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Capital, Autonomy, and the Limits of Corporate Critique

I. Introduction

Jean-Philippe Robé's *Property, Power and Politics: Why We Need to Rethink the World Power System* presents, primarily in its second half, a forensic study of the advantages firms are afforded by their corporate structure, and their use of those advantages to externalize costs, evade political obligations, shield themselves from accountability, and denature the legal orders in which they operate. It is a very valuable contribution. My focus here concerns a constellation of elements central to this system of advantages. These are: the specific kind of property owned and controlled by firms; that property's power-conferring features; and the normative criteria by which its present distribution and use should be assessed. I want to put pressure on Robé's treatment of the first and second topics, using a more robust conception of *capital*, and critique on that basis his assumptions regarding the third. My overall point is that—while the book exposes the pathologies of the multinational system, and cogently explains how they operate—corporate power is condemned in that analysis by normative reasons that, when systematically examined, bear with equal force upon the powers of private capital more broadly. This vitiates the book's final remedies. Its “rethinking” effort is incomplete.

II. The Power of Multinationals

Robé advances several connected claims. First, governments have failed to assemble a regulatory regime adequate to curb the power multinational firms command worldwide. Firms can direct high volumes of property across borders, states need that property, and the ensuing inter-state rivalry forces each to commercialize their sovereign orders—to turn their laws into services offering high-profit investment opportunities. Second, it is the use of incorporation, a legal structure of property ownership, which enables firms to do this. Antiquated and confused beliefs about property rights hinder the necessary task of assembling the legal support and constraints required to make global markets work. Multinationals concentrate property in ways that render markets dysfunctional, or suspend them altogether, absorbing more and more commercial processes into their privately enclosed allocation systems. Third, this process allows for costs to be externalized upon society that would otherwise be encoded into the price system, if markets, especially capital markets, operated properly. Climate change is the most conspicuous example, but increases in firm power have also brought concomitant declines in labor's bargaining power, reduced public welfare provisions, surging inequality, and greater political unrest.

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I think the first claim is correct. I also endorse Robé's emphasis on the significance of incorporation as structuring device, without which the political power of firms cannot be understood. Limited liability, legal personality, asset partitioning, the share-ownership schema, asset lock-in—all of these features define the corporate form. Robé's account of *how* such features, and the decision to constellate them into one enterprise type, “concentrates property rights over productive assets” by appeal to “liberal individual rights”—whose first justification, historically, lay in their securing autonomy for natural persons—is convincing (238). But he does not theorize the powers intrinsic to the assets themselves, the processes by which they arise, or the dependence relations they foster—beyond the specificities of their being corporately owned. What exactly are those assets, and what, if anything, is wrong with their concentration under a *private* decision-procedure, corporate or otherwise? These questions reach beyond Robé's discussion.

To appreciate what is missing, we can start with that discussion's instrumentalist framing. Sovereign institutions emerge and function, if not as Nozickian protection rackets, then as administrative service providers which supply goods whose value can be defined prior to and apart from the legal state. Given this view, the goods cited by Robé are not surprising: private property rights protection, contractual enforcement, and predictability (117). *Rechtstaaten* manage the conditions of market functionality. When their authority is compromised, market power becomes coercive, externalizing harms, pitting individuals and communities against each other—ultimately enlarging the number of people “who have lesser access to rights of autonomy” (295). Missing from this picture are two vital considerations: the non-instrumental or *constitutive* grounds of legal order, and the specific quality of *capital* as a property form. They are related with respect to autonomy. The normative reasons to oppose what Robé plainly opposes—the firm's power to unilaterally shape and determine legal order—are, as Robé concedes, autonomy-based. Yet, their consistent application *also* challenges the powers inherent in private capital ownership more broadly, corporate or otherwise. Or so I want to suggest.

Nowhere in the book, however, is a substantial conception of autonomy presented. Nor are we given any argument for why people deserve it, if they do. This is a curious omission in a book on repressive power. But it also obscures an entire genus of normative reasoning about legal order and property relations, one that Robé anyway rejects too easily. He writes as if political theories invoking a state of nature are either fabular mystifications or failed histories, and that “any talk of natural, fundamental, inalienable, or inviolable rights”—which such theories seek to ground—“has no theoretical value and is irrelevant” (140). Because he fails to see their point as devices for *normative reasoning* about the conditions of freedom, he ignores non-instrumental views of political order.

