Contributions to Political Economy (2025) 1–23

THE MODERN CORPORATION: A CRITICAL SURVEY

Benjamin Crawford[†]

London School of Economics and Political Science, London, UK
b.j.crawford@lse.ac.uk

This critical survey reviews long standing debates between the 'entity', 'contractarian' and 'stakeholder' theories of the corporation. These perspectives are shown to obscure the legal structuring power corporate law confers on the owners of capital, rewriting corporate property relations in terms of managerial interest intermediation, contractual voluntarism, or stakeholder 'property' rights, respectively. Marxist analysis and the perspective of workers and labour law are utilized to show the limitations of these debates and emphasize the constitutive role of class relations in corporate law. From this perspective, the dominant theories fail to deal with fundamental characteristics of the modern corporation: the shifting of risk, the exercise of control without liability, and patterns of hierarchy beyond the firm. New perspectives emerging from the 'Law and Political Economy' movement in the US, in particular Katherina Pistor's analysis of the ways in which capital is 'coded' in law to the advantage of elites (The Code of Capital) are more promising. What Pistor brings out is twofold. Firstly, the critical role of private law rules in the core 'modules' which underpin capital. Secondly, the relative autonomy with which elites are able to utilize these rules to enhance and protect their wealth. Yet Pistor ignores the labour relationship and the class dimensions of the code of capital in her analysis. The survey concludes with reflections on the limits to legal reform of corporate law, and directions for future research bringing together analysis of the code of capital and Marxist perspectives.

JEL Classification: L2; L20; L22; K31

I. INTRODUCTION

The modern corporation is associated with a plethora of problems. These include problems of concentrated corporate and market power (Vaheesan, 2020), the generation of social and environmental externalities (Robé, 2020), corporate irresponsibility arising from the escape from liability for both investors and control

[†]I would like to thank Professor David Whyte and Professor Aristea Koukiadaki for their supervisory support during preparation of the thesis on which this paper is based, and the Institute of Employment Rights who supported the research.

parties (Greenwood, 2017; Ireland, 2012), the shifting of risk from shareholders to other creditors (Pistor, 2019), and related issues of arms-length control and hierarchy beyond the firm (Paul, 2020). The nature of the corporation and its relation to the firm as a legal and economic form of productive organization has been the subject of long-standing theoretical debates in political economy and legal scholarship. These debates have centred on a set of concerns regarding the nature of corporate personhood, the status of the shareholder interest and 'ownership' rights within corporate governance, and the degree of autonomy of corporate management to serve the interests of workers, communities, society, and the environment. Indeed, the problems presented by the modern corporation are well recognized within the field of corporate law and governance. Recent years have seen joint statements by large numbers of scholars identifying the contribution of corporate law and governance practices towards 'a wide range of systemic risks, as well as devastating social, environmental and economic impacts' (Johnston *et al.*, 2019, p.3). These impacts are understood as the outcomes of 'practices of shareholder primacy' which drive directors to adopt the short-term time horizons of capital markets, ignoring environmental, social and even their own sustainability in a 'tragedy of the horizon' *(ibid.*, p. 3). The problems of 'shareholder primacy' and the modern corporation are held to be the result of 'mistaken' beliefs by economists, journalists and business experts about the corporation and corporate law, which lead to 'errors in the ways in which corporate law concepts are understood and applied' (Stout *et al.*, 2016, p. 1). The 'powerful legal reality' of corporate personhood is ignored in governance practices, or treated by the courts in a contradictory way, as both strong for the purposes of shareholder protection whilst simultaneously reducible to the shareholder interest (*ibid.*, p. 1). These problems, it is argued, can be corrected through reforms to directors duties and board obligations to free corporate directors to act in what they believe to be 'the best interests of the company as a separate entity' (Johnston *et al.*, 2019, p. 4). The implications of corporate personhood should be taken to their full conclusion: the liberation of the corporate entity from the parties who own its shares.

This argument entails a number of assumptions. Firstly, at its core this is an argument about law, and law's autonomy from capitalist social relations. This assumes that the corporation, as a creature of law, can be neatly repurposed to meet the social preferences and challenges of the day. Secondly, this entails assumptions about political economy, and the ability of democratic processes to significantly intervene in the processes and practices of corporate law and finance in ways which put them to the service of social prerogatives. Thirdly, it entails assumptions about the normative role of legal theory, and the idea that the prevailing conceptualizations of the corporation in the academy, as well as legal and policy circles, drive the development of corporate law and governance towards socially desirable models.

This critical survey sets out why these assumptions are problematic and argues that developments in the critical literature point towards deep pathologies in private law and corporate law which pull in the opposite direction to the aspirations of legal reformists. By adopting the perspective of labour, it shows how the core debates within the fields of corporate law, between 'entity', 'contractarian' and 'stakeholder' debates are overstated and have largely served to obscure the class relations of corporate capitalism, revealing a normative preference for the dominance of capital owners over production. The various ways in which these debates have framed the property relations of the corporation, and the firm/market distinction, fail to capture the patterns of exploitation which characterize the contemporary corporate economy. Conversely, Marxist perspectives explain the persistence of disparities between capital owners and workers but remain stuck in a production/circulation binary which struggles to capture the complex character of corporate property relations. Recent scholarship in Law and Political Economy (LPE), in particular the contributions of Katherina Pistor, is more promising, shedding light on the complex relational nature of the abstract property forms of the modern corporation. What Pistor brings out is twofold; firstly, the critical role of private law rules in the core 'modules' which underpin capital: contract, property, corporate and insolvency law most prominently. Secondly, the relative autonomy with which elites are able to utilize these rules to enhance and protect their wealth. However, a more thoroughgoing engagement with class relations and the perspective of labour is needed. Adopting the perspective of labour sheds light on the legal structuring power of private law as a fundamental dimension of the contemporary crisis of labour law and workers' rights in the face of corporate power. This indicates a fruitful trajectory for future research, exploring the potential for workers and unions to contest the code of capital.

