

Personal Freedom versus Corporate Liberties*

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Introduction

Are limited liability business corporations compatible with the free market, as libertarians understand it? Many libertarians think they are. Others are at least doubtful. And still others—I include myself¹ among them—deny that limited liability business corporations belong in a free market.² My purpose here is to spell out some of the reasons for that denial as well as to qualify it: I have no argument against large enterprises that issue limited liability shares or protect their managers with extensive vicarious liability arrangements. However, as we shall see, the compatibility problem of the corporation does not stem from these contemporary business practices.

There is no need here to consider the legal and political incentives and disincentives, such as tax and labour laws, accountancy requirements, jurisprudential doctrines, administrative practices and so on, that in various national legal systems may incline people to see the corporate form as advantageous or disadvantageous relative to other forms of business organisation. Such factors reflect various types of interventions by the state, its legislators, administrators and judges, which would be absent in a libertarian free market. Consequently, they are not germane to the logical question of the compatibility of business corporations with the principles of the free market. Of course, I must assume respect for personal

* This text is based on the notes I had prepared for the Libertarian Alliance Conference, held at the National Liberal Club in London, 19-20 November 2005. I thank Chris Tame for inviting me to speak on the topic of corporate liability, and also the numerous participants who helped me with their questions and suggestions. Shortly before the conference was held, the *Journal of Libertarian Studies* published Piet-Hein van Eeghen's "The Corporation at Issue, Part I". I have incorporated some references to it in this text: it makes substantially (and often in greater detail) the same analytical points that I emphasise, although it does so from a somewhat different underlying political philosophy.

¹ See my "Is the Corporation a Free-Market Institution?" (*The Freeman: Ideas on Liberty*, March 2003, LIII, 3; also at <http://fee.org/pdf/the-freeman/feat7.pdf>).

² The most notable libertarian apologist of the business corporation is Robert Hessen (see below in the text). Norman Barry also has produced vigorous defences of the business corporation in his *Business ethics* (Macmillan, London, 1998) and *Anglo-American capitalism and the ethics of business* (Business Roundtable, Wellington, New Zealand, 1999).

Gary North (<http://lewrockwell.com/north/north408.html>) and Stephan Kinsella (<http://blog.mises.org/blog/archives/004269.asp>) respond to anti-corporation arguments by Mike Rozeff (<http://lewrockwell.com/rozeff/rozeff28.html>) and Robert Murphy (http://anti-state.com/article.php?article_id=-415).

Piet-Hein van Eeghen, "The Corporation at Issue, Part I" (*Journal of Libertarian Studies*, XIX, 3, Summer 2005), offers a critique of the corporation that is based on nineteenth century liberal ideas about the separation of the private and the public sector. Van Eeghen suggests that the corporate form is required for the state as the guardian of "the public interest" and other public sector providers of genuine "public goods" but that it should not be allowed in the private sector, at least without explicit authorisation (a charter) granted by the state. I am no fan of this 'political liberalism' or 'Rechtsstaat-ideology' (cf. my "Political Liberalism and The Formal Rechtsstaat" (<http://users.ugent.be/~frvandun/Texts/Articles/Godefridi.pdf>)). Thus, while I am largely in agreement with Van Eeghen's critique of the business corporation, I do not share the political philosophy that underlies his proposals for the reform of corporate law. I certainly do not accept Van Eeghen's statement that "the State has a *natural* right to corporate status" (p.54, emphasis added): no corporate entity is a part of the natural order of the human world; hence no corporate entity has any natural right.

property and freedom of contract as essential background conditions for assessing the libertarian legitimacy of the corporate form of business. However, I cannot assume that prevalent legal doctrines concerning, say, shareholders' rights and contracts between a corporation and suppliers of capital are accurate representations of the contracts that free persons would accept if they wanted to attract or supply capital to a business undertaking. The same goes for legal doctrines concerning managerial responsibilities and contracts between a corporation and people who seek employment as corporate managers, officers, or other representative agents. There is no reason to assume that "judge-made law" in the libertarian context of a decentralised judicial system without monopoly or other privileges would settle on the same doctrines that it has developed in the legislation-driven nationalised court systems with which we are familiar.³

The question before us, then, is which features of the corporate form, as we know it today, are and which are not compatible with a regime of freedom and its institutionalisation of the principles of respect for personal property and freedom of contract. Of course, a logically coherent theory of personal freedom as a condition of order in human relations also must be a coherent theory of personal responsibility and liability. Otherwise, it would degenerate quickly into a 'freedom to' theory of do-what-you-want-and-let-the-chips-fall-where-they-may or a 'freedom from' theory of stop-everybody-else-from-doing-what-you-do-not-want-them-to-do. Either of these degenerate forms of the theory of freedom rules out the harmonisation of interests according to general principles of justice that is the most alluring aspect of the libertarian philosophy. One persistent criticism of the corporate form in the world of business is precisely that it is a source of disharmony: it exhibits an imbalance between the rights and responsibilities of corporate action⁴, which arguably is a cause of the emergence of large and interlocking command-and-control structures, managerial and technocratic conceptions of profit, and volatility and instability in markets.⁵

I begin with a short discussion of the corporate form (section 1). This form is not peculiar to incorporated business organisations. It is also a characteristic of political corporations (states) and of religious, charitable, and other non-profit corporations. I then present some libertarian misgivings about corporations in general and political and business corporations in particular (section 2). Next I turn to the logical question of compatibility and discuss briefly Robert Hessen's arguments in defence of the corporate form. I show that they do not succeed (section 3). The crucial question 'Who owns the corporation?' is the subject of section 4. In the fifth and last section there are some general remarks on the relevance of the critique of the corporate form for libertarian theorising.

³ Anglo-Saxon, especially American, interlocutors and correspondents have a tendency to use Common Law doctrines as a proxy for libertarian jurisprudence, thereby obfuscating the institutional context within which these doctrines were developed. I believe their view is without justification. Although various episodes in the development of the Common Law certainly illustrate that some magistrates of the state are unwilling to bow to the dictates of other agents of the state, the fact remains that Common Law judges are at least as jealous of their state-conferred corporate prerogatives and privileges as members of other "organs" or "powers" of the state.

⁴ Van Eeghen, *op.cit.*, p.57 and the references given there.

⁵ Van Eeghen, *op.cit.*, p.59-67.

Section 1

The corporate form

In today's non-libertarian legal culture corporations are organisations that enjoy a legal status as separate persons—as “persons in their own right”.⁶ An organisation that is not legally recognised by the state or any of its organs as a person separate from its owners, partners or members is not a corporation. This, as we shall see, is the heart of the matter. Libertarian apologists of the corporation tend to dismiss corporate personhood as an inconsequential epiphenomenon. The gist of their position is that, regardless of the legal doctrine of corporate personhood, people would still act within their libertarian rights in incorporating business organisations and that such free market corporations would not differ essentially from the corporations with which we are familiar.

Legal recognition of corporate personhood blurs the distinctions between natural or human persons and artificial persons in discussions of rights, responsibilities and liabilities. However, the differences are obvious enough. Unlike human persons corporations are not individuals. A corporation can be split up in two or more other corporate persons, and it can be merged with another to form a new corporate person. As it is not an individual (indivisible) entity or atom, it would not be methodologically sound to treat it as an essential or necessary denizen of the human world on a par with natural persons. Indeed, if one wishes to regard corporations as separate persons at all then one should say that they are not

⁶ U.S. Supreme Court, *MONELL v. NEW YORK CITY DEPT. OF SOCIAL SERVICES*, 436 U.S. 658 (1978) 436 U.S. 658, *MONELL ET AL. v. DEPARTMENT OF SOCIAL SERVICES OF THE CITY OF NEW YORK ET AL. CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*, No. 75-1914. Argued November 2, 1977, Decided June 6, 1978, Brennan J.:

“[B]y 1871, it was well understood that corporations should be treated as natural persons for virtually all purposes of constitutional and statutory analysis. This had not always been so. When this Court first considered the question of the status of corporations, Mr. Chief Justice Marshall, writing for the Court, denied that corporations “as such” were persons as that term was used in Art. III and the Judiciary Act of 1789. See *Bank of the United States v. Deveaux*, 5 Cranch 61, 86 (1809). By 1844, however, the Deveaux doctrine was unhesitatingly abandoned:

[A] corporation created by and doing business in a particular [436 U.S. 658, 688] state, is to be deemed to all intents and purposes as a person, although an artificial person, . . . capable of being treated as a citizen of that state, as much as a natural person. *Louisville R. Co. v. Letson*, 2 How. 497, 558 (1844) (emphasis added), discussed in *Globe* 752.

And only two years before the debates on the Civil Rights Act, in *Cowles v. Mercer County*, 7 Wall. 118, 121 (1869), the Letson principle was automatically and without discussion extended to municipal corporations.”

In 118 U.S. 394 (1886) *COUNTY OF SANTA CLARA v. SOUTHERN PACIFIC RAILROAD CO.* the Supreme Court reputedly granted Fourteenth Amendment rights to corporations. However, as David Korten writes in *The Post-Corporate World, Life After Capitalism* (Berrett-Koehler Publishers; 2000), pp.185-6: “[f]ar more remarkable...is that the doctrine of corporate personhood, which subsequently became a cornerstone of corporate law, was introduced into this 1886 decision without argument. According to the official case record, Supreme Court Justice Morrison Remick Waite simply pronounced before the beginning of argument in the case of *Santa Clara County v. Southern Pacific Railroad Company* that

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

The court reporter duly entered into the summary record of the Court's findings that

The defendant Corporations are persons within the intent of the clause in section 1 of the Fourteen Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws.”

Apparently, the American doctrine of corporate personhood developed on the basis of an informal remark by a judge that the court recorder then inserted in his summary notes. On this incident, see the entertaining narrative in Thom Hartmann, *Unequal Protection*, Rodale, 2002, chapter 6.

natural but artificial or conventional persons—human artefacts rather than human beings. Hence, corporations have the attribute of “perpetuity”: not being mortal they can continue to exist indefinitely, at least in principle, for as long as the legal system that recognises, and compels its subjects to recognise, them as persons continues to do so.

