Reinventing the American Corporation

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Abstract

The corporation is a work of fiction, a legal entity organized to benefit a group of stockholders, employees and customers. It offers limited liability to its owners, the stockholders, great flexibility to its managers, and (when in competition with other companies) a cornucopia of goods and services to its customers at low prices.

The U.S. corporation is primarily organized to directly benefit its *stockholders* through dividend payments and/or rises in the corporation's publically traded stock value. There is no direct mechanism to benefit its customers, employees and the public. If its employees, customers and the public happen to benefit from the corporation, this occurs through the natural workings of the free market system, *ala* Adam Smith's *Wealth of Nations* (Smith, 1776).

The public benefits from a corporation's operations through the corporate payroll, new products offered by the corporation, purchases from vendors, and from low prices resulting from aggressive competition. Employees benefit from their salaries, although the salary levels are established through a competitive process in the labor market. Employee benefits are much like salaries, set through labor market competition. Corporations may sponsor civic events, artistic productions, humanitarian causes, and television productions, but they usually want recognition for it, and the internal justification for the expense is as a form of publically promoting a good corporate name. Anonymous corporation sponsorship of such an event is rarely known, as it carries no benefit back to the corporation's profitability. (Bakan, Business as Usual, 2004) Worse, any publically-traded corporation that actually undertakes social programs for their own sake may be sued under a key Supreme Court decision, *Dodge v. Ford (1916)*, in which the Court declared that all corporate profits belong to the shareholders, and could not be disbursed arbitrarily by any executive. (Bakan, Dodge v. Ford, 2004)

The modern American corporation often carries with it a burden of undesirable social ills, for example, massive layoffs; environmental costs; plant closings; seeking the bottom line in labor costs; unwillingness to engage in apprentice-level training of new employees; eager to dismantle or enfeeble labor unions; avoiding taxation when and where possible; buying off legislators; pushing toward more privatization of government services; producing vast wealth inequities; lobbying to remove regulation; and always striving toward monopoly positions in their market arena (Bakan, Business as Usual, 2004) (Stiglitz, 2012) (Clements, 2012) (Lessig, 2011) (Hartmann, 2010) (Nace, 2005).

We claim that many of these negative side-effects of corporations are an indirect consequence of the relatively weak U.S. laws governing corporate structure, and its heavy dependence on *laissez-faire* free-market economic theory. The free market system is often the most efficient, but not always the most socially beneficial, as Adam Smith himself pointed out. We also claim that by revising the corporate charter process through suitable federal legislation, many of these ills can be corrected. The perceived need for complicated government supervision and regulation to protect employees and the public could also be reduced.

In short, we propose that every large corporation operating in the United States carry a second corporate board, which we'll call a *supervisory board,* with management hiring/firing power, and power to review and possibly veto any action proposed by the usual *management board.* A third to a half of the supervisory board members are to be corporate employees, nominated and elected by the company's

employees. The remaining supervisory board members, and the entire management board would be nominated and elected by the stockholders. None of the supervisory board members may also serve on any management board or other supervisory board.

This system of incorporation has been in effect in Germany since the Second World War. The trauma and economic collapse caused by that calamitous war stimulated a rethinking of how the nation's business climate should be shaped through corporate and labor law.

Germany's economic recovery after the war and the later successful merger with an impoverished East Germany has been a storybook miracle. The recent European crisis, involving an insolvent Greek economy, is on the verge of recovery, largely due to German support of the Euro through major loans to Greece and other EU countries on the brink.

A Look at the German Corporation

The modern German corporation was formed shortly after the end of the Second World War. The total defeat of Nazi Germany and the collapse of the old Junker corporate system provided a unique opportunity for that nation to to redesign its corporate legal structure, and not just rebuild its factories.

Edward Kaitz, in a 1994 paper (Kaitz, 1994), noticed the efficient manner in which West Germany was able to rebuild East Germany after the fall of the Berlin Wall, through massive assistance to the East Germans. To quote Kaitz:

> There is a substantial body of evidence that would support the claim that the German economy is one of the world's most efficient based on any measure of the "return on investment" made to its various stakeholders. Its labor force is the most highly paid in the world. Its economy is more oriented to international markets than any other nation in the world. German infrastructure, whether it be roads or the educational system, seems more closely geared to the needs of the individual than that of any other major industrial nation. In sum, its potential political extremism notwithstanding, Germany appears to work well for its various stakeholders. (Kaitz, 1994, p. 9)

More recently, Germany has surfaced repeatedly in the international news related to the European Union financial crisis. Greece is a member of the EU, is on the verge of national bankruptcy (as of this writing), and will most likely be bailed out through major loans from other EU nations, and from Germany in particular (European Union, 2012) (Davison, Goldstein, & Kenney, 2012).