Section II outlines the ways in which the 'entity', 'contractarian', and 'stakeholder' perspectives conceptualize the property relations of the corporation and the extent of the 'externalization' of the shareholder. It is argued that these theories rewrite the property relations of the corporation as managerial interest intermediation, contractual voluntarism, or stakeholder 'property' rights, respectively. Section III places these theories in historical perspective. It argues that the 'entity' perspective overstates the correspondence between the legal form of the corporation and the economic form of the firm. It is argued that contra the entity theory, the corporation has long denoted a legal not economic form. Contra the contractarian view, this legal form is a powerful social ordering device. In both cases, the abstract legal forms of contract and the corporate entity are presented in ways which mask rather than reveal the economic power of corporate and financial actors. These abstractions are demonstrated, drawing on analysis of the disparity between the 'epistemic order' of law and legal theory and the 'social order' of contemporary financialized capitalism (Birch, 2016). Section IV introduces the perspective of labour, and labour law, as the paradigmatic example of the gap between the formal categories of private law and real social relations. It is argued that the legal relations of the corporation must be analyzed in terms of the form of rights in liberal law, through which private law rights of property confer autonomy on the rights holder, to which statutory and contractual forms of regulation can only respond in a limited way. The argument is illustrated with examples of the problems corporate forms of ordering present for collective bargaining. It is argued that Marx's understanding of capital as relational is needed to understand the property relations of the corporation, but that both Marxist critique, and labour law's regulatory function, remain trapped in the sphere of production and the legal imaginary of the 'entity' perspective, missing the fragmented character of contemporary relations of exploitation beyond the firm. Section V brings in perspectives from 'law and political economy' (LPE) analysis. The work of Katherina Pistor is shown to provide the tools for understanding the political and instrumental nature of private law, and the relative autonomy of elites to deploy the basic rules of private law—including the corporate entity—to structure assets in ways which enhance and protect their wealth, and shift risk and losses onto others. The class dimensions of the 'code of capital', which Pistor disregards are discussed as a crucial dimension of this in need of further research. It is suggested that a more fruitful engagement by Marxist analysis with the 'code of capital' also requires a shift in focus from the production/circulation binary to economic 'coordination', and 'coordination rights' (as suggested by Ulysse Lojkine) which is discussed as an adjunct of legal coding analysis. Section VI concludes, with reflections on the prospects for reform of the corporation.

II. ENTITY OR CONTRACT: AN OVERSTATED DEBATE

Academic debates on the nature of the corporation have been dominated by two broad bodies of theory. The 'entity' theory develops a legal institutionalist approach, understanding corporate personhood as the legal embodiment of the socio-economic reality of the business firm (Berle, 1947). This strand of thought emphasises the role of the state in granting the legal privileges or 'concessions' of incorporation (Dodd, 1932) and affords a clear role for public prerogatives in the internal governance of the firm (Berle, 1959). The 'contractarian' theory, associated with the US 'law and economics' movement which emerged in the 1970s, emphasises functional, private, contractual logics in the emergence of the corporate form, and the efficiency benefits of shareholder ownership and capital markets as modes of governance (Jensen & Meckling, 1976). A third body of work, the 'stakeholder' theory, emerged from the contractarian approach, but with an emphasis on the relational dimensions of contracts and the contributions of all constituents of the firm to efficient and profitable production (Blair & Stout, 1999).

These debates have been concerned with the extent of shareholder property rights and decisional authority within the firm, the degree of autonomy of corporate management from shareholder 'owners', and the legitimacy of non-shareholding parties having a say in corporate decision making. These issues arise from the peculiar nature of the share as a property form tied to the corporate legal person. During the 19th century, in English law, the corporate entity was conceptualized as a legal shorthand for the 'aggregation' of the shareholder members of a Joint Stock Company (JSC) (Ireland, 1996). The original legal form of the share was that of an equitable interest in a company's assets, implying an identification between a company and its members

(Ireland, 1996). Economic developments in the form of the growth of large JSC's and the development of liquid markets for shares from the 1830s onwards were facilitated by the legal reconceptualization of the share, transforming it from a direct interest in the company's assets into a legal object of property in its own right. The new form of 'intangible share capital' opened a legal space between the company as asset owner and the shareholder as share owner (Ireland, 1999). In tandem with this process, a series of company law statutes extended access to incorporation rights and limited liability. General limited liability shifted the recourse of company creditors away from shareholders assets and towards the company as a separate, property-owning entity, facilitating reduced shareholder supervision and decision making within the company, diversification of holdings, and increasingly large and liquid share markets (Ireland *et al.*, 1987).

It is this process of the 'externalization' of the shareholder which underpinned the development of entity theory perspectives in the Anglo-American world from the early 20th century. The shift of the capitalist owner from direct oversight of production to a rentier position 'outside' the firm led to claims that the corporate form reflected a transformation of capitalist property relations, opening up the firm as a social institution through the externalization of the shareholder. Berle argued that the nature of shareholder ownership had been transformed by the emergence of the widely held public corporation. Lacking effective managerial control, and free to exchange their shares for cash, shareholders had opted for liquidity rather than control (Berle, 1959). Berle claimed that the exercise of corporate power had been separated from the underlying property rights of the nominal owners, opening up a 'separation of ownership and control' which empowered a new technocratic managerial class to make corporate decisions in the broad public interest (Berle, 1959). This managerial autonomy, and the replacement of capitalist ownership relations within the firm by a corporate bureaucracy, was presented by 'managerialist' theorists as transcending the basis for class conflict in production (De Vroey, 1975).

In contrast to Berle's cautious promotion of public prerogatives in corporate management, scholars in the US law and economics tradition, alongside neoliberal economists such as Milton Friedman, decried the dangers of allowing managerial power to escape market discipline (Friedman, 1970). These scholars shared the empirical analysis of the 'separation thesis' but deployed a functionalist argument for strong shareholder property rights to keep corporate managers focused on profit maximization through both property incentives (stock options) and the disciplinary effects of capital markets (Jensen & Meckling, 1976). Corporate management, it was argued, was the 'agent' of the shareholder owners, and thus solely responsible to the shareholder interest in maximum returns (*ibid.*). The contractarian theorists account however, presented a radically revised view of the nature of property relations in the firm. Following Coase (1937), the contractarian theorists were concerned with the distinction between the firm and the market, and the problem posed by the existence of large vertically integrated firms for the contractual ontology of neoclassical economics. Coase had argued that the firms emerged as 'islands of conscious power' within the 'ocean of unconscious co-operation' of individual contracting in the marketplace (*ibid.,* p. 388). The boundaries of the firm marked the switch from the contractual price mechanism of the market to the status order of the firm, at the point at which the relative costs of coordination through open contracting could be reduced by the hierarchical order of the firm (*ibid.*). The contractarian theorists fiercely diverged from Coase on the hierarchical nature of the internal order of the firm. Armen Alchian and Harold Demsetz sought to redraw Coase's firm in terms of contracting equals: 'The firm...has no power of fiat, no authority, no disciplinary action any different in the slightest degree from any ordinary market contracting between any two people' (Alchian & Demsetz, 1972, p.777). The only powers to 'punish' are that of withholding future business or seeking redress in the courts for breach of contract. In this regard, it was claimed that the employer-employee relationship is no different to that of a customer and their grocer; one can 'fire' their grocer by ceasing to purchase from them or sue them for selling faulty produce (*ibid.*, p. 778). In line with this claim that the social relations of the firm reflect pure contractual voluntarism, the contractarian theorists argued the legal form of the corporation was simply a 'legal fiction . . . which serve[s] as a nexus for a set of contracting relationships among individuals'(Jensen & Meckling, 1976, p. 311). Coase's firm/market distinction, based upon the internal hierarchy of the firm, is dissolved into the corporation as *pure market interaction*. The property-based hierarchy of capitalist firms is recast as horizontal equal exchange.

