

**“Capital” Punishment:  
For Corporations That Violate the Public Trust**

Jeffrey A. Miller

I see in the near future a crisis approaching that unnerves me and causes me to tremble for the safety of my country. As a result of the war, corporations have been enthroned, and an era of corruption in high places will follow, and the money power of the country will endeavor to prolong its reign by working on the prejudices of the people until all wealth is aggregated in a few hands, and the Republic is destroyed. I feel at this moment more anxiety for the safety of my country than ever before, even in the midst of war.

--- Abraham Lincoln, 1864

If America's sixteenth President were to return for a visit, he would find that the words he wrote in a letter to William F. Elkins (Lincoln, 40) were indeed prophetic. After nearly 140 years, the power of corporations in our society has been strengthened far beyond that which could have been imagined in Lincoln's time. The United States Supreme Court in 1886 conferred upon corporations the status of "personhood," thus providing a protection, which shields them from accountability and disclosure of actions that may be harmful to our society. Corporations have played a role in our political system -- through campaign funding, direct lobbying and even the choosing of political leaders -- with results that run counter to the peoples' interests. While considered *public* entities with public accountability, corporations have repeatedly acted in *secrecy* on matters that should require public input and scrutiny. As a result, wealth and power have been consolidated in the hands of a few.

How did corporations obtain this power? Is this the role that we envisioned for business entities in an economic democracy? In this paper, we will look at the history of corporations and their assumption of power that is incompatible with a free society. While we will consider a variety of views as to the proper role for corporate entities, the position of this paper should be clear. We need to reform the role of corporations in our country. We should consider placing limits on the duration of corporate charters, or conditions upon their renewal. States should exercise the responsibility that has always been theirs' -- the oversight of corporate activity. If the states are unwilling or unable to provide responsible oversight, we should consider removing

their oversight power, and federalizing corporate charters. Finally, if we are going to consider the corporation to be a person and afford it the same kinds of rights and freedoms that are extended to the individual, perhaps it is time to revise the methods by which we hold the corporate "person" accountable. We should impose the same kind of punishments that we have established for individuals. If a corporation is convicted in the courts for a violation of law, we should curtail its freedom to conduct business for a period of time. In the event of repeat offenses, the penalties should be increased. In those instances where a corporation severely violates the public trust, it should cease to exist. The corporate charter should be revoked, the assets seized and the corporation dissolved.

How and why were corporations formed? The origin of the corporation appears innocent in purpose. Monarchs and democracies alike chartered corporations to serve the public interest and accomplish a public good, providing a function that the state might not be able to perform. Ralph Estes writes in The Tyranny of the Bottom Line: Why Corporations Make Good People Do Bad Things, that corporations, "were created for a specific public purpose, to perform a task that individual citizens or the established governments could not do better" (22). Examples of such public needs included transportation, turnpikes, insurance and banking. The primary purpose was *not* to provide a return to the investors (although this was certainly recognized as a necessary incentive to provide funding for the corporation) but was rather, "to provide a *public* return, a public benefit" (23). This would eventually change during the middle of the nineteenth century when the return of profit to shareholders and the serving of their interests would replace the public good as the corporation's primary purpose.

As the establishment of corporate charters became more commonplace, the purpose of such charters related less to the public interest and more to private enterprise. As a result, there arose a concern that corporations could create problems for society and a demand to place

restrictions on the nature of corporate activity. Kevin Phillips writes, in his book Wealth and Democracy – A Political History of the American Rich:

The prominence of rich beneficiaries whetted public suspicions of the privilege that clung to the word “corporation.” Daniel Raymond, in his *Thoughts on Political Economy* (1820), the first general text on economics written in the United States, called corporations “detrimental to national wealth. They are always created for the benefit of the rich, and never for the poor.... The rich have money, and not being satisfied with the power which money itself gives them, in their private individual capacities, they seek for an artificial combination, or amalgamation of their power, so that it's force may be augmented.” (208)

As a result of these concerns, "Limitations imposed on corporate charters by state legislators included a time duration, usually twenty years or less, full liability of stockholders for corporate debts, a narrow interpretation of charters, and a reserve clause that allowed the legislature to amend any charter at any time for any reason" (Estes, 25). Charters had always been subject to revocation in the event that the state found itself able to perform the function for which the corporation had been formed, or in the event that the corporation operated outside of its chartered franchise. The Pennsylvania State Legislature addressed this issue in 1834, when it declared: “A corporation in law is just what the incorporation act makes it. It is the creature of the law and may be moulded to any shape or any purpose the Legislature may deem most conducive for the common good” (Grossman and Adams).