Why, among the several major EU nations (France, Belgium, the Netherlands, etc.), has Germany so successfully weathered the economic storms, and continues to be among the most financially stable nation in the world? Its unemployment rate is now at 5%, from a peak of 8% shortly after the October 2008 banking crisis (Unemployment rates, 2012).

Not only is the German unemployment rate about half that of the United States, but that nation supports an efficient universal health care system, unemployment insurance, an elderly care system, and an excellent school system in which the children study and work hard on their lessons. In short, the redesigned German corporate system has not only proved to be effective in the usual business sense of profitability, but it has also supported a superb social organization, with low unemployment, excellent schools, and a vibrant economy.

So why is that?

Let us examine corporate governance and the apprenticeship program in Germany, which appear to be the key to Germany's prosperity. Of course, these merely scratch the surface of what is a very complicated, interlocking set of financial and legal systems upon which Germany's prosperity rests.

German Corporate Governance

We start with corporate governance in Germany, which is rather different than that found in America.

Kaitz describes the German plan as one of *inclusivity,* or *collaborative,* as opposed to arms-length *combative* transactions typically found in labor-management relations in the United States. These led to a general recognition of the interdependence of Germany's industry (*capital*), its work force (*labor*), and its banking system, and a need for institutional mechanisms to serve the needs of all three groups in a cooperative rather than a confrontational way.

A German corporation by law has two boards, a *management board (Vorstand)* and a *supervisory board (Aufsichtsrat)* (Kaitz, 1994, p. 9). Almost every company is required to support a *works council (Betriebsrat)* composed of representatives from the employees.

The supervisory board is required by law to draw a fraction of its membership from the corporation's employees. One third of the membership is required if the company has between 500 and 2000 employees, and one half if the company is larger than 2000 employees. The remaining seats on the supervisory board, and all the seats on the management board are nominated and elected by the corporate stockholders.

The supervisory board is the key *policy* formation body of the corporation. It is responsible for hiring and firing management-level employees, setting compensation levels within the firm, and for supervising the actions of the management board. It has review and veto power over management board decisions, beyond that of its direct personnel and salary management.

The management board is the *operational* arm of the corporation. It operates much as any American board of directors, within the constraints set by the powers of the supervisory board. It may set general corporation strategy, develop research, marketing and manufacturing plans, etc. But all these are subject to review and approval of the supervisory board. No secret maneuvers can be hidden from the supervisory board - its approval for major corporate actions, especially those affecting the welfare of the employees, must always be sought by management from the supervisory board.

Since part of the supervisory board's membership is drawn from the company's employees, it's clear that the supervisory board acts as a major constraint on corporate actions that might injure its employees.

The employee members are typically sensitive to the impact of the corporation on its communities. Thus the supervisory board has significant influence over the corporation's impact on its community neighbors, the school system, police and fire protection, hospitals, local tax policy, and more.

A third body in German industrial organizations is the *Betriebtsrat,* or *Worker's Council* (Kaitz, 1994, p. 10). German law requires worker's councils in firms employing five or more people. A worker's council is essentially a union, except that it may or may not be tied to a national union organization. The law also specifies the rights and responsibilities within the firm of its worker's council. Because of the employee representation on the supervisory board, there is typically a close relationship between the worker's council and that board. Thus every worker, from the floor sweepers up to the research scientist, has some influence over the policies and plans of his/her company.

Kaitz points out that this three-tier structure of works council, supervisory board and management board supports a system in which the German corporation not only is more supportive of the needs of its employees, but the employees are actively involved in promoting continual modernization and upgrading of German technology (Kaitz, 1994, p. 10). Rather than fighting automation in a vain effort to save jobs, a German union will work closely with its company to introduce automation, retrain its employees, and to share the enhanced profitability with all.

A company's supervisory board and its works council are also aware of the need to keep the company alive and profitable. It's a situation in which the company is a goose that lays golden eggs. No one wants to kill off the goose. Everyone wants to help the goose lay bigger and more valuable eggs.

For another view from the perspective of a modern German corporation, see the web page for the SGL Group, a German-based corporation that specializes in carbon products (SGL Group, 2012) (Healthcare in Germany, 2012). SGL does not mine coal for heating and electricity generation. It is a high-tech company with numerous products based on graphene, carbon nanotubes and other applications of the graphite form of carbon. Their web pages provide a company perspective on the German system.

