

# ARTICLES

## DEFENDING CORPORATIONS<sup>1</sup>

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### INTRODUCTION

Are corporations incompatible with the free market? In the minds of most people, the corporation is part and parcel of laissez faire capitalism. Yet some ostensibly libertarian critics see the corporation as somehow illegitimate. In this article, we address – and firmly reject – some claims of these critics, for example, Van Eeghen<sup>4</sup> and, partially, Hessen,<sup>5</sup> for not going far enough in the defense of the corporate form of organization.<sup>6</sup>

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<sup>4</sup> Piet-Hein van Eeghen, *The Corporation at Issue, Part I: The Clash of Classical Liberal Values and the Negative Consequences for Capitalist Practices*, 19 J. LIBERTARIAN STUD., Summer 2005, at 49, 49-70, available at [http://www.mises.org/journals/jls/19\\_3/19\\_3\\_3.pdf](http://www.mises.org/journals/jls/19_3/19_3_3.pdf) [hereinafter Eeghen, *Part I*]; Piet-Hein van Eeghen, *The Corporation at Issue, Part II: A Critique of Robert Hessen's In Defense of the Corporation and Proposed Conditions for Private Incorporation*, 19 J. LIBERTARIAN STUD., Fall 2005, at 37, 37-57, available at [http://www.mises.org/journals/jls/19\\_4/19\\_4\\_3.pdf](http://www.mises.org/journals/jls/19_4/19_4_3.pdf) [hereinafter Eeghen, *Part II*].

<sup>5</sup> ROBERT HESSEN, IN DEFENSE OF THE CORPORATION (1979).

<sup>6</sup> Eeghen, *Part I*, *supra* note 4, at 49, criticizes Walter Block, *Henry Simons Is Not A Supporter of Free Enterprise*, 16 J. OF LIBERTARIAN STUD., Fall 2002, at 3, 3-36, available

Let us, then, consider Eeghen's criticisms of the corporation<sup>7</sup> and rescue this commercial enterprise.<sup>8</sup> We shall, in section I, organize this reply around the following criticisms of *The Corporation at Issue, Part I*:<sup>9</sup> A. Corporate Entity Status; B. Management Autonomy; C. Monopoly; D. Egalitarianism; E. Individualism; F. Speculative Instability; G. Concentration of Markets and Control; H. Profit; I. Personal Morality; and J. Conclusion. In section II we comment on *The Corporation at Issue, Part II*,<sup>10</sup> the second part of his series. Here we organize our response under these headings: A. Perpetuity; B. Limited Liability; and C. Third Party Effects.

## I. REPLIES TO CRITICISMS OF *THE CORPORATION AT ISSUE, PART I*

### A. *Corporate Entity Status*

According to Eeghen, the corporation "really only [has] one defining feature: entity status."<sup>11</sup> He wrote: "In the case of the private business corporation, entity status implies that title to the firm's assets is held by the corporation in its own right, separate

at [http://www.mises.org/journals/jls/16\\_4/16\\_4\\_2.pdf](http://www.mises.org/journals/jls/16_4/16_4_2.pdf) (critiquing HENRY SIMONS, *ECONOMIC POLICY FOR A FREE SOCIETY* (1948)), for being too "scathing" about Simons's credentials as a libertarian on several grounds. First, Eeghen does so with regard to fractional reserve banking. However, in this regard, Block considered Simons in a very positive light, listing his views on this subject under the heading of "Issues on which Simons is Compatible with Libertarianism." Block, *supra*, at 5. This is hardly "scathing," and even more puzzling in view of Eeghen's statement that "opposition to inconvertible fiat money is an almost standard element of the current libertarian credo." Eeghen, *Part I, supra* note 4, at 50.

<sup>7</sup> Other criticisms of the corporation, along the lines of this author, include Jeff Barr & Lee Iglody, *Proceedings of the Austrian Scholars Conference 7: De-legitimizing the Corporation: An Austrian Analysis of the Firm* (Mar. 30-31, 2001); Frank van Dun, *Natural Law, Liberalism, and Christianity*, 15 J. LIBERTARIAN STUD., Summer 2001, at 1, 1-36; Piet-Hein van Eeghen, *The Capitalist Case against the Corporation*, 55 REV. SOC. ECON. 85, 85-113 (1997); *see also* Henry Hansmann, et. al, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1333 (2006). *But see* Posting of Stephan Kinsella to Mises Economics Blog, <http://blog.mises.org/archives/004269.asp> (Oct. 27, 2005, 16:38 EST); Posting of Stephan Kinsella to The LRC Blog, <http://blog.lewrockwell.com/lewrw/archives/004382.html> (Apr. 29, 2004, 14:06 EST).

<sup>8</sup> Eeghen taxed "modern capitalist practice . . . [with] undue cyclical instability and excessive inequality of income and wealth." Eeghen, *Part I, supra* note 4, at 49. The first charge is fair enough, if "modern" goes back to the 1930s, and even to the 1990s. The second is more difficult to assess. What is "excessive inequality"? Unfortunately, this author vouchsafed us no answer.

<sup>9</sup> Eeghen, *Part I, supra* note 4.

<sup>10</sup> Eeghen, *Part II, supra* note 4.

<sup>11</sup> Eeghen, *Part I, supra* note 4, at 52.

from its shareholders.”<sup>12</sup> Eeghen failed to satisfactorily explain why this is objectionable from a libertarian perspective.

As an initial philosophical matter, a corporation cannot meaningfully exist as an entity distinct from individual human beings. This notion violates the principles of methodological individualism that underlie libertarian theory and Austrian economics. Just as groups, committees, and clubs cannot themselves act, neither can corporations. Eeghen is mistaken in thinking that there can logically *be* any such thing as “the corporation itself.” Only the individual members of any of these conglomerates – for example, its officers, directors, managers, and employees – can act and therefore be responsible. That is, there is not and there cannot be any such thing as a corporation separate and apart from *human beings*.

Robert Hessen has addressed the philosophical incoherence of the idea of “entity status” for corporations:

The entity idea and its corollary – that a corporation cannot derive rights from its members – is false and should be discarded. *Every* organization, regardless of its legal form or features, consists only of individuals. A group or association is only a concept, a mental construct, used to classify different types of relationships between individuals. Whether the concept is a marriage or a partnership, a team, a crowd, a choir, a corps de ballet, or a corporation, one fact remains constant: the concept denotes the relationship between individuals, and has no referent apart from it.<sup>13</sup>

In a critique of Richard Epstein’s views, Murray N. Rothbard expressed a similar view:

Epstein’s . . . argument is contained in the sentence: “X corporation hurt me because its servant did so in the course of his employment.” Here Epstein commits the error of conceptual realism, since he supposes that a “corporation” actually exists, and that it committed an act of aggression. In reality, a “corporation” does not act; only individuals act, and each must be responsible for his own actions and those alone. Epstein may deride Holmes’ position as being based on the “nineteenth century premise that individual conduct alone was the basis of individual responsibility,” but Holmes was right nevertheless.<sup>14</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> HESSEN, *supra* note 5, at 41.