This account of the relations of the firm was modified through the 'stakeholder' model of the firm. Stakeholder theorists pointed to the relational dimensions of the labour contract, in particular in relation to job security, and argued that workers and managers engaged in 'implicit' forms of contractual exchange, which secured reciprocal benefits such as additional effort and firm specific skills specialization by workers in exchange for implicit guarantees of job progression and continuity of employment (O'Connor, 1990; Stone, 2019). Such implicit contracts, unenforceable at common law may require statutory alterations to corporate governance arrangements to protect the value thus generated (O'Connor, 1990). The shareholder centric contractarian model is reconceptualized as an instance of 'team production', with conflicting interests of capital and labour aligned through the 'mediating hierarchy' of the corporate board (Blair & Stout, 1999). Developments in the stakeholder theory generated yet another reconceptualization of corporate property relations, through the claim that through contractual and statutory regulation the law has steadily come to recognize worker's 'property in work' (Njoya, 2007). Simon Deakin has addressed the nature of workers claims in the firm as a type of property right through conceptualizing the corporation as 'commons' (Deakin, 2012). Deakins analysis begins with the observation that the contractarian theory is legally wrong. In law, shareholders cannot be the corporation's 'owners', since the corporation is a legal person and cannot be owned. This gives rise to the troubling idea that the corporation is 'ownerless' (*ibid.*). Instead, Deakin argues, rights are constituted through 'multiple, overlapping property-type claims' at the level of the business enterprise or firm (Deakin, 2012, p. 367). The corporation therefore is reconceptualized as a 'commons'; a 'shared resource whose sustainability depends upon the participation of multiple constituencies in its governance' (Njoya & Carse, 2015, p. 312). Regarding corporate law, Deakin argues that the damaging shareholder centric model of the firm is a product of the dominance of agency theory, which misconceives the nature of the property rights in the firm. This can be rebalanced through the development of new legal models of the firm which can shape its legal totality: as an outcome not only of corporate law, but employment, insolvency, competition, tort and tax law, which serve to 'adjust and reconcile' the multiple property-type claims (Deakin, 2012, p. 367). From this perspective, the development of statutory mechanisms to secure workers 'implicit' contracts have the effect of conferring 'property in work' through their attachment to the corporate asset pool (Deakin, 2013, p. 137; Njoya & Carse, 2015).

The power conferred upon capital owners within production is recast by the entity, contractarian and stakeholder theories thus: as being *fractured* by the corporate entity and the separation of ownership and control, *dissolved* within relations of pure contractual voluntarism, or *extended* to all parties through stakeholders' enjoyment of 'property-like' claims. This persistent tendency of theorists of the corporation to *write away* capitalist property relations, however, appear dubious when placed in concrete historical context.

III. THE SOCIAL ORDER AND THE EPISTEMIC ORDER

These theoretical depictions of the social relations of the corporation raise a number of problems concerning the relationship between law, legal theory, and economic reality. This section develops a critique of the claims of the entity and contractarian theories regarding the nature of corporate property relations by placing them in historical perspective. It argues that contra the entity theory, the corporation has long denoted a legal not economic form and, contra the Law and Economics view, this legal form is a powerful social ordering device. It is argued that, in both cases, the abstract legal forms of 'contract' and the 'corporate legal person' have been deployed in ways which masks rather than reveals the economic power of corporate elites.

One of the core claims of the entity theory is that legal concepts correspond to the social and economic objects that law seeks to explain. For example, Berle argued that corporate law must develop a 'theory of enterprise entity' in order to capture the socio-economic reality of the business firm to which it applies. He critiqued the proliferation of multiple corporate 'paper personalities' within the singular business firm for diverging from the 'original conception of the corporation...built around a sovereign grant of certain attributes of personality to a definable group, engaged in an enterprise' (Berle, 1947, p. 344). These 'paper personalities' should be set aside and the courts should reconstruct the 'single enterprise' out of the assets and liabilities of the multiple entities where they are 'owned . . . operated and maintained' as such (Berle, 1947, pp. 344–45). Other entity theorists such as British statesman Harold Laski argued similarly 'The entities the law must recognize are those which act as such, for to act in unified fashion is . . . to act as a corporation'.(Laski, 1916, p. 422).

Yet in most jurisdictions, the corporate entity has long outgrown any correspondence to any specific economic form of organization. The economic case for the ‘separation thesis’ rests on a particular type of firm; the large, vertically integrated, publicly quoted corporation. Yet the core conceptual framework of company law has long been applied to more diverse forms. The basic conceptual structure of company law which facilitated the emergence of the JSC has changed little over time, despite its application to radically different economic forms, such as small business concerns where the company and its owner are to all intents and purposes the same, and multi-entity corporate groups and multi-national companies.[1] The conditions under which firms can incorporate have become progressively more liberal almost everywhere (Deakin, 2017, p. 1514). The company does not need to correspond with any particular organizational structures to incorporate (*ibid*.,). The incorporated ‘company’ no longer denotes an economic form, but merely a legal one (Ireland, 1996, p. 45).

Indeed, the ‘separation thesis’ of Berle and Means itself reflected not legal but economic developments. The relative autonomy of US corporate managers they observed was rooted in patterns of increasingly dispersed shareholding and deep and liquid markets from the 1920s onwards, and the relatively weak position of finance over production in the post-war period arising from the restrictions and regulation of international capital flows under the Bretton Woods system which weakened the power of finance and financial property owners (Ireland, 2012, p. 16). Whilst in some European countries such as Germany, the apparatus of corporate decision making was deeply overhauled in the postwar period, American and English corporate law were marked by relative continuity. What changed dramatically in this period was the structure of shareholder capital itself, unlocking the power of the ‘residual control rights’ of the shareholder. Since the late 1960s shareholding patterns concentrated significantly as institutional investors became the dominant actors, accounting for over 80% of UK public companies aggregate ownership base by 2017 (Moore & Petrin, 2017, p. 103). The period of concentration of control of financial markets over production is associated with a shift towards ‘shareholder capitalism’ and the associated notion of processes of ‘financialization’ understood, at the firm level, as an increase in the power of investors and capital markets to influence decision making and governance arrangements within firms (Gospel & Pendleton, 2006, p. 7). The reforms recommended by the agency theory to align the managerial and shareholder interests and increase exposure to takeovers and market discipline became widely adopted (Froud *et al*., 2006). These transformations were associated with the capture of increasing proportions of company surpluses by shareholders and senior executives and financial managers through dividends, rising share prices, fees, stock options, and performance related pay (Jacoby, 2008). Emergent financial actors such as hedge funds intensified the exposure of companies to the ‘market for corporate control’ through intensive activism on minority holdings (*ibid*.).