However, the power of the states to regulate or limit the activities of the corporation was mitigated by the tremendous growth in the U.S. economy in the nineteenth century, along with changes in technology and competition among the states, clamoring to stimulate growth and development along with the revenues generated from the corporate entities. Easterbrook and

Fischel write in The Economic Structure of Corporate Law, "Managers may incorporate in any state, no matter where the firm's assets, employees and investors are located. States thus must compete with each other to attract incorporations. Jurisdictions successful in the competition obtain revenue from franchise fees and taxes and create demand for the services of the local bar" (212). With numerous states to choose from, corporations soon found themselves courted with proposals that included an ease of restrictions as well as other attractive offers, all in exchange for a decision to incorporate in a specific state.

What happened to change the scope of the activities of the corporation? How did the corporation, an entity chartered by the state to serve the state's purposes, accumulate the kind of power that would effectively turn the relationship around, resulting in the corporation making political decisions and influencing legislation? The answer lies in an event and an institution: the Civil War and the United States Supreme Court.

The Fourteenth Amendment to the United States Constitution states:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any *person* of life, liberty, or property, without due process of law; nor deny to any *person* within its jurisdiction the equal protection of the laws. (Naljalian, 496)

The Amendment, considered a civil rights amendment, was passed shortly after the Civil War, with its primary purpose being "to safeguard newly emancipated blacks from unfair governmental treatment" (Naljalian, 496-497). Although the Union had won the war, there were numerous attempts (some by local and state governments) to limit the rights of former slaves. At the time of the Amendment's enactment, few individuals would have guessed that shortly thereafter, the "persons" that were provided with protection of life, liberty and property would include corporations.

In 1886, the U.S. Supreme Court took up the Case of *Santa Clara County vs. Southern Pacific Railroad Company*. While few historians may be interested in the details of the case itself, the Court's decision had far-reaching implications. On behalf of the Court, Justice Harlan wrote that the railroad company had experienced a violation of its rights. In the Court's opinion, Santa Clara County had violated the Fourteenth Amendment rights of the railroad, "imposing upon the defendant unequal burdens, and to that extent denying to it the equal protection of the laws" (U.S. Supreme Court). This interpretation came as no surprise to court watchers. According to Natasha N. Naljalian in Fourteenth Amendment Personhood: Fact or Fiction, Chief Justice Morrison R. Waite stated, prior to the opening oral argument:

The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person its jurisdiction the equal protection of the laws, applies to...corporations. We are...of [the] opinion that it does. (502)

Corporations would waste no time in taking advantage of the protection offered by the Fourteenth Amendment and sanctioned by the highest court in the land --a protection, notes Virginia Rasmussen from the Project on Corporate Law and Democracy, "bestowed well before most people in this country were considered persons under the same law" (1). The Amendment had been written with the purpose of guaranteeing equal protection and civil rights for former slaves. However, Marjorie Kelly, editor of Business Ethics Magazine and author of the book The Divine Right of Capital reports that, "In 1938, Justice Hugo Black noted that, of all the cases in which the Supreme Court applied the Fourteenth Amendment in the half-century following Santa Clara, 'less than one-half of 1 percent invoked it in protection of the Negro race, and more than 50 percent asked that its benefits be extended to corporations'" (163). This view by the Court that the corporation was entitled to the rights of "personhood" would be further clarified in

the next century. "In 1909, the Court ruled that corporations could be prosecuted for crimes...and over the last 20 years, the Court has held that the First Amendment guarantee of free speech applies even to corporate 'persons'" (Stewart, 40). The ability of the State to enforce its chartering authority over corporations was effectively eliminated. This set the stage for an unchallenged consolidation of wealth and power in the hands of corporations, their owners and executives.

