

**Corporate Theory: Jurisprudence's Heart of Darkness**

by

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## **Abstract**

This thesis examines corporate theory as form of conduct to be reflected on as a whole: How did it become possible to ask, 'what is a corporation?' How was the concept of a legal entity, separate and distinct from its owners, constructed? These questions are approached from a theoretical perspective that sees law as a constitutive part of the socio-political field.

From this perspective three lines of inquiry are pursued. First, the historical contingency of the modern corporate legal form is explored through an examination of the debate and events that led up to the enactment of the first statutes of general incorporation and limited liability by the British parliament in the mid nineteenth century. Second, corporate theory is considered in the light of Foucault's concept of *problematisation*. Finally, the relationship between the specialised legal knowledge of corporate theory and the process whereby sectional interests of the corporate sphere are presented as universal is interrogated.

The thesis argues that corporate theory, when considered as a form of *problematisation*, can be roughly divided into three discursive forms: corporate ontology; managerialism; and the 'new' economic theories of the firm. These discursive forms are intimately linked to differing forms of government rationality (what Foucault termed *governmentality*). Corporate theory serves as a resource that is deployed in the debates around corporate regulation rather than as a complete blueprint for action. In a similar vein the development

of the company legal form is not the discovery of a timeless a-historical entity but the product of a specific set of historical circumstances. The corporation can be seen as a structure which is invested with certain ethical, governmental, and economic values. The manner in which corporate theory presents these values can be highly problematic particularly with regard to the issues of corporate responsibility and the valorisation of shareholder property rights. The accretion of values onto the legal form is an ongoing process. Corporate theory is often deployed in support of such moves and is thus often complicit with the presentation of such values and interests as being universal in character.

## **Table of Contents**

Abstract	ii
Table of Contents	iv
Acknowledgements	vi
Prologue	vii
<b>Part I: Corporate Theory and Company Legal Form</b>	
Introduction: Corporate theory and the work of thought	1
Corporate theory in legal discourse	3
Modern company legal form	9
Structure of Thesis	10
<b>Part II: Perspectives and Methods</b>	
Introduction	18
Theory and Foucault	19
Law and Discourse	25
Law's claim to truth	30
Law's claim to truth - some qualifications	32
Prolemisation and Archaeology	38
Hegemony and Ideology	44
<b>Part III: Incorporation by Registration: A Genealogy</b>	
Introduction	49
The development of modern company legal form in England	50
Outline of the genealogy	67
1834-1837: The question of <i>en commandite</i> partnership	71
1838-1844: Fraud and joint stock companies	79
1845-1854: The shift towards limited liability	86
1855-1856: The enactment of general limited liability laws	102
Conclusion to the genealogy	114
<b>Part IV: Corporate Theory: A Problematisation</b>	
Introduction	117
Outline of discursive forms:	
(1) Corporate Ontology	118
(2) Managerialism	121
(3) 'New' economic theories of the firm	124

General features of the problemisation:	
(1) Power	127
(2) The concern to govern civil society	131
(3) Limits of memory - legal personateness	133
Specific features of the problemisation:	
(1) Corporate Ontology and Classical Liberalism	135
(2) Managerialist Debates and Welfarist Liberalism	138
(3) 'New' Economic Theory and Neo-Liberalism	142
 <b>Part V: Corporate Theory and Ideology</b>	
Introduction	148
Shareholder and company: separate personalities	150
Companies and individual responsibility	152
Corporate Ontology and responsibility	154
Managerialism and the 'technicisation' of politics	156
'New' Economic Theory and the freedom of the subject	158
 <b>Part VI: Conclusion</b>	160
 <b>Bibliography</b>	163

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## Prologue

*And this critique will be genealogical in the sense that it will not deduce from the form of what we are what it is impossible for us to do and to know; but it will separate out, from the contingency that has made us what we are, the possibility of no longer being, doing, or thinking what we are, do or think.<sup>i</sup>*

*The problem is not changing peoples' consciousnesses - or what's in their heads - but the political, economic, institutional regime of the production of truth. It's not a matter of emancipating truth from every system of power (which would already be a chimera, for truth is already power), but of detaching truth from the forms of hegemony, social, economic, and cultural, within which it operates at the present time.<sup>ii</sup>*

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<sup>i</sup> M.Foucault, "What is Enlightenment?" in P.Rabinow, ed., *The Foucault Reader* (London: Penguin, 1991) 32 at 46.

<sup>ii</sup> M.Foucault, "Truth and Power", in C. Gordon, ed., *Power/Knowledge* (New York: Pantheon, 1980) 109 at 133.



## **Corporate Theory and Company Legal Form**

### **Introduction: Corporate theory and the work of thought**

Corporate theory is an area of enquiry where history, economics, political science and law meet. The term refers to “attempts to provide a coherent conceptual framework within which the existence of corporations as social, economic, and political phenomenon can be explained and the consequent implications for their external regulation can be asserted.”<sup>1</sup> Corporate theorists seek to answer “that most abstract question of all: what is a corporation?”<sup>2</sup> It is an area of intellectual endeavour that at times has been both vibrant and acrimonious. It has attracted the attention of a diverse range of thinkers from English jurists such as Dicey and Maitland, to the American pragmatist philosopher John Dewey and the current raft of ‘law and economics’ specialists. The purpose of this thesis is to reflect upon this intellectual enterprise. How did it become possible to ask, ‘what is a corporation?’ How was the concept of a legal entity, separate and distinct from its owners, constructed? What have been the effects of discussing this particular problem?

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<sup>1</sup> S. Bottomley, “Taking Corporations Seriously: Some Considerations for Corporate Regulation” (1990) 19 Federal Law Review 203 at 204. [“Taking Corporations Seriously”] I will confine my paper in the same manner as Bottomley confines his: i.e. I will not explicitly address issues of internal corporate governance or decision making.

<sup>2</sup> J.C Coates, “State Takeover Statutes and Corporate Theory: The Revival of an Old Debate” (1989) 64 New York U. L. Rev. 806.

Has corporate theory been used as a resource to advance the interests of particular groups? The aim is to *think* about corporate theory.

So with this aim in mind the various theories of the corporation will not be examined to express a preference nor will any move be made to immediately introduce a new solution to compete for theoretical dominance. The initial approach will be reflective. Corporate theory will be examined as a whole, as a particular form of conduct that is amenable to the work of thought:

*Thought is not what inhabits a certain conduct and gives it meaning; rather it is what allows one to step back from this way of acting or reacting, to present it to oneself as an object of thought and question it as to its meaning its conditions and its goals.<sup>3</sup>*

I do not make the claim that it is possible to entirely extricate myself from the stated concerns and premises of corporate theoretical knowledge. However, it is possible and desirable to maintain some critical distance from the conduct of corporate theory. I wish to step back from the truth claims of specific theories and focus upon corporate theory as a form of intellectual practice.

The specific focus will be upon the contributions to corporate theory made by, or received into, Anglo-American academic legal discourse<sup>4</sup> as they apply to the *modern*

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<sup>3</sup> Interview with Michel Foucault conducted by Paul Rabinow in P. Rabinow, ed., *The Foucault Reader* (London: Penguin, 1991) 381 at 388. [hereinafter "Polemics, Politics and Problematisations"]

<sup>4</sup> For the sake of convenience I will use the phrase 'corporate theory' when I'm referring to the legal academic discourses that develop and apply theories of the corporation.

*company legal form.* Academic discourse refers to statements ( mostly written ) made by academic lawyers in their capacity as 'experts' that: 1) evaluate legal doctrine<sup>5</sup> using a particular theory of the corporation as a normative guide or; 2) evaluate the determinate effects that a particular corporate theory (as opposed to the conduct as a whole) has had upon legal doctrine or; 3) develop a particular corporate theory and/or argue that legal doctrine should reflect that particular corporate theory. Before outlining the areas of enquiry to be explored it is appropriate to give fuller descriptions of the terms corporate theory and modern company legal form.

### **Corporate theory in legal discourse**

The purpose of this section is to describe in fuller detail the raw subject matter of corporate theory in legal discourse and to point out how this subject matter is not isolated from wider intellectual currents, particularly philosophical notions of the person.

The word person derives from the Greek *prosopon* which refers to "the mask worn by the actor to represent the god, hero, etc., impersonated in a play."<sup>6</sup> The Latin *persona*

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<sup>5</sup> Doctrine "refers to identifiable legal rules or principles in a discrete area of law". An obvious example is the *ultra vires* doctrine which governs corporate contractual and tortious capacity. I also use 'doctrine' more generically to refer to the applicable legal principles in a broader area such as 'corporate free speech doctrine'. See C. Tollefson, "Theorizing Corporate Constitutional Rights: Revisiting 'Santa Clara Revisited' " Master's Thesis. Osgoode Hall Law School at 5. [hereinafter "Santa Clara Revisited" ]

<sup>6</sup> D.P. Derham, "Theories of Legal Personality" in L.C. Webb, ed., *Legal Personality and Political Pluralism* (Melbourne: Melbourne Univ., 1958) 1 at 12.

initially had an equivalent meaning; but it also came to represent the role played by a natural person in legal proceedings. *Persona* denoted the subject of civil rights and duties - the rational social actor participating in the public sphere.<sup>7</sup> *Persona* was not a self evident characteristic that automatically attached to all human persons; indeed the institution of slavery and the position of women in Roman society made this quite evident.

For the Christian theologians and philosophers *persona* also implied another meaning that tended to blur the distinction between the human person and the concept of personality. *Persona* not only implied the subject of civil rights and duties but also an independent and fundamentally unchangeable individuality. It took on this additional meaning as Christian theologians grappled with the concept of the one omnipotent God embodied in the Trinity.<sup>8</sup> In the sixth century Boethius gave the following definition: "*Persona est naturae rationabilis individua substantia* - a person is the individual subsistence of a rational nature."<sup>9</sup>

The first strand of the concept points to the manner in which a persona is generated only via rational action in the public sphere. Personality is only arrived at by the process of interaction with others in society. On the other hand the concept of person

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<sup>7</sup> *Ibid.* at 1. See also F.W. Hallis, *Corporate Personality: A Study in Jurisprudence* (London: Humphrey Milford, 1930) for a fuller discussion of the genealogy of personality.

<sup>8</sup> *Ibid.*, especially Hallis at pp. xx - xxv.

<sup>9</sup> *Ibid.* at xx.

simultaneously refers to a more independent and fundamental essence. Hallis summed up this tension:

*This struggle is inherent in the very life of personality. For it is not a struggle between human individuality and a force entirely alien to it. It is a struggle in which the two contesting forces are elements of a single reality, human personality.<sup>10</sup>*

Both Hallis and Webb have pointed out that this broader philosophical conception of person is not equivalent to the legal person which is discussed in jurisprudence. A 'person' in law is simply a rights and duties bearing unit. Both argue that such a unit is fundamental as it serves as a base entity from which legal relationships can be conceptualised.

Webb makes the further observation that this legal 'personateness' has no necessary logical link to the personality of human beings. He argues that the 'personateness' of a human being, a corporation or any other entity for that matter is equivalent if one confines the analysis to this basal level. The question of personateness can be expressed in the following terms.

*Do the rules of the legal system establish that this entity (i.e., this man, this group, this fund, this purpose) is to be recognized as an entity for the purposes of legal reasoning (is to have the capacity to enter legal relations)?<sup>11</sup>*

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<sup>10</sup> *Ibid.* at xxiv.

<sup>11</sup> D. Derham, "Theories of Legal Personality", *supra* note 6 at 15.

If the answer to this question is yes with respect to two different things then they share a logical equivalence as basic entities that are used within a particular system of legal reasoning. It makes just as much sense to view the legal personateness of human beings as 'unnatural' as it is to consider the personateness of a company as 'unnatural'.<sup>12</sup>

Corporate theory which is addressed to the modern company legal form deals with a situation where business organisations have access through an administrative procedure to legal personateness. Such access is very liberal compared to the lobbying/ pleading process required to secure legal personateness either through the grant of a royal charter or the passage of a specific Act of Parliament ( the two modes by which business organisations secured legal personateness prior to the enactment of the statutes permitting general incorporation).<sup>13</sup> If this legal personateness is logically equivalent to the personateness of human beings and it is widely available, what is there for corporate theorists to discuss? The answer lies in the distinction between legal personateness and legal personality.

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<sup>12</sup> "In both cases the use of the term 'legal person' is as necessary a part of the statement which if true or possibly true asserts claims, decides, or assumes that a designated entity (whether a man, a group of men, a fund, an idol, or a purpose) is treated under the rules of the legal system with reference to which the statement is made, as a unit or entity in the logic of that system." D. Derham, 'Theories of Legal Personality, *supra* note 6 at 5.

<sup>13</sup> See pages 50-68 of this thesis for a fuller discussion of modes of incorporation and the relevant legislation.

*The distinction is between legal personateness as the constant unit in the logic of a legal system - 'a right and duty bearing unit' - and legal personality as referring to the sum total of the legal relations actual or potential, of a legal person, and hence refers to categories of legal persons. ... The legal personateness in any such context would necessarily be assumed.<sup>14</sup>*

Corporate theory can be conceived of as an enquiry into the nature of the legal personality of the company. What relations can or should a company be allowed to enter in to? To what extent is a company capable of being responsible for its actions? What rights should these classes of persons possess in relation to the state? What rights should they have as opposed to natural persons? These are the questions that animate corporate theory. To say that corporate theory is an enquiry into legal personality is not to deny that social, political, and economic forces are significant in determining what entities are asumed to have personateness. However, in the context of corporate theory the personateness of companies is simply assumed.

Corporate theory attempts to come to terms with the nature of associative life within society. It has been noted that legal personateness and the broader philosophical conceptions of personality diverge; but this is not to say that inquiries into the legal personality of companies are made within a realm of 'pure' law without reference to social life. Thinking about company legal personality inevitably draws attention to the social, political and economic aspects of companies. There is within corporate theory an

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<sup>14</sup> D. Derham, "Theories of Legal Personality", *supra* note 6 at 7. Derham draws this distinction from the work of A. Kocourek, *Jural Relations* (2nd ed., Indianapolis, 1928) at 291-292.

interaction between legal reasoning and the underlying social phenomena which legal discourses help to sustain. Simultaneously such legal discourses are used in attempts to organise such phenomena. In the context of this interaction corporate theory is responsive to and influenced by the tensions inherent in our current conception of personality.

Such interaction seems to take place on two main axes. Firstly, companies in many cases represent significant group activity within society. In coming to terms with such activity one cannot help being confronted by the tension between 'individuality' and 'sociality' inherent in conceptions of personality. Secondly, when dealing with a legal person, we must find some means of attributing responsibility and some basis upon which to extend rights to that person. It is perhaps inevitable that the mental templates we use to conduct these tasks draw upon our notions of human personality and the nature of individual moral agency. Corporate theory cannot seal itself off from the philosophical elements of personality. Nor can it totally abstract itself from wider intellectual currents or popular discourses.<sup>15</sup> It is now appropriate to give a description of the basic attributes of the person that corporate theorists most commonly discuss - the modern company.

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<sup>15</sup> This point is taken from F. Hallis, *Corporate Personality: A Study in Jurisprudence*, *supra* note 7 at xxxv: Legal concepts are not arbitrary inventions of an authority above and outside of law itself, but have their being only in an inherently juristic context, and this context is sustained by a complex interaction of facts of social life and thought operating with a view to giving that life a certain structure.



## Modern company legal form

The modern company can be initially defined as a legal person which has the following characteristics: a corporate name, the capacity to sue and be sued in that name, the ability to own property, perpetual succession and possession of a common seal. These are the attributes most commonly associated with modern company legal form.<sup>16</sup> To this list I would add three additional personality traits which have been extremely influential in the increasing prevalence and contemporary significance of the company legal form. Firstly, the person can be created by complying with a routine administrative process and secondly the 'shareholders' of the person have limited responsibility for the liabilities of the company. Thirdly, the term company originally had particular connotations as to economic form whereas the modern company denotes a particular legal form that encompasses a variety of different economic forms from the one person company to the multinational.

The corporate theory literature to be examined in this thesis is taken from a wide range of sources. It includes English and American material as well as material received into those discourses that originated elsewhere. However, when modern company legal form is referred to in this paper it should be taken to mean the company form that took shape in England over the period 1844 - 1856. The reasons for this focus are threefold.

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<sup>16</sup> This list of characteristics can be found in any common law company textbook. For example see Gower, L. C. B. *Principles of Modern Company Law*, 3rd ed., (London: Stevens and sons, 1969).

Firstly, it is within this time span that the company legal form became generally available and limited liability of shareholders became a routine incident of the incorporation process. Secondly, the changes that occurred to company legal form during that period occurred primarily as a result of legislative reform and thus the primary documentation is readily available in the form of Committee reports, draft Bills, transcripts of evidence given before the various committees together with records of Parliamentary speeches and debates. Thirdly, England was an extremely influential jurisdiction in that time period. The reforms to English company law had a wide ranging impact on the shape of company law throughout the common law world.

### **Structure of thesis**

**Part II** of the thesis (**Perspectives and Methods**) will develop the theoretical concepts that will be used in the subsequent parts. The initial premise for Part II is that law plays a role in constituting social relations and that legal discourses are significant because they put in place certain forms of discursive possibility - they influence both what can be said and what can be done. A second and related premise is that the company along with the family and the workplace can be viewed as one of the more important sites of regulation within modern society. In this context regulation does not refer to specific state structures or doctrine. Regulation refers to the way in which the actions of groups

or individuals can be directed. Regulation refers to the field of power relations.<sup>17</sup> Such power relations have the effect of structuring "...the possible field of actions of others."<sup>18</sup>

Legal discourses play a role in the supervision and implementation of this regulatory activity. The company is not a static pre-existing form that law simply stumbles upon and precedes to act upon. Law does not simply act upon the company but helps to constitute it : "company law [**and I would add the modern company form**] is the creation of jurists, lawyers judges and legislators."<sup>19</sup> Part II will set out the terms of my engagement with the theory to be used. This will involve an assessment of the truth claims inherent in the concepts that I will be using to interrogate corporate theory. Part II will develop the notion that legal discourses play a socially constitutive role together with a detailed discussion of the specific concepts to be utilised in subsequent parts.

**Part III ( Incorporation by Registration: A Genealogy)** will highlight the historical contingency of the modern legal form of the company.

The modern company form is a recent construct. This is a point which legal discourses, particularly corporate theory, tend to ignore. Anglo-American legal discourse

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<sup>17</sup> This conception of regulation is taken from P. Dreyfus & H. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics* (London: Harvester Wheatsheaf, 1982) at 221.

<sup>18</sup> *Ibid.*

<sup>19</sup> R. McQueen , Book Review (1992) 7 Canadian Journal of Law and Society 247 at 248. This is not to suggest that legal discourses cover the field of regulation or that the company form is solely constructed through law, see *infra* note 129 and the text in the accompanying paragraph.

begins its inquiry at the stage of designating the attributes of the corporation. Once a company is formed legal discourses leave no space for ongoing questioning of whether one can think of the company in a way that differs substantially from the current conception of legal personality.<sup>20</sup> The political, economic, social and juridical forces and choices that combined to bring about the emergence of the modern company form are submerged and suppressed behind the smooth visage of the legal person. I want to disturb this smooth facade, to highlight that to speak about companies in the language of corporate theory is not the discovery and description of a timeless a-historical form. Rather, it is "a historically conditioned emergence"<sup>21</sup> of a new field of experience whose influence is historically contingent.

Such an enterprise can be termed a 'history of the present'. This is because the purpose of such a study is to point to the contingency of the present. This approach attempts to make some of the conditions of possibility of current corporate doctrine and corporate theory visible. 'History' in this sense does not imply a necessary or laudatory progression. The processes that led to the formation of the company form should be examined; but this examination should not valorise or ascribe a positivity to these processes.<sup>22</sup> One could describe the approach as genealogical.

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<sup>20</sup> See Rudi Visker's more general observation regarding law's treatment of juridical subjects: R. Visker, *Michel Foucault: Genealogy as Critique* (London: Verso, 1995) at 130.

<sup>21</sup> G. Burchell, "Liberal Government and Techniques of the Self", (1993) 22 *Economy and Society* 267 at 277.

<sup>22</sup> See Michel Foucault's more generalised observations on the 'genealogical method': M. Foucault, "Prison Talk" in M. Foucault, C. Gordon, ed., *Power/Knowledge* (New York: Pantheon, 1980) 37 at 49.

Genealogy rejects the notion that there are timeless truths or eternal Platonic forms waiting to be discovered through an examination of history. Genealogy is concerned to show that what we understand as the present is a field that results from the interaction of many different events and chance collisions, where different forms and problems are copied and recopied over each other in an 'entangled and confused' parchment. One is not concerned with the search for origins. The genealogist is concerned with how enquiries into the past can reveal the conditions of our present.<sup>23</sup> The 'present' is conceived of as a space "composed of a field of problems, questions and responses determined by the continuity or discontinuity, clarity or obscurity of the administered ensemble of relations which constitute the partition between present and past, 'new' and 'old'."<sup>24</sup>

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<sup>23</sup> C. Gordon, "Afterword" in C. Gordon, ed., *Power/Knowledge* (London: Harvester Wheatsheaf, 1980) 229 at 233.

<sup>24</sup> *Ibid.* at 242. Foucault's genealogical approach to history is heavily influenced by Nietzsche. Foucault describes the notions of genealogy and 'history of the present' in some detail in the essay "Nietzsche, Genealogy, History". The following extract clearly shows this influence as well as stressing the opposition between genealogical studies and the 'search for origins'.

*Why does Nietzsche challenge the pursuit of the origin (Ursprung), at least on those occasions when he is truly a genealogist? First, because it is an attempt to capture the exact essence of things, their purest possibilities, and their carefully protected identities; because this search assumes the existence of immobile forms that precede the external world of accident and succession. This search is directed to "that which was already there," the image of a primordial truth fully adequate to its nature, and it necessitates the removal of every mask to ultimately disclose an original identity. However, if the genealogist refuses to extend [sic] his faith in metaphysics, if he listens to history, [sic] he finds that there is "something altogether different" behind things: not a timeless and essential secret, but the secret that they have no essence or that their essence was fabricated in a piecemeal fashion from alien forms.*

(M. Foucault "Nietzsche, Genealogy, History" in P. Rabinow, ed., *The Foucault Reader* (London: Penguin, 1991) 76 at 78. )

I want to consider the speeches, debates, and conflicts that contributed to the formation of corporate theory and the modern company form. The aim is to challenge the cognitive closures which corporate theory involves and to open up the possibility of conceiving of the corporation in different ways. My goal is to use the past to make intelligible “the ‘objective’ conditions of our social present, not only in its visible crises and fissures, but also the unquestioned solidity of its rationales.”<sup>25</sup> Part III of the paper will attempt to pursue this goal in a concrete historical site, that of England from the 1840s through to the mid 1850s. During this period corporate form first became available through registration and *The Limited Liability Act, 1855* (U.K.), 18/19 Vict., c. 133. extended limited liability to the shareholders of companies that were incorporated through the registration process. The capital requirements, minimum share denominations and compulsory publicity for corporate records that this Act imposed were quite rapidly dispensed with upon the passage of the *Joint Stock Companies Act, 1856* (U.K.), 19/20 Vict., c. 47. Thus, this period represents a rich historical site from which to develop a history of the present.

**Part IV (Corporate Theory: A Problematisation):** Corporate theory that has concerned itself with the modern company form has taken three discursive forms over time. The first form was ‘corporate ontology’ which was an almost metaphysical inquiry into the nature of the corporate person. The second took the form of a debate over the

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<sup>25</sup> *Ibid.* at 233.

legitimacy of the power wielded by managers of large companies (the managerialist debates). The third form involves the use of microeconomic theory to generate a vision of the company form. Although the division between these three discursive forms is not absolute they do represent three different ways of talking about corporate personality. I want to reflect on corporate theory by viewing it as a form of problemisation:

*By "problemisation" we mean the way in which experience comes to be organized so as to render something as a "problem" to be addressed and rectified: interpretive schemes for codifying experience, ways of evaluating it in relation to particular norms, and ways of linking it up to wider social and economic concerns and objectives.<sup>26</sup>*

The first half of Part IV will set out those features of the problemisation of corporate theory that remain constant across the three discursive forms. It will be shown that despite their differences the discursive forms share key features that comprise a common problemisation. The latter sections Part IV will explore the nature and the content of the differences among the three discursive forms.

**Part V (Corporate Theory and Ideology)** is concerned with the constitutive effect that corporate theory has upon corporate doctrine and upon the political and popular discourses within which conflicts over the external regulation of corporations are fought out.

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<sup>26</sup> P. Miller and N. Rose, "Production, Identity, and Democracy" (1995) 24 Theory and Society 427 at 429.

It is my contention that the power of the truth claims made by academic legal discourses concerned with the company should not be discounted. Corporate theory plays a role in legal education providing lawyers with frameworks to contemplate and discuss company law and regulation. Legal academics use these theories as the normative foundations for textbooks which are deployed as authoritative statements of doctrine. These same academics also play consultative roles in the law reform process.<sup>27</sup> Knowledge of the company is more often than not conceived of as a legal knowledge. Corporate theory plays a real role in constituting the company both as a legal entity and as an object of regulation. Of equal importance is the fact that the discourse of corporate theory imposes a framework that influences, channels and in some cases limits what can be said and done. It is important to examine the possible effects of this discourse. Colin Gordon has spoken in general terms about an 'ethical question' that needs to be asked in relation to 'expert' knowledges: "what kinds of relations can the role and the activity of the intellectual establish between theoretical research, specialized knowledge and political struggles?"<sup>28</sup> This question is relevant to the conduct of corporate theory. Due to the constitutive nature of these legal discourses it is important to interrogate the way corporate theorists institutionalise the relationship between themselves and their intended audience.

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<sup>27</sup> As McQueen has argued jurists contribute to the construction of the company form. See Mc Queen, "Book Review", *supra* note 19.

<sup>28</sup> C. Gordon, "Afterword", *supra* note 23 at 233.



My view is that corporate theorists ignore or are silent about the way corporate theory has served as a resource that can be deployed in order to justify particular outcomes. Particular corporate theories are not used in their entirety to play the role of legal doctrine's guide. Instead, elements of these theories are articulated into legal doctrine and policy debates in a heterogenous and highly strategic fashion. Corporate theory is used in the process of portraying sectional or group interests as being universal. Part V will explore the nature of these potential ideological effects of corporate theory.

## **Perspectives and Methods**

### **Introduction**

This Part of the paper outlines the influence of Foucault and other theorists on my work. It begins by signalling my use of Foucault's conception of power and his notion that power and knowledge are intertwined. However, many of Foucault's (and other theorists') concepts are deployed in this thesis in a fashion which he himself might have rejected. The first section of this part explains the reason why I think it is valid to use ideas in a promiscuous fashion. The second section will describe the relationship between law and discourse. I will then explore the nature of law's claim to truth. The third section will deal with some qualifications to law's claim to truth and raise some issues regarding the theory deployed so far. The most notable of these is the desirability of supplementing Foucault's genealogical and archeological methods in order to be able to more critically examine concentrations of power.

The last two sections set out the concepts that will be used to examine corporate theorising. The first will discuss the use of Foucault's archaeological method to consider corporate theory as a form of problemisation. The final section will return to the issue of supplementing Foucault's archaeological and genealogical approach in order to deal with concentrations of power. The supplement suggested will involve the use of the Gramscian

concept of hegemony and the use of ideological analysis so that it functions in tandem with the notion of discourse.

## Theory and Foucault

In one sense "theory explores the concepts and terms that are inevitably employed in studies of discrete phenomena."<sup>29</sup> In the second sense theory refers to "a certain style of questioning the foundations of the disciplines in the humanities."<sup>30</sup> In the third sense "theory comes under a certain suspicion. As used by the French poststructuralists, theory often means unexamined, naive or exaggerated truth claims about the values of ones discourse ... Theory is, for the poststructuralists, an epistemological attempt at conceptual clarification which spills over into a metaphysical gesture to regulate the terms of reality."<sup>31</sup>

As Stuart Hall puts it: "I am not interested in Theory, I am interested in going on theorizing."<sup>32</sup> Following Foucault my point of departure for this engagement is a recognition that power and knowledge are inseparable:

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<sup>29</sup> M. Poster, *Critical Theory and Poststructuralism: In Search of a Context* (New York: Cornell University, 1989) at 6.