[1] Ireland (1999) p.44

This 'shareholder value' corporate model is widely understood to be an outcome of agency theory's impact upon corporate governance regulation and corporate management practice (Robé, 2020, p. 316). Yet this perspective neglects the material dimension of the transformations since the late 1970s. Financialization is driven by two core trends: the expanding liquidity of capital markets and the rise of concentrated power of investment funds within these markets (Aglietta & Reberioux, 2005, p. 1). Neither of these phenomena are traceable to theories of corporate governance. As Sanford Jacoby has argued, agency theory merely provided a justification for the emergent dominant practices of the finance over production; 'It offered an economic rationale for hostile bids, for stock options, and for other governance changes intended to raise shareholder influence'(Jacoby, 2008, p. 32). Major institutional investors were able to shape corporate law and governance mechanisms, embedding agency theory and the 'shareholder value' principle in corporate governance codes, which became a kind of 'constitution for the market after Reagan and Thatcher' (Froud *et al.*, 2006, p. 5). However, in contrast to the core structures of corporate law, these reforms appear relatively superficial. Indeed, as Paddy Ireland has argued, the period of financialization has simply allowed shareholders to exercise the rights they already possessed *more effectively* (Ireland, 2012, p. 14).

From this perspective, the contributions of theory appear far less explanatory and far more normative: the contractarian theory, and the separation thesis of Berle and Means appear as an alibi for the growing power of finance. Indeed, given the intensification of investor power, reducing shareholders 'agency costs' would appear to be an unlikely priority for corporate governance reform. Such a priority is only possible through an ontology that negates the impact of concentrations of economic *power* through corporate forms of organization.

This is rooted in neoclassical economics understanding of property rights. For the contractarian theory (as for neoclassical economics), property rights are held to emerge through processes of rational contracting. Mainstream economic theory claims that contracting behavior in markets call property rights into existence, as people contract to set up institutions enforcing entitlements to resources in order to facilitate investment, production and exchange (Getzler, 1996). The private contractual mechanism is the method for the specification of property rights and associated rights of control in production, and the determination of the costs and rewards thereby produced (Jensen & Meckling, 1976, p. 307). As such, property rights merely facilitate the contractual bargains of parties around the corporate 'nexus of contracts'. This view completely ignores the ways in which the corporation enables the concentration of property rights. As Jean Philippe Robé has argued, the emergence of the shareholder corporation has had radical implications for the function of property rights in liberal societies. The ideological framework of liberalism justified strong private property rights as mechanisms for the decentralization of property, decisional authority and power from the state to individuals (Robé, 2020). The industrial revolution, and the legal revolution which accompanied it gave rise to the shareholder corporation and the concentration of property rights in large enterprises, flipping the effect of strong property rights from decentralization to concentration: the corporate legal person enabled the concentration of property rights to an almost unlimited degree (Robé, 2020, p. 25). The rise of global mega-firms, and patterns of concentration of ownership, have the effect of a double concentration through patterns of 'common ownership' where a small group of the largest asset management companies collectively constitute the largest shareholder in most of world's largest publicly traded firms (Azar *et al.*, 2018). Yet paradoxically, the period of neoliberalism is understood as being defined by 'individualism' and a 'market' driven social order, reflected in the dominant theory of the corporation as pure contractual relations. Kean Birch has engaged with this dissonance by distinguishing the 'epistemic order'; specific economic, legal and managerial claims about the role of business in particular periods of capitalist development, from the 'social order'; the actual emergence and dominance of business formations (Birch, 2016, p. 114). Neoliberalism's 'epistemic order' is contractarian. This demonstrates the importance of law, and particularly contract law to neoliberalism. The neoliberal social order—despite claims of the powers of the market—has entailed the legitimation of corporate monopoly and concentrations of market power whether this distorts the market or not (Birch, 2016, p. 107; Paul, 2019; Vaheesan, 2020). This contradiction hinges directly upon framings of the corporation. As such, reconstructing the corporation in terms of pure market exchange between individuals was crucial to mediating neoliberalism's epistemic and social order.

Therefore, both the contractarian and entity theories conceal normative preferences for particular modes of social hierarchy. Berle and Means 'separation thesis' obscured capitalist property relations through a reified managerial class serving the public interest. The 'law and economics' movement sought, via Coase's concept of 'transaction costs', to secure both the individualist ontology of neoclassical economics and the political claims of neoliberalism (the free individual in the marketplace), by rewriting corporate hierarchies as free contract. So, whilst the corporate legal person cannot be found to correspond to any specific form of economic organization or 'firm', nor can it be written down as a legal fiction facilitating the actions of individuals, given its critical role in enabling a vast concentration of property rights over production. How can this apparent 'gap' between law and social relations be understood, given law's centrality to contemporary social, economic and political orders? The next section turns to the labour relationship, Marxist analysis, and labour law as the paradigmatic example of the gap between formal legal categories and social organization. From the perspective of labour, the deeply contradictory nature of the modern corporation is thrown into sharp relief.

IV. CONTRACT, PROPERTY AND ECONOMIC DOMINATION

The 'epistemic order' of the 'nexus of contracts' corporation relies heavily upon the claim, that the employment relationship is an expression of pure contractual exchange. The labour contract- as all other contracts—is understood as an exchange between equal individuals transacting in the marketplace. It is not considered to be the case that parties' choices are constrained by unequal distribution of resources in ways which have implications for freedom of contract. Yet, for scholars and practitioners of labour law, the idea of the labour relationship as being contractual in nature has always been problematic (Freedland, 2003). Labour law is distinct from other legal disciplines in that its mainstream tradition takes a critical perspective (Dukes, 2019, p. 345). Early labour law scholars recognized that the employment relationship was only formally a contractual exchange relationship, but substantively a relationship of economic domination (*ibid*.). The distinction between the formal and substantive dimensions of law links the tradition closely to Marx's critique of liberal law. Marx criticized the inherent contradiction of liberal rights forms, which both secure formal equality in the public sphere (equality under the law) whilst removing the question of substantive equality in the sphere of civil society from the ambit of politics and public law (Menke, 2020, p. 1). Under these conditions the wage-labourer is formally free to exchange his most immediate possession—his labour capacity—through contractual agreement without the complex status orientated regulations of feudal society (Boonen, 2019). Yet due to the private nature of property in capitalist society the 'free' labourer is actually compelled to sell their labor as it is the only consistent form of income, giving them little control over the terms under which they sell their labour power (Boonen, 2019). As the commodity for sale is embodied in the person selling it, the appearance of a purchase of a commodity (labour power) entails the acquisition of a right over the person solely capable of exercising it; the equal freedom enjoyed by both sides is revealed to be superficial (Menke, 2017, p. 120).