"The high-water mark of U.S. wealth concentration and inequality," writes Kevin Phillips, "occurred in the quarter century before World War I, but precise official markers do not exist. A somewhat informed guess would put the zenith around 1901 or 1902. By this point, the heyday of the trusts and great industrial combines had bestowed huge wealth on a small handful while the farm holdings of rural America were still near the beginning of a recovery from their mid-nineties nadir" (122). Moreover, "The measure of the Gilded Age, beginning in the 1870s, was that by the 1890s the goliaths of U.S. business, railroading and finance had gained defacto control over many state legislatures, the federal judiciary, and the U.S. Senate" (xvi). The Senate was not yet elected by direct vote. Corporations, railroads and mining companies exercised considerable influence over the state legislatures, "partly to dominate their legislation, but just as important to get a lock on the U.S. Senate, the members of which (until 1913) were chosen by these very legislatures" (238). The ability to influence the choice of Senators and their resulting legislative agenda meant ultimately having a say in the matters of commercial ventures, reforms, government appointments and judicial nominations. However, those who exercised their influence did not anticipate that they would experience opposition in the form of Republican President Theodore Roosevelt. Suspicious of corporations and targeting the trusts, Roosevelt stated, "I believe in corporations. They are indispensable instruments of our modern civilization; but I believe that they should be so supervised and so regulated that they shall act for the interest

of the community as a whole" (Phillips, 307). Some reforms were accomplished during Roosevelt's two terms and the years immediately following (most notably the Clayton Antitrust Act, the establishment of the Federal Trade Commission and the direct election of U.S. Senators). However, the power of corporations was not limited in any significant manner. The reason is that there was no real accountability for the actions of the corporation. Supreme Court Justice Louis D. Brandeis referred to corporations as, "the Frankenstein monster which States have created by their corporation laws" (Morris).

The traditional model of accountability for the corporation holds that the corporate entity is a "profit maximizing unit" (Boatright, 219-220), accountable to its owners, meaning the stockholders who have invested in the corporation. However, the question we must ask is who really invests in the corporation and has a stake in its performance? Those who purchase stock are certainly making an investment. Yet, many would argue that stockholders are not the only investors. Ralph Estes argues that *stakeholders* make an investment comparable to stockholders. Employees and managers provide their skills, experience and an investment of time. Suppliers train employees to use equipment or apply new methods with materials; this is certainly an investment. Communities invest in infrastructure, for example roads and bridges, along with police and fire protection, all critical to the operation of the corporation. Customers invest when they make their purchase. Government and society supply a social structure and a system of government that provides incentives for investment, protection from foreign traders in the form of tariffs, and tax benefits (Estes, 4-6). Finally, our environment provides the raw materials from which we manufacture our products, as well as the utilities that generate power to run the equipment in our factories. All of these constituents make investments in the corporation and *hold a stake* in the outcome of these investments.

Many individuals do not believe that business has a responsibility to the stakeholders and instead assert that the corporation is only accountable to the shareholders. Milton Friedman, writing in "The Social Responsibility of Business Is to Increase It's Profits," states that the idea that an executive of a corporation has a social responsibility "must mean that he is to act in some way that is not in the interest of his employers" (34), i.e., the shareholders. Friedman believes that in a free society, the idea of corporate social responsibility is "a subversive doctrine...There is one and only one social responsibility of business - to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game..." (38).

Interestingly enough, Friedman seems to understand that the executive does in fact *act as an agent* for not only the shareholders, but also the employees and customers. However, he only recognizes this relationship in the context of the spending of money. Writing of the actions of the corporate executive, he states, "Insofar as his actions in accord with his 'social responsibility' reduce returns to stockholders, he is spending their money. Insofar as his actions raise the price to customers, he is spending customers' money. Insofar as his actions lower the wages of employees, he is spending their money" (34). Why is it that Friedman does not recognize the additional accountability to the community, government and society, and environment?

Ralph Estes' response is that Friedman is too narrow in both his definition of *profit*, as well as his allocation as to *who should benefit* from it. He writes:

The Bible asks, 'For what is a man profited, if he shall gain the whole world, and lose his own soul?' Here, frequently in other contexts, profit is used in a general sense to mean betterment, gain or benefit. Economists speak more narrowly of increase in resources or capital over a period of time. Accountants are more specific still, and usually mean the excess of revenues over expenses. Not very interesting so far, but what happens when we ask, 'profit for whom?' ...Does maximizing profits mean only

maximizing gains to stockholders? Or does (should) it mean maximizing gains to all who make the enterprise go? (7)

Additional support for the idea that the shareholder does not possess *absolute primacy* over the interest of the investments in the firm is found in the 1932 book, The Modern Corporation and Private Property, by Adolf A. Berle and Gardiner C. Means. Writing in the preface to the 1967 edition, Berle reminded his readers that in the original edition, "Dr. Means and I had pointed out that the two attributes of ownership -- risking collective wealth in profit-seeking enterprise and ultimate management for responsibility for that enterprise -- had become divorced" (xx). The fact that the owner of the capital (the shareholder) was not at all involved in the management of the risk of that capital and that their liability was limited to their investment only, meant that he or she had in effect, *surrendered* some control, and as a result could not expect their interest to remain primary.