Unlike natural persons corporations are not self-representative, neither in word nor deed. They lack the capacities that define natural personhood, namely the capacities to act, think and speak for themselves. Natural persons must do those things for them. A corporation derives its person-like capacities from individual persons—but only from individuals that legitimately occupy one or another pre-defined corporate position, say Member of the Board, Chief Executive Officer, Treasurer, Manager, Shareholder, or Employee.⁷ From this the corporate attribute of separate or “limited” liability follows immediately: because the corporation and the individuals that represent it are regarded as separate persons, the individuals are not to be held liable for the actions and debts of the corporation and the corporation is not to be held liable for the actions or debts of the individuals. However, again because they are regarded as separate persons, those individuals may have contracts with the corporation that rearrange their respective liabilities. Moreover, the legal system that gives the corporation its separate personhood may well stipulate, by means of legislation, or come to accept, through its judge-made law, that in some situations the corporate veil should be lifted to redirect liability from the corporation to one or more of its individual agents. However, legislation and judge-made law equally well may make the corporate veil even more opaque by extending corporate liability far beyond the range determined in the explicit or implicit contracts between the corporation and its agents. Because the degree of opaqueness of the corporate veil may vary from one legal system to another, it may be possible to argue, say, that in the Anglo-American legal system corporations are more compatible with the requirements of a free market than they are in the German or the Japanese legal system. However, the question of this paper is whether the corporate form itself is compatible with the laws of personal freedom.

Although as a rule the occupants of corporate positions are natural persons, in some cases they may be other corporate persons. For example, one corporation can be a (or even the only) shareholder of another. It is probably not practical but it certainly is conceivable that one corporation hires another to act as its CEO or Financial Manager. Corporate positions are not nature-given; they are defined by legal rules, some of which originate with or within the corporation, others with or within the political corporation known as the state. Of course, within a libertarian free market, state-imposed rules would be absent, as only general principles of the law of freedom⁸ would be lawful constraints on contractual arrangements and the regulatory powers of organisations that were created by contract.

As artificial persons, corporations enjoy most but not all of the legal rights, and have most but not all of the obligations⁹ that natural persons have as citizens, including many so-called

⁷ These corporate positions also are discussed as if they were persons—again, artificial persons, with rights, duties and obligations listed in or inferred from the rules that define the corporation. Thus, a corporation is an artificial person and at the same time an order of artificial persons. In this respect it is like a state, which is also an artificial person and an order of artificial persons, for example, ministers, magistrates, civil servants, and citizens. A citizen is a legal person—or, to put it more exactly, it is a legally defined position in the state that is defined by the legal system of that state. Historically, the position of a citizen is reserved for natural human persons. Other legally defined positions, such as that of a corporation, historically are reserved for organisations or organised groups. However, some legal systems allow that a single individual occupies the position of a corporation. Some comments on one-man corporations follow in the text.

⁸ For a discussion of these, see my *Het fundamenteel rechtsbeginsel*, Antwerp, 1983. For a bare-bones version of the underlying logic, see e.g. ‘Natural Law: A Logical Analysis’ (http://www.units.it/~etica/2003_2/-vandun.htm).

⁹ For example, on the one hand, they generally do not have the right to adopt children, to vote or to hold political office in the legislative, executive or judiciary branches of national and local governments or their subdivisions; and they typically must keep more records for government inspection than natural

human rights. That is why corporations are called legal persons. Thus, they legally can sue and be sued; own property; buy and sell and generally enter into contracts with natural persons or other corporations; form associations; publish opinions; and the like. In many countries, recent developments on the legal front have seriously weakened the erstwhile dogma that corporations cannot commit crimes or intentional torts, thereby making corporations even more like individual persons than they were supposed to be only a few decades ago.¹⁰

Artificial personhood is not objectionable in itself. It goes without saying that individuals contracting with one another to set up an organisation have the libertarian right to endow it with fictional personhood. However, it also goes without saying that, according to libertarian principles, such a contractually created artificial person cannot diminish in any way the rights or increase the lawful liabilities of persons who were not parties to the contract. In short, the right to create an organisation and endow it with fictional personhood does not imply the right to create a *separate* person with full or nearly full standing in the law as a person 'in its own right'. This point will be taken up in section 3.

Like other organisations and associations, a corporation is a tool by means of which human agents seek to attain their goals, yet it also is a person in its own right, separate from the natural persons without whose actions and decisions it would be no more than a piece of paper. Consequently, where there are corporations, we confront not only other people and their organisations and associations, but also *personified incorporated tools* that serve as masks or shields behind which people can act without putting their own responsibility and liability on the line. Moreover, although they are thought of as separate persons, different corporations often mask and shield the same men.

As noted before, because a corporation and the individuals that occupy representative positions in it are regarded as separate persons, their liabilities also are regarded as separate. In this connection it is customary to speak of the limited liability corporation. However, we should not misunderstand that notion. As separate persons, corporations are *fully* liable for their actions: for just like natural persons they are liable to the full worth of their assets. To the extent that limited liability is considered a problem, it does not arise from the difference between natural and corporate persons. It arises from the difference between incorporated and unincorporated tools, organisations and associations. Its cause is the fact that corporate liability as a rule does not extend to the wealth of the natural persons that actually are responsible for the corporation, its actions and the behaviour of the assets that it controls—a privilege not available to those responsible for other organisations and associations. In short, incorporation allows some individuals to limit their liability *unilaterally*. It allows them unilaterally to impose risks on others for which they otherwise would be personally liable. That is why corporations deserve carefully scrutiny by anyone who professes a concern for the freedom of human persons.

persons. On the other hand, they have no legal duty to serve in the armed forces or to attend school for a number of years.

¹⁰ Because corporations are artificial persons, what they are and what they can do cannot be ascertained empirically. It must be determined on the basis of a legal evaluation of their statutes: they can do only what legally is deemed relevant for achieving the purpose for which they were created—and both the purpose and the ways of attaining it must be recognised as legitimate by the legal system under which they were created. Hence an organisation like “Murder, Inc.” (as in the 1951 Humphrey Bogart film *The Enforcer*) would not be a corporation, no matter how closely its structure mimicked that of a legitimate corporation. For a long time the artificial nature of the corporation was held to mean that a corporation *by definition* could not commit crimes or intentional torts; hence only individual agents of the corporation should be held answerable for corporate crimes or torts. However, this restriction has been weakened considerably, in part to give the often numerous victims of a corporate action a chance to recover compensation for damages from the corporation itself.

Section 2

Libertarian misgivings about the corporate form

Obviously, a critique of the corporate form per se cannot be directed solely against business corporations. That is because not only business organisations can be cloaked in corporate garments but also political, religious, charitable, recreational and other organisations. On the one hand, in sympathy with the young Edmund Burke's exclamation "The thing! The thing itself is the abuse!", most libertarians oppose the political corporation of the state, although so-called minarchist libertarians, like many classical liberals and conservatives, exempt some historical or merely hypothetical states from criticism. On the other hand, most libertarians seem to defend the business corporation as a purely voluntary ("contractual") organisation, although at least those among them who are sympathetic to Austrian economics rarely, perhaps never, use theoretical arguments about the free market process that essentially rely on the corporate form of business organisation.¹¹ About non-profit corporations (and "foundations" and "trusts") opinions appear to be much more diverse: some see them only as lawful because voluntary associations while others see them as potentially dangerous concentrations of ideological power that might be used to subvert the order of the free market¹².

If the corporate form were merely a lawyer's name for a lawfully constituted contractual association of individuals then the wide range of opinion noted in the previous paragraph would be understandable: there is nothing wrong with the corporate form per se but one may like some corporations and what they do less than others, or not at all. However, if the critics are right and the corporate form constitutes a separate person then corporate persons, no matter what their field of activity is or what they do, exist to the detriment of some natural persons and their natural rights precisely because they give a legally embedded advantage to other natural persons. This obviously is or should be a problem especially for the Rothbardian anarcho-capitalist wing of libertarianism, which is outspoken in its support of natural law and natural rights as the foundations for a coherent philosophy of freedom.¹³ As a natural law libertarian, I have to ask myself whether there is a natural right to incorporate. I don't think there is but let us see.

Libertarian opposition to the political corporation known as the state

Libertarian opposition to political corporations (states) need no documentation here. However, I believe that an excessive focus on physical violence has led many libertarians to embrace a quasi-behaviouristic political theory: What's wrong with the state, they say, is that it is an organisation of the means of aggression for the purpose of forcing *non-consenting* people to obey and submit. In this approach, the state's lawfulness turns on whether or not people consent to its rule over them. Consideration of the state's corporate structure accordingly falls by the wayside. Hence, because business and religious and charitable corporations are not essentially preoccupied with violent coercion, their corporate structures are left off the hook.

¹¹ Austrian economic analysis usually starts with 'Crusoe economics' and from there moves to ever-more complex interpersonal settings. See M.N. Rothbard, *Man, Economy and State, The Scholar's Edition*, Ludwig von Mises Institute, Auburn, Alabama 2004. It is an analysis of human action, with a consistent stress on subjective valuation and opinion, which are functions of an individual mind, something that a corporation does not have. See L. Mises, *Human Action, A Treatise on Economic, The Scholar's Edition* (Ludwig von Mises Institute, Auburn, Alabama 1998).

¹² Obvious examples would be the plethora of corporations (such as *Greenpeace*) in the environmentalist movement.

¹³ M.N. Rothbard, *The Ethics of Liberty* (Humanities Press Inc., Atlantic Highlands, N.J. 1982).

One problem with this behaviourist approach is that it is weakened by the so-called social contract theory of the state, which implies that the state exists with the consent of the governed—or, to quote Ayn Rand, that it enjoys the sanction of the victim. Now, it is easy to make fun of literal versions of the social contract theory; but the consent of the governed should not be taken lightly. With very few exceptions, most people nowadays consent to being governed by the state, however much they may dislike and want to change or replace particular policies or politicians. They consent because they honestly believe that there is no serious or realistic alternative for *the* state. While they occasionally can and do move from one state to another they cannot move to a non-state. Moreover, they cannot even imagine that one would want to move to a non-state—hence their ostensible consent to the state as an institution, which does not necessarily imply consent to its contingent realisation.