Crucially this domination is rooted in property relations and the character of property rights in liberal constitutions. As Robé has argued, property rights have a fundamental character in liberal constitutions, based upon the 'right to exclude' all others from the object of property. From this basic right to exclude flows the right to 'make the rules': the private legal authority of the property rights holder. In contrast to Deakin's theory of the corporation as commons, based upon the 'bundle of rights' theory of property, Robé argues property is 'a right as a matter of principle with "*bundles of limits*"'(Robé, 2020, p. 82). In the context of the business enterprise, property rights are the basis for decisional autonomy; the employer commands because he has property rights in the workplace, the employee obeys because he has contractually agreed to. Absent commands which are explicitly prohibited through positive law, via state backed property rights, the employer is indirectly authorized to create norms for the conduct of its business in a form of constitutionally accepted private government (Robé & Rogowski, 1997, p. 68). Crucially these powers of rule setting *do not arise through the joint exercise of freedom of contract* (Robé, 2020, p. 71). The identity of who obeys and who commands in the employment contract are derived not from the content of the contract but from who owns the assets used in the production process to which the contract pertains (*ibid.*). Property creates a fundamentally different legal position between the parties to the employment contract; those who accept work from the owner of property will have to obey the rules set by the owner of property as long as they are in compliance with the employment contract and laws: 'Property is not only inequality in terms of *wealth*; it is also inequality in terms of *legal power*' (*ibid.*, p. 70). In recognition of this gap between the formal legal order, and substantive relations of economic domination, labour law's regulatory power relies upon mechanisms which utilize the contractual form as a fulcrum for the regulation of the labour relationship through both statutory means and the deployment of workers collective power: laws abstractions are balanced by forces *outside of the law*.

However, in the context of the corporate structuring of the labour relationship, such battles play out on an uneven playing field. The legal regulation of collective bargaining exemplifies the disparity of power rooted in the form of rights, and the formalism of law. Christoph Menke has argued that legal regulation is different from the autonomy of subjective rights in the sense that the limitations imposed are *pursuant to the broad aims* of public regulation (Menke, 2017, p, 126). This places constraints on the ways in which rights claims rooted in statute intervene in property.

Hugo Sinzheimer, considered a 'founding father' of labour law, argued that by bargaining collectively, employers and unions do not enter contractual relations but 'engage in the autonomous creation of norms governing the relations of third parties' (Dukes, 2009). In this idealized, autonomous mode of bargaining (also reflected in Kahn-Freud's notion of 'collective laissez faire') the absent role of law means neither the parties to negotiation, nor its content are prescribed. Outcomes are decided by the power the parties can bring to the dispute. Where workers can exert collective power, the collective dimension of labor law challenges the autonomous rights of property in a way which cannot be said to simply reflect the existing (regulatory) order. There is nothing that is *per se* formal or contractual in worker's collective power. But the shift into *rights* claims entails a shift into contractual relations (Boonen, 2019). In the institutionalization of collective bargaining rights both the normative content of regulation and the identities of the parties must become fixed. The International Labour Organization's (ILO) principles of collective bargaining demonstrate this well. Bargaining may proceed across a broad range of subjects concerning both working conditions (working time, overtime, rest, wages etc.) and also elements of 'managerial' control (staff reductions, changing hours) which go beyond the terms of employment, yet they must be 'primarily or essentially' questions relating to conditions of employment (Gernigon *et al.*, 2000). At the same time, formalism produces certain identities—such as 'employer', or 'bargaining unit' which may be extremely disadvantageous to one side of the dispute. The ILO's principles emphasize free and voluntary negotiation, free choice of bargaining level (within any given organizational structure) and minimal intervention by the authorities (*ibid.*). These principles formalize participation rights in the collective mode of regulation. Yet this approach reproduces an economic imaginary of equal participants. In practice, workers often face the obscure decisional hierarchies of large corporate groups, or private equity firms, with no formal rights of representation. Formalism, in reducing disputes to contractual relations depoliticizes both the content of claims and the nature of the parties. Regulatory rights instruments intervene to secure processes which can contribute to substantive outcomes, but in doing so remove the substantive political content: the power of the parties and the way it is distributed. Broader questions over the way in which work is organized, the labour process itself, and its impacts upon local communities or the environment are largely out of scope (Crawford & Whyte, 2023). By contrast, the autonomy of property rights is not subject—as a matter of principle—to the 'public goals' of regulation.

The implications of complex corporate structures for collective and participatory regulation in the firm are exemplified by the case of business format franchising. The challenges franchising presents for workers' rights are well recognized. Franchising is characterized by an extensive legal architecture, deploying an array of highly restrictive contracts to 'bind subordinate units into a coherent, centrally controlled business organizations' (Callaci, 2021, p. 157). The franchisee agrees to comply with the detailed rules and regulations of the 'franchise system' lay out by the franchise agreement contract. The parent franchisors effectively control working conditions by setting contractual requirements on franchisees to implement the franchise system in its entirety, backed by threat of the termination of the franchise contract intellectual property rights of the franchisor. In this way, whilst the individual worker in franchise might have an employment relationship with the franchisee that hired them, their working conditions for the most part will be determined by the franchise system imposed by the parent franchisor. As such the franchise system breaks down and destabilises structures of labour representation (Koukiadaki & Katsaroumpas, 2017). The franchisor is not party to collective bargaining yet overdetermines the outcomes through the power to enforce the terms of the franchise agreement (Shamir, 2016). Responses to the conditions of fragmented employment exemplified by franchising, by workers and unions seeking to establish the principle of 'joint employers' face an uphill struggle in common law jurisdictions, due to judicial respect for corporate legal personality upheld as 'freedom of contract' (Njoya, 2014). As demonstrated by the literature on 'fragmentation', the splitting of the competencies of control from the formal 'employer' harms organizing and bargaining efforts (Shamir, 2016). From a collective bargaining perspective, the ability of the corporate owner to structure production using multiple legal entities is a source of power which workers organizations find hard to match. Workers seeking the optimal bargaining unit within the firm or seeking to counter the effects of fragmentation by organizing across the supply chain for example face a much steeper task.