More about the German Unions

The German unions - the worker's councils - are very strong, and represent virtually every German worker, often up through the ranks of skilled office workers and research scientists. At the same time, strikes almost never occur, because they are unnecessary. Issues between management and the unions almost never arise because both have agreed to work together toward a common cause - the success of the company tempered by the welfare of its employees. The supervisory board acts as a powerful advocate for the employees through its employee members and its relationship to the worker's council, but it is also fully aware of the business issues faced by the company.

If management is primarily aimed at maximizing profit for the stockholders (which is a reasonable goal, generally), their tools for achieving that are as powerful as those of any American corporation, but are tempered by the need to satisfy the supervisory board. Layoffs can still occur, but they have to be justified to the supervisory board, and the laid-off employees must be suitably compensated in some way.

A major difference is that a German works council does not consider itself an *opponent* of management, rather a *proponent* of the company's prosperity, along with the general prosperity of the company's employees. It has, of course, the ear of the supervisory board, which has the power to turn management around in difficult situations. But overt conflicts rarely surface. Even during hard economic times, these three groups work together to find a way to preserve the company, protect the employees as much as possible, and minimize the damage to the stockholder's equity. In short, these three groups comprise a team that works together to solve company problems without having to resort to a nuclear option of a company-wide strike, a plant closing or a mass layoff.

German Apprenticeships

German children attend school through age 16, when they may quality for a *Gymnasium,* essentially a university, or consider employment in a small or large company. The university-bound students will typically emerge from college into a well-paying technical or managerial position, and are typically sought-after by several companies. They are essentially in a free-market situation, though of course tied to their union within the company, if not part of management. Their salaries are determined by what a corporation is willing to pay, and can freely move from one company to another. Gymnasia graduates account for a small percentage of the German work force, although a highly valued and vital segment of the high tech companies.

At a somewhat lower skill level are the apprentices (Solskice, 1994). An apprentice contract is typically for 3 to 4 years, and is offered to a high school graduate who has failed to pass the *gymnasia* examinations. An apprenticeship may be offered to an older worker transferring from another company, but they are rare, since employees seldom transfer.

An apprentice works for the company at a reduced salary, typically about half that offered for a full-time employee doing the same job. The company agrees to keep the apprentice on the payroll for the period of the apprenticeship, but is under no obligation to offer full employment at its end. The apprentice is also free to "jump ship", before the contract ends, but very few do, for reasons explained later.

Once an apprentice has completed his contract, he/she is usually offered a full-time position with the company. He or she is free to seek employment with another company, but, again, the statistics show that very few go that route. An apprentice typically remains with the company until retirement, provided, of course, that the company survives that long. With retirement there is usually a pension plan of some sort that varies from company to company.

Why Isn't There More Mobility?

To an American, the question is why doesn't a German apprentice seek employment with another company, once he or she has received all that training? Or before the end of the training period? Surely one's income could be increased by going into the general employment market?

A related question is why do so many companies train apprentices? Consider the companies with 500 to 1000 employees. There are 372 of them. Only 0.5% (one out of 200) of these companies have no apprenticeship program (Solskice, 1994, p. 37).

There is a significant cost to a company in maintaining an apprentice program. For example, a typical company with 1000 or more employees in 1980 spent DM14,310 per year per apprentice, of which the apprentice received DM8,944 in salary. That company will have spent DM42,930 in training a three-year apprentice, often with little productivity to show for it. That expenditure will pay off if the apprentice completes the training period, then remains with the company for another 4 years (Solskice, 1994, p. 36).

If the employee leaves the company, that training cost is lost. The employee will also leave with a certain knowledge of proprietary methods and procedures, which might be transferred to a competitor. There is therefore a certain risk and concomitant cost that the apprentice will leave the company after being trained. If that risk proves to be too high, the program will have to be terminated. On the other hand, if enough apprentices can be retained, then the program will pay for itself.

