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The Parallel Historical Path of Company and Labour Law

Frank Carrigan

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Abstract The paper explores the conceptual foundations of the legal principles that govern the operation of company and labour law. The paper argues that far from seeing the doctrinal architecture of company and labour law as a product of apolitical and objective rules a paradigm shift is required. The rule book conception of law is a misguided methodological framework. In sharp contrast to that methodology this paper avers the legal principles governing company and labour law must be viewed through the prism of the sovereignty of property rights. In effect, the viewpoint that law is an autonomous domain is eschewed in this paper. Instead the historical, social and economic forces directing legal developments in two crucial fields are illuminated. The upshot is a study illustrating the dialectical bond that exists between company and labour law. The paper is divided into three parts. The first part examines the way prescriptive law is the keystone of labour law. The role of the control test and implied terms are scrutinized in order to illuminate the way that the common law of employment facilitates the hegemony of managerial prerogatives. Apolitical legalism plays no role in this sphere of law. The second part considers the juridical forms that entrench the power of shareholders and managers in the modern company. In this sphere of law the courts sanction facilitative law by prioritizing the voluntarist assumptions of business people. The curve of legal reasoning in company law is dominated by the courts treating the leading personnel in companies as the personification of economic relations. The owners and administrators of capital are regarded as occupying the commanding heights of the economy, and are given judicial support to choose their own constitutional arrangements. Shareholders and directors are vested with a large degree of autonomy and discretion that is translated into the capacity to opt in and out of the regulatory web. The final part sums up the factors that underpin the triumph of the prescriptive and facilitative law that dominates labour and company law.

F. Carrigan (✉)
Department of Law, Macquarie University, Sydney, NSW 2109, Australia
e-mail: frank.carrigan@mq.edu.au

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Introduction

The aim of this paper is to explore the conceptual foundations of the legal principles that govern the operation of company and labour law. Company and labour law are treated as separate fields of scholarship. A graphic illustration of this atomistic approach is expressed by the fact that there is no previous study devoted to examining the dialectical bond between company and labour law. This is a pity because the close proximity of these areas of law offers an opportunity to examine if there are common characteristics shaping the operation of legal doctrine in these complementary fields. The close identity of these spheres of law can be summarized by noting that company law exists to regulate the controllers of capital while labour law monitors the wage-labour bargain. The modern company is the nexus that binds together the controllers of capital and those on wage contracts and its structure is a cardinal feature in comprehending the parallel relationship of company and labour law.

The paper seeks to excavate the legal doctrine that governs the workplace and the boardroom. It will attempt to demystify the structure of the legal forms that operate in company and labour law. At first blush the task of peering below the surface in order to locate the tectonic plates of law appears an unproblematic exercise. For the conventional wisdom is that the scope of the rules regulating company and labour law is a product of traditional legal analysis. In effect, the legal principles governing company and labour law doctrine are viewed through the conceptual lens of legal positivism that treats law as a body of rules based on logic, determinacy and coherence. This paper argues that far from seeing the doctrinal architecture of company and labour law as a product of apolitical and objective rules a paradigm shift is required. Utilizing a different framework of analysis this paper contends that the juridical forms of company and labour law are a concentrated expression of wealth and power, or more succinctly property rights. The paper explores how social and economic forces have directed the course of company and labour law. Or viewed from another angle historical jurisprudence is utilized in this paper to deconstruct the legal universe governing companies and the regulation of the buying and selling of labour hours. Historical developments have been instrumental in shaping the modes of legal thinking in company and labour law.

In brief, legal doctrine has a history and the underlying dynamic of that history is not grasped by focusing on unwarranted presumptions about judges mechanically deciding cases in line with neutral rules that are independent of the interpretative matrix of judges. Instead legal developments particularly in areas such as company and labour law that stand at the crossroads of a property owning democracy are indubitably shaped by historically defined social groups armed with sufficient economic power to translate their policies into law. This viewpoint should not elicit surprise but legal positivism and its cult of objectivity based on rules that are reified and treated as independent of social institutions is hegemonic in market economies.

Mechanical jurisprudence is particularly dominant in key areas like company and labour law, and this reality has put its ideological stamp on lawyers and judges.

The upshot of the dominance of legal positivism is its key role in obscuring the true nature of the legal forms that regulate company and labour law. There are some contrarian voices that raise questions about the core nature of mechanical jurisprudence and its abstract conceptual reasoning that rigorously excludes extra-legal factors from its analytical framework. These maverick voices are not just from the left of the political spectrum. Even a conservative thinker such as Judge Richard Posner bluntly eschews analogical reasoning and the viewpoint that law is "an autonomous domain of knowledge and technique."[1] As Posner pithily notes, "law is shot through with politics."[2]

Of course, Posner like every thinker is no innocent reader of legal texts. His philosophy of law is imbued with his own trenchant theoretical and political presuppositions. Posner's brand of free market politics is underpinned by the form of economic jurisprudence that is the watchword of the law and economics school of legal theory. For Posner the methodological framework of neo-classical economics with its emphasis on individual economic agents pursuing their self-interest through voluntary bargains ensures optimum efficiency. As early as the 1960s Posner was heaping praise on Friedman's view that unregulated markets guided by price signals must be used to allocate goods and services.[3] Posner extended Friedman's economic analysis to legal regulation. Posner invoked the economic efficiency of unregulated markets as the touchstone for assessing whether a legal rule was just and efficient.[4] According to Posner the common law is a system of rules that accords with the logic of an unregulated market and the role of judges is to promote the efficient allocation of resources.[5] This study rejects both legal positivism and a legal theory that emanates from neo-classical economics as the motor force of legal development. Instead the historical jurisprudence utilized in this study will enunciate the theme that those with the economic surplus of society under their command have benefitted from judges shaping legal doctrine in the field of company and labour law in ways that served elite economic interests. It is argued that neither a legal theory based on treating law as an autonomous sphere of concepts nor an economic philosophy that places the individual as the unit of analysis and fetishizes price signals and the illusion of free markets as the barometer of the allocation of power and wealth can throw light on the parallel path taken by two ostensibly different branches of law. Instead the rationale that explains the parallel path of company and labour law is the correspondence between legal principles and the extant system of property relations. The history of property and power are the duo that explain the legal framework of company and labour law. Apolitical legalism and the proponents of the invisible hand of unfettered markets piloting legal reasoning obscure the reality that company and labour law is a product of those who appropriate and

[1] Posner (2008), p. 8.

[2] *Ibid*., p. 9.

[3] Posner (1969) 21. 3 Stanford Law Review p. 636, fn 191.

[4] Posner (1986), p. 495. Posner (1975) 53 Texas Law Review pp. 763–764.

[5] Posner, "The Economic Approach," p. 760.

dispose of the economic surplus generated within the modern company. The act of judging is bound up with powerful groups bent on perpetuating their stranglehold on the forms of property rights that guarantees profits and capital accumulation.

Examining the legal forms that underpin property rights in the field of company and labour law sheds light on a range of issues of contemporary importance. A corollary of the search for the locus of company and labour law in property rights is the realization that it is not traditional legal reasoning or the methodological individualism practised by the law and economics school that supplies the answer to the roots of legal developments in these branches of law. Instead law as a constituent element of historical power relationships is the driving force of regulation in these spheres of law. Judicial reasoning is not an extrinsic element of the social formation. It is intrinsically linked to the social structure and its deployment in company and labour law acts to perpetuate property rights. Legal rules are a means to an end for they play an important role in classifying social relations in a hierarchical society where property rights are the sovereign principle. E P Thompson astutely observed that law was an ideology that historically legitimated class power.[6] In a nutshell, it is no accident of history that the company regulatory system serves a facilitative function. A soft form of regulation emphasising autonomy and discretion applies in the company legal field to ensure that managers and shareholders can exercise power and pursue wealth maximization. In labour law prescriptive doctrine or what can be termed command law predominates in order to defend the appropriation of the economic surplus and uphold the employer prerogatives that flow from property rights. In both company and labour law there is a convergence of purpose insofar as the aim is the preservation of the socio-economic infrastructure and the entrenchment of the legal rights of the economic elite.

The paper is in three parts. The first part examines the way prescriptive law is the keystone of labour regulation by analysing the role of the control test and implied terms. These key juridical forms highlight the way the common law facilitates employer prerogatives. The second part considers the juridical forms that entrench the power of managers and shareholders in the modern company. The third part will sum up the factors underpinning the triumph of the facilitative and prescriptive law that dominates company and labour law.

The Control Test and Power

With the repeal of the British master and servant legislation in 1875 it appeared the circumstances were ripe for the flourishing of facilitative law in the field of labour market regulation. The latter part of the nineteenth-century was the heyday of the free market and laissez-faire thinking.[7] It was a period that heralded the full blown emergence of voluntary exchange relations encapsulated by the mantra of freedom of contract.[8] It was an age that held out the prospect of the elimination of coercion

[6] Thompson (1990), p. 262.

[7] Polanyi (1971).