<sup>30</sup> *Ibid.*

<sup>31</sup> *Ibid.*

<sup>32</sup> "On Postmodernism and Articulation: An Interview with Stuart Hall" edited by Laurence Grossberg, in Morley & Chen, eds., *Stuart Hall: Critical Dialogues in Cultural Studies* (London: Routledge, 1996) 131 at 150. [hereinafter "On Postmodernism and Articulation"]

*Perhaps too, we should abandon a whole tradition that allows us to imagine that knowledge can exist only where the power relations are suspended and that knowledge can develop only outside its injunctions, its demands and interests ... We should admit rather that power produces knowledge ... ; that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations.<sup>33</sup>*

I wish to interrogate the concepts of corporate theory from this perspective. This will involve an engagement with theory in the first and second senses. I do not maintain that such an exercise is somehow a-theoretical or that it doesn't involve truth claims. However, the truth claims made do not automatically necessitate the reimportation of meta-theory.

Theory in the second sense refers to a "a certain style of questioning the foundations of the disciplines in the humanities."<sup>34</sup> This type of theory can be referred to loosely as poststructural.

*Poststructuralism refers to a series of regional analyses that have undermined notions of foundationalism and of a unified self-transparent subject. As a movement that has undermined the ideals and the project of the Enlightenment, poststructuralism has contributed to the general condition of postmodernism.<sup>35</sup>*

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<sup>33</sup> M. Foucault, *Discipline and Punish* (London: Penguin, 1991) at 27.

<sup>34</sup> M. Poster, *Critical Theory and Poststructuralism: In Search of a Context*, *supra* note 29 at 6.

<sup>35</sup> K. Bartlett, "Feminist Legal Methods", (1992) 109 Harvard Law Review 829 at 877.

Poststructuralism problematises two essential components of what can be referred to as modern thought. Firstly, the notion of the sovereign subject is called into question. Secondly, poststructuralism questions the efficacy of employing meta-narratives based on the constitutive subject to explore the possibilities of secular redemption. Modernist thought (particularly that of the Enlightenment) attempted to use reason to construct theories of a universalising nature which would provide a grounding for a life liberated at once from superstition and from despotism.<sup>36</sup> Not all the thinkers that could be described as modernist were sanguine about the possible success of this enterprise but they still privileged this set of questions.<sup>37</sup>

Poststructuralism departs from this problematic. Foucault gives a formulation of the political problem faced: "It's not a matter of emancipating truth from every system of power (which would be a chimera for truth is already power) but of detaching the power of truth from the forms of hegemony, social, economic, and cultural, within which it operates at the present time."<sup>38</sup> Approaching this task does not necessarily involve a flight into irrationalism nor does it necessarily involve nostalgia for the pre-modern.

I freely acknowledge that poststructuralism's departure from the modern problematic does not entail the bracketing of all truth claims. It is acknowledged that the questioning of the sovereign subject and the problematising of the relationship between theory and

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<sup>36</sup> See J. Faubion, "Introduction" in J. Faubion, *Rethinking the Subject* (Boulder: Westview, 1995) at 5.

<sup>37</sup> See *Ibid.* at 8.

<sup>38</sup> M. Foucault, "Truth and Power" in C. Gordon, ed., *Power/Knowledge* (New York: Pantheon, 1980) 109 at 133.

politics involve particular truth claims. Foucault's insistence on the intertwined nature of power and knowledge also entails a claim to truth. What distinguishes these particular truth claims from meta-theory is that by their nature they question the possibility (and desirability) of a univocal account of social life. They also involve an ongoing questioning of the conceit that theory can provide a blueprint for each and every act of resistance.

Therefore, criticisms which claim that poststructuralist analyses are necessarily inconsistent (because they institute a meta-narrative of the type they criticise) are questionable because they ignore the qualitative differences in the nature of the respective truth claims. It may be impossible to bracket all truth claims; but this need not necessitate the re-importation of a meta-theory.

My engagement with theory (in the second sense) in this thesis is problematic in two ways. First, I deploy concepts in a manner that may have been refused by the theorist whom I draw them from. Second, these concepts are deployed in order to interrogate corporate theory which is a new and unfamiliar context for their deployment. Therefore, before moving to discuss law and discourse I wish to set out the terms of my engagement with theory.

The application of Foucault's texts has not only involved exegesis but also the exploitation of some of the concepts contained in his work in order to advance inquiries foreign to those Foucault pursued. Paul Rabinow explains this phenomenon by using

Foucault's own nomenclature to describe him as a "founder of discursivity"<sup>39</sup>: (Founders of discursivity have been) described as "figures who provide a paradigmatic set of terms, images and concepts which organise thinking and experience about the past, present and the future of society, doing so in a way, which enigmatically surpasses the specific claims they put forth."<sup>40</sup> In the process of this application or theorizing, concepts will (unavoidably) be modified and positions will be taken that Foucault (and here I mean the natural individual) may well have refused. In particular the emphasis in this paper on 'law's claim to truth' and the attempt to use some conception of ideology in combination with a discursive analysis are positions not immediately associated with Foucault. Such an approach to an author's texts can provoke a feeling of unease or a distaste akin to that felt for the ethos of the grave robber: "get in quietly, grab what looks most valuable (with no concern for the ritual significance of the objects), get out and back to the marketplace fast."<sup>41</sup>

I would contend that such feelings are unwarranted. It is ironic that I will be drawing on Foucault in order to justify the release of some of his terms and concepts from his own authorial control. My reply rests on the concept of 'author function'. Author function

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<sup>39</sup> This is a phrase first coined by Foucault himself in the article, "What is an Author?" in P. Rabinow, ed., *The Foucault Reader*, *supra* note 3, 101.

<sup>40</sup> P. Rabinow, "Introduction" in P. Rabinow, ed., *The Foucault Reader*, *supra* note 3, 3 at 25. I am of course aware that Foucault's originality in relation to these 'terms, images and concepts' should not be uncritically overemphasised. However, it is my intention to deploy these concepts in this thesis **not** to provide a genealogy of them.

<sup>41</sup> J. Simon, "In Another Kind of Wood", (1992) 17 *Law and Social Inquiry* 39 at 49-50. I do not suggest that Simon himself is displaying outrage through his use of the grave robber analogy, indeed if read as whole the piece exhibits a much more considered view. I am merely borrowing a useful illustration of a particular sensibility. If the reader hasn't already guessed I keep a pick and shovel close by my desk.

refers to how an author's name "manifests the appearance of a certain discursive set and indicates the status of this discourse within a society."<sup>42</sup> The presence of an author is one of the factors that regulates the discourse. "A private letter may well have a signer - it does not have an author; a contract may well have a guarantor - it does not have an author. An anonymous text posted on the wall probably has a writer - but not an author. Author function is therefore characteristic of the mode of existence, circulation, and functioning of certain discourses within society."<sup>43</sup> The salient point is that this figure of the author is not some pre-existing subject but a construction of the discourses which exhibit author function. The individual and the author are undoubtedly linked but the linkage is not isomorphic. "[T]hese aspects of an individual which we designate as making him an author are only a projection, in more or less psychological terms, of the operations that we force texts to undergo, the connections that we make, the traits that we establish as pertinent, the continuities that we recognise, or the exclusions that we practice."<sup>44</sup>

Who is speaking? What did they really say? What part of themselves did they manifest in their work? These are questions which are focused on the figure of the author. My goal is to interrogate corporate theory not to agonise over whether a particular theorist would have agreed with my approach nor to offer my work as a proof or disproof of a particular "author's" contentions. This is not to say that these questions associated with

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<sup>42</sup> M. Foucault, "What is an Author?", *supra* note 39 at 107.

<sup>43</sup> *Ibid.* at 107. Foucault stresses that author function is neither constant nor universal in its effects upon discourses but varies according to period and type. (*Ibid.* at 110.)

<sup>44</sup> *Ibid.* at 110.



the figure of the author are always useless or invalid; but it is important to recognise that they are not the only questions, nor are they always going to be the most useful. The figure of the author need not resemble that of Banquo's ghost - the use of an author's ideas in a manner which may have been refused by the natural individual need not be perceived as bloody gashes, the horror of which must distract the reader from digesting the present meal.

### **Law and Discourse**

The purpose of this section is to point to how law can be conceived of as a discursive phenomenon. Discourses are significant because they represent ways of seeing and acting that play a constitutive role in the social field. Discourses exert power effects. Legal discourses can and do operate in this fashion. The legal discourses concerned with the company legal form are important because they helped constitute the company, a legal form that came to play an increasingly significant role during the modern epoch.

Discourses exert power effects. This is not to say that knowledge can be reduced to power; rather it is an acknowledgement that:

*[I]t is not the activity of a subject that produces a corpus of knowledge, useful or resistant to power but power/knowledge, the processes and the struggles that traverse it and of which it is made up, that determines the forms and possible domains of knowledge.<sup>45</sup>*

I adopt Foucault's conception of power: Power is not a thing to be possessed nor is power synonymous with political structures. Nor is power merely an ideological effect. Power is as much implicated in the creation and structuring of positive effects as it is in the process of subordination.<sup>46</sup> Legal discourses help to constitute the area within which social relations "are generated, reproduced, disputed and struggled over, the most important implication being that within such a field, which Foucault would designate as a discursive formation, the legal discourses in play both place limits of possibility on social action and impose specific forms of discursive possibility."<sup>47</sup> Purvis and Hunt's definition of discourse captures the analytic motivations for the use of the concept - it captures the idea that discourses represent ways of seeing and of acting.

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<sup>45</sup> M. Foucault, *Discipline and Punish*, *supra* note 33 at 28.

<sup>46</sup> See generally M. Foucault, "On Power and Norm: Notes" in Morris and Patterson, eds., *Michel Foucault: Power, Truth, Strategy* (Sydney: Farrer, 1980) 1.

<sup>47</sup> A. Hunt, "Foucault's expulsion of law: Towards a retrieval" (1992) 17 *Law and Social Inquiry* 1 at 31 [hereinafter "Foucault's expulsion of law"].

*Discourse refers to the individual social networks of communication through the medium of language or non-verbal sign systems. Its key characteristic is that of putting in place a system of linked signs. ... What the concept tries to capture is that people live and experience within discourse in the sense that discourses impose frameworks which limit what can be experienced or the meaning that experience can encompass, and thereby influence what can be said and done. Each discourse allows certain things to be said and impedes or prevents other things from being said. Discourses thus provide specific and distinguishable mediums through which communicative action takes place.*<sup>48</sup>

Although it relies upon some of his concepts this constitutive view of law is at odds with Foucault's expulsion of law from his account of modernity.<sup>49</sup> Many of Foucault's texts identify law as a repressive power that functions in a wholly negative fashion. Smart<sup>50</sup> and Hunt<sup>51</sup> retain Foucault's conception of power but do not follow Foucault in his displacement of law from modernity. This is not to say that either of these theorists are insensitive to the issue of the link between law and state violence. An uncritical focus upon discourse runs the risk of disguising the presence of repression and non-consensual exercises of power that still play a real role within Western democracy. My focus upon discourse in this thesis is because I think corporate theory is most effectively interrogated in this fashion, it does not constitute wilful blindness towards the presence of repression and organised violence.

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<sup>48</sup> T. Purvis & A. Hunt, "Discourse, ideology", (1992) 44 British Journal of Sociology 475 at 485.

<sup>49</sup> See A. Hunt, "Foucault's expulsion of law", *supra* note 47.

<sup>50</sup> C. Smart, *Feminism and the Power of Law* (London: Routledge, 1989)

<sup>51</sup> A. Hunt, "Foucault's expulsion of law", *supra* note 47.

Theorists who advocate the discursive and constitutive nature of law are interested in the role legal discourses play in co-ordinating and supervising different forms of disciplinary regulation. Simon cites as an example the “ferocious activity around legal rules that govern power relations in work, the professions, and the family during the late 19th and 20th centuries.”<sup>52</sup> An example which is more relevant to this thesis is the manner in which the early statutes of general incorporation in England set out the structures and underlying norms for internal corporate governance. Another relevant example is the role law played in the deployment of accounting expertise to discipline corporate conduct.

Within this perspective law is not seen as a monolithic phenomenon: “The previous conception of law as a totalising and transcendent unity is superseded by historically specific production of regulatory devices that mediate between state and civil society and between state and individual.”<sup>53</sup> The point of the enquiry becomes the investigation of how specific legal discourses have contributed to the constitution of particular social relations in concrete settings. So when speaking about law I am not referring to a single monolithic entity but to “a plurality of principles, knowledges, and events.”<sup>54</sup>

The discourses of law that are concerned with the company can be conceptualised as being both responsive to, and constitutive of, particular fragments of modernity. The particular fragments I have in mind are the development of the company legal form and the

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<sup>52</sup> J. Simon, “In Another Kind of Wood”, *supra* note 41 at 51.

<sup>53</sup> A. Hunt, “Foucault’s expulsion of law”, *supra* note 47 at 30.

<sup>54</sup> C. Smart, *Feminism and the power of law*, *supra* note 50 at 4.

increasing economic significance of the company legal form.<sup>55</sup> The development of the company legal form was part of, and contributed to, the processes of industrialisation, commodification and rationalisation which helped to constitute the modern world.<sup>56</sup>

This can be seen if we consider the role that the company form played in the process of industrialization that occurred from close to the turn of the century up to the Great War. The rise of the company form was part of the processes of industrial growth, rationalization and centralization that characterise the modern epoch. The company form became increasingly significant in these transformations towards the turn of the century. "The three decades before the first World War had seen the triumph of the company in almost all spheres of economic life."<sup>57</sup> This period also saw the rise to dominance of the joint stock economic form which utilised the company legal form.

*In an increasing number of industries the minimum capital outlay required for production came to exceed the capacity of economic partnerships with the result that more and more joint stock companies emerged ... Moreover, in the great amalgamations dating from the late 1880s the joint stock company began to emerge as a mechanism for centralizing and monopolizing markets.<sup>58</sup>*

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<sup>55</sup> See P. Ireland, "The Rise of the Limited Liability Company", (1984) 12 International Journal of the Sociology of Law 239 at 245.

<sup>56</sup> See S. Best and D. Kellner, *Postmodern Theory: Critical Interrogations* (New York: Guilford, 1991) at 2-3.

<sup>57</sup> P. Ireland, "The Rise of the Limited Liability Company", *supra* note 55 at 245. It is worth noting that by the outbreak of the First World War use of the company legal form had outstripped the growth in the joint stock company form. Ireland attributes this growth to three factors: 1) increased awareness of the company form and its advantages; 2) decreased criticism and hostility directed towards the use of the company form by individual proprietors and economic partnerships; and 3) increased concern about financial risk and bankruptcy as a result of the economic downturn of 1873-1896. (*Ibid.* at 247-248.)

<sup>58</sup> *Ibid.* at 245. As far as the situation in the United States went W. Bratton Jnr argues that the pace of industrial incorporation increased significantly after 1870 and that the 'management' corporation began to emerge around that time. Bratton states that from the 1890s onwards these large corporations, effectively controlled by management, came to dominate the economy of the United States. See W. Bratton Jnr, "The New Economic

In subsequent Parts of the thesis I highlight the historical specificity of these discourses by examining the speeches, debates and conflicts that contributed to the formation of corporate theory and the modern company legal form - a crucial site of regulation.

### **Law's claim to truth**

Even though there is a plurality of legal discourses, the power of law's claim to truth lies in the presentation of law as a unified body of knowledge possessing an authoritative method. "The law's reliance on statutory interpretation, precedent, and a complex body of rules of evidence first to determine the 'truth' and then to impose a sanction or remedy thus comprises a self-referential system of knowledge. ... As its capacity for and means of truth finding suggest, the language of the law was embedded in a set of concrete institutional practices - a legal method - which produces a self confirming account of reality."<sup>59</sup> Put crudely, the power of legal discourses springs in no small measure from their invocation of 'Law'. Law attempts to set itself and its findings aside from other discourses.<sup>60</sup> The self-referential character and the exclusivity of this knowledge is

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Theory of the Firm: Critical Perspectives from History" in S. Wheeler, ed., *The Law of the Business Enterprise* (Oxford: Oxford University, 1994) 117 at 130-133.

<sup>59</sup> T. Loo, *Making Law, Order and Authority in British Columbia, 1821-1871* (Toronto: Uni. of Toronto, 1994) at 8. See also C. Smart, *Feminism and the Power of Law*, *supra* note 113 at 4.

<sup>60</sup> C. Smart, *Feminism and the Power of Law*, *supra* note 50 at 9.

effectively an exercise of power - law's pronouncements upon a topic or an object that it has made it's own are to be more authoritative than those statements originating in other discourses. Smart argues that:

*law exercises power not simply in its material effects (judgments) but also in its ability to disqualify other knowledges and experiences.*<sup>61</sup>

Similarly, I argue that corporate theorists invoke the power of 'Law' in expressing their views about the nature of companies. The appropriate measures for the external regulation of companies depends upon the nature of their personality - the total sum and character of legal relations 'actual or potential of a legal person'. Unsurprisingly this is conceived of as a legal inquiry. This holds true even in relation to the 'new' economic theories of the firm. These theories may draw their ideas on what values and goals the company form should reflect from the discipline of economics but the expertise to be used to actualise the conception of the company is legal expertise. Economic truth claims become legal prescriptions and derive much of their authority from the power of 'Law'. Knowledge of the company is conceived of as a legal knowledge. It invokes law's claim to truth and treats other accounts as secondary.

### **Law's claim to truth - some qualifications**

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<sup>61</sup> *Ibid.* at 11.

The first qualification is that although legal discourses have an effectivity and a significance they are not automatically determinative. The question of whether law plays a dominating or subordinate role in relation to other discursive or institutional practices cannot be answered in advance. As Hunt suggests: "Directionality and causality must always be questions of specific historical and contextual investigation."<sup>62</sup> Thus while I perceive legal discourse to be constitutive, I am not subscribing to a version of legal imperialism.

The second qualification is that law does not cover the entire field of regulation. Regulatory techniques and practices have developed out of non legal discourses. This is especially true of the disciplinary mechanisms and psychological techniques that Foucault elaborates upon in *Discipline and Punish* and *Madness and Civilization*; but it is also true in a range of other areas, such as accounting practices, management styles, and labour relations. Legal and non-legal discourses form interlocking mutually constitutive realms.

This is particularly true of the modern company. As Thompson<sup>63</sup> and Lowe<sup>64</sup> have observed the legal dimension is just one of the dimensions that is of significance for the company. The financial, organisational and those dimensions associated with the technology or the division of labour are also important.

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<sup>62</sup> A. Hunt, "Foucault's expulsion of law", *supra* note 47 at 31.

<sup>63</sup> G. Thompson, "The firm as a 'dispersed' social agency" (1982) 11 *Economy and Society* 233.

<sup>64</sup> G. Lowe, "Corporations as objects of regulation" (1987-88) 5-6 *Law in Context* 35.



*... a corporation should be conceived not as a unified entity, the different aspects of which are determined by some central principle, but as a conglomeration of different relationships and practices - linked to each other but in a variety of ways which may be complementary or contradictory.*<sup>65</sup>

Within such a 'dispersed' entity many modes of regulation will not be directly dependent upon legal discourses. A good example of this is the role of accounting practices in corporate regulation. Although legal rules provide a point of insertion for accounting expertise, the accounting profession exercises a regulatory influence on companies that is largely autonomous of law. The norms and processes imposed by accounting practices have a powerful influence on corporate behaviour. Moreover, the legal dimensions of a company do not consist of one single dimension: "Firms or enterprises are subject to a wide range of legal and semi-legal regulation .... For instance, aspects of their activity are coerced by laws of contract, by types of factory inspection, by health and safety regulations, by regulations concerning working arrangements and conditions, price formation and so on."<sup>66</sup>

This is not to discount the importance of formal legal organisation and separate legal personality for the organisation of companies. Indeed, the notion of separate legal personality and how it has been theorized has had important implications for how the appropriate level and manner of external regulation of companies has been discussed. It is

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<sup>65</sup> *Ibid.* at 38.

<sup>66</sup> G. Thompson, "The firm as a 'dispersed' social agency", *supra* note 63 at 246.

also significant because it is a critical element in the constitution of the 'site' around which the different relationships and practices which make up a company conglomerate.

This brings me to the third qualification. Corporate theory's effectivity does not take the form of a particular theory gaining dominance and exercising paradigmatic control over the legal doctrine concerned with the regulation of companies. The discursive effects of a particular corporate theory do not unproblematically translate into instrumental effects. The claim that power/knowledge relations are omnipresent is **not** a claim that such relations are omnipotent.<sup>67</sup>

There is a distinction between rational reflected discourses, such as corporate theory ; and non-discursive institutional practices, such as the specific legal and non-legal regulatory techniques that are applied to the companies (for example bookkeeping methods, systematic management, audit, the system of required meetings of shareholders and directors); and the effects produced within the social field.<sup>68</sup> Corporate theory is just one of several relevant discursive dimensions. Also, the prescriptions of corporate theory do not translate directly into the techniques available for regulation. Furthermore, the effects which regulatory techniques produce in the social field are in turn dependent upon the problems, successes, and setbacks these practices encounter in their implementation

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<sup>67</sup> See C. Gordon, "Afterword", *supra* note 23 at 246: "The misunderstanding here consists in a conflation of historical levels which reads into the text two massive illusions or paralogisms whereby it is supposed that programmes elaborated in certain discourses are integrally transposed to the domain of actual practices and techniques, and an illusion of 'effectivity' whereby certain technical methods of social domination are taken as being actually implemented and enforced on the social body as a whole."

<sup>68</sup> The distinction between these orders of events is taken from C. Gordon, "Afterword", *supra* note 23 at 246.

and utilisation: Regulation is reliant upon technical devices such as “writing, listing, numbering and computing in order to construct a knowable, calculable and administrable object.”<sup>69</sup> An example of such a setback was the attempt to use financial reports and balance sheets to regulate aspects of corporate conduct in England in the 1840s. This measure was unsuccessful at that time because accounting practices varied so widely due to the fact that accountants were yet to be organised (or disciplined) along professional lines.

There is a difference between the doctrinal rules of company law (and the effects they produce) and the theoretical discourse that provides the background resource for such rules. The doctrinal rules of company law are the result and the conglomeration of any number of strategies that have been pursued in relation to the company legal form. A ‘strategy’ can be defined as the purposive pursuit of interests through discursive practices.<sup>70</sup> Discourses such as corporate theory do not form the medium for strategy but serve as a resource.<sup>71</sup>

*And the point where the perspective of strategy becomes indispensable for genealogy is where the non-correspondence of discourse, practices and effects creates possibilities for operations whose sense is, in various ways, either unstated or unstateable within any one discourse. Strategy is the arena of the cynical, the promiscuous, the tacit, in virtue of its general logical capacity for the synthesis of the heterogeneous.*<sup>72</sup>

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<sup>69</sup> P. Miller & N. Rose, “Governing Economic Life” (1990) 19 *Economy and Society* 1 at 5.

<sup>70</sup> A. Hunt, “Foucault’s expulsion of law”, *supra* note 47 at 36.

<sup>71</sup> See C. Gordon, “Afterword”, *supra* note 23 at 251.

<sup>72</sup> *Ibid.*

This arena of synthesis and combination is an appropriate way in which to think about the field of corporate doctrine and the events that have occurred in the history of reform of corporate regulation. Particular corporate theories have been deployed in manner that has been promiscuous, at times cynical, and that has nearly always involved the synthesis of the heterogeneous. I would suggest that the notion of strategy is one which provides a starting point from which to interrogate legal doctrine (or in the case of Part III of this paper the creation and the modification of the company legal form) - it allows us to question these areas in relation to their goals, their conditions of possibility and also allows us to ask whose interests are being served.

To import this notion of intentionality is not to invoke the existence of a monolithic state or to defer to the operations of social classes conceived of as meta-actors. It is not intended to turn away from the complexity and depth of field that genealogy can offer. Instead, this notion of strategy allows the development of an analysis that tries to deal with concentrations of power. This theoretical move is a corrective to Foucault's excision of the notion of intentionality from his conception of strategy and the fact that his analyses do not on the whole attempt to deal with concentrations of power. The concern is that if one remains exclusively on the local level then the resistances to power are necessarily going to be fragmented and partial. Thus, the use of *strategy* (as conceived of by Hunt and Poulantzas) attempts to take advantage of Foucault's conception of power and genealogical approach while invoking a conception of hegemony as a necessary

supplement. Further development of this necessary supplement will be deferred until the last section of this Part.

To summarise the position so far: we have the notion that law is a constitutive part of the socio-political field. This constitutive role is still significant in the modern epoch. Legal discourses are significant because like any other discursive phenomena they structure and channel the possibilities for action. In the case of the company, these discourses do not simply act upon the company but in fact help constitute it. Corporate doctrine and discourses that deal with possible reform of company regulation operate in a field where strategy is a key concept, it is the field of the *instrumentalisation* of the real. It is a field where specific regulatory devices that mediate between the State and the company and between the company and its members have been produced. The rational reflected discourses of corporate theory do not serve as a medium for strategy (despite the fact that many theories are written as if they were) but rather as a resource. The deployment of these resources has been partial and non-synchronic, disparate elements of different theories have been synthesised into legal doctrine. Corporate theory can serve as a resource in a variety of ways. For instance a particular theory can be used as a rhetorical device to buttress a particular claim or a theory can be employed as a mental template in order to conceptualise a problem or delineate the boundaries of a dispute. Corporate theory's role as a resource is worth considering because corporate law and the reform process can be seen as serving particular interests. Although these interests are not reducible to discourse it is through discourse that they are articulated and corporate theory

is part of the discursive fabric (whether explicitly or implicitly). Secondly, corporate theory is a significant resource for strategy because use of corporate theory invokes the power associated with legal discourses' particular claims to truth.

### **Problematisation and Archaeology**

The preceding sections have set out my general perspective regarding legal discourses and the reasons why legal discourses concerned with the company legal form are significant. The manner in which I intend to interrogate corporate theory is by examining it as a form of problematisation. Interrogating a legal discourse in this fashion assists in diverting attention away from the intimate details of particular theories. It will allow an examination of the discourse as a whole. In developing a problematisation of corporate theory Foucault's concept of archaeology will be drawn upon.<sup>73</sup>

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<sup>73</sup> As an aside it is worth noting that many scholars when documenting Foucault's intellectual career supposed that he abandoned the archaeological approach entirely. Although I am not directly interested in intellectual biography I find myself in agreement with Colin Gordon, Paul Rabinow and Hubert Dreyfus in maintaining that the elements of archaeology which I am about to discuss remained important themes in the work of the 'later Foucault':

*Foucault only abandons the attempt to work out a theory of rule-governed systems of discursive practices. As a technique, archaeology serves genealogy. As a method of isolating discourse objects, it serves to distance and defamiliarize the serious discourse of the human sciences. This in turn, enables Foucault to raise the genealogical questions: How are these discourses used? What role do they play in society? (H. Dreyfus and P. Rabinow, Michel Foucault: Beyond Structuralism and Hermeneutics, supra note 17 at xxi. See also C. Gordon, "Afterword", supra note 23 at 244-245.)*

*... what I am analyzing is not the system of its language, nor in a general sense, its formal rules of construction: for I am not concerned about events: the law of existence of statements, that which rendered them possible - them and none other in their place: the conditions of their singular emergence; their correlation with other previous or simultaneous events discursive or otherwise.*<sup>74</sup>

Employing an archaeological approach will help to bring out the common problematic shared by apparently divergent theories. This approach will assist in seeing how corporate theories share the same concerns that arise out of the matrix of social, political and technical circumstances.

