

REVOLUTIONIZING CORPORATE LAW

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THE TITLE OF this session is "Revolutionizing Corporate Law." But I believe that rather than revolutionizing corporate law, we must revolutionize the Constitution. Let me explain.

Corporations have successfully claimed an enormous array of human rights, of people's constitutional rights -- such as freedom of speech, due process, equal protection. And law and culture treat corporations as private entities.

There are two consequences: first, corporate managers wield our Bill of Rights -- which means they use the Constitution to turn the coercive force of our local, state and federal governments against us. Second, *defining the corporation* is removed beyond the authority of the American people -- outside the reach of public, democratic processes.

What IS the corporation which governs us today? The corporation is not a market mechanism, but a political force. Its purpose is to concentrate wealth and power, in order to define work; to dictate investment; to choose technologies, to design whole systems for production and delivery of people's basic needs (for example, energy, health care, transportation, and food); to fashion the nation's relations with other countries, the nation's role around the world.

In other words, corporations define this society and, increasingly, the Earth. Giant corporations govern.

That's what they DO. Their managers and directors make private decisions which in an authentic democracy would be made by the people through democratic processes not dominated by a wealthy, propertied few. Corporations which usurp the rights of persons and function as private governments are, by definition, denying people's basic rights, including the right to govern ourselves. This is what giant corporations are designed to do, and they do it well.

So asking corporate leaders to be less oppressive does not undo what corporations are designed for. Investing years in regulatory struggles to set "acceptable" levels of corporate poisoning does not undo what corporations are designed for. Regulating corporate buying of elected officials or union activity, or establishing voluntary "codes of corporate conduct" or "patients' bills of rights," does not undo what corporations are designed for. In fact, all such efforts keep more people from seeing that property rules, not people.

What should we NOT do?

If we focus on one harmful corporate behavior at a time we miss seeing that such behavior is not an isolated thing, but part of the broad corporate invasion into our self-governance, enabled and validated by our culture. For example, when corporations inject great sums of money into our elections and law-making, when they make sure a policy debate has been framed long before it comes before the public, they are using the tools of corporate rule that are protected by law.

What we should do is be intentional about understanding the essence and purpose of corporations, and craft goals and strategies accordingly.

Let me describe two examples.

The Abolitionists did not spring from out of the blue in the 1820s with a clear understanding of how to frame their work. They could, after all, have ended up demanding a slavery protection agency -- you know, the equivalent of today's Environmental Protection Agency -- to make slaves' conditions a little less bad. They could have persuaded their supporters to back a slave owners' voluntary "codes of conduct." They could have sought authority for defenders of slaves to bring lawsuits on slaves' behalf.

Over the course of two generations, from 1820 to 1860, the many people who considered themselves Abolitionists engaged in an extraordinary, vigorous process towards defining their goal. They invested time and energy defining the problem and then fashioning appropriate remedies. And here's how they ended up.

- They defined slavery as a fundamental denial of basic human rights.
- They accused the United States Government and public officials of complicity in this denial of rights.
- They denounced the Constitution, and openly violated federal and state laws by aiding runaway slaves.
- Slaves themselves revolted and escaped. Judges and juries openly supported the growing Abolitionists' defilement of the law of the land.

In other words, their ideas of "remedy" centered around changing how the nation understood slavery so that popular organizing could challenge not only slave owners but also the makers and enforcers of law, and change the Constitution.

By the time the bloody Civil War offered the opportunity, they had built a political movement skilled at and characterized by defiance, and with the clout to get their three constitutional amendments enacted.

A generation later saw the flowering of the Populist movement. Farmers had organized around the reality that they were beholden to the merchants who sold them seeds and who bought their crops, and to the banks that loaned them money. So they started off forming cooperatives, pooling their resources to borrow money, buy supplies and market their products. As they gained power, the banks refused to lend them money. Realizing that they did not understand money, they undertook to study it.

What they came up with were not lending regulations which banks and merchants had to obey; not voluntary or compulsory codes of conduct, but something else. Their investigations and discussions revealed that their government printed money and gave it to the banks, which then sold it to the people. Their solution was to eliminate the banks, so that people could, for example, go down to the post office and get loans at pretty much no interest. They said: it's our government, it's our money. Why can't we decide what to do with our money?

Provoked by the oppression they were experiencing in their communities which they had traced back to banking and other corporations, they set out to challenge the corporate state which had been making the rules of property, contracts, commerce and money. They realized that they wanted to define the system, and no longer let the system define them.

For this purpose, they built what historian Lawrence Goodwyn called "the largest democratic mass movement in U.S. history."

