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Abstract

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TRUST, CORPORATION AND THE WORKER

BY LORD WEDDERBURN, F.B.A.*

In this article, Lord Wedderburn provides a detailed examination on the evolution of the concepts of the trust and the corporation. Focusing on British law, he explores not only the once strong connection between the two but also delves into the policy and social issues underlying their operation.

In 1904, F.W. Maitland wrote:

And now let me once more repeat that the connection between Trust and Corporation is very ancient. It is at least four centuries old.¹

Both the Trust and the Corporation represent remarkable legal mechanisms enabling men to manage their affairs at a distance and behind a defensive wall — through the “corporation,” that is a separate legal person, and the “trust,” the institution created by the Chancellor and the courts of equity which Maitland described as “the most distinctive feature” of English law and which, Cheshire held, “in the course of its development has become the axis round which revolve so many activities of the English speaking people.”²

The two concepts, though independent of one another, have trodden paths that intertwine in the history of the common law at least since the end of the fourteenth century. Both were recognised early by the Crown for what they were, machineries of the most sophisticated legal invention with great potential to become alternative centres of property and, therefore, of power. Such alternative concentrations of power were not acceptable to the Crown, and in the time of Edward III we find the rule, which stuck, that it is “only the sovereign who could make a *persona ficta*.” By 1530, a statute — albeit of short lived effectiveness — prohibited gifts to “bodies without corporation, for a longer period than twenty years”; and some five years later it was the “extremely strong-willed King” who “forced upon an extremely unwilling Parliament” the *Statute of Uses* to control abuses of the trust.³ From

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* Cassel Professor of Commercial Law, London School of Economics in the University of London. The Falconbridge Lecture in Commercial Law, 18 September 1985.

¹ F.W. Maitland, “Trust and Corporation” in H. Hazeltine, G. Lapsley & P. Winfield, eds., *Maitland: Selected Essays* (1936) 141 at 214.

² G. Cheshire, *Modern Law of Real Property*, 11th ed. by E. Burn (1972) at 4.

³ See W. Holdsworth, *A History of English Law*, vol. 3 (1909) at 372-75; and *ibid.* vol. 4 at

the very outset the legitimacy of both corporation and of trust was an issue with the State. Property and power cannot avoid the problem of legitimacy.

During this period, Government created a form of "medieval collectivism" through joint stock corporations created by charter or letters patent, "state sanctioned bodies" from which emerged both joint stock trading and "an inexpensive means by which the Crown could govern its overseas territories."⁴ Four centuries later, we find that the trust and the corporation are now, to use a fashionable idiom, "privatised," even "deregulated." Restrictions on the use of the trust, in terms of its historical perspective, are relatively few, and in all common law jurisdictions the State has made available to groups of citizens the opportunity by mere filing or registration to act as a company, or corporation. Thereby are acquired the two greatest privileges available in the legal systems of the Western World — *incorporation*, the right to act as a corporate "person" separate from the stockholders or controllers; and *limited liability*, whereby human beings permitted by the law to take the full profit are also protected from the full financial liabilities of their business transactions.

It is of no little interest that judges — at any rate English judges — today treat the latter (limited liability) as the obvious reason for the former (incorporation) when historically they are divorced. Lord Diplock, for example, declared recently:

My Lords, the reason why English statutory law, and that of all other trading countries, has long permitted the creation of corporations as artificial persons distinct from their individual shareholders and from that of any other corporation even though the shareholders of both corporations are identical, is to enable business to be undertaken with limited financial liability in the event of the business proving to be a failure.⁵

Our judges do occasionally "pierce the veil" of corporate personality, contrary to the normal principles of the law, and treat the company as one with its controllers, or as one "person" with the rest of its group of companies (for though we teach and speak of "company" the reality of our times is not the "company" but the *group* of companies). These decisions of the judges, emanating from the unexpressed, and perhaps sometimes inexpressible, premises of judicial policy we call "creative" if we like them and "bad law" if we do not. Contrary to what Kahn-Freund called the "calamitous" precedent of *Salomon v. Salomon*,

444; On the *Statute of Uses*, see *ibid.* vol. 4 at 461; F.W. Maitland, *Equity*, ed. by J. Brunyate, (1936) at 34.

⁴ E. Palmer, D. Prentice & B. Welling, *Canadian Company Law* (1978) at 29-30.

⁵ *Dimbleby & Sons v. N.U.J.*, [1984] 1 W.L.R. 427 at 435 (H.L.).

where it was laid down that, like the chartered corporation, the new, registered "company is at law a different person altogether from the [shareholders],"⁶ English judges have been slow to "pierce the veil" of corporate personality. As one judge put it recently,

the trouble with any doctrine which involves disregarding the legal form of transactions and preferring their substance is that once one starts on the process one does not know when to stop.⁷

There is something to be said for this self-conscious constraint upon the judicial libido, at least when they are compared with the exceptions such as the final phase in the judicial career of Lord Denning when he usually made it clear that he had no intention of stopping short of whatever conclusion he thought to be just and proper, whatever the legal forms might be.

The strength and omnipresence of the corporate legal "person" in our law and society today cannot be denied. It is, therefore, worth asking whether Maitland would still be able to recognise that strong connection between "Trust and Corporation," and how far any such connection relates to the debate about the policies of our company laws, especially in connection with the different groups of human beings with whom it comes into contact, whether they are shareholders, directors, creditors or employees. My aim is to do so by reference mainly to British law and experience, partly because this is the system best within my knowledge, partly because that system is the common origin of the many different Commonwealth developments and even, in many respects, of United States legal experience, partly, too, because while the English legal system illustrates in rather old fashioned ways the link of which Maitland spoke, there has been less debate about the social issues involved on that side of the Atlantic than on this.

Most observers would not agree with Lord Diplock that, comparatively, British law has long permitted corporation with "limited financial liability" for the shareholders, apart from certain types of chartered incorporation. Incorporation was known and used for centuries in England long before limited liability was generally available. Most other European countries have enjoyed widespread use of business associations with a limitation upon the participants' liability for much longer (the *société en commandite* for instance) and in this respect the British commercial law of 1850 was very backward. It was

⁶ [1897] A.C. 22 at 51 (H.L.) *per* Lord Macnaghten; O. Kahn-Freund, "Some Reflections on Company Law Reform" (1944) 7 *Mod. L. Rev.* 54.

⁷ *Shipping Company Uniform Inc. v. International Transport Workers' Federation*, [1985] *Ind. Rel. L. Rev.* 71 at 75 (Q.B.) *per* Staughton J.

not until 1855 that limited liability became available in England for companies formed by something equivalent to registration. Only then was the obligation of a gentleman to put his assets to the full behind his business or trade ventures — for that is what classical partnership doctrine demanded — commuted into the protected liability which is treated as normal today. Although chartered corporations had permitted members freedom from corporate debts since the fifteenth century, most charters allowed the corporations to make “leviations,” or calls, on members to pay for them; and where that was so, the Courts of Equity in 1671 permitted creditors a direct action against the members, so that by itself the incorporation gave little more than an “illusory” limitation of liability. In 1855, limited liability became real⁸ notwithstanding the vigorous protests by many at the time. Lord Mounteagle said limited liability would encourage reckless enterprises and “open the door to dishonesty and fraud,” while Lord Overstone declared in 1856 that this “singularly inappropriate” measure would foster innumerable evils:

by giving facility for the widespread introduction of joint stock companies reckless in their procedure because protected by limited liability and filling the community with instruments of gambling in the form of shares upon which little or nothing has been paid up.⁹

In England the *Law Times* in 1858 said the measure had in three years earned its name of “The Rogues Charter,” claiming that “Limited liability has had a fair trial and has proved an egregious failure for all good purposes and fertile only of ill.”¹⁰

In its early years the new limited companies were subjected to careful control. They had to advertise their status by the word “Limited” and at least three quarters of the capital had to be subscribed by 25 shareholders who paid up 20 per cent on shares of at least 10 pounds per value. Yet limited liability quickly took a hold in England, as it had already in the United States where, since their independence, and more rapidly in the nineteenth century, charters were granted by the State Assemblies to corporations. An examination of the United

⁸ Houldsworth, *supra* note 3, vol. 3 at 484; *Salmon v. The Hamborough Company* (1671), 1 Cham. Cas. 204 (H.L.) [hereinafter *Salmon*]; and see L.C.B. Gower, *Modern Company Law*, 4th ed. (1979).

⁹ *The Law Times* (21 June 1856) at 150; *Salmon, ibid. per* Lord Mounteagle. One is tempted to speculate whether Lord Overstone met Mr. Mckenzie in his travels from Upper Canada to England, whose excoriations upon the “evils of limited liability” were to lead to his revolutionary draft constitution of 1873 which aimed to ban “incorporated trading companies”, see F. Labrie & E. Palmer, “The Pre-Confederation History of Corporations in Canada” in J. Ziegel, ed., *Studies in Canadian Company Law* (1967) 33 at 51-52.

¹⁰ *The Law Times* (25 March, 1858) 14.

States corporate history reveals the appearance of general incorporation laws in the year 1811 in New York and in other States increasingly in the 1830's, allowing for incorporation on registration.¹¹ Many of these laws included similar controls over corporate life and dealings. As Justice Brandeis put it, the "enactment of general corporation laws does not signify that the apprehension of corporate domination had been overcome. . . ." That apprehension even added the meaning of "trust," in its American sense, after John D. Rockefeller showed what you could do with a shareholding Trust in Standard Oil.

The progressive removal of the "limitations upon the size and powers of business corporations," Brandeis recounted, was due not only to the desirability of the relaxation but "to the conviction that it would be futile to insist upon them; because local restriction would be circumvented by foreign incorporation," in what he called the "race of laxity."¹² This was the beginning of that long process of regulatory relaxation, through the New Jersey corporations law of 1896 to the triumphant Delaware Codes that had led the way throughout this century in that "race to the bottom" in American State corporation legislation; a competitive dash for corporate business by offering "do-what-you-like" laws, albeit now tempered by Federal Securities Laws and the, at times, more regulatory attitudes of minority States such as New York and California.¹³ More important to our purpose is the fact that limited liability was accorded to stockholders in these United States corporations from the outset. Indeed, there appears to have been little or no resistance in the United States to the introduction of limited liability, none parallel to that which persisted in England after the *Bubble Act 1720*, until it fell away when the *Limited Liability Act* was passed at the height of the Crimean War in 1855 in what is still an unsolved historical mystery.¹⁴ There are those — and Maitland himself was among them — who believed that, even without legislation, the ingenu-

¹¹ E.M. Dodd, "The First Half Century of Statutory Regulation of Business Corporations in Massachusetts" in *Harvard Legal Essays* (1934) 65; J. Davis, *Essays in the Earlier History of American Corporations* (1917); A. Levy, *Private Corporations and Their Control*, vol. 1 (1950) at 103-15 and 146-55; H. Ballantine, *Corporations* (1946) at 10-67.

¹² *L.K. Liggett Co v. Lee*, 288 U.S. 517 at 548-51 (1933); see W. Cary, "Federalism and Corporate Law" (1974) 83 *Yale L.J.* 663; see also New Jersey Corporate Law Revision Commission, *Report* (1968).

¹³ See H.J. Friendly, "In Praise of Erie — And of the New Federal Common Law" (1964) 39 *N.Y.U.L. Rev.* 384 at 413; H.G. Manne, "Our Two Corporation Systems" (1967) 53 *Va. L. Rev.* 259; W. Cary, *ibid.*; S. Arshat, "Reply to Professor Cary" (1976) 31 *Bus. Lawyer* 1113; L. Loss, *Fundamentals of Securities Regulation* (1983) at 29-38. See also M. Eisenberg, *The Structure of the Corporation* (1976); J. Hurst, *The Legitimacy of the Business Corporation in the United States* (1970) esp. at 30-74.

¹⁴ See Gower, *supra* note 8 at 43-46.

ity of equity lawyers could have brought about limited liability for those who put capital into the *unincorporated* "deed of settlement companies" that were the vehicle by which British business evaded the *Bubble Act's* prohibition against acting as a body corporate, between 1720 and 1844. Essentially, this involved property held by trustees and managed by directors. It was a trust to which the proprietors would subscribe their money, being in the eye of the common law "partners" (with full liability) in the enterprise,¹⁵ but with the crucial advantage of transferable "shares" (or in eighteenth century terminology "actions"). The addition of contractual clauses provided for limited liability for the proprietors for it was thought that: "If the State had not given way, we should have had in England joint-stock companies, unincorporated, but contracting with limited liability."¹⁶

However, the State did give way, or rather was forced to do so. The monumental advantage of limited liability was permitted and company registrations boomed. Already, the deed of settlement companies "in the new commercial and industrial conditions, were being formed in ever increasing numbers."¹⁷ In perhaps the last period in which British capital can be said to have concentrated on investment at home rather than abroad, some 2,500 new incorporations appeared on the register between 1856 and 1862; and if that sounds a small number compared with 949,903 private, and 6,508 public companies on the British register in 1983, studies have shown that it represented at the time a massive quantity of investment and in particular, represented investment increasingly in industrial companies.¹⁸ Proponents of the new system claimed that it was needed for the "men with small capitals," those of the "Middle and Working Classes."¹⁹ They should be allowed a "fair opportunity" in the market. Yet, the small shareholder was remote from the outset of the limited company. The function of the 1855 Act was to provide a safer and more flexible mechanism for investment by capital as a whole. The economic system demanded better mechanisms for investment and the legal system — as it always does, even if belatedly — gave way. Rather mournfully Maitland recognised the realities

¹⁵ A. DuBois, *The English Business Company after the Bubble Act* (1938).

¹⁶ Maitland, *supra* note 1 at 210, the American example at 212. The courts in fact accepted this round-about method in respect of shareholders in some insurance companies and American "trust deeds" had used the same device.

¹⁷ Holdsworth, *supra* note 3, vol. 13 at 370; C. Cooke, *Corporation, Trust and Company* (1950) at ch. 10.

¹⁸ See H. Shannon, "The Coming of General Limited Liability" (1931-32) 11 *Econ. Hist. Rev.* 267 at 290 and "The First 5,000 Limited Companies" *ibid.* 421.

¹⁹ V.K. Select Committee, "Investments for Savings of the Middle and Working Classes" in *Parl. Papers*, vol. 19 (1850) at 169.

when he commented on the so-called legal personality of these new corporate entities:

man thinks of his [unincorporated] club as a living being . . . while the joint-stock company is only a sort of machine into which he puts money and out of which he draws dividends.²⁰

The continued prohibition on generalised limited liability in England until such a late date, and the manner in which it was apparently wrung from the legislature as a *concession*, are facts of some importance to more recent company law developments. It must surely be of importance in Canada that the *société en commandite* and the incorporation of limited partnerships were well-known in the 1840s, and that even before the great general incorporation Act of 1850 for joint stock companies by mere filing in manufacturing and other industries, the *principle* of limited liability "had been conceded in company Acts for many years."²¹ Comparison between British and Canadian company and commercial legal development proves useful in terms of the rich contributions from the Canadian courts, but one must take account of the different origins for as Wegenast reminds us, by:

a strange turn of legislative history, we find the British Parliament in 1862 adopting the method of incorporation by registration, which had been devised in the American Colonies after the Revolution because of the lack of the Royal prerogative while two years later the Canadian Parliament designs its own system based on the original common law method of incorporation by letters patent.²²

In England, the desire to regulate the affairs of this new corporate person on the legal stage had many sources: the ancient links between chartered corporations and "monopolies," the experiences of the Bubble period; and the old distrust of limited liability. This was not wholly new to the legislature, for it was the judges who attempted in 1875 to provide protection for investors and creditors by insisting upon the *ultra vires* doctrine and confining the limited company to the objects set out in its memorandum. The company must be limited to this capacity said Lord Hatherley because,

this Act was passed with a view to enabling persons to carry on business on principles which were up to that time wholly unknown in the general conduct of mercantile affairs in this country . . . the general principle of partnership was that every person entering into any partnership whatsoever thereby subjected, before this description of legislation had been entered upon, the whole of his property, whatsoever it might be, to the demands of his creditors The

²⁰ Maitland, *supra* note 1 at 201.