When examining discourses in this fashion an important aspect of the analysis is to examine the specific transformations that occur. Paying attention to such transformations ensures that changes in the discourse do not appear to be totally random nor totally predestined. It allows us to give the concept of change some analytical content.<sup>75</sup> This involves charting not only the intradiscursive transformations (from say corporate ontology to the managerial/anti-managerial debates) and extradiscursive dependencies but also the play of interdiscursive dependencies. Without wishing to pre-empt the analysis to be carried out in Part IV of this thesis it is worth saying that the three discursive forms of corporate theory are linked to differing forms of government rationality. If one examines the shifts in corporate theory one can detect a correlation with shifts in the discourse of government rationality (what Foucault termed *governmentality*). The remainder of this

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<sup>74</sup> M. Foucault, "Politics and the Study of Discourse", in Burchell, Gordon, & Miller, eds., *The Foucault Effect* (London: Harvester Wheatsheaf, 1991) 53 at 59. Emphasis added.

<sup>75</sup> *Ibid.* at 58.

section will clarify my use of the term government rationality and provide some evidence of this interdiscursive dependency.

A rationality of government does not refer to any specific set of State policies. It refers to a kind of discourse. A rationality of government represents a particular way of seeing and thinking about the nature and practice of government. It provides a framework that allows specific aims to be developed and assessed.<sup>76</sup> The specific goals and interests behind those aims cannot be reduced to discourse but it is through a discourse of government rationality that they are articulated:

*Language from the perspective of government is not a matter meanings, but of ways in which the world is made intelligible and practicable, and domains constituted such as "the market" or "the family" which are amenable to interventions by administrators, politicians, authorities and experts - as well as by the inhabitants of these domains themselves - factory managers, parents and the like.<sup>77</sup>*

The above quotation mentions 'the family' and 'the market' as important domains that are constituted within contemporary government rationalities. I would add 'the company' as another important domain for discourses of government rationality. That interdiscursive dependencies exist between discourses concerned with the company and discourses of government rationality can be shown with the aid of an example. The example will demonstrate the link between the government rationality known as classical

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<sup>76</sup> See C. Gordon, "Governmental rationality: an introduction", in Burchell, Gordon & Miller, eds., *The Foucault Effect*, *supra* note 74, 1 at 3.

<sup>77</sup> N. Rose, "Government, authority and expertise in advanced liberalism" (1993) 22 *Economy and Society* 283 at 288-289.



liberalism and the debate concerning the extension of limited liability to the shareholders of companies.

The government rationality of classical liberalism rejected previous views that the State was capable of supervising every aspect of life down to the minutest detail. Classical liberal government had to respect the autonomy of civil society and the rational actors who were assumed to populate it. The task of government is to regulate in a manner which is "intrinsically linked to the *natural*, private interest motivated conduct of free market exchange, because the rationality of these individuals' conduct is precisely what enables the market to function in accordance with its nature. Government cannot override the free conduct of governed individuals without destroying the basis of the effects it is trying to produce."<sup>78</sup>

As Nicholas Rose has pointed out the rationality of classical liberalism involved the deployment of expert knowledge in an attempt to maximise wealth and well being without violating the autonomy of civil society:

*Liberal government arts of rule from the middle of the nineteenth century, sought to modulate events decisions and actions in the economy, the family, the private firm, and the conduct of the individual person. The problem was how political aspirations could instrumentalize expert capacities (and vice versa) without compromising their independence, their truth values, or the autonomy of the domains over which their authority was to run.*<sup>79</sup>

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<sup>78</sup> *Ibid.* at 271.

<sup>79</sup> *Ibid.* at 291.

Civil society was both the object and the end of government.<sup>80</sup> An important part of the task was the efforts that were made to help produce and sustain the governable, calculable and rational citizens upon which this system of government was based - the problem is how to intervene in order to help actualise civil society without destroying or damaging its autonomy. In this mode of government one is forced to act so as not to interfere.

The rationality of classical liberalism informed the debates and process of company law reform. The influence of this problematic can be seen in the following excerpt from a speech given by Robert Lowe:

*I am arguing in favour of human liberty - that people may be permitted to deal how and with whom they chose, without the officious interference of the State ... We should profit by the lessons of the science of political economy; to interfere with and abridge men's liberty is to do for them what they can do for themselves ... is helping the fraudulent to mislead them ... Having given them a pattern, the State leaves them to manage their own affairs and has no desire to force on these little republics any particular constitution ... The only way that the Legislature should interfere is by giving the greatest publicity to the affairs of such companies that every one may know on what grounds he is dealing.<sup>81</sup>*

In the speech Robert Lowe argued in favour of the Limited Liability Bill 1855 (subsequently enacted as *The Limited Liability Act, 1855* (U.K.), 18/19 Vict., c. 133.)

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<sup>80</sup> G. Burchell, "Liberal Government and Techniques of the Self", *supra* note 21 at 272.

<sup>81</sup> As quoted in P. Stein, "Nineteenth Century English Company Law and Theories of Legal Personality", (1983) 12 *Quaderni Fiorentini* 502 at 508.

which would extend the protection of limited liability to shareholders of companies. In Lowe's view such a reform was a necessary move to correct the overly paternalistic reluctance of the legislature to sanction limited liability. Lowe argued that creditors were more than capable of protecting themselves provided they had the necessary information. The authority for this view drew upon the expert knowledge of political economy. Thus, so as not to interfere in the domains of the market and the firm the Legislature had to act by employing this specific legal measure. A failure to take this step would have damaged the rational, calculating capacities of the citizen which was at once the aim and the subject of liberal rule.

The correlation between discourses concerned with the company and discourses of government rationality will inform my analysis in Parts III and IV. I now turn to the task of providing details of the theoretical supplement based on the concept of hegemony.

### **Hegemony and Ideology**

Corporate theory can locate concerns related to the regulation of companies within certain discursive formations and within these formations the sectional interests of particular actors can be represented as universal. In short, the deployment of corporate theory within a strategy ( the purposive pursuit of interests through discursive practices) can have ideological effects. One of the difficulties with the archaeological and genealogical concepts that have been discussed so far is that they make direct critical

comment upon such ideological effects difficult. This difficulty arises because Foucault's emphasis on the capillary nature of power is not equipped to aid in analysis aimed at concentrations of power.<sup>82</sup> Therefore, it is necessary to provide a supplement to these concepts. The supplement will involve combining a 'discursive' perspective on the state with the concept of hegemony.

I do not intend to develop a full blown theory of the state nor make an attempt to fully analyse the role of the state in the development of the modern company form. Rather, I wish to develop a perspective on the state that will allow me to 'go on theorising' about the potential ideological effects of corporate theory. This perspective does not conceive of the state as a meta-actor nor does it focus on particular concrete state institutions. This 'discursive' approach de-centres the state and places it within the field of governmentality:

*Posed from this perspective, the question is no longer one of accounting for government in terms of 'the power of the State', but of ascertaining how and to what extent, the state is articulated into the activity of government: what relations are established between political and other authorities; what funds, forces, persons, knowledge or legitimacy are utilised; and by means of what devices and techniques are these different tactics made operable.*<sup>83</sup>

The focus is upon how certain state bodies or actors interact with other agents and bodies of expert knowledge in order to decide upon appropriate areas for state action and the manner in which this state action will be executed. This perspective draws attention to

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<sup>82</sup> This point is taken from A. Hunt, "Foucault's expulsion of law", *supra* note 47.

<sup>83</sup> P. Miller and N. Rose, "Political Power Beyond the State", *supra* note 69 at 177.

the way in which corporate theory is articulated into the debates concerned with corporate regulation and law reform in a fashion that produces ideological effects. For the purposes of this thesis an ideological effect occurs where a sectional or specific interest of a group within society is presented as universal.<sup>84</sup> A general example is the manner in which the separate legal personality of companies is used to identify them with human citizens. Often this identification is exploited to resist efforts to extend company regulation. The regulation of companies is portrayed as an interference with the rights of citizens generally. A sectional interest is presented as being universal.

The directionality of these ideological effects are not necessarily compelled by the internal logic of a particular corporate theory. The effect depends upon how the discursive resources of corporate theory are deployed - how the corporate theory is articulated into a particular strategy. Articulation refers to the way in which "discourses and ideologies emerge by bringing into proximity and combination elements that do not have any pre-given class or political significance. It is the way in which different elements are combined that gives each specific discourse its ideological significance or effects."<sup>85</sup>

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<sup>84</sup> This formulation of ideological effect is drawn from T. Purvis and A. Hunt, "Discourse, ideology", *supra* note 48 at 497. They argue that although this formulation differs from Marx's own writings on ideology it retains much of the concept's critical thrust: "Displaced is the ideas/being distinction with its major epistemological consequence the decentring of the human subject manifest in the problematic of consciousness, and expelled is the opposition between true and false consciousness. But retained and moved into central prominence is a key feature of the critical thrust of Marx's account, namely its focus on the way in which the interpellation of subject positions operates systematically to reinforce and reproduce dominant social relations - it is this that we have described as the directionality of ideology theory." (*Ibid*)

<sup>85</sup> *Ibid.* at 492.

A good example is the use made of the real entity theory of the company by progressive jurists in the early decades of this century. Jurists such as Harold Laski used 'real entity' theory to assert that the associative life of the company involved an element above and beyond the aggregate sum of actions of the human actors involved. The synergy of these interactions produced a 'real' person. The existence of this 'real' personality was used to advance the argument that companies should be held responsible for their criminal and tortious actions.<sup>86</sup> This can be contrasted with the way in which 'real' entity theory has been activated in contemporary debates concerned with extending charter or constitutional rights to companies. 'Real' entity theory is used to equate the company with other citizens who are deserving of protection from state power. Thus, a refusal to extend charter or constitutional rights to companies is portrayed as a violation of individual (human) rights. In this case 'real' entity theory is a resource deployed within a strategy that has a de-regulatory bias.

While these ideological effects may not be logically compelled by the particular corporate theory this is not to say such effects are totally random or unimportant. The ideological effects associated with corporate theory can be implicated in strategies which become predominant. They can help to construct the dominant view or conceptualisation

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<sup>86</sup> This example of the deployment of 'real' entity theory is taken from M. Hager, "Bodies Politic: the Progressive History of Organizational 'Real Entity' Theory", (1989) 50 University of Pittsburgh Law Review 575 [hereinafter "Bodies Politic"].

of a problem related to the regulation of companies. They can contribute to the development of a hegemonic position.

*Hegemony in its most complete form, is defined as occurring when the intellectual, moral and philosophical leadership provided by the class or alliance of classes and class fractions which is ruling, successfully achieves its objective of providing the fundamental outlook for the whole society.<sup>87</sup>*

Two important ideas need to be added to the above quotation. Firstly, the exercise of hegemony involves a complex interaction between the three spheres of the economic, civil society, and the state. "In any given historical situation hegemony is only going to be found as the partial exercise of leadership of the dominant class, or alliance of class fractions in some of these spheres but not in all of them equally successfully all the time."<sup>88</sup> Secondly, a hegemonic position is neither preordained nor static. Hegemony is a dynamic phenomenon that is resultant upon the general line of force that develops through the clash of different strategies (emanating from both within and exterior to the state) being pursued by groups within society. What this brings to this thesis is the ability to consider how specific strategies, that utilise corporate theory as a resource, contribute to the development and ongoing re-negotiation of a hegemonic position.

The dynamic nature of hegemony and the role of a diverse range of strategies in the development and re-negotiation of such a position can be seen in the events that occurred

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<sup>87</sup> R. Bocoock, *Hegemony* (London: Tavistock, 1986) at 63.

<sup>88</sup> *Ibid.* at 94.

both before and after the passage of general statutes of incorporation in England. These events will form the subject matter of Part III, Incorporation by Registration: A Genealogy. Part V, Corporate Theory and Ideology will discuss in more detail the deployment of corporate theories in ways that produce ideological effects.



## **Incorporation by Registration: A Genealogy**

### **Introduction**

The debates that contributed to the development of the modern company legal form in England were concerned with three forms of business organisation. The first was the chartered corporation that possessed a separate legal personality through either a Royal Charter or special Act of Parliament. The second form was the unincorporated joint stock company and the third was small partnerships. These debates grappled with four main issues: 1) The appropriate level of accessibility for corporate charters; 2) Whether or not certain of the advantages of separate legal personality should be extended to the joint stock form; 3) Whether limited liability should be extended to the shareholders of joint stock companies; and 4) Whether a form of partnership should be introduced that permitted certain 'sleeping' partners to limit their liability.

My goal is to pursue a genealogical study of the speeches, debates and conflicts that contributed to the formation of the modern company legal form which in turn was to become the primary subject matter of corporate theory. The subject matter of this genealogy is the reforms made in company law in England from 1837 to 1856. I have

chosen this period because it involved intense discussion of all four of the issues raised above and it was during this period that two of the most important elements of modern company legal form became part of company law doctrine in England. They were the availability of corporate form through a process of registration and the limitation of the liability of shareholders for the debts of the company. Before beginning this study I wish to locate the 1837-1856 in a wider context with reference to contemporary secondary literatures. This overview will make the significance of this period more apparent and will also serve to emphasize the interconnectedness of the reforms made in this period to preceding and subsequent events.

### **The development of modern company legal form in England**

In 1844 *An Act for the Registration, Incorporation, and Regulation of Joint Stock Companies* (U.K.), 7/8 Vict., c. 110. was passed that made incorporation generally available via a process of registration. Prior to this Act incorporation had only been available via the grant of a Royal Charter or by a specific Act of Parliament. During this period 'Companies' unable to obtain incorporation were organised on a joint stock basis.

A joint stock company was a concern with a relatively large amount of shareholders who hold shares which were freely transferable and likely to be traded in the marketplace. Funds for such a concern were normally raised by way of a public offer of shares

organised by the promoters of the company. The legal organisation of this structure relied upon the use of a trust. The deed of settlement set out the mutual obligations of the directors, shareholders and trustees. Even if incorporation could not be achieved the use of a trust allowed joint stock companies to function effectively with a large and shifting number of subscribers. Certain procedural difficulties still existed with respect to actions brought by and against such extended partnerships but by and large the arrangement was workable.

The attitude of the State to the unincorporated joint stock company shifted to outright hostility in the wake of the South Sea Bubble scandal and similar collapses that had occurred with increasing frequency in the first two decades of the eighteenth century. This hostility culminated in the passage of the *Bubble Act* (U.K.), 6 Geo. I, c. 18. in 1720. The major assault on the joint stock company was contained in section 18 of the statute which made it illegal for bodies not incorporated by Charter or special Act of Parliament to act or presume to act as a corporate body or to raise or pretend to raise transferable stock. Hahlo<sup>89</sup> points out that companies which were incorporated by Charter or Act of Parliament were not precluded from utilising the joint stock form. So, the *Bubble Act* can be viewed as an attempt to restrict and control the use of the joint stock form and the trade in shares rather than as an outright prohibition. The use of charters for purposes not warranted by them was also prohibited<sup>90</sup> together with the formation 'of dangerous and

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<sup>89</sup> Hahlo, "Early Progenitors of the Modern Company Form" (1982) *Juridical Review* 139.

<sup>90</sup> Company promoters unwilling or unable to secure a new charter for their promotions would often attempt to purchase the charter of a dormant enterprise and use it as the vehicle for their own particular scheme.

mischievous companies, tending to the grievance of subjects of the realm'.<sup>91</sup> The provisions of the Act were not to apply to those enterprises formed before 24 June 1720.

Partially due to the collapse in public confidence in joint stock enterprises in the wake of so many spectacular collapses and partially due to the *Bubble Act*, joint stock companies were not to become a significant issue again until early in the nineteenth century. At that time an increasing number of 'partnerships' of a joint stock nature were formed. This resulted in the reactivation of the *Bubble Act* which hitherto had been rarely invoked. Several successful prosecutions were undertaken.<sup>92</sup> However, as the joint stock company became increasingly useful as a means to raise the large amounts of capital needed for the burgeoning industrial and financial enterprises of the period judicial attitudes softened somewhat. In 1811 several proprietors of the Birmingham Flour and Bread Company were charged under the *Bubble Act*.<sup>93</sup> The proprietors were found not guilty. There were two main reasons for this decision. Firstly, the Court considered that there were some restrictions applicable to the transfer of shares in this company. Secondly and more significantly the Court stated: "we think it impossible to say that it makes a substantive offence to raise a large capital by small subscriptions, without any regard to

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<sup>91</sup> See H.B. Buckley, *Joint Stock Companies*, 8th ed. by A. C. Clauson (London: Stevens and Haynes, 1902) around page 184 for further detail and case references.

<sup>92</sup> In *Buck v Buck* 1 Campb. 547, it was held that any company not incorporated and specifically empowered to possess such stock was illegal if it professed to have its stock divisible into shares transferable from one person to another without restriction. In *Rex v Dodd* it was held that a company with transferable shares based upon a prospectus which declared that no person could be accountable beyond the amount for which he should subscribe was illegal. For further details see Buckley, *Joint Stock Companies*, *supra* note 91.

<sup>93</sup> *R v Webb* (1811) 14 East 466., 104 ER 658.

the nature and quality of the objects for which the capital is raised.”<sup>94</sup> The ‘company’ in question was formed to more efficiently produce flour and bread in a time of soaring bread prices and hence was not judged to be mischievous. Thus, if a company had some restrictions on the transferability of its shares and the objects of the company were adjudged to be beneficial the proprietors of a joint stock company were not put in jeopardy by the *Bubble Act*.

In 1825 the *Bubble Act* was finally repealed. The *Bubble Repeal Act* (U.K.), 6 Geo. IV, c. 91.; the *Letters Patent Act* (U.K.), 4/5 Wm. IV, c. 94. of 1834 together with the *Chartered Companies Act* (U.K.), 1 Vict., c. 73. of 1837 all attempted to increase the number of joint stock companies that were formally registered and incorporated. These statutes still treated incorporation as a privilege and few unincorporated joint stock ‘companies’ attempted to gain registration.<sup>95</sup> The Board of Trade who had effective control over the granting of charters under the 1837 Act was extremely restrictive in its criteria and the cost of charters was often prohibitive.

Following the tabling of the report of the Select Committee on Company Law Reform chaired by Gladstone the *Joint Stock Companies Act, 1844* (U.K.), 7/8 Vict., c. 110. was passed. It effectively adopted the deed of settlement structure that had developed in the Court of Chancery and made it generally available through an administrative process. The

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<sup>94</sup> per Lord Ellensborough at 664.

<sup>95</sup> For a fuller account see L.C.B. Gower, *The Principles of Modern Company Law*, *supra* note 16.

important distinction was that this new statutory creature was a legal person, with a common seal, perpetual succession, the ability to own property, and the capacity to sue and be sued in the corporate name. Incorporation became available as of right rather than being a privilege or favour to be lobbied for.<sup>96</sup> The Act “encompassed all associations with transferable shares and all associations of 25 or more whether their shares were transferable or not.”<sup>97</sup> This suggests that the Act was designed specifically to apply to the economic form of the joint stock company. However, while the 1844 Act provided registered joint stock companies with a form of corporate legal personality it was not at the time considered to be identical to the legal personality of corporations (those entities incorporated by specific statute or Royal charter).<sup>98</sup> Grant, in his 1850 treatise on corporations said:

*... other companies [ i.e. firms organised on a joint stock basis] have been allowed by the legislation (which has been provided by that and other statutes for those purposes) to be erected with constitutions partaking to some extent of corporate character but in others being no more than partnerships ... for joint stock companies 7 & 8 Victoria c. 110, erecting bodies partaking of corporate powers but with several incidents of partnerships: they have been called quasi corporations.*<sup>99</sup>

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<sup>96</sup> Applicants were required to file prescribed particulars about the proposed company. After such filing the Registrar issued a certificate of provisional registration. The applicant then had to form a deed of settlement. To obtain the full benefits of the Act the deed then had to be registered.

<sup>97</sup> P. Ireland “The Rise of the Limited Liability Company”, *supra* note 55 at 242.

<sup>98</sup> Stein deals with this issue in some detail see P. Stein, “Nineteenth Century English Company Law and Theories of Legal Personality”, *supra* note 81 at 507.

<sup>99</sup> See J. Grant, *A Practical Treatise on the Law of Corporations* (London: Butterworths, 1850) at 625. Emphasis added.

One significant incident of partnership that incorporated joint stock companies shared with their unincorporated cousins was that members of the company were jointly and severally liable for the debts of the company. Joint stock companies attempted to provide limited liability for their members by contracting on the basis that creditors only had recourse to the funds of the company. However, unless the contract was one of a highly formalised nature, such as a contract for marine insurance, such clauses were held to be ineffective.<sup>100</sup> Thus, the new statutory companies were denied one of the major advantages of incorporation.<sup>101</sup> By the middle of the nineteenth century limited liability of the shareholders had become one of the main reasons for seeking corporate status. Gower cites the Wormley company charter ( granted in 1768 ) that specifically provided for the limited responsibility of the shareholders for the company's debts as an early example of this trend.

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<sup>100</sup> See for example *Re Sea Fire and Life Insurance Co* (1854) 3 De. GM & G 645. This citation is taken from Gower, *Principles of Modern Company Law*, *supra* note 43 at 36.

<sup>101</sup> At common law it had been held comparatively early that the members of a corporation were not liable for the debts of a corporation even in the case of a trading company. An early authority for this position was in *Banco Regis Edmund against Brown and Tillard* (1668) 1 Lev. 237, 83 ER 385. In that case a corporation's seal along with the signatures of the defendants were placed on a bond, the corporation was subsequently dissolved and it was held that the particular natural persons who signed the bond were not liable to repay the bond. Admittedly this protection was largely illusory as many corporate charters of this period empowered the Governors (analogous to present day directors) of a corporation to call on members to contribute funds to satisfy the corporations outstanding debts. These calls were known as levitations. An example of the Court compelling a levitation can be found in the case of *Salmon v Hambourough Company* (1671) 1 Ch App Cas. 204, 22 ER 763. The governors of the company were charged by the Court of Chancery to carry out a levitation to satisfy the creditors of the corporation on pain of contempt. The case also provides some indirect authority for the proposition that in extreme cases the creditors of the corporation could be subrogated to the Governors' powers to make 'levitations'. Gower also suggests that it was uncertain point as to whether corporations had the power to make levitations even if the power was not expressly included in their charters. (see *Principles of Modern Company Law*, *supra* note 16 at 26.) Nevertheless there were charters which expressly provided for limited liability of corporate members and unsurprisingly this became a sought after provision when seeking a corporate charter.

The question of whether limited liability should be extended to the shareholders of companies incorporated under the 1844 statute was the dominant issue in company law circles for the next decade. After eleven years of intense legal, legislative and public debate *The Limited Liability Act, 1855* (U.K.), 18/19 Vict., c. 133. was passed. Limited liability was extended to the shareholders of concerns with 25 or more members.<sup>102</sup> This number together with minimum capital requirements contained in the Act effectively restricted limited liability to the joint stock economic form. However, this situation was to alter rapidly:

*Within a year, however, the 1856 Joint Stock Companies Act [19 & 20 Vict. c. 47.] had both transformed the company legal form and greatly extended its ambit. It not only dispensed with the minimum capital requirements, minimum share denominations and the distasteful publicity requirements of the old law, but enabled associations of only seven persons to incorporate..<sup>103</sup>*

The 1856 Act made limited liability of shareholders more or less a standard incident of the company legal form. The Act also set in train a process whereby a cleavage was created between a particular economic form (joint stock) and the company legal form. Gradually the company form lost any necessary connotations as to the economic form of the enterprises that could incorporate. This change occurred in the same time frame as the shift in legal doctrine and jurisprudence away from the notion that a company (or

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<sup>102</sup> At the same time Robert Lowe introduced the Limited Liability Bill attempts were made to reform the English law of partnership. The Partnership Amendment Bill proposed to introduce a limited partnership or *commenda* similar to that which was existence on the continent. However, these reforms did not eventuate and the Partnership Amendment Bill was allowed to lapse.

<sup>103</sup> P. Ireland, "The Rise of the Limited Liability Company", *supra* note 55 at 244-245.



corporation) was legally distinct from its members but somehow still comprised of them to the current conception of the company as entirely separate from its members.

At the time of its enactment there were two prevailing views regarding the ambit of the 1856 legislation. Robert Lowe and Robert Collier argued that the legislation was intended to apply only to the joint stock economic form. They supported this contention by drawing attention to the bill to amend the law of partnership which was introduced contemporaneously with the Companies bill:

*"Lowe stressed that the Joint Stock Companies Bill was meant to amend the law relating to joint stock companies only, explicitly rejecting as undesirable the extension of limited liability to partnerships and sole traders through the widening of its scope to associations of fewer than seven. He objected, not to granting such enterprises limited liability, but to incorporating them, arguing that it would render their acts open to 'constant ambiguity'."*<sup>104</sup>

However, some argued that the proposed legislation had a potentially broader application. "Alexander Hastie a staunch opponent of limited liability, contended that the Bill, even as it stood, could be used or 'abused', by associations fewer than seven. An individual, he said, merely had to give a single share to six others - 'it might be his servants'."<sup>105</sup> It was this very situation that was brought before the House of Lords in *Salomon v. Salomon & Co. Ltd* [1897] A.C. 22 some 40 years later.

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<sup>104</sup> *Ibid.* at 242-243.

<sup>105</sup> *Ibid.* at 243.

Hastie's observations did not make much initial impact on the process of company law reform. The 1867 Select Committee on Company Law "treated it as axiomatic that company law reform meant reform of the law applicable to joint stock companies."<sup>106</sup> Before exploring the rise of what we today would call the 'private' company I would like to describe some related developments in the jurisprudence associated with the company legal form.

Nathaniel Lindley, in his 1860 treatise *On the Law of Partnerships, including its application to Joint Stock and other Companies*, did not attribute to the company legal form a legal existence that was *entirely* separate to that of its shareholders.<sup>107</sup> This view is also present in the doctrine of the time. For example in *Myers v. Perigal* (1851) 2 De. G. M. & G. 599 the company was described as having "carried on their concerns". As Ireland *et al.*<sup>108</sup> have pointed out, up until the mid-nineteenth century incorporation did not imply the creation of an entirely separate entity. Rather, the corporate entity was seen as linked to the incorporators - the analogy to partnership was close.<sup>109</sup> The Company Act of 1856 provides evidence of this: "Section 3 of the 1856 Act stated that: "Seven or more persons may form *themselves* into an incorporated company." Evidence of the conceptual

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<sup>106</sup> *Ibid.* at 246.

<sup>107</sup> P. Stein, "Nineteenth Century English Company Law and Theories of Corporate Personality", *supra* note 81 at 511 makes this observation about Lindley's view. I agree with his assessment but disagree with his further argument that Lindley's view represented the refusal of any essential characteristic of incorporation.

<sup>108</sup> P. Ireland, I. Grigg-Spall, D. Kelly, "The Conceptual Foundations of Modern Company Law" (1984) 14 *Journal of Law and Society* 149.

<sup>109</sup> *Ibid.* at 149-151.

shift to viewing the company as an entirely separate entity can be seen in the omission from the corresponding section of the 1862 Act (s.6) of the words "themselves into".<sup>110</sup>

Ireland *et al.* attribute this conceptual shift to the changing nature of the joint stock share from one of realty to that of a right to revenue only. While I agree that this factor is significant there were other important factors. These factors included the reception into English legal discourse of the German juristic concept of *juristische Personen*<sup>111</sup> and the connection of the discourses concerning 'legal' persons with the statutory company form. These changes together with ongoing processes of commercialization and objectification of relations within civil society (and the fact that the company legal form was becoming increasingly significant as the vehicle used to pursue such relations) contributed to the ongoing abstraction or reification of the corporate entity.

By the 1870's the conception of the corporation as entirely separate from its members had taken on the status of orthodoxy in jurisprudential writings. Writers such as Markby and Pollock had adopted J.C Savigny's romanist conception of the *juristische Personen* into their particular versions of fiction theory.<sup>112</sup> The previous views were not simply overturned or repressed *but rather (re)presented as a form of 'misunderstanding' the effects of incorporation.* Peter Stein has reported that:

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<sup>110</sup> *Ibid.* at 150

<sup>111</sup> One of the first mentions of the concept of legal persons in English jurisprudence was made by John Austin in his 1831 book *The Province of Jurisprudence Determined*. See Stein, "Nineteenth Century English Company Law and Theories of Legal Personality", *supra* note 81 at 509.

