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IS THE CORPORATION AN ENEMY OF DEMOCRACY? HOW TO GIVE THE CORPORATION A LITTLE SOUL

*Paul J. Zwier**

In his masterful book, *GREAT TRANSFORMATION*,¹ Karl Polanyi theorized that *laissez faire* market capitalism had within it the eventual demise of democracy. He argued, in effect, that the myth free markets would magically most fairly distribute goods and services among its citizens would become a “bad seed,” that would grow to choke out democratic decision-making. In other words, once citizens in a democracy lose jobs and pensions, and get pay cuts, and pay ever increasing prices for medical care, they start to see themselves as pawns in a rigged system justified by free market formulas that are hard to understand. Add in further loss of life savings and investments when markets correct, and the combination of theory and loss will make these people to feel that their lives and fortunes were beyond their control. Polanyi predicted that the resulting loss of morale among them would cause them to favor fascism to the slow working of the free market democracies. They would prefer the corruption of oligarchs and dictators who could at least pretend to “do something” to respond to the punishing impact of the soullessness of the market, than to wait for the market to make it all right.

Polanyi wrote before economists argued for government regulations to curb the destructive tendencies on citizens from *laissez fare* capitalism. Recognizing that markets work best where there is full information and transparency, which almost never seemed to exist in the real world, governments provided different regulations: antitrust regulations, regulations of securities, and created institutions to regulate money supply and interest rates to provide fundamental protections.

Still, the vulnerability of citizens to unregulated market forces did not go away.² Recent events in the US since WWII tell the story here. First there was Big Oil and the Middle East, and high interest rates, then the Savings & Loan crisis, and then, more recently the Big Banks and mortgaged backed securities crisis in 2006-7. Added to this is the continue escalating costs of medical care.

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¹ KARL POLANYI, *THE GREAT TRANSFORMATION* (Farrar and Reinhart, 1944).

² See generally, Martha Fineman, *The Vulnerable Subject*, 20 *Yale Journal of Law and Feminism* 1 (2008) (for a discussion of how law needs to be reoriented to take into consideration the effect of both state and corporate actions on vulnerable populations).

What is sometimes overlooked in analysis of these event is the legal structure of the market actors that drive these crises. Private financial institutions, oil companies, and medical care providers, and other major economic actors act as corporations, and therein may lie the problem. After all, as the 18c English Lord Chancellor Thurlow famously wrote, “Corporations have neither bodies to be punished, nor souls to be condemned; they therefore do as they like.”³

Though it may seem a bit antiquated to refer to souls, (even in individuals⁴), it is worth remembering what Plato meant when he referred to individuals as having souls. That individuals have souls is evidence both by their continued attempts to create the ideal city state and by their attempts to live virtuous lives.⁵ The evils and imperfections of the physical world are the result of matter. That matter is evil does not take on really serious proportions, however until Plato introduces his understanding of the nature and destiny of the soul. The soul has fallen into a sensible world, and it must return to the supersensible world if it is to attain it proper destiny. Without a clear understanding of the need for soulful decision-making, the logic of materialism is unrestrained, and hedonistic.⁶

The legal structure of the corporation was born out of the theories of unregulated capitalism and give permission and emphasis to matter, or profits, for profit’s sake. It provides corporate managers the protection of the business judgment rule. Its board’s duty of loyalty to the shareholders insures that managers put profits to the shareholders ahead of community responsibilities or manager’s virtues or values. In other words, the corporation was given the legal structure that would continue to promote the myth of free market magic--decisions based on profit maximization will best distribute goods and services, but also justified devastating effects from corporate decisions on labor,

³ JOHN POYNTER, LITERARY EXTRACTS FROM ENGLISH AND OTHER WORKS; COLLECTED DURING HALF A CENTURY: TOGETHER WITH SOME ORIGINAL MATTER 268 (John Hatchard and Sons, 1844).

⁴ Cf. JAMES HILLMAN, THE SOUL’S CODE (Ballentine Books, 1996) (arguing that while psychologists (Freud) prefer thinking of the Ego, or (Jung) the Archetype, to describe the essence of what makes a each human unique, that it is better to reclaim Platonic ideas of the Soul, or *daimon*, to reinvigorate the “eachness” in individual calling and community. The idea of the soul can be an anecdote to the drab materialism of the modern age).

⁵ *Id.*

⁶ James Hillman defines soul as the essence of who someone is, their calling, their “acorn” that they discover by “growing down” as well as up to determine what is their fundamental purpose in life. Can this apply beyond individuals to, say countries? So, China has no soul. The Soviets had no soul. The EU has no soul and the US has no soul. Regarding the US, some blame it on market capitalism. Others blame it on the corporation, which too, is said to have no soul.

communities, and potentially sowed the seeds of discontent that can threaten democracies.

