

People v. Profits: A False Dichotomy?

An interview with Robert C. Hinkley of Jones Day

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Robert C. Hinkley, developer of the Code for Corporate Citizenship, is a corporate attorney and currently a partner of the international law firm of Jones Day. He has practiced corporate law for over 20 years and has spoken and written on the topic of corporate social responsibility during his recent time away from practice.

Mr. Hinkley has proposed adding 28 words to the existing duty of directors, which is to make money for shareholders according to the doctrine of shareholder primacy, and thereby creating a legal duty for corporations to take into account the social effects of their actions. He was the sole incorporator of License to Kill, Inc., a corporation organized under the laws of the Commonwealth of Virginia. The company plainly admitted in its certificate of incorporation that its objective is to generate profit at the expense of the health of its customers and society at large.

Q: For those who do not know or who have little exposure to this topic, what is corporate personhood?

A: “Corporate personhood” is the short way in which some anti-corporate activists refer to the fact that corporations have become entitled to the rights of real people protected by the Constitution, including the right to Due Process and the right to Equal Protection. They argue this was a mistake and should be overturned (in reference to Santa Clara County v. Southern Pacific Railroad Co., 118 US 394 (1886)).

Q: What does Due Process and Equal Protection for corporations mean, both literally and practically?

A: It means a number of things. On the Due Process side, it includes the right to a fair trial. On the Equal Protection side, it prohibits government from passing laws directly against one company, but not its competitors.

Q: Did the Framers intend to have companies hold a claim to these sorts of rights?

A: Probably not. At the time of the framing of the Constitution, there were very few corporations in America and none

resembling the big multi-nationals that we have today. However, there are lots of things that were not contemplated by the framers which now read into the Constitution – and rightly so. Extending Constitutional rights to corporations was almost certainly bound to happen. When faced with the issue, the Supreme Court essentially had to determine if corporations should be afforded the Constitutional protections available to people, or should government be able to set up a separate system of justice for corporations - one where corporations had no right to Due Process and Equal Protection. The first question [the Supreme Court] probably asked was, “why should people give up these rights when they put their property into a corporation”? The second question they must have faced is, “did they want government to be able to create chaos in the business community by passing laws which otherwise denied Due Process or violated Equal Protection”? This was probably enough. They decided to extend these rights to corporations and, until Americans move to amend the Constitution to specifically deny these rights, I think rightly so.

Q: With regard to corporate personhood and corporate social responsibility, can you briefly highlight some of the work you are most proud of?

A: I think corporate personhood is a non-issue which takes away from something more important: the discussion of what makes corporations violate the public interest, and how we can we make it stop. If I have contributed anything to this discussion it is that I have used my background as a corporate lawyer to point out that all corporate abuse of public interest has a common source: the duty of directors to make money for shareholders. Then, I went the extra step and suggested a solution. This solution is based on the teachings of W. Edwards Deming, Peter Senge and others, and it attacks the problem at the source and is capable of being understood by everyone from the chairperson of the board right down to factory floor employees on their first day of work. I am proud of this, but I hope not so proud that when someone comes along with a better solution, I don't get behind it.

Q: You have said that corporations have “good people” acting in the pursuit of the goals of other “good people.” Taking this into consideration, where does the process go

afoul when certain corporations disregard their social responsibilities?

A: Corporations of any size are made up of specialists. Some people sell, some manufacture, some do the bookkeeping and finance, some advise on the law. From the first day they enter the door of their corporate employer, all employees know that their jobs are to help the company make money. They also quickly learn that the company hires other specialists/experts to do the jobs that they are not doing. They also learn that if they are not doing their job well, the company will replace them with someone who will. Too often in this system, employees end up doing their jobs in a way that results in collective action that abuses the public interest. The interesting thing is that, when this happens, it is usually impossible to blame any one employee. They've all just done their job, helping the company make money, and no one is responsible for the harm that has been caused.

Q: How does this compare/relate to your experience as a corporate attorney working for a large firm?

A: Law firms tend not to abuse the public interest in ways that big corporations do. First of all, they are much smaller in terms of the number of people working for them and the amount of capital behind them. Big corporations are places where sometimes thousands of people work collectively backed by billions of dollars in capital. When this happens, more damage can be done to the environment, human rights, the public health and safety, the dignity of employees and the welfare of our communities in one afternoon than the average law firm will do in a hundred years. That being said, law firms can be pretty rough on their employees, especially young associates.

Q: You have suggested the "28 words" to add to the Corporate Code (Doctrine of Shareholder Primacy). Can you briefly explain what these words are and how they will affect corporate social responsibility?

A: Under existing corporate law, it is the duty of directors to run the business in a way that makes money for shareholders. I have suggested a code for corporate citizenship that would add 28 words to this duty. They are "But not at the expense of the environment, human rights, public health and safety, dignity of employees, or the welfare of the communities in which the corporation operates." The duty of directors to make money drives all corporate action. The idea behind the "28 words" is to balance this obligation with a higher duty not to damage the public interest in the pursuit of profits. For too long we have assumed that the two concepts are mutually exclusive. They are not, and the sooner we realize this, the better off mankind will be.