That type of consent does not weaken the philosophical libertarian critique of the state but it does undermine the behaviouristic (and ultimately Hobbesian¹⁴) approach that relies on mere behavioural signs of consent. No matter how explicit they may be, such signs rightly do not carry much weight in a libertarian critique of the state because by themselves they do not reveal the extent to which they are the result of training, indoctrination, or programming. A robot can be programmed to display consent; unfortunately, to some extent people too can be programmed to do so. Certainly in an age of state-controlled education and massive exposure to regime-friendly propaganda consent is likely to be mass fabricated—a corporate artefact. Think of the state’s legitimacy as the Stockholm syndrome writ large: Aren’t you grateful that those with the power to ruin or even kill you let you live in relative comfort? Shouldn’t you return their trust?

In contrast, from the point of view of natural law or justice-based libertarianism, the question of lawfulness cannot be settled by noting mere expressions of consent. It must be settled with reference to a standard of *free, informed, and rationally justifiable consent*.¹⁵ However, there is not a shred of evidence that according to such a standard one should deny rational consent to the state *only* on the ground and to the extent that it is an aggressive organisation.¹⁶ A theory of free, informed and rationally justifiable consent also must look at the question whether *artificial persons* of any kind, not just states, ever should be considered persons ‘in their own right’, on a par with natural persons. Ultimately, libertarianism stands

¹⁴ “[T]his Dominion is then acquired to the Victor, when the Vanquished, to avoyd the present stroke of death, covenanteth either in expresse words, or by other sufficient signes of the Will, that so long as his life, and the liberty of his body is assured him, the Victor shall have the use thereof, at his pleasure. And after such Covenant made, the Vanquished is a Servant, and not before: for by the word Servant [...is meant...] one, that being taken, hath corporall liberty allowed him; and upon promise not to run away, nor to do violence to his Master, is trusted by him.” (Hobbes, *Leviathan*, Chapter 20)

¹⁵ “Will this free and informed consent be aggregated somehow by majority rule? If that’s not possible rationally, then it is no way to settle legitimacy.” (Remark by Mike Rozeff, in private correspondence) The standard of free, informed and rationally justified consent has nothing to do with majority rule or any other manner of collective or corporate decision-making, which is not an endogenous feature of a libertarian world. It is a standard that can be invoked in an argument between two natural persons, if need be in front of a judge (I do *not* mean a magistrate of the state), either to prove or to disprove that a person lawfully consented to an action by another. (Hence my dialectical or dialogue-based foundation of libertarian principles in *Het fundamenteel rechtsbeginsel*, op.cit in note 8 above, which is similar in spirit to H.-H. Hoppe’s idea of “the primacy of argumentation”, in his *A Theory of Socialism and Capitalism*, 1989, and *The Economics and Ethics of Private Property*, 1993, both published by Kluwer Academic Publishers, Boston.) The conditions of lawful consent obviously will vary with the circumstances. Buying a box of cookies is not the same as signing an open-ended labour contract, a fortiori an open-ended ‘social contract’. Consent given in an environment saturated with propaganda and more or less subtle intimidation is not a paradigm of free, rational consent. One of the tasks of a court of justice is to create an environment in which factors such as propaganda, intimidation and even the weight of public opinion are held at bay. Politicised justice notoriously fails in that respect.

¹⁶ Consequently, the so-called “non-aggression rule (or axiom)” does not provide a sufficient foundation for a libertarian political philosophy or a libertarian legal theory. See my “Against Libertarian Legalism” (*Journal of Libertarian Studies*, XVII, 3, Summer 2003, 63-90) and “Natural Law and the Jurisprudence of Freedom” (*Journal of Libertarian Studies*, XVIII, 2, Spring 2004, 31-54)

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for the freedom of individual natural human persons, not for the liberties of artificial, corporate persons under one or another legal convention.

Libertarian misgivings about the corporate form of business

My focus here is on the business corporation (as a general type, regardless of differences in various national legal systems). However, it must be noted that historically corporations were political and religious organisations and then privileged ‘public-private partnerships’ before they made their appearance as denizens of the so-called private sector of a national and still later of a thoroughly politicised ‘global’ international economy. Libertarians have more than enough reasons to be wary of corporations, even if they shun critiques that are based primarily on widely publicised scandals and allegations of corporate misconduct.

The history of corporations

Libertarian misgivings about business corporations are motivated in part precisely by a consideration of the role of corporations in history, in particular their links to governments¹⁷ and the financial and monetary systems sustained by central banks, which surely are early instances of corporations that straddle the border between economics and politics.¹⁸ Although in medieval times there was nothing comparable to the modern state, there were many lords with more or less purely proprietary (“territorial”) rights of rule but also lots of corporate entities—cities, universities, guilds, monasteries, and of course the Church, the universal corporation of Christendom—that de facto or by grant from an overlord enjoyed such eminently political rights as having reserved areas of jurisdiction, keeping their own armed forces, and taxing and regulating the lives and work of their subjects. Because of the great multitude of such entities and the fact that in many cases their jurisdiction did not amount to a territorial monopoly, their mutual jealousies regarding their prerogatives were significant factors in averting the emergence of large centralised and territorially integrated systems of rule. In that sense they were constitutional safeguards of freedom in the medieval world, which is not to say that they paid as much attention to the personal freedom of their subjects as they did to their own corporate liberties. However, they gradually lost their liberties to the state, but that state was itself a giant territorial corporation.

Despite the fact that some kings may have pretended otherwise, neither the territory nor the population of the realm was the king’s personal property. The state was not “the realm of the king”; on the contrary, the king was “the king of the realm”, occupying the majestic office in its corporate structure. Placed above all individual persons and corporate entities in the realm, he nevertheless was subject to the whole of it—and that whole was the corporate person of the state itself. Consequently, the king had *imperium* (the right to command) but not *dominium* (ownership). Thus, the king was supposed to rule in the public—that is to say, the state corporation’s—interest, which was neither his own personal interest nor the common interest of the subjects or any group or class among them.¹⁹ However, as the governor and

¹⁷ Already in Roman times, tax-farming corporations were in operation to run the predatory Republic’s and Empire’s system of provinces. (Charles Adams, *For Good and Evil*, Madison Books, Lanham, MD, 1993, Chapter 8) In the Age of Absolutism they were revived in France on a large scale (*Ibid.*, chapter 21) and probably were factors in creating the phenomenon of permanent public debt: money raised by corporations that were unsuccessful in securing the tax-farming contract might be loaned to the king or other grandees and corporate entities (cities, trading companies) rather than returned to the contributors.

¹⁸ It should be worthwhile to consider whether fractional reserve banking could have become the norm in banking if limited liability corporations had not existed. See Vera C. Smith’s *The Rationale of Central Banking and the Free Banking Alternative* (1936, LibertyPress, Indianapolis 1990) for indispensable background.

¹⁹ Compare Jean-Jacques Rousseau’s distinction (in *On the Social Contract*, 1762) between the General Will and the Will of All. It is a translation in the terminology of the political philosophy of voluntarism of the distinction between the concepts of public interest of the corporation and the common interest of the people who at any time happen to be involved in it. Although both ‘public interest’ and ‘general will’ are

sole representative of the state, he was the one who should determine which particular interest was at any time the public interest. Already in the seventeenth century, the era of European state building, mercantile corporations, such as the Dutch and the English East India Companies, became the primary conduits for exporting the then new European political model of governance all over the globe.

Eventually, the kings lost their majestic position to corporate bodies representing ever-larger classes of the population, but the nature and the means at the disposal of the position itself did not change much. The public interest, the interest of the political corporation itself (“the whole”), still is the preferred pretext for restricting the freedom and natural rights of individuals. Strictly speaking, these individuals are not even “the parts” of the corporation but merely people who happen to occupy one or another position within the legal system of the corporation.²⁰

Halfway through the nineteenth century Western states began to re-invent themselves as democratic corporations. At about the same time, general incorporation laws enabling the formation of business corporations were adopted widely²¹, but it was not until the last quarter of the century, that large fully private business corporations began to make their mark in economic and political life and to flex their muscles as policy-makers rather than policy-takers. Since then the mutual involvement of political and business corporations does not seem to have abated.²²

One may be tempted to see the adoption of general incorporation laws as the watershed between a regime under which corporate charters were privileges granted by the state and a regime that places corporations fully within the sphere of personal freedom and freedom of contract. I believe that view involves a logical mistake. There is a difference between abolishing a privilege and making it universally available, if the privilege²³ concerns an exception to general principles of law. Oligarchy—or aristocracy, in the modern sense of the word—presupposes that certain individuals or families have the privilege to rule and live at the expense of others. Democracy, as we know it today, presupposes that every citizen enjoys that privilege.²⁴ In that sense, modern democracy implies universalisation of

used primarily in connection with political corporations, it is obvious that they apply to every corporation (because of the conception of the corporation as a separate person or entity with an interest of its own).

²⁰ The Citizen (a legal position within the state) is part of the state. Hence it is true *by definition* that a citizen cannot but, and therefore should, obey the legal rules of the state: the state’s legal system defines what a citizen is, can do, or wants. However, since human persons are not parts of any state, it is an open question which if any legal rules *they* should obey, even if they happen to find themselves in the position of a citizen of a state.

²¹ When as a student I was introduced to the legal regime of business corporations (“anonymous societies” or *sociétés anonymes* as they are known here) my teacher, Professor Jean Limpens, mentioned that the corporation was instituted as a shareholders’ democracy after the model of the modern democratic state. Interestingly, the model was not a shareholders’ co-operative or the formation of a pool of common property. While these alternatives logically place the origin of the organisation in a contract *among shareholders*, the corporate alternative presupposes a contract *between the shareholders and the corporation*. It is the corporation that issues shares, not a group of shareholders.

²² M.N. Rothbard’s many historical works that explore the interplay between corporate and political power in American history are primary libertarian sources of this sort of critique: e.g. the essays “The Hoover Myth” and “War Collectivism in World War I”, in R. Radosh & M.N. Rothbard (eds), *A New History of Leviathan* (E.P.Dutton, New York 1972); and “Wall Street, Banks, and American Foreign Policy” (Rothbard-Rockwell Report, Center for Libertarian Studies 1995). Also a.o. Butler Shaffer, *In Restraint of Trade: The Business Campaign Against Competition, 1918-1938*, Bucknell University Press, 1997; Paul H. Weaver, *Suicidal Corporation*, Touchstone Books; Reprint edition, 1989.

²³ ‘Privilege’ is ambiguous: it may mean a legal status reserved for one or a few men, or it may mean a legal status that is not available under general principles of law. In most cases, a monopoly is a legal privilege in the first sense: it denies all people, with the exception of a few, to engage in a lawful activity. The political right to vote on other persons’ lives and affairs is a privilege in the second sense.