²¹ Labrie & Palmer, *supra* note 9 at 57.

²² F.W. Wegenast, *The Law of Canadian Companies* (1931) at iii, 21.

Legislature said: you may . . . form yourselves into a company, but in doing that you must tell all who may be disposed to deal with you the objects for which you have been associated. They will trust to that memorandum of association²³

In this way, it was thought, the investor could have confidence that he knew the venture in which he was investing and the creditor could know to what manner of enterprise he was lending. The restriction of *ultra vires* as an effective social mechanism has, of course, long ago been cast aside. First by the draftsmen who by prolix language gave to companies every object they could think of in their objects clause allowing all activities which the directors decide to undertake, secondly either by objective phrases such as "all kinds of operations . . . as an individual capitalist may lawfully undertake" or by subjective objects clauses (now accepted by English courts), and thirdly, in part, by legislation necessitated by the entry of the United Kingdom into the common market.²⁴ In many Commonwealth jurisdictions the matter has been settled by statute in favour of the company's having all, or virtually all, "the rights, powers and privileges" and the capacities of a natural person.²⁵ From the United States, Professors Cary and Eisenberg tell us: "Ultra vires was the expression of a social policy that failed."²⁶ Yet English judges still pursue its purpose. "You cannot" said Harman L.J. in 1970, "have an object to do every mortal thing you want because that is to have no object at all."²⁷ In 1985, the Court of Appeal affirmed the *ultra vires* doctrine, though reconstructing it in terms of a straightforward interpretation of the objects clause, rightly putting aside cases of abuse of corporate powers as involving not corporate capacity but breach of the directors' fiduciary duties. In so doing, Browne-Wilkinson L.J. said:

In my judgment, for this purpose the position of a company is analogous to that of a human being who has fiduciary powers. If two trustees convey trust property in breach of trust, the conveyance is not void. As human beings they have the capacity to transfer the legal estate; their capacity to transfer flows from their status as human beings not from the powers conferred on them as trustees

²³ *Ashbury Railway Carriage & Iron Co. v. Riche* (1875), 7 L.R. (H.L.) 653; see also *Cotman v. Brougham*, [1918] A.C. 514 at 520 *per* Lord Parker.

²⁴ *Bell Houses Ltd. v. City Wall Properties Ltd.*, [1966] 2 Q.B. 656 (C.A.); K.W. Wedderburn, "The Death of *Ultra Vires*?" (1966) 29 *Mod. L.R.* 673; R. Baxt, "Is the Doctrine of *Ultra Vires* Dead?" (1971) 20 *Int. & Comp. L.Q.* 301; *Newstead v. Frost*, [1980] 1 W.L.R. 135 (H.L.); B.G. Pettet, "Unlimited Objects Clauses?" (1981) 97 *Law Q. Rev.* 15; and *European Communities Act 1972* (U.K.), 1972, c. 68, s. 9 [now *Companies Act 1985* (U.K.), 1985, c. 6, s. 35].

²⁵ *Australian Uniform Companies Act* s.19 & Schedule 3; *Canadian Model Business Corporations Act*, 1975, s.15.

²⁶ W. Cary & M. Eisenberg, *Corporations: Cases and Materials*, 5th ed. (1980) at 38.

²⁷ *In Re Introductions Ltd.*, [1970] Ch. 199 at 209 (C.A.) [meaning, of course, a stated "object" in terms of (now) the *Companies Act, 1985*, *supra* note 24, s. 2(1)(c)].

So in the case of a limited company, if a transaction falls within the objects of the company (and is therefore within its capacity) it is effective to vest rights in a third party even if the transaction was carried out in excess or abuse of the powers of the company However, the analogy between companies and trustees is not complete. As an artificial person, a company can only act by duly authorised agents If the transaction is beyond the capacity of the company it is in any event a nullity and wholly void.²⁸

Slade L.J. said tersely: "The legal personality of a company incorporated under the Companies Acts exists only for the purpose of its incorporation, as defined in the objects clause," though he then proceeded, for ten more pages, to place the previous precedents in proper order. But the appeal to trust doctrines went further in these judgments, and they take us to another central issue of the trust-corporation inquiry; one that is nearer to some explosive social issues of modern life, instead of an uncharacteristic meander through the pleasant pastures of remote legal history.

One may focus on that issue by noting that the trust relationship was rejected by our law in a very important respect. Unlike the chartered corporation of the eighteenth century where the corporation was treated as a trustee for its members,²⁹ the corporation of today is not seen as holding its assets in trust for the shareholders. Notwithstanding the Court of Appeal's attempt in 1895 to hold that the boot-manufacturing company owned by Mr. Salomon through the shareholdings of himself, his wife and his five children who had pressed him to give them shares — "They trouble me," he said, "all the while" — should be treated as his agent or "trustee for him — a trustee improperly brought into existence" because it was, in effect, still a one man business, the House of Lords reversed the Court of Appeal. It was the denial that this approach was permissible which gave the decision its importance, not some abstract speculation about corporate veils.³⁰ The denial of that trust-relationship and the consequent affirmation of the independent personality of the company in full ownership of its own property in which shareholders have no direct proprietary interest, being left to the rights attaching to their shares, set our law off on the path of private or "closed" one-man companies.³¹ Had the Court of

²⁸ *Rolled Steel Products (Holdings) Ltd. v. British Steel Corporation*, [1985] 2 W.L.R. 908 at 954 (C.A.) per Slade L.J. [hereinafter *Rolled Steel Ltd.*]. See also, *Re Horsley & Weight Ltd.*, [1982] Ch. 442 (C.A.); and L. Sealey, *Cases and Materials in Company Law* (1985) at 105.

²⁹ *Child v. Hudson's Bay Co.* (1723), 2 P. Wms 207, 24 E.R. 702; and see *Townsend v. Ash* (1745), 3 Atk. 336, 26 E.R. 995.

³⁰ *Broderip v. Salomon*, [1895] 2 Ch. 323 (C.A.) rev'd [1897] A.C. 22 (H.L.).

³¹ *Short v. Treasury Commissioners*, [1948] K.B. 116 at 122 per Evershed L.J., aff'd [1948] A.C. 534; *Prudential Assurance Co. Ltd. v. Newman Industries Ltd. (No. 2)*, [1982] Ch. 204 at 224 (C.A.) [hereinafter *Prudential Assurance Co.*].

Appeal been upheld, the law, and not least the law of corporate taxation, would have taken a very different shape.

I. THE DIRECTORS AS FIDUCIARIES

The eye of equity had long identified more important targets. If the corporation was not a trustee for the shareholders or the controllers, were not the controllers, especially the directors, the equivalent of, or something like trustees for the corporation? Even in the days of the unincorporated "deed of settlement" company, directors had been made liable for breach of trust, and in one instance the trustees themselves escaped liability for the improper expenditure of funds because they had been coerced by the directors.³² Dr. Sealy has shown that the courts were well aware of the distinction between the trustees proper and the managing directors of these associations; directors did not acquire these modern "fiduciary" duties *because* they were the trustees, but rather because they had accepted an appointment of "trust" and were accountable for "breaches of trust." "In the limited legal vocabulary of the day, there was no other word which the judges would wish to use."³³

The roots of this usage lay largely in chartered corporations, where directors were subjected to trust-like duties as early as 1742, and in companies incorporated under special Acts of Parliament.³⁴ One of the latter was the 1843 decision of *Foss v Harbottle*,³⁵ in which shareholders in a company incorporated by statute were not permitted to sue the directors because their breach of duties using powers "entrusted" to them for the corporate good should be remedied by legal action brought by the company. Directors owe their duties to the company, not to each shareholder, and "the corporation might elect to adopt the

³² *Benson v. Heathorn* (1842), 1 Y & C.C.C. 326, 62 E.R. 909; *Grimes v. Harrison* (1859), 26 Beav. 435, 53 E.R. 966.

³³ L.S. Sealy, "The Director as Trustee" [1967] *Cambridge L.J.* 83 at 85; and his discussions in "Fiduciary Relationships" [1962] *Cambridge L.J.* 69 at 70-72 and "Some Principles of Fiduciary Obligation" [1963] *Cambridge L.J.* 119.

³⁴ *Charitable Corporation v. Sutton* (1742), 2 Atk. 400, 26 E.R. 642; *A.G. v. Wilson* (1840), Cr. & Ph. 1, 41 E.R. 389; *Mayor of Colchester v. Lowten* (1813), 1 V. & B. 226, 35 E.R. 89; *York and North-Midland Railway Co. v. Hudson* (1845), 16 Beav. 485, 51 E.R. 866.

³⁵ (1843), 2 Hare 461, 67 E.R. 189 (Wigram VC); see K.W. Wedderburn, "Shareholders' Rights and the Rule in *Foss v. Harbottle*" [1957] *Cambridge L.J.* 93; and "Derivative Actions and *Foss v. Harbottle*" (1981) 44 *Mod. L. Rev.* 202; S. Beck, "An Analysis of *Foss v. Harbottle*" in Ziegel, *supra* note 9, vol. 1 at ch. 18. *The Shareholders' Derivative Action* (1974) 52 *Can. Bar Rev.* 159; R. Gregory "The Section 20 Contract" (1981) 44 *Mod. L. Rev.* 526; D. Goldberg, "The Enforcement of Outsider-Rights under Section 20(1) of the *Companies Act 1948*" (1972) 35 *Mod. L. Rev.* 362; B. Rider, "Amiable Lunatics and the Rule in *Foss v. Harbottle*" [1978] *Cambridge L.J.* 270; C. Baxter, "The Role of the Judge in Enforcing Shareholders' Rights" [1983] *Cambridge L.J.* 96.

transaction." Although this decision is rejected by some Canadian writers and "relegated to limbo without compunction,"³⁶ and despite being dubbed by Dr. Sealy as "140 years' accumulation of procedural codswallop,"³⁷ *Foss v. Harbottle* remains fundamental to English company law, albeit our law has slowly — very slowly to Canadian eyes — allowed for a shareholders' "derivative" action to call the errant directors to account. The principle, say the English judges,

is not merely a tiresome procedural obstacle placed in the path of a shareholder by a legalistic judiciary. The rule is the consequence of the fact that a corporation is a separate legal entity.³⁸

Some duties placed upon directors *are* trustee's duties, namely where they actually possess the assets of the company and are treated as "constructive trustees." The 1894 statement of the principle has been repeatedly approved:

A limited company is of course not a trustee of its own funds, it is their beneficial owner; but in consequence of the fiduciary character of their duties the directors of a limited company are treated as if they were trustees of those funds of the company which are in their banks or under their control and if they misapply them they commit a breach of trust.³⁹

This liability is strict. The director is liable, good motive or bad, to restore company property misapplied, whether *ultra vires* or *intra vires*, in breach of the articles, and the company may be able to reach its property even in the hands of third parties who took with sufficient notice from directors that "abused their fiduciary duties" by breaking the "constructive trust."⁴⁰

However, where the directors are not dealing with corporate property, they are beset with "fiduciary" duties, duties not exactly those of a trustee (that would be impossible because they are not here possessed of property on which to impress the trust) but analogous to those of the trustee. Thus the director must not put himself in a position where his interest and his duty conflict:

It is a rule of universal application, that no one, having such duties to discharge, shall be allowed to enter into engagements in which he had, or *can have*, a personal interest conflicting, or which *possibly may* conflict, with the interests of

³⁶ R. Dickerson, J. Howard & L. Getz, *Proposals for a New Business Corporations Law for Canada* (1971) at 482; quoted in Sealy, *supra* note 28 at 438.

³⁷ L. Sealy, "Foss v. Harbottle — A Marathon Where Nobody Wins" [1981] *Cambridge L.J.* 29 at 31.

³⁸ *Prudential Assurance Co.*, *supra* note 31 at 224.

³⁹ *In Re Lands Allotment Co.*, [1894] 1 Ch. 616 at 638; *Belmont Finance Corp. v. Williams Furniture Ltd. (No. 2)*, [1980] 1 All E.R. 393 at 405 (C.A.)

⁴⁰ *Rolled Steel Ltd.*, *supra* note 28 at 949. See also *International Sales and Agencies Ltd. v. Marcus*, [1982] 3 All E.R. 551 (Q.B.); *Steen v. Law*, [1964] A.C. 287.

those whom he is bound to protect.⁴¹

If, therefore, he receives a benefit or payment arising from the execution of his office, and that payment has not been approved either in advance or subsequently by the company (here acting by shareholders' meeting) the director (in principles that reach back to the eighteenth century and beyond) stands in breach of his "trustee-like" fiduciary duties. It makes no difference that he may be quite innocent, receiving his benefit in all good faith to help the company along in a transaction, and the company which claims that he must account for his profit may now be controlled by the hands of a take-over bidder who is the last person to whom conventional morality would award it, as in *Regal (Hastings) Ltd. v Gulliver*.⁴² In a classic judgement, Laskin J. (as he then was) said such a "fiduciary relationship . . . betokens loyalty, good faith and avoidance of a conflict of duty and self interest," and he applied to senior management, as well as to directors on the board, the prohibition against obtaining "secretly or without approval of the company (which would have to be properly manifested upon full disclosure of the facts) any property or business advantage" of or for the company, including any "maturing business opportunity," whether or not the company would have acquired it or made use of it. That duty, he declared, relying upon a judgment of Lord Eldon in 1803,⁴³ follows them after they have departed from the business.

In real life, most of these duties are made tolerable for the directors (and senior managers) by reason of their waiver in advance or by subsequent ratification after their breach. A resolution in the shareholders' meeting is not normally a matter of difficulty for the board of directors. (I leave aside — somewhat reluctantly — the problem beloved of all company law students: which breaches of which duties cannot be waived or ratified?)⁴⁴ It is clear law that the shareholders, usually when acting by ordinary majority, certainly when acting

⁴¹ *Aberdeen Railway v. Blaikie* (1854), 1 Macqo. H. L. 461 at 471-72 (H.L.) (emphasis added).

⁴² *Regal (Hastings) Ltd. v. Gulliver*, [1942] 1 All E.R. 378 (H.L.) [hereinafter *Regal*].

⁴³ *Canadian Aero Services Ltd. v. O'Malley* (1974), 40 D.L.R. (3d) 371 (S.C.C.) [hereinafter *Canadian Aero*]; see also *Industrial Development Consultants v. Cooley*, [1972] 1 W.L.R. 443; *Cook v. Deeks*, [1961] A.C. 554; *Abbey Glen Property Corp. v. Stumborg* (1978), 85 D.L.R. (3d) 35 (Alta. C.A.); *Consul Development Property Ltd. v. DPC Estates Property Ltd.* (1975), 49 A.J.L.R. 74; *Weber Feeds Ltd. v. Weber* (1979), 99 D.L.R. (3d) 176 (Ont. C.A.).

⁴⁴ See Gower, *supra* note 8 at 579-602. On the special problem of how far s.205 *Companies Act, 1948* (U.K.), 1948, c. 38 (*Companies Act 1985, supra* note 24, s.310) permits waiver, see Gower, *ibid.* at 585, 601; J. Birds, "The Permissible Scope of Articles Excluding the Duties of Company Directors" (1976) 39 *Mod. L. Rev.* 394; R. Gregory, "The Scope of the *Companies Act 1948*, Section 205" (1982) 98 *Law Q. Rev.* 413, and the powerful reply by R. Instone, "The Scope of the *Companies Act 1948*, Section 205" (1982) 98 *Law Q. Rev.* 548.

unanimously, can approve and validate the *intra vires* acts of management, at least where no direct misappropriation of corporate property is concerned. In a remarkable example of the mystification accomplished by the law, the Court of Appeal applied that doctrine, as it was applied to Aaron Salomon and his troublesome family (able members of which had approved the dealings in that case of 1897), to the approval given to directors of a subsidiary company by its three shareholders, which were three giant multinational oil companies. By their unanimous approval all breach of duty and negligence was cured, thereby depriving creditors of any chance of recouping some of the 75 million pounds in losses caused by the crash of the subsidiary.⁴⁵ If we ask what is the nature of the "trustee-like" fiduciary duty, we must also ask why can it be so easily waived.