[8] Atiyah (1979). Friedman (1965).

that was a component part of the master and servant law that held sway prior to the ascendancy of contract doctrine. The repeal of the master and servant law that stretched back to the 1351 Statute of Labourers enabled a free market economy to emancipate the individual from the bonds of statutory domination that for centuries had been the hallmark of a system based on status relationships. In effect, with the abolition of the master and servant law the vestiges of feudalism and its closed chain of inborn privilege bowed before the creative destruction unleashed by a market system of voluntary exchanges between independent individuals. The free market transformed the medieval organization of labour and displaced the manorial magnates and merchant guilds.

The employment relationship became a component part of a contractual society that relied on market mechanisms to link individuals in collaborative economic undertakings.[9] The wage bargain was regarded as a free contract based on the unbridled choice of equal individuals. Autonomous individuals in charge of their own affairs became the cornerstone of the liberal legal and economic order.[10] The free will of the parties operating in a contractual context of mutual rights and obligations became the rallying call of a market society. Free markets and the law of contract formed a symbiotic relationship signalling an era of facilitative law. As Lawrence Friedman notes, liberal nineteenth-century economics fitted neatly with the law of contracts.[11] The market exchanges of equal competitors embodied in a nexus of facilitative contracts provided an authoritative mechanism for adjudicating breaches of voluntary obligations undertaken by free-contracting adults. Those who bought labour hours and those who sold labour hours were endowed with juridical equality. Facilitative law allows the parties to decide the terms of the contract and minimalist state regulation is justified by the element of choice and the voluntarist assumptions associated with private bargains. With competitive markets guaranteeing equivalence of power and the state acting in a value neutral manner facilitative law promotes voluntarism and juridical equality.[12] Thinkers as diverse as Hobbes, Maine and Nietzsche gave support to contract as the mechanism for implementing facilitative law and liberating the individual from coercion.[13] In effect, these influential intellectuals legitimated and helped propagate facilitative law.

The sanguine picture of the party autonomy view that framed contractual thinking in the nineteenth-century and is still visible today in the principles of the law of contract has its critics. For example, Collins notes contract law has two distinctive features. Firstly, the fundamental rules were selectively culled from previous historical epochs, but stripped of any moral texture so that the organizing principles reflected a nascent market society.[14] Secondly, it engaged in empire building as contract law attempted to subordinate a myriad of social relationships to contractual

[9] Fox (1974), p. 181.

[10] Wightman (1996), p. 2.

[11] *Contract Law in America*, p. 20.

[12] Tool and Samuels (1989), p. 3.

[13] Seidman (1989), p. 18.

[14] Collins (2003), p. 3.

logic.[15] In the field of employment its imperialist ambitions were crowned with success. From the fourteenth-century to the latter part of the nineteenth-century the legal form applicable to wage-labour was encapsulated by master and servant law. From the late nineteenth-century following the repeal of the British master and servant legislation wage-labour was legally conceptualised in contractual terms.

From the outset legal cannibalism was a keynote of the common law contract of employment. The doctrinal development of the common law contract of employment was heavily influenced by master and servant law. Quite simply, the doctrinal architecture of the employment contract mirrored key characteristics of medieval labour law. Moreover what innovation did occur was not due to jurists developing the common law judicial method in line with abstract logic and analogical reasoning. The much vaunted craft skills and technical proficiency of the legal positivistic school of thought was evident but it was not linked to the form of legal reasoning associated with legalism.[16] Instead the common law judicial process responsible for formulating common law rules for the governance of the labour market was dominated by policy-driven considerations. It was not apolitical legalism nor a theory based on simple economic efficiency but the drive to consolidate property rights that spearheaded the nature of the evolving doctrine of precedent in the field of the labour contract. The common law, in searching for rules to categorize work relationships, borrowed significant measures from the master and servant law in order to bolster the sovereignty of private property relationships. Thus the common law contract of employment was for employees not a celebration of free market ideology but a vehicle allocating power to employers. Coercion spearheaded by the inequality of bargaining power of employees and not the economic freedom sanctified by the jurisprudence of Posner ensured the common law contract of employment became complicit in a form of bondage.[17]

Distinguishing an independent contractor from those who were bound to an employer through the medium of a contract of work is the axis of the employment contract. The search for an apposite legal test in this area is of crucial importance in a society with a social and economic order that is highly stratified along class and property rights. Since the rise of the labour contract the need to segregate an independent contractor from the wage labourer has determined the nature and structure of the contract of employment. It is a classification exercise that filters into every aspect of labour law. Quite apart from the need to develop a legal test in order to classify social groups and corresponding lines of authority, identifying an employment relationship from other forms of legally constituted work relations plays an important role in tax assessment levels, determining who pays superannuation levies, responsibility for an injured party claiming a legal remedy for a breach of a contract of work and access to employment protection statutes.

For jurists, developing a legal test that would clarify the relationship between a worker and employer required the translation of economic relations into a legal

[15] *Ibid*., p. 4.

[16] A scholarly and lucid defence of legalism inspired by support for the judicial methodology of Sir Owen Dixon can be found in Gava (2002) 26 Melbourne University Law Review p. 566.

[17] Kahn-Freund (1972), p. 8.

principle and this was bound to be a Sisyphean task. Thus it is unsurprising that in determining whether a worker was an employee or independent contractor common law jurists would eschew abstract logic and instead cannibalize history to establish a cogent legal test. The juridical form chosen to define an employee could not afford to be out of kilter with the underlying hierarchical social conditions that it reflected. And as there was a lineage of past legal models that had served to regulate the labour market on behalf of economic elites there was a rich legal heritage to press into service. The only problem was that if the legacy of privilege and power rather than legal positivism was to be installed as the intellectual source for establishing a legal test for distinguishing an employee from an independent contractor it would entail the strangling at birth of any concept that the labour contract would embody facilitative law. Instead of a permissive and libertarian approach prescriptive law would be the master symbol of employment contract doctrine in an emerging market economy just as an autocratic disciplinary power had exerted a stranglehold over the past legal models that had governed the organization of work. Drawing on legal rules that traced their ancestry back to the slave and serf epoch was a scenario for the superior authority of the employer over the employee to be the governing principle of the modern employment contract and any hope of apolitical legalism or economic freedom would be stillborn. The concept of a common law judiciary entrenching the unilateral authority evident in past labour regulatory regimes as the motor force of a legal test in a contemporary market economy was contrary to the theory of classical contract law and its proclaimed virtues of party autonomy based on reciprocal relationships.

The common law test for designating an employee has its origins in slave law. Jurists in England during the Middle Ages established an overlap between the common law approach to labour regulation and the Roman law of slavery.[18] During this period the common law was an adjunct to the statutory master and servant regime but both enforcement systems resonated with the imagery of Roman law and acted in tandem to ensure the total subordination of serfs.[19] The autocratic and disciplinary power of the legal structure supported the rule of elite groups. Davis states that serfdom kept alive Roman concepts of slavery and this state of affairs was used to "transmit legal notions of total subordination to the early modern era."[20] With the gradual transformation in England from serfdom to wage-labour expressed at a legal level by the employment contract the element of subordination that had been a feature of the medieval labour process continued unabated.

Wedderburn has commented on the history of the chronic hostility of the common law to workers.[21] Furthermore he notes this animus prefigured the repeal of the master and servants acts. Wedderburn picks the 1850s as a decade when the common law hiding behind the rhetoric of equality began to store up its arsenal of disciplinary powers.[22] The timing was not an historical accident. By the

[18] Davis (1966), p. 40.

[19] *Ibid*., p. 39.

[20] *Ibid*., p. 40.

[21] Wedderburn (1993) 109 The Law Quarterly Review p. 245.

[22] *Ibid*., p. 259.

mid-nineteenth-century a new economic age had arrived. Macaulay with typical Victorian bravado celebrated the rise of industrial capitalism by declaring: "the greatest and most highly civilised people that ever the world saw, have spread their dominion over every quarter of the globe…have created …every mechanical art, every manufacture."[23] The protection of new forms of property based on factory capitalism spurred the enmity of the common law to workers. Wedderburn describes how the courts overturned the legislative attempt in 1847 to improve factory conditions, particularly those relating to child and female labour practices. In 1850 Exchequer judges used the freedom of contract mantra to strike down statutory provisions protecting these vulnerable workers. Parke B. in R*yder v Mills* justified this step by asserting that as the 1847 Ten Hours Act was "a law to restrain the exercise of capital and property, it must be construed stringently" or employers would be denied "full control of their property."[24] Basing his judgment on similar conceptual foundations Malins VC. in the 1868 picketing case *Springhead Spinning Co. v Riley* stated: "The jurisdiction of this court is to protect property."[25]

The historical role of the common law in defending the sanctity of private property predates the nineteenth-century. Hill notes that in the infant stage of capitalism in the seventeenth-century as inequality began to escalate and the basis of wealth was slowly changing from agricultural capitalism to industrial capitalism contemporary commentators "made no bones about the class nature of law in England."[26] The common law during the seventeenth-century was perceived as "a law of property."[27] In the nineteenth-century with the expansion of the industrial revolution and the rise of a financial and manufacturing bourgeoisie the employment contract became the cornerstone of labour law. Under the guise of developing positivistic rules that were objective and autonomous from society judges became deeply involved in elaborating a legal framework that mirrored their class origins and the affinity they felt for those who possessed property and capital. Atiyah has noted that nineteenth-century judges shaped the rules of contract law in line with positivistic assumptions.[28] He notes this attempt to treat law in terms of its own logic was not an apolitical exercise. Legal positivism became the template for contractual concepts but the overarching aim of this legal philosophy was its key role in implementing a burgeoning market society; and its symbolic value in expressing judicial support for those at the commanding heights of the economy.[29]

The 1850s and 1860s was the twilight period of the master and servant legal regime. With its slow demise the common law had time to formulate its approach to the legal conceptualization of wage-labour. The assumption of common law was that a contract was a bargain struck between equals. Judged on this premise with the triumph of contractual jurisprudence there were plausible grounds for believing that

[23] Lane (1974), p. 38.

