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Commercial Morality through Capitalist Law: Limited Possibilities

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Commercial Morality Through Capitalist Law: Limited Possibilities

Harry J. GLASBEEK*

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The point of departure of this paper is that one of the primary tasks of law in a liberal, capitalist democracy is to maintain and further the values and characteristics which are crucial to the functioning of capitalism. Certain widely held moral values, such as the requirement that we should act with honesty, integrity and in good faith when engaged in business dealings are compatible with this agenda. If the only issue was how to make the law more effective in the pursuit of these objectives, it would not be a very problematic or interesting one, except to the technicians saddled with the problem of implementation. But there are a number of virtues and values, commonly touted by church leaders, moral philosophers, populists and which, indeed, are sought to be practised by many people in their non-commercial lives, which clash with some of the more basic tenets of capitalist relations of production.

The ill fit between, on the one hand, the values of capitalism which are reflected in law and, on the other hand, historically evolved and culturally internalized philosophies and views, is brought out into the open occasionally. Recent economic circumstances and the behaviour of some individual capitalists have created such a moment. This has put pressure on the law to harmonize shared norms and commercial practices. It has always been very difficult for liberal capitalist law to respond positively to such demands and this time around the prospects are particularly dim¹. This paper sets out to support this assertion.

I. MANIFESTATIONS OF THE RIFT BETWEEN COMMERCIAL PRACTICES AND CONVENTIONALLY TOUTED MORALITY

There are a number of reasons why the problem of the ill fit between commercial practices and law, on the one hand, and a supposedly communally shared set of values, on the other, is more obvious today than it has been for some time.

Firstly, wealth is extremely concentrated. An indication of the concentration is given by Henry Veltmeyer. He calculates that, in 1983, "[c]orporations connected to a handful of twenty-five enterprises accounted for 34% of all industrial assets (land, buildings, equipment and other capital), 23.5% of all sales, and 32.6% of profits generated by all non-financial corporations². The *Financial Post 500* of June 1990 reported that the revenues of the largest 500 corporations in Canada were equal to 80% of the Gross National Product (GNP) of the country. These 500 corporations employed more than two million people. These corporations however, are the creatures of a few wealthy people. A study found that nine families controlled 50% of the equity (exclud-

1. Inasmuch as there are some who would impose new values by the means of law to reflect the needs of a socialist society, their prospects for success are, on the basis of my premise, non-existent.

2. Henry VELTMEYER, *Canadian Corporate Power*, Toronto, Garamond Press, 1987, p. 18.

ing that of the banks) traded on the Toronto Stock Exchange³. Diane Francis claimed that Canada's 32 wealthiest families, along with five conglomerates, controlled about one third of the country's non-financial assets. She said that the revenue of the various enterprises of these families amounted to nearly 123 billion dollars in 1985. The federal government's income in that year was only 80 billion dollars⁴.

Another reason for this situation is that our political system is based on the idea that overall economic welfare is to be created by a privately run and privately ordered economy. Elected governments, therefore, are dependent for their political survival on the generation of adequate overall economic welfare by autonomous private individuals. Although, as a consequence, in a liberal, parliamentary democracy, they are notionally empowered to order the allocation of resources in any way they see fit, governments tend to play a supporting role, rather than a commanding one, in respect of economic decision making. As Stanley Beck, the former Chair of the Ontario Security Commission, put it:

*In a private enterprise market system, such critical matters as the distribution of income, what is produced, the allocation of resources to different lines of production, the allocation of the labour force to different occupations and workplaces, plant locations, investment levels, the technologies used in production, the quality of goods and services, and the innovation of new products, are all matters that are in large part decided by businessmen. Yet they are also matters of great economic and social significance. They are, in a real sense, public policy decisions and, to the extent that they are made or shaped by business leaders, such leaders exercise a public-policy function.*⁵

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3. As cited by Stanley BECK, "Corporate Power and Public Policy", in Ivan BERNIER and Andrée LAJOIE, *Consumer Protection, Environmental Law, and Corporate Power*, vol. 50, Studies for Royal Commission on the Economic Union and Development Prospects for Canada, Toronto, University of Toronto Press, 1985, p. 197.
 4. Diane FRANCIS, *Controlling Interests: Who Owns Canada?*, Toronto, Macmillan of Canada, 1986. In 1978, an exhaustive report on corporate concentration in Canada had found that Canada had one of the most non-competitive economies in the first industrialized world; see ROYAL COMMISSION ON CORPORATE CONCENTRATION, *Report of the Royal Commission on Corporate Concentration*, Ottawa, Minister of Supply and Services, 1978 (hereinafter "Bryce Report"). For a presentation of more recent numbers, all of which reflect the argument in the text, see Harry J. GLASBEEK, "The Corporate Social Responsibility Movement – The Latest in Maginot Lines to Save Capitalism", (1987-88) 11 *Dalhousie L J* 363, 394-399; see also W. KRAUSE and J. LOTHIAN, "Measurement of Canada's Level of Corporate Concentration", *Canadian Economic Observer*, January 1989.
 5. Stanley BECK, *loc. cit.*, note 3, 182. For more theoretical arguments to this effect, see Fred BLOCK, "The Ruling Class Does Not Rule: Notes on the Marxist Theory of the State", (1977) 7 (33) *Socialist Revolution* 6; Theda SKOCPOL, "Political Response to Capitalist Crisis: Neo-Marxist Theories of the State and the Case of the New Deal", (1980) 10 *Politics and Society* 155. This structural explanation allows for the fact that, in practice, there will be considerable variations. In countries with highly developed social democratic practices, such as Sweden,

In sum, the ownership of a great proportion of the assets by the few does not just enhance their personal well-being and prestige, but it also gives them enormous power. The power stems from the right of these wealth owners to withhold their resources from others. It is basic to our kind of economic system that the owners of resources should not be forced to invest their wealth or to invest it in a particular way. We should inveigle them to do so if we can, but we should not coerce them into doing so.

This right not to deploy wealth and assets means that the wealth owners exercise power indirectly. Nonetheless, it is real power they exercise. Their decisions affect the political and social relations of all the non-wealth owners in our society who, in turn, can bring little or no influence to bear on these private decisions which have a crucial impact on their lives and on their choices. Very quickly, then, we have come to a central problem. Unless there is an acceptable justification for the ability of a few of our citizens to exercise power over the many, a dilemma exists in a society where the equal sovereignty of all individuals is held out to be a sacrosanct ideal. Respect for the autonomy of all individuals dictates that they should have a right to know in what way they will be affected by other sovereign actors' decisions in order to give them a real opportunity to participate in, and to affect, such decision-making. Similarly, that respect signifies that sovereign individuals should never be used as a mere means to an end, no matter how worthwhile⁶.

There is nothing novel about the notion that a free exchange economy, motivated by the drive of each individual to accumulate as much of the finite

the state appears to have more weight as a decision-maker but, as recent developments suggest, capital remains able to repulse real inroads on its power, such as Swedish capital's effective rejection of the Meidner Plan which was to give workers increasing control over vast pools of investment capital. Inasmuch as the structural approach does not explain how business, with its varying interests, can indicate to government what it wants and needs, the issue becomes complex. But, there are a great number of instrumentalities and instruments which establish close ties between dominant business groups and government functionaries which facilitate the process. For some elaboration, see H.J. GLASBEEK, *loc. cit.*, note 4.

6. Christopher D. STONE, "Corporate Social Responsibility: What it Might Mean, If it Were Really to Matter", (1985-86) 71 *Iowa L Rev* 557, 572 *et seq.*, has argued that these indicia of respect for the autonomy of individuals make up the dominant theme of the moral philosophy of a wide variety of schools of thought, ranging from Kant, to Hare, to Rawls. As is well-known, Rawls insists that each actor, before taking any action, should put herself in the position of those people likely to be affected and only act as planned if she would be willing to accept the worst of the results herself; see John RAWLS, *A Theory of Justice*, Cambridge, Belknap Press of Harvard University Press, 1971. In the context of this conference, in general, and of this paper, in particular, it is intriguing to note that Adam SMITH, the philosopher king of capitalist relations of production, had evinced a similar notion in 1759 in *The Theory of Moral Sentiments*, Indianapolis, Liberty Classics, 1976. There he argued that each individual had the capacity to put himself in the shoes of another, to become an "impartial spectator" and, indeed, use that capacity to see himself as others saw him. This enabled 'man', as Smith wrote, to rise above his natural selfishness and extend to others the tolerance and respect they should be shown. It is this, he argued, which gave man the capacity to be a person of grace or, as a Rawlsian might say, a just person.

resources as she can for her personal benefit, will lead to a distortion in the distribution of economic and social goods, especially if there was a pre-existing imbalance in the distribution of wealth⁷. Adam Smith, the founder of the moral philosophy which underpins capitalism, wrote :

*Wherever there is great property, there is great inequality. For one very rich man, there must be at least five hundred poor, and the affluence of the rich surpasses the indigence of the many*⁸.

Of course, this kind of unevenness may be tolerable if the distribution is not too skewed and/or if the power that goes with great wealth can be off-set in some way by the less wealthy⁹.

7. Prior to the emergence of capitalism, power was exercised by the few through military dominance and/or by a system of tribute and/or by a supporting set of religious tenets which gave someone the right to rule. Such societies tended to be brutish and many, perhaps most, people suffered harsh living conditions. But the starting position was that they were to be given access to the resources necessary to the maintenance of life. For example, under feudalism, a tenant who worked his lord's land owned the product of that work even if the fee that he had to pay to his lord was exorbitant and would take away most of his product. There was also a reservation of a right for all to lands which were to be held in common, that is, available to all to ensure access to the resources necessary to the maintenance of life. Market exchanges, by the use of money, were a relatively insignificant aspect of economic life. This meant that accumulation of wealth – and there are always some who are wealthier than others in all class societies – was due to the ability to exact tribute and/or to military might. But, by and large, the accumulation of wealth was restricted to gathering together physical objects which brought prestige. The advent of an economy in which everything could be exchanged by means of money signified that everything could be given a monetary value. There are now no longer any physical, nor any logical, constraints on the amount which can, or should be accumulated, while at the same time wealth can be measured very accurately within that system – something which it was not possible to do when the manifestation of wealth was, say, a building. Further, there is nothing in the capitalist system itself which gives anyone access, as a matter of right, to the resources necessary for the maintenance of life. In that context, some people successfully, and continuously, accumulate huge amounts of wealth, while most people scramble to stay alive. That is, capitalism developed on the basis of pre-existing wealth differentials which, in their time, had quite different consequences than those which they were going to have under capitalism. For a discussion of the differences between pre-capitalist class societies and capitalism on which this note is based see Robert L. HEILBRONER, *The Nature and Logic of Capitalism*, New York, London, W.W. Norton Co., 1985. It is this fundamental set of breaks from the prior political economic system which creates many of the difficulties for the imposition of morality through law in modern times: the values of the earlier system persist and are sought to be given life in an alien setting.

8. Adam SMITH, *The Wealth of Nations*, Oxford, Clarendon Press, 1976, pp. 709 and 710.

9. Thomas MORE, *Utopia*, Cambridge, Cambridge University Press, 1989, p. 38, noted that substantive inequality was, *a priori*, anathema:

"I don't see how you can ever get any real justice or prosperity so long as there is private property, and everything is judged in terms of money – unless you consider it just for the worst people to have the best living conditions, or unless you are prepared to call a country prosperous, in which all the wealth is owned by a tiny minority [...] while everyone else is simply miserable."

For some time during the post-World War II period, it was believed that this nice balance had been achieved. In the countries of the advanced industrialized world, particularly in the United States of America where much of our literature originates, a long wave of prosperity began. It was possible for property-less people who had to work for a living, especially if they were unionized workers in the mass assembly and primary industries, to earn a wage which would keep a family in better circumstances than ever before¹⁰. It was this context which permitted John Kenneth Galbraith to suggest that the emergence of large scale wealth centres, that is, large corporations, was a good thing.

His argument was that managers of large corporations were really large-scale national economic planners, rather than employees seeking to maximize the immediate profits of their employers' businesses. While this gave these managers-cum-wealth controllers enormous economic and political power, the political and moral institutions of society would not be endangered, Galbraith argued, if there were, as there appeared to be, consumer and worker-based power centres which could act as a countervailing force. While there would be disputations about the allocation of the goods and services produced, most interested parties had adequate means of self-protection. In this setting, privately planned growth by large corporations could continue to maintain an overall affluent industrial state capable of giving most people an acceptable living standard and style¹¹.

In a parallel set of arguments, made a little later but still imbued by the "good times are here forever" approach, the sociologist Drucker contended that there were no longer any serious power imbalances because, through their pension funds, workers had become real wealth owners and controllers in the post-World War II period. That is, the very people who, in more primitive

10. Piore and Sobel have argued that in the United States a series of productivity agreements were entered into between oligopolistically-placed organizations and their unions. The unions were "guaranteed" the average of productivity advances over the long haul, circa 3%, plus annual cost-of-living allowances. This kind of enhancement of the conditions of the aristocracy of labour spread, if somewhat unevenly, throughout the rest of the nation; see Michael J. PIORE and Charles F. SOBEL, *The Second Industrial Divide*, New York, Basic Books, 1984; see Daniel DRACHE and Harry J. GLASBEEK, *The Changing Workplace; Reshaping Canada's Industrial Relations System*, Toronto, Lorimer, 1992, for a discussion of evidence of similar ententes in Western Europe and Canada.

11. John Kenneth GALBRAITH, *American Capitalism; The Concept of Countervailing Power*, Boston, Houghton Mifflin, 1952. He held on to these views through the next two decades; see *The Affluent Society*, 4th ed., New York, New American Library, 1985; *The New Industrial State*, 4th ed., Boston, Houghton Mifflin, 1985. In the same period, Daniel BELL published *The End of Ideology: On the Exhaustion of Political Ideas in the Fifties*, Glencoe, Free Press, 1960. Its message was that – affluence now being widely shared and power more evenly diffused than ever before – class conflict had been eradicated. Disputations were about the distribution of goods and services, not power.

capitalist times, had been disempowered by their lack of property, now constituted a sovereign, dominant block¹².

Implicit to the arguments found in this literature was the idea that inequality of wealth ownership does give rise to the potential for the exercise of unjustifiable control by wealth owners over others in the economic, political and social spheres. There was a tacit acknowledgment that a system based on substantive inequality is potentially, politically and morally illegitimate. It was understood as well that, if there is no necessary countervailing power offsetting that of wealth owners and controllers and if wealth distribution is not kept relatively equitable, the rationale most capable of justifying the scheme are absent¹³.