This belief that *all* who hold a stake in the activities of the corporation should be able to hold the corporate entity accountable is what lies at the heart of efforts on behalf of corporate reform. In addition, proponents of reform claim that while the problems at Enron, WorldCom and Arthur Andersen are recent in nature, this by no means indicates that we are experiencing an isolated phase of wrongdoing. Corporate misconduct has existed for as long as we have had corporations. In the late 1800s with the Robber Barons as well as the Union Pacific Railroad scandal, President Rutherford B. Hayes was quoted as saying that America, "is a government of the people, by the people and for the people no longer. It is a government of corporations, by corporations and for corporations" (Korten, 65). The Teapot Dome Scandal, involving the secret leasing of naval oil reserve lands to private companies, broke in the 1920s. The Foreign Corrupt Practices Act was enacted in 1977, as a response to acts of bribery, corruption and fraudulent recordkeeping among corporations. Anyone who was listening to the news in the last half of the

twentieth century will recall stories involving savings and loans institutions, Michael Milken, Union Carbide and the Dalkon Shield.

It is tempting to suggest that the solution lies simply in weeding out those who act improperly on the corporate stage. However, as Barbara Ley Toffler states in her recent book Final Accounting - Ambition, Greed and the Fall of Arthur Andersen, "It's not the bad apples, it's the rotten culture" (229). While many believe that identifying and punishing wrongdoers sends a message to those who are also poised to engage in corporate mischief, "This, I believe is wishful and dangerous, if simple and efficient, thinking. It precludes examining destructive corporate cultures and instituting real change" (229).

In the wake of the recent corporate scandals, Congress in 2002 passed the Sarbanes/Oxley bill. Among the many requirements in the bill, are that the partner from the external auditing firm must rotate out of their responsibility at least every five years. The external auditing firm must work for the audit committee of the corporation's Board of Directors, not for management. In addition, loans to board members are prohibited (Baldwin Wallace). These changes are welcome and will help to modify the environment in which corporations report to those that are charged with monitoring their business activity. However, the requirements represent an inadequate approach to addressing the problems of the misuse of corporate power.

Recognizing the contributions of the various stakeholders to a firm's success, as well as the numerous relationships between them, we must put into place an improved method of governing the corporate entity. Writing in the article "Rethinking Assumptions Behind Corporate Governance," Margaret Blair states:

Governance systems, broadly defined, set the ground rules that determine who has what control rights under what circumstances, who receives what share of the wealth

created, and who bears what associated risks. Governance systems thus help determine how decisions are made about spending resources on building organizational capabilities, and how management and employees are evaluated and compensated. (17)

Some reformers advance the idea that all corporate charters should be limited in duration. Such a proposal would have far-reaching property redistribution and ownership rights implications, and as such is beyond the scope of this paper. However, the article "Who Says Corporations Have Eternal Life?" reports:

The Community Environmental Legal Defense Fund has drafted an amendment to the Pennsylvania corporate code that would limit the charter of every corporation to 30 years. Upon expiration, corporations would be required to submit a request for renewal, listing activities performed in the public interest. The request would be published in ten newspapers, after which the secretary of state would hold a public hearing. Renewal might be denied if the secretary of state found it was not in the public interest. (5)

In any event, States should reclaim their oversight responsibility for corporations that have been granted a charter under their authority -- a responsibility for which it is being compensated. The corporations provide a source of direct income to the state in the form of taxes, and indirectly through payments to other business for goods and services. In addition to the passing of legislation related to the corporations' purpose and governance, the states have another card with which to play -- the denial of business contracts. "Wayne Township of Pennsylvania in 1998 passed a 'three strikes and you're out' ordinance, preventing any corporation from doing business in the township if it has a 'history of consistent violations' -- defined as three violations

[state, local, or federal statutory or regulatory law] over the past 15 years" (Who Says Corporations, 5).