Q: Most people hope corporations consider the wide range of obligations that the broad terms of "28 words" contemplates. But, because of the general terminology, does this create an unclear duty for corporations? Could opponents claim their duties for broader social responsibility are unclear?

A: Using broad terms is not necessarily a bad thing. It eliminates really bad behavior and makes people cautious around the edges. I'll give you an example: I am a securities lawyer. The foundation of the federal securities law is full and fair disclosure by those trying to sell securities or whose securities are traded in public markets. The baseline liability standard of those laws is contained in Rule 10B-5, which states that a seller of securities may not use a false or misleading statement or omission of a material fact in connection with the sale of a security. These are broad terms, but we all recognize that you can't tell a buyer that a company's profits are going up when in fact they are going down and you can't fail to tell the market that the company is about to lose its license to do business. Short of egregious examples of false and misleading conduct, there are a number of areas where behavior is questionable. Here the lack of specificity in the law tends to make corporate executives more cautious. The consequence of this is that the securities law becomes largely self-enforcing. Of course, there are some who will test the grey areas. When they do and investors are hurt as a consequence, it is up to the private bar and our securities regulators to see that they pay the price.

Q: It seems there are often trade-offs between economic gains and social costs. At what point do we say it is okay to pursue profits at the expense of, perhaps minor, social interests?

A: Why do there have to be trade-offs? Has mankind lost its ability to imagine and innovate? I don't think so. The question we should be asking is not how much corporate abuse of the public interest we are willing to tolerate, but when we want it all to stop. There is nothing written in the laws of physics of the universe that profits must come at the expense of the public interest. That is a curtain drawn by those who want us to believe that we won't get the benefits of business if we don't allow them to keep polluting, damaging the public health and violating the dignity of their employees. This curtain keeps us from recognizing that profits and protection of the public interest do not have to be mutually exclusive. It also keeps business from having to search for solutions to the problems they create, a cost they would rather avoid. Let's draw back the curtain and let the light shine in. We should set a date for business, telling them when we want their destruction of the public interest to stop. This is not achievable by tomorrow, next month, or even next

year. But, it is achievable by some date in the future, say 15 years. If we have solved these problems by then, future generations will owe us a great debt. However, we will only solve these problems if we require business to look for the solutions that are possible.

Q: Can you explain License to Kill, Inc., and what this incorporation proved?

A: License to Kill, Inc. is a duly organized and validly existing corporation under the laws of the Commonwealth of Virginia. Its certificate of incorporation was based on the certificate of incorporation of a big tobacco company whose purpose clause states that its purpose is to engage in any business permitted under the laws of Virginia. Licensed to Kill's purpose clause says the same thing, but adds the following words: "Including but not limited to the manufacture and marketing of tobacco products in a way that kills more than 400,000 Americans and 4.5 million other people every year." Incorporating L2K was a way of showing how corporations are formed and operate under state sponsorship. In this regard, the state also provides certain benefits, including, limited liability for investors. The purpose of forming L2K was to raise public awareness and get people to start asking why should state governments be granting these benefits to organizations that destroy the public interest, even kill people. The point is that governments should only be allowing companies to be formed on the condition that they not be used to harm the public interest.

Q: In your address on the Virginia capitol grounds, you stated: "It is important to recognize that none of this damage would occur if not for the assistance provided by our state governments. Laws passed by state governments provide for the formation of corporations, license them to operate, and grant their shareholders immunity from liability." Is legislation the most effective way to restructure the system and make change that will be effective?

A: No and yes. Legislation that tries to control corporations once they have been created to pursue only their own self interest will never work. That is what we have been doing for more than 150 years. The unbalanced duty to make money is too strong. Corporations of this kind will always find ways to circumvent attempts to curb their pursuit of profit. Lobbying, legal hairsplitting - taking aggressive positions challenging regulators - and jurisdiction shopping - moving plants and jobs to places where the regulation is more lax - are examples of this. But legislation is needed to change the "corporation" to balance its pursuit of self-interest with a duty to the public interest.

The sound of this suggestion scares many Americans. They fear government is infringing on corporate freedom. They don't want to have government telling them personally that they have an obligation to the public interest. They question the right of the government to require corporations to shoulder these obligations. These fears are not unjustified. Our American system of government is premised, above all, on the protection of freedom. But what those who harbor these fears fail to see is that they are different from corporations, and the law should recognize this difference. People are born with morals, a conscience and a sense of right and wrong. Corporations only know self-interest. An individual's ability to damage the public interest without breaking the law is pretty limited. But big corporations can do extensive damage without ever breaking the law. Finally, people are born with inalienable rights to life, liberty and the pursuit of happiness. Corporations are allowed to be organized under laws enacted for their benefit. They have no inherent rights - now I am sounding like an anti-personhood advocate. They only have the rights we give them. But if we are to give corporations these rights - which, in fact, we already have - aren't we entitled to be protected from them being used against us? A better question is what happens to our freedoms and rights if we are not?

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