²⁴ See my “Hobbesian Democracy” (<http://users.ugent.be/~frvandun/Texts/Articles/Hobbesian%20democracy.pdf>).

aristocratic privilege. That, as we well know, does not make it a guarantee of personal freedom. And it does not turn the alleged right to rule others and to live at their expense into a principle of law. Similarly, if incorporation once was a privilege reserved for a few then general incorporation laws by themselves do not ensure the compatibility of the corporate form with the laws of freedom. True, the relative *value* of a privilege to an individual may diminish as the number of people who enjoy it increases, but conceptually the nature of a privilege does not depend on its value to any particular person or group.

Structural analogies with the State

There is a structural resemblance between business corporations and the organisation of politics (the State) and religion (the Church) in the West, which is fairly obvious in the case of business corporations with dispersed shareholding. They all are large, in some cases enormously large, organisations involving lengthy chains of principal-agent relationships.²⁵ These are difficult to monitor for outsiders and for those for whose sake the organisations nominally exist: citizens in the one case, believers in the other, and shareholders in the third. This dilutes the link not only between decision and action but also between these and personal responsibility and liability. Hence, they create an environment in which so-called stakeholder-groups can flourish.²⁶ Moreover, allocations of means and resources are largely dependent on budgets rather than on pricing—and this means that power relations, connections, influence, pressure, and coalitions built around the career-interests of individuals and groups within the organisation play an important role in the distribution of burdens and benefits. Admittedly, these are phenomena that pertain to all large organisations, not just corporations. However, if incorporation removes some of the obstacles to the enlargement of an organisation—and there are good theoretical and empirical reasons for saying that it does²⁷—then incorporation certainly exacerbates those problems.

However, not only size is a problem where monitoring is concerned; there also is a problem with monitoring what a corporation is supposed to do. Today's corporations generally are free from the 'single purpose' requirement that formerly had characterised most corporations other than the state, which always has pursued an abstract goal, Power or Control, by any available means. Abstract models in economic analysis notwithstanding, with regard to monitoring there is a difference between a single-purpose corporation (such as one that is formed to build a bridge in a particular spot or even one that is formed to build bridges wherever it has the opportunity) and a general-purpose corporation that is formed to make a profit no matter in what line of business. Subject of course to national regulations,

²⁵ In one-man corporations and in close (or few-men) corporations, the shareholders do not face insuperable problems of monitoring the management. To say "the operations of the corporate officers consist merely in the loyal execution of the tasks entrusted to them by their bosses, the shareholders" (Mises, *Human Action*, op. cit. p.703) makes sense with respect to such closely held corporations but not with respect to large, publicly held corporations. (See also note 37 below.) Ironically, Robert Hessen's "In Defense of the Corporation" insists that closely held corporations are unjust and should not be allowed in a free society! (See below in the text.)

²⁶ If it were not for the large discretionary powers of corporate management, stakeholders' claims readily would be identified as attempts to divert money away from those who have title to it to those making the claims. However, managerial discretion implies the possibility of 'buying goodwill for the corporation' from one group or another and to present this as 'normal business practice'. Thus, managers may raise their social standing and political profile by encouraging stakeholder activity at the same time that they strengthen their bargaining position relative to shareholders: the stakeholders' allegiance is to the management, not to the shareholders, and the management can use it to intimidate the shareholders into accepting or formalising even larger areas of managerial discretion.

²⁷ Historically, as far as size is concerned, the giant corporation is unmatched by any other form of business. Theoretically, the limited liability corporation has a unique advantage for entrepreneurs and investors in that it is able to externalise some of the risks of manufacturing, mining, transport and financial activities, especially in the context of the corporate economy where one limited liability corporation's risks are 'insured' by other limited liability corporations (banks, insurance and re-insurance companies, and ultimately governments and central banks—the so-called 'too big to fail' phenomenon).

modern business corporations are rather like states in that their abstract purpose, Profit, imposes virtually no restrictions on the sort of activities they might want to undertake. This, too, is an aspect of their being regarded as persons in their own right. Whereas a single-purpose corporation has an incentive to improve its products and services and still return a profit, a general-purpose corporation has an incentive to switch from one activity to another merely because the one currently looks more profitable than the other.²⁸ Not surprisingly, the general-purpose corporation is much less likely to be run by entrepreneurial engineers and technicians and funded by knowledgeable capitalists than single-purpose corporations such as the manufacturing corporations that dominated the corporate scene of the nineteenth century before 1890, when the “corporate revolution” really took off.²⁹ It is more likely to be run by MBA’s, accountants, and lawyers, and financed by managers of funds with no particular interest in or knowledge of its concrete activities.

Of course, there are obvious differences between political corporations and business corporations. For example, shareholders can sell their shares but citizens cannot sell their citizen rights—not on an open legal market anyway. Moreover, the government, the management of the political corporation or state, can increase taxes on some or all categories of citizens to pay the debts of the state. Business corporations do not have the power to tax shareholders, which is not to say that there are no ways in which the management can induce the shareholders to shoulder the burden of the corporation’s debts.

Important as they are, these differences nevertheless should not obscure the structural similarities that are consequences of the corporate form itself, regardless of the political or business nature of the corporation. For example, the holders of the national debt have no direct claims against the citizens or the ruling politicians. Neither do the holders of corporate debt have a direct claim against the shareholders and the managers of a corporation.

The most important structural similarity between political corporations and business corporations is the fact that, whereas in all organisations actions by officers and agents are covered to some extent by the doctrine of *respondere superior* (‘I was only doing my job; talk to my superior’), only in corporations does the chain of vicarious responsibility terminate with an artificial person, the corporation itself, which represents individual persons that are to remain anonymous (citizens, believers, shareholders). Thus, within the corporation, be it political, religious, commercial, for-profit or non-profit, the rule for the ultimate superior, the nominally sovereign authority of the corporation, is *ne respondeat*.³⁰ Responsibility evaporates at the top of the hierarchy. For the chief officers of the corporation, the model is ‘political responsibility’: they may lose their position (‘have to resign’), usually without being held personally liable for the consequences of what they directed the corporation to do. And that presupposes that those leaders hold a position in the corporation. In some cases, the real movers and shakers are formally outside the corporation, while the nominal leaders are no more than their stooges or front men.

²⁸ F.A. Hayek, “The Corporation in a Democratic Society”, in his *Studies in Philosophy, Politics, and Economics* (Simon & Schuster, New York 1967), writes: “[I]f we want effectively to limit the powers of corporations to where they are beneficial, we shall have to confine them...to one specific goal, that of the profitable use of the capital entrusted to the management by the stockholders.” (p.300) However, in terms of human actions and actual organisations of productive activities (involving human labour and physical means of productions) this hardly counts as a “specific goal” on a par with, say, “the profitable use of the specific means of production that the shareholders agreed to pay for”.

²⁹ Martin J. Sklar, *The Corporate Reconstruction of American Capitalism, 1890-1916* (University of Cambridge Press, 1988).

³⁰ Van Eeghen (see note 2) notes that “[w]hile management is the agent for shareholders..., it is also the agent for the corporation itself” (p.53) However, whereas in the one case the shareholders have at least the theoretical possibility of holding the managers answerable, in the other case the management is to some [possibly large] extent answerable to the corporation as represented by the management itself. It is like a ventriloquist answering the questions put to him by his dummy.

Corporate culture and corporate man

Other but related libertarian misgivings stem from the contemplation of what we may call cultural aspects of the corporate economy. Whatever the differences between business corporations and political corporations may be, both types of corporation tend to breed a bureaucratic culture³¹ that cannot but affect the outlook on life of a great number of people. Both are structures that force human relationships to be ordered according to a fixed system of vertically arranged positions and constrained by position-specific rules.

Consider the sort of life a man has when he is surrounded on all sides by corporate structures. It is likely to be centred on his position and career in the organisation for which he works or the political society in which he lives. Thus, competition for him primarily means rivalry in securing one or another position for himself or his friends within the organisation. He adjusts to the command-and-obey or team player mentality that it requires. His environment is defined immediately by the regulations and policies that his superiors have imposed and only remotely, if at all, by the general principles of law and morality. Thus he gets accustomed to utilitarian rather than moral thinking.³² In the extreme case, he may identify himself completely with his position in the organisation, internalising its rules and regulations, its policies and goals, as if he would be merely faceless human matter (an undefined human resource) if the organisation had not stamped its form and purpose on him.³³ The political equivalent of corporate man is of course the fully socialised man, whose principles of action are derived not from his own reason, opinions and values, but from the legal rules and politically correct opinions imparted to him by the societal regime.

Then there was the so-called managerial revolution.³⁴ It was a phenomenon of the rise and widespread adoption of the corporate form in society, not just in politics but also in the organisation of business and non-profit activities. In corporate systems an anonymous base of members, shareholders, or voters elects representatives that either assume the managerial tasks themselves or elect or appoint managers. Thus, the corporate economy, like the corporate political society in which it is embedded, is rife with principal-agent problems and manifold opportunities for shirking, free riding and passing the buck that need to be

³¹ Mises, *Bureaucracy*, Center for Future Education, Cedar Falls, 1983 (1944) explores the differences between political and commercial bureaucracies with reference to the market's discipline of profit-and-loss accounting.

³² Utilitarianism 'works' in closed universes where permissible moves in any situation are finite and known, have a rather well defined set of consequences attached to them, and can be ranked according to a predefined utility function ("measures of success"). If that is the case then one can calculate 'the best move' or something close to it—as for example a chess computer does in the fully rule-defined world of a game of chess. Corporations in particular, and formal organisations in general, lend themselves easily to utilitarian ("impersonal") decision-making because the decisions generally are made by managers acting to deploy assets assigned to them within a formal system of rules and given utility functions—as chess players deploy their pieces according to the rules and pre-defined utility functions of the game. See also Van Eeghen, op. cit., p.64-67. In more personal settings and probably nowhere more than in raising and educating one's children such a utilitarian approach would be highly inappropriate, if not totally unworkable.