<sup>14</sup> Murray N. Rothbard, *Law, Property Rights, and Air Pollution*, 2 CATO J., Spring 1982, at 55, 76, available at <http://www.cato.org/pubs/journal/cj2n1/cj2n1-2.pdf> (citing Richard A. Epstein, et. al, *Crime and Tort: Old Wine in Old Bottles*, in ASSESSING THE CRIMINAL 231 (Randy E. Barnett & John Hagel, III eds., 1977)).

Eeghen's objection to "entity status" is profoundly incompatible with the Austrian economists' emphasis on methodological individualism. States Mises on this issue:

First we must realize that all actions are performed by individuals. A collective operates always through the intermediary of one or several individuals whose actions are related to the collective as the secondary source. It is the meaning which the acting individuals and all those who are touched by their action attribute to an action, that determines its character. It is the meaning that marks one action as the action of an individual and another action as the action of the state or of the municipality. The hangman, not the state, executes a criminal. It is the meaning of those concerned that discerns in the hangman's action an action of the state. A group of armed men occupies a place. It is the meaning of those concerned which imputes this occupation not to the officers and soldiers on the spot, but to their nation. If we scrutinize the meaning of the various actions performed by individuals we must necessarily learn everything about the actions of collective wholes. For a social collective has no existence and reality outside of the individual members' actions. The life of a collective is lived in the actions of the individuals constituting its body. There is no social collective conceivable which is not operative in the actions of some individuals. The reality of a social integer consists in its directing and releasing definite actions on the part of individuals. Thus the way to a cognition of collective wholes is through an analysis of the individuals' actions.<sup>15</sup>

This is neither the time nor the place to criticize Eeghen's various significant deviations from libertarian orthodoxy.<sup>16</sup> His general support for government is separate from our present topic, the libertarian legitimacy of corporations. However, we cannot allow to pass without comment the following: "[T]he state should indeed be given a legal entity separate from its officials. Only if such a separation exists can state power be vested in the office rather than the person."<sup>17</sup> The term "should" implies "can." We argue that it is logically impossible for there to be an acting entity apart from individual human beings. However, just because this

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<sup>15</sup> LUDWIG VON MISES, HUMAN ACTION 42 (1949), available at <http://www.mises.org/humanaction/chap2sec4.asp>.

<sup>16</sup> His statolatry far surpasses advocacy of a "night watchman" state, limited to protecting person and property. He goes so far as to call for government involvement, if only in terms of contracting out to private corporate firms, such essentially market institutions as "roads, railways, canals and mining infrastructure," calling them "state-like" functions. Eeghen, *Part I, supra* note 4, at 52, 56.

<sup>17</sup> *Id.* at 54.

claim relies on nonsense does not mean it is not dangerous. For this statement is tailor-made for political war criminals – *all* of them – to claim that the murder of innocents was not their fault, but rather due to the state. In that way the forces of justice (e.g., in a Nuremberg trial) could only execute the state itself; although we like the sound of that, it is impossible, because “the state itself” has no human members whatsoever.<sup>18</sup> Indeed, this notion of Eeghen has pernicious effects already in the real world, as government employees acting in their official capacity generally cannot be held accountable for actions that harm members of the public.

Corporate law, like any other law, merely sets down rules for how individual people may and may not legally act. We call a corporation an “it” because that is more convenient than speaking awkwardly of “they” or listing each of the firm’s owners and the nature of their interest in the business each and every time we talk about it. As Easterbrook and Fischel put it, “It would be silly to attach a list of every one of Exxon’s investors to an order for office furniture just to ensure that all investors share their percentage of the cost.”<sup>19</sup> Eeghen seems to misunderstand this with his excessive concern for “entity status.” Eeghen pointed out that the putative contracts between a corporation’s owners “are simply not there.”<sup>20</sup> But how hard is it to understand that the contractual relationship is there, but it has been created merely by a shorthand form? More on this below.

Meanwhile, it is worth noting that the “entity theory” has been propagated primarily by leftists. They argue that corporations are not mere collections of individuals with individual rights and, therefore, as creations of positive law, have a “social responsibility” to act in an “unselfish” manner – a responsibility that must also be enforced by positive law to make corporations give money toward ends that do not serve the needs of the corporation’s shareholders or the market.<sup>21</sup>

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<sup>18</sup> Eeghen relied on “the accompanying restraints of democratic and legal control to which the state is subject.” Eeghen, *Part II, supra* note 4, at 37. Where were these “restraints” when the government of the U.S. murdered numerous innocents in its numerous foreign wars of imperialist aggression, of which the Philippines, Iraq, and Vietnam are only the tip of the iceberg? To count on the state for “restraint” after a century of state mass-murder and ever-expanding federal power is naïve at best. See more on Eeghen’s naïveté about the state below.

<sup>19</sup> Frank H. Easterbrook & Daniel R. Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416, 1426 (1989).

<sup>20</sup> Eeghen, *Part II, supra* note 4, at 43.

<sup>21</sup> David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 216-20 (1990).

### B. *Management Autonomy*

Here, Eeghen supported the anti-free enterprise and untenable hypothesis of Berle and Means that shareholders-principals' inability to control their managers-agents represents some sort of market failure.<sup>22</sup> Eeghen wrote: "[I]t has proved so difficult to make shareholder control over management more effective, despite the many legislative measures aimed at enhancing management accountability to shareholders."<sup>23</sup> Eeghen based his view on the ground that "management acts as agent for two principals, the shareholders and the corporation."<sup>24</sup> As we have shown above, however, there are only human principals here, the shareholders; there is no separate "corporation" apart from them. The fact that the shareholders and third parties with whom they collectively contract may choose to recognize the legal fiction of a corporate entity does not change this reality.

What of the main claim, that there is no market mechanism that can rein in runaway corporate managers? This is nonsense on stilts. The market's remedy for CEOs who mismanage corporate assets or pay themselves salaries out of line with their productivity is the "hostile" takeover. Many commentators complain that CEO salaries have hit the stratosphere and constitute an unconscionable exploitation of either the small stockholder or the workingman, or both. Suppose that the capital value of a firm would have been \$100 million if the CEO salary was "moderate," but, because of a stupendous compensation package, it is now worth only \$10 million. Such a firm would be ripe for the pickings by a corporate raider. He would purchase this business for, say, \$11 million, fire the parasitical CEO, watch the firm's value rise to its "proper" \$100 million, and pocket a hefty \$89 million in profit. The corporate raider is to outrageous CEO salaries what the canary is to coal mine safety, only he does the bird one better: not only does he warn of a problem, he solves it in one fell swoop. Yet government, in jailing people like Michael Milken, has obliterated this beneficial market mechanism.<sup>25</sup> Now, of course, many of the same statist critics who applauded Milken's downfall have the unmitigated audacity to complain of out-of-control corporate managers and astronomical CEO pay. In fact, anti-takeover legislation is the product not of

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<sup>22</sup> ADOLPH A. BERLE, JR. & GARDNER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* (1932); Eeghen, *Part I, supra* note 4, at 53.