[24] *Ibid*., p. 248.

[25] Quoted in Wedderburn (1986), p. 19.

[26] Hill (1996), p. 234.

[27] *Ibid.*

[28] *Rise and Fall of Freedom of Contract*, pp. 388–389.

[29] *Ibid.*, p. 389.

for the first time in history the legal regulation of labour relations would not entail economic power being supported by a privileged legal status. But the spectre of common law judges protecting property rights in the period before the dissolution of the master and servant law was ominous. In effect, this was a harbinger of the class bias of the nineteenth-century judiciary. There was an implication that judges would shape and interpret legal doctrine to suit elite interests. These omens proved deadly accurate for the 1850s witnessed common law judicial policy turning to the master and servant test and its ancient baggage for guidance in distinguishing between workers and independent contractors. Instead of the flourishing of facilitative law legal coercion in the form of judicial support for the unilateral authority of the employer became the keynote of the common law test. In 1855 Crompton J. in *Sadler v Henlock* stated an employer "retains the power of controlling the work."[30] This idea was developed into what revealingly came to be termed the control test in the 1858 case *Regina v Walker*.[31] The essence of this control test was the application of exclusive service with the right to control firmly in the hands of those controlling the organization of work. The buzz phrase 'exclusive service' was plucked straight from the lexicon of the master and servant test for distinguishing a subordinated worker.[32] In short, Baron Bramwell in *Regina v Walker* fashioned a common law test for categorizing an employee that cloned the master and servant test. Baron Bramwell's test focused on the employer having the right to control the manner in which the work was done.[33] In 1880 following the repeal of the master and servant laws Baron Bramwell refined the common law test and brought it even more in line with the element of subordination that prevailed in the evolution from slave to serf and finally wage-labour in an industrial age. Baron Bramwell in *Yewens v Noakes* stated "a servant is a person subject to the command of his master as to the manner in which he shall do his work."[34] Baron Bramwell's words serve as an object lesson in defining the contours of command law.

The right to control the manner of work is still the yardstick for defining whether the contract is one of employment. Over the years different tests have been promoted to aid in identifying a contract of employment. Social and economic changes inspired the emergence of Lord Wright's 'business reality' test in *Montreal v Montreal Locomotive Works Ltd.*[35] and the Denning LJ. 'integration' test in *Bank voor Handel en Scheepvaart NV v. Slatford*.[36] These tests expanded the range of factors to consider when determining if a worker qualified as an employee. Deakin and Wilkinson stress that these tests were distinguished from the control test on the

[30] (1855) 4 E. and B. 570 at 578 or 119 E. R. 209 at 212.

[31] (1858) 27 L. J. M. C. 207.

[32] Deakin and Wilkinson (2006), p. 90. Also see Kahn-Freund (1951) 14 The Modern Law Review p. 505.

[33] (1858) 27 L. J. M. C. 207.

[34] (1880) LR 6 QBD 530, 532–533.

[35] [1947] 1 D.L.R. 161, 169.

[36] [1953] 1 Q.B. 248, 295. In Australia a multiple indicia test was developed. It prioritized the control factor. See *Stevens v Brodribb Sawmilling Co Pty Ltd.* (1986) 160 CLR 16, 25.

basis that economic as opposed to personal subordination was given due weight.[37] This interpretation obscures the fact that the classic control test had from its inception expressed economic domination. However, whatever test was utilized control over the employee continued as the hallmark of the employment contract. Vettori argues that control has endured as key factor because it has retained its capacity to entrench the socio-economic status quo.[38] Kitto J. an Australian High Court judge in *Attorney General for New South Wales v Perpetual Trustee Company*[39] has best summed up the essence and effect of control and the role it plays in the labour contract. Kitto J. noted that vested with the right to control under the contract of employment the employee is under an obligation of subordination to the will of the employer.[40] This element of domination is expressed Kitto J. states by a duty of obedience in relation to obeying orders about how the work is to be done and the manner of execution of any task.[41] Furthermore, Kitto J. states obedience is of prime importance in connection with the work in the sense that it must be for the benefit of the employer.[42] Kitto J. provides a cogent analytical framework that skilfully interprets the parameters of control that a worker is compelled to follow in performing contractual work. But in stressing unqualified obedience to the employer Kitto J. unwittingly highlights that an employment contract is starkly at odds with the legitimizing norms of contractual logic.

The sharp divide between the party autonomy view of contractual theory and the prescriptive features of the contract of employment is illuminated by the role of implied terms. The next section will examine how implied terms operate in the employment contract and how they build on the asymmetrical relationship between employer and employee set by the control test in all its guises.

The Role of Implied Terms and Legal Fictions in the Employment Contract

In his final Hamlyn lecture delivered in the UK in 2003 Justice Kirby conjures up a beguiling image of the fairness and justice that the common law is capable of achieving if only judges got out their legal clippers and snipped away its less desirable edges.[43] The pity is that a close scrutiny of Justice Kirby's analytical framework reveals its misguided nature. The simple fact is that the common law is not tidy. But its untidiness is not an accident of history that can be cured by judicial fiat. For its lack of symmetry is not as Justice Kirby suggests solely attributable to the intransigence of conservative jurists.[44] History and those powerful enough to twist the common law to suit their selfish aims is the promethean force responsible

[37] *The Law of the Labour Market,* p. 95.

[38] Vettori (2007), p. 12.

[39] (1952) 85 CLR 237.

[40] *Ibid*., pp. 299–300.

[41] *Ibid*.

[42] *Ibid*.

[43] Justice Kirby (2004), p. 90.

[44] *Ibid*., p. 91.

for its ad hoc nature. While the legal code is posited on the pursuit of a system of harmonious rules this objective is imperilled by economic developments. In order to deal with the contradictions in society unleashed by economic changes the legal structure has to adapt to new circumstances if it is to retain its legitimacy. The common law has blurred edges because it exists in a dynamic environment and its adaption is by force of circumstances haphazard and limited. Change when it happens depends on filling gaps in existing rules and either bending old rules to suit new facts or rediscovering old rules and tacking them on to extant principles.[45] For legal conservatives doctrinal developments are generated from existing doctrine and are based on high technique and analogy by reasoning. The jurists who support this judicial method are not guilty of bad faith. Instead they are guilty of not understanding that no reading is innocent and that every doctrinal interpretation involves theoretical preconceptions that are as Posner correctly notes often unconscious.[46] When theoretical assumptions are not engaged in openly and hidden below the surface and issues are disconnected from the surrounding social structure the reality of law as a concentrated form of politics, economics and ideology is not only shielded from view but left unchallenged and hegemonic. In short, doctrinal shifts are driven by extra-legal factors. The upshot is instrumentalism shapes legal concepts. The common law serves particular interests and is not driven by a judicial method based on logical analysis, apolitical legalism or vague notions of economic efficiency propelled by an invisible hand. Power operates through a visible hand and jurists have historically been a guiding force in achieving the aims of those who stand at the apex of the pyramid of wealth.

The role of history and vested interests in twisting existing rules to suit societal shifts or borrowing rules from outside the common law to buttress property rights is amply displayed by the role of implied terms in the employment contract. Within feudal estates and craft guilds the status obligations of obedience, loyalty and fidelity provided a visible expression of the legal dominance of the elite. These feudal prescriptive rules fell under the rubric of the implied terms doctrine and this legal baggage was imported into master and servant regulatory legislation and then morphed into the common law contract of employment.[47] A key component of the first fourteenth-century labour statutes of the master and servant period was the entrenchment of a duty of obedience.[48] In a relationship based on status it is unsurprising that master and servant legislation entailed detailed regulation of the labour process. The absolute authority of the master over the worker ensured that the rules of the workplace were non-negotiable and prescriptive. But the existence of prescriptive rules in the form of implied terms inserted into the fabric of the labour contract during the heyday of a laissez-faire economy in nineteenth-century England when freedom of contract was hegemonic highlights the gulf between the rhetoric of reciprocity and the reality of common law judicial policy. In 1845 in *Turner v Mason* an implied duty of obedience was devised that became authority for

[45] Ibbetson (1999), p. 294.

[46] *How Judges Think,* p. 369.