Indeed, contemporarily labour law is understood to be in crisis because of the 'fragmentation' of the employer. The central concept of 'the employer' in labour law is rooted in bilateral contractual relations to which, most commonly, a corporate legal person is the counterparty. In conceptualizing the corporate employer as a 'unitary' actor and ascribing a coherent set of competencies and powers to the employer, labour law itself relies upon the assumptions of the 'entity' model of the corporation. The labour law concept of the employer has no direct correlation to the socio-economic concept of 'the firm', but it condenses a set of conceptions of the employer which are traceable to ideas of the economic function of the employment relationship and the firm: coordination (centralized managerial control), risk (which treats the employer as a juridical form for spreading social and economic risk) and equity (the employment unit as a space within which the equal treatment principle is observed) (Deakin, 2001, p. 83). Yet in contemporary practice this coordination function—the right, or effective ability, to control the worker and set pay, terms and conditions—has become split from the risk sharing and equity functions. The extension of employment rights based upon 'control' alone is rare in the extreme (Deakin, 2001). The contemporary employment landscape is replete with examples of extended hierarchy beyond the (single entity) firm which dispense with the 'risk-sharing' and 'equity' functions. As such, the concept of the employer misses the complex structure of control rights over production presented by contemporary corporate forms. As Prassl has noted, contemporarily the function of labour law regulation breaks down in the 'multiparty settings', such as subcontracting, private equity acquisitions, or employment decisions made within corporate groups (Prassl, 2012). The crisis of labour law must then be understood in relation to the abstract nature of the corporate employer. Yet the traditional analysis of the hierarchical power of property: both of Marx, and labour law scholarship more broadly, remains strictly within the firm. As such, the implications of corporate legal structuring are not addressed. For Marx, exchange relations in the sphere of circulation are considered to be exchanges of equal value. Competitive relations between firms are understood to drive intensification of exploitation through an endless efficiency drive which seeks to maximize the speed and intensity of the tasks performed (Selwyn, 2013). Yet the personal (and so legal) dimensions of this remain restricted to the parties to the labour relationship. The distinction between the firm as the realm of hierarchical domination, and the market as free exchange, is key. This distinction is upheld in the legal imaginary of labour law, which functions to mitigate only the immediate power imbalance between the worker and the employer.

Moving beyond this binary view entails analysis of the *relational* character of the abstract forms of corporate property, and the way they are mediated through the corporation. Paddy Ireland's historical analysis of corporate law provides such a perspective, drawing out the deep entanglement of the entity and the share. As Ireland has argued, the property form of the share ties together the fates of the 'industrial capital' of the corporation and the 'money capital' of the share. Using Marx's analysis of the emergence of 'money-capital', Ireland shows how the share as a form of credit facilitated the emergence of the distinct functions of the 'money capitalists'—passive rentier shareholders—and 'industrial capitalists' directly involved in production (Ireland *et al.*, 1987). The share as money capital enables capitalists to withdraw from production which becomes dominated by managers, to the sphere of circulation—the credit system, upon which capital accumulation is dependant (*ibid.*, pp. 154–55). Yet this withdrawal from production does not open up an autonomous space for the firm to function free from proprietary interests. The capitalization of the share determines its price based not upon the value of the company assets but by the profits generated by them, and the associated wage labor-capital struggle over surplus value (*ibid.*, p. 157). As such, despite its status as saleable property in its own right the contingent and variable nature of the return on the share links it closely to the function of the industrial capital of the company and the returns on its assets (*ibid.*, p. 160). For Ireland then both the reified company and the autonomous share-as-property are phenomenal forms which are traceable to struggles both between wage labour and capital within production, and between fractions of industrial and money capital (*ibid.*). The apparent autonomy of the corporate entity conceals the fact that it is 'but the personification of industrial capital and an entity subject to its relentless logic' (Ireland, 1996, p. 69). From this perspective, 'agency problems' are but a subset of the wider class dynamic of the corporation. As Carrigan has shown, the history of company law may be animated by conflict between directors and shareholders, but this conflict was circumscribed by a unified commitment to upholding property rights as the basis for decisional authority in corporate governance, the exclusion of other stakeholders from participation rights, and resistance to prescriptive corporate law regulation (Carrigan, 2011, p. 36).

What Marxist analysis has to offer here is an understanding of capital as *relational*. Ireland's perspective points to the need to understand the development of corporate law from the perspective of the needs of finance: of the drive of money capital to accumulate itself, securing investor interests in relation to those of workers. It also indicates that the development of legal institutions must be understood within the context of the process of *capital accumulation*: the dynamics of which are understood to drive social phenomena and particular capitalist forms. However, in treating law as the purely 'phenomenal' form of class formations this analysis risks missing the constitutive power of law in shaping class relations. The account of the corporate entity as driven by the impersonal logic of money capital also misses the concentrated power of some corporate actors, the extent of agency in the design of organizational forms, and the way they are secured by careful application of legal rules. This analysis is also limited in understanding the proliferating forms of hierarchy 'beyond the firm' through supply chains, or networked, franchised or outsourced forms of employment: relations which formally exist in the sphere of circulation. The abstract forms of corporate property underpinning such arrangements are deeply dependent upon law, and legal innovation in their development. This lens is also limited in conceptualizing relations of exploitation which go beyond the labor relationship: whether through abuses of market power, or environmental destruction. A deeper analysis of the ways in which property is structured in law is needed.

V. CODING THE CORPORATION

Recent years have seen the development of the 'Law and Political Economy' (LPE) movement, primarily in the US but with increasing reach in the UK and elsewhere. LPE is a broad interdisciplinary field of study which brings together critical approaches to law with the critical political economy tradition. Diverse perspectives are brought together through a central emphasis upon power relations and dynamics of inequality in the political and juridical (re)production of economic outcomes (Wilkinson & Lokdam, 2018). Building on the traditions of legal realism and critical legal studies, one of the key contributions of LPE to economic analysis is the emphasis on the political character of private law. Legal realists have long emphasized the social and political nature of property rights, and the role of law in their creation (Kennedy, 1991). Historically, in holding, a given 'thing' can be an object of private property, whether land, a corporation, or a brand name, has entailed the creation of new sources of economic wealth or power (Cohen, 1935, p. 816). Where mainstream economics defines itself as the study of 'scarcity' (Robbins, 2007, p. 15) this legal dimension indicates that scarcity may be created by privatizing common resources. In Marx's account of 'primitive accumulation' the origins of the private property regime underlying the capitalist order was instantiated through the acquisition of common resources by wealthy landowners. In stark contrast to notions of free contract, property rights were instantiated through the violent enclosures of common land and the removal of the rights of tenant farmers. Katherina Pistor has shown how this process, through which the concepts of the common law were created by and for the ruling classes, has continued to this day (Pistor, 2019).