<sup>112</sup> *Ibid.* at 514.

*"In the 1870s Seward Brice, reflecting upon Kyd's 1793 definition of a corporation as 'a collection of individuals united into one body', commented: '[It is] fairly accurate ... but sufficient stress is not laid upon that which is its real characteristic in the eye of the law, viz. its existence separate and distinct from the individual or individuals composing it.'"*<sup>113</sup>

*Ashbury Railway Co v. Riche* (1875) L.R. 7 H.L. 653. was one of the first instances where a company was conceived of as an entity entirely separate from its shareholders in legal doctrine. Prior to this case there had been a number of decisions that allowed an *ultra vires* action of a company's directors to be subsequently ratified by the shareholders - directors were considered to be the agents of the shareholders. Lord Cairns rejected this view pointing out that "the purpose of the Companies Act<sup>114</sup> in restricting the scope of the companies activities to the objects stated in the Memorandum of Association was not merely to protect the shareholders but also to protect the public ... If, therefore, a contract which was purported to be made on behalf of a company was *ultra vires*, it was void *ab initio* and nothing that the shareholders decided subsequently could validate it. The company was a distinct person from the shareholders, who should therefore not be equated with partners."<sup>115</sup>

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<sup>113</sup> *Ibid.* at 517.

<sup>114</sup> This refers to the *Companies Act, 1862* (U.K.), 25/26 Vict., c. 89. which consolidated the legislation pertaining to companies from 1844 onwards.

<sup>115</sup> P. Stein, "Nineteenth Century English Company Law and Theories of Legal Personality", *supra* note 81 at 513.

Around the time that the company legal form was beginning to closely resemble the reified conception with which we are familiar, consciousness of 'private' companies as a separate issue that needed to be addressed began to emerge. Shannon argues that although the use of the company legal form by economic partnerships or sole traders can be detected in the 1860s this move was checked by the backlash against the company form that occurred as a result of the financial crisis of 1863-65.<sup>116</sup> The 1877 Select Committee manifested an awareness of the existence of private companies; however, they were ambivalent to the question of whether or not they constituted an abuse of the Companies Act of 1862 (this Act had substantially the same prerequisites for incorporation as the 1856 Act, including the need for at least seven members). Also, in 1877 F. B Palmer "wrote a small book entitled *Private Companies: their formation and advantages*, a 'concise popular statement of the mode of converting a business into a private company, and the benefits of so doing'. In it Palmer argued that *any* business - regardless of its economic form - could 'convert' and adopt the company legal form."<sup>117</sup> In 1881 the popular distinction between private and public companies had been noted by Lord Justice Cotton in *Re. British Seamless Paper Box Co. Ltd* 17 Ch. Div. 467. From the late 1870's onwards the number of company registrations began to increase and this increase was in no small part due to the rise of the private company.<sup>118</sup>

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<sup>116</sup> Shannon, "The coming of General Limited Liability" (1931) 2 Economic Theory 267.

<sup>117</sup> P. Ireland, "The Rise of the Limited Liability Company", *supra* note 55 at 246.

<sup>118</sup> "In 1896, the Registrar stated that: 'The registrations of the previous years have been largely increased by the great number of private businesses that have been converted into [sic.] joint stock companies ..., sometimes spoken of as private companies ...' (*Ibid.* at 247) However, it is important to note that the private company and the company legal form in general were very much still emerging rather than dominant forms of business organisation:

... the Registrar of Companies, giving evidence before the 1886 Royal Commission on the Depression in Trade and Industry, estimated that in the five year period to the end of 1884, "during which the practice (of 'private'

Perhaps the single most significant case in English jurisprudence that dealt with access to the company form by economic forms of enterprise other than joint stock companies was the *Salomon* litigation. In 1892 a 'leather merchant and hide factor, wholesaler and export boot manufacturer' entered into a series of agreements and transactions that had the effect of transferring ownership of his business to a limited liability company which was formed for that express purpose - A. Salomon and Company Limited. The company was formed under the auspices of the *Companies Act, 1862* (U.K.), 25/26 Vict., c. 89. "The nominal capital was 40 000 l. , divided into 40 000 shares of one pound each. The memorandum was subscribed by Aron Salomon and his wife and daughter and his four sons each subscribing for one share. Aron Salomon afterwards had 20 000 shares allotted to him. No one else ever had a share in the company."<sup>119</sup>

On 26 January 1893 debentures to the value of 10 000 l. were issued to Aron Salomon by the company. These debentures formed part of the purchase price of the business. Using these debentures as security Aron Salomon obtained a loan of 5 000 l. from Edmund Broderip. On 5 February 1893 the original debentures were canceled "and

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*firms availing themselves of the Acts) has principally prevailed', some 560 had been registered, about 400 of which were believed to be still carrying on business. Overall though, the Commission demonstrated the relative unimportance of companies, legal or economic, at this time. (Ibid.)*

However, the tendency to use the company legal form in England was on the rise and it was given further impetus by the trend towards falling profits in the last quarter of the nineteenth century. "The Royal Commission set up to in 1885 to investigate the depression collected considerable evidence of contracting profit margins attributing them to falling prices (the average 40 per cent fall between 1873 and 1896 traditionally defines the period), protectionism abroad and 'overproduction'." (*Ibid.* at 249.)

<sup>119</sup> *Broderip v. Salomon* [1895] 2 Ch. 323 at 325.

in lieu thereof, with the consent of the appellant (Aron Salomon) as the beneficial owner, fresh debentures to the same amount were issued to Mr. Broderip in order to secure the repayment of his loan with interest at 8 per cent.”<sup>120</sup> Aron Salomon in turn loaned this 5000 l. to the company. Due to the effects of the loss of government contracts, strike action, and a general economic downturn the company ran into financial difficulties and was unable to sell its stocks of boots and shoes. The company subsequently defaulted upon interest payments due on the debentures held by Mr. Broderip.

Edmund Broderip commenced an action on October 11, 1893 to recover the interest and principal owing to him. An official receiver was appointed on October 25, 1893 and the following day an order was made for the compulsory winding up of the company. Assuming that the principal and interest owing to Broderip was paid out there would be an amount of 1055 l. remaining. The company had outstanding debts of 7733 l. 8s. 3d. to unsecured creditors. Aron Salomon as the beneficial owner of the debentures thought that he was entitled to the remaining 1055l. as debt had priority over the unsecured creditor and he was not personally liable for the company's debts. The liquidator considered that Aron Salomon was responsible for the company's outstanding debts.<sup>121</sup>

In the Chancery Division of the High Court orders to the following effect were made on February 14, 1895: The company was entitled to be indemnified by Aron Salomon to

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<sup>120</sup> *Salomon v. Salomon & Co. Ltd.* [1897] A.C. 22 at 24. per Lord Watson.

<sup>121</sup> These figures are taken from Lord Watson's statement of the facts in the case *Salomon v. Salomon & Co., Ltd.* [1897] A.C. 22 at 24.

the sum of 7733 l. 8s. 3d., (the amount outstanding to unpaid creditors). Further, the company was declared to be entitled to a lien for that amount upon all sums payable by the company to Mr Salomon including any amounts due to the debentures and Mr Salomon had no claim to any assets of the company until such time as the company's outstanding debts had been discharged.<sup>122</sup> Although the business had been transferred to the company in circumstances absent from any fraud Aron Salomon's status as a shareholder with limited liability did not protect him from this result. Aron Salomon appealed and on May 28, 1895 three judges of the Court of Appeal unanimously upheld the original orders.<sup>123</sup> The implications of this decision were clear - the private company was threatened with legal extinction.

The final act of this three part drama was played out in the House of Lords. Aron Salomon (now making his appeal as a pauper) was represented by no less than three Q.C's including Sir Henry Burton Buckley, (author of *Buckley's Joint Stock Companies* and later to become Lord Justice Buckley). The result was a complete reversal of the decisions of both Vaughan Williams in Chancery and the Court of Appeal. On November 16, 1896 all six Law Lords found in favour of Aron Salomon. This decision cemented the concept of the company as entirely separate to its members and also placed the use of the company form by all types of economic enterprises on a more secure footing.

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<sup>122</sup> For the full wording of the orders see *Broderip v. Salomon* [1895] A.C. 323 at 332-333.

<sup>123</sup> Although it is unnecessary to go into detail for present purposes the reader should be aware that the Court of Appeal upheld the original orders using reasoning that differed substantially from that of the judge at first instance.



The most common explanation of *Salomon* goes as follows: A company is a distinct legal entity which is entirely separate from its shareholders. This is the necessary and logical implication of incorporation. If a person sells their business to a company in a manner which ensures they retain effective control over the business the mere fact of this effective control is insufficient of itself to justify 'piercing' the corporate veil. If one projects this contemporary view of the implications of incorporation onto the decision the final outcome in the case is unproblematic. However, such an exercise leaves some nagging questions: Why had such a self evident conclusion not been stated in doctrinally authoritative form much earlier? Why did the judges in the lower courts reach the opposite conclusion? The most common answer to these inquiries is that it was not until the decision in the House of Lords that the "true nature and effects of incorporation were fully grasped even by the courts, since which time the complete separation of the company and its members have never been doubted."<sup>124</sup> Up until that point the notion of separate personality had been unclear and the judges in the lower courts had simply been misled as a result of this confusion.

I take issue with the notion that the decision of the House of Lords in the *Salomon* case can be interpreted as the final correction of a long-standing cognitive error. I agree with Ireland's *et al.* analysis that this explanation represents an overly "teleological

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<sup>124</sup> P. Ireland, I. Grigg-Spall, D. Kelly, "The Conceptual Foundations of Modern Company Law", *supra* note 108 at 152

reading of the past which as Foucault and others have argued turns it into a 'confused and stuttering version of the present'.<sup>125</sup> Firstly, the concept of separate legal personality had received considerable attention in English jurisprudence well before the turn of the century. This was a jurisprudence with which the judge(s) in Chancery and the Court of Appeal that heard the case were well familiar. The interpretations of the concept of separate legal personality were far more sophisticated and self conscious than the story of cognitive error admits. Secondly, this view mistakenly assumes that there is some necessary and fixed implication of incorporation waiting to be discovered. On the contrary, the implications that were attributed to the incorporation process by the Law Lords were the result of a series of specific historical events and struggles. *Salomon* is just another, albeit important, event in this genealogy; it is not the climatic discovery of the true nature of a pre-existing entity.

The process had come full circle, the company legal form had gone from being a legal form in a state of flux with rigid economic connotations to a relatively fixed legal form that could be adopted by economic organisations of differing types. I will now proceed with a genealogical study documenting the events from 1837 to 1856 that contributed to this process.

### **Outline of the Genealogy**

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<sup>125</sup> *Ibid.*

This study will focus upon four interrelated aspects of the debates, expert reports, opinions of political economists and lawyers, and legislation that will be examined. First, the language used, not in the sense of semantics or a hermeneutic inquiry into inner meanings; but language as “ways in which the world is made intelligible and practicable and domains constituted which are amenable to interventions by administrators, politicians and experts ....”<sup>126</sup> What is interesting in the material to be examined is that actors on either side of the debate often state their claims in language that draws upon the government rationality of classical liberalism. The outcome of a specific debate often depended not upon clashing world views but upon who could mobilise and deploy this rationality in a more effective manner.

Second, given this view of language it will be useful to inquire into the techniques and procedures that the various actors put forward as a way of actualising the company. Specific techniques were used to attempt to make the company amenable to administration. These techniques were to be deployed in a manner that would facilitate commerce and enhance the rational calculating capacities of the liberal citizen.

Thirdly, the consideration of the techniques employed will be used to highlight some of the different strategies that were pursued. A consideration of strategies<sup>127</sup> does not entail speculations of a psychologizing nature; but more of a focus upon *how* these

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<sup>126</sup> N. Rose, “Government, authority and expertise in advanced liberalism”, *supra* note 77 at 288-289.

<sup>127</sup> The usage of strategy here follows how the term was used in Part II of the thesis: The pursuit of interests by agents through discursive practices.

interests were pursued. The heterogeneity of the strategies that were pursued in relation to limited liability reforms should also be noted. Some reformers were concerned with how to best utilise the rising savings of the middle and working classes. Others were concerned to ensure that the attitudes of the working classes were shaped so that they were compatible with capitalism. Other strategies pursued involved liberal projects of enhancing the citizenry's capacities to calculate security and risk. All these positions played a role in the shift from the regulatory techniques employed in the *Joint Stock Companies Act, 1844* (U.K.), 7/8 Vict., c. 110. to those used in *The Joint Stock Companies Act, 1856* (U.K.), 19/20 Vict., c. 47. Similarly those opposed to the extension of limited liability also contributed to the development of company law doctrine. The concern that limited liability would sever the link between action and individual responsibility and lead to an erosion of commercial morality was ever present in the debates. As will be seen this factor helps explain why limited liability was extended to shareholders in the company form but corresponding legislation was not passed in the case of traditional partnerships.

This leads on to the fourth point: the hegemonic position that the pro limited liability position attained was one that involved the convergence of a number of views and was subject to ongoing negotiation, contestation and sometimes open hostility. So, not only is there a clash of views occurring within the context of a common government rationality (classical liberalism) there is also, in relation to limited liability, an unstable and varying

balance of power with respect to public opinion, expert opinion (expressed in parliamentary reports) and legislative action.

The primary linkage between the political authority of Parliament and other authorities is provided by the various Reports commissioned by Parliament from 1837 though to 1854. These Reports often surveyed the views and took evidence from eminent 'men of commerce', lawyers specialising in partnership and joint stock company law, and political economists. The prevailing weight of the evidence in the Reports or the views of particularly eminent witnesses were often utilised within the debates around key pieces of legislation: How best to govern so as not to interfere? The 'liberal' politicians of all party persuasions drew heavily upon expertise to assist them in answering that question. The following sections will try to portray the dynamism of the interactions between members of the Board of Trade (most notably Robert Lowe), pro-limited liability MP's, political economists such as Nassau Senior and J.S. Mill, along with reformers such as Robert Slaney who were concerned with the elevation of the working classes. Arrayed against these proponents of limited liability were: (1) Economists such as Tooke who still took the Adam Smith line regarding companies (they could never match owner-operators for diligence and efficiency). (2) Sections of big 'capital' - wealthy individuals involved in the substantial partnerships of relatively few members who dominated many sections of English commerce at the time and who were concerned about the potential competitive threat posed by companies. (3) MP's who took the conservative view that limited liability

would lead to irresponsible behaviour and damage the international standing of the English merchant.

The study is divided into four sections. The division is made for the sake of convenience and coherence as the 'periods' considered are roughly chronological in order. The first set of events to be considered are grouped around the publication of Bellenden Ker's report on the law of partnership in 1837 and also an early parliamentary debate on the issue of limited liability which was conducted in the context of whether or not to grant limited liability to the members of the Dublin Steam Packet Company. The second focuses upon the period 1837-1844. During this period there was not only the continued growth in joint stock railway companies but also big growth in the number of joint stock banks. The period is marked by widespread concern about frauds being perpetrated upon unwitting investors by unscrupulous company promoters. This concern was voiced heavily in the Report of 1844 and culminated in the passage of the *Joint Stock Companies Act, 1844* (U.K.), 7/8 Vict., c. 110. The third period begins in 1845 and traces some of the events that led to the enactment of *The Limited Liability Act, 1855* (U.K.), 18/19 Vict., c. 133. Notable features of this period included rising savings of the working and middle classes, the continued growth in the use of the joint stock form in mining, banking and railways. Also important were the Reports of 1850, 1851 and 1854 together with the Parliamentary debates sparked by those Reports. The final period to be considered is that surrounding the debates that led to the enactment of *The Joint Stock Companies Act, 1856* (U.K.) 19/20 Vict., c. 47., particularly the views that motivated the last ditch resistance to

the Bill in the House of Lords and the failure of the proposals to amend the law of Partnership to match the reform in company legislation.

### 1834-1837: The question of *en commandite* partnership

In 1825 the *Bubble Repeal Act* (U.K.), 6 Geo IV., c. 91. had been passed and it was once again legal to organise a business on a joint stock basis without the benefit of a royal charter or private Act of Parliament. The years 1824-1825 had seen a strong growth in the economy that was accompanied by increased use of and speculation in joint stock companies. However, 1825 turned out to be a year of crisis for the joint stock form:

*In June, there occurred a sharp recoil in the markets for both securities and goods. Interest rates had risen. There was more careful evaluation of prospects of individual undertakings and speculators were finding it difficult to pay up installments, having relied for some time on the profits accruing from the continuous rise in prices to make good on successive calls. In July, the Committee of the Stock Exchange had cautioned members against dealing in shares of companies with the 'respectability' of which they were not thoroughly acquainted. By November, various companies dissolved 'in consequence of impediments which had presented themselves,' were paying off deposit balances. In December, following the failure of several private banks, panic set in and the values of shares fell sixty to eighty per cent or vanished. The majority of the companies organized in the preceding two years went down in the collapse. 'We were brought to the end of a South Sea year and no one could wonder at the concussion from the fall of such a water spout.'*<sup>128</sup>

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<sup>128</sup> B. Hunt, *The Development of the Business Corporation in England* (Cambridge, Mass: Harvard University, 1936) at 44-45.

Hunt cites a contemporary commentator Henry English who estimated that of the approximately 624 enterprises floated during this speculative period only 127 were still in existence by 1827.<sup>129</sup> This crash depressed speculative joint stock activity for a considerable period of time. Speculative investment in joint stock companies became so rare that the *Letters Patent Act* (U.K.) 4/5 Wm. IV, c. 94., designed to allow the Board of Trade to grant particular attributes of corporate status to joint stock companies, was passed with little or no opposition. However the stated policy of the Board of Trade reveals the persistence of restrictive attitudes towards joint stock companies and the notion of general incorporation:

*Although the Act undoubtedly confers upon the Crown the power of granting limited privileges to Public Associations ... and specifically points to that of suing and being sued by their Secretary as one desirable not only for the benefit of such associations, but of the Public with whom they deal, it is necessary to take care that such powers are not conferred indiscriminately, and that so long as the present laws of Partnership remained unchanged, ... facilities should not be afforded to Joint Stock Partnerships which may interfere with private enterprise carried on under those laws unless the objects of such companies are of a nature fully to justify such interference upon the ground of general public advantage.<sup>130</sup>*

Thus, chartered corporations were equated with privilege and monopoly. Their existence was only justified if the purpose they pursued had public benefits that justified the granting of the privilege. The existing laws of partnership represented the 'natural' way in which business was conducted. Corporations represented a disruption to this

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<sup>129</sup> *Ibid.* at 46.

<sup>130</sup> *Board of Trade Papers*, 5/42, fols. 259-62 (November 4, 1834) as quoted by B. Hunt, *Ibid.* at 57.



'natural' order and thus the grant of charters should be kept to a minimum. By the mid 1830s however events had led to some initial queries regarding the utility of the English law of partnership.

First, despite the memories of 1825 the speculation in joint stock schemes reappeared in earnest. "By 1836, ministers of the Crown, 'struck with astonishment' were once again seriously warning the country against 'the rage for the formation of joint stock companies, having for their professed objects matters exceeding in absurdity those of the companies of the year 1825'."<sup>131</sup> There was also strong growth in joint stock banks and the years 1835-1837 also saw a boom in railway companies many of which were organised on a joint stock basis. "In 1835, thirty-five companies were actually promoted, having a total nominal capitalization of over 34 million l., from 1834 to the end of 1836, there were eighty-eight all told, capitalized at approximately 70 million pounds."<sup>132</sup> Although not as severe as the crash of 1825 (in this instance the vast bulk of joint stock banks survived)<sup>133</sup> there was an economic downturn in 1837. Furthermore there were some serious technical problems with the large partnerships formed during this period, particularly with regard to actions against such a partnership. These difficulties are exemplified by the case of *Von Sandau v. P. Moore, M.P. et. al.* (1825) 1 Russell 472 at 441: "the Court holding that the defendants could not be bound to answer jointly and there was no reason in fact, why the

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<sup>131</sup> *Ibid.* at 61.

<sup>132</sup> *Ibid.* at 57. Here Hunt is quoting directly from page 4 of the appendix of U.K., H.C., "Report of Select Committee on Joint Stock Companies" No 413 in *Sessional Papers* (1844) vol. VII, 1.

<sup>133</sup> "Most of the joint-stock banks established during the period maintained their footing through the crisis and violent liquidation of 1836-37." (*Ibid.* at 70.)

whole 300 shareholders might not have answered separately.” This posed serious difficulties for anyone trying to sue such a large partnership. Firstly, it would often be impossible to ascertain and correctly name all the existing partners. Secondly, the expense of having to consider each and every partner’s defence and argue the case against all these partners’ legal representatives would be prohibitive. Another serious issue was that in the instance of a dispute between partners relief often only lay in equity and often relief in equity was predicated on a dissolution of the partnership. Thus a partner with a genuine grievance had to weigh remedying this against the expense and inconvenience of dissolving a large partnership.

This combination of factors motivated Poulet Thompson, the President of the Board of Trade, to set up an enquiry headed by lawyer Bellenden Ker.<sup>134</sup> Ker’s view was that one shouldn’t have companies “for objects such as private individuals are perfectly able to accomplish.”<sup>135</sup> The report was primarily an investigation into the question of whether or not it would be desirable to introduce the *en commandite* form of partnership into English law. This form of partnership had a long history in France, Spain, the Netherlands and was also being used in several jurisdictions in the United States. Basically, it consisted of a small number of active partners who had full powers of management and who were jointly and severally liable for the whole of the partnerships debts. Added to this

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<sup>134</sup> U.K., H.C., “Report on the Law of Partnership” No. 530 in *Sessional Papers* (1837) vol. XLIV, 399. This Report was reproduced as an appendix to U.K., H.C., “Report of Select Committee on Joint Stock Companies” No 413 in *Sessional Papers* (1844) vol. VII, 1. All subsequent pinpoint page references to the “Report on the Law of Partnership” refer to the page reference from the Appendix to the 1844 Report.

<sup>135</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. XXXIII col. 689 (1836).

management core were any number of 'sleeping' partners who were prohibited from taking part in the day to day management of the partnership but whom were only liable for the partnership's debts up to the fixed amount of capital which they contributed. In most jurisdictions where the *en commandite* was in use the name of the 'sleepers' together with the amounts they had contributed had to be published. The *en commandite* form thus represented a compromise between the traditional English law of partnership whereby even the most casual shareholder was liable 'to their last shilling and acre' and a situation where general incorporation was available with limited liability for all shareholders.

The vast majority of merchants and lawyers who gave evidence before the Committee were against the introduction of the *en commandite* partnership into English law. The prevailing view was that the *en commandite* would not be able to compete with traditional partnerships. This was based on the view that a manager who did not have substantial assets at stake in the business would not be as diligent in their duties as a full partner would be. It was assumed that most managing partners in *en commandite* partnerships would not be persons of substantial assets. The vast bulk of those who gave evidence feared that if individuals were not held responsible for their actions then they might be induced into employing this more inefficient mechanism to carry out business. Such a reform was seen an interference with the 'natural' state of the law (and thus an unwarranted interference with civil society) that would prove damaging to commerce. The evidence of the political economist Thomas Tooke is representative of this dominant viewpoint:

*On the slightest reflection, however it must be obvious that the commandite is a privilege and has not the shadow of foundation as a natural right. The general if not universal rule of commercial transaction is, that the individual is liable, to the full extent of his [sic] means, for the engagements entered into by himself, or on his behalf, or jointly with others; and it is only by the interposition of a special law that he can be shielded from the more general one of being answerable in all cases, by the whole of his property, and, in some cases by his person for such engagements ... The privilege might operate in the way of a premium sufficient to induce a use of the inferior, instead of the better instrument, for carrying on the trade of the country.*<sup>136</sup>

Tooke's view prevailed. Any business organisation that involved limited liability and extended corporate structure was perceived as less efficient than individual enterprise. Use of a corporation was a valid governmental technique in circumstances where a corporation was the most effective vehicle for raising the capital needed to accomplish an object beneficial to the public. However, it was a technique that had to be jealously guarded so as not to damage the capacities of British commerce or the decision making abilities of citizens. As a result of Ker's Report the *Chartered Companies Act* (U.K.), 1 Vict., c. 73. was passed. The object of the Act was to facilitate the granting of incidents of incorporation in deserving cases. The manner in which the Board of Trade administered the Act was restrictive and betrayed the prevailing prejudice in favour of individual enterprise. "In several cases, the fact that the business was already being carried

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<sup>136</sup> U.K., H.C., "Report on Law of Partnership" No. 530 in *Sessional Papers* (1837) vol. XLIV 399 at 270 (emphasis added). Another eminent political economist Nassau Senior argued that it is imprudent to force people to be sensible. People should be free to associate for the purposes of commerce in any manner they see fit. He also thought that the *en commandite* might be beneficial as it would allow the combination of people with smaller capitals to combine and challenge the dominance of the great commercial houses. However, this view was very much a minority one. (*Ibid.* at 300)

on successfully by partnerships 'having no Privilege of Incorporation' was a factor sufficiently adverse in the eyes of the Board."<sup>137</sup> The only real change in the law that was in any way favourable to the limitation of responsibility was that under the 1837 Act a shareholder's responsibility for shares ceased upon transfer of shares.

The views expressed by Bellenden Ker and the bulk of the 'experts' he took evidence from was essentially replicated in an early debate on the issue of limited liability. In 1836 the English House of Commons had before it a bill to extend limited liability to the members of the Dublin Steam Packet Company.<sup>138</sup> The contribution of Henry Parnell seemed to best capture the mood of the House when he said: "Private adventures could not go into competition with a company managed on the principle of non-liability ... The business of a company, the partners in which were not liable for loss beyond a certain amount was never conducted upon the true principles of trade and commerce."<sup>139</sup> As Emmerson Tennant put it: "It was he contended, most unfair that they should be permitted with a limited responsibility to compete with companies, every proprietor of which was responsible to the last farthing of his property."<sup>140</sup> One participant Dr. Bowring argued that one day limited responsibility would be recognised as the more judicious principle.<sup>141</sup> However, Bowring's argument was not the argument advanced by the majority of those

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<sup>137</sup> B. Hunt, *The Development of the Business Corporation in England*, *supra* note 128 at 58.

<sup>138</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. XXXII, 1187. The initial details of this debate were taken from B. Hunt, *The Development of the Business Corporation in England*, *supra* note 128 at 72.

<sup>139</sup> *Ibid.* at 1189-90.

<sup>140</sup> *Ibid.* at 1186-87.

<sup>141</sup> *Ibid.* at 1194.

pushing for the passage of the bill. They adopted the dominant position and argued that although limited liability was undoubtedly a less efficient mechanism for the carrying on of trade that it was justified in this instance because of the great public benefits that would accrue by stimulating industry in Ireland. The prejudice in favour of individual enterprise however was too strong in this instance for even this argument to prevail. The attempt to have the bill read a third time was put off for another six months.

#### **1838-1844: Fraud and joint stock companies**

As early as 1838 it became apparent that the goal of making corporate charters readily available and less expensive was not being met by the 1837 *Chartered Companies Act* (U.K.), 1 Vict., c. 73. A new trading companies bill designed to effect this object passed through the House of Commons in 1838 but met defeat in the House of Lords. One of the principal opponents of the proposed reform was Lord Brougham who soundly condemned the measure:

*Verily, limited liability was 'contrary to the whole genius and spirit of English law, contrary to the genius and spirit of the Constitution!' Furthermore it would 'relax that care and vigilance which every partner ought keep over his associates'. Indeed the new bill would give 'a licence to every species of fraud'.<sup>142</sup>*

The bill lapsed and no renewed efforts were made to reintroduce a similar measure during this period. Indeed by 1844 Gladstone (the then President of the Board of Trade) had made it clear that the Board found its duties under the 1837 Act far too onerous as they were.<sup>143</sup>

So although the *Joint Stock Companies Act, 1844* (U.K.), 7/8 Vict., c. 110. was an advance for joint stock enterprise in that it gave them a statutable position this was not done in order to afford limited liability to their members; rather it was an attempt to make this particular form more amenable to regulation. The provisions of the Act were heavily influenced by the concerns and conclusions of the U.K., H.C., "Report of Select Committee on Joint Stock Companies" No. 413 in *Sessional Papers* (1844) vol. VII, 1.