[47] Selznick (1969), p. 132.

[48] *The Law of the Labour Market*, p. 62.

the proposition that an employer had sweeping powers to summarily dismiss an employee if a lawful order was infringed.[49] The implied terms doctrine legitimized the modern employer's unilateral control of the workplace. As Fox notes, implied terms supplied the legal sanction for "reserving full authority of direction and control to the employer."[50]

Restrictive workplace regulations incorporated into the employment contract as implied terms were derived from the master and servant law. The implied terms doctrine was a feature of master and servant law, and was coopted by judges in the period when wage-labour was on the cusp of being regulated by the common law contract of employment. A watershed case was *R v St John Devizes*.[51] In this 1829 judgment there was a disagreement between the master and a female servant over working hours. At the time of the employment of the servant working hours had not been reduced to writing.[52] The rules of the factory "existed only in the breast of the master."[53] Confronted by this fact situation Bayley J. stated that every contract of hiring implied working "all reasonable hours when required."[54] He noted that ordinary working hours in this particular factory was 12 hours, but he decreed there was an implication that if the master chose to work the servant beyond these hours she must obey that command.[55] Parke J. was equally blunt. He asserted that implied into every contract of labour was a term stipulating that a servant must obey the orders of the master.[56] In effect, the issue in this case turned on the judges' views of social policy and it was one that served employer prerogatives. The case was of fundamental importance for it became the fountainhead upon which the farrago of implied duties imposed upon employees in the employment contract was built.

The implied terms doctrine provided the judiciary with leeways of choice. On the surface a rule book conception of law prevailed as judges could call upon a growing number of implied terms when adjudicating disputes. But behind the mystique of the rules implied terms provided the judiciary with the power and flexibility to engage in discretionary lawmaking. Filling gaps in the labour contract with the ideological presuppositions of judges was given a green light. Smith makes reference to the 1858 case *Harmer v Cornelius*[57] to illustrate how it was not unusual for implied terms to be invoked to rectify mistakes that employers made in contracting with labour.[58] In this case an employer engaged two painters without checking on their competency. When it transpired that they lacked painting skills the employer sought to escape from the contract. Willes J. came to the rescue of the

[49] (1845) 14 M. and W. 112.

[50] *Beyond Contract: Work, Power and Trust Relations,* p. 188.

[51] (1829) 9 B and C 896; 109 ER 333.

[52] *Ibid.*, p. 900.

[53] *Ibid.*

[54] ER, p. 335.

[55] *Ibid.*

[56] B and C 896 at 901.

[57] (1858) 5 C. B. (NS) 236.

[58] Smith (1992) 3 (1) The Economic and Labour Relations Review p. 107.

hapless employer by devising a new implied term that stressed that every employee would perform their duties with proper care.[59]

With implied terms in law standard terms are imported automatically into the employment contract regardless of the will of the parties. These court imposed terms comprise the duty of obedience,[60] fidelity,[61] confidentiality,[62] cooperation,[63] care and competence.[64] Supplementing this class of implied terms is a category that provides scope for judges to import a term if they are convinced a contract is incomplete and requires an imported term to provide business efficacy to the contract. Bowen LJ. in the 1889 case *The Moorcock*[65] founded the phenomenon known as terms implied in fact. When a term is implied by factual circumstances to suit the context of a particular transaction a judge by stepping in and presuming the intention of the parties engages in a form of judicial activism that can result in reconfiguring workplace relationships. It is a regulatory tool of sweeping dimensions.

Implied terms of whatever class provide an object lesson in prescriptive law and highlight how little labour law has to offer workers. Implied terms are a condensed expression of how labour market regulation facilitates asymmetrical power relationships. With implied terms the presumption is that the employee acknowledges these imported terms and this assent legitimates their incorporation into the contract.[66] This fiction of consent to be bound to prescriptive rules serves an important role in perpetuating property based societies. Anderman whilst providing no historical context to support his thesis notes that the assimilation of the master and servant status rules of obedience, loyalty and fidelity into the law of contract protected the property rights of the employer and secured managerial prerogatives.[67]

In the past couple of decades a court imposed duty of trust and confidence was developed. Leading UK labour law scholars were effusive in their praise for this new duty believing it heralded a progressive leap forward for the contract of employment.[68] At its genesis in 1979 in *Courtaulds Northern Textiles v Andrew*[69] at the height of Keynesian social welfarism there were grounds for optimism as this new term held out the promise of circumscribing the capacity of employer's to

[59] (1858) 5 C. B. (NS) 236 at 246. 141 E. R. 94.

[60] *Turner v* Mason (1845) 14 M. and W. 112; *Laws v London Chronicle (Indicator Newspapers) Ltd.* [1959] 1 W. L. R. 698.

[61] B*oston Deep Sea Fishing Co. v Ansell* (1888) 39 Ch. D. 339; *Robb v Green* [1895] 2 Q. B. 315 at 320; *Wessex Dairies v Smith* [1935] 2 K.B 80 at 84.

[62] *Amber Size and Chemical Co. v Menzel* [1913] 2 Ch.239; *Faccenda Chicken Ltd. v Fowler* [1986] 1 All E.r. 617.

[63] *Secretary of State for Employment v Associated Society of Locomotive Engineers and Firemen (No2)* [1972] 2 QB 455.

[64] *Harmer v Cornelius* (1858) 5 C.B. (NS) 236; *Lister v Romford Ice and Cold Storage [1957] A.C. 555.*

[65] (1889) 14 P. D. 64 at 68.

[66] *Law, Society, and Industrial Justice*, p. 131, Collins (1986) 15 (1) The Industrial Law Journal p. 1.

[67] Anderman (2004), p. 105.

[68] Freedland (2003), p. 104.

[69] [1979] IRLR 84 (EAT).

abuse their power. But the 1981 case of *Woods v W. M. Car Services (Peterborough) Ltd.*[70] signalled a fundamental shift in the interpretation of the term. From being a term that was imposed upon employers it became a mutual obligation binding employers and employees. The watering down of the term as neo-liberalism gathered momentum ensured that the property rights of the captains of industry would remain unexamined and the judicial shift removed any prospect that employers' prerogatives would be impeded. Eventually those who believed a progressive revamp of the implied terms doctrine offered hope of an expansion of industrial democracy fell silent as they were forced to confront the extent of the false dawn.[71]

The Siren Call of Facilitative Rules in Corporate Law

Born in the golden age of free market economics and laissez-faire thinking the triumph of facilitative law in the field of modern employment relationship appeared a mere formality. But instead of freedom of contract being the sovereign principle in the labour market instrumentalism prevailed. In effect, the courts exhibited deference towards the power elite and persistently devised doctrinal developments to secure the hegemony of employer prerogatives. By contrast even though the Companies Acts 1844-62 were a child of the golden age of laissez-faire in this case the abstract ideal was mirrored by empirical reality. However it would be fallacious to believe that the economic logic of market mechanisms was the only factor spearheading the triumph of a facilitative company legal form. When it mattered government and the courts during the nineteenth-century were not afraid to intervene on behalf of the business elite. In such a vital area as securing the legal milieu for the reproduction of economic relations the regulatory ideology of the state was an influential actor in consolidating the rule of the company form. In sum, the state played an active role in creating the legal basis of the organizational form of production. Instrumentalism was fundamental in establishing the conceptual foundations of company law. With the Companies Act of 1844 free incorporation status by registration was granted and this legislative concession was followed by the 1855 Limited Liability Act and 1856 Joint Stock Companies Act that enshrined general limited liability in England. These measures were an artefact of state power aimed at removing obstacles to the unleashing of dynamic forms of entrepreneurship and their corresponding managerial structures.

There is a causal connection between an expanding market economy and the legislative history of the company legal form. But volitional factors were not insignificant and from the outset corporate personality and limited liability were shaped by those with the capacity to influence legal developments. The state was supported in its regulatory role by powerful stakeholders. The ownership rights of shareholders were of primary importance in moulding the company legal form.

[70] [1981] ICR 666 (EAT).

[71] Brodie (2004) 33 The Industrial Law Journal pp. 349–350. Riley (2006) 29 (1) University of New South Wales Law Journal pp. 166, 174.

Initially shareholders held sway over the contours of company doctrine but it soon became a contested terrain where tensions between directors and shareholders were reflected in the courts and legislation adapting the doctrinal framework to the shifts in power between these key stakeholders. The desire to appease those at the apex of the business pyramid set an indelible pattern for a permissive company legal form to flourish. The courts and legislation continually reinforced a legal culture based on directors and shareholders attempting to define their own code of conduct. The company was treated as a private sphere and those at the commanding heights insulated from prescriptive law. Beginning in the middle to late decades of the nineteenth-century company doctrine was captured by the lobbying power of directors and shareholders. The guiding principle of the regulatory framework was soft law. The facilitative spirit of the company legal form exerted an early stranglehold and its rhythm beat out subsequent doctrinal developments. In its formative stage the underlying rationale of company law was established. The courts and legislature combined to accommodate and legitimate the dual power arrangement between directors and shareholders and this pattern is as evident today as it was in the mid-nineteenth-century.

