafted to protect the errant corporation. And that is State granting of limited liability.

The mercantilist 18th Century environment, created under chartered monopoly control by the British East India Company, witnessed a threatened take-over of commercial activities around the port of Boston–thereby motivating the Boston Tea Party's ardent resistance to that move by the company. 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.

Simply put, the climate under which corporations operate has been be-spoiled 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 no historic precedent. 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 shareholders get a pass?

Since the latter 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]

This 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 will be found to be not only unnecessary but inimical to pure capitalism. Surprising to some, big business has itself been enticed to support increasing regulatory and anti-trust policy employed to capture market share. 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 government overreach in terms of crony protection in the name of regulation. We now have a corporate-government symbiosis, or what Mussolini termed *Corporatism*.

Unobjectionable aspects of the corporation

Some critiques of the corporate form go too far. 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 such 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, constitutional rights retained to individual members 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– viz., rights not constitutionally bestowed to their governments by the citizens.

Examples of breach of these rights, among many, include disruptive regulatory reporting requirements and IRS intrusions constituting Fifth Amendment violations even beyond that imposed on individuals. There are uneconomic subsidies and 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. Only recently we have had lockdowns and mandates that disproportionately impacted mostly small businesses.

Modern civilization has seamlessly accommodated large entities: Freight trains cannot be stopped at each intersection as could be 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 applications. 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 tends to have indefinite life, exceeding any of its owners. This application seems to yield more conveniences than difficulties.

Incorporation has merit for the small enterprise subject to incongruities in various government legal venues. For instance, courts have assigned liability jointly to those corporations involved in unproductive or even negative outcomes although not individually at fault. Close corporations and corporate general partnerships have allowed innovative entrepreneurship. Vulnerabilities to injudicious handling of lawsuits against enterprises not faced by more substantive joint stock companies should be acknowledged. At some lesser size an enterprise might be afforded liability limits. Owners are often officers who, while not personally liable for financial obligations, do have exposure in actions of malfeasance.[4] Certainly a point can be found, by a task-force of those specialized in the field, where, for larger businesses, an iterative removal of limited liability along with some legal reform would, accompanied with indemnities provided by increased use of insurance, point to a solution. Removing emphasis on corporate personhood, i.e. now seeing firms or businesses as owned by identifiable individuals, comports with the reality of methodological individualism. It would seem that 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 avoided any mechanism to charter corporations. The founders had good reason to be wary of chartered companies after experiencing the monopolistic intrusions of the British East Indian Company, again the real reason for the Boston Tea Party. Ultimately, corporations gained limited liability standing as States competed for reciprocal economic benefits.

Were these favors granted corporations necessary? The unprecedented growth rates of the economy in the last half of the Nineteenth Century occurred with business organized under the general partnership model without limited liability. "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 corporate model appears to not have stymied economic performance in the Nineteenth Century.

Limited liability not needed

This 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, an appropriate expense to those participating in activities that involve risk–professionals routinely procure malpractice or errors and omissions insurance. Changes in bankruptcy protections for insolvency would need careful restructuring to include exceptions.

The waiver of risk for the corporate shareholder (beyond their investment) granted through law unnecessarily relieves substantive corporations of an important measure of responsibility. Exempting shareholders removes a strong disincentive for engaging in predictable risk to harm. Risky behavior should jeopardize more than just the balance sheet of the corporation. With increased investor insurance needs, dissolution of corporations by bankruptcy or otherwise risky behavior should lessen gross under compensation of injured parties. Malfeasance, where the threat of treble damages arises, would extend possible liability to shareholders, 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 at $10 million or more per victim. A hypothetical case of say 25,000 fatalities from a vaccine would amount to $250 billion in damages and perhaps three times that for deliberate malfeasance (treble damages). This is exclusive of liability for possible injuries.[7]

Corporate power overreach

Employees or management, unless as deliberate participants in 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 engaged in violation of international law and human rights shielded by directives from the Defense department in operations such as the illegal Iraq war. 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. Should not each shareholder face personal culpability that might exceed loss of such shareholder's investment, at least financially? When governments escape consequences of wrongful acts, would not refusal by corporations to be complicit help to inhibit them? Why not? Under a State initiative corporate shares could be subject to liability exposure at a date certain for instance, perhaps by a State challenge to Commerce Clause applicability.[8]

Further concerns involve unwarranted legal advantages allowed to accrete to corporate entities. These include acquisition of various property rights through excessive patent law protections; property titles including acquisition of

broadcast spectrum rights; subsidies; 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 and, rightly or wrongly, allow avoidance of otherwise tax expenses on site value, all under publically expensed law enforcement protections.[9] 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.

When it comes to corporate political influence, given that governmental policies or agency interactions by their nature lie outside of our free-market model, certain concerns such as campaign finance, for instance, merit examination not possible here.

Other policies inadvertently favor larger firms. R.H. Coase reminded us that, unavoidably, firms may be more vertically integrated due to government: "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."[10]

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 in the last two centuries, judicial and legislative decisions influenced by politics, weakened customary tort law that had previously allowed victims to enjoin polluters for damages: 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.[11]

One attribute of progress easily unnoticed is the principle of emergent, spontaneous organization provided by civilized market environments. By the same token, in circumstances lacking customary respect for free choices in markets, retrogressive or anti-social attributes of tyranny emerge spontaneously and inexorably without need for a master plan. 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 that exempt Big Pharma; and the various bailout and bankruptcy protections for banks and financial institutions. Even more economically insidious are quasi-government entities such as the Federal Reserve with monopoly privileges such as granted by legal tender laws. Acceleration of wealth disparity of the 1% over the 99% can be easily attributed to the influence of the financially dominant corporations virtually 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 corporate arrogance regarding deliberate media disinformation and widespread shadow banning and censorship. Instead of shareholder inhibition we have a culture of shareholder proprietorship in ill-gained profit making.

Conclusion

Our economic system continues to move further away from market capitalism. Unnecessary privileges bestowed to corporations have produced an aberrant capitalism inimical to a prospering free economy. Big Tech and Big Media, in concert with Big Pharma and Wall Street, have recently breached historic limits of power and overreach that threaten to end modern individual civil protections in the guise of safety against unsubstantiated dangers. Shareholder culpability for corporate breach of conduct through a reexamination of the privilege of limited liability would be a starting point to reverse this dangerous development.

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[1] For example Blackrock and Vanguard. 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.

[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 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 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;*")

[9] Of which could be simply remedied through permanent elimination of taxes on buildings and improvements.

[10] Coase, R.H. "The Nature of the Firm", Economica, Nov. 1937, (p.492).

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