A different spin on this argument provides the fulcrum for the debate around corporate governance. The work of Berle and Means, which had established the gulf between ownership of shares in large widely-held corporations and the resultant control by non-shareholding managers over these corporations¹⁴, took on more significance during the halcyon period of post-World War II prosperity generated by dominant corporations. Not only did it become obvious that those who had contributed property were increasingly disempowered *vis-à-vis* the deployment of their property, but it became clear that there was no check at all on how these large resources were used and on the consequences this wrought. A denial of pluralist participation – pluralism being much in vogue amongst progressive intellectuals – was evident. It is this which gave the anti-managerialist movement (that is, the movement which argues in favour of the imposition of a checks-and-balances type of government on corporations) its impetus¹⁵. Since the 1970's, new theorists, the agency and institutionalist schools¹⁶, have argued that management is

12. Peter DRUCKER, *The Unseen Revolution: How Pension Fund Socialism Came to America*, New York, Harper and Row, 1976.

13. In his Foreword to *Economics and the Public Purpose*, New York, New American Library, 1975, Galbraith wrote that 'left to themselves, economic forces do not work out for the best, except perhaps for the powerful.'

14. Adolf A. BERLE and G. MEANS, *The Modern Corporation and Private Property*, New York, MacMillan, 1932.

15. For an early example of this literature, see Edward S. MASON (ed.), *The Corporation in Modern Society*, Cambridge, Harvard University Press, 1960. One of the most influential anti-managerialist articles, coming rather late in the day, was William C. CARY's, 'Federalism and Corporate Law: Reflections Upon Delaware', (1974) 83 *Yale L J* 663.

16. The founding work was that of R.H. COASE, 'The Nature of the Firm', (1937) 4 *Economica* 386, which was given new life by the self-styled agency theorists Armen A. ALCHIAN and Harold DEMSETZ, 'Production, Information Costs and Economic Organization', (1972) 62 *American Economic Review* 777 and Michael C. JENSEN and William H. MECKLING, 'Theory of the Firm: Managerial Behaviour, Agency Costs and Ownership Structure', (1976) 3 *Journal of Financial Economics* 305. Once the theoretical basis for revisionism was established, there was no dearth of agency scholars who were eager to put the anti-managerialists back into their box; see M. Bruce JOHNSON (ed.), *The Attack on Corporate*

already accountable to most stakeholders because of the latter's ability to protect themselves contractually and, therefore, no new-fangled governance schemes are needed. This debate goes on and on. Here it suffices to note that it rests on the premise that unequal wealth ownership and skewed control over wealth undermines our political, economic and moral systems unless these imbalances can be off set by the genuine exercise of countervailing power or by the provision of a decent amount of economic welfare for all¹⁷.

Since the mid-1970's, it has become increasingly clear that the system has not delivered the kind of economic welfare which the theoreticians and politicians took to be firmly established in the 1950's and 1960's. Job security has declined, precarious employment has increased¹⁸, in that more people than want to do so work at home, part-time, in casual or temporary employment situations, in non-unionized settings, etc.; more people work longer hours for less¹⁹, leading to increased labour market participation and even more precarious employment for more people²⁰; masses of people now have to rely on food banks, including many working people²¹; urban infrastructures are collapsing, crime and violence are increasing and, relatedly,

America, New York, McGraw-Hill Book Co., 1978; for a recent overview of the literature see (1988) 4 *Journal of Law, Economics and Organization*; for the variant known as the school of institutionalists, see Oliver E. WILLIAMSON, *Markets and Hierarchies: Analysis and Anti-Trust Implications*, New York, Free Press, 1975; "Corporate Governance", (1984) 93 *Yale L.J.* 1197.

17. From the narrow perspective of this paper, then, the debates around the governance of corporations and the corporate social responsibility movement, are just aspects of the larger problem, namely, that the circumstances in which capitalist commercial relations take place furnish an endemic legitimacy problem. Accordingly, corporate governance and corporate social responsibility are not treated in any detail in this paper. I have attempted a more elaborate discussion of this special aspect of the larger problem elsewhere, see H.J. GLASBEEK, *loc. cit.*, note 4.
18. It is intriguing to note that the expression "precarious employment", which is much in vogue, was used by the 19th century theorist, Pierre Joseph PROUDHON in *What is Property?*, New York, Howard Fertig, 1966. He used it to denote the fact that the worker for wages held his job by the condescension of his master. Proudhon noted that the word precarious came from the Latin "precor", which means "I pray".
19. Juliet B. SHOR, *The Overworked American; The Unexpected Decline of Leisure*, Basic Books, 1991, has calculated that the average American worker has added an extra month per year to her working time since 1969, despite the fact that unemployment has increased. In large part, this is the consequence of those who are employed having to work overtime. It is cheaper for employers to pay overtime rates than hiring extra employees, training them and paying them benefits. This rationale also operates in Canada, see A. DONNER, *Working Times: The Report on Hours of Work and Overtime*, Toronto, Ontario Ministry of Labour, 1987.
20. For example, *Quarterly Labour Market and Productivity Review* (Winter 1988), Table II-2; Mary Anne BURKE, "The Growth of Part-Time Work", (Autumn 1986) *Canadian Social Trends* 9-14.
21. G. RICHES, *Food Banks and the Welfare Crisis*, Ottawa, Canadian Council on Social Development, 1986.

more people per capita are imprisoned and under surveillance than at any other time in Canadian history, etc.²²

These developments are associated with the phenomenon described by Betcherman as the disappearing middle²³. He produced figures which show that the number of people who had what he considered to be middle level earnings had declined from constituting 27% of the workforce in 1967 to 21.5% in 1986. His conclusion was that the distribution of earnings of Canada's workforce has become increasingly polarized over these last 20 years. This is significant to the argument being presented here. It is precisely this middle segment of non-wealth owners which had been relatively satisfied in the early years of the post-war compromise. Their belief in a system which seemed to serve them well is being eroded very quickly. Worse, this group of people feels increasingly disempowered as it has become clear that it is the larger wealth-owners who make the decisions which adversely affect their lives. Indeed, in his latest book, *The Culture of Contentment*, John Kenneth Galbraith identifies this as the source of a crisis which contradicts his optimism of the 1950's. He now argues that the large corporate sector's unilateral planning and decision-making power has become so dominant that it permits these wealth groups to act in their narrow self-interest at the expense of everyone else, without having to face much economic or political opposition. As a consequence, he doubts that there will be a return to economic prosperity. This would require an overall industrial planning scheme which envisages giving direction to the private sector, something which it is impossible to institute if wealthy egoists control public and private policy-making²⁴.

There is much evidence to support the argument that the wealthy have taken the opportunity to grab most of the national economic spoils for themselves. They have been able to put pressure on governments to reduce their spending on non-wealth owners, successfully arguing that it is necessary for governments to cut these expenditures to better deal with deficits and thus to create more incentives for property owners. In support of this argument, capitalists are contending that governments should leave the borrowers' markets and that, if necessary, they should give up publicly-run services and, if these are profitable, to sell them to the private sector for a song. Deregulation and privatization have become a *cri de coeur*.

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22. M. MANDEL, "Rights, Freedoms and Market Power: Canada Charter of Rights and the New Era of Global Competition", in Daniel DRACHE and M. GERTLER (eds.), *The New Era of Global Competition: State Policy and Market Powers*, Montreal, McGill-Queen's University Press, 1991; D. HAY, "Time, Inequality and Law's Violence" a paper presented at the Mellon Lecture Series, Amherst College, Massachusetts, April 1991 (available on request).
 23. Gordon BETCHERMAN, "The Disappearing Middle", in Daniel DRACHE (ed.), *Getting on Track; Social Democratic Strategies for Ontario*, Montreal, McGill-Queen's University Press, 1992.
 24. John Kenneth GALBRAITH, *The Culture of Contentment*, Boston, Houghton Mifflin, 1992.

Responding to these pressures, governments have attacked the social net and the legitimate role of countervailing power groups, such as trade unions²⁵, while they have given direct assistance to the rich. The poor and the increasing number of insecure people are losing their protections, making their subordination obvious. Further, the declining middle, the group whose previous belief in the goodness of the scheme has come under such great strain, has been asked to pay an increasing proportion of the social and economic costs created by the restructuring of the private market economy. As corporations have paid less income taxes, the middle classes have paid more²⁶. Moreover, inasmuch as this is notionally being done to provide the rich with the incentive to invest their wealth in productive activity, thereby enhancing everyone's welfare, that is, on the basis of the trickle-down theory, the shift of state-imposed tax burdens has been a smashing failure²⁷.

Between 1983 and 1989, in Reagan's United States, 55% of all new wealth accreted to the top one half of one per cent of wealth owners²⁸. In 1989, Citizens for Tax Justice surveyed 44 United States corporations, which, between them, had posted 53.6 billion dollars in profits and had paid no taxes at all. These corporations actually reduced their capital spending and cut the

25. For the extent of the attack on trade unions, see Leo PANITCH and Donald SCHWARTZ, *The Assault on Trade Union Freedoms*, Toronto, Garamond Press, 1988; D. DRACHE and H.J. GLASBEEK, *op. cit.*, note 10; Larry HAIVEN, Stephen MCBRIDE and John SHIELDS, *Regulating Labour: The State, Neo-Conservatism and Industrial Relations*, Toronto and Winnipeg, Garamond Press and Socialist Studies, 1990; J. FUDGE, 'Labour, The New Constitution and Old-Style Liberalism', in *Labour Law Under the Charter*, Kingston, Ontario, Queen's Law Journal and Industrial Relations Centre, Queen's University, 1988.

26. For an account of the gradual diminution in contributions which corporate taxes have made to government revenues, see Alan V. DOUGLAS, 'Changes in Corporate Tax Revenue', (1990) 38 *Canadian Tax Journal* 66. These changes are attributable in part to lessened profits, in part to an overall lowering of tax rates (although occasionally these are ratcheted-up), in part to the persisting ability of corporations to render the effective tax rate less than the formal rate. For an account of how middle income earners have come to pay an increasing share of the tax burden, see Patrick GRADY, 'The Distributional Impact of the Federal Tax and Transfer Changes Introduced Since 1984', (1990) 38 *Canadian Tax Journal* 286. For more popular accounts of these movements, see NATIONAL UNION OF PROVINCIAL GOVERNMENT EMPLOYEES, *Revive Canada*, Ottawa, NUPGE, 1993; Linda McQUAIG, *Behind Closed Doors: How the Rich Won Control of Canada's Tax System - and Ended up Richer*, Markham, Ontario, Penguin Books Canada, 1987.

27. This is well-caught by the comment of a clergyman who ran a food bank. He was heard to remark that the trickle-down theory would have been a sound economic theory if it had not been for the sponges at the top.

28. Edward WOLFF, *The Rich Get Increasingly Richer*, Washington, D.C., Economic Policy Institute, 1992. This report also showed that the average wealth of the middle classes dropped from \$US 10,000 to \$US 7,000 and the bottom wealth classes saw an even greater deterioration, from minus \$US 2,000 to minus \$US 14,000. The poorest 2/5 of the population lost \$US 256 billion. The top one half of 1% of the population's families had an increase in their wealth of 4.6%, reversing a trend towards greater equality between 1962 and 1976.

number of their employees. The "saved" capital was spent on higher dividends (monies which then may have been invested but in a much more fragmented way than they would have been by the corporations themselves), increased salaries to chief executive officers (according to the survey, these increases averaged 54%) and to pay the enormous costs involved in mergers and takeovers²⁹. A study done in Canada some years ago showed that the greater the tax incentives given to large corporations, the less people they employed in due course³⁰.

At the same time as governments were attacking the rights of the poor and of working people, they continued to subsidize business directly. In 1986, subsidies by the three levels of Canadian governments to industry amounted to 10.5 billion dollars, 12.5 billion dollars in 1987, 11.3 billion dollars in 1988 and 11 billion dollars again in 1989³¹. As well, governments spend a great deal of their revenues on bailing out large enterprises which have failed (*soit-disant* to help the employees). The failure of large economic actors in the market is no longer permitted to have its automatic rejuvenating consequences³². Unsurprisingly, given these hand-outs to large capitalists, there has been a report which suggests that the increasing amount of revenue spent by governments on subsidizing industry is one of the central reasons for the Canadian deficits which are infuriating business so much³³. And, equally unsurprisingly, the social costs of deregulation are exacting their toll from the

29. As cited in the *Multinational Monitor*, January-February 1993.

30. Kenneth N. MATZIONARIS, "The Effectiveness of Tax-Incentives for Capital Investment", (1980) 2 *Canadian Taxation* 172; see also Gordon TERNOWETZKY, "Who Are the Real Welfare Bums?", Paper presented at the Organization for Justice Conference, Saskatchewan Anti-Poverty League Rights Committee, March 1989, (available on request). This paper shows how tax hand-outs to large oil corporations and banks were accompanied by large cuts in employment.

31. K. MURTY and Y. SIDDIQUI, "Government Subsidies to Industry", (May 1991) 4 *Canadian Economic Observer*; see also John DEUTSCH, *Roundtable on Economic Policy, Tax Expenditures in Government Policy*, proceedings of a conference held at Queen's University, 17-18 November, 1988.

32. Michael J. TREBILCOCK, *The Political Economy of Business Bailouts*, Toronto, Ontario Economic Council, 1985. Erik Olin WRIGHT, *Class, Crisis and the State*, London, Verso Editions, 1979, argues that, as concentration increases, recurring periods of overproduction and excess capacity (evident since the mid-1970's) can no longer be dealt with by the spontaneous market-rectifying mechanisms of bankruptcy and the devaluation of capital. The political and economic effects of these necessary market corrections would be too disruptive because wealth is so concentrated. The state, therefore, has to take the ensuing reallocations of resources in hand. This helps explain the increasing use of Chapter 11 proceedings in the United States and the corresponding *Corporation Credit Arrangement Act* processes in Canada. This point underscores one of the starting premises of this paper, namely that governments' welfare depends on their being attentive, even solicitous, to business's problems.

33. H. MIMOTO and P. CROSS, "The Growth of the Federal Debt", (June 1991) 4 *Canadian Economic Observer*.

non-wealth owners as well. One dramatic example will suffice to make the point.