Prior to 1844 and the inception of company law reform the only large scale enterprises that enjoyed a separate legal identity were those that were accorded this status by a Royal Charter or an Act of Parliament.[72] This cosy arrangement was slowly undermined by economic growth. The dynamic sectors of the economy spearheaded by rail, canal, banking and insurance enterprises began to seek a legal form that would facilitate large-scale ventures and be less dependent on state patronage.[73] The concentration and centralization of capital accelerated by the large capital funds required for new fixed capital projects spurred the growth of joint stock companies.[74] The railway sector became the epicentre of the move to forge new business laws to accommodate the large sums being invested. As Gamble and Kelly note "the main battering ram for change was the need to finance the railways."[75] Pressure for free incorporation was also sparked by speculative manias. A new legal form of organization became an imperative as a spike in unincorporated companies produced a series of speculative booms that unleashed widespread fraudulent activities that impacted on big and small rentier investors.[76] Both Hirst and Ireland identify the desire of rentier investors to engage in financing joint stock companies free of a climate giving succour to fraudsters driving speculative manias as a motor force for free incorporation and general limited liability.[77] It was the political clout of rentier investors that that led to the triumph of the company legal form. In the intra-class struggle between landed interests, those organized in partnerships and rentier investors the latter prevailed. Rentier investors clipped the

[72] Grantham (1998) 57 (3) Cambridge Law Journal p. 557.

[73] Gamble and Kelly (2000), p. 29; For a study that pinpoints the fraught dialectics of the law and the infant years of the railway industry see: Kostal (1994).

[74] Harvey (1984), pp. 137, 155.

[75] *The Political Economy of the Company*, p. 31.

[76] Cottrell (1980), p. 44.

[77] Hirst (1979), p. 140. Ireland (2010) 34 Cambridge Journal of Economics p. 843.

wings of the landed bourgeoisie and those combined in partnerships by assuming the position of the dominant fraction of the business elite. Finance capital became the new basis of wealth, power and prestige. Supporters of partnership law lauded its moral superiority and waged a campaign against the limited liability company but it proved fruitless. The advocates of partnership law and unlimited liability such as the prominent political economist J. R. McCulloch claimed the company legal form would encourage malfeasance as shareholders would have a state sanctioned vehicle capable of protecting them from personal responsibility for losses.[78] But this proposition was broken by the power of finance capital embodied in the rentier class.

Lord Eldon did not live to see the dawning of free incorporation. This would have been a matter of some comfort for no Lord Chancellor in the decades preceding the triumph of the limited liability company fought so vigorously against its inception. Lord Eldon stands as an object lesson for the truism that judges only influence the long term outcome of economic development when they are in tune with the evolution of social relations and the hegemonic fraction of capital. Eldon was an arch Tory and supporter of agrarian capitalism and his fierce resistance to free incorporation was expressed by his rallying call that business people should be liable for any losses to their "last shilling and last acre."[79] The agrarian inheritors of the economic philosophy of Lord Eldon and other vested interest groups were given a drubbing by the lobbying power of the rentier investors. Parliamentary supporters of the rentier investors were relentless and even canvassed the support of the working class as part of the strategy to secure general limited liability.[80] The *Economist* also gave its unqualified support to such a scheme on the basis "it would help eradicate hostile feeling between capital and labour."[81] Gower punctured the phony philanthropy underlying this embourgeoisment strategy. He derided the cynical attempt to achieve the harmony of disparate social classes through the mechanism of workers becoming joint stock investors. He noted: "one can detect more than a slight whiff of Victorian humbug when one reads the evidence of Chancery barristers accepting the eager invitation of M.P.s to persuade them that limited liability was desirable in the interests of the poor."[82]

The 1844 Act by compelling all joint stock companies to incorporate sought to eradicate the problem of fraud by introducing a series of company governance measures. Minimum capitalization requirements were mandated and this was matched by other statutory requirements that had to be satisfied before incorporation status was bestowed.[83] These included minimum share denominations and publicity stipulations designed to protect investors.[84] The move to achieve regulation through publicity was as McQueen points out flawed. The legislation lacked concrete steps

[78] Hunt (1969) p. 127.

[79] *Ibid.,* p. 117. Harris (2000), p. 233.

[80] *Industrial Finance*, p. 47. *The Development of the Business Corporation in England*, p. 118.

[81] *The Development of the Business Corporation in England*, p. 122.

[82] Gower (1969), p. 45.

[83] McQueen (2009), p. 46.

[84] *Ibid.*

to give its publicity provisions a prescriptive edge. Thus the 1844 Act failed to spell out "the content of either the balance sheet or the prospectus, nor did it identify the duties of the auditor charged with certifying the balance sheet."[85] But the 1844 Act was not a paper tiger. A sophisticated degree of statecraft was exhibited in the protection given to shareholders from rogue elements that destabilized economic activity.

The 1844 Act was to prove a high-water mark in the history of company regulation. The hallmark of subsequent legislative programmes was a retreat from some of the cardinal disclosure features of the 1844 Act. The subsequent history of regulatory failures was in no small part due to the fact that the 1844 Act symbolized the end of the unilateral capacity of shareholders to use their ownership rights to dictate the nature of doctrinal changes. Property rights alone were not sufficient to enforce shareholder dominance of the reform agenda. The 1844 Act enacted a key aim of the shareholders in joint stock companies. It protected this group from fraud and its disclosure aspects provided shareholders with a level of information that would be invaluable in guiding investment decisions. But even by 1844 shareholder primacy was under attack as the judiciary were busy whittling away their unilateral power base. Changes to property rights eased the entry of directors into the power bloc and created a conceptual space for the courts to reconfigure juridical relations within the company and in the process give a boost to facilitative law.

In a sense it was the creative destruction wreaked by the inexorable rise of the joint stock company that led to shareholders having to accommodate directors at the summit of the company. As the industrialization process accelerated in the early part of the nineteenth-century Smith's theoretical claims were bearing fruit. The intensive division of labour and productivity gains that flowed from large-scale enterprises created a hierarchical labour production system.[86] This phenomenon not only transformed the labour process and the lives of workers it also heralded a change in the leading personnel of the business class. The joint stock company opened up the field to modern management techniques and spearheaded the separation of ownership and management.[87] A managerial elite composed mainly of directors emerged that established a large degree of autonomy from the controllers of capital and they steadily became a "source of permanence, power and continual growth."[88]

As shareholders were forced to share the summit of society with directors there was a series of legal changes that reflected the economic transformation of the joint stock company and the realignment of power relations. The share is the umbilical cord that links the shareholder to the source of their wealth. Originally shareholders were regarded as having an equitable interest in the property of the company.[89] In effect each shareholder was regarded as a proprietor having a proportionate stake in

[85] *Ibid.*

[86] Smith (1986), p. 109.

[87] *The Limits to Capital*, p. 146.

[88] *Ibid.*, p. 147.

[89] Ireland (1999) 62 The Modern Law Review, p. 41.

the company. In 1837 *Bligh v Brent*[90] reconceptualised a joint stock company share. Following this case a share in a company was defined as bestowing no equitable interest in the assets of a company and shareholder rights boiled down to a dividend stream, transferability of shares and return of capital on winding up and voting entitlements.[91] The early nineteenth-century boom in railway shares provided the backdrop for a diminution of the legal rights of shareholders. As the share market burgeoned the shareholder began to evacuate from the role of combining ownership and control. A finance capitalist class developed. These financiers ceased having an interest in managing joint stock companies. They relinquished the role of supervising the production system and focused on building up a share portfolio that combined industrial and banking investments.[92]

The 1844 Act reaffirmed the separation of ownership and control and the corresponding reduction of the governance powers of shareholders. In simple terms the state adjusted the legal landscape to reflect a paradigm shift at the summit of the corporation. The Act imposed an iron curtain between management powers that were vested in directors and shareholders who were granted residual rights that could be expressed at the general meeting.[93] As the shareholders' grip on supervising directors waned there was a "steady shift of power from general meeting to board."[94] These English developments were replicated in other jurisdictions. In the 1860s in the US when a struggle for control enveloped the Erie Railroad directors regarded the attempt of shareholders to assert their influence as a "downright impertinence."[95] Functionless as regards their role in the production system and expelled from the administrative heart of the company shareholders were henceforth largely consigned to using their economic and political clout to ensure that the courts and legislature implemented legal measures that made profit maximization the overarching goal of directors. For their part directors' rational self-interest was based on maximizing their utilities to fend off any attempt to circumscribe their power base. And based at the strategic core of the dominant institution of the modern age directors were not impotent in regard to struggling to enforce a lax regulatory framework that suited their needs. At every future juncture where company law reform was on the agenda the tension between shareholders and directors was on display. This must not obscure the basic community of interests between shareholders and directors. They were for example unified in their commitment to upholding property rights and excluding other potential stakeholders playing a role in company governance.

A close investigation highlights how the contradictions between shareholders and directors were not insurmountable. In a nutshell, shareholders and directors had a mutual interest in eschewing the need for a strong state creating prescriptive rules to

[90] (1837) 2 Y and C Ex 268.