If the states are not able to fulfill their responsibility to oversee the behavior of corporations, the federal government could assume the oversight of corporate compliance on issues of governance, operation and other stakeholder issues. With it currently unnecessary for corporations to operate their production facilities or locate their headquarters in the same state as they are incorporated, firms are inclined to obtain their corporate charter in a state where oversight is as non-intrusive as possible. A single federal standard would prevent companies from avoiding their responsibilities and would prevent a "race to the bottom" for lax state accountability standards. The winner in this race is Delaware, which "allows companies to include provisions in their charter that limit directors' liability if they fail to take their responsibilities seriously. Delaware has also refused to pass a 'stakeholder statute,' which would allow directors to consider the interests of employees and other stakeholders when important decisions are made" (Greenfield, 6).

In the event that the corporation violates the law, and with the Supreme Court having decided that the corporation is a "person," we should consider restricting the freedom of movement (that is, the ability to transact business) of the corporation for some period of time. Just as an individual experiences limitations in their freedom when he or she has committed a crime, the corporation should experience this as well. The fact that this restriction impairs the ability of the corporation to earn an income is not unlike the effect on other persons. Those choosing to invest in a corporation would be advised to do so wisely, and with the diligence that will make such limitations in their ability to earn a return on their investment less likely. With the knowledge of the law and the impact known of the failure for a corporation to comply with the law's requirements, the investor need not be at a disadvantage. In fact, a side benefit will be

that conscientious and frugal investors will seek out those corporations with a positive record on issues related to financial accountability, governance, environmental compliance and other stakeholder concerns, with a likely result of improved financial return.

In severe cases of corporate malfeasance where the public trust has been violated, the state should exercise its option to revoke a corporation's charter, followed by the dissolution of assets. (Of course, in this type of "capital" punishment" no lives are lost.) A procedure should be established, whereby the impact of the corporation's actions can be assessed, and in the event that the corporate charter has been abused or misused, the charter will be revoked. Remember that the corporation operates with the permission of the state. If the operation of the corporation occurs in contradiction to the interests of the community, the corporation should cease to exist. Nothing proposed here would require a change in the law, but would simply mandate that those government entities that have been charged with the oversight of corporations perform that oversight and act appropriately to hold errant corporations accountable.

There will be arguments against such an approach to corporate accountability. Those who consider these suggestions to constitute extreme measures should take into account the extreme results that have been experienced in our country due to the assumption of power by corporations. The subversion of state governments, amassing of wealth and privilege in the hands of a few, and the placing of the corporate interest ahead of that of the community in matters of worker and consumer safety are indications of what Ralph Estes has aptly titled the "Tyranny of the Bottom Line" (xii).

Skeptics ask if we will be able to compete in the global economy if we embrace these changes in governance and accountability. It might be more appropriate to ask if will be able to compete if we do *not* make these changes. A Fall 2002 "Eye on Europe" column in Business

Ethics Magazine mentioned that the UK government has appointed a new Minister for Corporate Social Responsibility (9). Also mentioned, was a newly introduced bill in the UK Parliament:

1) making environmental and social reporting mandatory; 2) requiring directors to consider environmental and social impacts and making them liable if they are negligent in failing to do so; 3) creating a Corporate Responsibility Board to do investigations and conduct random audits; 4) establishing multiple penalties, including imprisonment, fines, suspension from stock exchanges, or suspension of operations. (9)

Certification of ethical workplace standards is also becoming popular in Europe. The "TrendWatch" column in the Spring 2003 issue of Business Ethics Magazine states that, "Companies certified under the SA8000 ethical workplace standards get preferential access to local government contracts in a region of central Italy, under a new law passed there" (5).

There is no guarantee that an adoption of this approach to the issue of corporate accountability will ensure that we remain competitive. However one must ask, since *when* have we sought a guarantee, in choosing a path that we believe will lead us to an improved world? Are we seeking assurances of our success, as we attempt to correct the kind of imbalance of power and privilege where a rising tide only lifts some boats? It is safe to say that having grown accustomed to their comfortable position, corporations will not look kindly toward any efforts to make them more accountable to the needs of stakeholders; yet, we will require this of them. Our commitment to democracy, in this case *economic* democracy, requires no less of us.

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