Despite the regular waiver of fiduciary obligations, not least in the articles of association in advance, judges have felt a pressure to relax the very duties themselves. The fiduciary duties must not be too strict for directors, they say, for that "might fetter their action to an extent which would be exceedingly disadvantageous to the company they represent." In the leading case which confirmed that directors will not normally be liable for negligence if they act honestly in accordance with their own (subjective) skill and experience (subject to any contractual duties attaching to them as executives) Romer J. said, in 1925, that they stand in a "fiduciary relationship to the company" but to say they are trustees "by way of analogy of what [their] duties are" is "wholly misleading."⁴⁶ This was in the context of the rule that directors are not as such obliged to attend to the company's affairs, and they may rely upon those to whom management is delegated, unless put on notice that all is not well.⁴⁷ Australian and New Zealand courts have responded to commercial need by loosening the bonds of the basic principle that a director may not in advance fetter his discretion owed to the company.⁴⁸ Moreover, judges have permitted directors to sit on the boards of competing companies (though not of course to transmit confi-

⁴⁵ *Multinational Gas and Petrochemical Co. v. Multinational Gas and Petrochemical Services Co. Ltd.*, [1983] Ch. 258; see K. W. Wedderburn, "Multinationals and the Antiquities of Company Law" (1984) 47 *Mod. L. Rev.* 87. See also, *Re Horsley and Weight Ltd.*, [1982] Ch. 442; P. Davies, "Companies, In General" [1983] *J. Bus. L.* 243; K.W. Wedderburn, "*Ultra Vires* in Modern Company Law" (1983) 46 *Mod. L. Rev.* 204.

⁴⁶ See respectively *Re Faure Electric Accumulator Co.* (1886), 40 Ch. D. 141 at 151 *per* Kay J.; *In re City Equitable Fire Insurance Co.*, [1925] Ch. 407 at 426 (C.A.).

⁴⁷ *Dovey v. Corey*, [1901] A.C. 577; *The Marquis of Bute's Case*, [1982] 2 Ch. 100.

⁴⁸ See *Thorley v. Goldberg* (1965), 112 C.L.R. 597 (Aust. H.C.); *Kevin v. Clark*, [1962] N.S.W.R. 686 (nominee director); *Berlei Hestia (NZ) Ltd. v. Fernyhough*, [1980] 2 N.Z.L.R. 150 (S.C.) [hereinafter *Berlei Hestia*] (joint venture); *Clark v. Workman*, [1920] Iv. R. 107.

dences from one to the other); a practice that would not be permitted to all other fiduciaries, and one which continues, even though both Lord Denning and Professor Beck have frowned upon it, the first before, the second after the *Canaero* judgement of 1974.⁴⁹ In these and similar judgments, the courts are forced to take account of the fact that directors are not a clear, qualified category; they are not, to use the untranslatable French word, recognisably a *cadre*. There is no "reasonable director" in the Clapham taxi cab. They range from the modern Aaron Salomon sleeves pulled up at the boot bench but managing director of his thrusting, one-man enterprise, through to the executive who enjoys corporate fringe benefits to double his living standard, perhaps still further to the type of director sought in an advertisement in the London *Times* of 1958, "Titled Person required to add distinction to the board of a Wine Company. No participation or investment required. Firm very sound."

Even more important, the judges from time to time take account of the fact that directors (and senior managers) are businessmen. The United States judiciary has led the race in applying the "business judgment" principle, to water down the fiduciary principle, together with the test of "fairness" to oust technical rules.⁵⁰ There are voices gradually becoming louder in England, arguing for a relaxation of duties which entangle the "director as business man,"⁵¹ where courts "should not venture in the determination of what are essentially managerial decisions."⁵² Indeed, writers have begun to argue that all corporate regulation should be decreased and that changes forced upon British company law by Directives of the European Economic Community be resisted (many of which are, it is true, obscure and are wholly inapt for our system — things got so bad in 1984 that two Directives on listing of securities were printed *verbatim* as Schedules to an Order for the not very good reason that no two company lawyers can agree what they mean).⁵³ Dr. Sealy has called for our company law to aim no longer at

⁴⁹ *London and Mashonaland Exploration Co. v. New Mashonaland Corpn. Co.*, [1981] W.N. 165; *SCWS Ltd. v. Meyer*, [1959] A.C. 324 at 367 *per* Lord Denning; S. Beck, "The Quickening of the Fiduciary Obligation" (1975) 53 *Can. Bar Rev.* 771 at 788-92, citing *Re Thompson*, [1930] 1 Ch. 203 (trustee opening a competing business is a breach of trust).

⁵⁰ Cary & Eisenberg, *supra* note 26 at 563-712; S. Beck, "Corporate Opportunity Revisted" in Ziegel, *supra* note 9, vol. 2 at n. 184; V. Brudney, "The Independent Director — Heavenly City or Petemkin Village?" (1982) 95 *Harv. L. Rev.* 597, at 607-616.

⁵¹ T. Hadden's preference of *Lindgren v. L&P Estates Ltd.*, [1968] Ch. 572 to *Regal*, *supra* note 42 — is one of the more reasonable demands: *Company Law and Capitalism*, 2d ed. (1977) at 233-239.

⁵² Rider, *supra* note 35 at 287.

⁵³ Stock Exchange (Listing) Regulations, 1984 S.I. No. 716. Professor Gower is of the view that they have repealed the law that stemmed from the *Directors' Liability Act, 1890* (U.K.) 1890

regulation but to be true "enabling acts," to "authorize business men to organise and operate their businesses," and to keep disclosure down to "an information service." No one interested in "business and entrepreneurship" would put company law in the hands of "chancery men whose preoccupation during the greater part of their professional time is with *avoiding* risks."⁵⁴ In 1985, he offered the fact that 457,000 companies are in default with their obligation to file accounts, most of which fail to make their annual returns, as proof that it is time to scrap the "dead wood," "mumbo jumbo" and "out-dated routines" in the 747 sections and 25 schedules of the *Companies Act 1985*, at any rate for small companies; "pointless demands" like financial reporting and compulsory audit should be abolished for smaller companies, and company law "decriminalised" in such areas as non-disclosure of directors' interests.

The manner in which British securities law has recently been handled must give great heart to this school of thought. It is now more than a year and a half since Professor Gower's very modest proposals for new, effective "self-regulatory agencies" (the idea of a statutory regulatory Commission was his first preference, but he wished to be "evolutionary or cautious") when he warned that unless action was taken "further serious scandals undermining public and international confidence are . . . inevitable."⁵⁵ The Government has published a White Paper and is setting up two "Self-Regulatory Agencies" in a structure which is satisfying few and which meets scarcely any of the challenges with which the City of London is beset, least of all the fundamental pressures that have arisen largely from the internationalisation of capital markets.⁵⁶ What is strange though is the complete ab-

c. 64, i.e. ss. 43, 44 *Companies Act, 1948*, *supra* note 44 (now *Companies Act 1985*, *supra*, note 24, ss.67-70; *Review of Investor Protection: Report Part II* (1985) at 50-51. Unless this is put right, it will be the biggest piece of deregulation achieved by stealth. It seems doubtful whether, as Gower asserts, the Government is committed to change by *Financial Services in the U.K.*, (Cmnd. 9532, 1985) at c. 13.

⁵⁴ L. Sealy, "A Company Law for Tomorrow's World" (1981) 2 *Co. Law* 195; see on disclosure, "The Disclosure Philosophy" (1981) 2 *Co. Law* 51 at 56; and his address to the Institute of Directors, *Financial Times* (18 July 1985). For a different view see T. Hadden, "Fraud in the City" (1980) 1 *Co. Law* 9; K.W. Wedderburn, "Information et Responsabilités des Administrateurs" (1981) 4. *Rev. Int. de Droit Comparé* 927.

⁵⁵ *Review of Investor Protection: Report Part I* (Cmnd. 9125, 1984) at para. 12-02; see T. Hurst, "Self Regulation Versus Legal Regulation" (1984) 5 *Co. Law* 161 at 170 (on internationalisation of the City).

⁵⁶ *Financial Services in the U.K.*, *supra* note 53. The choice of two agencies, the Securities and Investment Board and the Marketing of Investments Board, to supervise such existing bodies as the Stock Exchange, has been widely criticised: See *Financial Times* (3, 20 & 26 July & 19 August 1985). The City Take-Over Panel has decided to stay "independent". The pressure for change within the Stock Exchange has already brought about the impending end of fixed commissions and the 'single capacity' broker and jobber system, as well as exemption for the Stock Ex-

sence of any comprehensive debate about the nature of our company law. It is here that the trust re-enters the story.

In his 1975 article on "The Quickening of Fiduciary Obligation," Professor Beck stuck his flag firmly in the camp of fiduciary obligation; a duty "commensurate with the needs of an ever-expanding, ever more complex corporate economy," but nevertheless involving the "strict application against directors and senior management officials." This, Las-kin J. had said:

is simply recognition of the degree of control which their positions give them in corporate operations, a control which rises above day to day accountability to owning shareholders and which comes under scrutiny only at annual general or at special meetings. It is a necessary supplement, *in the public interest*, of statutory regulation and accountability which themselves are, at one and the same time, an acknowledgement of the importance of the corporation in the life of the community and of the need to compel obedience by it and by its promoters, directors and managers to norms of exemplary behaviour."⁵⁷

Professor Beck expressed similar views two years earlier when he said that "the realities of the governance of the modern corporation require that Equity's severity continue to be applied to corporate directors."⁵⁸ The answers to such concerns as given by those who insist that business managers are not trustees or even analogous to trustees is that these standards are wrongheaded:

Trustees do not maximize profit in the context of the competitive market. They do not concern themselves with innovation in products . . . trustees need not fear that beneficiaries may sell their interest to entrepreneurs who will install new trustees.⁵⁹

There is much to be said for this insistence that entrepreneurs are risk-takers out for profit. Trustees are risk-avoiders — careful, cautious, "chancery" men — out for the best return on investment. Moreover, for the most part, "trustees are not chosen by someone familiar with market workings who readily change trustees if dissatisfied."⁶⁰ Indeed, our legal system insists that trustees of pension funds *must* not, Megarry J. recently told National Union of Mineworkers' trustees on the employer's pension fund, demand an investment policy confined to

change from competition legislation, *Restrictive Trade Practices (Stock Exchange) Act*, 1984 (which will be extended to the self regulatory agencies: *Financial Services in the U.K. op. cit.*, para. 8.8). On the emergent conflicts of interest in the new City institutions see *Financial Times* (6 June, 16 July & 15 August 1984).

⁵⁷ *Canadian Aero*, *supra* note 43 at 384 (emphasis added).

⁵⁸ Beck, *supra* note 50 at 202.

⁵⁹ R. Winter, *Government and the Corporation* (1978) at 33.

⁶⁰ W. Bishop & D. Prentice "Some Legal and Economic Aspects of Fiduciary Remuneration" (1983) 46 *Mod. L. Rev.* 289 at 293.

home, as against overseas industries and "designed to ensure the general prosperity of coal mining." The rules of equity oblige them to consider the "benefit of all the beneficiaries" more widely (some were retired from the industry). "Whatever the position today, nobody can say that tomorrow cannot possibly make it advantageous to invest in one of the [investments authorised by the trust outside British industry]."⁶¹ This decision, following the discovery that pension funds do not operate in any manner different from other institutional investors and are largely under the control of the employer's financial advisers, was the final nail in the coffin that buried the claim by Drucker and others that the great pension funds had heralded the dawn of a more democratic, even socialist, capitalism.⁶²

The ownership of shares in Britain by institutions as compared to individuals has increased sharply in the last three decades. Institutions increased their share of equities to 54 per cent in 1981, compared with only 30 per cent in 1959, while the Stock Exchange gave the figure for "individual" share ownership in 1983 as 35 per cent whereas twenty years before it was 59 per cent.⁶³ This is, of course, part of the rapidity of capital concentration in Britain and internationally in which, though a centre of "latent power," the institutional investor has not exercised power over management. Indeed, the model on which English Company law was built has long been dead, if it ever existed — the "city state" of active shareholders to whom the elected directorate is regularly accountable.⁶⁴ Even in 1945, the Cohen Committee on Company Law noted the growth of "investment trust companies and unit trusts" and "the illusory nature of the control theoretically exercised by shareholders over directors. . . accentuated by the dispersion of capital."⁶⁵

⁶¹ *Cowan v. Scargill*, [1984] I.R.L.R. 260 (Ch.D.) at 269 [hereinafter *Cowan*]; see the convincing criticism by R. Nobles, "Pensions: Investment Policies and Trustees' Duties — *Cowan v. Scargill*" (1984) 13 *Indus. L.J.* 167. Pension funds own 30 per cent of British listed shares: *Sunday Times* 20 May 1984. See also R. Nobles "Conflict of Interest in Trustees Management of Pension Funds" (1985) 14 *Indus. L.J.* 1.

⁶² See R. Minns, *Pension Funds and British Capitalism* (1980); P. Drucker *The Unseen Revolution* (1976).

⁶³ *Wilson' Report on Financial Institutions* (Cmnd. 7937, 1980) at para. 250 ff. & Appendix 3; Central Statistical Office, *Studies in Official Statistics* No. 34 (1979); A. Johnson, *The City Take-Over Code* (1980) at 120; C. Feinstein & J. Revell, *The (London) Times*, (23 June 1960); J. Moyle, *The Pattern of Ordinary Share Ownership* (1971); *Stock Exchange Year Book* (1983-84) at 924; J. Farrar & M. Russell "The Impact of Institutional Investment in Company Law" (1984) 5 *Co. Law.* 107; R. Briston & R. Dobbins, *The Growth and Impact of Institutional Investors* (1983) at 4. L. Loss records that of securities listed on the New York Stock Exchange, institutional ownership grew from 8.5 per cent in 1979: *supra* note 13 at 4, n. 17.

⁶⁴ M. Pickering, "Shareholders' Voting Rights and Company Control" (1965) 81 *Law Q. Rev.* 248; K. Midgley, *Companies and Their Shareholders* (1975).

⁶⁵ *Report of the Committee on Company Law Amendment* (Cmnd 6659, 1945) at paras. 7,

However the shareholders do remain "owners." They "are not trustees for one another, and unlike directors they occupy no fiduciary position. . . . The 'company as a whole' is a corporate entity consisting of all the shareholders."⁶⁶ In theory the shareholders are still the ultimate controllers. Indeed, in spelling out the basic duty of directors, English law has always taken a position to which Winter and the market-school can hardly object. Directors must act "*bona fide* in what they consider, not what a court may consider, is in the interests of the company."⁶⁷ The interests of "the company," it is said are "of present and future members of the Company . . . [balancing] a long term view against short term interests of present members."⁶⁸ It is true, that judges occasionally allow the interests of the creditors to enter,⁶⁹ but basically the directors must consider shareholders' interests directly, albeit the indirect impact of other interests is allowed but, in the classical model, they will be corrected by the court if they prefer the interests of any others, the employees for example.⁷⁰ Modern British statute law confirms this model, for when in 1980, Parliament required directors to have regard to "the interests of the company's employees in general as well as the interests of its members," it also made it clear that in order to give them a power in special cases to donate funds to employees, or former employees, of the company, it needed to give them dispensation for acting "not in the best interests of the company." To make the point even clearer, the legislature felt obliged to require that the funds be taken from profits available for distribution and then subject the process to approval by shareholders in the general meeting.⁷¹ On a long term view, Company law is still based on the overall duty of directors to maximise profits for shareholders.⁷²

24. See also *Jenkins' Report of the Company Law Committee* (Cmnd 1749, 1962) 38-39 at para. 105.

⁶⁶ *Peters' American Delicacy Co. Ltd. v. Heath* (1939), 61 C.L.R. 451 at 504, 512, *per* Dixon J. (Aust. H. Ct.)

⁶⁷ *In Re Smith and Fawcett*, [1942] Ch. 304 at 306, *per* Greene M.R.