<sup>23</sup> Eeghen, *Part I, supra* note 4, at 53.

<sup>24</sup> *Id.*

<sup>25</sup> Murray N. Rothbard, *Herbert Clark Hoover: A Reconsideration*, 4 *NEW INDIVIDUALIST REV.* 3, 3-12 (1966).

altruism on the part of our so-called public servants, but rather of rent-seeking (that is, government-plunder-seeking) by those with an interest in preventing takeovers (i.e., corporate managers).<sup>26</sup>

Law professors Henry Butler and Larry Ribstein also have a sound response to this problem. First, if individuals want to have an organization in which management can be more effectively controlled, they can simply choose to form (or choose to do business with) some type of business other than a corporation. Decreased control over management is a price shareholders *willingly pay* in order to enjoy the benefits of the corporate form.<sup>27</sup> Who is Professor Eeghen to second-guess this choice by investors? If managerial abuse is really such a problem – so overwhelming that we should abolish the corporate form rather than suffer it – it easily could be limited “simply by dividing *all* enterprise into small firms that contract with each other.”<sup>28</sup> Of course, such a situation would be both un-libertarian and grossly inefficient, notwithstanding Eeghen’s apparent desire for the small firms to fit the neoclassical-economic model of perfect competition to which he apparently subscribes.<sup>29</sup>

### C. Monopoly

At several points in his essay, Eeghen articulated highly problematic views about monopoly, going so far as to embrace the likes of “the medieval guilds, the Dutch and English colonial trading companies . . . and English forerunners of modern central banks.”<sup>30</sup> True, he avers, this can be subject to “abuse,” but he does not reject the principle of monopoly outright.<sup>31</sup> On principle, he stated instead that “there is nothing necessarily and inherently wrong with monopoly . . . .”<sup>32</sup> For the libertarian, in sharp contrast, monopoly is always and ever an illegitimate grant of special privilege to business. Eeghen accused Block of failing to sufficiently distinguish *laissez faire* capitalism and corporate state monopoly capitalism (that is, we presume, fascism).<sup>33</sup> He might instead rethink his toleration of monopoly in this regard.

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<sup>26</sup> Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80, 92 (1991).

<sup>27</sup> Easterbrook & Fischel, *supra* note 19, at 1425.

<sup>28</sup> Henry N. Butler & Larry E. Ribstein, *Opting Out of Fiduciary Duties: A Response to the Anti-Contractarians*, 65 WASH. L. REV. 1, 21 (1990) (emphasis added).

<sup>29</sup> For a critique of this notion, see William Barnett et al., *Perfect Competition: A Case of “Market-Failure,”* 2 CORP. OWNERSHIP & CONTROL, Summer 2005, at 70, 70-75.

<sup>30</sup> Eeghen, *Part I, supra* note 4, at 55.

<sup>31</sup> *Id.* at 55-56.

<sup>32</sup> *Id.* at 68.

<sup>33</sup> *Id.*

At the same time, Eeghen sought to besmirch the modern corporation by associating it with monopolistic abuses of the past.<sup>34</sup> But the effect and intent of modern general incorporation statutes were to *eliminate* monopoly power that had been granted to state-privileged businesses under the older, genuinely monopolistic corporate form.<sup>35</sup> That is, Eeghen's criticism was *remedied* by these statutes more than a century ago. It is misleading to attack modern-day corporations because there used to be something else of a completely different character called a "corporation," which was created by positive law and enjoyed unjust state-granted privileges.

#### D. *Egalitarianism*

Somewhat surprisingly for an essay published in a libertarian journal, Eeghen called for greater egalitarianism.<sup>36</sup> He attacked "inequality" no fewer than eight times.<sup>37</sup> Most objectionable is this unwarranted attack: "the fact that Bill Gates most certainly deserves to earn incomparably more than almost all of us, does not negate the possibility that the relevant income differences are somewhat excessive."<sup>38</sup>

Why does Eeghen think that Gates deserves to earn more than the rest of us? From the libertarian point of view, this is an easy one: this results from voluntary market interactions. But for Eeghen, it is by no means so clear, since he rejects this institution. Nor can he marshal limited liability in his critique. There is no evidence that any Gates employee ever ran over any innocent pedestrian, where the damages were greater than the capital value of Microsoft. Why "somewhat" excessive? Cannot Eeghen better specify the actual amount of Gates's "excessive" earnings? Without the market as a guide, he cannot.

The libertarian perspective on income and wealth "distribution" is a clear one: whatever eventuates from "capitalist acts between consenting adults" is justified.<sup>39</sup> Whatever does not, is not. Libertarians, Eeghen to the contrary notwithstanding, do not favor the rich vis-à-vis the poor.<sup>40</sup> It cannot be denied that there has been

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<sup>34</sup> *Id.* at 55.

<sup>35</sup> Millon, *supra* note 21, at 208.

<sup>36</sup> Eeghen, *Part I*, *supra* note 4, at 66-68.

<sup>37</sup> *See generally* Eeghen, *Part I*, *supra* note 4.

<sup>38</sup> *Id.* at 68.

<sup>39</sup> ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 163 (1974).

<sup>40</sup> Walter Block, *Reconciling Efficiency, Freedom and Equality*, in *OPTIONS IN ECONOMIC DESIGN* 31 (Shripad Pendse ed., 1990); MURRAY N. ROTHBARD, *FREEDOM, INEQUALITY, PRIMITIVISM, AND THE DIVISION OF LABOR* (Ludwig von Mises Inst. 1991) (1970).

an awful lot of the wealthy legally stealing from the impecunious under our present system of corporate state monopoly capitalism.<sup>41</sup> Libertarians must certainly oppose this, but we also do not wish to promote a system wherein the poor can steal from the rich. In the specific case of Gates, it is clear that he has been more victim than victimizer, as in the unjustified antitrust case launched against him.<sup>42</sup>

Microsoft probably has – like many large businesses faced with competitors who do the same – enjoyed various government privileges along the way that have enriched Bill Gates even more than he has deserved. If so, Eeghen failed to identify those privileges, and pointing to the corporate form standing alone will not suffice.

### E. *Individualism*

Eeghen mistakenly conflated individualism and libertarianism (“liberalism”). In his view,

[T]he private right to free incorporation conflicts with the individualism inherent in liberalism, because private ownership rights are given to impersonal entities. The Harvard legal historian Morton Horwitz (1987, p. 21) notes in this connection:

“The corporation . . . was the most powerful and prominent example of the emergence of a non-individualistic or, if you will, collectivist legal institutions . . . . In all Western countries . . . theories of corporate personality were associated with a crisis of legitimacy in liberal individualism.”<sup>43</sup>

But there simply is no individualism (not to be confused with *methodological* individualism, discussed above) inherent in economic freedom, free enterprise, classical liberalism, or libertarianism.