My purpose in offering these two examples is to indicate that there have been occasions when people came together to analyze their common problems, and came up with solutions designed not to just make their conditions a little less bad, which did not just ask their oppressors to be a little less oppressive.

Instead, people mobilized to eliminate the *source* of their problems and their oppression.

Let's return to the title of this panel: "Revolutionizing Corporate Law." Corporate law, as far as I can tell, refers to internal corporate governance. So when lawyers and politicians talk about corporate law they are not talking about the relationship between corporations and the sovereign people in a democracy. They are talking about the relations among corporate directors, managers and shareholders. And maybe sometimes with the suppliers also. Not about the workers, because workers are basically a cost, a liability, and anyway, workers have no constitutional rights a corporate employer is bound to respect. Not about the broader community, for the same reason.

Just pick up some corporate law books. One of my favorites is Easterbrook and Fischel's *The Economic Structure of Corporate Law*. They are pretty clear:

. . . a corporation is a complex set of explicit and implicit contracts. Corporate law enables the participants to select the optimum arrangement for the many different set of risks and opportunities that are available in a large economy.

Here is another quote from the same book:

The corporate code in almost every state is an "enabling" statute. An enabling statute allows managers and investors to write their own tickets, to establish systems of governance without substantive scrutiny from a regulator. The handiwork of managers is final in all but exceptional or trivial instances. Courts apply the "business judgment rule," a hands-off approach that judges would not dream of applying to the decisions of administrative agencies.

Elected legislators write these enabling statutes, [1] like they write labor, environmental, tax, health and other laws. They live in this corporate culture, so they are shaped and driven by the culture's underlying assumptions and values about how things must work. And they are instructed by the rule of law; by judicial interpretations of the Constitution regarding property and personhood, contracts and commerce. These interpretations have turned the corporation into a private entity, defined "decision-making" as a corporation's private property; and enabled corporations to deny the rest of us our most fundamental rights.

Elected officials -- along with newspaper publishers and other pillars of our communities -- have been taught that the people who run corporations have the constitutional authority to direct "their" resources, to dictate "their" investments, to choose "their" technologies, to order "their" workers, to fix elections, to write laws -- to do pretty much what they want, however they want it. That's what this "enabling" stuff means. That's "the handiwork of managers" which judges are not to trample upon.

So the work of people today yearning to be free and self-governing is to challenge the basic nonsense and distortions masquerading as eternal truths -- as slaves and Abolitionists did with slavery, as Populists did with money and banks. Today we must challenge the nonsense that the corporation is private, that the corporation legitimately wields any rights, much less We the People's constitutional rights.

We need to see that if an artificial entity -- a mere creation of law -- is empowered with the constitutional rights of human persons, then we human persons will simply not be able to govern ourselves. That when corporations are empowered with the constitutional rights of human persons, there can be no consent of the governed. No democracy.

And we need to see that our public officials are complicit in this generations-old usurpation by men of property and their corporations.

If we define our problem as men of property using the Constitution, and therefore public officials, the courts, police and armed forces, to deny us our fundamental rights, then the solution is clear. We the People must defy the illegitimate authority of corporations to govern. We must contest and replace public officials who enable corporations to compel our obedience.

Where can we look for help? Well, the courts have played a major role in denying human rights, worker rights, self-governing rights, and in bestowing power and authority on property and wielders of property. Our state and national legislators have also been denying or giving away the people's authority since 1787. A powerful corporate culture and a rule of law have been miseducating people, misdirecting the nation's labor and wealth, colonizing people abroad and destroying the Earth's natural systems.

So our collective task is to create a lively ferment throughout our culture, and characterized by defiance to unjust laws. Our task is to educate and organize ourselves to such an extent that people can force legislators and judges, mayors and presidents, to change the law of the land. The way to do this is not by legitimating regulatory law by pretending it can solve our problems; not by asking more corporate leaders to please cause a little less harm; not by tinkering around the margins of corporate behaviors.

We need to launch escalating challenges to illegitimate corporate authority and to the public officials complicit in corporate usurpations.

As Guild lawyers, you represent individuals, unions and other organizations in disputes with corporations and with governments. You can help your institutional and individual clients contest corporate claims to rights; and challenge public officials' complicit in the corporate-plus-government denial of your clients' rights.

You can work with many different people and organizations to nurture a political movement to strip property of its power to deny fundamental human rights, and to elect public servants trained by this movement to understand that in a democracy, the people -- not property organized in the corporate form -- must govern.

NOTES

1. See "Corporations for the Seventh Generation," "Wrong Turn in Ohio," "The Corporate Crunch in Vermont," and "A Quick Look at What Happened in New Mexico" for more information on corporation codes.