⁶⁸ M. Holland Q.C., *Investigation into Savoy Hotel Ltd., and Berkeley Hotel Ltd.* (1954) at 16; see L.C.B. Gower, "Corporate Control: The Battle for Berkely" (1954-55) 68 *Harv. L. Rev.* 1176.

⁶⁹ *Lonrho Ltd. v. Shell*, [1980] 1 W.L.R. 627 at 634; possibly only in insolvency, A. Boyle and J. Birds *Company Law* (1983) at 575.

⁷⁰ *Parke v. Daily News*, [1962] Ch. 927.

⁷¹ *Companies Act, 1980* (U.K.), 1980, c. 22, ss. 46(1), 74(1), (2), (3), (6a). *Companies Act 1985*, *supra*, note 24, ss.309(1), 719(1), (2), (3); D. Prentice, *Companies Act 1980* (1980) ch.17 at 137-43; R. Pennington, *The Companies Acts 1980 and 1981* (1983) at 242.

⁷² The point remains the same even if one adopts the more modest object of "satisficing" profits on the theory of the firm elaborated by such writers as R. Marris, *The Economic Theory of Managerial Capitalism* (1964); on which see E. Herman *Corporate Control, Corporate Power* (1981) ch.3, esp. at 110-15.

For those who object to the fiduciary obligations placed on entrepreneurs, this is grist to the mill. With a forked tongue, the law tells their entrepreneur to maximise profit but to observe trustee-like standards fit for those who do not seek profit in the competitive market. It is an inadequate answer for them to rely upon the semantic distinction between "trustee" and "fiduciary," for "to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry: to which is he a fiduciary? What obligation does he owe as a fiduciary?"⁷³

The fact is that we cannot conjure the type of obligation which our law places on a director, still less the "strict application" which Laskin J. (rightly) imposed, out of the facts of the market. They represent an ethic imposed *ab extra*, partaking more of public law than of private law, reaching back to the time when "trust" was a natural companion of corporation. Indeed, is the tension which all the common law systems experience in deciding when and how to allow *relaxation* of the fiduciary duty by way of shareholders' waiver or ratification not caused less by the difficulties of doctrine (whether ratification is forbidden when corporate "property" is involved, or when there is "fraud," or when it is "unfair") than by the simple fact that we are permitting a standard imposed on directors for public purposes to be released by the mechanisms of private law? The strings of consent in the company's general meeting are pulled by the shareholders, if not by the directors themselves, to release them from an ethical standard. Fiduciary obligation is imposed by private law, but its function is public, and its purpose social.

The Law Lords have recently become enamoured with "fiduciary obligation" in the thick of public law. In order to stop the Greater London Council from running a highly subsidised (and popular) transport system, under statutory powers to promote provision of an "integrated, efficient and economic" transport service, they disallowed it as "arbitrary," with a major ground being that GLC is "an elected body," and as a local authority owed

a general fiduciary duty to the ratepayers from whom it obtains moneys needed to carry out its statutory functions, and . . . this includes a duty not to expend those moneys thoughtlessly.⁷⁴

⁷³ *Securities and Exchange Commission v. Chenery Corporation*, 318 U.S. 80 at 85-86 (1942), *per* Frankfurter J; see also on fiduciary remuneration, W. Bishop & D. Prentice, *supra* note 60.

⁷⁴ *Bromley L.B.C. v. Greater London Council*, [1983] 1 A.C. 768 at 829 (H.L.) However see *Swain v. Law Society*, [1983] A.C. 598 (H.L.). Oddly enough, only a few months later, faced with a statutory body, the Law Society, which had enjoyed a windfall under an insurance scheme for the profession (of solicitors) the Law Lords rejected any idea that the Law Society could be in a "fiduciary relationship" to the solicitors who contributed the premiums.

The point clearly emerges from a consideration of "insider dealing." As *The Times* wrote editorially in 1984: "As all those closely connected with the stock market know, insider trading goes on and on a large scale."⁷⁶ The provisions for crude criminal liability finally enacted in 1980, under which less than a handful of proceedings have been brought, established sanctions for insider dealing of such complexity that they are more likely to be "a fertile source of examination questions for years to come" than any realistic prohibition.⁷⁶ The conventional wisdom on "insider dealing" is that "there ought to be a law about it." But why? Many market economists claim that it may be beneficial in an economic sense.⁷⁷ Professor Manne is not alone in protesting that it can be a positive advantage, the sale of information promoting entrepreneurial abilities to the good of American business, a process in which no one really gets hurt.⁷⁸ One must then ask why most comparable jurisdictions do have legislation to ban it.⁷⁹

Professor Loss complains that the Manne school of market entrepreneurs display "apparent scorn for the moral or public opinion factor which is relegated to the 'it's just not right propositions.'" For him a market with insider dealing is like a game with marked cards.⁸⁰ Other justifications centre upon the need for an "informed market," which requires confidence to release information, and argues that prohibition of insider trading may enhance business decision making in larger corporations. Yet in all this, the protagonists of prohibition seem to be making heavy weather. The "marked cards" and "confidence" theory would not stand up to a successful re-education of the investing public

⁷⁵ *The [London] Times* (7 January 1984); see B. Rider, *Insider Trading* (1983).

⁷⁶ Gower, *supra* note 8 at 636-38 (there is no civil remedy) on *Companies Act, 1980, supra* note 71 Part V, now *Company Securities (Insider Dealing) Act, 1985* (U.K.), 1985 consolidated separately from the *Companies Act 1985, supra*, note 24 hopefully with a view to its speedy improvement. See also D. Branson, "Insider Trading, British Regulation and American Experience" [1982] *J.Bus.L.* 342 at 413, 536.

⁷⁷ H. Wu, "An Economist Looks at Section 16 of the *Securities Exchange Act* of 1934" (1968) 68 *Columbia L. Rev.* 260 at 266: "insider speculation will reduce price fluctuations and will aid 'fair price determination'."

⁷⁸ H. Manne, *Insider Trading and the Stock Market* (1966); and see "Insider Trading and the Law of Professors" (1970) 23 *Vand. L. Rev.* 547, replying to D. Ferber, "The Case Against Insider Trading" *ibid.* 621; E. Herman, "Equity Funding, Insider Information and the Regulators" (1973) 21 *UCLA L. Rev.* 1; R. Schotland, "Unsafe at any Price" (1967) 53 *Va. L. Rev.* 1425.

⁷⁹ See Loss, *supra*, note 13 at 608, n.13; B. Rider & H. French, *The Regulation of Insider Trading* (1979); on French reforms of 1983, see A. Tunc, "Reform of Insider Trading Law (1983) 4 *Co. Law* 205.

⁸⁰ Loss, *ibid.* at 607-608; see also K. Scott, "Insider Trading" (1980) *J. Leg. Stud.* 801; E. Haft, "The Effect of Insider Trading Rules" 80 *Mich. L. Rev.* 1051 (1982). See Loss's approach comparatively in "The Fiduciary Concept as Applied to Trading by Corporate 'Insiders' in the United States" (1970) 33 *Mod. L. Rev.* 34 at 35-37.

by the Manne school which claims people come to understand — or to believe — that the more trading there was inside, the richer all the investors would be. The fact is that insider dealing *is* regarded as “wrong.” How could it be otherwise for directors and managers whose fiduciary duties and rules of “exemplary behaviour” are broken if they even make a “secret profit” on the side, however innocent, from the execution of their office? We ban “insider dealing” because we make the value judgement that, in the public interest, given the role of the corporation in our society, that is a standard below which we will not permit the controllers of such power to fall. It is a social power in trust and must not be abused on an inside track. Enforcement is, alas, another story, but we would not repeal the law of theft merely because it was difficult to catch thieves and because Professor Manne told us there should be no such law because without it the entrepreneurial system would thrive.

II. FOR WHOM ARE CORPORATE MANAGERS TRUSTEES?⁸¹

This is essentially the same debate as that which swept through the American law reviews in the 1930's — a debate which, curiously, has never seen its equivalent in Britain. In that period professors Adolf Berle and E. Merrick Dodd contested the issue: For whom are Corporate Managers Trustees?⁸² Berle argued that corporate powers were held in trust for the shareholders, whereas Dodd was arguing that they were held in trust for “the entire community” with a “social service as well as a profit making function.” To some extent their disagreement was concerned with whether the enforcement of a wider social “trust” was practicable. Although the question has continued to be put, there is lessening confidence in the answer. Indeed, by 1966 we find writers asking whether directors are “Trustees” at all?⁸³ This legal debate sprang from two sources: the trauma of the crash, the recession and the New Deal, and the analysis of the world of large corporations made in

⁸¹ See further K.W. Wedderburn, “The Legal Development of Corporate Responsibility” in K. Hopdt & G. Teubner, eds., *Corporate Governance and Directors Liabilities* (1985) ch. 1.

⁸² A. Berle, “Corporate Powers in Trust” (1931) 44 *Harv. L. Rev.* 1049 and “For Whom Corporate Managers are Trustees” (1932) 45 *Harv. L. Rev.* 1365; E.M. Dodd, “For Whom are Corporate Managers Trustees?” (1932) 45 *Harv. L. Rev.* 1145; “Is Effective Enforcement of the Fiduciary Duties of Corporate Trustees Practicable?” (1934) 2 *U. Chicago L. Rev.* 194; J. Weiner, “The Berle-Dodd Dialogue” (1964) 64 *Columbia L. Rev.* 1458.

⁸³ H. Marsh, “Are Directors Trustees?” (1966) 22 *Business Lawyer* 35; C. Israels, “Are Corporate Powers Still Held in Trust?” (1964) 64 *Columbia L. Rev.* 1446; “A New Look at Corporate Directorship” (1968) 24 *Bus. Law.* 727.

1932 by Berle and Means.⁸⁴ The very name of their work linked the modern corporation with private property and therefore, since the controllers are acting (at least theoretically) on behalf of others, with trust. Maitland's connection remains. The "managerialist" thesis which Berle and Means advanced, whereby the large corporation was henceforth to be run by "a neutral technocracy" which was "divorced" from the shareholding "owners" has fared worse than their other conclusions, in particular the insight that the modern corporation brings "a concentration of economic power which can compete on equal terms with the modern state." Corporation law, they said, "becomes in substance a branch of the law of trust," but trust obligations which it is hard for the absent stockholder to enforce. Herman's analysis⁸⁵ has shown convincingly that this "divorce" is far from absolute. The description "greatly overstated the loss of stockholders' power and the separation and discretion of managers," and many studies have punctured the validity of the extremes to which managerialism was taken.⁸⁶ Herman found that the pressures in oligopoly "point toward a continued profit orientation," albeit "an internalisation of profitable growth criteria in corporate psyches and in the rules of large managerial corporations." The corporation has become "an institutionalisation of the capitalist function."⁸⁷ Of course, such solutions do not solve all the problems concerning the relationship of management executives in the large corporation to the capitalist function. They fail to answer, for example, in Marxist or similar analysis whether they are "delegated capitalists,"⁸⁸ an incipient revolutionary class,⁸⁹ or already an independent force, given remarkable qualities by Galbraith when he claimed that, as a matter of fact, "the technostructure, as a matter of necessity, bans personal profit-making."⁹⁰ Such claims find a new base for the fiduciary principle, but an extraordinary one in that the technocrats will presumably be self-policing in their abstemious self-denial — an idea hardly borne out by the realities of "golden parachutes" and daz-

⁸⁴ A. Berle & G. Means, *The Modern Corporation and Private Property*, 2d ed. (1967) at 241, 242, 312-13.

⁸⁵ Herman, *supra* note 72 at 112, 258.

⁸⁶ See C. Beed, "The Separation of Ownership From Control" (1966) 1 *J. Econ. Studies* 29; S. Aaronovitch & R. Smith, *The Political Economy of British Capitalism* (1981) at 239-50.

⁸⁷ P. Baran & P. Sweezy, *Monopoly Capital* (1966) at 4; R. Miliband, *The State in Capitalist Society* (1967) at 25-36.

⁸⁸ G. Carchedi, *Problems in Class Analysis* (1983) at 183-88, criticising R. Miliband, *Marxism and Politics* (1977); A. Cutlass *et al.*, *Marx's Capital and Capitalism Today* (1977).

⁸⁹ J. Burnham, *The Managerial Revolution* (1941).

⁹⁰ J.K. Galbraith, *The Industrial State* (1967) at 117 (as against profit for shareholders). One London corporate executive informed of this conclusion said, "you could have fooled me."

zling executive life-style.

By 1955, Berle himself believed in not a dissimilar fashion, that the modern corporation imposed trusts upon itself for the community and that in this sense the argument had been "settled (at least for the time being) squarely in favour of Professor Dodd's contention." Modern corporations had acquired a "conscience."⁹¹ Like others, he was much impressed by the way that the law had withdrawn prohibitions, such as *ultra vires*, to permit charitable and welfare donations of corporate moneys — a process noticeable but less widespread in Britain.⁹² These "altruistic" gifts are not, of course, "neutral" in political terms, as British industry showed in 1956 when it gave 3 million pounds to re-equip independent schools; just as all investment and other "internal planning of such corporations becomes in effect *social* planning," often *primary* social planning: "government fills the interstices left by these prime decisions."⁹³ Berle and Means were correct in predicting that the giant corporation would challenge the State. Corporations do spend on avowedly "altruistic" and social purposes.

Although our laws will not normally allow a company's directors to give all the assets away,⁹⁴ they do permit gifts on a wide interpretation of what is "impliedly" for the benefit of the company. For "there are to be no cakes and ale except such as are required to be for the benefit of the company."⁹⁵ Why do we allow funds subscribed for profit from (say) industrial purposes to be donated — in part — to disaster

⁹¹ A. Berle, *The Twentieth-Century Capitalist Revolution* (1955) at 137-51 and *Power Without Property* (1959). Herman, *supra* note 72 at 259 contrasts the view of William Hazlitt *Table Talk* (1952 ed.) at 264: "Corporate bodies are more corrupt and profligate than individuals, because they have more power to do mischief, and are less amendable to disgrace or punishment. They feel neither shame, remorse, gratitude, nor good-will."

⁹² *A.P. Smith Mfg. Co. v. Barlow*, 13 N.J. 145 (1953); *Theodora Holding Corp. v. Henderson*, 257 A. 2d 398 (Del. Ch. 1969). In Britain: *Evans v. Brunner, Mond and Co., Ltd.*, [1921] 1 Ch. 359 (implied power). British tax arrangements are less favourable to such gifts: on "company giving" see Directory of Social Change, *A Guide to Corporate Giving* (1984). Charitable and political gifts over 200 pounds a year must be disclosed: *Companies Act 1985*, *supra* note 24, s.235 & Schedule 7.

⁹³ H. Braverman, *Labor and Monopoly Capital* (1974) at 268-69.

⁹⁴ *Dodge v. Ford Motor Co.*, 204 Mich. 459 (1919); *Parke v. Daily News Ltd.*, [1962] 1 Ch. 927. The 'Jenkins' Committee (Cmd. 1749, 1962) at para. 52 stated the "implied powers" of companies too widely. See *Simmonds v. Hefner*, *The (London) Times*, (25 May 1983) for a reminder that *ultra vires* is still a control on giving in England [payments by League Against Cruel Sports to Labour Party in part *ultra vires*]; P. Davies, "Companies, in General" [1983] *J. Bus. L.* 485; K.D. Ewing, "Company Political Donations and the *Ultra Vires* Rules" (1984) 47 *Mod. L. Rev.* 57.