The object of the 1844 Report was stated to be "the greater security of the public".<sup>144</sup> This focus was in response to repeated calls for the regulation of the activities of joint stock companies, particularly the activities of the promoters of joint stock companies.

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<sup>142</sup> U.K., H.L., *Parliamentary Debates*, 3d ser., vol., XLIV, col. 1207 (1838, Lord Brougham). as quoted by B. Hunt, *The Development of the Business Corporation in England*, *supra* note 128 at 84.

<sup>143</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. LXXXVI, col. 276 (1844).

<sup>144</sup> U.K., H.C., "Report of Select Committee on Joint Stock Companies" No. 413 in *Sessional Papers* (1844) vol VII, 1 at iii.

With this in mind the Report classified three types of 'bubble' companies that required attention. Firstly, those founded on unsound calculations and having no possibility of success. Secondly, those so ill constituted as to render it probable that failure incident of mismanagement would attend them. Thirdly, those which were simply fraudulent in object.<sup>145</sup> The Report suggested that the following principles would serve to provide a remedy: For those companies which were simply frauds, publicity was the key. It was considered that the publication of pertinent information would 'baffle every case of fraud'. Such information included the names of directors, the amount of paid up capital, and the company's principal place of business. For those companies the formation of which was based on unsound calculations the remedy was more problematic. The attitude of the Committee and those who gave evidence was that it was impossible to legislate against cupidity. The only concrete measure suggested was ensuring that prospectuses were published and made available so that investors had something upon which to make a decision. The Committee felt that publicity alone would not guard against company failure caused by poor management. The Report suggested a number of other measures including requirements for regular meetings and the periodical balancing and audit of accounts. It was also proposed that directors should be made more accountable to the shareholders of a company.<sup>146</sup>

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<sup>145</sup> *Ibid.*

<sup>146</sup> *Ibid.* at v.



So the aims that the Committee thought appropriate were centred around two major themes. The first was the need for publicity throughout the process of company promotion and registration together with making available to the public an accurate record of share transfers. The second was a concern to ensure that sound regulations were instituted for the conduct of company. It is important to keep in mind that the emphasis on publicity resulted in a great deal of information being gathered and made available to government and administrators about the company form. The Committee sought to structure and organise the activities of companies in order to make them more governable and calculable. This goal was explicitly stated in the Report:

*... if it should be found hereafter that the expedients thereby contemplated do not meet the full extent of the evil, they [the Committee members] feel that by the establishment of the proposed plan of registration, the Legislature may obtain information of a trustworthy character which will thus be collected and may proceed with more confidence to supply the provisions which shall be found wanting.<sup>147</sup>*

The *Joint Stock Companies Act, 1844* (U.K.), 7/8 Vict., c. 110. closely followed the principles set out in the Report of 1844. It cast a wide net in regards to the entities that were subject to its provisions. Section II defined a joint stock company to include:

*Every partnership whereof the capital is divided or agreed to be divided into shares, and so as to be transferable without the express consent of all the co-partners ...  
Every partnership which at its formation or by subsequent Admission (excepting any Admission on Devolution or other Act in Law), shall consist of more than Twenty-five members.*

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<sup>147</sup> *Ibid* at v-vi.

The Act was to apply to all new joint stock companies and also set out the requirements and the means for existing joint stock enterprises to obtain registration. "The Act provided most joint-stock promoters with generous access to incorporation in a two-step process."<sup>148</sup> Section IV required that before company promoters could publicise a company promotion in any manner they had to first apply for a certificate of provisional registration. The section also required that the promoters provided the Registry Office (which was instituted under the Act) with details such as company name, name and address and occupation of promoters, the provisional place of business for the company etc. etc. The powers of the promoters upon the issuing of a provisional certificate were severely curtailed; they were only to take whatever steps were necessary to raise the necessary members and capital in order to obtain a certificate of complete registration. Complete registration could only be obtained after the deed of settlement forming the company had been executed "by at least One Fourth in Number of the Persons who at the date of the Deed become subscribers and who shall hold at least One Fourth of the maximum number of Shares in the Capital of the Company . . ." (section VII). The deed was to be a public document and had to provide for the appointment of at least three directors and one auditor. It also had to set out information on topics such as: company name; place of business; purpose of the company; the amount of proposed capital; the amount to be raised by loan; the total amount of Capital subscribed or proposed to be subscribed at the date of the deed; details of the subscribers and the number of shares they held and had paid a deposit for.

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<sup>148</sup> R. Kostal, *Law and English Railway Capitalism* (Oxford: Clarendon Press, 1994) at 25.

All this information was to be provided to the public via the registry office. There were requirements for companies to provide the Registry with half yearly returns of share transfers and details of current shareholders (section XI). The company had to make an annual return that included its name and business purpose (section XIV). It was the duty of the Registrar of Joint Stock Companies to report annually to the Committee of Privy Council for Trade which set out company registrations, company failures, lists of companies who failed to appoint auditors, details of prosecutions under the Act and details of company bankruptcies including details of the companies assets and outstanding debts (section LXXIX). So the machinery of the Act was in part designed to provide prospective investors and creditors with the necessary information to protect themselves and in part it was designed to provide the legislature with a battery of information on companies that it would have been very difficult to obtain by other means. Thus the Act sought to govern by enhancing the capacity of citizens to make rational, calculating investment decisions<sup>149</sup> and by making the company a knowable, administrable object.

However, the governance attempted by the Act did not cease there. It also sought to provide norms and structure for the internal governance of the company. Section VII required that the deed of settlement of the company made provision for the matters set out

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<sup>149</sup> Section LVII. of the Act required a company to have available at its principal places of business a copy of its deed, list of shareholders and their holdings, a list of directors and officers as well as a copy of the by-laws. These documents were to be made available to any shareholder or to any person who had the written authorization of a shareholder. Section XVIII empowered any person to inspect copies of any deed, return, register or index of any company held at the Registry office upon payment of the prescribed fee.

in Schedule A. Schedule A included the following major purposes for which provision had to be made: the holding of meetings; the direction and execution of the affairs of the company; the distribution of the capital of the Company into shares; and for borrowing of money. In all 38 individual items were listed in the schedule. The Act also set out the powers of the directors (section XXVII.) and provided that the shareholders were not to act on their own behalf in the ordinary course of business other than through the directors - thus the basic hierarchical management structure was formalised and legitimated through law. The Act required that books of account be kept (XXXIV.) and that such books had to be balanced and subject to examination by the company's auditors (XXXV.). Accounts had to be made available for inspection both by auditors and shareholders alike. The accounts of the company also had to be registered and a copy lodged in the Company's file at the registry. As well as taking full advantage of the supposed disciplining effects of keeping financial records a number of other recording requirements were imposed by the statute such as details of contracts made by the company as well as records of bills of exchange and promissory notes.

Therefore, although much of the Act and many of the views<sup>150</sup> expressed in the Report of 1844 were couched squarely in the language of classical liberalism and relied on the combination of publicity and the calculative capacities of the liberal citizen to regulate

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<sup>150</sup> A good example is the evidence of Sir William Clay: "If it be true that, as far as regards the relations of such associations to the public, the law can be so altered as to give an easy recourse to persons having dealings with them, might not the inconveniences to which the partners themselves would be exposed, fairly be left to the consideration of persons disposed to embark upon such undertakings." - U.K., H.C., "Report of Select Committee in Joint Stock Companies" No 413. in *Sessional Papers* (1844) vol VII., 1 at 186.

company activity at a distance, the Act in fact went further than this. In requiring that many of the minutiae of corporate life be formally regulated, in institutionalising the power of directors, by setting up a financial reporting regime and making those reports available for scrutiny by the world at large this Act undertook a disciplinary function with respect to companies. The protection of the public was used as a basis for the legislature to try and insure that the affairs of the company were conducted in an orderly manner that provided protection and ensured that the fullest benefits of making the company form widely available were accrued. This disciplinary project was not solely confined to the unincorporated and quasi-corporate entities targeted by the *Joint Stock Companies Act, 1844* (U.K.), 7/8 Vict., c. 110. It was also extended to statutory companies by *The Company Clauses Act, 1845* (U.K.), 8/9 Vict. c. 16. that paralleled the general regulatory structure put in place by the 1844 Act. The aim was to bring about uniformity in the Charters of these corporations. Each of the provisions of *The Company Clauses Act, 1845* were to apply to each and every company unless the specific Act of incorporation expressly excepted or varied them.<sup>151</sup> The provisions in large part were based on those included in earlier charters, private acts and deeds of settlement. These provisions subsequently formed the basis of Table A of the great consolidating statute of 1862 which in turn were the forbears of the modern articles of association.

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<sup>151</sup> Obtaining a Private Act to incorporate a company was no mean feat, as well as securing the necessary numbers in both Houses of Parliament, the would be company members also had to contend with a House of Lords standing order (U.K., H.L., *Parliamentary Debates*, 3d ser., vol. XI, col 856 & 1076 (1825) that required three quarters of the companies capital to be deposited in the Bank of England or invested in Exchequer bonds before the bill could pass the standing committee.

The powers of the company were set out in section XXV of the *Joint Stock Companies Act, 1844* (U.K.), 7/8 Vict., c. 110. The company was entitled to: use its registered name; to use a Common seal; to sue and be sued in the registered name; to enter into contracts to effect the business of the company; to purchase and hold lands; to issue share certificates; to receive share instalments and pay out dividends; to hold general meetings; to make by-laws at meetings; to appoint and remove directors and auditors. So the legal personality of the company was very similar to that of the modern company. However there were two salient differences: First, the company at this time is still not perceived as entirely separate from its members and, second, limited liability was not afforded to the shareholders. Indeed the 1844 Act was even more punitive than the earlier *Chartered Companies Act*. The liability of shareholders was set out in section LXVI which provided that so long as the judgment, decree or order have been pursued with due diligence against the company then any unsatisfied portion can be executed against the property of any shareholder or any former shareholder provided they held shares at the time the contract or engagement was unexecuted or unsatisfied or any former shareholder who held shares at the time the unsatisfied judgment, order or decree was obtained. The liability of former shareholders persisted for three years from the time they ceased to hold shares in the company.

#### **1845-1854: The shift towards limited liability**

From 1845 to 1854 arguments in favour of limited liability and the strategies pursued took four main forms.<sup>152</sup> First, there was a concern that under the present law of partnership there was no safe way to invest a part of one's wealth in return for a share of profits in a business. To safeguard against unlimited liability investors were confined to either lending money within the confines of the Usury laws or investing in treasury bonds. Neither of these options was very attractive given the tremendous industrial development that was occurring during this time. Beyond the vested interests of the rich but closely held partnerships, people engaged in commerce were seeking ways in which to invest. What was required was an investment that would allow them to take advantage of the potential for profits but at the same time posed a risk that was fixed.

Secondly, people interested in invention and innovation were concerned that the laws of unlimited liability made it difficult for inventors to obtain finance for their projects. In the eyes of many contemporary commentators the punitive liability laws of English partnership posed a greater impediment to the commercial development of new ideas than even the antiquated patent laws.

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<sup>152</sup> The first, second and fourth points are derived from my readings of the following Reports: 1) U.K., H.C., "Report of Select Committee on Investments for the Savings of the Middle and Working Classes" No. 508 in *Sessional Papers* (1850) vol. XIX, 169; 2) U.K., H.C., "Report of the Select Committee on the Law of Partnership" No 1091 in *Sessional Papers* (1851) vol. XVII, 1.; 3) U.K., H.C., "First Report, Royal Mercantile Law Commission" No 1791 in *Sessional Papers* (1854) vol. XXVII, 445. The third point is taken from B. Hunt, *The Development of the Business Corporation in England*, *supra* note 128 at 118-124.

Thirdly, the period saw a burgeoning in the savings of the middle and working classes while at the same time concern was rising about the reaction of the working classes to the social pressures attendant upon industrialisation. Some actors such as Robert Slaney were concerned with reform to the laws of liability in order to facilitate the combination of working class people to carry out projects such as hostels, reading rooms, bath houses and community centres. Others were concerned to provide the middle and working classes with opportunities for investment. It was thought that such a measure would forestall any discontent and assist in further integrating the working class into the economic system. Still others thought that experimentation with these forms of association should be allowed as a matter of principle.

Finally we have a group of individuals, including Robert Lowe and J.S. Mill who espoused a 'free trade' or 'freedom of contract' position. Individuals in their view should not be prevented by law from arranging liability between themselves in any manner that they see fit, and as long as these arrangements are given adequate publicity, because creditors are perfectly capable of deciding whether or not to contract with such associations. This view drew squarely on the government rationality of classical liberalism - people should be free to associate as they wish therefore government must reform the law in order to allow such association to take place. The government must act in order not to interfere. Political economists who supported this view argued that it would stimulate further growth in investment and that the market should be the judge of which business form was the most efficient in any given case



I would like to mention three factors that helped these arguments ultimately to prevail. The first is that during periods of economic confidence in the first half the nineteenth century the joint stock company was often the business vehicle of choice and increasingly this was recognised as occurring in productive industries rather than in the form of unproductive speculation. The *Circular to Bankers* reflected upon the use of joint stock companies in mining, banking and railways in the following manner:

*All public enterprise at this epoch takes the direction of Railways, protected [by limited liability] ... There is nothing like these three extraordinary developments of speculation to be found in our commercial history. The canal enterprises of sixty or seventy years ago were the objects of local interest and limited speculation almost unknown to the London money market; and the bubbles of 1720 were most of them absurd, and as ridiculous as betting upon the race of two maggots tumbled out of a bad nut - very different from the Joint Stock enterprises of our day, the majority of which, if not all, are for useful undertakings.*<sup>153</sup>

The second point is that the railway companies provided a working example of the feasibility of a limited liability regime. The great value that people placed in the development of the railway system and the wonderment at the scale of that development did no harm to those who championed more general limited liability provisions. From the

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<sup>153</sup> July 11, 1845 as quoted by B. Hunt, *The Development of the Business Corporation in England*, *supra* note 237 at 103.

repeal of the *Bubble Act* onwards railway companies had regularly been organised on a joint stock basis and incorporated under a Private Act with limited liability.<sup>154</sup>

The final point revolves around what has been termed the 'democratization of the money market' that occurred in Britain at that time. 'Returns filed in 1845 reveal that upwards of 21 million l. had been subscribed in sums of less than 2000 pounds by more than 20 000 individuals; 5000 others had subscribed in amounts upwards of 2000 pounds ... With reference to a subsequent return, *The Times* (August 13, 186) exclaimed: 'We are a nation of plethoric capitalists ... A subscription tax instead of an income tax would abolish our customs'.<sup>155</sup> This trend was accompanied by an expansion of regional share markets which combined with the widespread interest in railways to dramatically increase the numbers of small investors in shares. "Potential investors no longer needed to be wealthy to get into the game. Railway paper had become an easily accessible and readily tradeable commodity. The new national railway share market was open to the very rich, the middle classes, and members of the working poor alike."<sup>156</sup>

This spirit of speculation prompted a conservative backlash. *The Glasgow Citizen* lamented that: "Society is agitated by a thousand games of chance - stocks rise and heads are uplifted - or stocks fall and chins droop as leaving scarce neck-breadth."<sup>157</sup> The

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<sup>154</sup> See R. Kostal, *Law and English Railway Capitalism*, *supra* note 148 at 14-15.

<sup>155</sup> B. Hunt, *The Development of the Business Corporation in England*, *supra* note 237 at 105.

<sup>156</sup> R. Kostal, *Law and English Railway Capitalism*, *supra* note 128 at 30-31.

<sup>157</sup> B. Hunt, *The Development of the Modern Business Corporation in England*, *supra* note 128 at 106.

language of *The Times* is even sterner in tone: 'There should be a general agreement among the reputable classes in the principal towns either to put down this nuisance, which is enough to corrupt the morals of all the people, or else make it subject to such strict regulation as will wholly deprive it of its gambling or dangerous character.'<sup>158</sup>

The language used by *The Times* picks up upon a major theme of the strategies that opposed the introduction of limited liability. The discourse is almost moral in tone: if an individual is not wholly responsible for their own debts or the debts of the associations which they join then this will promote all sorts of profligate and speculative behaviour. People will be lured away from prudent ventures to pursue wild speculative gains all under the protective umbrella of what was pejoratively termed 'limited responsibility'.<sup>159</sup> This general concern (as will be seen from the examination of the various parliamentary reports which is to follow) took several specific forms. Conservative political economists were worried that the reputation of British merchants would be tarnished overseas if limited liability became the norm. They, and many M.P.'s, were also worried that such speculation would distract the middle and working classes from the sober industry and modest expectations to which they were most suited. There was also concern (laced with a good deal of self interest) in commercial circles that limited liability would promote inefficiency and lax business practices. Thus, all these views considered that general limited liability laws would be damaging to both the commercial character and rational

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<sup>158</sup> *Ibid.* at 108. Hunt is quoting from the edition of 14 November, 1845.

<sup>159</sup> This analysis is drawn from B. Hunt, *The Development of the Business Corporation in England*, *supra* note 128 at 108.

capacities of citizens. This view was to contend actively with the 'free trade' position both in evidence given to the Parliamentary committees and on the floor of both Houses.

The seemingly endless upward spiral in the value of railway company shares was to stall in October 1845. The price of railway shares began to fall. This fall was of such magnitude and of such a sustained nature that it soon developed into a serious financial crisis:

*By late December at least 549 provisionally registered railway companies had 'disappeared', and hundreds more were soon to be wholly abandoned. The fortunes and life-savings of tens of thousands of people had been wiped out ... January 1846 was surely one of the bleakest months in the history of English capitalism. So many local capital markets had been devastated by the panic that the larger economy of the country teetered on the edge of a major recession.*<sup>160</sup>

This crisis led to calls for more restrictive policies towards granting limited liability to such companies. Interestingly, it also led to calls for better and more consistent accounting practices and the auditing of those practices. These problems experienced with railway companies were mirrored in the actual effects produced by the *Joint Stock Companies Act, 1844* (U.K.), 7/8 Vict., c. 110. Experience found that the accounting practices instituted by the Act were of limited value as the quality of accounting expertise was on the whole rather patchy (the organised bodies of the accounting profession did not start to organise or exert disciplinary control in earnest until the mid 1850s). Also, the

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<sup>160</sup> R. Kostal, *Law and English Railway Capitalism*, *supra* note 148 at 41.

penal provisions of the 1844 Act had proved to be ineffective as actions had to be undertaken by the common informer. It had also been found that many of the formal provisions of the Act such as the requirement that one fourth of the shareholders execute the deed of settlement could be easily evaded by dishonest promoters.

The views of the Select Committee on Investments for the Savings of the Middle and Working Classes are summed up in the following passage:

*Your Committee are of the opinion that difficulties which affect the law of partnership operate with increased severity in proportion to the smallness of the sums subscribed, and the number of persons included in the association. They think that any measures for the removal of these difficulties would be peculiarly acceptable to the Middle and Working Classes and would tend to satisfy them that they are not excluded from fair competition by laws throwing obstacles in the way of men with small capitals.*<sup>161</sup>

The Committee did not think that a law of general limited liability was needed to achieve this aim of integrating the savings and the aspirations of the middle and working classes into the processes of industrial capitalism. They recommended that Charters should be more readily available and should be granted for a lesser cost than currently. Their position was similar to the measures envisaged by the 1837 *Chartered Companies Act* (U.K.), 1 Vict., c. 73. This system was still plagued by delay and great expense. Their other recommendation was to suggest that the remedies for fraud and the enforcement of

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<sup>161</sup> U.K., H.C., "Report of Select Committee on Investments for the Savings of the Middle and Working Classes" No 508 in *Sessional Papers* (1850) vol. XIX, 169 at iv (emphasis added).

rules for mutual government should be redesigned. The Committee thought these remedies should be changed so that every dispute between partners did not require a dissolution of the partnership in order for the aggrieved party to exercise their rights. Thus, the Report did very little to shift the status quo. It did contain however, some evidence from J.S Mill and Ludlow expressing views that were to gain increasing prominence. I will quote the evidence of each and comment upon it in turn.

Mill separated out the issue of general limited liability from the more specific issue of whether the *en commandite* partnership form should be introduced into England. This was significant because it separated the specific reservations regarding *en commandite* and the very conservative views English lawyers and merchants had about their closely held partnerships from the question of extending limited liability to the company legal form. With regard to joint stock companies Mill had the following to say:

*... The other is the question of allowing perfect freedom of joint stock companies ... If there were a general law, by which persons might form themselves into joint stock companies with limited liability whenever they pleased, I think you ought to allow also to limit their liability so that competition might be equal ... On general principles one sees no sufficient reason why people should not be allowed to employ their capital and labour on any terms that they please, provided those terms are known, and that they do not give themselves out for what they are not. (emphasis added)<sup>162</sup>*

Aside from the logical extension to the case of individuals the above passage represents most of the main elements of the 'freedom of contract' position. People should

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<sup>162</sup> *Ibid.* at 85-86.

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Aside from the logical extension to the case of individuals the above passage represents most of the main elements of the 'freedom of contract' position. People should be free to associate on whatever terms, limited liability included, and provided those contracting with the association are aware of such terms there can be no harm in this.

The second element of the 'freedom of contract' position is encapsulated by the evidence given before the Committee by Ludlow and it is significant because it directly contests (using the language of classical liberalism) the view that limited liability would lead to reckless commercial behaviour. Ludlow argued that limited liability would

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<sup>162</sup> *Ibid.* at 85-86.

produce the opposite result because; "it tends to bring persons of prudence and care to take part in enterprises which they would not do if the responsibility were unlimited."<sup>163</sup> In fact entering into such an arrangement on the basis of unlimited liability demonstrated a lack of caution. Also, such a law was just because without it joint stock shareholders were "delivered over bound hand and foot to the mercy of the directors."<sup>164</sup> Such a law would also make risk more directly calculable because potential creditors would be basing their decisions on the amount of stock and not merely upon the names of a few high profile partners.

The rather tentative recommendations of the Committee to Parliament did not satisfy those who wished for a more substantial reform to the law. On February 20, 1851 Robert Slaney moved a motion for the appointment of a Select Committee to consider the Law of Partnership.<sup>165</sup> The motion he sought was as follows: "To consider the law of Partnership, and a **proposed limitation of liability**, with a view to encourage useful enterprise, and the additional employment of labour."<sup>166</sup> Labouchere spoke on behalf of the government and successfully sought the following amendment to the motion: "expediency of limiting liability was substituted for "a proposed limitation."<sup>167</sup> Labouchere was scornful of the possibilities for working class 'investment' and deeply suspicious of any alteration to the

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<sup>163</sup> *Ibid.* at 6-7

<sup>164</sup> *Ibid.*

<sup>165</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. CXIV, col 842 (1851)

<sup>166</sup> *Ibid.* at 849.

<sup>167</sup> *Ibid.*



law of partnership; but he was less hostile to the exploration of the possibility of altering the laws of limited liability.

The Select Committee on the Law of Partnership began their report by commenting upon the the great increases in wealth that had occurred during the last half century and how the wealth of the nation to a certain extent had diffused among all ranks of the community. Interestingly, they then moved on to say the following:

*Your Committee think it would be a subject of regret if cautious persons, of moderate capital and esteemed for their intelligence and probity in their several neighbourhoods shall be now deterred from taking part in such undertakings by the heavy risk of unlimited liability; yet such persons would in many instances be the best guides for their humbler and less experienced neighbours and their names would afford security that the enterprise had been well considered and was likely to be well conducted.*<sup>168</sup>

It appears that the evidence of Ludlow given the year before had become the view of the current Committee. The Committee adopted the idea that the provision of laws of limited liability would be a beneficial measure particularly for the middle and working classes: “as thereby their self respect is upheld, their industry and intelligence encouraged, and an additional motive is given to them to preserve order and respect the laws of property.”<sup>169</sup> However, their recommendation were almost as cautious as the last Report. While acknowledging that the law of partnership as it stood needed revision, the Committee

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<sup>168</sup> U.K., H.C., “Report of Select Committee on the Law of Partnership” No 1091 in *Sessional Papers* (1851) vol. XVII, 1 at 6.

<sup>169</sup> *Ibid.* at 7.

merely recommended the establishment of another committee to investigate the possibility of pairing the introduction of limited liability with an overhaul of the bankruptcy laws. The only tangible suggestion they made was yet another call to make charters cheaper and easier to obtain. The only other item of note is contained in the evidence taken by the Committee from Mr. Phillimore, a proponent of general limited liability. He responded in the following manner to the questions of the committee:

*Q: Would not the natural state of things be unlimited liability, and the unnatural state of things limited liability?*

*A: I cannot agree with that, I do not at all admit that.*

*Q: If legislation does not interfere to prevent and to limit liability, it is of itself unlimited is it not?*

*A: By the Law of England, but not by any law of nature. A man has a fair right to say, 'Here is 100 l. ; I am responsible so far:' such was the law in the Pandects, the partner was liable pro virili. To give you a strong answer to the question you have put, I may put it in this way: if a person goes to another and says, 'There is 100 l., recollect I will be responsible for that 100 l. and for that 100 l. only,' the person to whom he said that would have no natural right whatever to come to him and say, "You shall be responsible for all your fortune. In the case which I have supposed, what a person would say to another is what he here says to society: 'Here I am; do not look on me as worth anything more than this; I am worth 100l. and for that I will be responsible and no more.'<sup>170</sup>*

Even though limited liability would require the reform of a longstanding law, Phillimore used nothing more than the doctrine of freedom of contract to present such a move as the 'natural' position. In order not to continue to interfere with civil society the

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<sup>170</sup> *Ibid* at 12.

legislature must act to reform the law. The potential of the 'freedom of contract' argument to appeal to more M.P's meant that its language was adopted even by people such as Robert Slaney whose primary interest in reform of the law of partnership was centred around the concerns of the working class. In 1852 he said in the context of a debate on limited liability that it "... had for its object the removal of obstacles to investment which pressed on all classes."<sup>171</sup>

The next Report that took up the vexed issues of limited liability and reform of the law of partnership law was U.K., H.C., "First Report, Royal Mercantile Law Commission" No 1791 in *Sessional Papers* (1854) vol. XXVII, 445. The first point of note is that unlike Ker's 1837 report the Commissioners did not perceive the tide of 'expert' opinion to be against alterations to the existing laws regarding limited liability and partnership. Indeed, they were at pains to point out that the people they had surveyed were evenly balanced.

*Your Majesty's Commissioners have been much embarrassed by the great contrariety of opinion entertained by those who have favoured them with answers to their questions. Gentlemen of great experience and talent have arrived at diametrically opposite; and in supporting those conclusions have displayed reasoning power of the highest order. It is difficult to say on which side the weight of authority in this country preponderates.*<sup>172</sup>

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<sup>171</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. CXIX, col 668 at 685. In that particular debate the concern that limited liability would erode commercial character was still very much in evidence. Baring maintained: "the result would be that in cases of failure the man whose character was at stake lost no money, and the man whose money was at stake had still an unblemished character. What was necessary for credit in this country was that the man with the money, should be responsible for the character of the business, and they ought never to do away with that which fixed in the right quarter that amount of censure which to a certain degree attached to a man that failed in business." (*Ibid.* at 685.)

<sup>172</sup> U.K., H.C., "First Report, Royal Mercantile Law Commission" No 1791 in *Sessional Papers* (1854) vol. XXVII, 445 at 5.