In the push for profits, greed is good. It is not only the banks that get caught up in the myth, but even the medical care industry, initially born out of a need to provide patient care, who also loses its way to free market ideologies imbedded in their corporate structures.⁷ When losses occur only band-aids are applied and then quickly torn off. When people lose their jobs they demand Dodd Frank regulations. When they can't get health care, they demand lower cost options. But democratically elected representatives soon respond to the myths of free market theories and roll these back. No one goes to jail. The distance between rich and poor is exacerbated. When jobs that return after financial downturns are low paying or require skills that are hard to come by, politicians don't blame the free market. Many start to scape goat: anti-immigrant sentiment arises, then there is nationalism, followed by racism. The rise of the global corporate actor exacerbates the sense of disconnect between the community and business interests. George Soros is blamed in Hungary. Mexico is blamed in the US. Even when local businesses are squeezed, their loss is explained by the importance of the free market. Jobs are lost and moved overseas. But, the consumer is told he is better off because he can get goods and services at low prices.

Two markets are particularly troubling and are examples of the problem. One, we have already mentioned, health care, and its particular problems in the pricing of pharmaceuticals.⁸ Price of drugs keeps rising. Martin Shkrieli raises the price of life saving drugs by 3000 percent. Hepatitis C drugs rise. Cancer drug prices deplete the savings of most who have need of them. Such price hikes exacerbate feelings of loss of control. Yet the market tells the public that

⁷ See *Fruit v. Schreiner*, 502 P.2d 133, 140 (Alaska 1972) (“There was a time when the artisans, shopkeepers and master craftsmen could directly oversee the activities of their apprentices and journey men. Small, isolated communities or feudal estates evinced a provincial sense of social interactions which ensured that many enterprises would conduct their businesses with a careful concern of the community of its patrons. But in the present day when hundreds of persons divide labors under the same corporate roof and produce a single product for market to an identified consumer, the communal spirit and shared commitment of enterprises from another age is sacrificed to other efficiencies. At the same time, the impersonal nature of such complex enterprises and their mechanization make third parties considerably more vulnerable to injury incidentally arising from the pursuit of the business. Business corporations are granted a personal identification in legal fiction to limit liability of the investors, but not to insulate the corporate entity itself from liability of the unfortunate consequences of its enterprise.”).

⁸ Paul Zwier and Reuben Guttman, *A Failure of Remedies: The Case of Big Pharma*, 3 EMORY CORP. GOVERNANCE AND ACCOUNTABILITY REV. 41 (2016); Paul Zwier, *High Prices in the US for Life Saving Drugs: Collective Bargaining Through Tort Law?*, MARQ. BENEFITS AND SOC. WELFARE L. REV. 17:2 (2016) (also available at Emory Legal Studies Research Paper No. 16-389, <https://ssrn.com/abstract=2707734>).

high prices are necessary to discover even better drugs and or a new generation of drugs. It leaves both patients and families baffled by health care and devastated by both the inevitable physical and financial cost of end of life care.

The pharmaceutical market is soulless. The aim of its products is seldom to cure. The manufacturer does better when the patient doesn't get better, but needs the drug to live, and so will pay for the drugs until there is nothing left. Health care costs skyrocket for end of life care, and the fight is often over insurance and coverage, without realizing that the market is simply not capable of regulating drug prices in any meaningful way. Without regulation of pricing, the market is captured by the profit maximization myth.⁹ Even well-intentioned actors get swept up in the market myths, fed by corporate law structures that provide justifications to sell drugs even when they cause more harm than good.¹⁰

Some see a second soulless unregulated market in the US, the market for guns. They argue that it is insistence on unregulated access to guns, (fueled both by the soullessness of gun manufacturers and even its secondary market, and their desire for profits) is the cause of so many violent deaths in America.¹¹ The recent school shootings in Florida highlight the dilemma. Students don't understand why the myth of unregulated access to guns should justify the dangers it imposes on the safety of others. Other countries don't have these shootings. Why can't some form of sensible gun regulation be enacted?

The problem with guns is acerbated by the 2d Amendment's right to bear arms. (Ignoring the actual language of regulation, "A well-regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."), the 2d amendment is widely viewed as a unregulated right to bear arms, that is necessary to secure liberty and protect against governmental oppression. And, of course, here in lies the problem. The market for guns show there is also a dark side to regulation. Regulation has to be administered by the state. It is too easy for the state to become an interested actor, and becomes a corrupting influence at best, a monopoly on the use of guns, at worst, exacting bribes for access to markets. Big state actors are easily corrupted and become all about their own profits and

⁹ Cf. L. Vertinsky, *Making Room for Cooperative Innovation*, 41 FSU L. REV. 1067 (2014).