⁹⁵ *Hutton v. West Cork Railway Co.* (1883), 23 Ch. 654 at 673 (C.A.) *per* Bowen L.J.; unless the gift is in pursuit of an *express* object: *In re Horsley & Weight Ltd.*, [1982] Ch. 442; *Rolled Steel Ltd.*, *supra* note 28.

funds, the relief of poverty, or even universities?⁹⁶

Corporate gifts smoke out the four different schools of thought about "corporate social responsibility."⁹⁷ First, the "market" school which is quite clear about social responsibility. If it means what it says, they are against it for as Milton Friedman thundered, "The social responsibility of business is to increase its profits." To advocate social responsibility for private business is "fundamentally subversive," if not "preaching pure unadulterated socialism"; and businessmen "who talk this way are unwitting puppets of the intellectual forces that have been undermining the bases of a free society these past decades."⁹⁸ Indeed, if management of big enterprises is entitled, or worse obliged, to depart from the role of "trustees for the shareholders," and consider "the public or the social interest" or support "good causes," its power will be seen to be "uncontrollable" and then it "could not be long left in the hands of private managers but would inevitably be made the subject of increasing public control."⁹⁹

Furthest along the spectrum from this is the "corporate conscience" school. After Berle's elaboration in the 1950's, the position became remarkably fashionable in the United States, even though his idea that the corporation was the "conscience-carrier of twentieth-century American society" met with savage opposition (it would "be intolerable to free men").¹⁰⁰ Others wished to cultivate corporate "conscience" as a source of motivation and use it in "the best possible series of compromises" along with competition and regulation.¹⁰¹ But all in this school held that the large enterprise had already become "the soulful corporation."¹⁰²

⁹⁶ "Some companies believe that they should be giving nothing to charity; it is not their business to give. Indeed, it is not the Directors' money to give, it is the shareholders' funds that bear the cost": *A Guide to Corporate Giving*, *supra* note 92 at 152.

⁹⁷ See further K.W. Wedderburn, "The Social Responsibility of Companies" [1985] *Univ. Melbourne L. Rev.* 4.

⁹⁸ M. Friedman, "The Social Responsibility of Business is to Increase its Profits" in G. Steiner & J. Steiner eds., *Issues in Business and Society*, 2d ed. (1977) at 168; *Capitalism and Freedom* (1962) at 133; *An Economist's Protest* (1972) at 177. See also his earlier, and more moderate, "Corporate Power, Government by Private Groups, and the Law" (1957) *57 Columbia L. Rev.* 155.

⁹⁹ F. Hayek, *Law, Legislation and Liberty*, vol.3 (1979) at 82; Hayek, "The Corporation in a Democratic Society" in M. Anshen & G. Bach, eds., *Management and Corporation 1985* (1960) at 99-117. See also E. Rostow, "To Whom and for What End Is Corporate Management Responsible?" in E. Mason, ed., *The Corporation in Modern Society* (1960) 46. Profit maximization should be re-established as the legal principle.

¹⁰⁰ B. Lewis, "Economics by Admonition" (1959) *49 Am. Econ. Rev.* 384 at 395.

¹⁰¹ W. Hamilton, *The Politics of Industry* (1957) at 138.

¹⁰² C. Kaysen, "The Social Significance of the Modern Corporation" (1957) *47 Am. Econ. Rev.* 311 at 314. On this school see Herman, *supra* note 72 at 258-60.

The third school has been the most popular. This is the "fudge" school. In one form or another, it argues that corporate "altruism" is really engaged in what it *believes* to be "socially responsible conduct" for what turn out to be "good business reasons." Sometimes expenditures for public benefit as Manne explains, buys off "forces that create real business costs in the form of unfavourable publicity." "Positive utility," we are told, can be derived from a reputation for "corporate statesmanship"; or produce "long-term benefit" for the stockholders with "relatively cost-free ways of meeting social norms"; or make the corporation less of a target for "ethical investors." Alternatively, others discovered that "altruism," reasonably practised, is a condition for the preservation of the modern capitalist system with diversified investment.¹⁰³ Some of these writers begin by being more favourable to "corporate altruism" while others note the internal structures of management that may filter out decisions to act philanthropically.¹⁰⁴ Some have even analysed the market and contextual social forces and discovered a process of osmosis: the corporation, if only it will listen, will be given by society "a clear signal when it should practice altruism" and when it should put aside strict profit-maximisation; a solution that provides a place not only for commercial largesse but also for the advertiser's commercial break.¹⁰⁵ All these writers define the problem out of existence by interpreting a (reasonable) dash of conscientious sauce to be good for the dish of long-term profit maximisation.

The fourth, "radical" school is rather different. It regards the corporate conscience as something which must be thrust upon, rather than emerge from, the large corporation. Hence the following: the proxy fight by the Project on Corporate Responsibility to put directors on the board of GM; campaigns for "ethical" investment or the prevention of corporate investment in South Africa or against employment discrimination; the stopping of Infant Formula milk being sold in the Third World; and prohibiting the manufacture by Dow Chemical Ltd. of napalm for use as a weapon.¹⁰⁶ Investor activism, and use of corporate

¹⁰³ H.G. Manne, "The Limits and Rationale of Corporate Altruism" (1973) 59 *Va. L. Rev.* 708 at 721-22; J.W. Mckie, ed., *Social Responsibility and the Business Predicament* (1974) at 14; H.G. Manne & H.C. Wallich, *The Modern Corporation and Social Responsibility* (1972) at 73; W.J. Baumol *et al.*, *A New Rationale for Corporate Social Policy* (1970). See also M. Ashen, ed., *Managing the Socially Responsible Corporation* (1974); R. Ackerman & P. Bauer, *Corporate Social Responsiveness* (1976).

¹⁰⁴ R.P. Rumelt, *Strategy, Structure and Economic Performance* (1974) at 158-59.

¹⁰⁵ D.L. Engel, "An Approach to Corporate Social Responsibility" (1979) 32 *Stanford L. Rev.* 1 at 49.

¹⁰⁶ See the valuable account of these campaigns in Herman, *supra* note 72 at 256-77; on Dow Chemical see also M.A. Chirelstein, "Corporate Law Reform" in Mckie, *supra* note 103 at

machinery, is here a contingent tactic in wider campaigns, though many of those engaged upon them also campaigned for reconstruction of the legal structure of the corporation. Professor Getz recorded that the "first echoes" of those developments were heard in Canada in the 1970's, and tells of a shareholders' meeting, where a group comprised of "some bearded men, some slim and sexy girls and quite a few black people" demonstrated against management's continued sale of aluminium to a Portuguese company for use in Mozambique, adding "it seems likely this sort of demand will be increasingly loudly heard in Canada."¹⁰⁷

We have seen an equivalent debate in Britain but it took a rather different route for reasons I will outline shortly. However, two things are clear. First, everyone except "the most devout free market economists" believes that the corporation does encounter *some* "social responsibility" to incur costs for "socially desirable, but not legally mandated, action."¹⁰⁸ Second, business, on its side, *purports* to act in that way. Many of these transactions owe more to advertising than to altruism. As Miliband has put it, this in after-dinner speeches is

where the giant enterprise becomes 'soulful', public-oriented, socially responsible and all but literally obsessed with the welfare and well-being of YOU, the customer. Here is where the corporation is most concerned with service, least with profits, and only concerned with profit because it affords the corporation a better chance to serve the customer and the community.¹⁰⁹

Some businessmen are straightforward about their activities in pursuit of social responsibility. Executives of Citibank and Levi Strauss (UK) explained their spending on "community affairs" last year in Britain as "seed corn," scattered because "the best place to do business is a happy, healthy community," homing in on "social issues . . . to try to take our activities away from pure P.R." Joan Robinson remarked that business "high-mindedness is not all just a publicity stunt to recommend their class to the rest of us," and if the desire for "good reputation and good conscience" hides behind hypocrisy, that is still "the homage which vice pays to virtue . . . much to be preferred to cynicism."¹¹⁰ Institutions have now been established to relate corporate-giv-

54-63; on "ethical" investors see *Securities and Exchange Commission v. Medical Committee for Human Rights*, 404 U.S. 403 (D.C.C.A. 1972).

¹⁰⁷ L. Getz, "The Structure of Shareholder Democracy" *supra* note 9, vol. 2 at 241.

¹⁰⁸ Brudney, *supra* note 50 at 604-605. For the "economic context" see J. Mashaw, "The Economic Context of Corporate Social Responsibility" in Teubner, *supra* note 81 at 55 and works cited at 68.

¹⁰⁹ R. Miliband, *The State in Capitalist Society* (1969) at 215-16.

¹¹⁰ *Financial Times* (9 August 1984); J. Robinson, *Economic Philosophy* (1962) at 145.

ing to social issues, for example, "Business in the Community" and "Action Resource Centre" in Britain which aim to switch funds from "church bells to job creation," because industry operates "increasingly by the consent of the community." No one will spurn the extra job that such activity may create (for no one else is creating anything other than part-time, shoe-shine employment) least of all any worker among Britain's growing army of unemployed. Furthermore, the countryside *is* better off with Shell's policy to "Protect the Countryside" than without it.

It would be wrong to suggest that this activity is based upon any credible theory of social responsibility, economic or legal, other than statements which belong squarely within the territory of the "fudge" school, like, "what is good for Exxon is good for Britain (and every other country)." This is particularly important if we recall, as we should, Braverman's conclusion that the "*internal* planning of such corporations becomes in effect *social* planning." All corporate decisions to buy church bells *or* to create jobs, noble though both may be, are dispositions of social power and raise the issue of social accountability; the old question of "powers in trust for whom?" Business itself raises the issue. When the Prime Minister of Canada says his government will "make sure that corporations fulfil their social responsibility," a corporation (Inco), challenged by one of his Ministers about its intention to make workers redundant, declared that it had been "particularly socially responsible."¹¹¹

The best known effort to explain corporate responsibility in Britain was made by the Confederation of British Industry [hereinafter referred to as the CBI] in 1973.¹¹² Profit, it declared, is the "principal yardstick" for private enterprise; but "profit alone" is not . . . the whole of the matter." The company owes responsibilities to members, creditors, customers, employees and to "society at large" (for the "environmental and social consequences of its business activities," for instance). It must go beyond its strictly legal duties. How does one encapsulate a formula for guidance? The answer, which became somewhat famous in the trade (for it was not a bad stroke on such a difficult wicket) was: "A company should behave like a good citizen in business." This standard was central to the various "codes" on business ethics which have subsequently been adopted by one in four of the large companies.¹¹³ However, it is not clear what effect it has had upon

¹¹¹ *The [Toronto] Globe and Mail* (13 September 1985).

¹¹² C.B.I., *The Responsibilities of the British Public Company* (1973).

¹¹³ International Management, *Survey on Ethics and Business* (1983).

British executives to be sent out into the market place with the injunction, "Be a good citizen in business." Perhaps more important is the CBI's recognition of the varied constituencies which a board must keep in mind; not just shareholders and creditors, but (on "an informed and ethical judgement") employees, customers, and citizens at large. Indeed, many businessmen assert that the economic or legal doctrine that they owe duties primarily to shareholders, is at odds with the *fact* that they regard themselves as acting and do act with a wider remit. In 1960, the editor of the *Investor's Chronicle* declared that the interests of shareholders, employees and customers were "co-equal interests to be served by companies."¹¹⁴ The Institute of Directors tells members they are "representatives of the shareholders' interest"; but they owe duties also to "employees, customers and creditors."¹¹⁵ The *City Code on Take-Overs and Mergers* tells directors today to take into consideration: "the shareholders' interests taken as a whole, together with those of employees and creditors."¹¹⁶ As Herman quotes the chairman of Exxon (Standard Oil) in 1946 on the task of the modern manager: achieving "an equitable and working balance among the claims of the various directly interested groups — stockholders, employees, customers, and the public at large."¹¹⁷ Even legally, there is a sense in which this formula can be more comfortable for management. If its obligation is to pay direct regard to interests only of shareholders and profit, there may be occasions (as the English cases show) when it will slip up, consider other interests improperly and be exposed to a legal action by a shareholder. But if the legal obligation is to balance, as best it can in its judgment, the competing interests of diverse constituencies, then only the board of directors that is both careless and crooked is likely to be caught out. It needs to put in evidence only an honest business judgment, taking one thing with another. On the other hand, when interests are legally recognised, machinery must surely be invented for enforcement. The exclusive right to challenge misfeasance can no longer rest in the shareholder if others too are ultimate beneficiaries of management's fiduciary duties.

Hypocrisy or not, these repeated statements by business leaders have compelled attention when governance of the corporation is on the agenda. They have challenged, at least in their formulation, the re-

¹¹⁴ W. Wincott, *Evidence to Jenkins Company Law Committee Day 1*, (23 September, 1960) at 49 (emphasis added).

¹¹⁵ Institute of Directors, *Guidelines for Directors* (1973) at 13.

¹¹⁶ Council for the Securities Industry, *City Code on Take-overs and Mergers* (1984), General Principle 9.

¹¹⁷ Herman, *supra* note 72 at 254.

peated strictures of Hayek and his acolytes:

Unless we believe that the corporations serve the public interest by devoting their resources to the single aim of securing the largest return in terms of long-run profits, the case for free enterprise breaks down.¹¹⁸

Hayek is a logical capitalist, regarded as “absolutely supreme” by the current British Prime Minister. Yet some of his logic belongs to an era now long past as can be seen when, in the same essay, he insists that no limited liability company should be permitted to own voting shares in another business company because that would break the chain of economic, market motivation. But companies break his precepts — or say they do — by giving money to “social purposes,” even to education and research (“clearly not desirable . . . as legitimate purposes of corporation expenditure”). From a rather different stable, Crosland wrote in 1956 that the *legal* issues about “major, structural reform” of companies, aimed at enforcing duties to the community or to workers by a more accountable management and reducing shareholders’ powers, were of little relevance because in the face of managerial power such a “change in the law, logical though it might be, would make no difference to the underlying reality.”¹¹⁹ It is just this apparent unavailability to legal process of the powers held by controllers of the modern corporation — management along with dominant financial interests — that has maintained the interest in the quest for new lines of accountability.

Even at a conventional legal level, the issue is not excluded. The recent draft programme for reform of corporation law by the American Law Institute [hereinafter referred to as ALI] was modest.¹²⁰ It did not advocate, as some do, compulsory Federal charters, but rather, advocated a majority of “independent” directors (a reform which Brudney has shown to have limited value)¹²¹ and an “audit committee.” The accent here is to increase the independence of the board of directors, not so much from shareholders as from the top management executives of the large corporation. This is an aim not dissimilar to that of the European company laws which have adopted a “two-tier” board struc-

¹¹⁸ Hayek, “The Corporation in a Democratic Society,” *supra* note 99 at 99-117. On Mrs. M. Thatcher’s comments see *Parl. Deb.*, H.C. (5th ser.), col. 756 (10 March 1948); on university guidelines for foundations and corporation giving see R.H. Mundheim, “A Comment on the Social Responsibilities of Life Insurance Companies as Investors” (1975) 61 *Va. L. Rev.* 1247 at 1261-64.

¹¹⁹ C.A.R. Crosland, *The Future of Socialism* (1956) at 351, 362.

¹²⁰ American Law Institute, *Principles of Corporate Governance and Structure: Restatement and Recommendations* Draft No.1 (1982).

¹²¹ See Brudney, *supra*, note 50; on social accounting see D.M. Branson, “Progress in the Art of Social Accounting and Other Arguments for Disclosure on Corporate Social Responsibility” (1976) 29 *Vand. L. Rev.* 539.

ture, as in Germany and the Netherlands, where a "Supervisory Council" supervises the "Management Board." The proposals, to British eyes, seem to relax parts of the fiduciary principle, not least by insistence upon standards of due care and "business judgment," by permitting the board in the American fashion to prevent derivative suits at least where this is not unreasonable.¹²² But the scheme is firmly founded on profit-maximisation. The role that corporation law reform is seen to play is limited in substantive terms, relying upon reforms of organisational structure and the basic elements of fiduciary duty. The ALI stated: "Corporate law should provide that the objective of the business corporation is to conduct business activities with a view to corporate profit and shareholder gain, except that [it may] properly take into account ethical principles that are generally recognised as relevant," and may also "devote resources, within reasonable limits to public welfare, humanitarian, educational, and philanthropic purposes."¹²³ This document, like the CBI Report in Britain, is one of the more successful products of the "fudge" school. We do not know when and how profit is to be forbidden if a transaction is alleged to be unethical, nor what kind of poll is to determine the ambit of relevant and "recognised" standards. As Branson says, in attempting to make corporations "accountable" with "flexibility," it

never articulates whether accountability is to shareholders, the society or clean air and water, and why this accountability is necessary . . . the drafters never bring to the fore reasons why law must limit managers' power.¹²⁴

III. WORKERS AND THE RECONSTRUCTED CORPORATION

The debate about corporate social responsibility still raises the question for company law whether the corporation should not be reconstructed. Except for the "devout" adherents to the market school, the framework of shareholder-democracy, on which company law is built, no longer seems entirely adequate. Should not the corporate "trusteeship" be redefined? It is here that the debates, largely in the last decade, on the two sides of the Atlantic diverge in their character, for reasons that reach deep into the cultural roots of the societies involved; reasons which certainly include the profound differences not only in

¹²² See *Zapata Corp. v. Maldonado*, 430 A.2d 779 (Del. S.C. 1981).