³³ These cultural and psychological aspects of corporate structures figure prominently in the writings of libertarian author Butler Shaffer (see in particular his *Calculated Chaos*, Alchemy Books, San Francisco, 1985). In contrast, some people claim that the Organisation Man is dead. However, that claim merely may reflect the efficacy of advanced ego-massaging techniques of modern *human resources management* that, in the interest of corporate efficiency, seek to convince employees that the corporation has their happiness at heart. Alternatively, the claim may reflect the degree to which Organisation Man's counterpart (non-organisation man) has disappeared from public perception. In the political sphere, nationalism (the internalisation of one's role as a citizen and the identification with the nation-state) had shown already in the nineteenth century how readily people let themselves be mobilised for corporate goals.

³⁴ Alfred D. Chandler, Jr, *The Visible Hand: The Managerial Revolution in American Business* (Belknap Press of Harvard University Press, Cambridge Mass. 1977); also of course James Burnham, *Managerial Revolution* (Penguin Books, New York 1941).

addressed by close and often intrusive surveillance and elaborate procedures of control, evaluation and intervention.

Corporate wealth

Consider also the nature of wealth and property in today's corporate economy. In his *Democracy: The God That Failed*³⁵ Hans-Hermann Hoppe developed an argument in political economy that was based on the distinction between property managed by or under the direct control of a real owner and property managed by managers controlled, if at all, by an abstraction, The People, The Nation, or The Community—an abstraction that is represented by corporate structures of collective and ultimately anonymous decision-making (electoral statistics). While Hoppe used that distinction to theorise about the long-run effects of monarchy and democracy,³⁶ it also applies rather directly to modern business corporations, controlled as they are by another abstraction, The Market, which is represented by transaction statistics produced by corporations ("stock exchanges") that organise the sale of shares and quote stock prices.

People who are dissatisfied with citizenship in one state can vote with their feet to move to another political corporation, but not to move out of the system of political corporations altogether. Just so, people dissatisfied with a business corporation whose shareholders and creditors they are can vote with their wallet to move to another corporation, buying its shares or bonds or depositing their money in its vaults. However, under present conditions, this merely means that control of the means of production will shift from one corporation to another.³⁷

For most individuals, wealth consists mostly of claims and derivatives of claims against political and business corporations. Stock, bonds, all sorts of credit-instruments and derivatives, and entitlements are basically paper claims against corporate entities, economic and political, whose leaders and members are not fully liable for the entities' actions. In many cases, they are not even direct claims. Often, indeed, individuals are connected to the corporate economy by way of having subscribed to a fund that invests in corporate shares, bonds or derivatives. Those funds typically are 'products' produced by corporations. Although the individual may believe that he invests in shares, he gets no control-rights whatsoever.

'Paper wealth'—for many people the only wealth they own—is to a large extent a phenomenon of the corporate economy. It is property the value of which depends on how corporate managers use real property bought with other people's money. It is property of immaterial things that may have value without having substance. Consider, for example a person's pension entitlement. Although 'bought' with the acceptance of lower wages or higher taxes, it often is merely an unfunded liability of one or another corporation that may

³⁵ Transaction Publishers, New Brunswick, NJ, 2001

³⁶ Although Monarchy and Democracy are systems of political rule—both ultimately rest on the power to aggress with impunity—, the significant differences between them, to which Hoppe draws attention, derive from formal differences of organisation. Democracy's *corporate* structure bears the brunt of his critique.

³⁷ Admittedly, the market for shares to some extent may force corporations to be more efficient (in some sense of that term) than governments. However, the argument here is not about efficiency but about compatibility with libertarian principles. Even so, it is somewhat surprising to hear an Austrian economist refer to "the role that the capital and money market, the stock and bond exchange, which a pertinent idiom simply calls the 'market', plays in the direction of corporate business" (Mises, *Human Action*, op. cit. p.303). In the long run that role may be decisive, indeed. The remark is reminiscent of Hume's celebrated dictum that government always rests on opinion, which also implies that in the long run 'the market of opinions' directs the operations of government. An Austrian economist, however, should not posit an instantaneous adjustment of corporate or managerial action to "the market" or the wishes of the shareholders anymore than a political theorist should assume that government and public opinion never are out of sync. In the polity as in the economy, all the exciting things happen "in the mean time", before perfect adjustment is reached (if it ever is).

dispose of it by going bankrupt or reforming or ditching its ‘social security system’. It is subject to manipulation—it can be inflated or deflated by decisions of non-owners (managers, politicians) as they repackage and recombine claims to suit their purposes.

Often, such claims appear safe only because the corporations in turn hold claims against other corporations or are reputed to have ready access to credit from still other corporations. Corporate wealth is intimately connected to the credit-industry. Compare your personal credit line with that of even a small corporate actor. Then remember that credit enables the debtor to buy real resources. A great preponderance of the means of production, capital goods and primary factors (land, natural resources) are ‘owned’ by corporations, and controlled by their managers, whose main concern may be to keep their jobs and positions, that is to say to prove more attractive to the voters or shareholders than the competition.³⁸ In terms of perception and action, most individuals are at a great and often insuperable distance from the material embodiments of what they nevertheless think of as ‘their wealth.’

One can argue of course that people are ‘free’ to buy or not to buy shares or corporate debt; that they are not compelled to take part in the corporate economy; and that by taking part they consent to it. However, this sounds very much like the argument that by not emigrating people consent to the conditions imposed on them by the state in which they happen to live. It is no argument to the effect that the corporate economy, as we know it, is at bottom no more than a consequence of the universal respect for personal freedom. In any case, from the fact that people are ‘free to choose’ among alternatives open to them it does not follow that these alternatives are the result of, or are compatible with, a regime of personal freedom.

None of the aspects of our corporate world mentioned in this section bodes well for a libertarian culture of personal freedom. However, without dismissing them as unimportant, I shall say no more about them here. At best they build a case against corporate capitalism that is based on circumstantial evidence. The most direct confrontation of opinions about the libertarian status of business corporations concerns their separate—or, as it usually is called, limited—liability, not only for contractual but also for non-contractual debts. This feature of the corporate form seems to place it outside the pale of the libertarian worldview. Indeed, one way to characterise the libertarian position is by saying that full and undiluted ownership and full and undiluted liability are two sides of the same coin. How does the limited liability business corporation fit in that equation?

Section 3

Robert Hessen’s defence of the business corporation

Libertarian or free-market oriented defenders of the business corporation generally follow the argument that was mapped out so skilfully by Robert Hessen³⁹ some 25 years ago in his brilliant little book in defence of the corporation. Let me address the question of the

³⁸ This reference to competition does not magically transform politics into a libertarian free market device. Is it different with the corporate economy? Is the market for corporate control a free market? Or is it a market that exists only because the corporate economy has received, a long time ago, a legal fiat from the state? There have been spirited defences of the market for corporate control, by mainstream economists such as H.G. Manne and by libertarian theorists such as Norman Barry. However, their arguments appear to presuppose that Anglo-American notions of ‘the private sector’ provide a sound theoretical benchmark of institutionalised freedom (as regards property rights and contracts).

³⁹ Robert Hessen, *In Defense of the Corporation*, Hoover Institution Press, Stanford CA, 1979, 133p. The second part of Van Eeghen’s paper “The Corporation at Issue” (forthcoming in the *Journal of Libertarian Studies*) is a hard-hitting point-by-point critique of Hessen’s book.

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libertarian credentials of the business corporation by way of a short discussion of his argument.⁴⁰ In his prologue, he wrote that his purpose was

to demonstrate the legitimacy of the corporate form—which means its compatibility with the principles of capitalism: individual rights, private property, freedom of contract, and voluntary peaceful cooperation.⁴¹

Obviously, if that was the book's purpose then we may suppose that at least Hessen himself thought that he had succeeded in proving the libertarian capitalist credentials of the existing corporate form. I do not think he succeeded. Consequently, I cannot agree with libertarians who point to Hessen's book to justify complacency about the presence and the role of business corporations in the modern world.

The gist of Hessen's argument is that every feature of the corporation can be accounted for in terms of lawful contracts. Hence, the corporation is no more than a web of contracts, a lawful construct under the principle of freedom of contract. This is what Hessen calls the inherence theory of the corporation,

the idea that men have a natural right to form a corporation by contract for their own benefit, welfare, and mutual self-interest. It is the only theory of corporations that is faithful to the facts and philosophically consistent with the moral and legal principles of a free society.⁴²

Quite so! *If* a corporation is merely a nexus of lawful contracts then it does not constitute a special problem for a libertarian. However, Hessen did not offer convincing proof that corporations-as-they-exist are mere contractual arrangements that would be lawful *under a regime of respect for natural rights*. Perhaps he did prove that they are mere contractual arrangements *within the existing American legal system*—but surely it takes a leap of faith to assume that the legal status of U.S. Citizens is a carbon copy of the natural rights of man. If the legal context within which men make contracts does not conform to the requirements of natural law and natural rights, then we cannot simply assume that their contracts, no matter how 'freely' made, conform to those requirements.

Indeed, Hessen's argument itself involves the concession that the corporate form, as it is understood today, contains at least one element that is not compatible with his "principles of capitalism": the idea that the corporation is a separate entity, a separate legal person. As Hessen puts it, "the entity concept serves no *valid* purpose."⁴³

This concession would not affect his argument *if* the separate person notion were absolutely inconsequential; *if* it in no way affected people's decision whether to give an organisation a corporate or another form. However, that is unlikely. The outstanding feature of the corporate form is precisely that it is a separate person. The corporation builders and

⁴⁰ Hessen wrote his book in response to Ralph Nader's (and others') criticisms of the corporate capitalist economy and more specifically to refute the cogency of Nader's proposals for changing American corporate law. The basic argument of Nader and others was that since corporations are creatures of the State, the State has a right and a duty to regulate them in the public interest. Obviously, this argument cuts no libertarian ice. Similarly, the argument (e.g. in Thom Hartmann, *Unequal Protection*, Rodale 2002) that since it is folly to regard natural and artificial persons as "equal persons", the state should create a different legal regime for each class of persons, is not relevant either, as it assumes the state's right to legislate what any person may or should do. It should be clear that defending the existing corporate form against Naderite attacks is not exactly the same thing as proving that it is compatible with libertarian principles or the principles of capitalism (as Hessen preferred to call them). In any case, I am not here questioning the validity of Hessen's refutation of Nader's claims and proposals.

⁴¹ Hessen, op.cit., p.xvii.

⁴² Hessen, p.22

⁴³ Hessen, p. 22, emphasis added—FvD

their armies of lawyers⁴⁴ have put up a mighty fight to secure that feature as a fixture of modern legal systems.