Pistor doesn't focus specifically upon the corporation or the firm, but rather the legal underpinnings of assets, and wealth in general. Wealth is generated and secured by the strategic application of legal rules, drawing from the core "modules of law": property, contract, corporate, collateral, trust and bankruptcy law. These have, for centuries, been strategically applied by the solicitors of the wealthy to legally 'code' or create assets in order to maximize and protect wealth (Pistor, 2019). Pistor argues that capital is coded in law. Capital is understood as a "legal property assigned a pecuniary value in expectation of a likely future pecuniary income" (*ibid.*, p. 12). Citing the old institutionalist economists Veblen and Commons, she shows how capital as 'an asset's income yielding capacity' developed legally in the US, with the late 19th century courts shifting from a principle of property as the right of exclusion (of an object), to the right of an asset holder to future revenues (*ibid.*). This analysis closely reflects Paddy Ireland's account of the emergence of the abstract property form of the share in Britain. This legal coding can be 'grafted onto' ever new assets as wealth owners seek new ways to protect and enhance their wealth (*ibid.*, p. 5). Through practices of 'coding' elites play a significant role in shaping the private law rules which constitute the playing field of economic activity: with major distributional outcomes (Pistor, 2019). Pistor distinguishes two broad functions of company lawyers, one as legal 'engineers' tasked with legally *securing* the business structure according to the desires of entrepreneurs. The lawyer as engineer navigates regulations and structures transactions to minimize costs; cloaking new ideas in the existing legal 'code' (*ibid.*, p. 163). The 'Master coders' however go beyond this function, combining the raw materials of private law to create new legal devices; new ways of legally *coding* assets in ways which are beneficial for their owners (*ibid.*, pp. 164–65). For example, in Pistor's account the basic features of corporate law enable asset owners to shift risk and losses onto others (contractual or tort creditors, and the state) on a huge scale. Giving the example of Lehman Brothers, Pistor shows how the shareholders of the lead firm made enormous profits through structuring assets across a chain of 209 subsidiary companies, each mandated to return profits to the lead firm. The structure relied upon the 'durability' characteristic of the corporate entity arising from the principle of shareholder lock-in (parties cannot unilaterally withdraw capital). The carefully parcelled up assets nominally reduced creditor monitoring costs, enabling shareholders to effectively leverage assets to raise cheap debt finance to service shareholder returns. The Lehman parent also guaranteed the debts of the underlying companies. Yet when the crisis hit, the total assets of the parent were revealed to be no more than the total assets of the 209 heavily indebted shell companies. Whilst creditors were wiped out, the wealth extracted by shareholders of the parent remained protected through limited liability (*ibid.*, pp. 48–51). For Pistor, this 'capital minting' function is central to the modern function of corporate law, which is "no longer primarily a vehicle for producing goods or offering services but has been transformed into a virtual capital mint" (*ibid.*, p. 48).

In contrast to Robé's account, for Pistor the question of ownership takes on a less fundamental character. Property rights are a crucial part of the code, but what matters is the combination of legal forms to maximize gains and shift losses elsewhere. This diverges from Robé's account which emphasizes property as the fundamental right to exclude. For Robé, shareholders do not have property rights due to the location of the 'right to exclude' within the prerogative of the corporate legal person. Yet Robé recognizes that wealth creation in contemporary capitalism rooted in the complex structuring of property not as possession, but as 'the right to'. He points out that most branches of economic theory fail to properly conceptualize the legal dimensions of property rights at all. The four major economic schools of thought (classical, neoclassical, Keynesian and New Institutionalist Economics) confuse property with possession. But this is a reductive notion of property which fails to capture its relational dimensions: property rights are not 'things', nor rights over things, but rights against *others* regarding a thing. The possessive view assumes that only one person can possess an object of property, but property rights as 'having the right to' is far more complex and enables the complex structuring of property as intangibles and securities, which grant rights regarding an object of property *under certain conditions* (Robé, 2011, pp. 47–48). This splitting of property and possession is exemplified in the range of corporate securities and intangible asset forms; of equity and debt instruments, and other intangible assets such as the franchise system. In each the owners of the abstract property form contribute capital for use by another, subject to a range of rights to intervene, or withdraw, the asset under given circumstances. Shareholders may only fully 'own' their shares, but under certain conditions they have the right to radically restructure, fragment and dismember, or even wind up, the entire enterprise. This is the complex structuring of property as rights of exclusion: having the 'the right to' replace the board, to spin off the property assets, to trigger insolvency proceedings, to withdraw the franchise contract. Having 'the right to' is the legal basis for capital. It enables the transformation of a thing into an asset, into something which can be traded, or credit can be secured against. At the same time, operationalizing 'the right to' is dependent not only upon the structure of rights but the degree of economic control. This is consistent with Marxist analysis which has long held that capitalist ownership can only be understood as having both an economic and legal character. Following Pistor, this is reflected in the basic logic of the code of capital: the deployment of legal expertise by elites to secure and maximize wealth.

The significance of the legal dimension of capital is greatly enhanced when considered from the perspective of labour, which Pistor largely ignores. Perhaps surprisingly—given the central thesis that wealthy elites have consistently controlled legal processes to support their own enrichment—the question of class and the capital–labour relationship is absent from the *Code of Capital*. The analysis remains firmly embedded in the sphere of circulation—capital as a tradeable asset, as derivatives, trusts and loans—rather than the sphere of production. Whilst recognizing that the legal coding of the corporation can confer privileges on shareholders vis a vis workers 'and other contractual creditors', the role of labour in generating the value of the multiple forms of capital in circulation is rejected (Pistor, 2019, p. 10). In fact, Pistor argues the 'code of capital' is available to workers themselves; such as the freelancer who can *capitalize* their labor through establishing a corporate entity and receiving dividends instead of a salary (*ibid*., p. 11). This is revealing; the definition of 'capital' as a strictly *legal* property comes at the cost of understanding it as a *social relation*. Yet the freelancer will likely *still only have their labour to sell,* beneficial tax arrangements or not. In contrast to the owners of intangible capital, workers cannot separate themselves from their labour, and package it up to on-sell on capital markets. The very nature of labour commodification is the granting of the 'right to' control one's own labour, to another. There is no limited liability for workers facing the labour market: if you lose your job, you may shortly thereafter lose everything else (Bryan *et al.*, 2009). The code of capital opens a basic asymmetry with workers, enabling the separation of 'owners' and their property: which workers cannot reproduce.

What Pistor's analysis offers is a way into understanding the relational dimensions of the contemporary forms of corporate property, and the tools to expose and unpick the role of law in securing relations of exploitation. For example, the exposure of workers to private equity takeovers, job loss through restructures, and the risk of insolvency and liquidation are closely linked to the risk tolerances of private equity firms, which are in turn associated with their liability protections, and ability to 'mint capital' through leveraging corporate assets. The use of complex corporate structures to hive off valuable assets from the productive enterprise within which workers are employed is also a key feature of private equity model and had major implications for employment conditions in key sectors such as care (Crawford, 2023). The process of expansion of private equity ownership has in turn been linked to the proliferation of new credit instruments such as 'covenant lite' loans and high yield bonds which have transformed issuer-creditor relations, eroding the function of statutory provisions for insolvency (*ibid.*). Similarly, the franchise system has developed as a particular kind of intellectual property which directly commodifies the labor process. The expansion of franchising has in turn been tied to innovative practices of 'Whole Business Securitization' which enable revenue streams from franchise contracts to be packaged up as financial assets in their own right. These forms of abstract property enable financialized ownership by companies who benefit from the tight uniformity imposed upon the labour process yet need never 'employ' any workers (Crawford, 2023). The legal developments underpinning these processes have real impacts for workers, yet have occurred in a rarefied space outside of the scope of workers' rights and unions' attention (Crawford, 2023).