¹²³ *Principles*, *supra* note 120 at para. 2.01; see M.J. Pritchett, "Corporate Ethics and Corporate Governance" (1983) 71 *Calif. L. Rev.* 994.

¹²⁴ D.M. Branson, "Countertrends in Corporate Law" (1983) 68 *Minn. L. Rev.* 53 (a useful review).

capital markets but also in the labour movements, both between Britain and most Western European countries and, even more, between the trade union movements of Europe and the labour unions of the United States.

The American debate in the 1950's included rough-hewn schemes for "membership" of the corporation to be extended to employees, suppliers, customers and even dealers — extensions of what Eisenberg terms "client group participation."¹²⁵ Many exponents lost heart for they could find no magic formula for reconciling conflicting interests. To reconstruct boards so as to encourage "responsibility" but then limit management's freedom of action seemed "to aim in both directions at once."¹²⁶ Others envisaged multiple legal actions by customers or employees against management, even "citizens' suits."¹²⁷ Notwithstanding the opposition these schemes have not died out. Indeed they proliferated in the so-called "confessional period" of the 1970's with its disclosures of corporate political payoffs, "slush-funds," external bribery, and "questionable payments." There were calls for more "outside" directors on boards, for "audit committees" and "public policy" committees to supplement SEC action.¹²⁸ The increase in "independent" directors seemed to change little (except that some academic directors increased their income by 80 per cent). However, the belief was still being expressed in 1980 that reform of the "corporation's internal governance structure [is] the most likely vehicle for accomplishing changes in corporate behaviour."¹²⁹ Stone proposed that every large corporation should have a minority of directors appointed by a Federal agency, and later more modestly suggested the addition of "special public directors" that could be appointed by a court.¹³⁰ But experiments with government appointees to the boards of American enterprises have not been happy,¹³¹ and as Crosland pointed out long ago, the trouble with "government nominees on a private board" is that they "must either 'go

¹²⁵ A. Chayes, "The Modern Corporation and the Rule of Law" in Mason, *supra* note 99, 25 at 40-45; M.A. Eisenberg, *The Structure of the Corporation* (1976) at 19.

¹²⁶ Chirelstein, *supra* note 106 at 56.

¹²⁷ A. Conard, *Corporations in Perspective* (1976) at 405-406.

¹²⁸ Brudney, *supra* note 50 at 636, 647; J.C. Coffee, "Beyond the Shut-Eyed Sentry" (1977) 63 *Va. L. Rev.* 1099; Herman, *supra* note 72 at 280-84.

¹²⁹ D.A. Demott, ed., *Corporations at the Crossroads* (1980) at 8. See also ch.2: B. Manning, "Thinking Straight About Corporate Law Reform"; ch.3: E.J. Weiss & D.E. Schwartz, "Using Disclosure to Activate the Board of Directors"; ch.4: A.A. Somer, "The Impact of the SEC On Corporate Governance".

¹³⁰ C.D. Stone, *Where the Law Ends* (1975) and "The Place of Enterprise Liability in Control of Corporate Conduct" (1980) 90 *Yale L.J.* 1.

¹³¹ Herman, *supra* note 72 at 289-92; A. Conard, "Reflections on Public Interest Directors" (1977) 75 *Mich. L. Rev.* 941.

native' or remain suspect."¹³² The most extensive plan for wholesale reform was presented by Nader and his associates. Large corporations would need a federal charter imposing many conditions, thereby repairing a defect in the Constitution. The board would represent nine constituencies, with representatives of shareholders, management, employees, marketing, law-enforcement, finance, planning, consumers, and the community.¹³³

It would be wrong to say that there have been no equivalent proposals in Britain. Reforms for company law have concentrated upon non-executive "independent" directors, "community" shares; division of governmental powers among many constituencies in a manner even more bewildering than Nader's, reduction of the equity shareholder to a fixed interest creditor, and control through efficiency or "social" audits.¹³⁴ Nor have all such proposals come from socialist or radical stables. An enlightened businessman in 1961 proposed shareholding constituencies for an employees' council, consumer advisory service, public authority and shareholders, whilst ten years before the owner of a chemical enterprise gave 90 per cent of his shares to found the first of a number of workers' co-operatives — the "Scott Bader Commonwealth."¹³⁵ The same is true in Europe. The proposals of Bloch-Laine in 1963, again for new interest group constituencies but (being French) with a prominent role for State participation, came from Catholic social doctrine.¹³⁶ But his overriding imperative was "the necessity to give a new place to workers and their representatives."¹³⁷ A similar philosophy of "co-partnership" inspired writers who adhered to the Liberal Party in Britain.¹³⁸ There are many other currents to what has been a

¹³² Crosland, *supra* note 119 at 358.

¹³³ R. Nader, M. Green & J. Seligman, *Taming the Giant Corporation* (1976); "The Corporate Impact" in Steiner & Steiner, *supra* note 100.

¹³⁴ Respectively, Pro-Ned, *The Role of the Non-Executive Director* (1982); J. Boswell, *Can Labour Master the Private Sector?* (1968); N. Ross, *The Democratic Firm* (1964); P. Derrick, *The Company and the Community* (1964).

¹³⁵ G. Goyder, *The Responsible Company* (1961); F.J. Blum, *Work and Community* (1968). See also on the John Lewis "partnership" A. Flanders, R. Pomeranz & J. Woodward, *Experiment in Industrial Democracy* (1968), and on the "Co-operatives" and "Yugoslav" pattern P. Brannen, *Authority and Participation in Industry* (1983) at 135-45.

¹³⁶ F. Bloch-Laine, *Pour une Réforme de l'entreprise* (1963); on the later French debates see P. Sudreau, *La Réforme de l'entreprise* (1975).

¹³⁷ N. Catala, *L'Entreprise* (1980) at 161, and see paras. 149-62 on the French debates. Today, unions and employers agree only on autonomous collective bargaining (at 176). But on the labour law reforms and the new duty to bargain of 1982, see G. Camerlynck, G. Lyon-Caen & J. Pelissier, *Droit du travail*, 2d ed. (1984) at paras. 800-93; Y. Delamotte, "Recent Trends in Regulation of Industrial Relations in France" (1985) 10 *Labour & Society* 7.

¹³⁸ M.P. Fogarty, *Company and Corporation — One Law?* (1965); *Wider Business Objectives: American Thinking and Experience* (1966); and *Company Responsibility and Participation*

broad river of pressure for "workers' participation." The experiments in "job enrichment" and "job satisfaction" within the plant, especially in Scandinavia, have undoubtedly changed the conditions and human relationships at many workplaces.¹³⁹ Yet, the crucial demands for worker participation have, in all countries, gone far beyond shopfloor reorganisation of work.

Two features have characterised the predominant part of the European debate. First, proposals for multi-constituency control of the corporation became a small eddy in the mainstream which has been concerned with two groups only: shareholders and management, on one side, and the workers on the other (though sometimes as in the German law of 1976, executive management is classified with the workers). European debate has been concerned with the issue whether we can, by law, create a new, bipartite control, out of which to achieve a redefinition of corporate powers held in trust. Beyond that there appeared to lie only the alternative of nationalisation and nationally public ownership. This acceptance of the company's employees as the new character in the drama marked our company law debates. Encouraged by managers who insisted that they *did* pay direct attention to workers' interests, Parliament introduced into British company law in 1980 the obligation for directors to pay regard to the interests of employees generally as well as those of shareholders, though it hastened to add that the duty could be enforced only by the *company*.¹⁴⁰ There was no intention to encourage shop stewards to come to work clutching a derivative writ in one hand and the Rule in *Foss v. Harbottle* in the other. In fact, the section has made little difference and can legitimately be written off as "window dressing."¹⁴¹

The second reason why the *1980 Companies Act* reforms were felt to be of little importance lay in the recognition that they were only a tiny part of the wider debate which was not about "workers' participation," but was really about "industrial democracy." In one country after another following the war, in some by new philosophies, in others by retracing the steps of old programmes,¹⁴² the legitimacy of the eco-

(1975).

¹³⁹ J. Elliott, *Conflict or Co-operation* (1978) at 197-202; R. Lansbury, *Improving the Quality of Working Life* (1978).

¹⁴⁰ *Companies Act 1980* (U.K.), 1980, c.22, s.46(1),(2) now *Companies Act 1985*, *supra* note 24, s.309(1), (2).

¹⁴¹ J. Birds, "Making Directors Do Their Duties" (1980) 1 *Co. Law* 67 at 73; see also Prentice, *supra* note 71 at 139 (directors should publish their reasons for decisions affecting employees); and "A Company and Its Employees" (1980) 10 *Indus. L.J.* 1.

¹⁴² See on the revival in British unions of older traditions and "syndicalist" thinking that "went underground" after 1932: Wedderburn, *supra*, note 81 at 32-34; S. Sciarra, ed.,

conomic and social order was put in issue. "*La question de la légitimité du pouvoir économique est posée dans vos entreprises.*"¹⁴³

IV. INDUSTRIAL DEMOCRACY AND POWERS IN TRUST?

Observers of these phenomena on this side of the Atlantic have been legitimately puzzled. How could it be that countries, especially Britain, which were thought to share a belief in the virtues of autonomous collective bargaining, a system that is predicted upon the *conflicting* interests of workers and employers, should now be considering structures in which the employer lion lies down with the union lamb in unitary peace? This caused particular concern when it came to be realised that the Draft "Fifth Directive" of the EEC was meant to infiltrate such notions of "employee representation" within the enterprise into the company law of each member State of the EEC. (The draft is now thirteen years old, quite unrecognisable from its first draft, permitting an "option" of workers' participation through collective bargaining, and unlikely to be enacted for many decades).¹⁴⁴ It was asked, for example, how workers' representatives who participated in the board of directors, or the like, could possibly avoid dual loyalties, wearing two hats at once.¹⁴⁵ The same questions, it must be said, were posed forcefully by many European trade unions. Herman excluded consideration of labour unions from his study saying that: "In the United States labour has rarely sought board representation . . . Organised labor has been oriented to bread and butter gains via bargaining."¹⁴⁶

Some Europeans have replied to this wonderment by pointing out that now even in the United States, representatives of unions can be found on a corporation board or two, but this is no answer. When a union representative went on the board at Chrysler, it was reported that he would "advance the interests of the broad Chrysler Community — shareholders, workers, suppliers, dealers, consumers, and the public."¹⁴⁷ So, too, where Eastern Air Lines in 1983 offered two seats on

Democrazia Politica e Democrazia Industriale (1978).

¹⁴³ M. Rocard, "Les socialistes face aux patrons" [Nov. 1976] *L'Expansion* at 193.

¹⁴⁴ Commission of E.C. "Proposed Directive on the Harmonisation of Company Law and Company Structure" (1975) 8 Bull. E.C. Supp. 8/75; and now (1983) 117 European Industrial Rev. and Report 8. See, too, on the "Vredeling" draft *Directive* (1983) 115 E.I.R.R. 7.

¹⁴⁵ B. Hamer, "Serving Two Masters" (1981) 81 *Colum. L. Rev.* 639; B. Forst, "Labor Union Representation on Boards of Corporate Competitors" (1982) 7 *J. Corp. L.* 421; B. Abramowitz, "Broadening the Board: Labour Participation in Corporate Governance" (1980) 34 *S.W.L.J.* 963.

¹⁴⁶ Herman, *supra* note 72 at 288.

¹⁴⁷ D. Fraser, 21 March (1980), quoted in Brudney, *supra* note 50 at 605, 139; but the *Wall Street Journal* (29 October 1979) reported him to say he would "speak for the auto workers and

the board and a 25 per cent equity holding to the union as part of a settlement with 20 per cent wage cuts, a rescue package for the enterprise.¹⁴⁸ These were not strides to a brave new corporate world. They were responses to cries for help in the recession, and, no doubt, in the particular industrial situations, were very sensible steps to take. The European movement towards "industrial democracy" had very different — perhaps unrealistic — perspectives, not (it is worth stressing again) necessarily a "socialist" perspective but one at which many different types of ideology arrived and with different emphases and accents. In 1975 the European Commission discussion document which was the beginning of renewed attempts to make the draft "Fifth Directive" more flexible said:

The current period of profound economic and social change in the world . . . emphasizes the necessity for action The scope for real increases in incomes has diminished or disappeared and unemployment continues to grow. As a result industrial relations have been placed under stress . . . the current economic situation, with its reduced possibilities for growth, has emphasized the need for mechanisms which will adequately ensure the pursuit of goals other than economic growth such as the improvement of the quality of life and working conditions The pursuit of such goals can probably be secured only by the existence of decision making processes in enterprises which have a broader, democratic base than such processes often have at present.¹⁴⁹

These were proposals which manifestly aimed to save, rather than to replace, the various capitalist economic systems of the member States. They also recognised the difficulties with which opponents of such reform made great play, not least the argument that "worker directors" (an unfortunate phrase, and one that is unfair to those directors who work hard) would inevitably be beset by dual or conflicting loyalties. I have always been struck by the way in which commentators reach for this particular weapon as soon as employee participation on the board of the company or elsewhere within the enterprise, comes within their sights. Usually writers would be shocked by the reflection that they appeared to express a radically Marxist view as to the irreconcilable conflict of interest which must (on this view) exist irredeemably between capital and labour. I happen to think that the conflict between employers which buy, and workers who sell labour power is fundamental to our societies. But many an incumbent of a place on a company board is already in a position of contrasting, if not conflicting, loyalties. Even on the "profit-maximisation" view of company law, directors

the public."

¹⁴⁸ *Financial Times* (13 December 1983).

¹⁴⁹ "Employee Participation and Company Structure" (1975) 8 *Bull. E.C. Supp.* 8/75 at 11.

must, in law, balance the interests of equity shareholders who want maximum dividend, with those of preference shareholders who want secure, fixed dividend, and frequently of many other types of shareholder. Admit the creditors to the directors' permitted considerations and the conflicts become even greater. We allow nominee directors on our company boards, put there by a powerful interest, possibly not even a shareholding interest. "There is nothing wrong in it," said Lord Denning in 1963:

it is done every day. Nothing wrong, that is, so long as the director is left free to exercise his best judgement in the interests of the company which he serves. But if he is put on terms that he is bound to act in the affairs of the company in accordance with the directions of his patron, it is beyond doubt unlawful.¹⁵⁰

Such rationalisations do not command total confidence in reality, however fine they may look in the books.

This is in fact a point where the trustee ethic seems to set too high a standard for the director in the eye of many common law courts. The Australian courts have long considered that a director put on the board to protect the interests of a secured creditor is entitled to give priority to those interests.¹⁵¹ This can be done in terms of legal doctrine only by giving to the interests of the company an artificial and reified character which allows the judge to do with it what he wishes. The problem is not made any easier if, as in a New Zealand case, two opposed patrons have the right to nominate directors.¹⁵² The truth is that, even in orthodox company law, there is no simple answer to the dual loyalty problem. The standard is set by the value judgements imposed by the ethic prevailing among those who determine standards of the law. Of course it is true that representatives of labour on a company board are inevitably subjected to conflicting considerations or, if you like, "conflicting loyalties." Yet to suggest that leaders of trade unions are not now subjected to conflicting considerations, whether to push the demands of the members beyond a certain point or whether to act as the machinery for explaining the company's point of view to the members, is to mistake the realities of the workplace. Wearing two hats is a normal part of a

¹⁵⁰ *Boulting v. Association of Cinematographic, Television and Allied Technicians*, [1963] 2 Q.B. 606 at 626-27; *Selanger United Rubber Estates Ltd. v. Craddock (No.3)*, [1968] W.L.R. 1555 (Ch. Div.) See the middle position taken by Gower, *supra* note 8 at 580.