Becker (Becker, 1993) examined the issue of training within an organization in an abstract way, and came up with several rules through a mathematical analysis of the issues. (They entail issues of the future value of the training investment, cost estimates, and various risk probabilities). Without reverting to his equations, we can summarize his findings as follows:

1. It's important to distinguish *specific* training and *general* training. General training could be usefully carried over to many other companies, while specific training can only be utilized within one company. For example, improvements in the trainee's basic math skills would a *general* training; instruction on the specific products designed by the company would be *specific* training. The companies primarily depend on the schools for general training, and focus on specific training for their apprentices.
2. Companies will readily pay for specific training, since that isn't easily transferrable to another company. However, there's still a certain risk that a turncoat employee will reveal proprietary procedures or other information to a competitor.
3. If the general risk of losing an apprentice to another company is low enough, then a company will be much more willing to finance apprenticeship.
4. Much hinges on whether a graduate apprentice can find another job that pays more than what his company is offering, after completing the apprenticeship and receiving a skill certificate.
5. Moving to another job entails a certain training cost for the new company -- the training received in the old company may only cover a half of what is required to become productive

in the new company. But the skill certificate will make the person attractive, so poaching an employee from a rival firm is worthwhile.

6. Moving to another job may require the employee to physically move, yet another cost for either the employee or the receiving company.
7. What if the transferring employee is a lemon? For example, suppose the old company can retain 95% of its apprentices. Is there something wrong with the few who want to leave their company? Perhaps he/she is at the bottom of the class, in which case, why hire that person?
8. If the old company loses more than half its class, one can blame the *company* and not the *persons*, and it may then be the case that those jumping ship are the *better* candidates.
9. Might the new company offer a higher salary than the old company is offering? The higher salary would be worth the cost, given the savings in training to be expected.

So how do these apply to the German situation?

Regarding points (4) and (9) above, the works councils have considerable influence on the salaries paid to various non-professional and non-managerial employees. They act much as the labor unions in the United States, by setting minimum wage standards on various job classifications.

However, in Germany, the works councils also act to set a *ceiling* on wages for skill-certificate jobs, as well as a *floor.* This may seem peculiar to Americans, whose labor unions only seem interested in raising the wages of their members. But the German works councils justify this by the results, which is that employees are much less likely to shift from one company to another on the basis of wages alone. The offering company is constrained to a salary offer that cannot be higher than what the person would earn in his home company, and this removes most of the incentive to poach employees. In short, this policy bolsters the apprenticeship program across the country, and incentivizes the German companies to support it.

Regarding point (7), so few apprentices apply for employment in another company that the target company views them with suspicion. What's wrong with this person? Why isn't he/she happy in his home company? Or have received an attractive offer of full employment. He/she could be a lemon.

Consider a system in which employees could be freely poached from one company to another, for example, from a company with a strong training program to one with a weak program or no program. See point (8). If large numbers migrate from company A to some other company, very likely there's something wrong with company A, and not its apprentices. Liberal poaching will over time destroy any company's apprentice program.

Note that German law does not *require* apprenticeship programs, it only permits and regulates them. Nor does it forbid poaching. The apprenticeship system depends on the works council system as a whole, and on their appreciation of the need to suppress poaching of trained employees across companies.

Health Care

Germany has had a universal health care system since the days of Bismarck in the 19th century, about three-fourths supported by federal taxes (Healthcare in Germany, 2012). One's health insurance does not depend on employment, and it covers everyone from the cradle to the grave.

Health care is simply not a factor in corporation decisions, except of course that an employee laid off will be short of money for the other necessities of life.

The German Banking System

On the surface, there is no particular connection of the apprentice/works council system to the banking system. However, the unions carry sizeable pension funds, as they do in the United States, and these provide some leverage over banking system policies. German banks are also free to own significant shares in German corporations, and the corporate boards and bank boards are often interlocking. General corporate strategy is often shared within the banks, and this helps the German companies avoid destructive competition between them.

The German banks also resist loaning money for mergers or acquisitions of companies by other companies or individuals. The significance of this to apprentices and the unions is clear -- German corporations have much less to fear from hostile takeovers. Indeed, hostile takeovers are rare in Germany.

In short, if the corporation can depend on surviving some bad quarters without a takeover funded by the banking system, it can afford to work out labor-friendly policies and prepare for a more prosperous future. It can also afford to invest in long-term R&D that may not pay off for several years.

Should American Corporations Approach the German Model?