The Reagan administration phased out restrictions on interest rates which had controlled the savings and loans industry and it diluted the monitoring and inspectorate systems overseeing financial institutions. At the same time, it raised the level of federal government insurance on moneys deposited with savings and loans enterprises from 40,000 to 100,000 dollars per deposit. In short, it encouraged the savings and loans industry to speculate, and speculate it did.

Thus far, 312 savings and loan companies have declared bankruptcy and many others are in jeopardy. The General Accounting Agency of the United States Congress puts the minimum cost of the defalcations, many of which were criminal in nature³⁴, at 352 billion dollars, with a possible maximum cost of 1.4 trillion dollars. As Snider notes³⁵, these numbers are mind-boggling; the total defence budget of the United States in 1989 was 300 billion dollars, while Saudi Arabia's gross national product was 100 billion dollars. Of course, it is the taxpayer who is being asked to pay to ensure that innocent depositors and investors recoup some of their losses³⁶.

34. The U.S. Department of Justice said that 2,942 defendants were indicted, resulting in 2,300 convictions in major financial institution fraud cases between 1988 and 1992. Over 1,100 of these defendants were involved in savings and loan businesses; U.S. DEPARTMENT OF JUSTICE, 1992, "Attacking Financial Institution Fraud", *2nd Quarterly Report to Congress*, Fiscal Year, 1992.

35. Laureen SNIDER, *Bad Business; Corporate Crime in Canada*, Toronto, Nelson Canada, 1993.

36. As a result of the savings and loan industry collapse, the U.S. Congress created The Resolution Trust Corporation. It is responsible to resolve the problems of failed savings and loan's. This means it is to merge them, sell them or manage them. It estimates the taxpayer losses so far have reached \$84 billion and that the government has had to spend nearly \$196 billion to 'resolve' other institutions; see RESOLUTION TRUST CORPORATION, *R.T.C. Review*, August, 1992. That this kind of displacement of obligations and responsibilities has created an anxiety in the public mind is easily evidenced. In Canada, the imposition of the Good and Services Taxes (GST) has been defended with arguments which show that it is a credible way of raising revenue. Nonetheless, its on-the-face regressive nature, coming on top of an increasing tax burden for the middle classes, has aroused strong feelings that unfairness pervades our political economy. In a similar vein, newly elected U.S. President Clinton apparently has been able to get a lot of popular support for his proposal to increase taxes by characterizing the new burdens as being more fairly shared than were the burdens in the past. Of course, it is implicit that there is to be no questioning of the wealth owners' characterization of the cause of the problems which have to be addressed, namely, that public deficits and public expenditures must be reduced at all costs. The emerging picture is clear: there is a growing resentment of the fact that the wealth owners and controllers have passed on the costs of a failing economy to others without being able to show that this is either economically worthwhile or socially just. The question of the morality of private accumulation and self-advancement is being implicitly questioned although, at the same time, each individual – desperate to stay where he is on the treadmill – is grasping for more of the pie for himself.

In sum, the indirect, but effective, use of the power to withhold, or threaten to withhold, investment at a time when overall general welfare has declined has attracted attention to several of the inherent delegitimizing features of our political economic system. The right of some to lord it over others and the corresponding lack of self-determination power possessed by most people in matters of vital concerns to them has come into sharper focus. Moreover, a sense that mean-spiritedness and self-aggrandizement are more valued traits than generosity and quiet soldiering-on, qualities that ethical teachers promote, has been underscored and may be creating a collective malaise about the ruling system.

The contrast between corporate and commercial values and behaviour and other kinds of community values has been brought out all the more starkly by the growing documentation of the corporate sectors' criminality which, largely, goes unpunished. As Ellis³⁷ and Snider³⁸ have pointed out, measurement of the dimensions of corporate crime is very difficult. It is agreed by all observers, however, that such data as are available lead to an understatement of the problem of corporate criminality³⁹. While many of the legal violations by corporations are relatively minor infractions of regulatory law, not unlike the violation of a parking by-law by an individual, and while many do not cause much damage to society, many of the infractions do cause serious harm and are morally outrageous.

The number of miscreants is large. Clinard and Yeager⁴⁰ found that 40% of the Fortune 500 did not commit crimes of any kind; 60% did. In sheer dollar terms, the amount of damage inflicted on our society by corporate criminality is staggering. Again, the difficulty of measurement is real but given that most figures are underestimations, a snapshot will indicate how serious the problem is. For instance, in 1974 the United States Chamber of Commerce reported its estimate of the cost of white collar crime (which it defined very conservatively). It calculated it to be 42 billion dollars annually, which was ten times the total amount taken in all theft reported in the FBI Index and 250

37. Desmond ELLIS, *The Wrong Stuff; An Introduction to the Sociological Study of Deviance*, Toronto, Collier MacMillan, 1987, p. 89.

38. L. SNIDER, *op. cit.*, note 35, chapter 1.

39. Susan P. SHAPIRO, "The Road Not Taken: The Elusive Part to Criminal Prosecution for White Collar Offenders", (1985) 19 *Law and Society Review* 179, writes, at 181: "Given the subtlety and complexity of white collar offenses, the possibility of masking illicit activities in everyday routines or hiding them in the privacy of corporate suites or complicated inter-organizational networks, the opportunities to manipulate the time over which events unfold, the frequently consensual nature of the illicit behaviors, and the often diffused quality of victimization, one might expect the dark figure of undetected violations to greatly overshadow that of most serious common crimes."

40. Marshall B. CLINARD and Peter C. YEAGER, *Corporate Crime*, New York, The Free Press, 1980.

times the amount taken in all bank robberies in the United States⁴¹. Or, if the seeking of monopoly is treated as a crime – as it should be in a truly competitive society, and as it was in Canada until recently – its cost are very high. Barnett has argued that, in the United States of the 1970's, excess profits due to illegal monopoly power may have accounted for one quarter of the total value of corporate stock held by stockholders in the United States⁴².

What is perhaps even more important to the argument that the conflict between capitalist morality and the kind of morality we might wish to impose on commercial actors through the law is a real one, is the fact that it is some of the truly blue-ribbon corporate actors which engage in heinous behaviour which affects many of us in a visible manner. Often the horrible results are the consequences of wilfully turning a blind eye to, and a callous lack of regard for, the well-being of fellow citizens: anti-trust activities which bilk the public, by actors like General Electric and Westinghouse and Canada Cement; or unfair competitive practices by prestigious firms such as Hoffmann-LaRoche; the bribery of government officials by the likes of Exxon, Lockhead, Macdonnell-Douglas; the knowing dumping of dangerous products on the market, such as the Ford Pinto, thalidomide, the Dalkon Shield; the knowing discharge of effluent, such as mercury into our river basins, or the spewing of sulphur dioxide or lead into the ambient air (as done by Reed Paper and Inco and Canada Metal); the illegal burying of toxic waste (as in Love Canal); the exposure of thousands of unknowing workers to the known hazards of asbestos fibres or cyanide or vinyl chloride or to poisonous radiation; or the selling and use of harm-causing products, such as pesticides (which cannot be sold or used here) to, and in, less aware, less regulated countries. And for all these kinds of activities the penalties, if any are imposed at all, tend to be *de minimis*⁴³.

For a while, and perhaps still, the clamour by some commentators that corporations and their leaders and owners should be treated in the same way as common deviants was perceived as shrill extremism, maybe even as infantile leftism. But, more recently, the wealthy classes began to be appalled by some of their own members' behaviour as some of their more crass cohorts set up elaborate schemes to steal from the wealthy rather than from the other classes. The likes of Boesky and Milliken became symbols of what was wrong

41. UNITED STATES CHAMBER OF COMMERCE, *A Handbook on White Collar Crime*, 1974. See also Jeffrey H. REIMAN, *The Rich Get Richer and the Poor Get Prison*, 3rd ed., New York, MacMillan, 1990; *Taskforce Report on the President's Commission on Law Enforcement and Administration of Justice, Crime and Its Impact; an Assessment*, 1967; John E. CONKLIN, *Illegal but Not Criminal: Business Crime in America*, Englewood Cliffs, Prentice-Hall, 1977; Stephen BOX, *Power, Crime and Mystification*, London, Tavistock Publications, 1983; D. ELLIS, *op. cit.*, note 37; L. SNIDER, *op. cit.*, note 35.

42. Harold BARNETT, "Wealth, Crime, and Capital Accumulation", (1979) 3 *Contemporary Crises* 171.

43. See H.J. GLASBEEK, *loc. cit.*, note 4, for references to data about these well-known events and the sanctions they attracted; see also L. SNIDER, *loc. cit.*, note 35.

with the economy: speculation, non-productive profit-seeking at the expense of innocent others. Plays and movies depicting that scene have become part of popular culture⁴⁴.

It is in this context that business newspapers and business schools have come to advocate the need to be more ethical. Ethics courses and centres have been established⁴⁵. Ethical investment funds have grown in number and in size⁴⁶. And, as noted, there is a good deal of continued and continuing public discussion about the need to restructure the corporation's governance structures so that the directors and executives will have the incentive to promote good, rather than bad, behaviour⁴⁷.

Laudatory as all these efforts are, they can achieve but little. The best they can do is to help maintain some respect and legitimacy for the economic and political system, at least for a little while longer⁴⁸. There are deep structural reasons which justify this pessimism.

II. THE STUMBLING BLOCK — CAPITALISM'S ESSENTIAL ATTRIBUTES

The economic system which we call capitalist relations of production has three central features. First, it is posited on the basis that private actors, rationally deploying their resources, assets and capabilities, will meet demands formulated freely by other private actors. As they do so, they will be rewarded. If that reward is handsome, it is likely that there will be competition for these fine rewards, leading to a competition for profits which, in turn, will lead to the

44. For example, *Other People's Money*; *Wall Street*. It is perhaps pertinent to the tone of this paper to remark that it is amusing that capitalism seeks to make money out of, what should be, its shame.

45. A Centre for Ethics in Corporate Policy has been set up at the University of Toronto; a longer established Centre for Professional Applied Ethics at the University of Manitoba under the guidance of Arthur Schafer has received more prominence than before.

46. Up to 1985 there were no ethical funds in Canada. Today there are at least six: The Ethical Growth Fund; The Summa Fund; two Environmental Investment Funds sponsored by Energy Probe; The Crown Commitment Fund and the C.E.D.A.R. Balanced Fund.

47. See H.J. GLASBEEK, *loc. cit.*, note 4, for a survey. Is it not interesting that there is a perception out in the community that our captains of industries need to be educated and monitored to ensure that they abide by the morality which, it is presumed, the vast majority of the population already has internalized? This is an issue to which I shall return.

48. This is supported by the observations of Richard FINLAY, a management consultant specializing in corporate and institutional politics, reported in the *Toronto Star*, March 11 1993, A19: "While most CEO's are honest, the priority they place on the management of the company's ethical responsibilities is not generally a high one. It is typically limited to delivering high-minded speeches on the subject once or twice a year [...] the evidence suggests that most companies rarely take the ethical dimension of their operations beyond lofty words."

optimal use of resources and assets by individuals in our society. All that the state needs to do is to ensure that competition truly reigns so that individual property owners can engage in maximizing their opportunities. The assumption is that, all other things being equal, more is better than less and that, therefore, we will always exploit whatever chances we have to get more. We are presumed to be "Rational Economic Men".

The first thing to note, then, and not to put too fine a point on it, is that greed is a cornerstone of working capitalism. This has received popular and official approval. For instance, Barbara MacDougall, at that time Minister of State for Finance, was addressing a conference on Native Canadian business enterprises in 1986, and she wanted to indicate how supportive she was of native-owned businesses: "There is one underlying motive in business shared by all – it is greed. We support it wherever it happens."⁴⁹

A second, and related, aspect is that inequality is built into the scheme. Everyone plays the competitive game and all start with different resources. As seen, assets are distributed very unevenly in our political economy. Further, competition yields winners and losers. And, as the only way to provide welfare for oneself is by looking after oneself, inequality acts as an incentive for those without property to participate in order to get some. In short, inequality, in and of itself, is not morally repugnant; to the contrary⁵⁰. Of course, equality of opportunity to compete is a requirement of the scheme. This gives it a civil libertarian cast as access to resources, jobs and accommodation is supposed to be freed from socially constructed fetters such as gender, race, ethnicity, nationality and, more recently, sexual orientation, or political and religious convictions. But, *substantive equality* is not one of the goals of capitalist relations of production. This brings us to the third point.

While the system rewards competitive successes, it is also more than happy to reward luck. Precisely because inequality is not seen as a problem, the starting point of would-be competitors is of no interest to the scheme. Whether or not property is inherited or obtained as a result of mighty, competitive efforts is of no interest to anyone.

Now, capitalism does not normally defend itself by saying that its principal values are greed, inequality and luck. More often than not, the drive to satisfy greed is described as a valiant effort to create wealth by innovative risk-taking. Substantive inequality, as noted, is described in terms of incentives and disincentives, while equality of opportunity is given a special place in the firmament of values. The message, then, is that capitalism is about self-help

49. As cited by David OLIVE, *Just Rewards; The Case for Ethical Reform in Business*, Markham, Ontario, Penguin Books, 1987, p.23.

50. An extremist, and extremely frankly expressed, endorsement of the argument that substantive equality has no moral value is Ayn RAND's *The Virtue of Selfishness: A New Concept of Egoism*, New York, New American Library, 1964, where she sets out her philosophy known as Objectivism. She has many explicit followers and, perhaps, many more implicit (even unaware) disciples.

and initiative. These are more appealing-sounding values than the pursuit of naked greed and the embedment of substantive inequality. Luck is most often characterized as being a minor and depoliticized aspect of the operation of the invisible hand which guides a neutrally operating market.

Nonetheless, these sugar-coated rationalizations of greed, luck and inequality do not do away with the fact that these essential attributes of working capitalism stand in sharp contrast to other moral virtues a political economy might wish to pursue, such as benevolence, altruism, sharing, co-operation and substantive equality. Yet, these values can be said to be much admired by our society, that is, they may be said to be integral components of those vaguely defined community morals which many moral philosophers might well argue ought to inhere in law. Indeed, it is true to say that it is precisely because capitalist relations of production threatened to undermine these kinds of values that it was seen as immoral by many moral leaders for many centuries.