The one most closely tied to the value of autonomy is the Kantian approach (Kant [1797] 2017; Ripstein 2009; Stilz 2016; Pallikkathayil 2016). It conceives autonomy as the freedom of being one's own master, empowered to determine rationally for oneself what one should do—the ends one has reason to adopt—and to act accordingly. The function of a legal condition is not in the first instance to enforce *pre*-political rights, where these are understood, à la Locke, as determinate claims against others over parts of the world non-identical with one's person, etc. It is rather to institute a *rightful condition*, a structure of reciprocal relations in which no individual is master of another. Let me explain. There is, to be sure, an innate right that persons have—one that does not depend on any juridical or social act to come into force—namely, the entitlement to independence from the will of others. Or, in other words, an entitlement to freedom. No person is born with a duty to do what others tell them to do, or with the right to order others to act as they wish. We have a claim to independence on account of our ability to set and pursue ends for ourselves, purposes that are ours. That claim bars others from acting to bind or constrain or direct an individual's will. But this freedom is, crucially, not

complete: in order to be made consistent, it must be structured or contoured to account for people having rightful claims to parts of the *shared* world. So while we don't need any political act to institute that right to freedom, we need to institute political order so as to make that right determinate, to specify what is to count as its realization, or its violation, among interacting persons. It is not best described as pre-political, but hypo-political: it obtains beneath the civic structure as its ground or foundation.

Civil duties and entitlements, on this view, are binding—they have their proper normative force—when they are set by the *shared* will of everyone subject to them. Legal order is legitimate, and accords with its concept, only when it realizes and executes this *omnilateral* will. If nobody can be bound by another's unilateral will, but everybody must be bound in some way in order for any of them to enjoy independence from others, then the binding normative power must be held in common. That power is brought about in and through the coherence of a political community, the pooling of their individual wills for their shared ends. As Kant has it: “Only the concurring and united will of all, insofar as each decides the same thing for all, and all for each, and so only the general united will of the people, can be legislative” (Kant [1797] 2017, 314). What it legislates is the *determinate* freedom to set and pursue one's own ends. That includes the claim to use objects and spaces. Under law we set forth, in a rightful way, a structure of reciprocally endorsed terms of access. We endow one another with property rights, in the broadest sense.¹ Everyone needs everyone else to honor them, and to perform various actions that facilitate, or at least do not obstruct, their respective purposes, insofar as these lie within the province of our independence.

When a community's juridical system is shaped to deny that independence, to serve the unilateral wills of private agents (like multinational firms), political life *becomes* a state of nature. Robé fails to see, in his critique of the social contract tradition, that the state of nature is not in the first instance an imagined genealogy or *Gedankenexperiment*, but an analytically defined situation. In that situation, individuals subordinate others by determining their ends. This forces the problem of property onto the agenda, and with it the problem of property's specific forms. Since there is at least one right that (contra Robé) doesn't depend on some positive act of law for its establishment—the basic right to freedom, which all persons have equally—and this can only be rendered complete under law, we need to ask how it might be misbegotten, as legally sanctioned *unfreedom* (Ripstein 2009, 35-37)?

There are many paths in that direction. Some pass through the acquired positive rights of property, as with slavery. The most salient of these in our context, I submit, is when private property rights extend over capital. Robé's view is that property rights today are essentially *in rem*: they endow their holder with the authority to be “the rule-maker towards [all] others in connection with his property *as a matter of principle*” (78). The more property an individual owns, the more rules he can make for others, and, hence, the greater degree to which others can be subjected to his will. For this to be subjection in the sense outlined above—a denial of autonomy—the structure of ownership can't have been instituted omnilaterally. Because firms can use the corporate structure, they can accumulate quanta of property sufficient to make them rule-makers over large populations: true. But that would seem conditional upon, not analytically defined as, their power to usurp public authority and to privatize the legislative order. For an explanation of *this* power, we must inquire into the *kind* of property they own and direct, and the set of arrangements by virtue of which this power is conferred. Robé varies in his descriptions of the former: assets, capital, goods, and property are all used interchangeably, modified by the term “productive,” or sometimes “real” (275). His account of the latter focuses only on the location and

¹ Inclusive, then, of common and collective use, management, and agenda-setting arrangements.

design of property jurisdictions, and the legal rules of allocation and transfer across them. Missing from the explanation are (1) *capital's* defining qualities, and (2) the relations of social dependence that obtain by virtue of those qualities.