We reach the central theme of this paper. I say, **we must do something** to tame the excesses of the so-called free-enterprise corporate model that is now the norm in America. There are many reasons for wanting a change in corporation governance of some kind (Nace, 2005) (Clements, 2012) (Lessig, 2011) (Stiglitz, 2012), to wit:

- American corporations have successfully assumed all the legal rights of a natural person through numerous Supreme Court decisions, and that has legally impeded government regulation of corporate activities, among other things.
- Corporate instability due to fear of hostile takeovers from a bad quarter or two means significant instability in employment, possible loss of pension funds, and destruction of a company union.
- While most high-tech companies take very good care of their skilled marketing, scientific and research specialists, the attitude toward the common laborer is typically one of finding the cheapest possible labor with the fewest benefits -- a race to the bottom.
- Large corporations feel free to close any plant anywhere, or move their operations to a region with lower labor costs, even if the move is to a foreign country.
- American corporations are often totally insensitive to the human impact of a plant closure.
- American corporations are often insensitive to the externalities they generate, and will typically take advantage of the profit derived from unpaid externalities. In fact, a corporate CEO is *required by law* to put profit for the shareholders ahead of any other concern. (Bakan, Dodge v. Ford, 2004), (Dodge v. Ford Motor Company, 170 N.W. 668 (Mich. 1919), 1919). The Wall Street demand for quarterly profit is relentless. It comes from blocks of institutional shareholders who have no concern for anything other than the bottom line.
- The top management of the large American corporations is compensated at a level unprecedented in history, through bonuses and stock options. A bonus used to be offered to a CEO for achieving certain growth targets - it was called an *incentive bonus.* Now, many corporations award a huge bonus whether or not a target was met - the name has changed to a *retention bonus.* One can only explain this by realizing that a corporation board of directors is now typically chosen and controlled by the CEO.
- Huge inequities in income and wealth now are the norm in the United States (Business Insider, 2012). The top 1% of Americans now own one third of the total wealth, while the bottom half of Americans own less than 2.5% of the total wealth. While Americans aren't bothered by the existence of the wealthy, our huge inequity is arguably a threat to our democracy (Stiglitz, 2012). It is moving us into a two-tier society, with a thin upper crust commanding all the resources and

controlling the government, with most of the population struggling for basic food, water and shelter. A major factor in our inequity lies in corporate governance run amok.

- Corporations are now free to buy advertising space for political issues and even candidates for office, through the recent *Citizens United* decision by the Supreme Court (Citizens United v. Federal Election Commission, 558 U.S. 50 (2010), 2010) (Citizens United v. Federal Election Commission, 2012). Of course, they will espouse their own cause, which is growth in revenues and profit, and that is usually not consistent with a public need.

Some enterprises are poorly served, or not at all, by private corporations. For example, a health care insurance company, which, like all corporations, is required by law to put the interests of shareholders before those of its customers. And that generally means that a significant portion of their business -- and significant profit -- is in denying claims to its insured customers. The health insurance industry was also largely responsible for preventing any Congressional discussion of a government-operated single-payer health plan during the deliberations for the Affordable Health Care law. (Sunlight, 2013)

Social problems have long been associated with corporations and their narrow profit-seeking interests. Fire insurance companies once also operated their own fire departments, which led to an absurd situation in which one company's fire fighters would do nothing on the scene when some house was on fire, but had the wrong insurance insignia. (History of firefighting, 2012)

Such free-market social problems typically arise whenever a clearly defined seller:vendor relationship cannot be identified. These include police protection, public schools, roads, general mail service, the military, health services and hospitals. Problems will also arise whenever a corporation can influence an election or legislative deliberations through campaign contributions and lobbying effort.

The German corporation model appears to be largely free of these corporate defects. Of course, Germany does not have our Constitution and Bill of Rights, so the issue of corporate "personhood" is absent. But it appears from the evidence of history that the dual-board model of German corporations, along with the banking and labor practices that have built up around it over the past several decades, has achieved a form of corporate governance that is largely free of these problems.

It is a model that deserves our study and attention.

What the United States Could do Now to Emulate the German Model

Of course, we must first somehow agree, politically, that the German corporate model is superior to ours. That by itself will be a political struggle, given the current political climate of America, and the nearly complete capture of the Republican party by Wall Street. More thought and study is needed to develop a *political* strategy toward that end.

I have to assume that both progressives (Democrats) and conservatives (Republican) are interested in the general welfare of the nation. Also, that both are concerned about high levels of unemployment, the federal deficit, market instability, and our decimated cities (Detroit, Michigan; Gary, Indiana; Flint, Michigan; Cleveland, Ohio; Stockton, California, among many others). There should also be broad concern about various corporate abuses, lost tax revenues, inappropriate corporate subsidies, and more, that seem to have no obvious solutions.

Opposition will arise from those most heavily invested in the current American corporate model. They will argue that our corporations will be less profitable through their need to take care of their employees as part of their mission. The supervisory board concept will look to them as merely an obstructive body of union-friendly people, interfering with the "real" task of the corporation. But that begs the question of what the general purpose of a corporation should be within a democratic society. Should it only be driving shareholder profits, or should it also be serving some general societal needs?