In pre-capitalist societies, selfishness and avarice were seen as the greatest sins that a human being could manifest. In those polities, status and personal relationships determined a person's obligations to other people. Apart from any obligations to others owed as a result of their status, people produced for their own needs. Precisely because relationships were personal, trade and exchange via the means of money were seen as depersonalizing and, therefore, unappetising forms of conduct⁵¹. Taking advantage of other people's need for money was perceived as corrupt and, even worse, as corrupting of he who sought to become wealthy in that way. As early as the fifth century, Pope Leo the Great, had decreed that "[i]t is difficult for buyers and sellers not to fall into sin"⁵². Aquinas angrily noted that "[h]e who in trading sells a thing for more than he paid for it must have paid less than it was worth or be selling for more. Therefore this cannot be done without sin"⁵³. And, earlier, Cicero had noted that trading was bound to be corrupting of those who did it: "Sordid [...] is the calling of those who buy wholesale in order to sell retail, since they would gain no profits without a great deal of lying."⁵⁴ In short, for centuries the idea of working for gain, of being frankly selfish, was considered to be profoundly wrong:

51. There was always some merchant trade and many local markets but they were insignificant to the way in which the economy operated during feudal times and the Middle Ages; see generally, R. L. HEILBRONER, *op. cit.*, note 7, p. 37 *et seq.*

52. As cited in John GILCHRIST, *The Church and Economic Activity in the Middle Ages*, New York, St. Martin's Press, 1969, p. 51.

53. St. Thomas AQUINAS, "On Fraud Committed in Buying and Selling", from *Summa Theologica* in Arthur Eli MONROE (ed.), *Early Economic Thought*, Cambridge, Harvard University Press, 1930, p. 60.

54. As quoted in Robert L. HEILBRONER, *The Making of Economic Society*, 7th éd., Englewood Cliffs, Prentice-Hall, 1985, p. 24.

In the numerous treatises on the passions that appeared in the 17th century, no change whatever can be found in the assessment of avarice as 'the foulest of them all' or in its position as the deadliest Deadly Sin that it had come to occupy towards the end of the Middle Ages.⁵⁵

And the idea that selfishness was not a virtue, whereas selflessness was, was echoed by none other than Adam Smith himself when, writing as a moral philosopher, he noted:

And hence it is, that to feel much for others, and little for ourselves, that to restrain our selfish, and to indulge our benevolent affections, constitutes the perfection of human nature; and can alone produce among mankind that harmony of sentiments and passions in which constitutes their whole grace and propriety.⁵⁶

It is central to this presentation that it is the apparent failure of working capitalism to respect these non-capitalist values which causes anxiety about the moral impoverishment of our contemporary commercial relationships. It is these older values which create a dilemma for law-makers and lawyers. Because contemporary law, at least in its fundamentals, is seen to be connected in an unbroken way to the law of yesteryear, we feel we need to reflect some of those older, but still widely touted, notions of virtue and morality. But, because contemporary law, in its essentials, embeds the necessary features of capitalism which can only live in uneasy tension (if at all) with values such as benevolence, altruism, and the like, probably the best that can be hoped for by reformers who see law as an autonomous institution is that law can be made to make greed, luck and substantive inequality more appealing, less harsh⁵⁷.

55. Albert O. HIRSCHMAN, *The Passions and the Interests*, Princeton, Princeton University Press, 1977, p. 41. From all this, it is easy to understand why the demanding of interest, usury, was treated as an excommunication offence by the Council of Vienne as early as 1311; this approach lasted well into the 17th century; see R.L. HEILBRONER, *op. cit.*, note 7, p. 107 *et seq.*

56. A. SMITH, *op. cit.*, note 6, p. 71.

57. This is saying no more than that unquestioned adherence to certain economic theoretical beliefs and, more importantly, to a set of economic relations, will limit legal manoeuvring. One does not have to be a dogmatic marxist, who holds firmly to the notion that the economic forms the base and that the law is merely superstructural, to take this approach. Thus, the winner of the Nobel Prize for Economics, P. SAMUELSON, was reported in the *New York Times*, October 12, 1986, as stating: "Let those who will write the nation's laws, just as long as I can write its [economic] textbooks." (As cited in K. LUX, *Adam Smith's Mistake; How a Moral Philosopher Invented Economics and Ended Morality*, Boston and London, Shambala Publications, 1990, p.11).

III. GREED, LUCK AND INEQUALITY AS LEGAL PRINCIPLES

When a person with property invests some of it to set up a productive enterprise, workers will be hired to do the necessary work. The worker brings skills – physical and intellectual – emotional abilities and, sometimes, tools to the process. The end-result is a product or service. It belongs to the property investor, not to the workers⁵⁸. Typically, the property owner will have done none, or very little, of the actual work⁵⁹. The fact that those who do not work will want to expropriate the workers' product is, as John Stuart Mill noted, as long-lived as the existence of class societies. He wrote that:

*The surplus [...] whether small or great, is usually torn from the producers, either by the government to which they are subject, or by individuals, who by superior force, or by availing themselves of religious or traditional feelings of subordination, have established themselves as the lords of the soil.*⁶⁰

As this passage indicates, however, there was always a need to justify this taking, this expropriation, in some way, either by pointing to the rightful exercise of governmental or military might, or to the religious or status-established right to subordinate others. Under capitalism, especially contemporary liberal democratic capitalism, these kinds of political justifications are not available: all individuals are meant to be equally sovereign. How then is the taking of value by non-producers justified in a capitalist system? After all, for the property investor to make a profit on the goods or services produced, these must cost less to produce than to sell, that is, workers are to be paid less than the value of the goods or services they produce.

The justificatory argument is that the property owners are not passive participants, that their provision of capital is a productive activity. It is, of course, a somewhat peculiar form of productive activity and, therefore, a mystifying expression is used to describe it: "risk-taking". Because property owners are entitled to deal with their assets as they wish, they do not have to invest them; they are entitled to use them for themselves as they see fit, that is, completely selfishly. By letting risk-takers appropriate some of the value

58. For a stylish presentation of this well-known argument, see Richard Michael FISCHL, "Some Realism about Critical Legal Studies", (1987) 41 *University of Miami L Rev* 505, 527.

59. This is obviously so where the property owner is a corporation. It is a creature of law in which the property of the investors becomes vested as legally owned by it. Neither the workers, the shareholders, nor the creditors of the corporation own the product or service produced; it belongs to the corporation.

60. John Stuart MILL, *Principles of Political Economy*, Toronto, University of Toronto Press, 1965, p. 13.

produced by others, the law is privileging their power – in an economy where resources are unequally divided⁶¹ – to withhold these resources from us.

The legal right given to property investors to retain surplus value might be more morally acceptable if the ownership of a disproportionate amount of the economy's resources by a relatively few people could be justified⁶². But, private property rights do not spring from nature itself. Major reallocations had to occur before capitalism could emerge from the shadows of feudalism. Under that regime the nature of property ownership and use did not yield, at least not in abundance, a prerequisite for capitalist relations of production, namely, a readily available pool of people who need to work for wages in order to get access to the necessities of life. Such a pool had to be created.

The enclosure fights which took place in Europe are well-documented. Basically, they were the result of a drive to get more pasture land by enclosing food-producing land used in common by poorer peasants. As a consequence of the enclosures, the users of lands held in common were forced into the work-for-wages force. That this was a new departure, one which broke with the moral values of feudal society was, at least in the early days of the enclosure movements, hardly controversial. Thus, in the beginning⁶³, land was set aside for peasants dispossessed from the land which was to be enclosed. This dovetailed with the views of the clergyman John Latimer and the other Commonwealth Men who believed that there were such things as "social goods" in which the poor man was entitled to share as a matter of right⁶⁴.

61. Of course, it would be impossible to exercise such power over others in an economy where everyone had equal access to the economy's resources.

62. Note that the investor's share is not in any measurable way related to this contribution. Indeed, there is a good deal of sound empirical evidence to the effect that, of all the variables, growth in the input of capital per labour hour may be the least positively correlated to the growth of output per labour hour; see the Nobel Prize work of Robert M. SOLOW, "Technical Change and the Aggregate Production Function", (1957) 70 *Quarterly Journal of Economics* 65. Recent research which substantiates this position is detailed and analysed in Neil BROOKS, *The Canadian Goods and Services Tax: History, Policy and Politics*, Sydney, Australian Tax Research Foundation, 1992, pp. 128-130.

63. This was true in the 13th century. Later enclosure statutes did not offer these protections. Note that properly passed laws were used to take land away from people who, until that moment, had had legal rights in respect of it.

64. See Richard H. TAWNEY, *Religion and the Rise of Capitalism*, West Drayton, Penguin Books, 1937. Tawney's discussion shows that the enclosure movement in the United Kingdom began in the 11th century and was completed by the late 18th century. In Europe, it began later and finished at about the same time. Note here that Thomas MORE's *Utopia*, *op. cit.*, note 9, was an angry response to the immorality of Henry VIII's drive to expropriate church lands. This drive had two major results. Peasants who had been looked after by the church were now left to the not-so-tender mercies of new owners. Secondly, a speculative trade in these released lands flourished (not unlike what happens when the shares of nationally-run corporations are sold to the public in contemporary times), which led to further immiseration of tenants. Tawney wrote, that "rackrenting, evictions and the conversion of arable land to pasture were the natural result, for surveyors wrote up values at each transfer and, unless the last purchaser squeezed his tenants, the transaction would

Similar power-based legal manoeuvring took place in many colonies where enterprising capitalists found that wage-labour was unknown to the societies whose resources they coveted. One strategy, of course, was to institute slavery; another was the imposition of taxes on people who had no money. Severe penalties were attached to non payment. This forced people to enter into work-for-wage arrangements⁶⁵. Another means of acquiring and accumulating property and wealth in colonies was to physically take all the land and resources used by indigenous people. The legal justifications for this were that conquest gave a right to take the land or that the lack of any decent religious tenets by indigenous people made it right for them to be dispossessed or that indigenous people did not know how to use the land properly (that is to say as the colonizers would use it) and, therefore, were not entitled to it⁶⁶. The last of these explanations, of course, is one which continues to trouble us to this day. The refusal of the law to recognize native peoples' antecedent rights of ownership stems from our legal argument that they had no form of ownership which can be recognized by "decent" law⁶⁷.

not pay". R.H. TAWNEY, *op. cit.*, p. 145. It is in this kind of context that Proudhon's thesis of 'property is theft' was offered; P.J. PROUDHON, *op. cit.*, note 18. In short, the expropriation of property by the few at the expense of the many helped to set the stage for the unequal wealth division from which capitalist relations of production were launched. See also Robert TRESSEL, *The Ragged Trousered Philanthropist*, London, Paladin Grafton Books, 1991, for a vivid, populist argument as to how the legal taking of property by the few led to the immiseration of the many in Britain; also Karl POLANYI, *The Great Transformation*, Boston, Beacon Press, 1959.

65. Lord Hawick, Under Secretary of State for the Colonies, wrote in an official memorandum in 1832:

"The great problem to be solved in drawing up any plan for the emancipation of the slaves in our Colonies, is to devise some mode of inducing them when relieved from the fear of the Driver and his whip, to undergo the regular and continuous labour which is indispensable in carrying on the production of Sugar [...] I think it would be greatly for the real happiness of the Negroes themselves, if the facility of acquiring land could be so far restricted as to prevent them, on the abolition of slavery, from abandoning the habits of regular industry. Accordingly, it is to the imposition of a considerable tax upon land that I chiefly look for the means of enabling the planter to continue his business when emancipation shall have taken place."

As cited in Robert MYLES, *Capitalism and unfree labour: anomaly or necessity?*, London and New York, Tavistock Publications, 1987, pp. 86-87; for a discussion of a particular application, see C. Van ONSELEN, *Chibaro: African Mine Labour in Southern Rhodesia 1900-1933*, London, Pluto Press, 1976. Perhaps this is one of the reasons that wealth-owners believe that the raising of revenue by taxation by governments is unacceptably coercive. They know of what they speak.

66. E.P. THOMPSON, *Customs in Common*, London, Merlin Press, 1991.
67. In this context, the recent High Court of Australia decision in *Mabo c. The State of Queensland*, No. 2, (1992) 175 C.L.R., which stated, albeit with many qualifications, that Australian law, from now on, will have to recognize other ways of exercising dominion over land than our own as evidence of property ownership, signals a radical legal change. Its impact is unpredictable and is causing a great deal of political anxiety and manoeuvring in Australia.

None of this provides high moral ground on which to base the unequal division of property in our society and the unequal power relations which it creates.

The law, then, played a central part in these reallocations of property rights to the few which ensured that, in modern commercial affairs, substantive inequality is the normal starting point. Yet, today, the law does not allow a questioning of the validity of property ownership, provided that the most recent claim to title is the result of a valid exchange, inheritance or neutral operation of fortune. But, worse, the law not only assists capitalists negatively by *permitting* a few wealth owners to exercise a disproportionate amount of power over non-property owners, a power which is derived from their right not to invest their property if they decide not to do so, it also acts positively to *help* them do so.

In a capitalist economy, non-property owners rely primarily on property owners for the creation of jobs, that is, for access to the necessities of life. This gives wealth owners disciplinary power over workers. It is for this reason, of course, that employers are heard to complain so often that government interventions which establish welfare nets lead to a self-indulgent workforce, an undisciplined, unproductive rabble. The point is clear: if workers are forced to rely on private investors, the private investors' power not to invest gives them real control over pools of would-be workers. Government aid for workers potentially undermines employer dominance.

In addition, when workers are employed, the threat of being disemployed is an effective disciplinary tool, even when there is a social welfare net which will protect the discarded to some extent, for some time⁶⁸. Workers are under pressure to obey the employer's orders at all times. The employer needs to be able to exercise that kind of pressure because, when an employment contract is entered into, the employer has no certainty that the labourer will produce more value than the wages which he is due to be paid as a result of the contract⁶⁹. The law comes to the assistance of the employer by imposing an enforceable duty on an employee to obey the employer's orders, to exercise reasonable care and skill and to be of good faith and fidelity.

68. These days we tend to sugar-coat the brutality of causing unemployment with unbelievably fancy language. Job losses are described as "Operation Improvement Work", "Re-engineering", "Employee Repositioning", "Pro-active Downsizing", "Progressive Rationalization" or, more simply, "Rationalization".

69. In marxist terminology, the worker has sold her labour power, that is, her capacity to produce value. In itself this is of no use to the employer until it is turned into labour. As the object of the sale, labour power, resides within the person of the seller of it, a person who is a subject-party to the contractual arrangement, there is an inevitable struggle between the employer-purchaser and worker-seller about the amount and quality of labour to be rendered.