I'll start with (1). *Capital* is a distinct object of a property claim, different in kind from other such objects. The difference consists in its being endowed with a monetary value derived from its potential to generate a future monetary *profit* (Levy 2021, xiv). Katharina Pistor has shown how laws and their enforcing states do the actual work, ontologically, of converting phenomena into capital. They code what could be, or was once, a common asset as some individual's private wealth, securing it against the claims of others (even when they had a hand in its creation), and allowing it to multiply its value in obscure ways (Pistor 2019). The state creates capital as a form of present and future value and structures its ownership as the claim to that value, along with the various discretionary powers—catalogued so ably by Robé—to decide where and how the profit is to be yielded. But striving for that yield is co-natively intrinsic to this kind of property, in the sense that, for an asset to be capitalized *just is* for its owner to have a certain relation to the asset, that of being disposed to or engaged in using it to produce more money than was expended on its acquisition and maintenance. *Expectations* about the conditions of profitability, then, are central to what capital is, in a way that is not true of other objects of our property rights—the normal stuff we use in daily life—which, though justified as *ours* vis-à-vis our general end-setting future orientation, prescribe no *particular* end. Capital always prescribes profit-making as an end, whatever form that profit takes (such as rents, capital gains, royalties, interest, dividends), and sets its owners toward endeavoring to make the facts that come to obtain answer to their expectations (Foley 2006, Ch. 5). To the degree that other people's agency is required instrumentally to do that, *their* ends must be made consistent with profitability, whatever their freely formed values and commitments are or would otherwise be. The more control a capital owner can acquire over the conditions enabling, limiting, and directing people's agency, the better placed she will be to *capitalize* on possibilities that her rivals wish to turn to their own profitable advantage. The important thing here, then, with respect to autonomy, is the nature of capital as *private property*, not (mainly) whether rights over assets used in economic production are interpreted as *in rem* or *in personem*, etc., or even, finally, whether they are assigned to incorporated firms. Which brings us to (2).

The relations of dependence that turn legality into a private commercial service, and bring about or themselves constitute the other ills Robé discusses, especially those involving “heteronomy” or “subordination” (99), are not merely negative externalities produced by the multinational corporate economy's present setup, and which can be solved by more stringent regulatory and accounting measures. They would remain under any arrangement in which provisioning is conditional on the growth of privately owned and administered capital, and under which persons must commodify their labor in exchange for the goods needed for survival and minimal social respect. This is by Robé's own lights. Net social wealth comprises assets generated via capital investment, and capital held under private authority, corporate or otherwise, simply *is* private power over the conditions of public provisioning—the arrangements under which, and the processes by which, the public uses its state to create and supply its needful goods, broadly construed. Why? Because the allocation of labor and resources in production, the locations and technologies used, the circumstances under which people work, and what sorts of products and services to create *all* result from choices concerning investment. The fact that those choices are not random—market conditions will count in favor of or against any given choice—is irrelevant. It is still *investors* who deliberate and decide. Their will prevails.

Investors do so inside a legal framework, but it is as true that in a functioning market, as in the corporate command system that Robé analyzes, any government operating the legal apparatus which

depends on revenues from, and the stability created by, economic growth, will be conditional on investor confidence and approval. The threat of capital strike and capital flight disciplines governments in advance. That subordinates the population. But it isn't as if capital owners are simply in the grip of authoritarian dispositions or intentions; they are themselves constrained by the property form's structure. Each capital owner, when markets are working their magic, is disciplined in turn by the logic of competition and the threat of falling into the proletarian ranks. Each is compelled to optimize by taking advantage of profitable opportunities before a rival can. At the micro-level, the veto authority of capital owners entails asymmetric power over what workers do and how they do it, an advantage that workers cannot counter by threatening to exit into another authoritarian workplace, presided over by a capital owner with the same veto power. The picture, in sum, is rather bleaker than Robé suggests. If people are entitled to autonomy, and they are only free within a system of their own reciprocally endorsed and collectively authored rules, then private capital undermines freedom *in principle*, and not only when magnified and operated in a corporate structure. Robé's book powerfully exposes how the incorporated firm provides capital with its modern armature of dominating agency. But it does not lead us to conclude that a more scrupulous accounting of unfreedom, and a somewhat less supine and compliant state, are viable remedies.

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