¹⁰ The Opioid crisis is a good example of this phenomenon. See generally SAM QUINONES, DREAMLAND: THE TRUE TALE OF AMERICA'S OPIOID EPIDEMIC (Bloomsbury Press, 2015).

¹¹ Ellicott Matthey et al., *In-State and Interstate Associations Between Gun Shows and Firearm Deaths and Injuries: A Quasi-experimental Study*, 167 ANNALS OF INTERNAL MEDICINE 837 (2017).

power. As a result there is a need to keep the state small, and always refreshing, to keep down the tendency of those who do the regulating from, themselves, corrupting the market. Wouldn't it then be better for the corporation to somehow regulate itself? Why is it so hard to give the corporation a soul?

Growing out of this recent gun crisis are some interesting efforts to try to give corporations some soul. Whether it is other corporate actors denying NRA discounts, or corporate advertisers pulling advertisements to commentators critical of student protestors, or investors refusing to invest in political parties unless they support reasonable gun control, or CEOs of investment funds that threaten pulling their investment support to funds investing in companies who advocate for unregulated access to guns, or other corporations' CEOs who decide to speak out against gun violence or racism, or through corporate foundations who give for charitable causes,—there are forces at work in the corporate world that try to curb the excesses in the market. These actors are attempting to find a new paradigm that will allow a corporation to exercise some soul in a socially responsible community-oriented way, without doing too much damage to the myth of unregulated markets. Still in each case there has been significant push back to their attempts to put back some soul in the corporation.

Take the example of Delta. When Delta and other corporate actors try to respond to the loss of life by cutting back on discounts to NRA members, the state of Georgia took steps to deny its tax benefits. Companies should focus on profits, not on values and virtues. Corporations should be soulless when it comes to the market for guns.

Or, advertisers like Bayer; Ruby Tuesday; Liberty Mutual Insurance; The Atlantis Paradise Island resort; Office Depot; Jenny Craig; Hulu; Nutrish; TripAdvisor; Expedia; Wayfair; Stitch Fix; Nestlé; Johnson & Johnson and Miracle-Ear, who decided that Laura Ingraham's criticism of David Hogg, student spokesperson for gun safety, for his academic abilities, was a bridge too far. They apparently didn't want their corporate brand associated with such extreme views on gun rights.¹²

Then there are the attempts by a prominent Republican investor, Al Hoffman to insist that the Republican party regulate the sale of military assault weapons. Of course, the NRA then met directly with President Trump and got

¹² *Advertisers Bail as Laura Ingraham Goes on Vacation*, CBS: MONEYWATCH (Apr. 2, 2018, 12:04 PM) <https://www.cbsnews.com/news/laura-ingraham-advertisers-drop-show-she-goes-on-vacation/>.

him to back away completely from any regulation of assault rifles.¹³ Still, Hoffman is trying to use political leverage to put pressure on gun manufacturers to get some soul.

Or, take the approach of Laurence D. Fink, founder and chief executive of the investment firm BlackRock, who is taking a more generally progressive message on corporate responsibility to provide CEOs room to act more responsibly.¹⁴ He informed business leaders that their companies need to do

¹³ See Alexander Burns, *Prominent Republican Donor Issues Ultimatum on Assault Weapons*, N.Y. TIMES (Feb. 17, 2018), <https://www.nytimes.com/2018/02/17/us/prominent-republican-donor-issues-ultimatum-on-assault-weapons.html> (“Al Hoffman Jr., a Florida-based real estate developer who was a leading fund-raiser for George W. Bush’s campaigns, said he would seek to marshal support among other Republican political donors for a renewed assault weapons ban . . . For how many years now have we been doing this—having these experiences of terrorism, mass killings—and how many years has it been that nothing’s been done?” Mr. Hoffman said in an interview. “It’s the end of the road for me . . . Republican elected officials in Washington and Florida have shown no significant interest in considering new gun restrictions after the Florida school shooting. The party, which has full control of both the state and federal government, has traditionally opposed virtually all new limitations on firearms. Mr. Scott has resisted pressure to back new gun regulations after the killing of 17 people at Marjory Stoneman Douglas High School in Broward County on Wednesday, though he said “everything’s on the table” in a television interview . . . I’m going to email every single donor I know in the Republican Party and try to get them on board,” he said. “We’ve really got to start a little movement here.” Hoffman’s reaction reminds me of the corporate divestiture movement in the 1970s, where university endowments, and other socially responsible corporate investors divested themselves of stock of South African apartheid supporting companies. We will not invest until you do something about apartheid. Congress, we will not invest in your campaigns until you do something about gun safety.”).