To justify a legal approach which favours wealth owners by reinforcing their power to lord it over employees, the law pretends that, for its purposes, both individuals who are party to the contract of employment are equal, sovereign people. From this perspective, would-be workers have the right to enter into a contract of employment, or not, as they choose. The law, in a somewhat paradoxical manner, though, begins from the notion that (given the starting point of any enterprise, namely that the capitalist-investor would not create jobs unless it could control the ensuing enterprise), workers are content with an understanding that they owe duties of obedience and fidelity to the employer. Notionally, suggests the law, if would-be employees do not like these kinds of "naturally" implied conditions, they can bargain to change them.

Workers, of course, do want to resist the pressures created by the fierce competition amongst them which leads to job insecurity, pressure on wages and the capacity of employers to exercise their prerogative of management arbitrarily. This is why they have sought, and continue to seek, to have governments enact protective regimes such as minimum wage legislation, maximum hours of work legislation, health and safety legislation, child labour legislation, legislated minimum notice requirements and vacation pay provisions, unemployment insurance protections, etc., and, most importantly, this is why they have formed trade unions.

In various jurisdictions, at different times, they have had different degrees of success. In our part of the world, they have never been able to counteract two important components of the old law's starting position, namely, that the property owner retains the right to withdraw its investment and to demand obedience from its workforce. This is true even where workers have been allowed, and have been able, to lessen competition amongst themselves and thereby to diminish the disciplinary powers of the employers, that is, where they have entered into statutory collective bargaining. Indeed, the most prestigious public inquiry into collective bargaining in Canada has noted that this regime has brought many benefits but, that, nonetheless, it has embedded "the means of legitimizing and making more acceptable the superior-subordinate nexus inherent in the employer-employee relationship"⁷⁰. The wording of the Woods Task Force is instructive: it sees the employer as superior and the worker as subordinate and it claims that this

70. Report of the TASKFORCE ON LABOUR RELATIONS (Woods), *Canadian Industrial Relations*, Ottawa, Privy Council, 1968, paragraph 291. At the moment there is much discussion to the effect that the Canadian workplace should be more co-operative, based more on team work. The debate is a complicated one but it suffices to say that the manipulations originate with employers as they find that the hierarchical way in which they have managed for so long is no longer competitively productive. As a consequence, the changes in work processes they are bringing about are not aimed at giving workers more power; employers are looking for other ways to exercise control while heightening efficiency. For a discussion of the literature and empirical data, see Daniel DRACHE and Harry J. GLASBEEK, *The Changing Workplace; Reshaping Canada's Industrial Relations System*, Toronto, James Lorimer, 1992, chapter 10.

characterization is inherent in employer/employee relationships. It is hard to understand how this kind of relationship fits in with a society where there are supposed to be no status relationships of any kind. The implicit response, of course, is a falsehood, namely, that workers have freely chosen to be subordinated.

Workers are unable to attack the fundamental power of employers because they do not have the option not to enter into contracts of employment, whereas the employer does. This is so by definition. A property owner is not only legally entitled to withhold his assets from the market. In point of fact, he can just sit on them and eat them, at least for a long time. By definition, a worker, a non-property owner, in order to eat, must invest what is in effect her only property – her labour power⁷¹. Of course, some workers, at some times, in some places, are lucky enough to have a choice as to whom they sell their labour power. But they must sell it. In a very deep sense, then, contracts of employment are not truly consensual. As Friedman has noted, one can only be said to have truly done something freely if there was a real freedom not to do it⁷².

The law, by ignoring both the source of property ownership and the ensuing lack of choice of one of the parties to a contract of employment, pretends that contracts of employment are consensual and that their terms, therefore, should be enforceable without more, unless the contract is clearly illegal or contrary of a well-known head of public policy. The taking of value

71. This was observed by A. SMITH, *op. cit.*, note 8, p. 84. "Many workmen could not subsist a week, few could subsist a month, and scarce any a year without employment. In the long run, the workman may be as necessary to his master as his master is to him, but the necessity is not so immediate." For a similar judicial understanding, see *Devonald c. Rosser & Sons*, [1906] 2 K.B. 728, 743 (C.A.), where Lord Justice Farwell, said: "The master makes his living by realizing a profit; the workman makes his by his wages. The master's profits are ascertained as an ordinary rule *de anno in annum*. But the workman has to live *de die in diem*, and his wages presumably do not leave a large scope for saving for a future day when unemployment is forthcoming." For a while this understanding meant that the common law required employers to continue to pay their laid-off workers if they wanted the legal right to have them available when there was work to be done. Regrettably, this notion that the gross inequality of wealth between capital and labour required this kind of decency has been forgotten by the law, basically because it is felt that statutory collective bargaining has redressed the imbalance sufficiently. For a more detailed discussion, see Harry J. GLASBEEK, "The Contract of Employment at Common Law", in John C. ANDERSON and M. GUNDERSON (eds.), *Union Management Relations in Canada*, Don Mills, Addison-Wesley, 1982; Harry W. ARTHURS, D.D. CARTER, J. FUDGE and Harry J. GLASBEEK, *Labour Law and Industrial Relations in Canada*, 3rd ed., Toronto, Butterworths, 1989.

72. Milton FRIEDMAN, *Capitalism and Freedom*, Chicago, University of Chicago Press, 1962. Peculiarly enough, Friedman then pretends that a worker who needs to sell her labour power is in the same position as a family which could produce for all its needs but which, to maximize its assets, decides not to do so. This assumption, on which the Friedman argument that labour markets reflect freedom of choice depends, represents a gross error. For a marvellous exposure of this egregious error, see C.B. McPHERSON, "Elegant Tombstones: A Note on Friedman's Freedom", (1968) 1 *Canadian Journal of Political Science* 95.

produced by others, once seen as a *prima facie* immoral act which required justification by reference to military power, religion or established tradition, is justified by modern capitalist law by means of a *pretence*.

This alone should make it hard to make an argument that law can force moral precepts onto capitalist relations of production, except moral tenets of the capitalist kind which accept that the exploitation of workers amounts to morally acceptable behaviour. Perhaps it is the instinctive unease which this proposition engenders that makes people who support our political economic regime stress the great level of welfare that capitalism produces for workers. Implicit in that kind of argumentation is that, if workers do well – especially if they do better than they did in earlier times – the exploitation to which the socialist critics refer is really just exploitation in a technical sense; it is not a serious issue. But, this is not an argument based on morality; it is one based on manifested social facts and they change all the time. Thus, as soon as capitalism stops producing jobs and general economic welfare, the moral (and concrete) problems of employer/employee relationships surface.

Unquestionably, it is this which has caused moralists of a different kind, that is, moralists whose precepts may be the ones many people think of when it is urged that the law should impose more morality on commercial actors, to preach against the way in which modern society and its laws permit labour to be treated. Thus, the Episcopal Commission for Social Affairs for the Canadian Conference of Catholic Bishops, in its 1983 *Ethical Reflections On The Economic Crisis*, wrote as follows:

The current structural changes in the global economy [...] reveal a deepening moral crisis. Through these structural changes, "capital" is reasserted as the dominant organizing principle of economic life. This orientation directly contradicts the ethical principle that labour, not capital, must be given priority in the development of an economy based on justice. There is, in other words, an ethical order in which human labour, the subject of production, takes precedence over capital and technology. This is the priority of labour principle. By placing greater importance on the accumulation of profits and machines than on the people who work in a given economy, the value, meaning, and dignity of human labour is violated. By creating conditions for permanent unemployment, an increasingly large segment of the population is threatened with the loss of human dignity. In effect, there is a tendency for people to be treated as an impersonal force, having little or no significance beyond their economic purpose in the system. As long as technology and capital are not harnessed by society to serve basic

*human needs, they are likely to become an enemy rather than an ally in the development of peoples.*⁷³

In sum, the ability of capital to extract profit is central to the system. A liberal capitalistic legal system has had to *pretend* that profit taking is justified because workers have given their consent to it. The *hidden* use of force by property owners is ignored.

It follows that, where a profit is attempted to be made by *positively and openly* forcing or tricking another into making a concession, that is, into falsely giving consent, the law should provide a remedy. And it does. For this reason, in less central spheres than capital-labour conflicts, an increasing number of legal examples abound which suggest that moral precepts redolent of a different time might be imposed by modern law. But, it may be that even this apparently more appealing picture is not as rosy as it seems.

IV. MORAL LAWS AND EFFICIENT LAWS

Contracts between apparently legal equals will not be enforced if they were entered into as a result of duress, or as a result of a mistake about the fundamental nature of the deal, or as the consequence of a deliberate misrepresentation, and sometimes not even if they are entered into as a result of an innocent or negligent misrepresentation. For instances of the latter, a court may grant the misled party a legal remedy if, say, there was a known, but not declared, defect in title or a failure of the goods sold to be fit for the particular purpose to which they were to be put or where, to the seller's knowledge, the goods were known to be below average market quality. In short, the consent given must be real.

It is proper, of course, to treat these legal requirements of peaceability and honesty as evidence that the law does impose moral tenets on commercial actors. It is also true that these very requirements create a climate in which market actors can operate more efficiently⁷⁴. Market activities operate best where reliable information is freely available and, of course, where the choice to enter into a transaction is truly voluntary. This leaves the question of what the law can be expected to do when there is no obvious

73. After this paper was presented, the Canadian Conference of Catholic Bishops made a similar statement to the one cited in the text. After 10 years, the problem has not gone away. The importance to any economic regime to look after labour's material welfare, if it was to have a claim to legitimacy, was noted by Adam Smith: "No society can surely be flourishing and happy, of which the greater part of its members are poor and miserable. It is but equity besides, that they who feed, cloathe and lodge the whole body of the people, should have such a share of the produce of their own labour as to be themselves tolerably well-fed, clothed and lodged." A. SMITH, *op. cit.*, note 8, p. 79.

74. Arthur Allen LEFF, "Thomist Unconscionability", (1979-80) 4 *C.B.L.J.* 424; Anthony KRONMAN, "Contract Law and Distributive Justice", (1980) 89 *Yale L J* 472.

compatibility between moral sentiments and business efficacy unanswered⁷⁵. As it stands, it is not easy to get the law to declare that a positive act which is said to undermine consent amounts to a culpably oppressive or fraudulent act. The law is slow to call the conduct of commercial actors or commercial activities truly immoral, although it may be inclined to grant remedies to a disadvantaged person on another basis.

In a recent article⁷⁶, Madam Justice McLachlin, suggested that there was a judicial tendency to find fraud more easily than in the past. It may be true. But, the very case she cites for that proposition, *Rainbow Industrial Caterers Ltd. c. Canadian National Railway*⁷⁷, involved what most lay persons would consider to be an outrageous intentional deception of one contractor by another, causing great damage, but which the British Columbia Court of Appeal held not to be a fraud. What employees of the C.N.R. had done was not to advise a successful tenderer for the provision of meals on railways that they were aware that there would be many less meals than the number on which they knew the tenderer's calculations had been based. In the 1993 decision of *British Columbia Hydro and Power Authority c. B.G. Checko International Ltd.*⁷⁸ the Supreme Court of Canada had very similar facts before it and, again, did not characterize the conduct as fraudulent. While Madam Justice McLachlin, then, may well be right in her assessment, the supporting evidence is hard to find. Indeed, as is suggested below, the law seems to go out of its way not to find fraud, looking for other ways to provide obviously needed relief. Perhaps this is laudatory: to stigmatize an actor as truly immoral should not be done lightly. At the same time, a question to which I shall return, is raised: might not the law's cautious approach tend to dilute the moral values sought to be promoted by those who want compliance with the tenets of honesty and integrity not to be just a matter of form, but also of spirit?

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75. The idea that the law may have more than one function and the power to choose which of its goals is to be pursued is part of a vigorous theoretical debate about the role and place of law. In this paper, the assumption is not that law simply reflects the interests of the powerful, even though the tone of the paper may suggest this from time to time. Rather, my position is that law has scope to exercise some, but not complete, autonomy. It will serve to embed the essential economic relations of capitalism, but has room to manoeuvre, permitting it to satisfy other goals. In addition, there are many grey areas in which judgment calls need to be made as to whether or not the essential relations of the economic system and/or legal institutions might be better served by rulings and decrees which align practices more closely with normative views, rather than by giving the powerful that which they seek. For a very useful discussion and analysis of the burgeoning literature, see Eric TUCKER, "The Law of Employers' Liability in Ontario 1861-1900: The Search for a Theory", (1984) 22 *O.H.L.J.* 213.
76. Beverley McLACHLIN, "A New Morality in Business Law?", (1990) 16 *C.B.L.J.* 319. She offered a similar analysis in her presentation at the morning session of this conference.
77. (1988) 54 D.L.R. (4th) 43 (B.C.C.A.).
78. January 21, 1993 (unreported, as yet).

It is certainly true, however, that law, particularly as administered by the courts, seems to have embarked on a journey which imposes more trust and good faith obligations on commercial actors⁷⁹. A spate of recent cases suggests that A has a duty of care to act with integrity and honesty towards B who has reposed her trust in A. Put baldly, the courts are saying, more clearly than they have, that A cannot just act in his own enlightened self-interest in these kinds of circumstances. Integrity prevents it. But, so does business efficacy.

The law always has protected those to whom a fiduciary relationship was owed. In addition, claimants to inventions, copyright and patents, as well as trade secrets, have had access to sophisticated legal remedies. Technological advances, the globalization of production and trade, the increasing interdependence of commercial relations, all militate to the expansion of these existing categories so as to facilitate the modernization of commerce. Thus, what looks like an expansion of the moral and equitable content of commercial law may be no more than a modification of rules and practices to allow them to serve their original purpose – the facilitation of market activities – better than before⁸⁰.