[91] Ireland, "Company Law," p. 41; Grantham, 'The Doctrinal Basis," p. 563.

[92] Ireland, "Company Law," p. 42.

[93] Redmond (2009), pp. 38, 119.

[94] Ireland, "Company Law," p. 43; *Automatic Self-Cleansing Filter Syndicate Co.Ltd. v Cunninghame* [1906] 2 Ch 34.

[95] Herman (1982), p. 7; Hill (2000) 48 American Journal of Comparative Law, p. 47.

guide company governance. As shareholders became passive investors and in truth little more than well secured creditors they were still bestowed with valuable legal rights. Crucially, they were able to hide behind the separate legal entity principle and thus avoid personal responsibility for company malfeasance. And whilst directors had various legal duties imposed upon them shareholders were free to pursue in an untrammelled manner their partisan objectives.[96] Also the company constitution provided them with a bundle of rights that boiled down to a series of accountability mechanisms being imposed on directors. In essence, even though shareholders became coupon clippers and failed any Lockean test connected with legitimising private property they were still treated by the law as though they had valid property rights that directors were required to protect.[97]

Berle and Means detailed how the "traditional logic of ownership" had been broken and shareholders had subsequently lost the right to have the company operate exclusively in their interests.[98] Yet despite their fall from being considered the owners of the company shareholders were by and large propped up by the law. The only proviso was that they had to accept a dual power arrangement with directors. This outcome was the objective basis for putting directors on a long leash. As long as the furies of private ownership were not impacted upon and directors resisted unduly exploiting their position an uneasy alliance between shareholders and directors was forged. Shareholders were comforted by the warm embrace of the law that gave a guarantee that the power of directors "was not unlimited but was subject to checks and controls which ensured that it could not be used for the manager's own purposes or for any other arbitrary end."[99] That was the theory, but once directors deployed considerable power they engaged in a ceaseless guerrilla campaign to loosen the legal bonds that shackled them to prioritizing shareholder interests. Overall the imperative of absentee shareholders reliant on directors to provide them with a stream of revenue and supervise production created the landscape for directors to limit any punitive developments in company law. A pact between shareholders and directors was struck, and in the final analysis both sides benefitted from a weak regulatory framework. The power sharing deal excluded any other potential stakeholder including employees and communities from being vested with legal rights capable of circumscribing company power. Captive to the contest for legal dominance waged by the two groups at the summit of the company the state adopted a conciliatory posture. The courts and legislature created a corpus of company doctrine that tried to satisfy both parties. The resultant permissive laws were the real victory of laissez-faire thinking.

The advent of the 1856 Joint Stock Companies Act signified the height of laissez-faire philosophy. After 1856 a limited liability company could be formed in England by a simple registration process requiring seven shareholders. The 1856 Act swept away the bulk of the modest regulatory requirements contained in the 1844 Act. The 1844 disclosure provisions and accounting and auditing principles were displaced

[96] Grantham, "The Doctrinal Basis," p. 573.

[97] Ireland (2000), p. 150.

[98] Berle and Means (1962), p. 338. Grantham, "The Doctrinal Basis," p. 573.

[99] Stokes (1986), p. 160.

by a regime based on self-regulation. In Cottrell's words "England after 1856 had the most permissive commercial law in the whole of Europe."[100] The 1856 Act was the brainchild of Robert Lowe, Vice-President of the Board of Trade. Lowe was contemptuous of the reform recommendations outlined in the 1844 Select Committee on Incorporation chaired by William Gladstone and largely adopted by the 1844 Act. Gladstone was not hostile to a free market. He simply wanted to tighten the noose on rogue elements that destabilized the economy. He proposed that a modicum of disclosure principles would provide the publicity necessary to minimize fraud.[101] In 1856 Lowe excoriated Gladstone's publicity thesis and accused him of engaging in "hollow rhetoric."[102] Instead of the oxygen of publicity Lowe's regulatory approach turned on the seductive allure of untrammelled laissez-faire propositions. This was not unpalatable to the business elite that benefitted from a nightwatchman state.

Lowe was spellbound by the view that the state had no role to play in regulating a limited liability company. For Lowe the only function of the state in commercial life was accepting applications for the registration of companies and banking the fees from incorporation.[103] Lowe's libertarianism was based on a combination of free trade and freedom of contract. The corollary of this philosophy was the magic of the market would in Lowe's view inspire ethical conduct.[104] He had no concept of how the economic logic of the market would operate to supplant free markets and install duopolies and monopolies. Or that rogue elements were an integral part of a profit making system and the temptation to take short cuts to wealth accumulation by bending the rules of the market was a systemic feature of business life. Instead Lowe was naive enough to believe that unfettered market forces would ensure a myriad of competing companies that resembled little republics.[105]

Lowe's utopian vision became an ingrained aspect of the legal culture of English commercial law. The pervasive nature of laissez-faire infiltrated regulatory ideology, and the upshot was that permissiveness became a constituent element of the company legal form. Lowe's little republic model quickly evaporated as economic crises and frauds continued to exert their pernicious impact on company affairs. But henceforth every time regulatory reform was in the air to counter the depredations of company malpractice Lowe's deregulatory ghost would be exhumed. The legacy of governments having no substantial enforcement role to play in regulating the conduct of companies had struck a chord in business circles and it resonated long after Lowe left the scene. It was a notion that was to become the guiding principle of the intensive lobbying of directors and shareholders in the post 1856 era. Even when regulatory deficiencies were stark in the post 1856 epoch and radical reform would have benefited the overall interests of capital the competing interests of shareholders and directors proved a stumbling block. With

[100] *Industrial Finance,* p. 41.

[101] *A Social History,* p. 45.

[102] *Ibid.,* p. 164.

[103] *Ibid.,* p. 51.

[104] *Ibid.,* p. 10.

[105] *Ibid.,* pp. 115, 195.

the growth of large scale firms and the capacity of business to set the agenda for crucial areas of public policy it was easier for vested interests to make sure that facilitative law ruled. Lowe's vision of little republics establishing a code of social responsibility was eclipsed by a trend towards duopolies and monopolies.[106] These combines were powerful enough to set the agenda on regulatory ideology and at the end of the day the mutual interest of shareholders and directors to limit the scope of the enforcement capacity of the state won over the logic of a holistic solution to company malpractice. Galbraith observed that regulatory agencies mellowed with the passage of time and became "either an arm of the industry they regulate or senile."[107] In contrast to Galbraith's dictum the English state managed to be from a very early stage an extension of company power and senile. For the leniency shown by the state towards society's most powerful institution and one capable of inflicting harm on a number of levels given the pursuit of maximizing profit certainly exhibited signs of decrepitude. In the province of the company legal form command law was a bridge too far for the key mandarins of the state apparatus.

Both in the field of legislative and doctrinal developments the conceptual agenda ran in parallel lines in the post-1856 company law sphere. The cornerstone of legislative and judicial decisions was the reproduction of a facilitative framework legitimating the dual power of shareholders and directors. Shareholders and directors engaged in a duet with state apparatuses to reinforce their respective privileged position. Directors in particular began to expand their sphere of legal influence. At the Select Committee on the Operation of the Limited Liability Act held in 1867 many witnesses reported that the impact of the current economic crisis had been intensified by the permissive nature of company law.[108] There was a call in 1867 to tighten the law in order to protect shareholders from fraud but it failed.[109] This failure to buttress shareholders was matched by the success of directors in repelling moves to beef up their regulatory standards. The 1867 Select Committee turned a deaf ear to the cogent body of evidence calling for directors of companies to be fixed with unlimited liability.[110] Tactical differences between shareholders and directors were evident in the different outcomes they achieved, but there was a strategic consensus on the state not becoming proactive in the field of company regulation. In its report the 1867 Select Committee echoed the unified business line that the state should only play a nightwatchman role as heavy regulation would stifle confidence and initiative.[111] McQueen quite rightly makes the acerbic point that this line of argument has been used subsequently as "the philosophical basis for doing nothing to strengthen the powers of the state vis a vis corporations."[112] Apart from minor changes to the capital structure of companies

[106] Hobsbawm (1975), p. 217.

[107] Quoted by Mayanja (2007) 20 Australian Journal of Corporate Law, p. 163.

[108] *Industrial Finance,* pp. 57–58.

[109] *Ibid.*, p. 61.

[110] *A Social History,* p. 163.

[111] *Ibid.*, p. 166.

[112] *Ibid.*

the 1867 Select Committee achieved nothing.[113] It set a parlous precedent for future regulatory reform initiatives.