<sup>41</sup> See G. WILLIAM DOMHOFF, WHO RULES AMERICA? POWER AND POLITICS IN THE YEAR 2000 (3d ed. 1998); G. WILLIAM DOMHOFF, WHO RULES AMERICA? (1967); G. WILLIAM DOMHOFF, THE HIGHER CIRCLES: THE GOVERNING CLASS IN AMERICA (1971); GABRIEL KOLKO, THE TRIUMPH OF CONSERVATISM (1963); LUDWIG VON MISES, THE CLASH OF GROUP INTERESTS AND OTHER ESSAYS (1978), available at <http://www.mises.org/etexts/mises/clash/clash.asp>; FRANZ OPPENHEIMER, THE STATE (Free Life Editions 1975) (1914); Hans-Herman Hoppe, *Marxist and Austrian Class Analysis*, 9 J. LIBERTARIAN STUD., Fall 1990, at 79, 79-94; Ralph Raico, *Classical Liberal Exploitation Theory: A Comment on Professor Liggio's Paper*, 1 J. LIBERTARIAN STUD., Summer 1977, at 179, 179-84; Llewellyn H. Rockwell, Jr., *Liberty and the Common Good* (Dec. 31, 2001), <http://mises.org/article.aspx?Id=860>.

<sup>42</sup> William L. Anderson et al., *The Microsoft Corporation in Collision with Antitrust Law*, 26 J. SOC. POL. & ECON. STUD., Winter 2001, at 287, 287-302, available at [http://www.ilanamerccer.com/phprunner/public\\_article\\_list\\_view.php?edtid1=200](http://www.ilanamerccer.com/phprunner/public_article_list_view.php?edtid1=200).

<sup>43</sup> Eeghen, *Part I, supra* note 4, at 56-57.

Horwitz may be an expert on history and Eeghen on economics, but apparently neither one knows much about the philosophy of libertarianism. Non-coercive collectivism is as compatible with these philosophical principles as is individualism. The missing element in the analysis of these two scholars is the distinction between coercion and voluntarism. It is coercion, not collectivism, that is the evil; it is voluntarism, not individualism per se, that is the key to the freedom philosophy. The intellectual, moral, and legal battle is not between individualism and collectivism; rather, it is between coercion and voluntary interaction. Yes, individual enterprise can of course be legitimate, but so can voluntary collectives, e.g., the kibbutz, the monastery, the convent, the commune, the typical family.<sup>44</sup>

Perhaps sports and athletics can clarify this point. It is sometimes said by people who espouse the view of Horwitz and Eeghen that track and swimming (individual events, not team relays), singles tennis, singles handball, the shot put, the high jump, boxing, etc., are all compatible with libertarianism, while teams sports such as baseball, football, volleyball, basketball, doubles tennis, and handball are not.<sup>45</sup> For the former are undertaken by *individuals*, and the latter by *teams*, or *collectives*.<sup>46</sup> This is nonsense. All sports, whether undertaken by individuals, teams, or collectives are legitimate, provided only that they are *voluntary*; that is, no one is forced to play.<sup>47</sup> Maybe libertarians happen to be more prone to individualistic activities and to holding individualistic philosophies – for example, many come to libertarianism through the individualistic philosophy of Ayn Rand.<sup>48</sup> But that has nothing to do with libertarian ideas per se.

#### F. *Speculative Instability*

Our author bemoaned excessive speculation brought about by the corporate format.<sup>49</sup> What, pray tell, is his criterion for “excess”? It is the fact that there are limited liability corporations.<sup>50</sup> In other

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<sup>44</sup> Walter Block, *Libertarianism vs Communitarianism*, in *ENCYCLOPEDIA OF COMMUNITY: FROM THE VILLAGE TO THE VIRTUAL WORLD* 860 (Karen Christensen & David Levinson eds., 2003). We express no opinion here on whether any of these arrangements are advisable, because that is a philosophical and pragmatic issue having nothing to do with libertarian principle.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See, e.g., AYN RAND, *ATLAS SHRUGGED* (1957).

<sup>49</sup> Eeghen, *Part I*, *supra* note 4, at 61.

<sup>50</sup> *Id.*

words, he has no independent measure of how much speculation is ideal and deems any speculation brought about by corporations (due to the additional ease of buying and selling shares) excessive.

And, what are we to make of the following: “And the ease and speed with which inordinate amounts of wealth are created and destroyed on the stock exchange is surely not one of the more attractive features of modern capitalist practice.”<sup>51</sup> There are some know-nothing market critics who complain that free enterprise does not act quickly enough.<sup>52</sup> There are others, apparently, who grumble about the very opposite characteristic, that it moves too quickly.<sup>53</sup> It is hard to satisfy everyone. This is not to deny that a “central-bank protected fiat money regime”<sup>54</sup> adds non-market instability. But, given prior government financial depredations, it is by no means clear that exchanges of stock are problematic. After all, the stock market is a positive sum game; each and every trade under its auspices, without exception, is mutually beneficial in the ex ante sense. Eeghen seems committed to the view that the 1929 crash of the stock market should not have been allowed.<sup>55</sup> In the Austrian view, however, this was a *result* of statist monetary mismanagement, not a cause.<sup>56</sup> Preventing it from occurring, given the

<sup>51</sup> *Id.*

<sup>52</sup> The most famous of all such claims is of course Keynes. JOHN M. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY* (Harcourt, Brace and World 1964) (1936). But the entire gargantuan Keynesian literature could also be cited at this point. For a critique, see JOHN COCHRAN & FRED GLAHE, *THE HAYEK-KEYNES DEBATE – LESSONS FOR CURRENT BUSINESS CYCLE RESEARCH* 103-18 (1999); WILLIAM H. HUTT, *THE KEYNESIAN EPISODE* (1979); Gregory M. Dempster, *Austrians and Post Keynesians: The Questions of Ignorance and Uncertainty*, 2 Q. J. AUSTRIAN ECON., Winter 1999, at 73, 73-81, available at [http://www.mises.org/journals/qjae/pdf/qjae2\\_4\\_5.pdf](http://www.mises.org/journals/qjae/pdf/qjae2_4_5.pdf); Roger W. Garrison, *Intertemporal Coordination and the Invisible Hand: An Austrian Perspective on the Keynesian Vision*, 17 HIST. POL. ECON. 309, 309-21 (1985); Hans-Hermann Hoppe, *The Misesian Case Against Keynes*, in *DISSENT ON KEYNES, A CRITICAL APPRAISAL OF ECONOMICS* 199-223 (Mark Skousen ed., 1992), available at <http://www.mises.org/etexts/hoppekeynes.pdf>; Murray N. Rothbard, *Keynes, the Man*, in *DISSENT ON KEYNES: A CRITICAL APPRAISAL OF KEYNESIAN ECONOMICS* 171-98 (Mark Skousen ed., 1992).

<sup>53</sup> For the view that capitalism moves too quickly, see Paul Krugman, *Is Capitalism Too Productive?*, FOREIGN AFFAIRS, Sept./Oct. 1997, at 79, available at <http://web.mit.edu/krugman/www/Xsupply.htm>. For a critique of the claim that this system moves too quickly, see Edwin W. Younkins, *Capitalism & Commerce: Market Prices Versus Government-Controlled Prices* (Feb. 16, 2002), <http://www.quebecoislibre.org/020216-15.htm>.