¹⁵¹ *Levin v. Clarke*, [1962] N.S.W.R. 686 (S.C.); A. Afterman, *Company Directors and Controllers* (1970) at 55-60; H.A.J. Ford, *Principles of Company Law*, 3d ed. (1982) at 375. On the "interests of the company" in English law, see "*Ultra Vires* in Modern Company Law" *supra* note 45 at 209-10; *Re Halt Garage (1964) Ltd.*, [1982] 3 All E.R. 1016 (Ch. Div.).

¹⁵² *Berlei Hestia*, *supra*, note 48. Jacobs J. did not follow Lord Denning in *Scottish Co-operative Wholesale Society v. Meyer*, [1959] A.C. 324 (H.L.); and see *Wotherspoon v. Canadian Pacific Ltd.* (1979), 92 D.L.R. (3d) 545 at 697-714 (Ont. H.C.).

trade union official's life, not least in the *administration* of collective agreements; that part of collective bargaining which makes it something more than a persistent haggles and makes "*joint regulation* a much more appropriate term to indicate its essential character."¹⁵³ The argument that a union representative on a company board will inevitably be captive is one thing. That is a practical judgment, adopted both by radicals and by traditionalists in trade unions. But the argument that the *law* cannot cope with those who are subject to trust-like duties if they are subjected to conflicting pressures is not true on the precedents. That is exactly what the English High Court dealt with recently in relation to trustees nominated for a pension fund, half by the employer and half by the union: all had to exercise the powers of investment "so as to yield the best return for the beneficiaries."¹⁵⁴

The importance of pension funds in all of our societies makes a related point. Workers in Western economies have new interests — new ties, some would say — in economic wealth, but the institutions in which these are expressed take a variety of forms and few of them give to workers as such influence of more than a passing character over the fundamental decisions that affect their lives.

This remains true even if the structure and administration of those institutions are subjected to collective bargaining with their trade unions. Certainly the institutions that have developed in Western Europe to promote that influence since the War are remarkable by their variety. Both at enterprise and at plant level one finds laws setting up the German Works Council composed wholly of workers; the French *comité d'entreprise* chaired by management; the Italian formal *comissioni interni* elbowed aside by the informal, union *consigli di fabbrica* which bear striking resemblances to British *shop stewards'* committees (especially combine committees with stewards of many unions).

Some of these bodies have powers by law, especially powers of consultation — and such rules of labour law are as much part of a reform of company law as sections in the Companies Acts — but few have powers that reach as far as the levels where strategic decision-making takes place. In the 1970's there was for that reason "a broad consensus in many countries that works councils have not lived up to the expectations that were placed in them when they were first initi-

¹⁵³ A. Flanders, *Management and Unions* (1970) at 222.

¹⁵⁴ Cowan, *supra* note 61; see R. Nobles's "Conflict of Interest in Trustees Management of Pension Funds," *supra* note 61 and see T. Schuller & J. Hyman, "Trust Law and Trustees" (1983) 12 *Ind. L.J.* 84.

ated."¹⁵⁵ Not everyone agreed with that, certainly not everyone in Britain in regard to shop stewards. Even so, the view *was* widespread that if workers' influence was to be felt in the taking of critical decisions about the enterprise, new institutions should at least be considered.

It was this that led to the close debate about experiments with worker participation at the board level in the company. It seemed quite absurd to say that directors in the modern company were subjected to fiduciary duties which involved shareholders and employees equally and then to omit the employees altogether from the constitution of the incorporated enterprise. Such an offer to the workers would be little better than a fraudulent prospectus. At this level of the board there were, again, many varieties of experiment. Two systems attracted most attention a decade ago, the German and the Swedish. By the mid-1970's both were well established experiments, and it may be of some importance to those societies that the experiments began when they did. In 1951, largely on the proposal of British advisers, German trade unions were drawn into co-determination in companies at both of two levels.¹⁵⁶ First, the Works Council was established by law (as it had been in the Weimar Republic),¹⁵⁷ composed of elected workers (who are usually, but need not be, union members), with certain consultative powers, but placed under a legal obligation to work with the employer in a spirit of mutual trust. Second, at the board level, on the top layer of the two-tier board structure of the large German company (the Supervisory Council) sit workers' and union representatives: 50 per cent in the coal and steel ("Montan") industries; and in other large companies, at first as one-third of the members, but now since 1976 nearly 50 per cent. Around these legal structures flows collective bargaining. Although commentators have questioned the extent to which the legal structures really allow workers to influence any strategic decisions by the Management Board,¹⁵⁸ and although the German model is usually offered as an example of "unitary" labour relations¹⁵⁹ (which makes it both

¹⁵⁵ J. Schregle, "Workers' Participation In Decisions Within Undertakings" (1976) 113 *Intn'l Labour Rev.* 1 at 8.

¹⁵⁶ H.J. Spiro, *The Politics of German Codetermination* (1958); see also D.F. Vagts, "Reforming the 'Modern' Corporation" (1966) 80 *Harv. L. Rev.* 23.

¹⁵⁷ O. Kahn-Freund, *Labour Law and Politics in the Weimar Republic*, ed. by R. Lewis & J. Clark, trans. by J. Clark (1981) at 214-21; and now *Works Constitution Act, 1972*.

¹⁵⁸ See P.L. Davies, "Employee Representation on Company Boards and Participation in Corporate Planning" (1975) 38 *Mod. L. Rev.* 254; S. Simitis, "Workers' Participation in the Enterprise" (1975) 38 *Mod. L. Rev.* 1.

¹⁵⁹ J. Schregle, "Co-determination in the Federal Republic of Germany" (1978) 117 *Intn'l Labour Rev.* 81; but contrast C.W. Summers, "Workers' Participation in the United States and the Federal Republic" (1979) 32 *Recht der Arbeit* 257 and "Co-determination in the United States" (1982) 4 *J. Comp. Corp. L. & Sec. Reg.* 155.

unreal and inappropriate for export), neither trade unionists, managers nor scholars in Germany are satisfied with that analysis. In particular, the dual loyalty problem is answered by stressing the fact that these structures are concerned not with *substantive* rules about "participation" but with the provision of additional *procedures* through which conflict may be, at least transitionally, resolved.¹⁶⁰ We shall see that this thinking had a parallel in Britain.

That approach brings us closer to the second experiment, in Sweden. This is based much more firmly upon collective bargaining, in a society where some 90 per cent of industry, let us remember, is privately owned, with an increasing slice being held by interests outside of Sweden. It has had three prongs.¹⁶¹ First, since 1973 each of the two trade union confederations has had *one* representative on the (one-tier) boards of companies of any size. This minority representation is aimed not at power, but at information. The directors appointed through trade union machinery report back to the Works Councils in their enterprises, which are established not by law but on an autonomous basis by the unions. A study of this structure in operation reveals that there has been little difficulty about confidential information acquired by workers' representatives, another problem which is often advanced by those troubled by dual loyalty difficulties. Indeed, it is well known in Britain that union officials and shop stewards acquire confidential information (about new models of products in development, for example), but there is no known case of such trade secrets being revealed, let alone of any insider dealing by unions on the stock market. Second, the traditional obligation to bargain has been supplemented by the bold *Joint Regulation at Work Act 1976*, which gives to workers' unions the right to negotiate "joint regulation" agreements on any matter within the ambit of corporate affairs. The final prong is the *Meidner Plan*, which is now modified into the project for Wage Earner Funds whereby part of the company profits is diverted into collective funds for workers and is intended to affect corporate ownership by holding shares. This last item

¹⁶⁰ See the valuable discussion by F. Kubler, "Dual Loyalty of Labor Representation" in Hopt & Teubner, *supra* note 81 at 429-42.

¹⁶¹ See F. Schmidt, *Law and Industrial Relations in Sweden* (1977); A. Victorin, "Co-determination in Sweden" (1979) 2 *J. Comp. Corp. L. & Sec. Reg.* 111 and "A New Era for Collective Labour Law in Sweden" (1978) 26 *Am. J. Comp. L.* 609; C. Summers, "Comparisons in Labour Law: Sweden and the United States" (1985) 7 *Indus. Rel. L.J.* 1. See, too, Reports to the 10th World Congress of the International Society of Labour Law and Social Security: L. Merrifield, "Worker Participation in Decisions Within Undertakings" (1982) 5 *Comp. Labour L.* 1; R. Richardi, "Worker Participation in Decisions Within Undertakings in the Federal Republic of Germany" *ibid.* 23; O. Bergqvist, "Worker Participation and Decisions Within Undertakings in Sweden" *ibid.* 64.

is currently a matter of sharp political division in Sweden. However, it was the second prong which caused the greatest interest in Britain in the 1970's because it seemed to address the central issue which a majority of British trade unions had identified as the modern crisis of collective bargaining.¹⁶²

That crisis related to the *levels* which collective bargaining can reach. Whereas British unions had for decades exerted influence, at least in times of so-called "full employment," upon the wages and other conditions of employment of workers, they had been relatively unable to influence the strategic economic decisions upon which the very future of employment might depend, in particular decisions about closures and about investment. These were the internal, corporate decisions which determined social priorities. In 1974, in an extraordinary reversal of traditional policy the majority of the unions in the Trades Union Congress adopted a programme in which they demanded workers' representation to the extent of *50 per cent* on the directing boards of all large companies and public corporations. Union leaders were insistent that this did *not* imply adoption of a unitary stance in relations with employer but rather, they saw this step as an extension of collective bargaining or joint regulation: The extension of joint regulation in any form, including collective bargaining, is a *de facto* sharing of the management prerogative.¹⁶³ It must be added that a minority of unions (some on the right, some on the left) rejected this demand. The EETPU said the union role is one of opposition to management decision. "Far better . . . that the responsibility for that decision is firmly laid at the management's door; then the collective bargaining machinery can oppose and moderate the impact of the decision when necessary." But that was exactly what worried the majority, not least because the power to moderate was not always evident. In modern economic conditions, that philosophy legitimises the right of management to make the critical decisions, leaving the union to negotiate such crumbs as it can after the investment decisions have been taken.

The Labour Government set on foot limited experiments in public corporations (all long since buried).¹⁶⁴ It also set up a committee under

¹⁶² This account does not imply that developments in other countries, not least the Netherlands, Denmark, and Norway, were not influential. See generally: P. Montalenti, ed., *Operet ed Europa La Partecipazione dei Lavoratori alla Gestione dell'Impresa* (1981); Symposium, "Worker Participation in Management" (1980) 4 *Comp. L. Yearbook* 1; E. Batstone & P. Davies *Industrial Democracy: European Experience* (1976); Commission on Industrial Relations, *Worker Participation and Collective Bargaining in Europe*; R. Lansbury, "Industrial Democracy through Participation in Management: the Australian Experience" [1978] *Ind. Rel. J.* 71.

¹⁶³ Trade Union Congress, *Industrial Democracy* (1974; new ed. 1977) at 35, para. 88.

¹⁶⁴ See [on steel] P. Brannen *et al.*, *The Worker Directors* (1976), and [on the Post Office]

Lord Bullock to recommend ways in which, in practical terms and by adjusting company law, workers' representatives might best participate in decisions of companies through representation on boards of directors. In the Bullock Report, a majority of the committee (which included the present writer) recommended a scheme for equal numbers of shareholder and employee representatives to be joined on the boards of all companies of any size (and all companies within big groups) by a third, smaller slice or independent members, added normally by co-option.¹⁶⁵ The Committee made many mistakes, not least of which was in expressing this formula in algebraic terms as " $2X + Y$," but that was not the only reason for the thunderous disapproval of management which can still be heard today. In fact, a complex battle followed the Report. The headlines in *The Investor's Chronicle* read "Fight Bullock at the Barricades."¹⁶⁶ The Government retreated behind a watered down version of the scheme;¹⁶⁷ and in 1979 it lost power in the General Election. Eminent commentators on the Report declared that it tried to mix oil and water. One could build industrial democracy *either* "in the land of collective bargaining on the pluralistic pattern" *or* "in the land of company law on the unitary pattern," not both. Although the reply was made that these "old maps of 'unitary' and 'pluralist' models" might be inadequate to modern needs,¹⁶⁸ the debate did not go well for the Report. It was argued that, in Britain as in Germany, unions misdirect their aim in looking to the board, for that is not where the real decisions are taken, a point to which Swedish experience suggested the reply that only by opening the doors of the board room can access be gained to those other levels of decision-making, or even to the information about the corporate decision-making processes. Whether or not any such scheme could have been introduced in Britain, we cannot now tell. What is clear is that the strategic decisions on investment and closures have remained within the area of managerial prerogative, touched very little by the fingers of collective bargaining, even in Sweden and Italy (where claims were made for success by collective bargaining in this respect in the 1970's). By 1980, though, the "industrial democ-

E. Batstone, A. Ferner & M. Terry, *Unions on the Board* (1983).

¹⁶⁵ *Industrial Democracy* (Cmnd. 6706, 1977).

¹⁶⁶ *Investors Chronicle* (28 January 1977). For an excellent account, see Elliott, *supra* note 139; P. Brannen, *Authority and Participation in Industry* (1983) ch.6; Institute of Directors, *The Fifth Directive: A Trojan Bullock?* (1980). For a summary, see Wedderburn, *supra* note 81 at 36-38.

¹⁶⁷ *Industrial Democracy*, *supra* note 165.

¹⁶⁸ Respectively, O. Kahn-Freund, "Industrial Democracy" (1977) 6 *Indus. L.J.* 65 at 75-76; P. Davies & K.W. Wedderburn, "The Land of Industrial Democracy" (1977) 6 *Indus. L.J.* 197 at 211.

racy" debate in Britain was silent.

Some echoes of it still remain, for example the traces of Bullock left in the archaeology of comparative studies on industrial democracy. The majority Report even faced an issue which the legal systems of Sweden and Germany have not confronted. It recommended that, for the large companies to which the "2X + Y" board scheme would apply, company law should be amended to render certain decisions by shareholders valid only if the mixed board of directors agreed. How could a system of law that insisted upon the right of employees to have representatives on the board permit a meeting composed only of shareholders to resolve to liquidate the company? Secondly, the majority Report insisted that there should be a "single channel" for workers' representation both in collective bargaining and in structures of representation within the company, and that channel must be the workers' independent trade unions. This is the case in Sweden but not in Germany. Problems of multi-unionism would be met by formation of a "Joint Representation Committee" of unions within the company and, more important, within the company group. This was one of the most hotly contested points. It was represented as a bid for "Union Power." But the proposals were not for nominees from union headquarters, but for representatives elected through union machinery in the enterprise. Moreover, the right to appoint to the board would not arise unless a ballot of the employees declared clearly in favour of the scheme. If the scheme were to depend on an employees' council or body outside the union, that would be either a citadel to be occupied by union members or a body in a state of tension with, or in hostility to, the union in its collective bargaining role. The first rendered it pointless while the second nullified the object of the exercise. Moreover, the proposal to stimulate "Joint Representation Committees" of trade unions at enterprise, company and company group level is one of which, in private, some managers, and trade unionists too, now speak of as a missed opportunity.

Trade union structure is fundamental to any such reconstruction of the incorporated enterprise. Unless a union is independent, democratic, representative and effective it cannot enter the scene as the true bearer of the trust of its members. That is why the Bullock Report also stressed "the importance of employee representatives keeping in touch with their constituents; if they do not, they will be of little use to the board or to those they represent, for they will not provide the necessary communication link between the two. This element of communication was strongly entrenched in the Report. It was the point of contact between two different tendencies within the majority. The first reflected a

belief in creating "a new relationship between capital and labour." Its thinking was "unitary" in industrial relations terms; it saw the scheme as gradually reducing, perhaps even abolishing, the basic conflicts of interests in industry. The second tendency was based more squarely upon an inevitable continuation of social and industrial conflict and saw the scheme as transitional, being a phase of "conflictual partnership."¹⁶⁹ What held the two together in the majority Report was the fact that neither tendency was millennialist, both saw the scheme they were proposing as a step forward into new territory, but a step without which Britain would be weaker in the economic travail which by then seemed to lie ahead. Both believed that without such a step there was no hope either of increased economic efficiency in the short-term or of any new platform of consent and legitimacy in the medium term. Both accepted the analogy — which, it is well known, came from Lord Bullock himself — with which the Report ended. Proposals in the nineteenth century to extend the right to vote were met with fears little short of "the subversion of the constitution and the dissolution of society," yet these reforms were later perceived as essential to a stable and prosperous society.