I would suggest that the embarrassment felt by the Commissioners sprang from the perceived role of expertise in liberal government. Expertise was supposed to function as a tool whereby government could decide on a course of action which would not overly damage the autonomy of the actors involved. The Commission's job was to survey the political economists, lawyers, merchants and working class advocates and present the Parliament with the authoritative expert view of what course to pursue. The problem was no such position existed for the committee to report on. In the face of this dilemma the majority of the commission (5 of 8 members) opted to support the status quo. They stated that changes to the law would not "operate beneficially on the general trading interests of the country."<sup>173</sup> The rationale was that there had always been sufficient capital for enterprise in the past and the increasing wealth of the nation made it likely that there would continue to be sufficient capital in the future. Any forced stimulus to further investment would lead to speculation which could be harmful to commerce in general. They suggested that in cases such as railways where the public objects of a project warranted limited liability then charters should be cheaper to obtain. The needs of the working classes could be satisfied through a Board who would have the power to grant the necessary privileges to effect such projects as the construction of lodgings and reading rooms. They also suggested that it may be beneficial to relax the Usury laws so that money could be lent at a rate proportionate to profits without the lender incurring the liability of partnership. The committee made no substantive reply in their report to the

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<sup>173</sup> *Ibid.*

objection (raised by Mill and others) that it was logically inconsistent to protect lenders from unlimited liability while denying this facility to would be investors.

One of the dissenting Commissioners, Bramwell, clearly indicated his preference for the 'freedom of contract' option:

*Ought A and B. to be prohibited from entering into a partnership on terms limiting the loss of B or both? Ought C to be prevented from dealing with them on those terms? The burden of proving this on those who assert it ... If ever there was a rule established by reason, authority and experience, it is that the interest of a community is best consulted by leaving to its members, as far as possible the unrestrained and unfettered exercise of their own talents and industry ... [he recommended]*

*1st. That persons be allowed of as right, to form partnerships limiting the liability of one or more or all of the partners.*

*2nd. That they be allowed to do so by private agreement among themselves, on registering their names, place and nature of business, terms of partnership, and capital subscribed by the limited partners.*

*3rd. That where the liability of all the partners is to be limited, the partnership should be incorporated, on registration.*

*4th. That the partnership name should be used, and in such a way as to indicate the limited liability ...*<sup>174</sup>

The designated experts were divided, the Committee itself was split so the issue was returned to the legislature unresolved and the battle to see who could frame their strategy with the greatest congruence to the rationality of classical liberalism intensified.

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<sup>174</sup> *Ibid.* at 23.

### **1855-1856: The enactment of general limited liability laws**

One of the first parliamentary skirmishes that followed the publication of U.K., H.C., “First Report, Royal Mercantile Law Commission” No 1791 in *Sessional Papers* (1854) vol. XXVII, 445. was initiated by Robert Collier who moved the following resolution on June 27, 1854:

*That the Law of Partnership which renders every person who though not an ostensible partner, shares the profits of a trading concern liable to the whole of its debts, is unsatisfactory, and should be so far modified as to permit persons to contribute to the capital of such concerns on terms of sharing their profits without incurring liability beyond a limited amount.*<sup>175</sup>

Collier and other members of the House pointed out that unlimited liability was in their view an unnatural interference with the laws of contract. Limited liability reform would increase the levels of investment and enterprise. It would also lead creditors to make decisions on the basis of an evaluation of the proposed project and the capital stock. Such reform would serve to attract prudent and conscientious investors and managers to participate in such projects. Collier added that:

*he believed that the change proposed would have important social bearings, tending materially to diminish the distance between capital and labour, interests sometimes apparently opposed but in reality always identical; and that it would be socially, politically and economically beneficial.*<sup>176</sup>

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<sup>175</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. CXXXIV, col. 752 (27 June 1854, Robert Collier).

<sup>176</sup> *Ibid.* at 759.

Limited liability reform was presented as a universal good. Collier, because proposed legislation was in the offing, offered to withdraw the motion but on the urging of the House in general the question was put and agreed to without a division being called for.

The proposed legislation was finally presented to the House of Commons in June of 1855. On June 29 Bouverie introduced a bill to reform partnership law and a bill specifically aimed at joint stock companies registered under the 1844 Act. He justified the separate treatment of joint stock companies on the basis of both their registered status and due to the fact that it was often the case that the shareholders of such concerns had no links to each other. The bill to reform partnership law proposed introducing the *en commandite* partnership into English law. Bouverie's arguments in favour of such a measure simply reiterated the arguments made since 1837 onwards. He then argued in favour of reform of the law pertaining to joint stock companies on the following grounds:

*The Foundation of the credit of Joint-Stock companies should be the mode in which the business was conducted and the objects for which the companies were carried on, and if the attention of the public were diverted from that true indication of credit to a false indication of credit - namely, the whole fortune of the shareholders massed together - the public were tempted to give to the companies an unfair and undue amount of credit.*<sup>177</sup>

Limited liability was presented as the basis upon which citizens could make rational calculations as regards risk. Unlimited liability was damaging to these capacities because it diverted attention away from a consideration of the objects of the company and the

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<sup>177</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. CXXXIX, col. 310 at col. 322 (29 June 1855).

amount of the stock. The reform was designed to act positively on investors and creditors: "to prevail on them to conduct their business with prudence and foresight, and to take care that those with whom they dealt were worthy of credit instead of relying upon the liability of a dormant partner to pay debts which ought never to have been incurred."<sup>178</sup> Both bills were read a second time without a division being called for. An attempt was made to delay the Committee stage of the Limited Liability Bill by Mr. Muntz on July 26. Muntz, who was a wealthy merchant outside of Parliament,<sup>179</sup> argued that joint stock companies and the separation of ownership and control that they entailed made such enterprises necessarily less efficient than close partnerships:

*No company could command that decision of purpose that untiring exertion, and that concentrated power which an individual, whose sole interest was at stake, could always display.*<sup>180</sup>

He proposed that the House should resolve itself into a Committee on the bill in three months time. If accepted such a motion would have effectively delayed passage of the bill until the next session of Parliament. This could have presented a potentially serious obstacle to the passage of general limited liability legislation. The liability bill only dealt with the issue of shareholder liability. It was a single issue bill presented as a stopgap measure that was intended to operate as an adjunct to the *Joint Stock Companies Act*,

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<sup>178</sup> *Ibid.* at 338.

<sup>179</sup> As John Mac Gregor rather caustically put it: "It did happen very curiously that the owners of large concerns and large capitalists were the principal opponents in that House." U.K., H.C., *Parliamentary Debates*, 3d ser., vol CXXXIX, col. 1378 at col. 1390 (26 July 1855).

<sup>180</sup> *Ibid.* at 1378.



1844 (U.K.), 7/8 Vict., c. 110. At this time there was a great deal of dissatisfaction with the results of the administrative regime imposed under that Act. Thus, if the enactment of the principle of limited liability had been delayed until the following session it could have been stymied as this reform may have been embroiled in the controversy surrounding the reform of company law in general. Such a fate had already befallen the Partnership bill. The issue of limited liability had become enmeshed with the ambivalence towards the *en commandite* form.

However, most members of the House wished to see the measure passed with respect to joint stock companies. Palmer's comment summed up the general mood of the House: "I can assure the House that no exertion and no determination shall be wanting on the part of the Government to give the public the benefit of this change in the law during the present Session."<sup>181</sup> The motion to move immediately into Committee was passed 121 votes to 40.

During the Committee phase in the House of Commons there were some interesting amendments discussed. An amendment to extend the ambit of the bill to include banking and insurance concerns was suggested but withdrawn. Initially the Limited Liability Bill required that a company have a 20 000 l. nominal capital and shares with a minimum face value of 25 l. in order for limited liability to be extended to shareholders. An amendment

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<sup>181</sup> *Ibid.* at 1390.

to drop these requirements was defeated 88 votes to 34.<sup>182</sup> On July 30th Bouverie successfully proposed that the minimum face value for shares be dropped to 10 l. and the nominal capital requirement be dropped altogether. These changes would make the advantages of limited liability available to a wider range of investors. Cairns attempted to further liberalise the reform by proposing an amendment that reduced the requisite number of shareholders to six but this was rejected 39 votes to 27.<sup>183</sup> The Bill was read a third time on the 2nd of August, 1855 despite bitter complaints from opponents of limited liability concerning the haste with which the Bill had passed.

The pace did not slow in the House of Lords. The Bill received its first reading on August 3, its second reading on August 7 and its third reading on August 11. This speed was in part derived from the pressure exerted by clear support for the reform both in the House of Commons and in the wider community at the time. As Lord Stanley of Alderley observed: "with the exception of the Leeds Mercury, there was no journal in the kingdom which would admit an article against the principle of limited liability. The House of Lords also felt pressure due to the fact that the Board of Trade had resolved not to grant any more Charters which extended limited liability until Parliament had resolved the issue. These combined pressures were enough to spur the Lords into action. The Bill was read a second time even though this involved an overriding a standing order not to read Bills submitted so late in a parliamentary session. The vote in favour was 38 to 14. In the

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<sup>182</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. CXXXIX, col. 1445-1451 (27 July 1855).

<sup>183</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. CXXXIX, col. 1517-1520 (30 July 1855).

abbreviated committee stage that the Bill passed through on August 9 & 10 some Lords attempted to raise the minimum face value of shares required<sup>184</sup> and also attempted to insert a minimum paid up capital requirement<sup>185</sup> in order to restrict the ambit of the bill. However, with no substantive discussion the majority rejected these amendments and proceeded to pass the Bill.<sup>186</sup>

The *Limited Liability Act, 1855* (U.K.), 18/19 Vict., c. 133. was the result of this speedy legislative action. It was basically a graft onto the 1844 Act containing just 19 sections. Under the Act any company with capital to be divided into shares of at least 10 pounds face value each could obtain a Certificate of Complete Registration with Limited Liability provided they met the conditions set down in the Act. The most salient of which were contained within section I: a) the deed of settlement had to include a statement regarding limited liability; b) the word "Limited" had to be included in the company name; c) the return to be lodged for provisional registration had to include a statement that the company was to be formed with limited liability; and d) the deed of settlement had to be executed by at least twenty five shareholders who collectively held shares which comprised at least three quarters of the nominal capital of the company. These shares had to be at least 20 per cent paid up.

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<sup>184</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. CXXXIX, col. 2028 (9 August 1855).

<sup>185</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. CXXXIX, col. 2101 (10 August 1855).

<sup>186</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. CXXXIX, col. 2131 (11 August, 1855).

Sections II and III respectively set out machinery whereby existing companies registered under the 1844 Act and companies constituted under Private Acts of Parliament could obtain a Certificate of Limited Liability. Section IV contained the publicity requirements. The company name (including the word "Limited") had to be displayed at the company's place of business. The word "Limited" also had to be included on the company seal, advertisements, promissory notes, cheques, money orders, bills, invoices, receipts, and letters. A company director, officer or other authorized person who attempted to use a seal or document that did not include the company name was liable to a fifty pound fine and was personally liable to the holder of any Bill of Exchange, money order, promissory note, or cheque unless the instrument was honoured by the company. Sections VII and VIII when read together effectively limited the total liability of a shareholder for the debts of a certificated company to the amount unpaid on the shares held. It is important to note that this limitation of liability was not retrospective, section XI preserved the rights of existing creditors and section XII provided that any change in a company name would not affect the rights of the company or other parties. Any director who consented to the payment of a dividend when a company was insolvent was made jointly and severally liable up to the amount of the dividend (section IX). Compulsory winding up was required if three fourths of the subscribed capital of a company was lost (section XIII). At least one of a company's auditors was subject to the Board of Trade's approval. The Board had the power to appoint an alternate auditor if the auditor submitted by the company did not meet with approval (section XIV).

This Act did not remain in force for long. On 1 February 1856 Robert Lowe (by then the President of the Board of Trade) introduced the Joint Stock Companies Bill and the Partnership Amendment Bill.<sup>187</sup> I will deal with the passage of the Companies Bill before discussing the fate of the Partnership Amendment Bill. With the introduction of the Companies Bill it was clear the Lowe wished to fundamentally change the techniques used to regulate the company form. He argued that the Committee of 1844 and the framers of the 1844 Act had been "far too sanguine in the hopes they placed on legislation being able to remedy all wrongs."<sup>188</sup> He argued that the attempt by the State to enforce and regulate the minutest details of corporate conduct and the enforced production of a vast number of returns was not having the desired effect. There were also problems with the provisional registration scheme as it was simply being flouted by dishonest promoters and was a burden to honest ones.<sup>189</sup> Further, the 1844 Act was entirely deficient with respect to enforcement as actions were left to the common informer to pursue. For Lowe these were not simply technical problems which required a redrafting of the provisions or the deployment of greater resources; instead they demonstrated an ignorance of how to govern:

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<sup>187</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. CXXXX, col. 110 (1 February, 1856).

<sup>188</sup> *Ibid.* at 117.

<sup>189</sup> Kostal argues that the deterrent effect of *The Joint Stock Companies Act, 1856* (U.K.), 19/20 Vict., c. 47. was seriously miscalculated by its framers: "Prosepctive bubble promoters, it had been imagined would be put off by the legal obligation to reveal their names, occupations and addresses to potential subscribers. In the event however this assumption proved to be disastrously wrong. Promoters of all but the most outrageous swindles were only too glad to register the requisite information (accurately or no) pay a 5 pound fee, and in turn receive a 'Certificate of Provisional Registration'. This inexpensive document not only enabled promoters to collect deposit money and speculate in new scrip, but provided even highly dubious enterprises with the gloss of legality and legitimacy." (R. Kostal, *Law and English Railway Capitalism*, *supra* note 148 at 35.)

*...it is quite impossible by any legislation that we can devise to really protect the public in matters which they are fully able to protect themselves ... We entirely repudiate as the basis of legislation the principle upon which the present Joint-Stock Companies Act is founded - that it is in the power of the Government to prevent the institution of fraudulent Companies ... unless we assume that a man is honest until he is proved to be a rogue - the disruption of human society must necessarily follow.*<sup>190</sup>

According to Lowe any attempt to govern in an overly paternalistic fashion would not achieve its aims. Further, the chance of fraud was not of such magnitude that it justified stifling use of the company form. Therefore, the new bill dropped the requirement for a minimum amount of capital to be paid up - this simply burdened the honest while providing no real impediment to fraud. Similarly, the minimum face value of 10 pounds per share was dropped. Lowe argued that this restriction could not be justified as it was impossible to argue that the reform was for the universal good if it denied the right of association to the poor.<sup>191</sup> The reforms he argued for were couched squarely in the language of classical liberalism:

*We propose now to take our stand upon the only firm foundation on which the law can be placed - the right of individuals to use their own property, and make such contracts as they please, to associate in whatever form they think best, and to deal with their neighbours upon such terms as may be satisfactory to both parties.*<sup>192</sup>

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<sup>190</sup> U.K., H.C., *Parliamentary Debates*, 3d ser. vol. cxxxx, col. 121-124 (1 February, 1856).

<sup>191</sup> *Ibid.* at 127.

<sup>192</sup> *Ibid.* at 130.

The Bill was read a second time on Friday February 8, 1856.<sup>193</sup> There is no record of any debate occurring on that day nor of a division of the House being called for. Similarly on the Bill's third reading there was virtually no debate.<sup>194</sup> The Bill moved on to the House of Lords where debate centered around the objections of the Chambers of Commerce of Glasgow and Manchester. Petitions from these bodies were presented by Lord Overstone.<sup>195</sup> Overstone together with Lord Brandon of Monteaule also published a protest against the legislation. The objections raised by these Lords and the Chambers of Commerce centered around the potential damage to commercial character and the encouragement to undue speculation that limited liability would cause. However, these arguments had already been countered in early debates by pro limited liability actors. The protest was perceived as emanating from a narrow position of vested interest. Lord Stanley of Alderley argued that:

*... although Manchester, Glasgow, Liverpool, and other large commercial towns possessed active energetic and intelligent representatives in the other House, they had not expressed any apprehension by the mouths of those representatives; and the inference therefore, was, that the apprehensions shared by the noble Lord [Overstone] were shared in by a small and exclusive class, and were not felt by the large body of the community.*<sup>196</sup>

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<sup>193</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol CXXXXI, col 451.

<sup>194</sup> *Ibid.* at 897.

<sup>195</sup> U.K., H.L., *Parliamentary Debates*, 3d ser., vol. CXXXXII, col. 1474 (Overstone).

<sup>196</sup> *Ibid.* at 1477 (Lord Stanley of Alderley).

On Monday 30th June, 1856 the Bill was read for the third time with no debate.

Before moving on to outline some notable features of the legislation I would like to pause and dwell briefly on the fate of the Partnership Amendment Bill. The first version of the Partnership Amendment Bill met with much greater opposition than the Joint Stock Companies Bill. It was eventually withdrawn on the basis of a technical objection. The Bill was rapidly reintroduced as the Partnership Amendment Bill (No. 2) on Monday April 7, 1856. Perhaps the most notable feature of the Bill was it envisaged limited liability for 'silent' partners without any significant provision for publicising either the identity of these partners or the amount for which they were liable. Many of those who were in favour of limited liability in the close partnership context were dissatisfied with this aspect of the Bill. The Bill was read a second time but the vote was a relatively close one, 99 votes to 66.<sup>197</sup>

On July 14, Phillimore expressed grave concerns about the absence of publicity provisions in the proposed Bill.

*He was anxious for the adoption of limited liability but must say that the Bill, as it stood, was not sanctioned by any legislation in the world. All countries which adopted the principle of limited liability required publicity, which was completely excluded from this Bill.*<sup>198</sup>

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<sup>197</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. CXXXXII, col. 666 (26 May 1856).

<sup>198</sup> U.K., H.C., *Parliamentary Debates*, 3d ser., vol. CXXXXIII, col. 801 (14 July 1856, J. G. Phillimore).



He proposed that the Bill should be amended so as to require 'silent' partners and the amount of capital they had pledged to be recorded in a public registry. Lowe argued against this change but his position was weak given that publicity was the rationale for his spirited advocacy of *The Joint Stock Companies Act, 1856* (U.K.) 19/20 Vict., c. 47. (The primary sources are frustratingly silent as to why Lowe adopted this position with respect to the Partnership Amendment Bill.) Phillimore's suggested amendment was carried 108 votes to 102 and for a second time Lowe withdrew the Partnership Amendment Bill. This was the last attempt in the nineteenth century to introduce limited liability for traditional partnerships.<sup>199</sup>

This section will conclude by outlining the salient features of *The Joint Stock Companies Act, 1856* (U.K.), 19/20 Vict., c. 47. The first is that it further liberalised both access to the company form and the extent of limited liability. The company form was available to any group of seven or more persons (section III) and the provisional registration phase requiring the lodging of returns and a certain amount of paid up capital was dispensed with.

The second noteworthy feature was that the extent of shareholder liability was much reduced under the new Act. The combined effect of section LXV. of the 1844 Act and sections VII. and VIII. of the 1855 Act had meant that former shareholders could be liable

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<sup>199</sup> Although it can be argued that the rise of private companies in the later decades of the century together with their reaffirmation by the House of Lords in *Salomon* achieved this reform in *de facto* fashion.

for amounts unpaid on shares for up to three years. Under the new Act the shareholder's liability was still limited to the amount unpaid on shares but this liability only persisted for one year from the date of the transfer of their shares (section LXIII). Further protection was added by section LXVI. that required the transferee to indemnify the transferor against all calls made, accrued or due on shares subsequent to the transfer.

The final feature to be noted is the shift from State supervision of the minutiae of company life to an increased emphasis on providing the pattern for internal governance. Section IX of the Act provided that 'Table B' would be the default regulations for the company. It dealt with matters such as the issuing and transmission of shares, increases in capital, general meetings and the powers of directors. The emphasis was upon the internal enforceability of these rules rather than the lodging of multiple returns with the Registry. Although the Act no longer required the lodging of the accounts of the company with the registry, great significance was placed upon the role of accountants and auditors. Table B contained a model balance sheet and the machinery of the Act placed great reliance on the accounting profession with regard to the Parts of the Act that dealt with liquidation and winding up of companies.<sup>200</sup>

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<sup>200</sup> This move on the part of legislature was coterminous with the increasing professionalization of accountants. "Associations of professional accountants arose during the fifties. The Edinburgh Society was chartered in 1854 and other were formed in various commercial centres over the following decades." B. Hunt, *The Development of the Business Corporation in England*, *supra* note 128 at 140.

## Conclusion to the genealogy

During the period 1837 to 1856 incorporation with limited liability had gone from a jealously guarded privilege, associated with monopoly and interference with the natural order, to a widely available business form. The emphasis of the legislation was upon internal governance rather than state supervision. The event of company failure was no longer to spark clamour for the legal extinction of the form but merely to trigger the dispassionate process of liquidation. No longer was the company seen as the harbinger of speculative manias but rather as the vehicle of rational, calculable progress available to rich and poor alike. This viewpoint was not universal (the opposition of the rich partners of the great commercial houses) nor was it eternally stable (the decisions in the lower Courts in *Salomon* testify to this) but it was and still is hegemonic. Availability and widespread use of the company form is perceived as normal, efficient and rational. Views that affirm this are seen as universal and objective whereas criticism and questioning of this status quo are presented as sectional and partisan.

Many of the issues that animated the debate around corporate regulation during that period continued to be of great significance. The resistance to the notion of the individual being able to limit their liability in the context of a small partnership played a significant role in the *Salomon* case - which was a watershed in English company law. The concern with the efficacy and the appropriate level of publicity that should be imposed on prospectuses and company activities is an issue that is still with us today. Another issue

that came to prominence in the mid nineteenth century which is still current is the vexed question of the appropriate responsibilities and powers of company directors and auditors. This period also saw a considerable solidification in the company legal form that has been the primary subject matter of corporate theory for over a century. Corporate theorists discuss a legal entity which is generally available. This entity is deemed to be entirely separate from its shareholders who have the advantage of limited responsibility for the entity's debts. It is to a consideration of corporate theory which I now turn.

## Corporate Theory: A Problematisation

### Introduction

Corporate theory concerned with the modern company form has taken on three broadly distinct discursive forms. The forms are corporate ontology, managerialism, and the 'new' economic theories of the firm. These forms should not be understood as a 'periodization' in the strict sense of the word. Moreover, this schematic makes no claim that these discursive forms are hermeneutically sealed off from each other: "What we inhabit as the present is a 'virtual space' composed where the residues of past rationalities intersect with the phantasms that prefigure the future."<sup>201</sup>

The purpose of this part is to consider corporate theory as a form of problematisation. This study will be divided into three sections. The first section will provide a description of the discursive forms. The second will identify general features of the problematisation that remain common *across* the three discursive forms. The third will deal with features of the problematisation that are more or less unique to each of the discursive forms. The most important of these is the way in which each discursive form is correlated to a particular form of government rationality. Part V will reflect upon how certain features of

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<sup>201</sup> N. Rose, "Government, authority and expertise in advanced liberalism" *supra* note 77 at 285-286.

the problematisation have contributed to the deployment of specific theories in a way that has had ideological effects.

## **Outline of discursive forms<sup>202</sup>**

**(1) Corporate ontology:** The first of these discursive forms I wish to consider has been dubbed 'corporate ontology'. Anglo-American legal thinkers in the late 1800s and the first quarter of this century "[spoke] of organizations as 'persons' and attempt[ed] to deduce from this the rights and responsibilities that this concept should carry."<sup>203</sup> The enquiry into the legal personality of the company was conducted in quite literalist terms. Corporate ontology basically provided us with three versions of the corporate person.

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<sup>202</sup> The three discursive forms to be outlined are not the result of totally independent research. They draw on the categorisations developed by other writers concerned with examining aspects of corporate theory. The following sources have heavily influenced the way in which I have categorised corporate theories in this thesis: W. Bratton Jnr., "The New Economic Theory of the Firm: Critical Perspectives from History" in S. Wheeler, ed. *The Law of the Business Enterprise* (Oxford: Oxford University, 1994) 117.; C. Tollefson, "Corporate Constitutional Rights and the Supreme Court of Canada" (1993/94) 19 *Queens Law Journal* 309.; S. Wheeler, "The Business Enterprise: A Socio-Legal Introduction" in S. Wheeler, ed., *The Law of the Business Enterprise* (Oxford: Oxford University, 1994) 1.; J. Dewey, "The Historic Background of Corporate Legal Personality" (1926) *Yale Law Journal* 655.; and P. Stein, "Nineteenth Century English Company Law and Theories of Legal Personality" (1983) 12 *Quaderni Fiorentini* 502. In this section, where appropriate I will provide references to sources that either fit within a particular form or that offer a detailed treatment of the theories that can be located within that discursive form. These lists are not intended to be exhaustive. They merely provide a sample of the writings within each discursive form. I must also emphasize that these discursive forms are not totally rigid nor impermeable to each other. Although my designation of particular pieces represents a 'best fit' this is not to say that a particular piece will not contain concepts or arguments that involve a reactivation of a prior discursive form or that prefigure a concept to be found in a subsequent discursive form.

<sup>203</sup> M. Hager, "Bodies Politic" *supra* note 86 at 578.

The first is **fiction/concession**<sup>204</sup> theory: “The earliest concept of the corporation within the Anglo-American legal tradition is that of an artificial person granted ‘life’ and hence legal status by an act of the sovereign. In English jurisprudence this conception was originally used to try to explain the phenomenon of corporations created by grant of a Royal Charter or by the enactment of a special Act of Parliament. It was quickly applied to the new generic legal person - the company.”<sup>205</sup>

Fiction/concession theory is a vision which attributes to the state an overarching constitutive rôle. The state is the source of the associative life that is carried out by the company. The company is regarded as fictitious and is often referred to as an ‘artificial entity’. In this context artificial refers to rules of art and fiction “should be derived from *fingere* in the sense of making not feigning [the fiction concept].”<sup>206</sup> The company is

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<sup>204</sup> The concepts of a corporation being a fiction and a concession are often conflated under the rubric of ‘fiction theory’ but as John Dewey has pointed out: “there is nothing essentially in common between the fiction and concession theories, although they both aimed towards the same general consequences far as limitation of power of corporate bodies is concerned. The fiction theory is ultimately a philosophical theory that the corporate body is but a name, a thing of the intellect; the concession theory may be indifferent to the question of the reality of a corporate body, what it must insist upon is that its legal power is derived. - J. Dewey, “The Historic Background of Corporate Legal Personality” (1926) 35 Yale L. J. 655 at 667.

<sup>205</sup> Especially given the use of the term corporation to denote a business organisation incorporated under general incorporation statutes in the United States the terms corporation and company have become somewhat interchangeable. However it is worth noting that in English law they have different formal meanings. The term corporation is generally reserved for those legal persons who obtain incorporation either by Royal Charter or by private act of Parliament. (The Crown enjoys powers at common law to create corporations, this power falls within the Royal Prerogative. From the eighteenth century onwards a petition to the English Parliament for a grant of incorporation by Private Act of Parliament was an alternate means of obtaining corporate status.) The term company refers to incorporation obtained by application to a government registrar under general companies legislation. For more details see any edition of Gower’s *Company Law*. In this section of the paper for the sake of convenience I use the word corporation as an umbrella term to denote not only the entities created by Royal Charter but also those entities incorporated under general statutes of incorporation on both sides of the Atlantic. However, beyond this section of the paper I use the terms corporation and company in accordance with their formal meanings in English law.

<sup>206</sup> J. Dewey, “The Historical Background of Corporate Legal Personality”, *supra* note 204 at 656. Here Dewey is drawing upon observations made by Pollock, “Theory of Corporations in Common Law” (1911) 27 Law Quarterly Review 219.

regarded as a concession because it has no inherent powers, only those reposed in it by the state.”<sup>207</sup> Because of its constitutive role the State retains an inherent supervisory role (the concession concept). This supervisory role is reflected in the traditional doctrine of *ultra vires* and the older writ of *quo warranto*.<sup>208</sup>

The second persona is provided by **contractualist theory**. The corporate person is conceived of as an interlocking grid of contractual exchanges. “Internally the corporation is regarded as an association or aggregation of individuals; it comprises contractual relations between members *inter se* and between members and management.” Our person is an artificial aggregate and “when viewed externally the general assertion is that: The authority of the sovereign toward the corporation ... is no greater and no less than its authority towards any other private agreement among contracting parties.”<sup>209</sup> The legal powers of the artificial person are not derived from State power. The contractualist persona may be a ‘fiction’ but it is certainly not a concession. The corporation or company has a fundamentally private character.