<sup>54</sup> Eeghen, *Part I, supra* note 4, at 61.

<sup>55</sup> *Id.* at 60-61.

<sup>56</sup> See generally MURRAY N. ROTHBARD, *AMERICA'S GREAT DEPRESSION* (Ludwig von Mises Inst. 5th ed. 2000) (1963), available at

underlying investment misallocations, would not have stopped the Great Depression.<sup>57</sup>

Further, even with the instability created by fiat monetary policy, the stock market has been remarkably stable over the long run and provides risk-averse diversified investors – such as the typical participant in a mutual fund – high returns. For example, from about 1928 to about 1998, the stock market (as measured by the S&P 500) provided an average return of more than ten percent per year.<sup>58</sup> Indeed, it is the nature of corporate shares that allows the ordinary person to increase his wealth in this way with relatively little personal knowledge of the market or the businesses in which he has a share. How could Eeghen, or anyone else, object to that?

### G. Concentration of Markets and Control

Eeghen confused the neoclassical notion of perfect competition with free enterprise: “[C]orporate capitalist practice has strayed far from the free-enterprise ideal of market decisions being taken at a decentralized level by countless relatively small suppliers and demanders so that market outcomes are broadly impersonal.”<sup>59</sup> The true free enterprise ideal, contrary to Eeghen’s beliefs, is free entry – a system in which government does not prohibit, or limit, competition with extant firms. In sharp contrast, and having absolutely nothing to do with this ideal, is the perfectly competitive requirement that there be an indefinitely large number of competitors. Eeghen is very much mistaken in believing that rigorous competition between only a few competitors places the “invisible hand . . . under threat.”<sup>60</sup> It would appear that his goal for the economy is indistinguishable from Mao’s goal for the communist Chinese to manufacture steel in hundreds of thousands of small backyard mills.<sup>61</sup> Eeghen’s understanding of the very concept of

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<http://www.mises.org/rothbard/agd.pdf>; see also Posting of Steven C. Horwitz to The Austrian Economists, <http://austrianeconomists.typepad.com/weblog/2009/01/letter-to-the-editor-on-the-new-deal.html> (Jan. 13, 2009, 9:19 EST) (“The Fed, a government-sponsored entity, was also responsible, according to a majority of economists, for allowing the 1929 stock market crash to drive the economy into the Great Depression.”).

<sup>57</sup> ROTHBARD, *supra* note 56, at xxxv (characterizing the depression as “inevitable” result of monetary inflation that occurred during the 1920s).

<sup>58</sup> Dwight R. Lee, *Social Security Can Be Good For Your Health*, 55 THE FREEMAN, Sept. 2005, at 25, 26, available at <http://www.fee.org/pdf/the-freeman/0509Lee.pdf>.

<sup>59</sup> Eeghen, *Part I*, *supra* note 4, at 63.

<sup>60</sup> *Id.*

<sup>61</sup> For a discussion of Mao’s “Great Leap Forward,” see, for example, ALAN H. PRICE ET AL., THE CHINA SYNDROME: HOW SUBSIDIES AND GOVERNMENT INTERVENTION CREATED THE WORLD’S LARGEST STEEL INDUSTRY 5 (2006), available at

the invisible hand is revealed to be fallacious with his claim that when “fewer people make the relevant decisions . . . fewer people are likely to benefit.”<sup>62</sup> This is something we might expect to hear from Tom Hayden of Economic Democracy fame,<sup>63</sup> not from a professional economist. For the record, the invisible hand entails people seeking their own personal selfish interest while unwittingly doing that which is in the interest of others.<sup>64</sup> It matters not one whit how many or few of them there are, despite arguments made by “liberals” like Eeghen or Hayek to the contrary.<sup>65</sup>

#### H. Profit

That the supposedly free-enterprise-oriented Eeghen would take an anti-profit position should by now not be too surprising. The reasoning behind this stance is remarkable. First, he is unhappy that “only the lowest common denominator of their wishes [of the corporate shareholders] can be attended to, which is to maximize return on investment . . . .”<sup>66</sup> But this lowest common denominator is surely congruent with the wishes of virtually all of those who purchase stock in a company. The problem is that this author inverts the correct analysis of the comparison of the dollar vote and the political vote. It is in the *latter* case that lowest com-

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<http://www.sfsa.org/sfsa/news/2006/Chinese%20Steel%20Subsidies%20Paper.pdf> (“Chairman Mao proclaimed that China would double its steel production over the course of a single year. This led to the widespread establishment of small steel mills – the so-called ‘backyard blast furnaces’ – in towns and villages throughout China. The project was of course an economic, technological, and environmental disaster.”).

<sup>62</sup> Eeghen, *Part I*, *supra* note 4, at 63.

<sup>63</sup> See Website of Tom Hayden, Biography, <http://www.tomhayden.com/biography.htm> (last visited Mar. 13, 2009); Wikipedia.com, Tom Hayden, [http://en.wikipedia.org/wiki/Tom\\_Hayden](http://en.wikipedia.org/wiki/Tom_Hayden) (last visited Mar. 13, 2009); William T. Poole, Campaign for Economic Democracy Part I: The New Left in Politics (Sept. 19, 1980), <http://www.heritage.org/Research/GovernmentReform/IA13.cfm>; William T. Poole, Campaign for Economic Democracy Part II: The Institute for Policy Studies Network (Apr. 19, 1981), <http://www.heritage.org/Research/GovernmentReform/IA14.cfm>.

<sup>64</sup> On the invisible hand, see Arthur M. Diamond, Jr., *The Intergenerational Invisible Hand: A Comment on Sartorius’s Government Regulation and Intergenerational Justice*, 8 J. LIBERTARIAN STUD., Summer 1987, at 269, 269-74; Anthony Flew, *Social Science: Making Visible the Invisible Hand*, 8 J. LIBERTARIAN STUD., Summer 1987, at 197, 197-212; Garrison, *supra* note 52, at 309-21; Roy A. Childs, Jr., *The Invisible Hand Strikes Back*, 1 J. LIBERTARIAN STUD., Winter 1977, at 23, 23-24.

<sup>65</sup> Walter Block, *Hayek’s Road to Serfdom*, 12 J. LIBERTARIAN STUD., Fall 1996, at 327, available at [http://mises.org/journals/jls/12\\_2/12\\_2\\_6.pdf](http://mises.org/journals/jls/12_2/12_2_6.pdf).

<sup>66</sup> Eeghen, *Part I*, *supra* note 4, at 64.

mon denominators play a role. If the denizen of the ballot box prefers candidate A on policies 2, 4, 6, and 8, and candidate B on 1, 3, 5, and 7, he has no way to register approval for either of them. He is forced to accept one package deal or the other. In sharp contrast, given a market dollar vote, an almost infinitesimal focus can be attained, for example, for a blue ball or a red sweater.