¹⁴ See Andrew Sorkin, *BlackRock’s Message: Contribute to Society, or Risk Losing Our Support*, N.Y. TIMES (Jan. 15, 2018) <https://www.nytimes.com/2018/01/15/business/dealbook/blackrock-laurence-fink-letter.html> (“It may be a watershed moment on Wall Street, one that raises all sorts of questions about the very nature of capitalism . . . In a candid assessment of what’s happening in the business world—and perhaps taking a veiled shot at Washington at the same time—Mr. Fink wrote that he is seeing “many governments failing to prepare for the future, on issues ranging from retirement and infrastructure to automation and worker retraining.” He added, “As a result, society increasingly is turning to the private sector and asking that companies respond to broader societal challenges.” . . . Part of Mr. Fink’s argument rests on the changing mood of the country regarding social responsibility. He contends that if a company doesn’t engage with the community and have a sense of purpose “it will ultimately lose the license to operate from key stakeholders.” . . . Until recently, companies like BlackRock have traditionally been passive investors and have done little to pressure the leaders of companies they invested in; in fact they were known for rubber stamping management’s plans. It was active investors who sought to hold companies accountable—either by agitating for change or by selling their shares to express their displeasure. Indeed, Mr. Fink has in the past denounced “activist” shareholders as too focused on the short term. “If you asked me if activism harms job creation, the answer is yes,” he told me back in 2014. Now he is changing his stripes. Despite Mr. Fink’s insistence that companies benefit society, it’s worth noting he’s not playing down the importance of profits and, while it’s a subtle point, he believes that having social purpose is inextricably linked to a company’s ability to maintain its profits. On that score, Mr. Fink and Friedman aren’t that far apart. “It may well be in the long-run interest of a corporation that is a major employer in a small community to devote resources to providing amenities to that community or to improving its government,” Friedman wrote in 1970, adding that this approach may make it easier to attract desirable employees along with “other worthwhile effects.” But he also added a dollop of reality to the debate. Noting “widespread aversion” to things like capitalism, profits and the “soulless

more than make profits—they need to contribute to society as well if they want to receive the BlackRock investments.

Mr. Fink has the clout to make this kind of demand because his firm manages more than \$6 trillion in investments through 401(k) plans, exchange-traded funds and mutual funds, making it the largest investor in the world, and he has an outsize influence on whether directors are voted on and off boards.¹⁵

A third example of impulses directed at corporations, to give them some community values, comes from their CEOs. The NYT has recently started a series on CEOs who may be trying to put some soul back into their corporations.¹⁶ Their first subject, Kenneth C. Frazier of the Merck Co., who famously resigned from Trump’s advisory committee after his refusal to condemn white racism in Charlottesville, VA, is quoted as saying he sees no conflict between shareholder interests, and interests of society at large. Frazier’s cause is the death penalty.

Ironically Merck does not seem to have many qualms about high priced drugs. As opposed to Merck’s founding CEO, George W. Merck, who would argue that doing right by the patient was at the heart of their business, and if they did that, profits would follow,¹⁷ Merck now takes the view that pricing of drugs is driven by market forces alone. That is not to say that as a matter of corporate law, CEOs aren’t severely restricted by market forces when it comes to setting the price of drugs. If they did not they might be subject to takeovers, or shareholder law suits. The market demands they put shareholder interests above patient interests. So, giving the corporation a soul will take some courage.¹⁸

corporation,” he wrote that social responsibility is “one way for a corporation to generate goodwill as a byproduct of expenditures that are entirely justified in its own self-interest.”)

¹⁵ Id.

¹⁶ David Gelles, *Merck C.E.O. Ken Frazier on Death Row Cases and the Corporate Soul*, N.Y. TIMES (Mar. 9, 2018) <https://www.nytimes.com/2018/03/09/business/merck-ceo-ken-frazier-on-death-row-cases-and-the-corporate-soul.html>.

¹⁷ Merck, *Medicine is for the Patient, Not for the Profits* (n.p., n.d.) <https://www.merck.com/about/our-people/gw-merck-doc.pdf> (a published speech given by George W. Merck at the Medical College of Virginia at Richmond on December 1, 1950. Last visited on Apr. 8, 2018).