The third persona is that of the **real entity**. Under this theory the company is conceived of as a natural entity that does not owe its existence to the state. So not only are the powers of the company not derived from state power, the legal personality of the

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<sup>207</sup> M. Hager, “Bodies Politic, *supra* note 86 at 313.

<sup>208</sup> Quo warranto is a writ that compels the defendant to demonstrate that their actions were supported by a franchise from the sovereign. It was used to prevent corporations from breaching their Charters. See C. Tollefson, “Santa Clara Revisited”, *supra* note 5 at 7.

<sup>209</sup> S. Bottomley, “Taking Corporations Seriously”, *supra* note 1 at 208-209.



company is something which has existence independent of legal rules of art. A.V. Dicey alludes to this inner group reality: "When a body of twenty or two thousand or two hundred thousand men [sic] bind themselves together to act in a particular way for some common purpose, they create a body which, by no fiction of law, but from the very nature of things, differs from the individuals of whom it is constituted."<sup>210</sup> The company, of itself, is entitled to the minimum level of interference from the state without further reference to the rights of shareholders or managers.<sup>211</sup>

**(2) Managerialism:** Around the 1920s -30s "legal theory turned inward, increasingly preoccupied with questions of internal corporate efficiency rather than more fundamental questions concerning the role and legitimacy of corporations within a broader social setting."<sup>212</sup> This shift was an attempt to come to grips with the ever increasing role that large incorporated business organisations were playing in American and British society.

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<sup>210</sup> C. Tollefson, "Corporate Constitutional Rights and the Supreme Court of Canada" (1993/94) 19 *Queens Law Journal* 309 at 318. Dicey's original piece is "The Combination Laws as Illustrating the Relation between Law and Opinion in England during the Nineteenth Century" (1904) 17 *Harv. L. R.* 511 at 513.

<sup>211</sup> The following pieces are a sample of corporate ontology: Jacobson, "The Private Use of Public Authority: Sovereignty and Associations in the Common Law" (1980) 29 *Buffalo L. Rev.* 599, 662-3; A. Appel, "Corporations: Recent Treatment of the Corporate Fiction" (1927) *Cornell L. Q.* 99.; T. Baty, "The Rights of Ideas - and of Corporations" (1920) 33 *Harv. L. Rev.* 358.; G. Canfield, "Corporate Responsibility for Crime" (1914) 14 *Col L.R.* 469.; J. Francis, "Criminal Responsibility of Corporations" (1923) 18 *Illinois L.R.* 305; A. Harno, "The Privileges and Powers of a Corporation and the Doctrine of Ultra Vires" (1925) 35 *Yale L. J.* 13.; A. Machen Jr., "Corporate Personality" (1911) 24 *Harv. L.R.* 253-267 & 347-365; V. Morowetz, *A Treatise on the Law of Private Corporations* (2nd ed, 1886); M. Hagar, "Bodies Politic: the Progressive History of Organizational 'Real Entity' Theory" (1989) 50 *U. Pitt. L. R.* 575.; Ernst Freund, *The Legal Nature of Corporations* (Chicago: Univ. of Chicago, 1879); Otto von Gierke, *Political Theories of the Middle Ages* edited and translated by F.W. Maitland (Cambridge: Univ Press, 1900); H.J Laski, *Foundations of Sovereignty* (New York: Harcourt, Brace and Co, 1929); A.V Dicey, *The Combination Laws as Illustrating the Relation between Law and Opinion in England in the Nineteenth Century* (1904) 17 *Harv. L.R.* 511; J. Brown, "The Personality of the Corporation and the State" (1905) 21 *LQR* 365; G. Dreiser, "The Juristic Person - III" (1909) *U. Pa. L.R.* 300; F. Pollock, "Has the Common Law ever Received the Fiction Theory of Corporations?" (1911) 27 *LQR* 219; H.J Laski, "The Personality of Corporations" (1915) 24 *Harv. L.R.* 404

<sup>212</sup> C. Tollefson, "Santa Clara Revisited", *supra* note 5 at 15.

To a certain extent the growing centralization of the economy and the increased use of the company legal form simply outstripped the parameters of corporate ontology.

Metaphysical inquiries into the nature of corporate personality were abandoned and the company was conceived of as a structure used to conduct business. Hohfeld in his 1923 text, *Fundamental Legal Conceptions* described the corporation as “an association of natural persons conducting business under legal forms, methods and procedures.”<sup>213</sup>

The personality of the company ( the sum total of legal relations, actual and potential) was not to be found through philosophical debate but through a pragmatic examination of these ‘forms, methods and procedures’. An area of chief concern was the great power that was exercised through the company structure particularly in the case of the large ‘public’ company. Legal theorists, following Berle and Means, were in agreement that management was the controlling group within these structures.<sup>214</sup> Debate centered around the issues of whether this power was exercised legitimately. One major issue was whether managerial power was constrained by the occupational training and professional codes of the managers. Another important question was whether or not the internal division of power within a company effectively constrained managerial power. Also at issue was whether competitive forces effectively constrained managerial power. Initially this referred to competitive pressure restricting the activities a company could pursue and

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<sup>213</sup> Hohfeld quoted in W. Bratton Jr., “The New Economic Theory of the Firm: Critical Perspectives from History”, *supra* note 58 at 144.

<sup>214</sup> As pointed out by both Tollefson and Bratton the publication of Berle and Means *The Modern Corporation and Private Property* in 1932 was an important event in the shift away from corporate ontology.

the manner in which they could do so - i.e. competitive pressure was such that the managers could only safely pursue efficient production and profit maximisation, any other course would result in the failure of the company. As this view became more problematic, due to the recognition that the product markets of many large companies did not resemble the competitive market paradigm, a number of other 'market constraint' theories proliferated. One notable example is the 'market for corporate control' whereby even if managers possess a large amount of freedom due to their position and market conditions in the company's product market their actions are still constrained by market forces. Such constraint is said to occur because as a firm strays from the goal of profit maximisation its share price falls and it becomes vulnerable to take-over bids. The aftermath of a successful bid would include changes to management personnel and strategy. The pro/anti managerialist debate effectively dominated corporate theory until the 1980s.<sup>215</sup>

**(3) 'New' economic theories of the firm:** Although theories of corporate personality based upon economic analyses existed from the mid 1930s it was not until comparatively recently that these ideas began to challenge the terms of the pro/anti managerialist

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<sup>215</sup> Some other examples of pro/anti managerialist writings are: Wolff, "On the Nature of Legal Persons" (1938) 54 LQR 494; I.M. Wormser, *Disregard of the Corporate Fiction and Other Allied Corporation Problems* (New York: Baker, Vooris and Co., 1929); J.P. Davis, *Corporations* (New York: Capricorn, 1961) -see Abraham Chayes's introduction in this reprint of a turn of the century textbook.; M. Radin, "The Endless Problem of Corporate Personality" (1932) 32 Col. L.R. 647.; J.W. Hurst, *The Legitimacy of the Business Corporation in the Law of the United States* (Charlottesville Virginia: U of Virginia Press, 1970).; W. Cary, "Federalism and Corporate Law: Reflections upon Delaware" (1977) 83 Yale Law Journal 663.; E. Herman, "The Limits of the Market as a Discipline in Corporate Governance" (1984) 9 Delaware Journal of Corporate Law 530.; W. Baumol, "On the Theory of the Expansion of the Firm" (1962) *American Economic Review* 1078.

debate.<sup>216</sup> The 'new' economic theories of the firm draw upon developments made in microeconomic theory in the 1970s and 1980s in order to contest the management centered conception of the company. Bratton has identified two variants within these 'new' economic theories. The first which he terms neo-classical, asserts that the "firm is a legal fiction that serves as a nexus for a set of contracting relations among individual factors of production".<sup>217</sup> The second variant is comprised of the neo-institutionalists who like the neo-classicists consider the firm as a set of contracts. However, taking on board elements of managerialism they perceive the firm to be a governance structure that can be distinguished from the more general relations of the market.<sup>218</sup> "[I]nstitutionalists inquire into differences between market and firm organisation."<sup>219</sup> A notable feature of the 'new' economic theories is that they do not see the company as a power structure that needs to be legitimised; rather it is perceived as a mechanism through which the entrepreneurial qualities of all participants (management, shareholders and employees) can and should be facilitated.

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<sup>216</sup> This approach had its beginnings at least as far back as 1937 when Ronald Coase published "The Nature of the Firm" 4 (1937) *Economica* 386.

<sup>217</sup> W. Bratton Jnr, "The New Economic Theory of the Firm: Critical Perspectives from History", *supra* note 58 at 122. Some examples of neo-classical writings are: M. Jensen and W. Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" (1976) *Journal of Financial Economics* 305.; R. Hessen, "A New Concept of Corporations: A Contractual and Private Property Model" (1979) 30 *Hastings Law Journal* 1327. F. Easterbrook and D. Fischel, "Corporate Control Transactions" (1982) 91 *Yale Law Journal* 698.; E. Fama and M. Jensen, "Separation of Ownership and Control" (1983) 26 *Journal of Law and Economics* 301.

<sup>218</sup> *Ibid.* at 124. Some examples of institutionalist writings are: O. Williamson, "The Modern Corporation: Origins, Evolution, Attributes" (1981) 19 *Journal of Economic Literature* 1537.; B. Klein, R. Crawford and A. Alchian, "Vertical Integration, Appropriable Rents and the Competitive Contracting Process" (1978) 21 *Journal of Law and Economics* 297. A good summary and critique of institutionalist approaches to the corporation is C. Perrow's "Economic Theories of Organization" in S. Wheeler, ed., *The Law of the Business Enterprise* (Oxford: Oxford University, 1994) 208.

<sup>219</sup> *Ibid.*

Before moving on to study corporate theory as form of problemisation it is necessary to explain how corporatist analysis intersects with the discursive forms just discussed. Corporatist analysis problematises the traditional public/private dichotomy that informs many political analyses:

*Corporatism (or liberal corporatism as it is sometimes called) is a claim that a new mode of political and social structure has emerged in the late twentieth century capitalist welfare state. In contrast to parliamentary democratic theory, corporatist theory points to a "blurring" or "meshing" of the boundaries between the state and civil society.<sup>220</sup>*

This perspective has been used to analyse the appropriate role for a variety of interest groups within society. Corporatist analysis draws attention to the contemporary significance of large companies. Their control over significant amounts of capital and labour mean that decisions made by these entities have a significant impact upon the distribution of resources within the regions (or nations) in which they operate.

*Given this, a corporatist inspired analysis suggests that corporations ought to be regarded as important formal sites at which both the interests of the state and those of individuals are being continually defined and renegotiated. In other words, the corporate legal form .... increasingly facilitates the creation of sites for the "meshing" or mediation of relations between state and modern civil society.<sup>221</sup>*

All corporatist inspired theories of the corporation share this perspective to a certain extent. However, the conclusions drawn have varied widely between theorists and over

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<sup>220</sup> S. Bottomley, "Taking Corporations Seriously", *supra* note 1 at 217.

<sup>221</sup> *Ibid.* at 219.

time. Various corporatist analyses are coterminous, overlap or intersect with the other forms of corporate theory already described.

Some corporatist analyses of the company share the organicist conception of real entity theory and stress the primacy of group over individual goals.<sup>222</sup> Another branch of corporate theory which leans heavily on corporatist analysis is the corporate social responsibility movement (CSR). Adopting the management centered conception of the company CSR proponents argue that the increasingly blurred line between the public and private spheres justifies widening the decision making criteria of managers to include the interests of groups other than the shareholders.<sup>223</sup> CSR writers share a problematic in common with other anti managerialist thinkers.<sup>224</sup> Because different forms of corporatist analysis intersect and align with differing forms of corporate theory I will not be treating corporatism as a discursive form in its own right.

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<sup>222</sup> For a fuller discussion of this form of corporatist analysis see M. Hager, "Bodies Politic", *supra* note 86.

<sup>223</sup> The citations to CSR literature are legion. A good example is S. Bottomley, "Taking Corporations Seriously: Some Considerations for Corporate Regulation." (1990) 19 Federal Law Review 203. For an extensive literature review and an analysis of the various aims and strands of thought within the CSR movement see J. Tolmie, "Corporate Social Responsibility" (1992) 15 University of New South Wales L. J. 208. For a criticism of CSR aims and perspectives see H. Glasbeek, "Corporate Social Responsibility: The Latest in Maginot Lines to Save Capitalism" (1988) 11 Dalhousie Law Journal 363.

<sup>224</sup> As the reader may be aware another corporatist inspired variant eschews both the organicism of real entity theory and the management centered conception of the corporation. This variant utilises autopoietic systems theory to analyse the company (See for example Gunther Teubner, "Enterprise Corporatism: New Industrial Policy and the 'Essence' of the Legal Person" (1988) 36 American Journal of Comparative Law 130. Such analyses fall outside the scope of this thesis. Autopoietic systems theory represents a departure from the problematisation to be examined. The application of systems theory to study companies and corporate theory is a move that is contemporaneous with my attempts to deploy Foucauldian concepts to study corporate theory.

## General features of the problemisation

**(1) Power:** One element of significance for corporate theory as a form of problemisation is a common conception of power. Anglo - American legal discourse takes power to be "a right, which one is able to possess like a commodity, and which one can in consequence transfer or alienate, either wholly or partially, through a legal act or through some act that establishes a right such as takes place through cession or contract."<sup>225</sup>

This shared conception of power can be seen most clearly by examining the manner in which the implications for the external regulation of companies are traced from the attributes of the corporate persona. According to concession theory the associative life of the company flows from a grant of a portion of state power. The role played by state power in the genesis of the legal person justifies the supervisory power retained by the state. This can be contrasted with contractualist theory. Contractualists conceive of the company as an aggregation of pre-existing natural rights bearing subjects. The power to create this associative life rests with these private individuals. Thus, the activities of the company are merely a form of organizing the activities of these rights bearing individuals. Therefore, the state can claim no greater regulatory powers over the corporation than it already possesses in relation to the natural subjects of which it is comprised. In similar fashion, the real entity is conceived of as a private entity whose existence is not dependent upon the state. However, the status of the real entity as a natural person also has

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<sup>225</sup> C. Smart, *Feminism and the Power of Law*, *supra* note 50 at 6.

implications for the external regulation of the corporation. A natural person is entitled to the rights accorded to other subjects.

Therefore, it is the starting point of the power that animates the associative life and the direction in which this power flows that is significant for determining what constitutes legitimate external regulation. The extent to which citizens have 'contracted' for some of the state's power is the extent to which the state can regulate. Corporate theory was organised around this question of who possessed the power that initially animated the legal person.

In the managerialist debates the emphasis shifts somewhat. The problem is no longer what is the source of animation for the legal person- the company is perceived of as a structure and within that structure the group referred to as management possesses the power to direct the activities of the legal person. The question of where this associative life emanates from is simply swept away by events. The sheer significance of modern companies makes the question of who effectively controls these entities far more pressing. Given, that managers have the 'power' the pressing question becomes whether or not this 'power' is legitimate. However, the essence of this 'power' being discussed remains the same. Power is still a commodity and it is a concrete power that can be possessed by an individual or by a definable group. Theorists who adopt a pro-managerialist stance argue that the power possessed by managers is legitimated either through the expertise of the



managers or by the fact that exercise of this power is effectively disciplined by market forces.

Anti-managerialists challenge such claims to legitimacy upon two main grounds, firstly that expertise and/or the market do not effectively discipline managers. Secondly, they point to the fact that this power possessed by managers cannot be unproblematically characterised as private in nature. This is because the sheer scale of the resources controlled by large corporations makes them important sites for the mediation of relations between state and civil society.<sup>226</sup> Drawing upon this corporatist inspired analysis the anti-managerialists argue that the increasingly blurred lines between the public and private sphere provide a basis for the legitimisation of state regulation of managerial activities which goes beyond the realms of enforcing fair dealing as far as the interests of shareholders are concerned. What is interesting is that this position still involves discussing power in order to delineate the appropriate boundaries of state regulation (in this case it is the 'public' character of the power that is in issue). Further, this power being discussed does not depart in many important respects from the 'power' discussed by pro-managerialist theorists, it may be 'public' but it is still like a commodity and it is still possessed by the managers.

The new economic theories of the corporation depart from the management-centered conception of the company but this move is not prompted by a qualitatively different

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<sup>226</sup> See note 221 and accompanying text.

conception of power. These theories share much of the contractualist perspective in relation to the source of the power that animates associative life and the appropriate role for the state. The 'power' derives from private individuals interacting in civil society and hence the state has no more of a mandate to regulate corporate activity than it does for any other activity carried on in the private sphere. In either case the 'private' nature of the associative life dictates the scope and nature of state regulatory activity. In this perspective state activity is not dominated by the need to respect a quasi-natural civil society; rather state activity should be aimed at encouraging and facilitating the entrepreneurial qualities of the individuals involved. Once again the 'problem' of what is the appropriate scope for state regulation of the company is based upon an inquiry into the nature of the legal person with special emphasis on the source of the power that animates associative life.

Corporate theory is organised around the problem of the legitimacy and the source of authority for a particular form of associative life - the company. The discussion takes place with reference to a common conception of power. The commonality of conception of power in corporate theory can be further emphasised by contrasting it to the 'dispersed entity' posited by both Thompson and Lowe.<sup>227</sup> These theorists take the iconoclastic view that the company should be perceived of as a conglomeration of relationships and practices. These relations are analysed from a perspective that views power as relational

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<sup>227</sup> See G. Lowe, "Corporations as Objects of Regulation", *supra* note 64. and G. Thompson, "The Firm as a 'Dispersed' Social Agency", *supra* note 63.

and productive. Power is seen as something to be analysed at a micro or capillary level. In viewing power in these ways, these two isolated articles depart significantly from the problematisation that has persisted for the last century in corporate theory. Corporate theory as a whole views power as a concrete commodity in the form of a right that can be transferred or alienated. This particular conception of power came to be an organising feature of corporate theory because the questions of the source of associative life and the legitimacy of regulating that life in corporate theory are inextricably bound up with the liberal (human) subject and their existence in civil society.

**(2) The concern to govern civil society:** Corporate theory came to be organised around a liberal-sovereigntist conception of power because it was practised in a context where liberal discourses of governmentality were predominant. Corporate theory became involved with the liberal concern to govern civil society in a manner which sustained and enhanced its autonomy. This involvement occurred because companies started to become increasingly significant legal and economic actors within the field of civil society. Corporate theorists were faced with the problem of how company activity fitted into the liberal schema. This same concern faced corporate theorists in all three discursive forms. The manner in which it was dealt with varied across the discursive forms.

Those theorists who wrote corporate ontology did so primarily in a period when the company form was not yet the dominant form of business organisation. The legal person was conceptualised in very individualised terms in this discourse. Once company activity

is conceived of as being carried out by an individual then the question of how to come to terms with this associative life is largely solved, discussions of company regulation are largely subsumed under more generalised discussions of individual- State relations. Some specialised discussion relating to the duties of directors was undertaken but this can be seen largely as a discussion regarding the regulation of interpersonal relations (director to shareholder). The traditional doctrine of *ultra vires* dealt with restricting a company to the activities set out in its objects and thus did not necessitate a departure from the individualistic template. Similarly, questions of company responsibility were dealt with in a fashion that focused upon the capacities of the legal person - corporate responsibility was talked about as a particular subset of individual responsibility.

Within the managerialist debates the company is conceived of as a structure with a certain group of people in control - the managers. The concern of this discourse is over the large amount of power that these individuals exercise within civil society. Depending upon the perspective adopted this exercise of power is either illegitimate and thus harmful to the life of civil society or the exercise is legitimated through expertise and/ or market constraints and therefore not harmful to civil society. In the case of the new economic theories the concern is how to maximise the opportunities for the various parties involved in the company to engage in free contracting. Encouraging and providing the environment for such entrepreneurial activity (whether through 'deregulation and/or privatisation) is deemed to be the most beneficial course of action.

It is clear then that the three discursive forms of corporate theory are located within the liberal problematic of government. The discursive forms differ not because they depart from this problematic but because they are each correlated with a different form of liberal government rationality.

**(3) The limits of memory - legal personateness:** An important element which contributes to the construction of a problematisation is not just what is said but what is left unsaid, what is assumed to be so.

Corporate theory understands companies as always already juridical beings, as legal subjects and dismisses the construction of the juridical. Theories of the corporation naturalise the juridical form taken on by the corporate person, irrespective of how these theories differ in other respects. The legal personateness of the company is not questioned, there is no space within these discourses for ongoing questioning. Ways to think about a company other than as a legal 'person' are not within the constituted domain of the discourse.

Thus, corporate theory is very much a discourse about legal personality and is not an enquiry into the ramifications of, or the alternatives to, legal personateness as a means to organise associative commercial activity. This state of affairs is not as surprising as it may first appear because one must remember that the discourse of corporate ontology was

initiated in Britain and the US. at a time when the joint stock company was not the most significant form of economic organisation nor was the company the most significant legal form of organisation.<sup>228</sup>

Given its relative novelty not that much attention was at first paid to the issue of personateness for the new statutory 'person'. Instead, the discussion was fashioned from an amalgam of pre-existing theories and viewpoints. All three of the main personae generated within the discourse drew on theory and sources that had concerns with entities such as ecclesiastical bodies or mediaeval guild structures. Quite disparate political and moral considerations were applied to talk about a creature of a different nature - the joint stock company possessing modern corporate form.

The discourse of corporate ontology continued through to at least the first quarter of this century. During this period ( in which corporate theorists took company legal personateness for granted) the company became the dominant actor in economic life: In terms of economic activity the company became one of the most significant governmental sites during the three decades preceding World War One. It also saw the increasing dominance of the joint stock form company as an economic form (remembering that this economic form now utilised the company legal form).

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<sup>228</sup> "...the overall importance of the company as a legal organisational form by the mid 1880s should not be overstated. It was still very much subordinate to the partnership. ... J.B Jeffreys estimates that, 'taking about 100 000 as the number of important partnerships in this country[Britain] in 1885, we see that limited liability companies accounted for at most at that date between 5 per cent and 10 per cent of the total number of important business organisations excluding one-man concerns and public utilities.'" (P. Ireland, "The Rise of the Limited Liability Company", *supra* note 45 at 244-245.)

Discussion about business enterprises possessing modern corporate form had been initiated against the backdrop of classical liberalism. These discussions developed in such a way that the company was conceived of as person separate from the state and separate from those involved in its operations (shareholders, managers, employees). Even when the company became a hugely significant organisational form corporate theory did not shift from this conception. The managerialist debates represented a shift in discursive form that in some ways attempted to grapple with the predominance of the company form; but this did not take the form of re-evaluating or questioning the personateness of the company form. As has already been noted, a company's status as a 'person' implied certain rights to freedom from state interference. I will explore some suggested ideological effects of this assumed personateness in Part V of this thesis.

### **Specific Features of the Problematisation**

#### **(1) Corporate Ontology and Classical Liberalism:**

Corporate ontology sought to integrate the company into legal and governmental discourses by providing a vision of the company as a person. Although the company was not a natural person it is was still individual enough to be integrated into these discourses. Corporate ontology preceded on the basis that this integration would not involve too much disturbance to an outlook of civil society as a quasi-natural field populated by

rational calculating individuals. Within corporate ontology there are three key dichotomies that correspond to three key choices made by corporate theorists regarding the attributes of corporate personality. Firstly, the company is either a natural person or an artificial person. Secondly, the company is either an aggregate or a unitary entity. Thirdly, the personality of the company can be characterised as either private or public.

Corporate theorists attempted to make the phenomenon of the company an intelligible and administrable object within the framework of classical liberal government. The manner in which they did so made sense within the framework of that discourse. If a company is a person then, once you have established its relevant personality traits, regulating it poses no unique problems. Company regulation was assessed according to the criterion applied to all regulatory measures: Would this measure help to enhance and sustain the autonomy of civil society? As demonstrated in Part III of this thesis this question was very much present in the debate concerning the extension of limited liability to the shareholders of companies.

Another example is the treatment of the issue of corporate responsibility for crimes and tort. Once the company is conceived of as an individual this issue can be resolved using familiar terms. A company should only be held responsible if it has the requisite capacity. To punish any individual for an action they are incapable of understanding runs counter to the wider norms of classical liberal government. Once this problem definition is adopted the only live issue (which the corporate theorists pursued with fervour) is that



regarding the actual capacity of the company. Concession theory initially attributed to the company a very limited capacity to be responsible for wrongs. In its most extreme version the fact that the company owed its existence to the state made it functionally incapable of committing a tort or a crime. Over time this position softened, companies could be responsible for wrongs that did not entail 'human malice'. At the turn of the century progressive writers such as Laski adopted the real entity theory in order to press for greater corporate responsibility for wrongs inflicted.<sup>229</sup> To a limited extent this was translated into legal doctrine via an organicist metaphor in which the directors and senior officers represented the 'mind' of the company. Modern jurists have taken pains to point out the limitations of the metaphor; but even today issues of corporate responsibility are commonly conceived of in very similar terms.

Corporate ontology's aim to provide an intelligible and administrable vision of the company form by presenting the company as an individual was not without its tensions. These tensions were apparent in all three of the persona generated. Concession theory's explanatory power became increasingly questionable as statutes of general incorporation were passed and as the traditional doctrine of *ultra vires* was gradually eroded. Wheeler points out that contractual theory was able to provide a good model for the explanation and structuring of intra firm relations but real difficulties arose in trying to apply the model to explain the relations between company and state. The organicist metaphors of the real

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<sup>229</sup> Examples of these writings include: H. Laski, "The Basis of Vicarious Liability" (1916) 26 Yale Law Journal 105.; and O. Gierke, *Das Wesen der menschlichen Verande*, Inaugural address upon assuming the Rectorate at the University of Berlin (Oct. 15, 1902). These examples are taken from M. Hager, "Bodies Politic", *supra* note ## at 584 & 588.

entity theory pursued within corporate ontology also became increasingly strained as they attempted to cope with all aspects of associative life represented by the modern company.<sup>230</sup> These tensions combined with a number of other factors, including a more general shift in the prevailing discourse of government rationality, resulted in the managerialist debates becoming much more prominent than corporate ontology. This shift and the structure of these debates is the subject of the following section.

## **(2) The Managerialist Debates and Welfarist Liberalism:**

Before describing the salient elements of this form of problematisation it is necessary to briefly describe the form of government rationality that informed the managerialist debates.

This mode of government rationality can be described as welfarist: "in which the State tried to ensure high levels of employment, economic progress, social security, health and housing through the use of the tax system and investments through state planning and intervention in the economy, and through the development of an extended and

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<sup>230</sup> I say the real entity theory associated with corporate ontology because I wish to distinguish those theories from more recent theoretical treatments of the company who also pay considerable attention to the notion of companies as 'real' entities. These theoretical treatments do not use organicist methods but rather draw upon organisational and systems theory in order to develop a model of the company. These models represent a departure from the problematisation I am sketching here. They are also of quite recent emergence, many of these models were developed contemporaneously with the theory deployed in this thesis. The combination of these two facts means that they fall outside of the scope of the thesis. As mentioned earlier a leading figure in this work is Gunther Teubner, see for example "Enterprise Corporatism: New Industrial Policy and the 'Essence' of the Legal Person", *supra* note 224.

bureaucratically staffed apparatus for social administration.”<sup>231</sup> These techniques of government were based on a rationality where:

*The state was to become the guarantor of both the freedom of the individual and the freedom of the capitalist enterprise. At the same time, the state was to produce a set of technical devices that would ‘re-invent community’, socializing both individual citizenship and economic life in the name of collective security.*<sup>232</sup>

Governments were attempting to respond to the social fragmentation that attended the modernising process yet did not attempt to do so by reviving the cameralist vision of total penetration of society by the state. Government in accordance with a welfarist rationality was still a process of government from a distance. The separation between society and state in this form of government rationality was highly dependent upon the expertise of professionals. The state did not directly prescribe norms for conduct but empowered professionals to do so. The authority of the professionals largely derived from the truth claims of their expertise. By attempting to co-ordinate and harness these expert knowledges the state sought to govern from a distance.<sup>233</sup>

I would argue that this rationality of expertise infuses the managerialist debates. The primary issue is the legitimacy of the power that managers exercise by virtue of the position they occupy in the power structure of the firm. This was the problem raised by

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<sup>231</sup> P. Miller and N. Rose, “Political Power beyond the State”, *supra* note 69 at 191.