Eeghen also registered disapproval of the fact that there will be a "large impersonal market in corporate control,"<sup>67</sup> but did he not just finish saying that his ideal as far as concentration is concerned is "countless relatively small suppliers"? If that does not describe the owners of many corporations, then nothing does. Previously, he criticized capitalism as a system in which "fewer people make the relevant decisions."<sup>68</sup> With corporations there are thousands of shareholders making decisions to purchase or sell stock, and he now bewails the "large impersonal market in corporate control . . . ."<sup>69</sup> It seems that some people will just never be satisfied with free enterprise.

### I. *Personal Morality*

According to Eeghen, "Due to the impersonal nature of the corporate firm which they represent (the corporate veil), managers have a reduced sense of personal moral agency which inclines them to stray more easily from agreed standards of decency . . . ."<sup>70</sup> Again, a better explanation is the fact that government has made it more difficult to discipline badly behaving managers by engaging in a "hostile" takeover.

Eeghen's criticism here also seems rather vague. For example, he said, "we seem to have become motivated by profit just a bit too much; material prosperity is great but it tends to become just a bit too important for us; harnessing nature's powers and using its resources for our benefit is legitimate but we tend to go a bit overboard . . . speculative activity . . . has clearly become excessive."<sup>71</sup> Eeghen did not expressly provide the moral criteria he uses to determine what constitutes a "bit too much;" thus, one can only conclude that whatever additional amounts of these things the corporate form creates is precisely too much for Eeghen's personal tastes.<sup>72</sup> It is fine for Eeghen to have subjective preferences, but

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<sup>67</sup> *Id.*

<sup>68</sup> Eeghen, *Part I, supra* note 4, at 63.

<sup>69</sup> *See id.* at 64.

<sup>70</sup> *Id.* at 65.

<sup>71</sup> *Id.* at 66.

<sup>72</sup> *Id.*

quite another for him to enact them into law to prevent others from enjoying the benefits of the corporate form.

If any institution promotes immorality, surely it is the government, which Eeghen apparently sees as less inherently bad than the corporation. Indeed, Eeghen has no problem with corporations when they are doing the government's bidding in the name of "public service."<sup>73</sup> But not only are our politicians notoriously immoral by almost anyone's criteria, they also reduce ethical behaviour both within government and in the general populace by creating countless moral hazards<sup>74</sup> and engaging in aggressive wars, torture, and so much other conduct offensive to both liberty and most any notion of decency.<sup>75</sup>

### J. Conclusion

Eeghen concluded the first of his two articles by stating: "[T]he main problem with Block's [view of the corporation] is that it shuts the door on the liberating realization that capitalism and corporate capitalism need not be synonymous."<sup>76</sup> Here, Eeghen elevates a perfectly reasonable intra-libertarian debate over the legal status of the corporation (particularly as it impacts third parties, see below) into an uncalled for, useless, and needless squabble over whether or not libertarianism and fascism are identical.<sup>77</sup> No one but an enemy of freedom, such as a Marxist, would take any joy

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<sup>73</sup> *Id.* at 49.

<sup>74</sup> See, e.g., Christopher Westley, *Terrorism and the Moral Hazard*, LUDWIG VON MISES INST., Mar. 8, 2003, <http://www.mises.org/article.aspx?Id=1202&month=55&title=Terrorism+and+the+Moral+Hazard&id=61>; Walter E. Williams, *Moral Hazards* (Mar. 22, 1999), <http://www.gmu.edu/departments/economics/wew/articles/99/Moral-Hazards.htm>.

<sup>75</sup> Eeghen strained mightily to offer non leftist criticism of the corporation. Eeghen, *Part I, supra* note 4, at 65. Curiously, he ignored the radical libertarian literature on this subject, which demonstrates that many corporations seek state subsidies ("corporate welfare bums") and laws stifling, or prohibiting, outright competition against them. See RAND, *supra* note 48; ROTHBARD, *supra* note 56; MURRAY N. ROTHBARD, *THE MYSTERY OF BANKING* (1983); BUTLER SHAFFER, IN *RESTRAINT OF TRADE: THE BUSINESS CAMPAIGN AGAINST COMPETITION, 1918-1938* (1997); Walter Block, *Corporate Welfare Bums*, FRASER F., Aug. 1990, at 24, 24-25; Robert Higgs, *In Restraint of Trade: The Business Campaign Against Competition, 1918-1938*, 3 Q. J. AUSTRIAN ECON., Winter 2000, at 91, 91-94 (book review); Rothbard, *supra* note 25, at 3-12; Murray N. Rothbard, *War Collectivism in World War I*, in *A NEW HISTORY OF THE LEVIATHAN* 66 (Ronald Radosh & Murray N. Rothbard eds., 1972); Richard W. Wilcke, *An Appropriate Ethical Model for Business and a Critique of Milton Friedman's Thesis*, 9 INDEP. REV., Fall 2004, at 187, 187-209.

<sup>76</sup> Eeghen, *Part I, supra* note 4, at 68.

<sup>77</sup> See *id.*

from such a critique. For it by no means follows that one who defends limited liability corporations also favors businessmen ripping off consumers, or the rich defrauding the poor, as this author implies.

## II. REPLIES TO CRITICISMS OF *THE CORPORATION AT ISSUE*, PART II<sup>78</sup>

### A. *Perpetuity*

According to Eeghen, "Other typical features of the corporation like limited liability and perpetuity are not independent, original attributes, but are derived from its entity status."<sup>79</sup> We see no reason to accept this claim. In any case, we have already given reasons for rejecting Eeghen's analysis of entity status. Were we to accept his view that perpetuity stems directly from entity status, we could dispose of the former on the basis of our rejection of the latter. However, we wish to deal with the perpetuity charge on its own merits, whether or not it is dependent upon this author's fallacious entity doctrine.

What, then, is the libertarian perspective on perpetual enterprises, those that last beyond the life of any one person, or even dozens of generations? To what degree can one generation impose its wishes as to how property should be treated onto the next? Given that a corporation lasts forever, is it illegitimate on that ground?

To take a simple case first, suppose that John Jones leaves land to his son, stipulating that the latter (and his heirs) must forever light a candle to the memory of the former, or relinquish ownership rights. If John Jones Jr. will not accept this bequest with that condition, the land will be left to the next oldest son on that basis, Peter Jones. Must the eldest continue this practice if he is to retain ownership? Yes, he must, as long as there is anyone with legal standing to challenge his ownership status. Suppose now that Jones III, son of Jones Jr. and grandson of Jones comes into ownership with this stipulation. But soon afterward, he neglects his grandfather's wishes in this regard. As long as there is no living person with standing who objects, he may do so and yet retain his ownership. However, if the first cousin, the heir of Peter Jones, stands ready to claim this land when and if John Jones III neglects his

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<sup>78</sup> Eeghen, *Part II*, *supra* note 4.

<sup>79</sup> Eeghen, *Part I*, *supra* note 4, at 53.

grandfather's wishes, then Jones III must persist in this candle lighting practice or lose the property to Peter Jones Jr.<sup>80</sup>

Given this analysis, it is easy to see the libertarian view on perpetual corporations. As long as there are living people who purchase and/or hold shares and thus maintain the business firm, it is a legitimate enterprise, even if it lasts until the end of time. The "dead hand of the past" can control matters only as long as there is a living person, with standing, who is willing to respect it. When there is no longer such a person, the corporation comes to an abrupt legal end.