If ‘corporate personhood’ is not inconsequential then Hessen’s concession destroys his argument as a libertarian defence of the corporation as it exists. It then comes down to a proposal to *reform* the law of corporations. And Hessen does propose a reform. It is on page 20 of his book (where it is inserted inconspicuously in a discussion of vicarious liability):

The proper principle of liability should be that whoever controls a business, *regardless of its legal form* [emphasis in the original], should be personally liable for the torts of agents and employees. Thus, in partnerships, vicarious liability would fall upon the general partners only, while in corporations, the officers would be liable (whether they are owner-investors or hired managers). . . .

The current rule that shareholders are not personally liable for corporate torts because [the corporation] is an entity distinct from [them] has permitted and condoned an injustice: the use of the so-called one-man corporation and the close corporation. . . . The use of [these constructs] has unfairly thrust the burden of accidents and injuries upon the hapless victims.

Although Hessen’s argument seems to be that corporations can be defended without mentioning the separate person doctrine (given that it ‘serves no valid purpose’), we see that he himself conceded that the doctrine does make a difference. He explicitly noted that separate person corporate capitalism permits and condones unjust and unfair outcomes in the form of one-man and close corporations, which would not be there if corporations were mere contractual arrangements *within a legal system defined by the principles of capitalism*. Thus, he admitted that separate person corporations are not compatible with libertarian principles.

In short, the corporate form that Hessen defends, excludes the idea that the corporation is a separate entity. It leaves no room for the notion of corporate liability but seems to equate the corporation with a partnership of ‘officers of the corporation’, at least for the purpose of dealing with non-contractual liability. That may seem like a nice thought but not like an accurate description of corporate realities, now or on the eve of the Reagan era, when Hessen wrote his book. Moreover, as we shall see, it does not square well with Hessen’s freedom of contract doctrine.

The one-person corporation

We can agree with Hessen that the one-person corporation is an abomination of the principles of libertarian capitalism. However, is the abomination, as he suggests, a consequence of the one-man aspect—or is it a consequence of the corporate aspect?

If one doubts that the one-person corporation is incompatible with libertarian principles, one may conduct the following thought-experiment.

Imagine the world in a condition that is in accordance with your own version of libertarianism. Now, imagine that I appear in that world. To your surprise I have the letters llp tattooed on my forehead. Yes, I am a limited liability person! What does that mean? Well, it means that there is plain old natural me, the private Frank, if you will, and then there is the public Frank, an artificial person that I have created.⁴⁵ I have endowed my public persona with assets worth 1000 grams of gold and have contracts with it that stipulate that I will act as its chief manager and its sole shareholder. Moreover, I have promulgated to the world that, unless I decide otherwise, all my actions should be ascribed and accounted to my public self: I interact with the outside world only through the medium of my public self, except in

⁴⁴ In a case decided in 1854, Abraham Lincoln, acting as attorney for the Illinois Central Railroad Company, unsuccessfully argued that the railroad, as “a person”, should have the protection of the “uniform taxation” clause of the 1847 Illinois State Constitution. (Thom Hartmann, *op.cit.* p.85)

⁴⁵ Obviously, nothing in the corporate form precludes me from creating as many public personae as I want. However, for the sake of simplicity, let us assume that there is only one incorporated Frank.

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those cases where I decide to act as a private person. Consequently, I have publicly limited my liability for all debts, contractual and non-contractual, to the worth of my public persona's assets (1000 grams of gold initially).

This operation does not harm my public persona with creditors. If my public persona goes to a bank and asks for a loan and the bank tells it that its public assets are not sufficient to establish its creditworthiness then my private person can step forward and agree to make some of my private personal wealth available as collateral for the loan. Of course, I can do something like that in all contractual relationships.

However, unless I decide otherwise, my liability for torts and damages arising outside any contractual relation is limited to the assets currently owned by my public persona, even though it cannot do anything without my personal intercession or involvement. That is because my public persona contractually has assumed vicarious liability for torts arising out my actions as its manager. Surely, Hessen is right to denounce this construction but what ground does he have to denounce it only in the case of the one-man corporation?

As noted above, my public persona is not harmed by the fact that other market participants may interpret its limited assets as insufficient creditworthiness. If they insist, I can always personally guarantee its debts. However, a more important question is whether my creation has not harmed or done injustice to others. Hessen says it does but only because mine is a one-man corporation. If we abstract from this purely numerical aspect, his argument must be that my corporate form does not do harm or injustice. Other libertarians apparently agree. Here is what Rothbard had to say:

On the purely free market, ... men [creating a limited liability corporation] would simply announce to their creditors that their liability is limited to the capital specifically invested in the corporation, and that beyond this their personal funds are not liable for debts, as they would be under a partnership arrangement. It then rests with the sellers and lenders to this corporation to decide whether or not they will transact business with it. If they do, then they proceed at their own risk.⁴⁶

This is weird, to say the least. Everybody seems to agree that the default position is that my liability is "unlimited". Everybody also seems to agree that I always can limit my liability contractually, if the other parties to the contract agree to the limitation. I can limit my liability if I am willing to pay the price the other parties ask for bearing more of the risk involved in the deal than they otherwise would have to bear. However, according to Hessen and Rothbard, if I *unilaterally* have assumed the corporate form, the default position is reversed: no additional or special contract is needed to limit my liability; on the contrary, it now falls to the other party to take steps to undo the limitation and pay the price (or at least incur the transaction costs) for getting me to agree to increase my liability.

To see the consequences of this stance, imagine a world in which incorporation was an original, natural right of every person, with everybody's liability limited *de jure naturale* to zero (or to whatever he or she announces, or perhaps to, say, the value of a week's work). Alternatively, imagine a world in which everybody had a natural right to incorporate himself merely by announcing "I am a corporation." Incorporation then most certainly would not be a privilege but one may well ask in what manner such a world would meet the requirements of justice. Would it not be somewhat like a world in which everyone has a natural right to steal from everybody except those who have paid him to respect their property?⁴⁷

⁴⁶ M.N. Rothbard, *Man, Economy and State, The Scholar's Edition*, Ludwig von Mises Institute 2004, p.1144.

⁴⁷ There is an obvious Coasian flavour to the argument, which one certainly would not expect from Rothbard and Rothbardians like Walter Block, who on several occasions has given a most scathing account of the Coasian approach yet dismisses the critique of the corporation as "know-nothing-ism" with a mere reference to the Hessen-Rothbard position (W. Block, "Henry Simons is not a Supporter of Free Enterprise", *The Journal of Libertarian Studies*, XVI, 4, Fall 2002, p.28, note 75). For Block's critiques of the Coasian theorem and the approach to the study of law and economics it has inspired, see his "Coase and Demsetz on Private Property Rights", *Journal of Libertarian Studies*, I, Spring 1977, 111-115; "Ethics,

If everybody has a natural right to incorporate then the question arises: Why don't we all incorporate? What is the point of remaining unincorporated? The usual answer (again derived from Hessen) is that incorporation implies costs that may well offset its advantages or benefits. Now this happens to be true but as an argument regarding the question of the compatibility of the corporation with libertarian free market capitalism it is beside the point. What are these costs of incorporation? More onerous publication requirements are often cited as obvious examples. Another example is the increased likelihood to be singled out as a 'deep pocket' by a judicial system derailed by a pervasive culture of litigation and a commitment to satisfy individual plaintiffs merely because they are perceived to be less wealthy than the corporate defendants. However, such costs do not arise from the requirements of free market exchanges but from government regulations and a court system that has abandoned the quest for justice in an effort to turn itself into a mechanism for redistributing wealth. In a truly free market, supported by courts that recognise its principles, only the negligible costs of making the announcement that one is a corporation could offset the benefit of no or limited liability! Thus, there does not seem to be any point in remaining unincorporated, if, as Hessen alleges, incorporation is a natural right. Clearly, the unilateral assumption of the corporate form is not as innocuous as Hessen and Rothbard imply.

It is a safe bet that you will not accept my dual appearance, as a private person hiding behind the corporate veil of my public persona, as a lawful feature of your libertarian world. Note, however, that I have not done violence to or aggressed against anyone in *creating* and *publicising* the one-man corporation that is my public persona. Therefore, if you believe that any action that is not an aggression is legal in your libertarian world, and if you assume that the risk of harm created by your *legal* actions falls entirely on those who eventually suffer the harm⁴⁸ (yourself or others), then you logically are committed to accept the libertarian legitimacy of self-declared limited liability persons, that is to say one-man corporations. Indeed, you are committed to accept the legitimacy of the *form* of the separate-person corporation itself. As a separate entity, the artificial person of the corporation remains what it is no matter how few or how many persons hide behind its corporate veil.⁴⁹ If the one-man corporation is illegitimate then so is the any-number-of-men corporation. If the latter is not illegitimate then neither is the former sort of corporation.

Shifting the argument

Here, then, is where I must part company with Robert Hessen. He assumes that he can single out the one-man corporation and the few-men or close corporation for their incompatibility with the principles of capitalism and leave the larger corporations in full possession of the corporate playing field. However, to reach that conclusion he must shift his line of argument:

Regardless of one's view about limited liability for torts, the whole issue is irrelevant to giant corporations, which either carry substantial liability insurance or possess sizable net assets from which claims can be paid. (p.21)

Efficiency, Coasian Property Rights, and Psychic Income: A Reply to Demsetz", *Review of Austrian Economics*, VIII, 2, 1995, 61; "Private Property Rights, Erroneous Interpretations, Morality, and Economics: Reply to Demsetz", *Quarterly Journal of Austrian Economics*, III, Spring 2000, 63-78

⁴⁸ This seems to be the position defended by Walter Block ("Towards a Libertarian Theory of Blackmail", *Journal of Libertarian Studies*, XV, 2, Spring 2001, 55-88). However, I cannot recall having seen any more developed statement of his position on limited liability corporations than his jibes against H.C. Simons' critique of the corporate form ("Henry Simons is Not a Supporter of Free Enterprise", *Journal of Libertarian Studies*, XVI, 4, Fall 2002, p. 3-36, especially 27-28)

⁴⁹ Logically, at least, there may be an artificial person, a corporation, even if there is no real or natural person pulling its strings. Such a corporation would be totally inert, because an artificial person is not capable of acting or thinking on its own or speaking for itself, but inertness does not entail non-existence.