As the nineteenth-century unfurled the hallmark of limited liability legislation continued to be defined by the spirit of voluntarism that was rife in business circles. Whenever the business cycle went into a tailspin or a company scandal erupted there was a predictable clamour for the state to boost its regulatory role. The populist cry for company reform was consistently rebuffed by a business chorus chanting the virtues of liberal individualism and a strong bias against any laws that aimed at fettering individuals maximizing their material self-interest. And with the rise of monopoly capitalism business became a state within a state. Political power gave business the capacity to enforce its will on a pliant government. Another Select Committee sat in 1877 and it suffered the ignominy of none of its reform proposals being enacted.[114] An economic collapse of a magnitude that was not to be repeated until the 1930s enveloped the English economy in the 1880s and it sparked another debate about the regulatory function of the state. Shareholder concerns about directors' malfeasance formed the backdrop to the enactment of the Directors' Liability Act of 1890.[115] However, the fact that shareholders wanted to bolster directors' liabilities whilst keeping as an article of faith the laissez-faire belief in minimal state intervention in the general sphere of company affairs played into the hands of directors.[116] They garnered support across the spectrum of state institutions. Lord Herschell speaking in the House of Lords struck a note that has echoed down the years when he declared that imposing greater legal responsibilities on directors would proscribe the talented from seeking board positions and vacate the field to candidates of dubious quality "who had nothing to lose."[117] Whilst a representative of the London Chamber of Commerce was so persuasive in his rhetoric and lobbying for soft regulation that he "almost succeeded in making directors appear in the role of a persecuted race."[118] Little wonder those who drafted the Directors' Liability Act set a trend by only imposing civil liability on directors who engineered untrue statements in a prospectus, and then compounding the regulatory weakness inserted an opt out clause that absolved those who subjectively believed statements to be true.[119] In brief, the subjective state of mind of directors was the standard of proof. What directors believed to be the case became the legal yardstick, and this archetypal example of laissez-faire thinking permeated not only the legislative programme. It was a form of reasoning that segued into judicial decisions and its core features have remained unassailable. The legislature and judiciary in the crucial age of the genesis of the modern corporation engaged in a duet that resulted in facilitative law in both spheres of the state apparatus. The doctrinal architecture of company law was created by jurists who

[113] *Ibid*., p. 165.

[114] *Industrial Finance,* p. 64.

[115] *A Social History,* p. 251.

[116] *Ibid.*

[117] *Industrial Finance,* p. 66.

[118] *A Social History,* p. 251.

[119] *Industrial Finance,* p. 68.

were prepared to vest directors with sweeping discretionary and exculpatory powers in return for their duty to act solely for shareholders and maximize their profits.

Even if the legislature had exhibited a desire for tough company regulation the task would have been made harder by the lenient approach of the courts. The courts reinforced the glacial pace of statutory reform. As Select Committees languished judicial decisions built up a body of facilitative law that made corporate reform an elusive objective. Conceptual clarity on the issue of the judicial interpretation of directors' duties was achieved at a very early stage of the development of the limited liability company. Legitimating the power base of directors by formulating a system of company law rules that facilitated their key role in a profit system became a judicial imperative. Support from the bench for the principle that gross or culpable negligence was required before the common law duty of care and skill was breached was established by early case law and this lax standard set the tone for doctrinal developments. The judiciary bear a heavy responsibility for the facilitative nature of the doctrinal basis of company law. The legacy of treating directors with kid gloves is still evident in the modern law.

The 1872 case that entrenched the standpoint that directors would only be held to have breached their duty of care if their behaviour was grossly negligent was *Overend and Gurney Company v Gibb*.[120] This was followed in 1884 by *Re Denham and Company*[121] where a director failed during a 4 year period to read financial accounts and only periodically attended board meetings while some of his peers looted the funds of the company. The director confronted the charge of breaching his duty of care and the court found he was guilty of considerable negligence but exonerated him on the basis that his knowledge and experience fell short of the capacity to gauge the importance of company accounts.[122] In effect, these cases highlighted that the common law was insouciant about the standard of care being pitched at a low level. Judges were obviously prepared to licence companies being run incompetently. In 1899 *Lagunas Nitrate Company v Lagunas Syndicate*[123] reaffirmed that only gross negligence would attract a finding of a breach of the duty of care. Romer J. in the influential 1925 case *Re City Fire Equitable Insurance Company*[124] adopted the laissez-faire propositions that flowed from earlier cases and noted that directors would be legally protected if while executing their duties they did not exhibit "a greater degree of skill than may reasonably be expected from a person of his knowledge and experience." This matchless example of a subjective legal test has been aptly satirized by Mackenzie who notes: "The director is obliged only to do as much as could be expected from someone as incompetent and foolish as he happens to be."[125]

Even in the twenty-first century discretion and autonomy continue to be the watchwords of directors' duties. The Companies Act 2006 has codified the duty of

[120] (1872) LR 5 HL 480, at 486–487.

[121] (1884) 25 Ch D 752.

[122] *Ibid.*, at 767–768.

[123] [1899] 2 Ch 392 at 435.

[124] [1925] Ch 407 at 427.

[125] Quoted in Finch (1992) 55 (2) The Modern Law Review, p. 200.

care owed by a director. The duty of care test is now contained in section 174 of the 2006 Act. But uncertainty hangs over the standard of care now expected from company directors. For the existing case law on directors' duties will be utilized to interpret the duty of care statutory provision.[126] Even before the enactment of the 2006 Act Hoffman J. in the 1991 case *Norman v Theodore Goddard*[127] had modified the common law duty of care test. The formulation of Hoffman J. produced a hybrid objective/subjective test.[128] Section 174 of the 2006 Act endorsed the Hoffman J. test. Thus the statutory standard is a two limb test. The first limb is not dependent on the particular directors' capabilities.[129] It's the second limb that is problematic and it resonates with the type of juridical reasoning expounded in the nineteenth-century and by Romer J. in 1925. For it states that a component part of the statutory duty of care test is the "general knowledge, skill and experience that the director has."[130] The introduction of a subjective element in the test implicitly raises a discretionary aspect that could pose problems when applying the test. Using the authority of Romer J. the element of the objective statutory standard of care could be diluted as exculpatory factors such as the director's position, qualifications, function and the company's circumstances and size are forensically examined by counsel representing those confronting a breach of duty action.

If the underlying objective of company law is to seal the dual power of shareholders and directors this appears at odds with the law of fiduciary relationships. Shareholder primacy appears axiomatic in the field of fiduciary duties. Quite simply, directors have a fiduciary duty to act in good faith and in the best interests of the company. At first blush the fiduciary bonds appear to exert a stranglehold on directorial discretion and autonomy. Once the temptation to reify the company is eschewed it is apparent that the best interests of the company are coextensive with benefiting the shareholders. For as Parkinson notes the company is an inanimate entity that is incapable of experiencing well-being and possessing a sense of what its interests are.[131] In sum, what is good for the company is what benefits the shareholders and their interest is profit-making and keeping the directors under their thumb. From one angle, fiduciary duties appear to offer an object lesson in achieving the loyalty and subordination of directors. However, an investigation of judicial authority and the manner in which the Companies Act 2006 has codified fiduciary duties offers a more intriguing and complex mosaic. In short, both the courts and legislature have highlighted the role of instrumentalism in shaping the contours of company law. The outcome has been a delicate balancing of shareholders and directors' rights with the result that the law has reflected a dual power arrangement.

The loyalty aspect of a director was summed up by a common law test that focused on the need to act in good faith and strive for what was in the best interests

[126] Davies (2008), p. 478.

[127] [1991] B. C. L. C. 1027.

[128] *Ibid.*

[129] *Principles of Modern Company Law*, p. 491.

[130] *Ibid.*, p. 490.

[131] Parkinson (1996), pp. 76–77.

of the company. Lord Greene MR. in *Re Smith and Fawcett Ltd.*[132] provided the standard formulation. Lord Greene's punctilious formulation of the test contained a crucial passage that stipulated that the director and not the courts were responsible for exercising business judgments.[133] From this perspective the director's duty was one of subjective good faith and the upshot was Lord Greene MR. effectively sanctioned the separation of ownership and management. By judicial fiat the managerial function or control of the enterprise was located within the boardroom and not the share register. The rationale for a director to be given such extensive latitude regarding the operation of rules designed to protect shareholder interests and ensure a barrier against a finding of malfeasance is partially explained in another fiduciary law case heard before the House of Lords in 1916 when the court argued against "establishing rules as to directors' duties which would impose upon them burdens so heavy and responsibilities so great that men of good position would hesitate to accept office."[134] The considerable discretion handed to directors by fiduciary law in determining what constitutes the interests of shareholders is further illuminated by Stokes. She observes that the wide dispersion of shareholding in large companies has weakened the capacity of capital to regulate the conduct of directors.[135] A corollary of this relative weakness is a reluctance to invoke a legal remedy that is nominally in the hands of shareholders.[136]

Fiduciary obligations have now been codified but the 2006 Act has left the balancing of shareholder and directors' powers undisturbed. Section 172 adopts a subjective good faith test and the result is that just as litigation to enforce the common law duty was rare and largely unsuccessful the statutory provision is expected to play a minor enforcement role. Davies states that section 172 will be basically a dead letter because "it is very difficult to show that the directors have broken the duty of good faith, except in egregious cases or cases where the directors, obligingly, have left a clear record of their thought processes leading up to the challenged decision."[137]

The touchstone of company law is property rights. This is exhibited in the deferential approach of the common law to directors and shareholders. The courts and legislature mediate relations between directors and shareholders by providing the rules that arbitrate the conflicting claims of these two groups. The content of the rules is circumscribed by the need to consolidate the sovereignty of private property and reinforce the dual power of directors and shareholders. The judicial and legislative process also shapes the place of workers in company law. And again there is a correspondence between the notion of property and the law only this time there is no sense of deference towards one of the prime stakeholders in the company. The property based justification of company law as it relates to workers

[132] [1942] Ch 304.