But Eeghen does not share the libertarian view on perpetual corporations. In his view,

Hessen thus seeks to establish how perpetuity is not the logical outflow of possessing entity status, but the result of special private contracting. In order to succeed in this endeavor, he finds it necessary once more to subtly change the meaning of the relevant term. In the normal classical sense, corporate perpetuity does not mean that corporations literally exist for ever. It merely means that a corporation has a life separate from that of its shareholders, so that the death or departure of a shareholder does not require it to be reconstituted.<sup>81</sup>

If there is anyone changing the clear meaning of words around to suit his nefarious purpose in this case, it is not Hessen. Eeghen defines "perpetuity" not in terms of perpetual life, but rather on the basis of what he calls corporate "entity status."<sup>82</sup> But we already have a perfectly good definition of what Eeghen means by this latter phrase: the corporation lives over and above and separate from its owners. It is an entity apart from its human owners. Why, then, define "perpetuity" in precisely this manner? This is particularly galling in that it is Eeghen who accused Hessen of changing definitions midstream,<sup>83</sup> while doing precisely that himself. He thus stands condemned out of his own mouth.

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<sup>80</sup> Under common law, the ability to transfer property in this way is limited by the Rule Against Perpetuities, which holds: "No interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest." Jesse Dukeminier, *A Modern Guide to Perpetuities*, 74 CAL. L. REV. 1867, 1868 (1986) (quoting J. GRAY, *THE RULE AGAINST PERPETUITIES* § 201(4th ed. 1942)).

<sup>81</sup> Eeghen, *Part II*, *supra* note 4, at 44.

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

### B. *Limited Liability*

Eeghen criticized Hessen's views on this subject on three grounds: (1) historical precedents, (2) the fact that limited liability cannot be attained through private contract, and (3) the fact that there is no continuum between partnerships and corporations.<sup>84</sup> We confine ourselves to the second of these critiques.

This debate between these two authors concerns whether or not limited liability is logically implied by entity status. We have no interest in that issue. Instead, our concern is whether or not limited liability is compatible with the libertarian legal code. When put in this manner, it is clear that there is no incompatibility between the two. As long as there is no fraud, as long as all those who deal with corporations know full well that in case of any dispute, they will only be able to sue for an amount up to the full capitalization of the corporation and not have access to the shareholders' personal assets, there can be no problem with the libertarian legal code.<sup>85</sup>

As against this, Eeghen asserted:

If it is agreed that the corporation is a legal entity separate from shareholders, then Hessen's claim that it can be the product of private contracting is obviously severely weakened if not dismissed. It is clear that private contracting can achieve only *joint ownership* of the contractors' assets (a partnership); it cannot establish a legal entity separate from the natural persons of the contractors themselves to which they assign their assets. Not surprisingly, Hessen does not offer any meaningful explanation of how this can happen, beyond the naïve suggestion that private people can create a corporation simply by writing their own incorporation contract and lodging it with the relevant state authorities.<sup>86</sup>

Again, Eeghen is wrong, and Hessen is precisely correct. If every party to a contract agrees that a corporation exists as a legal fiction (not an "entity" in the Eeghen sense), then *for their purposes* it does so exist. Perhaps in the early days of corporations, more explicit notice was needed; people might not have realized the limited liability aspects of this kind of business firm. But today only a very unsophisticated economic actor would not realize this – everyone knows what a corporation is and what kind of deal you have if you

<sup>84</sup> Eeghen, *Part II, supra* note 4, at 40.

<sup>85</sup> During the course of his discussion of limited liability, Eeghen took a cheap shot at John D. Rockefeller, accusing him of pulling a "trick." Eeghen, *Part II, supra* note 4, at 43. For an antidote to this, see John S. McGee, *Predatory Price Cutting: The Standard Oil (New Jersey) Case*, 1 J.L. & ECON. 137, 137 (1958).

<sup>86</sup> Eeghen, *Part II, supra* note 4, at 44.

contract with one. People doing business in the real world understand this concept. Why is this beyond Eeghen and his fellow “libertarian” critics of the corporation?

C. *Third Party Effects*

The most powerful argument against limited liability corporations is that while those who directly engage in commercial deals with the corporation do so voluntarily, the same cannot be said for those who are victimized by this type of business in torts. Suppose an airplane owned by corporation X crashes onto the property of Y. The latter, of course, never agreed to this. Why must he be limited to the value of the shares of stock in X to make good his loss? Why can he not also sue the stockholders of X up to the extent of their personal wealth?

Hessen answered:

[A] shareholder’s liability for torts is limited to his investment in the corporation, and he cannot be singled out to pay the whole amount (unless, of course, he personally committed the tortuous act). . . .

How, if at all, can limited liability for torts be integrated into a *contractual* theory of corporations? The answer is that it can’t – and it needn’t be. The question poses a false alternative: either limited liability for torts is a state-created privilege or it is contractual (which it obviously is not). In fact, there is a third possibility.

The rules of tort liability originated many centuries ago in England when courts established the doctrine of *respondeat superior* – let the master be answerable for the acts of his servant. This principle of vicarious liability is based on the premise that the servant commits the tort while engaged in some activity on behalf of the master (for example, he injures a pedestrian while driving the master’s carriage) and that the servant is personally hired, instructed, and supervised by the master. By holding a master fully liable for the torts committed by his servants, the courts gave the tort victim someone solvent (“a deep pocket”) to sue for damages. . . .

Subsequently, application of the principle of vicarious liability was extended to sole proprietors and to general partners on the premise that they personally select and monitor their employees and agents. This extension is reasonable, but it does not automatically follow that the same principle should be extended to corporate shareholders. Vicarious liability should only apply to those shareholders who play an active role in managing an enterprise or in selecting and supervising its employees and agents. The tort liability of inactive shareholders should be the same as that of limited partners – that is, limited to the amount

invested – and for the same reason; namely, inactive shareholders and limited partners contribute capital but do not participated actively in management and control.

The proper principle of liability should be that whoever controls a business, *regardless of its legal form*, 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 . . . .<sup>87</sup>

This constitutes a definitive and preemptive answer: *the problem is with tort law, not with the corporate form per se*. Eeghen did not so much as even mention this answer to his objection, let alone attempt to refute it. Instead, the closest he came to alluding to it is indirectly, in response to a third author, Epstein: “Epstein . . . maintains that other indispensable legal principles like vicarious liability also deviate from common law. But it is not obvious that vicarious liability is indispensable for a noncorporate private sector.”<sup>88</sup> And this is *all* Eeghen said about this very crucial matter.