Obviously, this is an irrelevant argument. It may have pragmatic value, but remember that Hessen was arguing for the compatibility of the corporate form with *the principles of capitalism*. In any case, his argument now relies on the distinction between corporations with sufficient insurance or assets and corporations that have neither of these. Conceptually and perhaps also empirically, it has nothing to do with the distinction between one-man and close corporations, on the one hand, and giant corporations, on the other hand.

Moreover, speaking empirically, liability insurance for corporations overwhelmingly is supplied by other corporations.⁵⁰ The attempt to prove that one corporation is compatible with free market principles by *assuming* that other corporations are compatible with those principles obviously goes nowhere.⁵¹ As for assets, a service corporation that is housed in rented space may be a corporate giant and yet have no more saleable assets than a few tons of office furniture and equipment, a customer database and a couple of trademarks.

In the real world, of course, one-man corporations and few-men corporations *should* be relatively harmless. To the extent that the legal rules they have to apply and the judicial traditions in which they have been indoctrinated permit it, judges will not hesitate to tear apart the corporate veil in search of the real decision-makers and agents (the shareholders or managers of the one-man or few-men corporation). The injustice of permitting a few known individuals unilaterally to limit their own liability is too obvious for judges to stand by in idleness, unless they are legally bound, as magistrates of the state, to respect the legal form in defiance of requirements of justice. In large corporations, the corporate veil is far more effective because there is little personal contact between shareholders and managers so that the latter more easily can invoke their status as employees to use the doctrine of vicarious liability to their advantage—to shift responsibility upward to higher management and ultimately to the corporation itself (the shareholders remaining out of bounds as far as liability claims are concerned).⁵²

Robert Hessen could state justifiably that corporations are compatible with libertarian principles of capitalism, *provided that we do not think of organisations as entities or persons in their own right and to the extent that they merely are contractual arrangements*. However, he went astray in believing that the mere fact that a creditor can insist on a contractual stipulation to the effect that the self-announced limits of a corporation's liability should be raised or lifted completely obviates all concerns of justice. He also went astray in believing that questions concerning limited liability for non-contractual debts could be dismissed with a glib reference to sufficient insurance or assets or to the assumption that officers of the corporation are liable regardless of what their contract with the corporation stipulates. Let us elaborate a bit on this last point.

⁵⁰ Even Lloyd's of London now counts among its members more limited liability corporations than "Names" (individuals with unlimited liability) and is expected to become an exclusive preserve for limited liability corporate insurers in the near future. See http://en.wikipedia.org/wiki/Lloyd's_of_London and the article "Lloyd's of London: Insuring for the Future?" in *The Economist*, September 16th, 2004.

⁵¹ Under present conditions insurance companies are very much intertwined with other financial corporations, banks, and ultimately the really big players in the field, central banks and governments (which justify most if not all of their activities with the claim that they are the insurers-of-the-last-resort). Hence, if, for the reasons adduced in this text, limited liability corporations are outside the pale of the free market then so are limited liability insurance corporations. Consequently, contracting away one's liability to a limited liability insurer does not appear entirely kosher. 'The free market' refers to people acting according to the principles of libertarian capitalism, which do not permit any one of them to limit his liability unilaterally.

I am inclined to believe that limited liability insurers tend to exacerbate the well-known problems of the insurance industry, for example moral hazard and asymmetrical information about the composition of the insurer's risk pool. However, I shall not develop my reasons for that belief here.

⁵² Note again the similarity with the political organisation of the state: its officers and managers (civil servants and politicians) refer to higher authorities and these ultimately refer to the voters (citizens) who remain anonymous and beyond the reach of liability claims.

Section 4

Shareholders, managers, and owners

It should be clear that the problem of the limited liability corporation is not the fact that the liability of managers is limited. Managers typically are linked by contract to the corporation that employs them. Under the doctrine of freedom of contract, their contracts can stipulate any distribution of liability between the employer (the corporation) and the employee. To attract managers, a corporation generally will offer the protection of its own vicarious liability for many of the risks associated with the manager's role and function within the corporation. There is no reason why these contracts should not touch on liability for torts. Hence, Hessen's recommendation that 'in corporations, the officers would be liable (whether they are owner-investors or hired managers)' for torts goes against the grain of his own inherence or freedom of contract theory of corporations.

It also should be clear that the problem of the limited liability corporation is not the fact that the liability of shareholders is limited. That limitation of liability too is entirely contractual. You buy the shares in return for the prospect of sharing in the profits of the corporation, of being able to sell your shares to anyone who might want to buy them, and to get a share of the positive residual value of the corporation if it ever should be dissolved. However, you do so on the understanding that you in no way will be held accountable or liable for any action undertaken by the corporation. In that sense, shareholders do not have liability at all. Issuing shares is a way to raise capital. To make the buying of shares more attractive, a corporation may throw in others sorts of goodies, for example voting rights in the shareholders' general assembly and lavish receptions when it meets. However, these extras do not change the fact that the sale of such shares is purely a matter of contract. One cannot suggest therefore that shareholders should be held fully liable for the corporation's acts of commission or omission without violating the principle of freedom of contract.

Accepting the validity of Hessen's argument, Stephan Kinsella⁵³ asks: "[D]oes respecting corporate status violate anyone's rights?" He obviously expects us to answer in the negative, his argument being that corporate law does not (or should not) allow the doctrine of vicarious liability to divert liability for torts from the actual managers or employees of a corporation to the corporation itself. However, that diversion is the very point of corporate personhood as far as liability is concerned, even if there are defences in cases of actions outside the scope of 'normal business practices' (crimes, abuse of authority, conduct unrelated to corporate action or policy, and the like⁵⁴). To hold the managers or employees personally responsible and liable for *all* non-contractual debts that may result from the execution of their corporate tasks, *even when there is no contract in which they explicitly have assumed the risk of full liability*, would be blatantly unjust—unless one assumed either that the corporation's 'normal business practices' carry no risk whatsoever of accidents or mishaps (which is absurd) or that the managers are (or own) the corporation. The latter assumption obviously contradicts Kinsella's position that *the shareholders* own the corporation. However, he also holds that shareholders are not liable for corporate debts of any kind. Hence, the result is that the corporate status implies externalising liability (without contractual sanction): either from the shareholders to the managers and employees, as Kinsella would have it, or from the corporation to [some of] those who otherwise would have enforceable claims against it. Thus, the answer to Kinsella's question is: "Yes, respecting corporate status does violate the rights of persons."

⁵³ See his blog referred to above, note 2.

⁵⁴ However, consider the legal developments referred to in note 10 above.

Who owns the corporation?

From the contractual limitation of shareholders' and managers' liability there follow two important corollaries:

First, neither the shareholders nor the managers fit the libertarian position that ownership and liability are two sides of the same coin. Hence, the pat answer that 'the shareholders or the management own the corporation' will not do.⁵⁵ They have a perfect alibi: they are linked to the corporation by contracts of sale or employment that, as a rule, strictly limit their liability for what the corporation does.

Hence, if shareholders and managers were the only possible candidates for the owner's position then we should say either that *nobody owns the corporation* or that *it owns itself*. Both of these possibilities are anathema from the libertarian point of view, if they are not entirely illogical.⁵⁶

Second corollary: unless the corporation's liability was limited before it began to issue shares or hire managers, it remains as fully liable after it started to do so as it was before! Hence the question: Was the corporation's original liability limited to its legal assets or did it extend to the assets of its owners? Let us consider the alternatives:

On the one hand, if the corporation's original liability included the assets of its owners before the sale of shares or the hiring of managers then it continues to do so afterwards. Indeed, *ex hypothesi*, both types of contract explicitly rule out that the shareholders or the managers take over full liability from the owners of the corporation. Therefore, full liability remains with the owners. Consequently, the whole idea of the limited liability corporation is an oxymoron.

On the other hand, if the corporation's original liability did *not* include the assets of its owners then the question is: How did the owners acquire the benefit of owning a corporation through which they can act without creating any liability for themselves? Here, the answer must be: ultimately from the *founders of the corporation*, its original owners, for they were the people who created that particular corporation, drew up its constitution, and gave it the features and attributes it has.

However, as we saw in section 3 above, under libertarian capitalist principles the founders, who are natural persons, cannot limit their own liability by mere fiat. Indeed, from the founders' point of view, the corporate form is no more than a device, a tool, a means for achieving their ends. Now, the creator of a tool is at once its owner and also the one who is liable for its use *to the extent that no one else voluntarily has accepted to bear the risk of liability for him*. The fact that he then sells shares or hires managers, does not diminish his liability for torts one bit. That liability remains with him until he disposes of his property. It also does not diminish his liability for contractual debts except in cases where his contractors have agreed to a limitation of his liability.

Once we draw attention to the owners, and in particular the founders, of a corporation, we clearly can see the anomaly presented by prevalent notions of the corporation. If natural persons can endow one kind of tool, namely an organisation of their own creation, with separate artificial personhood then why should they not be able to endow any other tool, say a hammer, a car or an oilrig, with the same? If they could do that then they could tell anyone who was harmed by their use of a hammer 'to go and sue the hammer!' Thus, if someone accidentally were to hit you with an *incorporated hammer* then, no matter how much damage

⁵⁵ Piet-Hein van Eeghen makes this point with impeccable clarity, in the article referred to in note 2 above, p.52-54 and p.57-58.

⁵⁶ Note that under the American doctrine of corporate personhood (see note 6 above), the Fourteenth Amendment, which offers equal protection to all persons, strictly speaking covers corporations. If we accept that doctrine then we must logically conclude that no one legitimately can own a corporation, because no one legitimately can own another separate person. Consequently, the corporation must be a self-owning person—which is absurd, at least from a libertarian point of view.

you suffered, you would be entitled only to seize the hammer and sell it for what it's worth.⁵⁷ Obviously, that would be absurd—but then so is the idea that those who use the corporate form can escape personal liability by pretending that their corporation itself is liable.⁵⁸

The conclusion must be that human persons cannot by their own right create a limited liability corporation *under natural law* (the law of natural persons). If socio-empirically it seems that they nevertheless have that ability then the explanation must be that it derives from an *artificial law* (the law of artificial persons)—the positive law, enacted by the legislature or developed by the monopolistic judicial system of a political corporation that will not hear an appeal to natural law.