In a similar vein, there always has been a problem about the right of an employer to restrain an employee's ability to work elsewhere or to set up a (competing) business of her own. The employer's ownership of the labour power he has purchased which – as seen – attracts legal protection, must be off-set by the law's need to promote the liberal economic principle of individual decision making and pursuit of self-interest. In short, the decision making which ensues is redolent with the language of good faith, loyalty, freedom, and the like, but this does not hide the fact that what is being weighed in the balance is the most efficient way to further the commercial activities of capitalists and would-be capitalist. The criteria used are somewhat imprecise because the law is interested in the promotion of rugged efforts by individual commercial actors to pursue their self-interest or to search out information which will give them an advantage in the market place. There are many ways in which these efforts can be made. Understandably, there is no *a priori* way of balancing the various actors' interests as material circumstances vary and change. As Justice LaForest, said in *Lac Minerals*, it is useful to impose obligations which are consistent *both* with "business morality and with

79. Shining examples are provided by *Lac Minerals Ltd. c. International Corona Resources Ltd.*, (1989) 61 D.L.R. (4th) 14 (S.C.C.); *Standard Investments Ltd. c. Canadian Imperial Bank of Commerce*, (1985) 22 D.L.R. (4th) 410 (Ont. C.A.).

80. For an elaboration of this argument in respect of one such apparently equitable, morally-laden, cause of action, see Harry J. GLASBEEK, "Limits on the Action of Breach of Confidence", in Dale GIBSON (ed.), *Aspects of Privacy Law: Essays in Honour of John M. Sharp*, Toronto, Butterworths, 1980.

encouraging and enabling joint development of the natural resources of the country⁸¹.

In these various spheres of judicial activity, then, the law imposes moral constraints on business actors that, as thinking capitalists, they should want to be imposed. All this case law shows is that some aspects of some of society's shared non-commercial moral values are compatible with the promotion of greed, inequality and luck. To find an indication that the law might rise to treat greed, inequality and luck as lesser moral values one has to look elsewhere in judicially-made law.

The law and the unconscionability doctrine — morality's trojan horse?

For the most part, cases on unconscionable transactions deal with contractors who have taken advantage of relatively impecunious persons, who also may have had a very poor understanding of the nature of the bargain because of their stupidity, drunkenness, limited experience, and so forth. But, there seems to be something of a desire to treat these cases as if the judges are ready and willing to say that inequality of bargaining, *per se*, may permit them to set aside a contract on the basis that its terms are unfair. Certainly, in her article, Madam Justice McLachlin notes that there is an increasing willingness to apply the unconscionability doctrine to bargains where the disadvantaged contractor is not ignorant or incapacitated, or very poor⁸². But, the judiciary will not do this very often, if at all. As early as 1967 the late, great contract lawyer, Arthur Leff, had noted that while there had been one decided case under a statute providing for a doctrine of unconscionability, the doctrine had given rise to 130 learned discussions. That is, there was a great disparity between the plausibility of the use of the doctrine and its actual use⁸³. In a later piece⁸⁴, Leff explained why this was, and will remain to be, the case.

81. Cited approvingly by B. McLACHLIN, *loc. cit.*, note 79, 44.

82. The two cases cited by Madam Justice McLachlin might be read a bit more cautiously than she did. One of them, *Harry c. Kreuziger*, (1979) 95 D.L.R. (3d) 231 (B.C.C.A.) involved an unknowing and impecunious complainant, that is, it was a fairly traditional unconscionability case. The other one, *Dusik c. Newton*, (1985) 62 B.C.L.R. 1 (B.C.C.A.), was not. But, both had the rank smell of fraudulent advantage-taking about them. Arguably, they would have been better decided on the basis of fraud if courts were really interested in imposing integrity on business communities. It is only because the law is reluctant to apply stringent notions of honesty and integrity that they have to reach out for the manipulable doctrine of unconscionability to grant what is instinctively felt to be the necessary remedy.

83. Arthur Allen LEFF, "Unconscionability and the Code – The Emperor's New Clothes", (1967) 15 *U Pa L Rev* 485.

84. A.A. LEFF, *loc. cit.*, note 74.

Leff's argument was that, unlike fraud, duress (and "all the other little fraudlets")⁸⁵, an unconscionability doctrine, untrammelled by a requirement of induced or truly unusual incompetence in the complainant, would demand that courts set fair terms for a contract, guided only by some criteria external to the market. This runs counter to a scheme posited on self-advancement, in which individuals, acting in a market in which the invisible hand sets prices, are supposed to rely on their superior assets, or on their personal abilities and knowledge, no matter how acquired. If this results in an imbalance in bargaining power, it is not for the courts to second-guess any bargain which ensues, in the absence of obvious coercion or fraud. As a corollary to this argument, the apparently disadvantaged contractor, being a sovereign and free decision maker, does not have to enter into a contract and should be encouraged to rely on her own resources, abilities and capacities to access information. If he could expect the court to intervene if he struck a bad bargain, there would be a disincentive to calculate risks carefully, to exert maximum effort, etc. The starting position that "natural" advantages and disadvantages must be presumed not to taint transactions, then, is the problem.

What all of this means for the purposes of this presentation is that the unconscionability doctrine, on the face of it, is a potentially promising source for the argument that the law is interested in, and capable of, importing older style, maybe even anti-capitalist, virtues into the regulation of modern commercial affairs. But, it is only a plausible argument, not a persuasive one⁸⁶. In support, note that when it comes to the one contract where there clearly is a huge imbalance of bargaining power and in which it is truly difficult to argue that the economically disadvantaged party freely agreed to the terms – the employment contract – the judiciary is most unlikely to apply the unconscionability doctrine to help workers⁸⁷.

85. *Id.*, 427.

86. This might also be said of the much more sophisticated argument by A. KRONMAN, *loc. cit.*, note 74, who argues that rules of contract law should be used to achieve distributional goals whenever other legal instruments, such as taxation, are likely to be more intrusive and objectionable. Note here also that Mark Tushnet has shown how these plausibility arguments work. He indicated that it is quite possible to argue, on the basis of some social welfare decisions which required governments to provide certain social services, that the Supreme Court of the United States might actually be able to implant socialism in the United States. He rightly points out that logical though this might be in technical legal terms, it makes absolutely no social, political or economic sense and will not happen. Similar arguments can be made about the way that rights disputes are viewed under the Charter: all sorts of arguments are possible, but only certain results are likely to ensue; see Harry J. GLASBEEK, "A No-Frills Look at the Charter of Rights and Freedoms or How Politicians and Lawyers Hide Reality", (1989) IX *Windsor Yearbook of Access to Justice* 293.

87. In *Matthew c. Bobbins*, [1980] *Property and Compensation Rep.* 1., the English Court of Appeal – comprising, amongst others, Lord Denning, the guru of the unconscionability doctrine – held that the doctrine allowed relief to be given where the terms of a contract were very unfair, where consideration was grossly inadequate or where the bargaining

In sum, the bases for existing interventions with commercial affairs are just as much market-facilitating as they are reflections of strongly held beliefs in honesty, integrity and good faith. They do not bite deeply enough to confront the private disciplinary and hierarchical powers of property owners and only tentatively, if at all, move towards some notion of substantive equality via the route of a fair price principle. They do little, if anything, to promote sharing, benevolence, co-operation, or altruism, even though the law has the theoretical scope to do so where it is perceived that it is necessary to the legitimacy of the system that there be some rapprochement between normative sentiments and existing practices. Moreover, inasmuch as some judicial steps are being taken which involve the setting of some standards of honesty, integrity and good faith, they are rather hesitant steps which tend to water down the very values promoted. This is so because the law feels it must pay respect not only to existing unequally held property rights, but also to the other major ingredient of commercial activity under capitalism: selfishness.

V. SELFISHNESS — A DRAG ON LAW'S OCCASIONAL ATTEMPTS TO INSTALL MORALITY OF A DIFFERENT KIND

Self-interest is seen as a positive economic force because, through the operation of the invisible hand, all of society will benefit if all persons follows their own dictates:

power of the complainant was seriously weakened as a result of his needs. Yet, the doctrine was held not to be available to help the worker/tenant defendant in the case, because employment relationships did not give rise to a presumption of undue influence, unlike relationships such as that between a mother superior and a novice, a banker and a customer, a publisher and song composer, or even a landlord and a tenant. Workers would only be able to get such unconscionability doctrine relief in particularly egregious circumstances. The starting assumption that the inherently unequal bargaining power of employers and employees is not unfair and does not lead to unfairness appears to be sacrosanct. Interestingly, where employers are hard-pressed by the terms of employment contracts, courts have given them relief, although not by direct reference to the unconscionability doctrine. In a typical case, *Universe Tankships Inc. of Mavrovia c. International Transport Workers Federation*, [1982] 2 W.L.R. 803 (H.L.), the facts were such that the union's conduct could be characterized as having gone beyond the statutorily limited scope of bargaining tactics, permitting the collective agreement to be set aside at the behest of the employer. In *N.L.R.B. c. Bildisco and Bildisco*, 465 US 513 (1984), it was held that an employer who was a Chapter 11 debtor could reject a collective agreement unilaterally if, on the balance of equities, this made sense. This "fairness" approach to collective agreements when employers were squeezed caused US unions to press for remedial legislation. They got paragraph 1113, *Bankruptcy Code*, 11 U.S.C. (Supp. IV, 1986) which provides that an employer must first offer the union a new deal before it abrogates the collective agreement because of its credit problems. It is unlikely that this will help unions much, despite the useful decision in *Wheeling-Pittsburgh Steel Corp. c. United Steelworkers*, 791 F. 2d. 1074.

*It is not from the benevolence of the butcher, the brewer or the baker, that we expect our dinner, but from regard to their own interest. We address ourselves, not to their humanity but to their self-love, and never talk to them of our necessities but of their advantages. Nobody but a beggar chooses to depend chiefly upon the benevolence of his fellow citizens.*⁸⁸

But, in our non-commercial lives, we still think that to be unselfish is a virtue. Accordingly, some justificatory mechanisms have had to be provided for this egoistic approach to commercial affairs.

Protestantism overcame the Catholic church's teachings that selfishness and avarice were unacceptable character traits by arguing that the pursuit of one's own interest was an indication that a human being was trying to make the most of God-given abilities and that this vigorous pursuit of self-interest was, therefore, a sign of piousness. The drive to accumulate wealth was justified because it was an indication that God was being glorified⁸⁹.

A complementary supporting argument was found in the fact that selfishness in commercial affairs requires planning and rational decision-making. In this sense, it connotes the pursuit of a controlled interest, rather than a heedless exercise in self-indulgent pursuits of animalistic instincts. Making the accumulation of wealth, rather than more primitive drives, the focus of activity, was seen as having a civilizing effect on society. Hirschman has spoken of *le doux commerce* because the chase of money was an interest, rather than a passion⁹⁰.

There is, then, a formidable justificatory framework for economic selfishness as a cornerstone of capitalism. But, selfishness does have its downsides. As all persons strive to look after themselves in an economic system where unfettered competition is the leitmotif, each Economic Rational Man is under pressure to take advantage of, or even to dupe, fellow citizens to maximize his profits. The law finds it hard to deal with this.

There is no question that the law recognizes the primacy of individualistic maximization of economic opportunities⁹¹. It has accepted as normal what, in pre-capitalist societies, was unthinkable, namely, that to buy

88. A. SMITH, *op. cit.*, note 8, p. 14.

89. Max WEBER, *The Protestant Ethic and the Spirit of Capitalism*, New York, Scribner, 1958; see also R.H. TAWNEY, *op. cit.*, note 64.

90. A. HIRSCHMAN, *op. cit.*, note 55.

91. This may have been reinforced by the rugged political individualism enshrined in the Charter of Rights and Freedoms. The assumption of that document is that self-assertion should be unimpeded in the private sphere and as collectivist interests which put pressure on the state to act in an interventionist manner might ride rough-shod over this precious right of individuals to act as self-interested persons, the state should be subject to judiciary scrutiny.

low and to sell high is not only good business acumen, but also a legal and moral way to advance self-interest. The law, then, no longer has an easily applied bright line by which to evaluate the morality of profit-seeking activities. As a consequence, it is caught between giving self-interest and individual autonomy free rein, on the one hand, and the need to reflect some of the community's rather ill-defined desire for integrity, honesty and good faith, on the other. Because the former is more precise and usually requires inaction by the law and the latter is vague and demands positive action to give it life, there is a tendency to favour the former over the latter⁹². A couple of examples to support this point follow.

In his fine article comparing the disparate ways in which law treats welfare and income tax deviance, Professor Hasson⁹³ cites a speech by Estey, then a Queen's Counsel. Estey was trying to draw the line between legal and illegal tax stratagems. He found it very difficult. He regarded the following tax-minimizing strategies to be straddling the border between acceptable and unacceptable tactics:

A taxpayer is a majority shareholder in a limited company and he places his wife on the payroll although she does not in fact work for the company. The identity of the wife is disclosed in all accounting records.

A taxpayer forms a partnership with an infant son who makes no contribution to the capital and does little or no work. If the partnership agreement is bona fide apart from these elements, is this tax evasion if it results in a lowering of the total income tax paid by the partnership as against the preceding proprietorship?⁹⁴

It would seem that the reason why Estey found it difficult to determine whether or not these clear attempts to lessen tax burdens which the law would like to impose were wrongful was his starting premise, one which he shares with accountants, lawyers and, one suspects, most judges. It is that the right to arrange one's own affairs to optimal advantage is to be unconstrained and that, to alter this, a law must be specific. That is, the pursuit of self-interest is to be accorded the highest value by the law. Attempts at legal restraint, therefore, must be read as narrowly as possible. The reasons for "novel" restraint, implicitly, have lesser moral sway than the "established" privilege of self-interested conduct by individuals. As a consequence, law will be deemed

92. This is really a reprise of the argument as to how difficult it seems to be for the courts to find that fraud has been committed when clearly egregious conduct has been established.

93. R.A. HASSON, "Tax Evasion and Social Security Abuse – Some Tentative Observations", (1980) 2 *Canadian Taxation* 98. The story he tells is a replay of the general argument in the text. Almost by definition it is the richer people who will get the greatest advantage from not paying income taxes; it is the richer people who benefit most from having welfare recipients be treated harshly. Unsurprisingly, tax evasion is treated with kid gloves by the law, welfare deviance with an iron fist.

94. As cited in R.A. HASSON, *loc. cit.*, note 93, 126.

not only to permit, but also to endorse, what, to a moral philosophy of a different kind, might be undesirable behaviour because it seeks to avoid a socially imposed responsibility.