To what extent are we willing to accept that the Adam Smith invisible hand sometimes strikes people down and contributes to destructive economic cycles, unemployment and other social ills?

If we can somehow rationally agree that the German corporate model has something to offer us, whether we are of a progressive or conservative persuasion, then the question is one of what can be done within our constitutional system.

To us, the answer is surprisingly simple, and is, in our humble opinion, fully constitutional. Here it is:

> **Congress to pass a law requiring every corporation with at least 500 employees to be governed by both its usual management board, but also a supervisory board, with responsibilities and powers similar to those of German supervisory boards. No supervisory board member may serve on any management board. Half the supervisory board members must be non-managerial employees of the corporation. The employee members will be selected by the employees through a democratic election; the remainder by the stockholders.**

There are obviously many unanswered details that will have to be worked out politically. Starting with the German model and experience would provide a baseline for further discussion in Congress.

For example, the "500" is arbitrary -- it could be 1000 or 2000, or changed over time. Starting with a large number means that only a few multi-national corporations would be affected, and that would give us time to assess whether the new governance is effective. A smaller corporation may choose to adopt a supervisory board, but that may add cost and be unnecessary. The big abuses that can be traced to corporations are mostly centered on really large multi-national corporations, whose influence in politics and elections through their lobbying, is particularly troublesome.

The constitutional authority for such a law would clearly rest in our Constitution's commerce clause, article 1, section 8, *viz.*

> *To regulate Commerce with foreign Nations, and among the several States, and with the Indian tribes;*

How Would the Corporate System Change?

Much depends on a careful definition of the supervisory board's powers and responsibilities, and also just how its members are chosen.

We were careful to specify that half the membership must be *employees,* and that these members are not at the management level of the corporation. Being a manager implies that you have hiring and firing power, as well as fixing salary levels and, at a high-enough level, adjusting the corporate tree structure.

Making the distinction should be easy and unambiguous. It's possible that these employee members may be highly-placed in the corporate ladder as senior scientists or marketing advisors - but to the extent that they have little or no influence on the usual management decisions, they would be eligible as members of the supervisory board.

Now, how would those employee members be chosen? That requires some form of organization of the company's non-management employees, for the purpose of nominating and voting on the supervisory board members. And that in turn sounds very much like a labor union or a works council.

My prediction is that something akin to the German works councils would have to arise spontaneously within each corporation. Each council would function much as any other labor union. A works council would be attached to a particular corporation, and be concerned about the personnel and community aspects associated with the corporation.

Would There be Immediate Repercussions?

Requiring a supervisory board would in general have no effect on the operation of most corporations for the first year or two.

It would take at least a year to set up our equivalent of the works councils, work out elections, and decide on the specific responsibilities and powers of the new board. There would likely be no impact whatsoever on the corporation's operations. Another year or two could go by with many discussions between the boards, probably with some anger and frustration, as the new board defines and begins to assume its policy and personnel responsibilities.

The works council would at first be organized merely to elect employees to the supervisory board. Over time, it would also register employee concerns, to be filtered and sent on to the supervisory board for consideration and action.

The new powers of the supervisory board, along with its ear to employee concerns through plant works councils, will eventually result in a system in which each plant and work group will find ways of dealing with employee concerns at a local level, without losing sight of the overall need to maintain profitability and keep up with advances in automation.

In any case, a suitably crafted law that outlines the new board's responsibilities and limitations, along with establishing suitable intellectual property and security protections, should eventually result in a system in which management and labor learn to cooperate with each other and work toward the overall benefit of the corporate owners (the stockholders) as well as the employees, their families and their communities.

Would Our Corporations Become Uncompetitive?

Further study is needed on this issue. Solskice attributes much of the success of the German corporate model to the global market niches that the large German corporations have found (Solskice, 1994, p. 37). This is one of high-end, high-quality, craftsmanship products. Think of Mercedes and BMW as opposed to Ford and Chevy. Think of the Bosch line of kitchen appliances rather than Whirlpool and Kitchenaid. The German products are more expensive, but also more dependable, more serviceable, and with a longer lifetime.

American corporations are far more diverse, ranging from the large fossil fuel extraction companies, to major banking houses, mass produced products, etc.