We believe that over 100 years later an extension of industrial democracy can produce comparable benefits and that our descendants will look back with as much surprise to the controversy which surrounded it as we do to that which surrounded the extension of the political suffrage in the nineteenth century.

Many have noted that in ideological terms, opposition to the Bullock scheme did not come only from management and that opposition to workers participation in the enterprise at decision-making level was a point held in common by both Marxist European unions and American labour unions.¹⁷⁰

Behind the proposals of the "Bullock" Report, however, lay three social facts of the utmost importance. First, the trade union movement was still accepted as broadly representative of British workers. This did not mean that every worker was a union member (the "closed shop" has always been a minority phenomenon in Britain), but by 1979, the high point of membership, the density of union membership in Britain was 54 per cent (it is still 50 per cent today) and nearly 80 per cent of

¹⁶⁹ Davies & Wedderburn, *ibid.* in reply to the description of modern developments as "bar-gained corporatism" by C. Crouch, *Class Conflict and The Industrial Relations Crisis* (1977).

¹⁷⁰ See O. Kahn-Freund, *La Participation: Quelques Expériences Etrangères* (1976) at 27: "Il est remarquable de constater ici pour une fois une attitude fondamentale identique de la part d'esprits inspirés de la doctrine marxiste et, par exemple, des syndicats américaines. Cette attitude est fondée sur la conviction que le conflit des intérêts existe, qu'il ne peut disparaître, que se soit par la discussion ou par une organisation de l'entreprise."

employees had terms and conditions covered by collective bargaining. The strength of autonomous trade unionism, the method by which the individual employee escapes from subordination to the employer, is a key factor in any experiment with industrial democracy and reconstructed corporate governance. Swedish structures cannot be understood without the knowledge that some 80 per cent of white collar workers and 95 per cent of other workers are union members. So too, the inability of German unions to raise membership above 37 per cent is central in that country; and the decline of union density below 20 per cent of the workforce in the United States is of profound importance to us all.

The second element was the fact that the great majority of British trade unions have never been concerned with collective bargaining alone. Their programmes have, with varying degrees of emphasis, long included an economic and political challenge to the social structures in which they work. This is a feature of all the major trade unions movements of Western Europe, with the exception (some would argue) of the DGB in the Federal Republic of Germany. It is a feature which divides those trade unions by a chasm from the 'labour unions' of the United States who do not mount a challenge to the political economy within which they bargain, and it is a characteristic which continually reasserts the justification of trade unions being in politics, which the ILO has insisted to be necessary to their function of protecting the interests of their members.

The third social fact was the *acceptance* of trade unions as a necessary and desirable "estate of the realm." If this gave rise to "corporatism" in some periods, as in the Labour Government's "Social Contract" of the later 1970's, it was also thought to establish a certain *consensus*, a fundamental commitment to "full employment" and the acceptance of limits beyond which government would not go in either dismantling or extending the Welfare State; limits which, looking back, we can now see were for the most part astonishingly observed by administrations in the government of both parties between 1950 and 1980.

Since 1980, that is no longer the case. The commitment to "full employment" has gone as have public policy as new perspectives on the Welfare State. Deregulation and a return to free markets are perceived as requiring a removal of the obstacles constituted by, or the "coercive monopoly" of, trade unions.¹⁷¹ These concepts of Hayek are now domi-

¹⁷¹ See F. Hayek, *Law, Legislation and Liberty* vol.1 (1979) at 142; vol. 3 at 144; *The Constitution of Liberty* (1960) at 504; *1980's Unemployment and the Unions* (1980) at 39-64.

nant in the corridors of Whitehall. Legislation has reintroduced the liabilities of the common law as the basis of a new labour law which ascribes to trade unions the rights — and illegalities — of 1901.¹⁷² Political activity by trade unions within the law is restricted and the definition of “political” is enlarged, whilst the donation of funds by companies for political purposes is, save for disclosure, unregulated. Unemployment is 13 per cent of the workforce and still rising. Two million full-time jobs have been lost in manufacturing industry since 1980. New jobs are invariably part-time or in self-employment. Half a million young citizens under 21 years of age have never known gainful work. But that is a story for another time. Its relevance here is that, although a decade has not yet passed since the Bullock Report, its pages speak as if from another world. It would be impossible to write such a Report today, for the backcloth of necessary social *consensus* appears to have been more fragile than expected. While many who signed it expected, and wanted, social and economic change, few of them could have predicted in 1977 the fragmentation — better, the segmentation — of British society, and especially of the labour market, which has occurred in the 1980’s.

For those interested in worker participation, however, a study of that other period is not irrelevant. For one thing, as dedicated an opponent of the Report as the *Financial Times* warned management in 1981 that workers’ attitudes “bred mainly by fear of unemployment” did not indicate “a permanent willingness to cooperate with management decisions”; it was not arguing for “soft management,” but “[the] tide that swept the Bullock proposals on industrial democracy into a major issue has not receded for ever.”¹⁷³ Whether or not that be correct, the conclusion of a research study for the Bullock Committee in 1976 summarises a view then widely held,

a consideration of the European experience of worker representation at board level suggests that, to be even marginally effective as a meaningful form of industrial democracy, workers require parity representation on a meaningful board, a formal recognition of their link with trade unions and a less restricted notion of board secrecy. Without such conditions worker directors are trivial in democratic terms.

Collective bargaining, it went on, with extended union rights to information, appeared to be “a more adequate method” of securing workers’ rights in this period, but in the longer term, an introduction of board

¹⁷² P. Fosh & C. Littler, eds., *Industrial Relations and the Law in the 1980’s* (1985); K.W. Wedderburn, *The Worker and the Law* (forthcoming 1986); J. Clark & K.W. Wedderburn, *Labour Law and Industrial Relations* ed. by K.W. Wedderburn, R. Lewis & L. Clark (1983) ch.6.

¹⁷³ *Financial Times* (30 November 1981).

representation could be "potentially important."¹⁷⁴ One lesson of the British "industrial democracy" debate is that reform should not offer more influence within the corporation than it can deliver.

Britain is not the only country to experience no new experiment in "industrial democracy" in the 1980's. Indeed one can report few advances on this front from any country in Europe, except perhaps for the introduction of a duty to bargain in France in 1982. True, the structures in Sweden and in Germany are intact, but elsewhere what had seemed to be a slow and inexorable advance now has turned into a defensive retreat. The reason had little to do with the law; nor has there been fundamental change in the disillusion "with attempts at achieving better corporate governance through increased shareholder democracy."¹⁷⁵ The previous trend towards 'participation' and industrial democracy, though, now appeared to be "the mark of Western European economies in growth; it may not be thought remarkable that the gale of recession should sweep these same socio-economic systems back into a restrictive legal attitude towards the trade unions."¹⁷⁶ In this development, we must distinguish carefully "participation" from "consultation." There is less participation by workers, but more consultation of workers. It has been a phenomenon commonly observed in the recession, in Britain and elsewhere, that management has increased the extent of its "voluntary consultation" of the workforce, sometimes through trade union machinery and sometimes outside the normal collective channel of representation. Workers' participation in decision-making is a very different animal in the labour relations zoo from consultation of workers by a management which retains full discretion to make the critical decisions. Indeed, consultation often comes after those decisions have been made. Statutory backing for trade union rights to participate in the implementation of management decisions, as in the United States, does not therefore sustain 'industrial democracy' in the way attempted by the *Swedish Joint Regulation of Works Act, 1976*. On the other hand, more trade unionists in Britain now take a jaundiced view of participation. Far more reject participation on the company board which they regard less as an opportunity for joint regulation than as an invitation to preside jointly over the redundancies of their members. "Industrial democracy" may be a banner borne aloft

¹⁷⁴ Batstone & Davies, *supra* note 162 at 43.

¹⁷⁵ K. Hopt, "New Ways in Corporate Governance" (1984) 82 *Mich. L. Rev.* 1338; L.C.B. Gower on company law "in disarray": "Whither Company Law" (1981) 15 *U.B.C.L. Rev.* 385.

¹⁷⁶ K.W. Wedderburn, "The New Legal Framework in Europe" in *Industrial Relations Society of Australia, International Issues in Industrial Relations* (1982) 34 at 56.

more readily in booms than in recessions. When an economy, like the British, is turned geriatric by decades of starvation of investment and innovation, the maximisation of profit leaves little space for social experiment.

Yet that is not the only lesson of these three decades of European effort. An Australian Minister, pledging his government to a programme of industrial democracy, said last year, "The essence of industrial democracy is the right of employees to influence decisions affecting their working lives."¹⁷⁷ The need of workers to reach decisions that determine employment might be thought to become more urgent when the danger to their very employment has grown so much larger. As the threat of massive unemployment has grown however, the gaze of union leader and union member alike has retreated from the horizons of new societies, or even the middle distance of reform, back to the ground on which they stand today. The traveller from Europe cannot report that he has discovered a secure new social compact in which the managers of private corporate power are found to be impressed with new trusts which represent the interests of workers alongside those of shareholders. Yet it may not be irrelevant that amongst the many features which he will have mapped are the two countries where the recession has not bitten so deeply and where the social edifice appears so far to have cracked less obviously than elsewhere, Sweden and Germany. There one constituent (of course, it is only *one*) in social development was the participation of workers' representatives in what were *thought* to be elements of "industrial democracy" — something more than a token, the *beginnings* of a redefinition of the corporation — which were laid down sufficiently early before the current crisis. This he might report as worthy of interest to any society which still had time and wealth enough to discuss such issues, not least perhaps in the newly industrialising countries of the Third World. Even in the balance sheet of Milton Friedman an investment in "industrial democracy," if made in time, might show a profit.

Indeed, it seems unlikely that the debate on "industrial democracy" can, in the longer term, be divorced from that about the reform of company law. The point has been reached in the United States where reformers "need a perception of the particular problems that exist with corporation law today These goals must be stated urgently A simple understandable statement must supplant 'governance,' 'accountability,' 'legitimacy,' or 'flexibility' as a lodestar for

¹⁷⁷ R. Willis, Minister for Employment and Industrial Relations, 1984, *Employee Participation News* No. 3 at 8.

corporation law reform." This, it is said, implies that it should "adopt the goal of shareholder protection, not just in the sense of protecting property but also with a view toward restoring integrity to, and belief in, the investment process."¹⁷⁸

But to European eyes such a programme omits a fundamental issue, namely, the legitimacy of the distribution of powers achieved by incorporation with limited liability as it affects the workers whose labour power is purchased. It was the gradual insertion of worker-participation on to the agenda of company law reform, as part of the law of the enterprise, which has linked the debates about "industrial democracy" with the modern form of the old question: "For whom are corporate managers trustees?" The narrow issue that links corporations, trust and the workers was and remains:

What are the modern conditions . . . on which private capital in a mixed economy can be allowed the privilege of incorporation with limited liability?¹⁷⁹

V. A POST-SCRIPT

To this conclusion, a post-script must be added, one which Maitland could not have foreseen, and which we still imperfectly understand, but which is an immediate issue in all societies ("an international fact of life," the Watkins Task Force called it in Canada in 1968).¹⁸⁰ It cannot be adequately discussed here, but it must be mentioned. Our traveller would be obliged to report that it is one to which very few of the programmes of reform, either in corporate governance on the American pattern or on industrial democracy in the European style, have addressed themselves effectively. The most important characteristic of capital today is its international character. Most of the important corporate groups are multinational. Transnational capital is strong; it crosses oceans and frontiers with ease. Transnational labour power is weak; each nation's labour movement flourishes in the web of its proud but separate history. Transnational collective bargaining scarcely exists.¹⁸¹ The Netherlands found it necessary to exempt the

¹⁷⁸ Branson, *supra* note 124 at 112.

¹⁷⁹ K.W. Wedderburn, *Company Law Reform* (1965) at 19.

¹⁸⁰ Task Force on the Structure of Canadian Industry, *Foreign Ownership and the Structure of Canadian Industry* (1968).

¹⁸¹ See P. Davies, "Labour Law and Multinational Groups of Companies" in K. Hopt, ed., *Groups of Companies in European Law* (1982); D. Kujawa, "The Labour Relations of United States Multinationals Abroad" (1979) 4 *Labour & Society* 3; K.W. Wedderburn, "Multinational Enterprise and National Labour Law" (1972) 1 *Indus. L.J.* 12; H. Northrup & R. Rowan, *Multinational Bargaining Attempts* (1979); R. Blainpain, *Comparative Labour Law and Industrial Relations* (1982).

companies of transnational enterprises from its laws on industrial democracy. It is true that such international agencies as the OECD, ILO and the United Nations have tried to elaborate codes of conduct for these organisations, but they can hardly be called effective control or engines of accountability. The difficulties posed by the different codes of national company law and their interaction with multinational corporations have as yet scarcely been even defined in relation to such codes. For example, the OECD *Guidelines for Multinational Enterprises* raise in every paragraph the question of the liability of a parent company for the subsidiary at home and abroad.¹⁸²

The conflict between the theoretical and formal legal independence of subsidiaries and the reality of extraterritorial control by foreign holding companies affects almost every group and remains essentially unresolved.¹⁸³

We may now have entered an "environment dominated by vast impersonal organisations that pride themselves on their rootlessness, the 'international corporation'." They have "helped create enormous wealth" but they have also,

broken down traditional community links and brought forth new problems whose solutions require protective and control mechanisms - private, governmental, local, national, and international - that do not now exist. Governments have grown large and potent along with large firms, but they continue to lose the power of initiative in a world of increasingly rapid change, international mobility of resources, and internal political conflict and stalemates.¹⁸⁴

Before we have produced answers to the governance of the national corporation, or have constructed the terms of some transitional trust for the exercise of national corporation powers, or have found a way by which political democracy in nations can be complemented by industrial democracy, the difficulties raised to the power of an international economy where the initiative lies with those who wield corporate power largely on their own terms. The lawyer, then, who confronts such problems today, in making his analysis and proposals on a national or regional plane, must aim further to make a contribution which will at least open up the international agenda. It is a daunting prospect.

However, there are precedents, found in unlikely places. On February 15, 1850, Lord Shaftesbury, having learned of an interpretation

¹⁸² See *International Investment: OECD Guidelines for Multinational Enterprises* (Cmd. 6525, 1976) esp. at 5-6 on Disclosure of Information; K. Simmonds, ed., *Multinational Corporations Law*, vol. 3 (1978). See also the *Tripartite Declaration of Principles regarding Multinational Enterprises* (1977 ILO).

¹⁸³ T. Hadden, *The Control of Corporate Groups* (1983) at 4 (a pioneering study).

¹⁸⁴ Herman, *supra* note 72 at 301: "The hope for the future must be that a series of survivable small shocks or minor catastrophes will occur".

by the judges of the Court of Exchequer which wrecked the *Ten Hours Act*, passed to protect women and children enslaved in factories wrote in his diary: "Adverse judgement in the Court of Exchequer . . . Ten Hours Act nullified. The work to be done all over again."¹⁸⁶ A century and a quarter later, in the development of transnational capital and an internationalised economy, history may have already nullified even the inadequate projects of reform which have so far attempted to expand industrial citizenship by imposing new trusts upon the giant corporation and to give to those who sell their labour power new levels of democracy at the workplace. If that be so, the work must begin all over again. After all, women and children in most of the industrialised countries do not now work in factories for more than ten hours in the day.

¹⁸⁶ J. Wesley-Bready, *Lord Shaftesbury and Social-Industrial Progress* (1926) at 236.