The second example concerns a case in which a vendor did not only not tell a purchaser who had asked him questions about the slag on the property being sold that it was radioactive, but actually told the purchaser that it was a most useful material for land-fill purposes. The court had no trouble finding that a fraudulent representation on which reliance had been placed had been made to the purchaser. The damages which flowed from this reliance were awarded to the misled purchaser, but the court refused to award him punitive damages:

*It is, I think, clear that the claim for punitive or exemplary damages cannot succeed; this is not a case in which there has been intentional injury, abuse of authority, or any other factor which would characterize the conduct of the defendants otherwise than as ordinary commercial dishonesty.*⁹⁵

This kind of overt acknowledgement that a certain amount of sleaze is part and parcel of commercial relations is rare, but the fact that an acceptance of morally troubling behaviour colours the law's approach to commercial relations generally is not hard to document. An easy example is furnished by our legal attempt to regulate misleading advertising.

Misleading advertising law is not very well enforced in Canada⁹⁶ but, whatever the extent of prosecution, it is restricted to rather specific violations. The law tolerates a great deal of distortion and exaggeration, false promises and the like, provided it feels it can categorize such distortions as "puffery". The creation of images, the seduction into beliefs which translate into lifestyles which, in turn, help construct markets for profit-making activities, is the legalized objective⁹⁷. We live in a legal society where truth telling is not an exalted virtue. As Daniel Boorstin said in the early sixties:

Advertising befuddles our experience, not because advertisers are liars, but precisely because they are not. Advertising fogs our daily lives less from its peculiar lies than from its peculiar truths. The whole apparatus of

95. *C.R.F. Holdings Ltd. c. Fundy Chemical International Ltd.*, (1980) 14 C.C.L.T. 87, 108 (J. Taylor). Emphasis added. The case went to appeal, but the point was not in issue there; (1982) 19 C.C.L.T. 263.

96. See *The Report of the Auditor General of Canada to the House of Commons, 1990*, Ottawa, Minister of Supply and Services, 1990.

97. All of this is well-known and well-documented. Often the titles of the books which discuss the issue, tell the story, for example, Vance O. PACKARD, *The Hidden Persuaders*, Harmondsworth, Penguin, 1970; Stuart EWEN, *Captains of Consciousness; Advertising and the Social Roots of the Consumer Culture*, New York, Toronto, McGraw-Hill, 1976; J. NELSON, *Sultans of Sleaze: Public Relations and the Media*, Toronto, Between the Lines, 1989; Roland BARTHES, *Mythologies*, St. Albans, Paladin Books, 1973.

*the Graphic Revolution has put a new elusiveness, iridescence, and ambiguity into every-day truth in twentieth-century America.*⁹⁸

The point here is not, of course, that people do not know that they are being fooled. To the contrary. In a 1984 study by the Roper Centre for Public Opinion and Research, 81% of the respondents said that advertising claims were exaggerated, while 70% of Americans agreed that business and industry in that country hood-wink the public through advertising⁹⁹. In another poll, only 1% of respondents said that none of TV advertising was misleading¹⁰⁰. So, people are not fooled. But, they are taught not only that many respected businesses engage in ugly practices, but also that they prosper by doing so and that it is legal to do so. There is a price to pay for this.

An overwhelming number of people indicate, again and again, that big business houses, their directors and managers are not to be trusted. Again, Blumberg provides us with a survey of the surveys. He notes that the American public's confidence in business leaders has fallen dramatically since 1966 (the time when economic welfare began to plummet) and since then has consistently remained under 20%¹⁰¹. Of course, these perceptions are reinforced by an increasing public understanding that corporate actors are not only likely to be less than direct in their dealings with others, but that they often transgress the minimal rules of behaviour on which the law does insist. Thus, Blumberg cites a 1970 Harris poll which found that fully 90% of the respondents believed white collar crime was either very common or somewhat common; only 10% of the people said that it was not very common¹⁰². More important, perhaps, was the finding that only 2% of Americans rated the ethical standards of business executives as excellent. Nearly 60% rated executive ethics as only fair or poor. We now begin to see why it is necessary to urge that executives and directors should be given lessons in ethics that the rest of the population is already deemed to possess. Widely publicized efforts of this kind are really attempts to restore legitimacy to the practices of business.

Self-interest, then, is to be pursued by the lowly amongst us in a milieu of distrust, hyperbole, gentle, and not so gentle deception. In this context, the natural tendency of self-interest to shade over into the taking of unfair

98. Daniel J. BOORSTIN, *The Image: or, What Happened to the American Dream?*, New York, Atheneum, 1962, pp. 216-217.

99. As cited in Paul BLUMBERG, *The Predatory Society; Deception in the American Marketplace*, New York, Oxford, Oxford University Press, 1989.

100. *Id.*, p. 216. The ABC News/Harris poll cited there also indicated that 52% of people said most or all of TV advertising was misleading and 40% said some of it was misleading.

101. *Id.*, p. 203.

102. *Id.*, p. 206.

advantage of others is reinforced by what appears to be publicly and legally accepted practices¹⁰³.

This tendency is so well recognized that it has a name: the prisoner's dilemma. The argument is that while no one individual wants to behave unfairly, if each individual has reason to believe that everyone else will, it is logical to be the first to cheat¹⁰⁴. In addition, but more speculatively, there is an intuitive understanding by many of the less well-placed people in our society that a good number of the members of the elite got to their position not by being outstanding practitioners of self-interested competition but rather as a result of inheriting the ill-gotten gains of others. This may make it psychologically easier for the rest of us to be more aggressive than touted, but rarely practised, ethical considerations should permit.

Certainly it is true that ordinary commercial activities are rife with wrongdoing. The Blumberg study established that 70% of the businesses studied had engaged in deception of some kind. While some of the actors only misbehaved occasionally and their infractions did not have very serious effects, others regularly swindled customers and caused a great deal of loss. For my purposes here, the most important finding was that only 29% of the employers studied never deceived anyone¹⁰⁵.

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103. In large corporations this tendency is given added impetus by a constellation of factors. The pressure on lower order decision-makers to bring home the bacon pushes them to adapt the legal and physical environments to their immediate needs. They are encouraged to do so because the likelihood of being held responsible is somewhat remote. Most of the damage will surface long after they have left. Further, decision-making in a large endocratic corporation is so diffuse and sophisticated that law enforcement officers have a hard job finding out how criminal decisions were made. The sanctions, then, appear far off; the rewards for bringing home the bacon are immediate.
104. These difficulties are well-known. F. LUTHANS and R.M. HODGETTS, *Social Issues in Business: A Text with Current Readings and Cases*, New York, MacMillan, 1976, p. 55, reported that a survey of the American Management Association had found that "3000 executives questioned felt under pressure to compromise personal standards to meet company goals". C. MADDEN, "Forces which Influence Ethical Behaviour", in C. WALTON (ed.), *The Ethics of Corporate Conduct*, Englewood Cliffs, Prentice-Hall, 1977, p. 66, found that most managers believed that their counterparts in other firms "would not refuse orders to market off-standard and possibly dangerous products". Russell MOKHIBER, *Corporate Crime and Violence: Big Business Power and the Abuse of Public Trust*, San Francisco, Sierra Club Books, 1988, reports the findings of some surveys. One revealed that more than half of the executives surveyed agreed that the "American business executive tends to ignore the great ethical laws as they apply immediately to his work. He is preoccupied chiefly with gain". Another survey analysed 119 corporation codes of ethics. The conclusion was that the codes gave more attention to unethical conduct likely to decrease a firm's profits than to unethical conduct which might increase profits.
105. P. BLUMBERG, *op. cit.*, note 99, p. 16. Whatever the merits of the study (and the author's unusual methodology required him to write an explanatory chapter), what is important is the indication that legal – let alone moral – behaviour may be rarer than illegal conduct, that is, that the trap of the prisoner's dilemma constitutes the dominant paradigm.

All of these uglinesses arising out of reliance on selfishness as an economic engine are sought to be justified by economists on the basis that, eventually, the naked pursuit of self-interest will create the greatest possible amount of welfare for the greatest number of people. It is a system based on utilitarianism. This correlative of the political and legal promotion of selfishness adds to the difficulty of imbuing the law which regulates economic actors with virtues such as benevolence, altruism, sharing, co-operation and the promotion of more substantive equality. This spin on the foregoing arguments needs some elaboration.

VI. WHEN EVERYTHING IS EQUALLY IMPORTANT, EVERYTHING IS EQUALLY UNIMPORTANT

As a standard of behaviour, the simple-minded pursuit of self interest has distinct advantages. It is unambiguous. More, it is subjective; it cannot be second-guessed. All individuals decide for themselves what is in their own interest. It is this which makes urging the imposition of altruism anathema. If a poor person needs a few dollars to eat and a rich person wants to spend the same few dollars on a trinket, there is no way of saying that the rich person will get less pleasure from buying the trinket than the poor person would get from having the food. That is, there is no basis for forcing the wealthy person to give up a trinket so that another can eat. In the commercial setting this means that there are no objective criteria by which to evaluate profit seeking activities. If a property owner determines that his interests are better served by producing a nerve gas than a machine which might alleviate pollution, it is right and proper for him to produce the nerve gas. Both his personal gratification and, it is assumed, the overall economic welfare will be advanced in that way¹⁰⁶.

The range of activities and transactions in which these self-indulgent kinds of decisions can be made is expanded by our facility to put a monetary value on everything, including human life. The costs and benefits of every activity are measurable. The logic of this has enormous consequences. Dealings between people become dealings between rational economic calculators. Their relationships are defined by the links they need to form to bargain about the commodity which is the vehicle by which they seek to maximize this well-being. That is, depersonalized relationships in a

106. If there is a real demand for the anti-pollution device, it will be built. In its extreme form this is the logic of Ayn RAND's philosophy of objectivism. In *The Virtue of Selfishness: A New Concept of Egoism*, New York, American Library, 1965, she argues that a man's need to survive and prosper mandates the standard of moral values by which he must live. Therefore, altruism is anathema. As she writes in her book of essays, *Capitalism: The Unknown Ideal*, New York, New American Library, 1967, p. viii, "the foundations of capitalism are being battered by a flood of altruism, which is the cause of the modern world's collapse".

manipulating, manipulated and always alienating setting are the norm¹⁰⁷. What this means is well illustrated by an example which only *seems* extreme.

In a memorandum to his colleagues, L. Summers, the Chief Executive of the World Bank, argued that there should be more dumping of polluted waste in poor countries. His utilitarian reasoning was that the cost of pollution is the threat to health and life it poses. It is more cost-efficient to have pollution where health and life are worth less because people have smaller incomes and lower life expectancies.

Further, as a pollution-free environment is largely a question of lifestyle, that is, people want beauty and pleasant smells around them, the citizens of rich countries are likely to impose more costly controls on pollution-causing activities than are poor people who, because of their poverty, do not put as high a price on beauty and pleasant smells. To shift pollution and pollution-creating activities to poor areas, then, would make production less costly, more efficient.

This memorandum appeared as an article in *The Economist* under the heading "Let Them Eat Pollution"¹⁰⁸. *The Economist* was not opposed to the ideas in the article, just to their explicit formulation. This is understandable because the reasoning employed by Summers is the reasoning which underpins much of our regulation of productive activity.

The assumption that self-generated productive acts in one's own interest are not to be questioned, unless there already is a legal restriction on such an activity, makes it hard for law makers to regulate any activity at all. They carry the ideological burden of showing that a proposed activity is a less efficient way of creating overall welfare than some other way of using the assets and resources. Arguments abound as to whether the costs of the harm likely to be inflicted by the activity outweighs the wealth they may regenerate. Only under capitalism, where selfishness and utilitarianism have been upgraded to ethical values, can this kind of debate be seen as having a moral content. It yields predictable outcomes when governments do seek to regulate.

The regulatees play a large role in the regulation of their activities. After all, being the best judges of their self-interest, they are the ones with the

107. This was beautifully captured by Robert K. MERTON, *Mass Persuasion: The Social Psychology of the War Bond Drive*, New York, Harper and Bros., 1946, when he wrote at p. 143: "Society is experienced as an arena for rival frauds."

108. *The Economist*, February 8, 1992. Mr Summers, apparently strung by the angry reaction of groups such as the Environmental Defense Fund, Friends of the Earth, Greenpeace, issued a second memorandum to the World Bank, expressing his surprise that people had not understood that he was being deliberately provocative, a devil's advocate. While this did not appease the environment and Third World critics (See *Multinational Monitor*, March 1993), it must have convinced the newly elected Clinton administration. It appointed Mr. Summers to the post of undersecretary of international affairs at the United States's Treasury where he will be a key person in the U.S.'s dealings with third world countries.

requisite skills and abilities to measure the costs and the benefits of their activities¹⁰⁹. This means that the regulators' non-legal, but very high barrier of proof, is even harder to hurdle. More often than not they seek to clear this hurdle by showing that their proposed regulation is good for the capitalists involved and beneficial for capitalism in general. That is, regulation is sought to be imposed on the basis that it promotes the particular and general self-interest of property investors. Indeed, this is the way in which most attempts to improve large businesses' behaviour is justified.

The suggestions that business leaders should be subjected to courses in ethical behaviour and that they should comply with the ethical codes of their firms are made not just on the basis that they are morally uplifting and legitimating, but also on the basis that they are likely to improve profits. Similarly, ethical investment funds which are to monitor corporate behaviour are sold on the basis that they return as much (if not more) profit as less nobly focussed investment houses¹¹⁰. It is easy to discern the emotional appeal of this kind of argumentation: it harmonizes the reform movement with the dominant ideology.

The imposition of "moral" constraints by mechanisms which are designed to help private investors to pursue their own interests is not, within a system of morally and legally sanctioned self-interest and utilitarianism, offensively coercive. Further, it is logically attractive. If these appeals to investors is well co-ordinated and the moral constraints they propagate become widely spread, business actors may feel confident that they all are equally constrained and the temptation to cheat because others will (that is, the prisoner's dilemma) will be lessened¹¹¹. Such morality promoting techniques, therefore, meet with little opposition.

By contrast, when governments step in to impose "moral" restraints on behalf of all of us, they are not – as, say, ethical investment funds are – acting as single-minded egoists. They have a tougher road to hoe. Their interventions are not justified by self-interest. It is easy, therefore, to characterize them as paternalistic or, more damning, as inherently coercive. Ironically, as the

109. The difficulties this creates are elaborated in Allan SCHNAIBERG, "Obstacles to Environmental Research by Scientists and Technologists: A Social Structural Analysis", (1976-77) 24 *Social Problems* 500.