The central question here is whether this German market niche is the result of the dual-board system of governance or the apprentice system. We feel that both have contributed, but that the apprentice system is mostly responsible, rather than the supervisory boards. The apprentice system grew out of a family-oriented craftsmanship approach to products that has been a hallmark of German production for centuries. While modern products are now churned out in robotically-driven assembly lines, many with few line workers, the need for quality craftsmanship is still there in the development of the engineering staff and engineering support personnel needed in such factories. Achieving high standards in quality, serviceability and longevity of a product requires a lot of well-trained engineering work.

We also predict that, as in Germany, general strikes would be rare, given that the supervisory board operates along the lines described above. The existence of the labor component of the supervisory board, and the powers of that board to mitigate or veto major actions of the management board, should work to reduce the need for a strike.

It may be true that the need to consider employee and community welfare in making major corporate decisions tends to make such a corporation less competitive on the world market. That's a short-sighted reaction to the concept of this second board -- that it would just obstruct and impede necessary corporate activities. Any American corporate director would consider such a board an impediment to their company's success, at first blush. It would take away the freedom to freely open/close plants, lay off thousands of employees, *etc.* that is now the norm in the United States. Whether that is a good thing depends on one's perspective.

On the whole, we must ask ourselves whether the goal of an American corporation is solely to maximize its shareholder profits, or to also empower and protect its employees? I contend that both are desirable and achievable.

Changes in the Banking System

We mentioned that the German banking system is not interested in funding hostile takeovers of corporations, largely because the German banks have heavy direct investments in corporations. Whether our investment banks can be taken out of that game is an open question. In any case, something must be done to more fully insulate corporations from the need to deliver quarterly profits, or risk being taken over. Our corporate ownership instability is a cost, and one that contributes to our lack of competitiveness in the world market.

A law restricting banks from loaning money to corporate raiders makes sense. Let us end the all-too-common practice of a capital management company leveraging its assets with bank loans to take over some company, strip its assets, and then letting it founder into bankruptcy.

What About Small Corporations?

A small business is not likely to gain much from a supervisory board. By "small" I have in mind a company with one or two plants employing a few hundred people. The owner may also be the CEO and board president, and will likely be spending his time walking around the plant getting to know his employees. He will also be much more attuned to the welfare of his employees and their communities.

Shutting down a plant for profitability reasons is also unlikely. More likely is a business failure for other reasons, such as a strong foreign competition from a country with low labor standards. For example, the RubberMaid company has largely closed its manufacturing doors in the U.S. for that reason, yet its products are still made (in Asia) and sold into American markets (Young, 2004).

The need for union representation is unlikely to be an issue for a small business. Note that under the German model, the "unions" are mostly attached to specific corporations as works councils, and have only a loose relationship with a national union. It's still possible for a national union to try to organize small businesses, but it's unlikely that they would have much success at it.

A small business is not likely to afford a Washington lobby, and that pretty much takes it out of the political arena, except to work with his/her state and federal representatives, or various trade groups.

Is an Apprentice System Feasible in the United States?

This deserves more study. Please note that a German-style apprentice system is fully compatible with the American Constitution. Involuntary servitude is forbidden by the twelfth amendment, *viz.*

> *Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.*

But notice that the German apprentice contract is compatible with German law, which also forbids slavery and involuntary servitude. The typical apprentice contract imposes a condition on the *company*, not the apprentice, to continue the employment for the period of 3 to 4 years, albeit at a lower salary than similar fulltime employees. The apprentice is free to leave their service at any time, and is under no obligation to remain with the company after the contract is fulfilled. Most choose to stay with the program, and also to remain with the company (Solskice, 1994).

We've discussed above why the apprentice program works in Germany, and a central issue is curbing employee poaching. Whether a similar program can take root in America is an open question. A key issue is whether American corporations will feel free to poach trained apprentices, or other employees, from other corporations in a similar line of business. In Germany, that freedom is constrained by the works councils, which are an offshoot of the supervisory boards. They have effectively set ceilings as well as floors on the salary levels of apprentice-level employees, throughout the country, making employee poaching difficult.

In short, a poaching company should not offer a person a salary much higher than he/she would earn at the parent company.

Given that every American corporation must have a supervisory board, and that something like the German works councils become established in them, it's very possible that poaching will slowly disappear. At some point, it becomes economically advantageous for a corporation to set up and pay for an apprenticeship program. The programs themselves and the general acceptance of the constraints that make it possible throughout the nation, then form an economic Nash equilibrium (Nash Equilibrium, 2012), one that clearly has beneficial consequences for our corporations, their stockholders, its employees, and the nation.

In short, we see no reason for a national law to discourage poaching, or one that requires a works council for every company. On the other hand, there should be no law that restricts the natural formation of unions or works councils.