[133] *Ibid,* p. 306.

[134] *Cook v Deeks* [1916] 1 AC 554 at 563; See also Mayanja, "Promoting Enhanced Enforcement," p. 179.

[135] *Company Law and Legal Theory,* p. 173.

[136] *Ibid.*

[137] *Principles of Modern Company Law,* p. 510.

was cogently expressed in 1883 by Bowen LJ. in *Hutton v West Cork Railway*.[138] Bowen LJ. stated: "The law does not say that there are to be no cakes and ale, but there are to be no cakes and ale except such as are required for the benefit of the company."[139] Bowen LJ. was not preventing the board of directors from engaging in philanthropic gestures towards workers, but the criterion was that any benefit had to also serve the owners of the company. The company was there to provide profits for shareholders and any sum expended on workers that was not linked to this overarching aim was a gratuitous benefit that breached directors' duties.

The Conservative government in 1980 introduced a statutory provision that appeared to signal a new approach to the role of the worker in company law. Section 309 of the Companies Act required directors as part of their duty to take account of the general interests of employees.[140] Any hope that this was more than elaborate window-dressing that introduced a duty that was merely procedural and had no substantive content was dashed by the scathing critique of two leading company law scholars. Parkinson opined that the statutory provision "does not compel the directors to do anything they would not otherwise have been inclined to do."[141] And Sealy damned the section by noting that it "is either one of the most incompetent or one of the most cynical pieces of drafting on record."[142] The dead letter nature of any contemporary change to soften company law as it applies to workers was confirmed by the 2006 Act introduced by a Labour government. Section 172(1) watered down the wording of the previous provision by dropping the reference to directors having regard to "the interests of the company's employees in general as well as the interests of its members."[143] Now there is only a bland reference to "employees' interests" that scotches any possibility of a judicial interpretation that would put directors in the position of placing workers and shareholders on the same level.

In all the legal gyrations in the field of English company law that is designed to procure the hegemony of shareholders and directors there is no evidence of judges basing decisions on allocative efficiency. Quite simply, there was no empirical basis for this to occur. The legal theory of the Law and Economics school is based on unrestricted competitive enterprises sparking allocative efficiency. But gaining ground in the latter part of the nineteenth-century and culminating in the 1930s the English economy in a move that Hobsbawm notes would have horrified J. S. Mill, switched from free trade to the rule of giant corporations and oligopolies.[144] There was simply no economic space in England for judges to mirror the alleged rational allocation of resources in an unrestricted competitive economy. Competitive capitalism and the free market were dead in England by 1939.[145] Monopoly

[138] (1883) 23 Ch. D 654. See also *Parke v Daily News Ltd.* [1962] Ch. 927.

[139] *Ibid.*, p. 673.

[140] Bottomley and Forsyth (2007), p. 314.

[141] *Ibid.* Quoted in Bottomley, Forsyth.

[142] *Ibid.* Quoted in Bottomley, Forsyth.

[143] *Principles of Modern Company Law,* p. 518.

[144] *Industry and Empire*, p. 217.

[145] *Ibid.*, p. 216.

capitalism ruled the economic landscape.[146] Property rights in the monopoly epoch, and the power pact struck by shareholders and directors is the beat that drives company law.

Conclusion

For too long the dialectics of law has been ignored in the field of company and labour law. This article has addressed an omission in the literature. It has forged the close dialectical unity that exists between two ostensibly independent branches of law. Every academic year countless students study company and labour law and it is to their detriment that the interdependent nature of these two areas of law is not illuminated. A rich historical tapestry is obscured from the sunlight of disinfectant. Forging the dialectical bond that exists between company and labour law is of cardinal importance. Its epistemological and juridical importance cannot be exaggerated. The reality is that company and labour law run on a parallel path. And it is the nature of the legal doctrine in these two nominally separate fields of study that pinpoints the shared universe of company and labour law. Once you excavate below the level of the rules that prevail in company and labour law and seek for the hidden abode that explains the source of the legal principles the issue of power looms large. For the core legal concepts in these two spheres of law are shaped by historical, social and economic relationships. Through a glass darkly the appearance of economic relations in a legal form is a distinct feature of company and labour law. It is the philosophy of historical and economic jurisprudence based on locating law as a component part of a matrix of social relations of power, property and capital, and not apolitical legal rules or the myth of individualism and free markets, that takes one to the roots of law. Social structure and not autonomous legal rules or economic efficiency based on price signals and individual behaviour is the source of company and labour law.

This article has focused on an underlying theme in labour and company law. It has pinpointed the different jurisprudential approaches taken in labour and company law. In labour law the guiding principle is a battery of prescriptive rules that constitutes a form of command law. The upshot of this methodology is legal doctrine in labour law achieves the subordination of the workforce by reinforcing managerial prerogatives. The securing of legal hegemony by the employers is executed by the aptly named control test that identifies an employee, and this governing mechanism is buttressed by a range of asymmetrical implied terms that are skewed to consolidate managerial power. In comparison to the punitive nature of labour law the doctrinal keynote in the company arena is facilitative law. The framework of company law is replete with examples of the courts and legislature sanctioning soft law by prioritizing the voluntarist assumptions of business people. Put another way company law is unintelligible outside the recognition that policymakers have been guided by a conceptual agenda that translates property rights into the machinery of the law.

[146] *Ibid.*, p. 217.

Bending to the will of a market economy has resulted in a weak regulatory structure exemplified by a history of permissive laws that lacked sufficient enforcement sanctions. The facilitative aspect of statute law has been mirrored by the courts. Common law directors' duties provide empirical support for Justice Holmes incisive critique of soft laws. Holmes observed: "legal obligations that exist but cannot be enforced are ghosts that are seen in the law but are elusive to the grasp."[147] The duty of care and the fiduciary obligations of directors provide an object lesson in laws that are there to give symbolic comfort to the community that the key institution of the modern age is legally constrained whilst the reality is that paper tiger laws rule. The courts have collaborated with the desire of the leading personnel in companies to in effect choose their own constitutional arrangements. Shareholders and directors have orchestrated legal doctrine to synchronize with their preference for autonomy and discretion. Laissez-faire precepts predominate. Fiduciary ideology in company law is suffused with the capacity to contract out of obligations and this arms directors and shareholders with the temptation to opt in and out of the regulatory web.

The spirit of legalism with its depiction of law as a sphere of autonomous concepts and depoliticized rules is a singular absence from the doctrinal architecture of company and labour law. Instead the law in this field consists of instrumentalist rules designed to preserve and protect property rights. The drive to consolidate property rights is the rationale for the ostensible differences in the nature of labour and company law. While on the surface there appears little unity of purpose in labour and company law it can be seen that both streams of law intersect at a vital juncture. Prescriptive labour law aids in reproducing relations of domination at the workplace and entrenches the socio-economic status. While facilitative law as applied to the company legal form enables maximum scope for capital ownership and also provides the required flexibility to strike a balance between the shareholders and directors who reign supreme at the summit of the modern company. The dual power system underpinning the governance of the company requires soft laws that take into account the delicate balancing act engaged in by the twin constituent elements of company organisation. In effect, the top strata get the best of all possible worlds handed to them by company and labour law.

As to the eternal question of what is to be done? Or is it possible to conceive of the progressive reform of company and labour law a short riposte suffices. At bottom history teaches that a company is a device for maximizing profits and the accumulation of capital. Judged from this perspective any argument that it can pursue progressive legal policies is devoid of merit. Given the overriding goal of profit-maximization the logic of facilitative company legal rules favouring shareholders and directors bears the stamp of unerring logic. On an equally sobering note the prescriptive nature of labour law is underpinned by inexorable logic. The wage contract obscures how the income of shareholders' is derived from unpaid labour. Juridical equality enables the wage contract to parade as a bargain freely struck by equals, whilst the freedom to choose cloaks the process of wages falling short of the value of wealth produced. Selling labour hours at a cost below its

[147] Mayanja, Promoting Enhanced Enforcement, p. 160.

value provides the economic surplus garnered by shareholders. The wage contract expresses an economic relationship based on exploitation and the law is complicit in this arrangement. The wage contract hides and perpetuates injustice. It is a classic example of legal coercion. With the social relations of the company based on an unequal economic axis it would be an act of self-delusion to believe that the objective structures of property relations responsible for prescriptive labour laws will undergo any deeply progressive transformation during the age of capital. The long post-second world war boom and the triumph of Keynesian social welfarism produced only marginal improvements for those on the downside of company life. In an epoch of neoliberal state policies the prospect of progressive change has withered. The asymmetrical power relations evident in company and labour law are a product of a long historical process that continues to haunt its legal foundations.

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