¹⁸ Even legal prescriptions on corporate behavior don’t seem to be effective in giving Pharmaceutical companies much soul. Repeated caught engaging in off label marketing, Big Pharma simply pays the fines and admits no wrongdoing. See Zwier, *A Failure of Remedies: The Case of Big Pharma*, *supra* at note 7. (even after the Yates memo, (a memo that insisted the US not accept settlements without admission of guilt), since the Trump administration, little has change in exacting admissions of guilt). Cf. Evan Sweeney, *Impact of the Yates Memo*, FIERCEHEALTHCARE (Dec. 27, 2016) <https://www.fiercehealthcare.com/special-report/impact-yates-memo> (citing a brief rise insistence on criminal liability).

Finally, there is the attempts by corporations to use charitable foundations to try to at least create an impression of corporate responsibility and care for the community. The Ford Foundation is a prominent example, though usually the actual foundation is set up by the individual, separated from the business side of things. And so, there is the Carnegie Mellon Foundation, The Rockefeller Foundation, and the Gates Foundation, as prominent examples. These foundations sometimes buy newspapers, or fund universities, as ways of appearing to give back to the community.¹⁹

To Polanyi, the way to counteract the eventual demise of democracy was through a strong labor movement in the community. Labor could be given the tools to embed the corporation in the community. Labor could bargain for wages, but also bargain for work conditions, and schools, and opportunities of its children, and for environmental protections-- that it be clean and safe, in order to best protect the community interests, in the face of forces bent on profit maximization. But the labor movement in the US no longer carries the political weight it once carried.²⁰ Of course the ability of the company to move where labor was cheaper, and regulations and costs less onerous, has undermined Polanyi's Vienna solution. US international corporations move away to get better tax treatments. These corporations become even less connected to the community. They seem incapable of resisting the temptation to move jobs overseas, along with their cash and assets. Steel, coal, and other manufacturing business leave or cannot compete. Communities are affected.

What can be done to give the corporation a soul? . . . to imbed it in the community? . . . to enable it to be a socially responsible actor? It seems we are left with a variety of individual driven solutions, with limited effectiveness. Yet in combination they speak loudly that individuals in corporations shouldn't lose their own souls but speak and act in ways to call the collective company to stakeholders into account. In other words, it is the executives in the corporation give it its soul, or its investors/shareholders, who condition their investment on agreements that the company act responsibly in the community. Hedge funds like BlackRock may give companies the space to exercise its community

¹⁹ *But see*, Eduardo Porter, *When Corporate Giving is More About Getting*, NYT, Wednesday April 4, 2018, B1, (reporting that . . . Sifting through the donations to charity from 1998 to 2015 by foundations set up by the largest companies in the United States—those in the Fortune 500 or the Standard & Poor's 500-stock index—Marianne Bertrand of the University of Chicago's Booth School of Business; Matilde Bombardini and Francesco Trebbi of the university of British Columbia; and Raymond Fisman of Boston University detected a pattern of contributions to 1,087 charities linked to 451 members of Congress).

²⁰ Mike Collins, *The Decline of Unions is a Middle Class Problem*, FORBES (Mar. 19, 2015) <https://www.forbes.com/sites/mikecollins/2015/03/19/the-decline-of-unions-is-a-middle-class-problem/#54c23f3c7f2d>.

responsibilities and resist the temptation to use short term profits to excuse its soulless behavior.

The stakes are high. If we can't figure out how to give the corporation a soul, then Polanyi may be right. Governed by the myths and theories of unregulated capitalism, corporations will be a continuing destabilizing force on democratic principles and values. Important here is to recognize the relationship between democracy and rule of law and the corporation. There is a need in corporate board rooms for a recognition that sustainable liberty to transact and own businesses depends on the corporation having a little soul. If oligarch and dictators rule, corporate control and ownership are continually at risk.

And so, it is left to corporate individual decision-makers, whether they be CEOs, or advertisers, or board members, or investors, to insist that the corporation see itself as being embedded in the communities where it lives and works. They must not be silent or invisible but be socially responsible members of that community. Perhaps Polanyi provides an important justification and warning to corporate actors. Whether on the issues like gun safety, or on the high price of lifesaving drugs, the body politic is watching. Either corporations start acting more responsibly, or they will eventually share and or cause like in Polanyi's prescient views before WWII, the same fate as democracy. Without a soul, they lack "eachness" and its justifications in liberty that support their existence.²¹ And without souls, sooner or later, the corporate form of government, itself, may become targets of soulless politicians.

²¹ Hillman, *supra* at note 3, at 113–28.