<sup>232</sup> N. Rose, “Government, authority and expertise in advanced liberalism”, *supra* note 77 at 293.

<sup>233</sup> This description of the significance of expertise in welfarist liberalism is taken from N. Rose, “Government, authority and expertise in advanced liberalism”, *supra* note 77 at 285.

Berle and Means in their classic separation of ownership and control thesis.<sup>234</sup> They posited a contractual relationship between owners (shareholders) and managers whereby many of the traditional incidents of ownership did not lie with the shareholders but rather with managers. In this relationship the shareholder interest could in no way be said to effectively control the actions of management. In the absence of this control the question was whether there was any effective source of norms to govern the conduct of managers or was managerial power a threat to liberal-democratic ideals. The way in which this problem came to be organised draws directly upon welfarist rationality. As Bratton argues: "Participants in the discussion chose to address the issue as one of policy - 'social' policy - rather than one of legal theory or doctrine. This discussion seemed to obviate the need for further philosophical discussion of the nature of the corporation."<sup>235</sup> Pro-managerialists argue that management power is disciplined either by professional codes of conduct or by market forces.

Anti-managerialists point to the convergence in the scale and type of power exercised within large companies and certain state organisations. This convergence is used to justify their view that companies have a public as well as a private character. This public character forms the normative basis for imposing duties of a more inclusive nature upon company managers and directors. Seemingly this challenge to the validity of managerial

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<sup>234</sup> As Bratton points out these ideas did not develop in a vacuum. He cites two of the works of the iconoclastic economist Thorstein Veblen as an example. See W Bratton Jr., "The New Economic Theory of the Firm: Critical Perspectives from History", *supra* note 26 at 135.

<sup>235</sup> *Ibid.* at 135.

power represents a departure from the problematic that the pro management theorists pursue. However, I would argue that the anti-managerialist position is also infused with the rationality of welfarist liberalism and thus is part of the same problematisation as pro management positions.

Both sides of the debate accept that the deployment of expertise forms the only legitimate basis for proposed governmental intervention. According to this view intervention in the corporate sphere should take the form of channeling and directing the relevant rules of managerial conduct . Once established these rules of professional conduct would achieve the desired purposes without the need for direct state intervention.

Pro -management theorists argue that the structuring of professional rules of conduct should be restricted to aligning management behaviour with shareholder interests - hence the concepts of 'trust' and 'reasonable skill and diligence' which inform so much of current company law doctrine. Anti-managerialists consider that one should act upon the same group of individuals in the same manner. The only difference is that for an anti-management theorist it is permissible and desirable to seek to channel and direct managerial conduct in order to serve a range of interests beyond that of shareholder entitlements and profit maximisation. While in wider political discourses the influence of welfarism has waxed and waned, managerialism broadly construed effectively dominated corporate theory for half a century from the 1930s to the early 1980s.

**(3) 'New' economic theory and Neo-liberalism:** Although there have been earlier systematic criticisms of the welfare state it was not until the late 1970s that such critiques reached the point where they presented an alternative rationality to welfarist liberalism.

While neo-liberalism at first appears to be a reactivation of classical liberalism it differs substantially due to the fact that governmental reason is no longer tied to a vision of a semi-autonomous civil society. Rather, governmental action is quite explicitly aimed at promoting an environment which will lead to the flourishing of the entrepreneurial subject.<sup>236</sup>

*... it becomes a question of constructing the legal, institutional and cultural conditions which will enable an artificial competitive game of entrepreneurial conduct to be played to best effect.*<sup>237</sup>

A good example of this is the great efforts made by neo-liberal governments to undertake privatisation and corporatisation programmes in order to open as many sectors as possible to conditions of entrepreneurial conduct. The vision of the entrepreneurial subject endowed with freedom and autonomy "has come to predominate over almost any other evaluations of the ethical claims of political power and programmes of government."<sup>238</sup> Government is no longer to be carried out through society and the

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<sup>236</sup> Mind you this has not prevented many neo-liberal politicians and commentators from attempting to identify their position with 'traditional liberal values'.

<sup>237</sup> G. Burchell, "Liberal Government and techniques of the self", *supra* note 21 at 274.

<sup>238</sup> P. Miller and N. Rose, "Political Power Beyond the State", *supra* note 69 at 200.

articulation of experts within society. Instead, expertise is to be used to create the conditions for the expansion and strengthening of the entrepreneurial qualities of individuals - "... citizenship is to be manifested not in the receipt of public largesse, but in the energetic pursuit of personal fulfillment and the incessant calculations that are to enable this to be achieved."<sup>239</sup> Government is made possible by the fact that the citizens engage in such calculation. As Burchell suggests: "Government is a contact point where techniques of domination - or power - and techniques of the self interact, where technologies of domination of individuals over one another have recourse to processes by which the individual acts upon himself [sic]."<sup>240</sup> Increasingly neo-liberal arts of government depend upon techniques such as audit, accounting, monetarisation, and the quasi-psychological discourse of the management consultant.

This relationship between the role of government and techniques of the self provides the link to the new economic theories of the firm. The firm is no longer seen as a power structure the effects of which must be justified; rather it is seen as a construct which should be arranged in such a fashion as to maximise the opportunities for entrepreneurial activity by those involved with the firm. The expertise which is necessary to achieve this result is economic theory. Corporate law should thus reflect the prescriptions of the appropriate economic theory.

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<sup>239</sup> *Ibid.* at 200.

<sup>240</sup> G. Burchell, "Liberal Government and techniques of the self", *supra* note 21 at 268.

The growing prevalence and influence of economic views of the firm are often attributed to the greater variety of micro-economic tools that became available during the 70s and 80s. I would argue however that the upsurge in such theories owes as much if not more to the increased influence of neo-liberal government rationalities.<sup>241</sup> In the introduction to this Part these theories were categorised as either neo-classical or institutional. I will now relate both variants to the problemisation as a whole.

Neo-classical theories of the firm contest the management centred conception of the company. They do so in an extremely direct manner - hierarchy and power structures simply do not appear upon the conceptual landscape. In these theories the company is a nexus of interlocking contracts between individuals pursuing their own personal goals. More specifically the contracts of which the firm is comprised are perceived of as a response to a series of principal and agent problems. The agent contracts to perform services for the principal within a milieu that, according to agency theory, is dominated by self interested exchanges between individuals. According to agency theory monitoring the performance of these contracts is costly and can never be entirely effective. This difficulty in monitoring performance encourages agents to engage in self interested behaviour at the expense of the principal.<sup>242</sup>

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<sup>241</sup> Economic analyses of the corporation did of course occur before the 1970s and 80s, Ronald Coase's article: "The Nature of the Firm", *supra* note 216 was an influential predecessor to contemporary work. It is likely that work such as Coase' did play some role in the development and promotion of neo-liberal government rationalities.

<sup>242</sup> C. Perrow, "Economic Theories of Organization" in S. Wheeler, ed., *The Law of the Business Enterprise*, *supra* note 58, 208 at 209. Among others Perrow provides the following references to agency theory: A. Alchian and H. Demsetz, "Production, Information Cost and Economic Organization" (1972) *American Economic Review* 777.; E. Fama and M. Jensen, "Separation of Ownership and Control" (1983) 26 *Journal of Law and Economics* 301.; and M.Jensen and W. Meckling, "Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure" (1976) 3 *Journal of Financial Economics* 305.



The network of contracts that characterises many large firms arise in response to these principle and agent problems. Organisational structure is simply a reflection of the various contracts constructed in order to deal with the problems of shirking and opportunism together with the difficulties associated with monitoring and preventing such behaviours. The connection to neo-liberal government rationality is fairly clear. The governmental techniques, and the expertise whose goal is to enlarge and enhance the entrepreneurial conduct of citizens, are directly relevant to the tasks of facilitating self-interested exchanges in the corporate milieu. Governmental action in this field is judged under the same criterion as government action in other spheres - freedom and autonomy of the private subject.

The neo-institutionalists present a richer picture of the structure of the firm. "While comprised of contracts, this firm entity amounts to a hierarchy. It is a 'governance structure' distinguishable in a meaningful way from market contracting. Following Coase the institutionalists inquire into differences between market and firm organisation."<sup>243</sup> The primary reason for the differences between market and firm and for the type of structure the firm adopts is due to the effects of transactions costs. The governance structure of the firm arises as economic actors seek to maximise the efficiency of transactions. Transactions costs economics recognises that not all contracts follow the model of spot contracts entered into in a market place where there is a large number of buyers and sellers

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<sup>243</sup> W. Bratton, "The New Economic Theory of the Firm: Critical Perspectives form History", *supra* note 58 at 124.

for each and every good and service. Quite often a firm enters into a long term contract for certain specialised needs. If the supplier's performance falls below par the firm cannot costlessly go to the market to have these needs fulfilled. Another important component of transaction cost economics is the notion of bounded rationality. Under conditions of bounded rationality decisions have to be made on the basis of incomplete data. This is important where a firm has to judge whether a supplier is simply shirking or whether their excuses for poor performance are in fact true. In most cases you can never be entirely sure of the facts and in any event the condition of small numbers bargaining means that switching suppliers is never a costless exercise.<sup>244</sup>

One solution to these market failures is found in vertical integration. By bringing suppliers and distributors into your organization your control over their actions is enhanced and the opportunities for effective monitoring of their performance are increased. Thus, according to the theory, savings will be made by internalising these operations. According to the neo-institutionalists the personality of the firm is predominantly shaped by this quest to reduce the costs of transactions. The theory is used to explain why concentration of resources exist in large firms and why in certain areas market rather than firm organisational structures persist. The organisational character of the firm is given a certain teleology, it exists because it is the most efficient way to structure the transactions in question.

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<sup>244</sup> This description of these components of transaction cost economics was drawn from Charles Perrow's exegesis, see C. Perrow, "Economic Theories of Organization", *supra* note 242.

Thus, corporate theory can be viewed as a form of problemisation. This problemisation has important features which remain constant across the various discursive forms that corporate theory has taken. The major difference between the discursive forms is the fact that each discursive form is correlated to a different form of government rationality. The potential ideological effects of the problemisation will be the focus of the next Part.

## **Corporate theory and ideology**

### **Introduction**

Corporate theorists as a general rule do not acknowledge that their highly specialised discourse is appropriated in a highly strategic manner. Discussion proceeds in order to develop an internally coherent and complete picture of the corporate person, the stipulations for corporate regulation then follow. This ignores the way in which corporate theory is deployed into doctrine and appropriated into wider public and political discourses. A good example of this is how certain neo-liberal politicians (Thatcher and Reagan are dated but solid examples) used certain elements of the new economic theories of the firm to add further ideological support (beyond the good government equals small government sloganeering) for privatisation programmes. In turn, the fact that companies were an effective means of activating the entrepreneurial qualities of the citizenry at large was used as one legitimating factor for a deregulation of the corporate sector. Elements of corporate theories are deployed in a fashion which makes them more of a rhetorical than a logical force.

The ideological effects produced depend to a large extent upon the specific articulation of the theory (or elements of the theory) rather than such effects being compelled by the theory's internal logic. Because of its aim to 'explain the company' and

the reliance on law as a self-referential field of knowledge corporate theory is singularly ill-equipped to deal with the issue of how its discourses are appropriated within particular historical settings to pursue discernible strategies. This presents two difficulties. First, corporate theorists' habit of producing fully blown models of corporate personality and deducing regulatory strictures from such a model institutes a dysfunctional dialogue between corporate theorists and their intended audience: Corporate theorists address their discourse to a notional rational subject. Supposedly, if this subject is convinced of the merits of a particular theory it will act to bring company law into line with the theory's prescriptions. However, as Pierre Schlag has observed: "one cannot communicate with bureaucratic power structures as if they were rationally competent, individual humanist subjects."<sup>245</sup> By continuing to address their arguments to this notional subject corporate theorists ignore the ways in which their theories are appropriated and deployed. In many cases corporate theory shuts its eyes to the ideological effects that it produces.

The second difficulty is that when corporate theorists talk about attributes of the corporate person they are speaking of a juridical entity entirely separate to both state and shareholders. Although it was not until the 1860-70s that the company form was considered to be totally separate from its members both in legal doctrine and legal theory, this separateness clearly contributed to the phenomenon of discussing companies in a manner analogous to that used to discuss other persons. Once a company is seen as an entirely separate legal person its personality is amenable to undergoing the individualising

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<sup>245</sup> P. Schlag, "Normativity and the Politics of Form" 139 U. Pa. L. Rev. 801 at 804-805.

effects of modern law. The law institutes you, me and the large business enterprise as a juridico-political subject-person. Corporate theory on the whole does not see this assumed equivalency as a problem to be addressed. The discourse takes this as a starting point from which to focus upon the personality of companies.

The particular ideological effects of corporate theory are hard to comment upon in any generalised fashion. Appropriate commentary would normally involve reflection upon the specific articulation of a particular corporate theory into an historical or contemporary strategy. However, the effects of the separation of company and shareholder into distinct legal personality are so pervasive and significant that they are worth commenting on in the abstract. A second point worth raising relates to the mismatch between large organisational structures such as companies and models of personal responsibility. These issues will be explored in the following two sections of this Part. The section will then conclude with a brief reflection upon some common ways that theories from each of the three discursive forms have been deployed to produce ideological effects.

### **Shareholder and company: separate personalities**

Many commentators on British and American company law<sup>246</sup> have observed that the contractualist vision is still particularly influential when the internal governance of a

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<sup>246</sup> See especially M. Stokes, "Company Law and Legal Theory" in Twining, ed., *Legal Theory and Common Law* (London: Basil Blackwell, 1986) 155.

company is at issue. These commentators have noted how perceiving the relations between shareholders, managers and the company itself through a contractualist lens has had a salutary effect upon the development of legal doctrine in this area. What is less well noted however is the effects that this perspective has when it is combined with the assumed separate legal personateness of the company. The company is a separate individual to the shareholders and its relationship to the shareholders is essentially contractual in nature. The legal relations between the two are couched in terms of two units individualised by law who transact with each other. The legal rights of the shareholder are separate from the legal rights of the corporation. This is a trite observation but the very taken-for-grantedness of the statement is exactly what is problematic. The legal personality of the company means that the shareholders stand one step removed from the employment of the productive assets at the company's disposal. Shareholders merely own shares and thus their involvement is conceptualised as a detached one. Put simply the average shareholder possesses rights without responsibilities and the type of right possessed is especially valorised and protected in common law systems - private property.

The result of this is that questions of corporate regulation are inserted into a discourse of private property rights. The private property rights of shareholders who are not formally responsible for the actions of the separate legal person can be used to trump other interests. The injunction against interference with private property has powerful resonances both within discourses of law and in the wider political discourses in which

questions of company regulation are discussed and fought out. It is true enough that there are instances when the Courts will look beyond the company and 'pierce the corporate veil' in order to impose responsibility upon shareholders. However, such situations are the exception rather than the rule. If one wishes to ignore the separation of company and shareholder one must bear the burden of the uncomfortable adjective.

### **Companies and individual responsibility**

Law does assist in creating legal persons as separate monads but also institutes them in relation to each other. The company and the shareholder are isolated from one another as individuals but at the same time linked through the nexus of contractual exchange. Investing in a corporation as a shareholder (who does not take an executive or directorial position) alters the moral character of the act of investment. Investing in a large public company is not like accomplishing the same investment in a different way. "It changes the action morally, and one reason this happens is that the responsibility associated with doing the deed oneself is not conserved."<sup>247</sup> Behaviour and the attribution of responsibility differ depending upon whether the context is a large organisation or a more personalised one. However, the mental templates we use to attribute responsibility do not fully deal with this - the company, the shareholder, and the director are perceived primarily in an individual

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<sup>247</sup> Wolgast, *The Ethics of Artificial Persons*, (Stanford: Stanford U, 1992) at 144. nb. Wolgast uses the term artificial person extremely broadly to include agents, professional consultants and companies, thus her usage does not refer to the artificial/ natural distinction drawn in corporate ontology.



context and not an organisational one. This is not surprising as the mental templates we employ to deal with issues of responsibility are primarily based upon individualistic models concerned with human persons.<sup>248</sup> I agree with Wolgast when she says that this divergence reveals an interesting problem. "It points to the existence of a deep and intractable conflict between the shape of institutions and the requirements of moral responsibility as we know them."<sup>249</sup>

I would contend that our difficulties in contemplating shareholder responsibilities concomitant with their entitlements to the revenue of companies is a manifestation of this lack of fit between individualistic templates of responsibility and the institutional structure of ownership in large corporations which figure so prominently in contemporary economies. Once ownership of the productive assets and the responsibility for their use is placed in the hands of the legal personality of the company it becomes almost unthinkable to contend that some elements of this responsibility should be retained by the shareholders - you cannot be your brother's nor your investment vehicle's keeper. I think this view is only fully convincing if one persists in ignoring the lack of fit between the ways in which we conceive of responsibility and current institutional arrangements. To allocate more

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<sup>248</sup> It is fair to say that legal theorists at the turn of the century were aware of this problem but did indeed use models based on individual human responsibility. The following quote from Freund is illuminating:

*[how is it possible] upon any other basis [than the individual] person], to deal with notions that are constantly applied to the holding of rights, and which explains their most important incidents: intention, notice, good and bad faith, responsibility? How can we establish, unless we have to deal with individuals, the internal connection between act and liability?*

( Freund as quoted in M. Horwitz, "Santa Clara Revisited: The Development of Corporate Theory" in M. Horwitz, *The Transformation of American Law, 1870-1960* (Oxford: Oxford University, 1992) 65 at 74.

<sup>249</sup> Wolgast, *The Ethics of an Artificial Person*, *supra* note 247 at 144.

responsibility to shareholders could well entail the imposition of flatter organisational structures in companies in order to allow shareholders the opportunity to ensure their new responsibilities could be effectively discharged. Now is not the time to go into that debate, but sufficient to say that I would be much happier with a discourse that actively engaged such questions and attempted to grapple with the issue of responsibility in institutional settings rather than simply skirting it as corporate theory does.

### **Corporate Ontology and responsibility**

The fact that corporate theory has elided this issue of the mismatch between corporate personality and models of responsibility leads into my comments regarding the deployment of certain elements of corporate ontology. A good historical example of this mismatch is the deployment of concession theory in a fashion that effectively limited company responsibility.<sup>250</sup> The company/ corporation was an artificial person whose grant of power emanated from the state. The state in no way could have authorised a company or a corporation to commit tortious or criminal acts. Therefore, any tort or crime was *ultra vires* the company/corporation and thus could not be attributed to the legal person. Hager points out that although corporations had been held liable in trespass as early as 1842 courts were reluctant to impose liability "for torts such as libel, fraud, and wrongful prosecution - involving malicious states of mind. This situation persisted [in Britain] up

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<sup>250</sup> This example and the one that follows it are drawn from M. Hager, "Bodies Politic", *supra* note 86.

until the 1904 decision in *Citizens Life Assurance Co. v Brown* [1904] App. Cas. 423 (P.C.).”<sup>251</sup> Concession theory played a role in presenting the sectional interests of the corporate sector as universal. The law could not be reformed because would involve imposing liability where no capacity for responsibility existed. Maintaining the status quo was thus identified with keeping a fundamental principle of the common law intact.

The strategic and doctrinal response to this state of affairs involved the use of ‘real entity’ theory. If one considers the corporation to be a ‘real entity’ then it is fair to say that the entity must possess some form of moral responsibility. The point of the enquiry then becomes to discover the nature of this feature of the legal personality. This was initially resolved by reference to an organicist metaphor - the legal person acted through various natural persons who formed the hands and the mind of the legal person. If an action was properly authorised by those natural persons who were deemed to compose the ‘mind’ of the legal person then the company/corporation was held to be responsible. Various commentators and judges have railed against the absurdities that result if this metaphor is applied too mechanically and have stressed the need for the application of common sense; but this the organicist approach still informs many issues of corporate responsibility to this day.<sup>252</sup>

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<sup>251</sup> *Ibid.* at 588-589.

<sup>252</sup> Of course one could object to this by pointing to the rise of the strict liability offence in legislation aimed at companies (particularly environmental legislation). However, these offences are aimed just as much at corporate officers and directors as they are at corporations themselves, also the strict liability offence is in essence not an alternative way of conceptualising and solving issues of corporate responsibility; it simply evades the question by arbitrarily assigning responsibility. As Horwitz has noted: “In a legal system whose categories were built around individual activity, it was not easy to assimilate the behaviour of groups. Inherently individualistic conceptions like ‘fault’ and ‘will’ were difficult to apply to corporations.” (M. Horwitz, “Santa Clara Revisited: The Development of Corporate Theory”, *supra* note 248 at 182.)

Companies are now considered to have a requisite degree of capacity which enables them to be held responsible for a far greater range of wrongdoing. The problem is that such wrongdoing is often impossible to establish. The application of individualistic templates of responsibility often gives rise to intractable evidentiary problems. One common response to such difficulties is to allocate responsibility in such a way that personally exposes directors and officers of companies to strict liability for wrongs occurring in the corporate context. What I find problematic about the discussion of the merits of such steps is that one begins with an issue of systematic institutional non-compliance to certain standards. However, due to the type of regulatory measures taken, discussion quickly collapses into a discussion about the rights of a director or officer (an individual human subject) *vis a vis* the power of the State. Once again we find ourselves pursuing an issue in a set of discourses which is not all that appropriate to the task at hand. The discussion of the most effective ways to punish corporate wrongdoing is conflated with issues of individual (human) rights.

### **Managerialism and the 'technicisation' of politics**

The managerialist debates involve a process that can be termed the 'technicisation' of politics. This refers to the manner in which potentially contentious issues (such as management power) are de-politicised by deference to 'expert' knowledge. This can be

seen in the two predominant strands of pro-managerialist thought. Firstly, there was the approach influenced by institutional economics that paid great attention to the split in ownership and control. Although managerial legitimacy is at issue theorists chiefly concerned themselves with answering the following question: If the profit motive does not control the behaviour of managers what objectives do they in fact strive to obtain? Secondly, how are (or can) these objectives be reconciled with the interests of shareholders. The dominant questions are technical issues of what motivates management conduct and the design of mechanisms (whether it be reporting requirements, legal doctrine or the market for securities) to ensure that management power is constrained and harnessed for the benefit of the shareholders. Corporate power is taken as a given, the fact that management is the group that holds much of this power is also a given. These two factors are not open for discussion nor perceived as amenable to change. Any such attempt to make such a change is portrayed as illegitimate because it would involve unwarranted government interference in a realm of expert knowledge.

Anti -managerialist theories also invoke the truth claims of expertise. However, the unquestioned and almost complete separation between shareholders and companies has been used to devalue anti- managerialist arguments. I shall endeavour to describe this effect with the aid of an example. One particular variant of anti-managerialist analysis is known as corporate social responsibility (CSR). Proponents of CSR argue that, given the blurring between the public and private sectors which is especially relevant to the case of the large business corporation, policy makers are justified in widening the decision-

making criteria that directors and officers of the company are required to take into account. While valuably problematising the public/private dichotomy CSR shares the rest of corporate theory's silence with respect to the structure of ownership and responsibility for corporate actions. This leaves CSR vulnerable to critiques that set up an opposition between the well defined private property rights of shareholders and the interests advocated by proponents of CSR. To sanction such a departure from the existing duties of directors and officers would be contrary to current legal doctrine and would entail prejudicing the property rights of 'innocent third parties'. Some neo-liberal versions of this critique associated with the new economic theories of the firm go even further and maintain that the only legitimate social responsibility of company directors and officers is profit maximisation. By leaving the structure of ownership unexamined CSR has few effective responses to arguments of that ilk.

### **New Economic Theory and the freedom of the subject**

The ideological effects of the nexus of contracts approach are reasonably clear; oligopolistic and monopoly power are simply no longer an issue. Agency theory does not provide the tools to analyse unequal power relations. Further, the issues of corporate regulation are tied to issues of personal autonomy and freedom. To propose regulatory

measures contrary to those that would be endorsed under neo-liberal government rationality is not simply economically inefficient it also impinges upon the personal freedoms of those involved in the contractual exchanges (the effects that corporate actions may have upon the lives and freedoms of others in the community is simply ignored). The ability to engage in entrepreneurial conduct is presented as the active condition of personal freedom.

Neo-institutional theories shares the valorisation of private exchange and the political perspective found in neo-classical writings. Corporate law should reflect the values of freedom and autonomy associated with the enterprising subject by allowing individuals to create organisational structures that minimise transaction costs. Neo-liberal rationality is once again presented as the active condition of personal freedom. Intervention in the corporate sphere on other ethical grounds is not simply inefficient. It is portrayed as impinging upon the freedom of individual citizens. The sectional interests of the corporate sphere are conflated with the more universal political freedoms of the citizenry as a whole.

## **Conclusion**

Company legal form is a construct, a construct which draws deeply from the government rationality from whence it came and the events which helped to forge it: The charter system administered by the Board of Trade; the railway booms; the speculative crashes of the first half of the nineteenth century; and the views of Smith, J.S Mill and a host of other figures. All these events and more have been inscribed onto the confused and tangled parchment of company legal form. Corporate ontology and managerialism added to and shifted the ideas associated with the structure. Even today we continue to take this basic structure and attempt to invest it with new and different political, economic, and ethical objectives. These attempts build upon, colonize, displace or re-present the values and objectives that have been pursued in the past. Corporate theory is often deployed in support of such moves, it serves as a resource that can produce ideological effects. Company law can be seen in one light as the heterogeneous accretions of the various strategies aimed at or pursued through the company form.

This historical contingency is both constraining and energising. Constraining because the power of law and the legal knowledges that have both constructed and coalesced around company legal form does influence the possibilities for present and future action. Energising because the company is revealed as neither timeless nor a-historical. The prevailing government rationality and the clash of forces in the 1840s and 50s produced a legal form far different to the traditional partnerships of British mercantile life. A



differing government rationality and view of what constitutes the citizen as subject would produce a different company.

The production and ongoing regulation of such a legal form involves a wide array of both legal and non-legal regulatory practices. The process of regulation depends not only upon the techniques and practices employed but also upon the effects produced in the social field. Regulation is dependent upon the problems, setbacks and successes encountered in the attempts to construct a knowable, calculable, administrable object. The complexity and the non-completeness of such regulatory programmes provides the insertion point for the strategies of actors (or groups of actors) who wish to instrumentalise the real with certain goals in mind. The maneuvering space afforded to the strategies pursued by Robert Lowe and by other pro limited liability individuals and groups that was afforded by the substantial failure of the techniques deployed in the *Joint Stock Companies Act, 1844* (U.K.), 7/8 Vict., c. 110. is a case in point.

The complexity and heterogeneous nature of strategies and the dynamic and unstable hegemonies that are produced both point to the usefulness and limitations of academic discourse. The challenge is to go on producing maps, ( "maps made for use not to mirror the terrain."<sup>253</sup> ) that make visible the links and cleavages between company form and legal theory visible. Such maps can serve as useful starting points and guides (though not

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<sup>253</sup> "Gilles Deleuze has said cryptically that Foucault should be seen not as a historian, but as a new kind of map-maker - maps made for use not to mirror the terrain." - P. Dreyfus & H. Rabinow, *Michel Foucault: Beyond Structuralism and Hermeneutics*, *supra* note 17 at 128.

blueprints) for action. The limitation is that the truths associated with the company legal form are attached to forms of existing hegemony not just through theory but also through the vast amount of techniques and practices associated with the legal form. The process of detaching these truths from these hegemonic positions is an ongoing one that requires engagement with these specific practices - a project like this thesis can only ever form just one part of such a task.

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