Eeghen set out to refute Hessen and failed dismally. This does not mean we fully concur with Hessen. Actually, we go further and claim that Hessen himself does not take as radical and correct a position on vicarious liability or respondeat superior, in terms of defending business firms, as he should have. Hessen characterized it as “reasonable” to extend this malicious doctrine to sole proprietors, general partners, and corporate officers, and we take the position that this is entirely incompatible with the libertarian legal code.<sup>89</sup> Therefore it should not be extended at all, to anyone. Rather, it should be ended, and salt sowed where once it stood, since it is profoundly out of keeping with the critical libertarian principle of personal responsibility. Respondeat superior is an attempt to undermine justice in its search for innocent “deep pockets,” and must be rejected totally.

Individual responsibility, not a search for deep pockets, must be our watchword in this matter. If one lawyer in a large law firm (a partnership, not a corporation) murders someone, his partners are not responsible, even though the murder may have been committed with funds derived from that firm. The murder would also have been impossible if the murderer had no shoes or, say, break-

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<sup>87</sup> HESSEN, *supra* note 5, at 20.

<sup>88</sup> Eeghen, *Part II*, *supra* note 4, at 39 n.1 (citing Epstein, *supra* note 14, at 263-74).

<sup>89</sup> HESSEN, *supra* note 5, at 20 (noting that the “application of the principle of vicarious liability was extended to sole proprietors . . .” and calling the extension “reasonable”).

fast. Yet, people who supply such materials are not at all responsible for the murder, either.

Rothbard has the definitive word on this matter:

Under strict liability theory, it might be assumed that if “A hit B,” then A is the aggressor and that A and only A is liable to B. And yet the legal doctrine has arisen and triumphed, approved even by Professor Epstein, in which sometimes C, innocent and not the aggressor, is *also* held liable. This is the notorious theory of “vicarious liability.”

Vicarious liability grew up in medieval law, in which a master was responsible for the torts committed by his servants, serfs, slaves, and wife . . . .

As long as the tort is committed by the employee in the course of furthering, even if only in part, his employer’s business, then the employer is also liable. The only exception is when the servant goes “on a frolic of his own” unconnected with the employer’s business . . . .

Even more remarkably, the master is now held responsible even for intentional torts committed by the servant without the master’s consent . . . .

. . . [T]he only real justification for vicarious liability is that employers generally have more money than employees, so that it becomes for convenient (if one is not the employer) to stick the wealthier class with the liability . . . .

One would expect that in a strict causal liability theory, vicarious liability would be tossed out with little ceremony. It is therefore surprising to see Professor Epstein violate the spirit of his own theory. He seems to have two defenses for the doctrine of *respondet superior* and vicarious liability. One is the curious argument that “just as the employer gets and benefits from the gains for [sic] his worker’s activities, so too should he be required to bear the losses from these activities. This statement fails to appreciate the nature of voluntary exchange: Both employer and employee benefit from the wage contract. Moreover, the employer does bear the “losses” in the event his production (and, therefore, his resources) turn out to be misdirected. Or, supposed the employer makes a mistake and hires an incompetent person, who is paid \$10,000. The employer may fire this worker, but he and he alone bears the \$10,000 loss. Thus, there appears to be no legitimate reason for forcing the employer to bear the *additional* cost of his employee’s tortuous behavior. Epstein’s second argument is contained in the sentence: “X corporation hurt me because its servant did so in the course of his employment.” Here Epstein commits the error of the conceptual realism, since he supposes that a “corporation” actually exists, and that it committed an act of aggression. In reality, a “corporation” does not act; only individuals act, and

each must be responsible for his own actions and those alone. Epstein may deride Holmes' position as being based on the "nineteenth century premise that individual conduct alone was the basis of individual responsibility," but Holmes was right nevertheless.<sup>90</sup>

But, but, but, splutter, splutter, splutter, harrumph, harrumph, harrumph, this *cannot* be right, the critic will continue to say. For, does not the corporation aid and abet the tortfeasor? After all, without the corporation, the truck<sup>91</sup> or airplane would not have been available. The corporation didn't exercise due diligence and care in entrusting the employee with the car in the first place. Or, consider what the Union Carbide Corporation did to the people of Bhopal,<sup>92</sup> most of them third parties. Do they not have any responsibility *at all*? Why, they are enablers! It is almost as if these corporate moguls *incited* their employees into victimizing innocent people. Hitler and Stalin may never have killed a single person by their own hands, and yet, of course, they are guilty of mass murder.

We call upon Rothbard to respond to this challenge:

Should it be illegal . . . to "incite to riot"? Suppose that Green exhorts a crowd: "Go! Burn! Loot! Kill!" and the mob proceeds to do just that, with Green having nothing further to do with these criminal activities. Since every man is free to adopt or not adopt any course of action he wishes, we cannot say that in some way Green *determined* the members of the mob to their criminal activities; we cannot make him, because of his exhortation, at all responsible for *their* crimes. "Inciting to riot," therefore, is a pure exercise of a man's right to speak without being thereby implicated in crime. On the other hand, it is obvious that if Green happened to be involved in a plan or conspiracy with others to commit various crimes, and that then Green told them to proceed, he would then be just as implicated in the crimes as are the others – more so, if he were the mastermind who headed the criminal gang. This is a seemingly subtle distinction which in practice is clear cut – there is a world of difference between the head of a criminal gang and a soap-box

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<sup>90</sup> Rothbard, *supra* note 14, at 55 (second emphasis added) (footnotes omitted).

<sup>91</sup> WALTER BLOCK, *PRIVATIZE THE HIGHWAYS* (forthcoming 2009). We abstract from the case where private roads could have prevented a traffic accident caused by a corporate employee, and also when government policy created the problem, as in the Exxon Valdez oil spillage, where under the Americans with Disabilities Act the company was forced to hire a handicapped person, an alcoholic, whose absence from the bridge was directly implicated in the accident.

<sup>92</sup> See Union Carbide Bhopal Information Center, <http://www.bhopal.com> (last visited Mar. 13, 2009); see also The Bhopal Medical Appeal: Homepage, <http://www.bhopal.org> (last visited Mar. 13, 2009).

orator during a riot; the former is not, properly, to be charged simply with “incitement.”<sup>93</sup>

All of this is not to say a corporation’s managers could not be liable in some cases even without respondeat superior. It may not be the pilot’s fault that the airliner he was piloting crashed – it could be a manager’s fault for failing to see that the plane which he directed the pilot to fly was improperly maintained. However we might apportion liability between the two of them, one still cannot see how it is the *shareholders’* fault. Of course, if the stockholders or the officers of the corporation conspire with the truck driving employee to hit a pedestrian, then they too are responsible for this crime. But they are guilty only in their role as “mastermind” or conspirator, not merely because they are members of the corporation.

#### CONCLUSION

Eeghen went to great lengths to suggest that the corporation is somehow incompatible with liberty.<sup>94</sup> As we have seen, however, the corporate form is perfectly compatible with liberty, as a means for individuals to voluntarily enter complex business arrangements, to the benefit of each other and the consumers they serve.

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<sup>93</sup> MURRAY N. ROTHBARD, *THE ETHICS OF LIBERTY* 81 (Humanities Press 1998) (1982), available at <http://www.mises.org/rothbard/ethics/ethics.asp>.

<sup>94</sup> Eeghen, *Part II*, *supra* note 4, at 59-67.