Employment Issues

Moving toward the German model should also help reduce unemployment, and to stabilize employment generally.

In short, the supervisory boards will typically step in to find mitigating measures to avoid massive layoffs and plant closings that have so devastated so many American families and communities.

Layoffs or closings are easily done under the American corporate model. There are no constraints on this, other than some concern for the future profitability of a company that has reduced its workforce. Indeed, a layoff a few weeks before a bad quarter ends causes an immediate jump in the profitability of the company, and that will be noticed by Wall Street as a good thing. Concern for those employees dropped from the payroll is usually zero. A general layoff also sends a chilling message down through the ranks that *you could be next,* ensuring that the remaining staff will work extra hard to avoid that fate.

Indeed, surveys have shown that most American companies have increased their productivity by threatening layoffs, demanding longer hours from their employees, cutting vacations, cutting health benefits, or shifting most pension costs to the employees. Layoffs are often "cured" by extracting more work from the remaining staff, boosting the bottom line (Newsweek, 2010).

Often, a layoff is followed by a hiring cycle, but usually one in which previously less-skilled employees are replaced by higher skill levels, or by fewer employees.

The effect of these unconstrained corporate actions can easily be shown to contribute directly to our current high unemployment level. The current unemployment level of about 10% across the nation would almost instantly drop to less than 5% if all companies were required to honor a 40 hour work week with two weeks of paid vacation. Of course, their costs would rise by about 5%, but since the competition is subject to the same constraint, the added cost would not cause a competitive disadvantage overall.

Note that these savage corporate actions would not likely occur under a supervisory board system.

There are alternative ways of dealing with bad quarterly profits. For example, instead of a 10% mass layoff, the company might ask that every employee take some unpaid leave. Paychecks would drop, profitability would be restored, but the employees would not suffer for the most part.

Must We Change our Health Care System?

The German corporation has no involvement in the German health care system. Germany has a single-payer system managed by the central government, and it's paid for through federal tax revenues.

The United States seems unwilling to move in that direction -- yet. Thus, the provision of health care here will likely remain a joint responsibility of corporate employers and the state and federal governments. However, taxes now support Medicare, and the Affordable Care Act of 2011 will be largely supported through federal taxes.

While I personally support a single-payer system operated along the lines of the Medicare system or the VA programs, I see no reason why a change in corporate governance would be incompatible with whatever health care system we settle on.

Note that any large corporate health insurance company would be required to have a supervisory board, and such a board would no doubt have a major influence on how the company does business. In particular, it's difficult for me to believe that such a board would tolerate their company routinely denying claims on spurious grounds. Or that any supervisory board would tolerate a corporate health plan with such onerous terms.

What About Corporations as Persons?

Removing the legal concept of personhood from corporations should facilitate the transition to dual board corporations, and help make such a federal law be sustained in the courts.

With personhood, one or more corporations will likely challenge a dual-corporate charter change in the courts on the grounds of a "government takings" under the fourth and fourteenth amendments (Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922), 1922). Their argument would likely go along the lines of showing some economic direct costs or damage to a corporation through this new requirement, and that such damage would not be compensated by the government. It would be infeasible to somehow pay every corporation for such "takings", and in fact difficult to assess just what that damage would be. Also, should the government be required to compensate for its "takings", one can foresee cases extending to the moon over just what the level of compensation should be. And in the meantime, no changes in corporate governance could take place.

Without personhood, no such claim could be made. A corporate case opposing a new corporate charter law would still very likely be filed, but the case would have to be settled under the general power of Congress to regulate interstate commerce. The government could make a strong case that certain changes in corporate governance will not only improve the general welfare of the people, but likely stabilize and improve the profitability of all our corporations.

Summary

While the American corporate has succeeded in providing employment to the bulk of our citizens and unleashed a cornucopia of products at affordable prices, there are many negative social impacts of large corporations that should be curbed without damaging the overall value of the corporation. These include cycles of high unemployment, community damage through arbitrary plant closings and layoffs, tendency to avoid taxes, and a lack of direct concern for the welfare of employees, their families and their communities.

We claim that many of these deficiencies can be curbed through a change in corporate governance.

In particular, we urge that large American corporations be required to carry a separate supervisory board responsible for overall management policy, with hire/fire authority, comprised of employee members. Many desirable consequences should flow from such a requirement, over time.

In short, there's every reason the German economic miracle could be made to work in the United States, for the benefit of everyone, including the corporate investors.

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