Actual positive law does not recognise the owners of a business corporation, or, if it does, illogically conflates the owners with those who happen to occupy contractually the statutory corporate positions known as Shareholders or Managers. It has no serious interest in answering the question 'Who owns the corporation?' Yet that is the libertarian question par excellence.

Obviously, then, a libertarian view of the corporation must consider its owners as well as its shareholders and managers; and it must consider the transfer of ownership as something distinct from the transfer of shares or the selection of a management team. However, if, as well might happen in some cases, the transfer of shares is in effect a transfer of ownership of the corporation itself then these shares cannot be 'limited' or 'no liability' shares. Thus, it would be necessary to distinguish at least between owners-shareholders and shareholders that are merely suppliers of capital to the owners. It will not do to refer to shareholders as 'the owners of the corporation' in all cases, except those where their liability for the debts of the corporation comes into play.

Of course, the separation of ownership and shareholding would have far-reaching consequences. For one thing, it is likely that corporate statutes (drawn up by the founders) would restrict the powers of the assembly of mere shareholders in matters such as choosing managers and acquiring particularly risky assets: the owners at least would reserve a veto right for themselves. It is also likely that owners would be more careful in circumscribing the actions of managers that will be covered by the owners' vicarious liability. Moreover, large undertakings probably would take the form of contractual cooperation or cartels rather than accumulations of corporate property.⁵⁹ Most important of all, the separation of ownership

⁵⁷ It is beside the point to insist that the courts will (or should) not permit this. *If* one legitimately could incorporate a tool or organisation and endow it with a constitution that makes it vicariously liable for actions done with it, then a court would have to accept the arrangement. It would be inconsistent to want to have your cake (the natural right to incorporate merely by announcing the existence of a corporation) and eat it too (the natural right to incorporate should count for nothing in cases where it leads to undesirable consequences).

⁵⁸ There would be no absurdity, of course, if we were to embrace that stalwart of social (and socialist) metaphysics, namely that certain social organisations by their very artificial or conventional or traditional nature are persons and that their so-called personal rights ultimately supersede the rights of natural human persons. However, at least from a libertarian point of view, that would be a clear *reductio ad absurdum* of the whole idea of corporations as separate persons.

⁵⁹ Interestingly, the great impetus for incorporation, at least in the United States, seems to have come from the courts' animosity against business pools and other forms of contractual cooperation that were deemed 'in restraint of trade'. Corporations provided businessmen with an alternative cooperative scheme that made it possible for them to coordinate activities on a large scale without running afoul of the courts' prejudices. The corporate form permitted them to do by rearranging property relations what they could not do by mutual agreement among otherwise independent partners. See W.G. Roy, *Socializing Capital: The Rise of the Large Industrial Corporation in America* (Princeton University Press, 1999), especially chapter 7: "[Businessmen and their lawyers] eventually found that the corporation offered a set of property relations that the government itself had created to supersede the limitations of individual ownership. [...] It was only when other means of organizing their industries were prohibited that they began to use corporate structures in a way that ironically reflected the original conception of corporations as supracompetitive, socially owned, financially capitalized, large scale enterprises." (Roy, p.191-192)

and shareholding would focus attention on the real owners and thus permit one to cut through the cloudy issues of liability that always have surrounded the corporation.

Section 5

Concluding remarks

A short note on natural law and artificial law

Natural law or justice-based libertarianism does not countenance the possibility that one natural person owns another innocent natural person⁶⁰ or the possibility that one artificial person owns another person, natural or artificial. It does not object to natural persons being the owners of artificial persons. Ownership is an attribute of natural, human persons. Here the difference between the natural law approach and the artificial or positive law approach is crucial. In artificial, 'positive' law the distinction between natural and artificial persons deliberately is kept unresolved. Indeed, when push comes to shove, certain artificial persons (the state in the first place) often get preferential treatment over other persons.

The positive law approach wallows in intellectual bluff: legal fictions that condone the use of arbitrary cut-off points and definitional stops to decide an argument one way or another. It directs its practitioners to cut off the search for responsibility and liability as soon as it encounters a person, whether that is a natural or an artificial person, such as a corporation. However, to avoid the most egregious injustices it occasionally will allow people to set the fiction aside and pierce the corporate veil. On other occasions, it will hold the corporation liable for no other reasons than that its pockets are deeper than those of the culpable managers or employees.

The natural law approach, in contrast, goes step by step through the whole network of relationships that constitute an organisation and the actions and decisions of the natural persons that brought it to its present shape. The natural law approach follows the evidence as far as it goes. In the case that is of interest here, it goes back to the natural persons who founded the organisation, its original owners, and from there forward again to those who succeeded them as owners (as buyers or heirs). If we find the original owners and can discover the succession of owners to the present then we also have identified the natural persons that are fully and personally liable for the debts of the organisation. The trouble is that in a legal system based on fictions there is no tradition of following the trail of ownership either of political or of business corporations.

Note that the natural law approach considers the organisation without assuming that it is something different from the organising agents and their actions. It does not look at the organisation as if it were a corporation. On the contrary, it looks at a corporation as no more than one of the things people do—a game people play. Thus, it has no need to ponder whether or not to pierce the corporate veil. Whether the organisation is called a corporation or not, the natural law approach always sees human persons doing things, making contracts, re-arranging property.

Anarcho-libertarianism and the limited liability corporation

So far I have not distinguished between various strands of libertarianism. A so-called minarchist libertarian might shrug off my remarks. For all his talk about free markets and free persons, he always keeps a supposedly utterly benign armed monopoly corporation up

⁶⁰ This raises the issue of 'voluntary slavery'. Without going into details, just for the record, I believe the logic of law and justice entails the proposition that there is no lawful way in which one man can own another innocent man. In other words, owning another man implies that he is not innocent (he must be a criminal) or that the action that effectuated the transfer of ownership was itself criminal and therefore unlawful. See theorem NJ4 on p. 27 of my 'The Logic of Law', which can be consulted at users.ugent.be/~frvandun/Texts/Articles/LogicOfLaw.djvu.

his theoretical sleeve with which to ‘solve’ the problems that, in his view, people cannot solve while acting according to the principles of libertarian capitalism. Thus, whatever qualms we may have regarding business corporations the minarchist can dismiss with the assurance that his government will see to it that nothing objectionable happens or goes unpunished. The same is true for many conservatives and adherents of the nineteenth century form of the *Rechtsstaat*.

For an anarcho-libertarian the implications of this discussion are radically different. For him to accept limited liability corporations is to accept that corporations might just as well concentrate on acquiring land and delivering protection services, including armed protection, and judiciary and enforcement services as on marketing sweets, soft drinks, or aspirin. In short, he must countenance the possibility that the whole of the political infrastructure of his libertarian world becomes the preserve of one or a few giant corporations.⁶¹ He can hardly afford to ignore the implications of such an eventuality. I have no crystal ball but I don’t think it would be stretching the imagination to expect that such a world should offer opportunities for amassing military and political power that some entrepreneurs will not pass by.

The form of the limited liability corporation makes possible, if it does not encourage, the concentration of large personal power for those who hide behind the veil of a great many corporations, which they can at the first opportunity amalgamate into one corporate giant—especially, of course, if there is no jealous power-monopolist (the state) to hold them in check. It is one thing to envisage arms and the enforcement of law and justice in a world where responsibility and liability are restrictions on the actions and power of proprietary firms or partnerships, and another to envisage them in a world where they are not. The gulf between anarcho-capitalism and anarcho-corporate-capitalism is wide and deep.

Unlike the Rothbardian anarcho-capitalist wing of libertarianism, which puts justice above “the myth of efficiency”⁶², many libertarians advocate free market capitalism primarily as “an incredible bread machine” and free market corporate capitalism as the most advanced version of that machine. Thus, one sometimes hears the argument that a world without corporations—at least one without corporate capitalism—would be immensely poorer than the world as we know it. However, I cannot see how throwing a corporate veil over business organisations can do anything more than create unnecessary uncertainties, partly managed and partly random redistributions of wealth, and arbitrary allocations of liability for harm. It may be true that the capabilities of limited liability corporations to raise huge amounts of capital are essential in explaining some of the technological wonders of our age. Nevertheless, we should remember Bastiat’s warning about “what is seen and what is not seen.” That the potential of unincorporated capitalism was not realised, does not mean it must be negligible in comparison with the realisations of corporate capitalism.

Personal freedom and corporate liberties

If corporations never had been endowed with a separate, artificial personality, would they have become as prominent in the world’s economy as they are today? I believe that having the status of a separate person is indeed the most relevant feature of the corporate form, as we know it, and that without it corporations, reduced to mere contractual arrangements, would not have achieved the pre-eminence they now enjoy. I grant that there are many corporations out there for which the corporate form is not all that important. However, that leaves potentially many corporations for which it is important—and many individuals that would not have achieved central positions in the corporate economy, if they had not had the opportunity to hide behind several corporate veils at once.

⁶¹ Another threat comes from non-profit corporations that are ideological opponents of personal property-based freedom and free markets.

⁶² M.N. Rothbard, “The Myth of Efficiency”, reprinted in the collection Murray N. Rothbard, *The Logic of Action, Volume I: Method, Money, and the Austrian School* (Edward Elgar, Gloucester, UK, 1997), 266-273.

Tuesday, 29 November 2005

Would a system of law, under the principles of personal freedom for all, protection of property and freedom of contract and association, permit associations that cover questions of liability with a corporate veil? Would it permit such a veil to obfuscate the liabilities of those who do and decide—to the detriment of whoever happens to be in the wrong place when the chips fall? I doubt it. As an ownerless or self-owning construction, the corporation is something that cannot exist on a free market, if the idea of a free market is derived from real people and their rights and corresponding responsibilities. Thus, corporations evidently exist because of legal privileges, deviations from the law that applies to other forms of associations that do not attenuate or diminish personal responsibility and liability.

A final thought: Because modern economic culture is well-adjusted to separate-person limited liability corporations, the idea that the struggle for personal freedom must be directed not only against the political corporations we know as states but also against powerful economic corporations certainly is frightening. It unhinges a lot of the clichés about the private sector that many libertarians accept all too uncritically. But then I never thought of libertarianism as a defence of the private sector. It is a defence of freedom for human persons, not of the legal positions that our rulers and their appointed judges so graciously reserve for ‘private activity’.