110. See "Ethical investing can pay dividends", *Toronto Star*, February 28, 1993, H3, which notes that one of the top performing mutual funds in the U.S. was an ethical fund, the Parnassus Fund. It returned 32% on the monies it invested. For a more extended and detailed argument that ethical investment can be profitable, see D. OLIVE, *op. cit.*, note 49.

111. There is little likelihood of this potential being realized. For instance, take the ethical funds strategy. Approximately \$250 million is held by ethical investment fund managers, a tiny fraction of the capital invested in Canada; see "Ethical investing can pay dividends," *op. cit.*, note 110. The attention given to these funds by reformers and legitimators is as disproportionate as that paid to the potential for change inherent in the unconscionable transaction relief doctrinal developments.

institutional capacity to set universally applicable and enforceable standards increases, the legitimacy for doing so decreases.

The ideological power, and legal acceptance, of the primacy of selfishness and the merits of a utilitarian approach to public policy-making ensures weak restraints, that is, weak regulation. Governments impose standards slowly and only after careful consultations with the business interests which are to be regulated¹¹². The regulations rarely will require accommodations which the leading businesses find very costly¹¹³. Relatedly, because of the starting position – that to pursue one's subjectively determined self-interest is an unalloyed good thing – regulators are shy about treating violations of their regulations as ugly acts. Because, in their minds, they start off with a question as to whether or not there ought to be any intervention at all with self-promoting conduct, the appropriateness of any imposed standard is always contentious. In the upshot, it is easier – if government enforcement of its own rules simply cannot be avoided – to treat the deviance as a non-stigmatizable offence.

Thus it is that, at the same time as legislators (in order to legitimate regulatory schemes which have come to be perceived as ineffective) have augmented maximum fines and the length of possible jail sentences for infractions, there is an increasingly vehement opposition to the use of the *Criminal Code* in respect of these offences. Specialized administrative sanction regimes are being advocated. The argument is that we should avoid the cumbersome judicial, criminal processes, with their onerous burdens of proof and the judiciary's lack of necessary expertise. It is better, it is said, to give the task of enforcement to expert agencies with streamlined procedures, armed with an appropriate arsenal of punitive weapons. This is an intuitively appealing argument but it hides a truth.

112. In itself this is a signal that a trade-off between citizenry well-being (health, safety, environment, etc.) and private profit-making is the norm and that a certain amount of harm is to be legally sanctioned. The essentially *moral* question as to whether or not private gain should ever be allowed to be made at the expense of, say, a worker's life is never to be faced directly. A legal system imbued with different values might still allow a trade-off between physical integrity and overall welfare, but would only do so after a larger, more democratically participatory process, one which would not assume that private profiteering must be given any weight, let alone be privileged, had been undertaken; see Laura SCHRAGER and James F. SHORT JR., "Toward a Sociology of Organizational Crime", (1977-78) 25 *Social Problems* 407.

113. Indeed, sometimes the real battle is about the *nature* of the regulations. Some dominant firms may be helped if the regulations act as entry barriers, for example, the requirement that there be technology standards, rather than performance ones, because the capital costs of the former may be prohibitive to would-be competitors. Further, the ability of major firms to dictate to governments standards which they are already meeting is well-established; see C. TUOHY, "Decision Trees and Political Thickets: An Approach to Analyzing Regulatory Decision-Making in the Occupational Health Arena", *Law and Economics Workshop*, Faculty of Law, University of Toronto, 1984.

The reluctance to apply criminal law in its pure sense to business deviants is due to the fact that the criminal law is the legal system's most severe and explicit means to express *moral* disapproval of conduct. It is difficult to characterize peculiarly aggressive manifestations of behaviour which, in a general sense, capitalist law sets out to promote, that is, selfish and utilitarian activities, as deserving of the most profound kind of moral condemnation which the law can muster. It is this implicit tension which has led us to a "decriminalization" approach¹¹⁴.

The privileged position in our economic and legal/moral values' system accorded to subjectively chosen self-interest also creates a major stumbling block for those reformers who want to restructure the governance of corporations so as to ensure that diverse stakeholders will have their interests protected. Profit maximization is a straightforward goal to set corporate managers, even though there will be disputes as to whether long-term or short-term objectives should be privileged. In a world where it is assumed all other subjectively determined goals are equally deserving of respect, to have them all pursued by one set of actors at the same time creates intractable tensions. If special directors are chosen to discharge the task *vis-à-vis* special interests, the problems are not overcome. Upon impasse, which and whose interest is to be privileged? Who makes this determination? These difficulties are real. Where there is a clash created by, say, the ability to produce a safer aeroplane but only at the expense of the producing workers' health and safety, by who, and how, should the decision be made?

114. For an example of how poorly regulatory systems are enforced, note the enforcement record of the occupational health and safety legislation; see Harry J. GLASBEEK, "A Role for Criminal Sanctions in Occupational Health and Safety", in Meredith Memorial Lectures 1988, *New Developments in Employment Law*, Cowansville, Éditions Yvon Blais, 1989. For examples of increased maximum fines and jail sentences, see for example section 66 *Occupational Health and Safety Act*, R.S.O. 1990, c. O.1 (fines up to \$25,000 for an individual, \$500,000 for a corporation, jail up to one year for infractions). The idea is to show that if the sanctions are as severe as criminal ones, the same goals – deterrence and prevention – are being pursued effectively. But, is the stigma, that is, the expression of disapproval the same? In any event, the availability of greater non-criminal sanctions does not mean that there is more vigilant enforcement. While the potential administrative punishment may be greater, the number of inspections and charges may fall; see E. TUCKER, "And Defeat Goes On: An Assessment of Third Wave Health and Safety Regulation", presented at a conference "Corporate Crime: Ethics, Law and the State", Queen's University, Nov. 1992 (available on request). As for the intellectuals' and public policy-makers' preference for a non-criminal law approach, or, at least, their hesitance about criminalizing business behaviour, see the debate fought out within the confines of the LAW REFORM COMMISSION OF CANADA, particularly *Our Criminal Law*, Ottawa, Law Reform Commission of Canada, 1976; *Crimes Against the Environment, Working Paper 44*, Ottawa, Law Reform Commission of Canada, 1985; *Workplace Pollution, Working Paper 53*, Ottawa: Law Reform Commission of Canada, 1986. Or, for a recent clear expression (under pressure from big business) that administrative control is to be privileged over criminalization, see the decriminalization of anti-competitive conduct, as analysed by W.T. STANBURY, "The New Competition Act and Competition Tribunal Act: 'Not with a Bang, but a Whimper'", (1986-87) 12 C.B.L.J. 2.

This kind of argument is, of course, the basis for Milton Friedman's well-known dismissal of the corporate social responsibility movement. His contention was that it was simply incoherent and anti-democratic to have some private actors, just because they controlled large resources, make social and political decisions. Inasmuch as economic decisions were to seek to effectuate specific public policies, he argued elected politicians should make them. Of course, the more this is done, the less economic freedom individuals will be able to exercise and, in turn, this dilutes political freedom as majoritarianism will come to hold sway in an increasing number of areas. This is unacceptable to Friedman and his followers¹¹⁵.

The fear of a state planned economy is great because of the deeply held beliefs that individualism is good, collectivism bad, that private decision making is efficient and public interventionism an economic disaster. Given the hold of these beliefs, the likelihood of the evolution of a state planned political economy is far-fetched. Intervention will thus rarely amount to more than tinkering by, say, allowing minor, ad hoc interest group participation in what are to remain private profit-making decisions. This *is* incoherent¹¹⁶ and unlikely to have much effect. It is for this reason that the corporate social responsibility movement, in part, is being refocused.

Many United States jurisdictions have permitted corporate managers to consider the consequences of decisions on stakeholders other than shareholders, but conservative critics point out that this is the result of managerial lobbying rather than of public concern for non-shareholder stakeholders. The critics' argument is that this kind of discretion protects managers who want to resist take-overs which may threaten their job security. Their fake solicitude for non-shareholders' interest will provide a cloak for the pursuit of their personal agendas at the expense of shareholders. Non-shareholder stakeholders are unlikely to have their interests better protected¹¹⁷.

This reasoning makes sense. Indeed, it is precisely because it is easiest to justify the contemporary drive for managerial responsibility and accountability by arguing that managers should be subjected to the shareholders' need to maximize profits, that it is quite likely that the great stakeholder debate will, in the end, lead to a return of more power for

115. Milton FRIEDMAN, *Capitalism and Freedom*, Chicago, University of Chicago Press, 1962; Friedrich A. VON HAYEK, *Law, Legislation and Liberty*, London, Routledge and Kegan Paul, 1982. The titles say it all.

116. Lord W. WEDDERBURN OF CHARLTON, "The Social Responsibility of Companies", (1985) 15 *Melb U L R* 4, refers to this as the "fudge" school of social responsibility and see H.J. GLASBEEK, *op. cit.*, note 4.

117. Roger DENNIS and Dennis HONABACH, "Introduction: Corporate Governance in the 1990's - Symposium: Investor and Public Interests in Corporate Governance", (1992) 44 *Rutgers L.R.* 533.

shareholders and little else. This seems to be the significance of the recent attacks on chief executive officer (CEO) salary packages and the actual dismissal of CEOs of major, but poorly, performing firms. These have been, in large part, the result of a flexing of muscles by formerly passive shareholders led by institutional investors. There also is a movement afoot to create private monitoring businesses which, acting (for pay) on behalf of contributing fund managers who have shares in the firms to be monitored, set out to participate in directors' and managers' decisions¹¹⁸.

In sum, self-seeking and utilitarianism are formidable hurdles to clear for those who would seek to impose a sense of social responsibility on what are, essentially, legal artifices created with a simple objective: the accumulation of wealth for those who invest their capital (narrowly defined) in them.

VII. CONCLUSIONS

The transformation from feudalism to capitalism was not only an economic revolution, it was also a political one. The idea that wealth was to be produced by individuals exploiting and maximizing their personal resources in a competitive setting led to an unleashing of economic potential which generated more abundance than had ever been seen. This dynamic economy could not have been created if individuals (and resources) had remained fettered as they were by feudal relations of production. Under feudalism, the rights, duties, obligations and privileges of individuals were determined by their status. Individual effort and merit was not to affect the incidents of their status. It was a static, not a dynamic, political economy. Political and social inequality were seen to be legitimate, indeed, ordained. Such a tightly integrated society, precisely because it was not to be altered by individual or collective political action, decreed that those in power owed responsibilities to those people they politically and economically controlled. To such a society, the pursuit of self-interest at the expense of others was a danger and, therefore, was easily seen as a sin. Benevolence, paternalism, cooperation and selflessness were useful as well as praiseworthy values.

This is why the advent of capitalist relations was truly revolutionary. It denied the legitimacy of political inequality. All individuals were equally worthy and were, therefore, not responsible for the well-being of any others, nor for the health of the polity. Each person was responsible for herself and was given freedom to exercise her options, to use her abilities and resources as

118. The name for the new forms of monitoring of business by profit-making businesses is "relationship investing". For its spreading scope, see the Cover Story, *Business Week*, March 15, 1993. It is not, given the premise of this paper, all that surprising that a publicly-inspired corporate social responsibility movement is fast becoming a private-for-profit movement whose goal it is to make profiteering more efficacious.

she wished. Human liberty was advanced enormously. Capitalism, with its promotion of selfishness, then, furnished both political and economic progress.

But the revolution left something undone. While it established formal political equality, it has been unable to deliver social and economic equality. Whereas under feudalism inequality in wealth and social power made sense, there is no easy legitimation for it under capitalism, except claims of desert which, empirically, are hard to maintain. When the economic system falters in its provision of overall economic welfare and the persisting inequalities – manifested by outcomes of hardship and injury for the many while few prosper – come to the fore, the problematic nature of the political legitimacy of the system is laid bare. Sometimes this is seen as being repairable by educating or coercing those with decision making power into accepting moral responsibility for their decisions. A political problem is thus transliterated to be a 'moral' one. This response has the advantage that it masks the fact that a significant political attack is being mounted, relying, as it does, on requiring adherence to values which are already supposedly shared. Typically, the aid of the law is sought in this exercise. What has to be faced, however, is that law, as an institution, is likely to block any radical restructuring. Its history is not to be ignored.

The argument in this paper has been that the ideology which infects law and which it, in turn, helps to propagate, is that formal political equality, rather than substantive political and economic equality, is the cornerstone of our political economy. Also, law has been instrumentally used to help maintain economic inequalities which, as a by-product, lead to actual (as opposed to formal) political inequalities.

It is true, of course, that the making and application of law is not couched in those terms and that there is a good deal of room for law makers and courts in which to manoeuvre. Electoral democracy permits positive laws to be formulated which put restraints on private actors. Indeed, we have many such laws. Similarly, courts have sufficient discretion to make private actors more responsive to the need to be more trustworthy and reliable. The picture is not completely bleak. But, it is far from promising.

The state through which new constraints are to be legally imposed is under increasing pressure to accommodate the demands for the unfettered pursuit of self-interest by powerful wealth owners. Its political power to impose greater and novel restraints by passing laws is more limited than it was during more prosperous eras. Of course, this is the paradox: it is precisely because of the increasing power of private actors *vis-à-vis* the state that the cry for the imposition of better values on private actors has arisen. Thus far, the calls for action are not very effective. More often than not they become demands that largely self-regulating businesses should exercise self-restraint.

When we turn to the courts, what has to be confronted is that the judiciary is the institution in which it is most strongly believed that formal political equality is a satisfactory state of affairs and that, if substantive

economic equality is to be an objective, it is for the legislatures to pursue it. Courts intuitively split the economic from the political spheres, thereby furthering the political and social control the economically powerful can exercise over the propertyless. Realistically, all that can be expected from the courts is rule making which insists that business be conducted without blatant lying, or that one person does not misappropriate information or goods entrusted in good faith to her for a specific, limited purpose, or that a powerful, well-informed, experienced person does not take too much advantage of the stupidity, inexperience, ignorance and economic desperation of another. It is naive to demand that courts impose benevolence and, even more so, altruism, as standards of commercial behaviour. Courts will fashion rules which require economic actors to stick more closely to values which make the economic system more efficient. This raises hopes that capitalism does not have to have an ugly face. But, the moral values which courts are most likely to perfect – albeit with much difficulty as some of the evidence in this paper suggests – are those which are functionally compatible with a society in which greed, luck, economic inequality and formal political equality continue to reign. Capitalist law is not a vehicle which can be used to complete the political revolution and to help establish social relations in which substantive and economic equality are a reality.