Indeed, they would appear to have occurred outside of the sphere of production altogether. As described above, the problems of labour law and regulation are increasingly generated beyond the immediate relations of production. The command competencies of the 'owner' are increasingly diffused across multiple actors and entities and differing forms of legal and economic relations. As Lojkine argues, contemporary corporate forms problematize the classic Marxian understanding of the labour relationship, and the analytical distinction between the spheres of production and circulation (Lojkine, 2021). Lojkine shows how Marx's framing of the sphere of production as being defined by the wage relation and surplus value appropriation, in contrast to the sphere of circulation defined by commercial relations of commodity exchange understood as exchange *of equal values*, becomes problematic under contemporary conditions. The problem, simply put, is this: in a supply chain which is the 'real' wage relation: between the small firm owner and the worker (implying an exchange of equal values between supplier and lead firm), or between the lead firm and the worker (implying the small firm owner is not accumulating capital)? If exploitation and the creation of surplus value occur in both spheres, then the distinction itself is flawed. Seeking to identify the 'real' labour relationship under these circumstances' risks obscuring the ways in which relations of exploitation are structured across the economy (Lojkine, 2021). For Lojkine, both historically and contemporarily capitalism has entailed the transfer of surplus value as much through credit and commercial relations as through the wage relation, entailing exploitation in both production and circulation. He suggests that preserving the central insight developed by Marx: that under capitalism exploitation pervades formally equal relations of exchange, requires a shift in focus from the primacy of production in capitalist exploitation to the concept of coordination. Lojkine (drawing on the work of Paul) argues that exploitation can be better understood through analysis of capitalism as a mode of coordination underpinned by 'coordination rights', a concept hitherto dominated by liberal economic thought (Lojkine, 2021). This approach is critical for the shareholder 'ownership' debate as well. It is not the question of the real 'owner' but rather, the complex structuring of rights based upon ownership of capital. The effects of the legal coding of capital are apparent in the manifold crises of labour regulation. Bringing together Pistor's analysis with analysis of coordination rights can shed light on the ways in which law shapes relations of hierarchy and exploitation across the economy.

VI. LEGAL REFORMISM AND SOCIAL RELATIONS

The implication of Pistor's analysis is problematic for the idea, as described in the introduction, that corporate law reform will enable the full externalization of the shareholder, enabling corporate management to pursue more broadly based social objectives and responsibilities. Pistor shows that the development of private law has a highly instrumental character. Pistor's legal coding largely takes place in private solicitor's offices, with only occasional airing in court or parliaments (Pistor, 2019, p. 19). At the same time the state is a crucial actor for Pistor, as ultimately legal claims must be upheld. Coding practices are dependent upon the backing of the state's coercive law powers, subject only to the political question of which private claims to property governments have been willing to underwrite (*ibid.*). Typically, however, this state function kicks in long after practices—and new asset forms—have become widespread, and the stakes of not backing asset owners have risen significantly. The state bailouts following the 2008 crisis are only one example in a long history of this pattern. This contradicts the underlying assumptions of both the entity and contractarian theorists regarding legal development. In contrast to the entity theory the law does not develop as a process which simply proceeds towards the recognition and description of 'social facts' such as the 'real' corporate entity as an emergent social form of productive organization. Dodd's assumption that the law followed the institutionalist logic of the corporate 'real entity' was based in the assumption that legal development follows public preferences. Dodd held that 'public opinion . . . which ultimately makes law' was shifting towards perspective of corporation as an institution which has a social service as well as profit making function (Dodd, 1932, p. 1148). The assumption that legal institutions embody public preferences is explicitly replicated (albeit in economistic terms) by the contractarian theory, which holds that corporate law has developed as the best way of meeting individual preferences through which the social good is expressed. The evolution of private law expresses the *de facto* public interest through securing patterns of rational, efficient free contracting. Pistor however argues that private law has an autonomous character that enables private forms of ordering to *diverge* from basic social norms. Private rights become increasingly dislodged from the normative preferences of the citizenry (Pistor, 2019, p. 208). This is possible because of the difference between the *form* of private law rights as open ended tools for the creation of private orders, and the form of statutory regulation as a limited set of prohibitions. The possibility of interventions in the public interest also has a temporal dimension. The mobilization of public anger and political will to intervene in obscure and complex areas of corporate law and finance typically come at a point of crisis in which the options are limited.

The perspective of labor demonstrates well the implications of the autonomy of private law for the legal ontology of the corporation. Ongoing developments in the legal structuring of the labor relationship are highly problematic for ideas that the autonomous character of corporate law facilitates the emergence of the corporate 'commons'. Contemporary trends appear to achieve the opposite, with high value assets such as franchise property legally packaged up and protected from workers claims. At the same time formal rights of collective bargaining—perhaps the best example of collective disposal over a common asset pool—are progressively hollowed out through corporate legal innovations. The assumptions underpinning the legal reformist response to the problems of corporate law are flawed. If private law develops not according to broad public preferences, or ideal type theoretical constructs, but instead according to the logic of economic power of elites, then it is unlikely that the corporation can be easily repurposed for the social good. However, if the agency of the legal 'coders' of capital is understood as tied to social relations and the labour relationship, then any challenge to its excesses and harms must come from there.

REFERENCES

Aglietta, M. & Reberioux, A. (2005) *Corporate Governance Adrift: A Critique of Shareholder Value*. Cheltenham: Edward Elgar, https://doi.org/10.4337/9781845425470.

Alchian, A. & Demsetz, H. (1972) Production, information costs, and economic organization. *American Economic Review*, **62**, 777–795.

Azar, J., Schmalz, M.C. & Tecu, I. (2018) Anti-competitive effects of common ownership. *Journal of Finance*, **73**, 1513–1565. https://doi.org/10.1111/jofi.12698.

Berle, A.A. (1947) The theory of Enterprise entity. *Columbia Law Review*, **47**, 343–358. https://doi.org/10.2307/1118398.

Berle, A.A. (1959) *Power without Property: A New Development in American Political Economy*. Brace: Harcourt.

Birch, K. (2016) Market vs. Contract? The implications of contractual theories of corporate governance to the analysis of neoliberalism. *Ephemera*, **16**, 107–133.

Blair, M. & Stout, L. (1999) Team production theory of corporate law. *Journal of Corporate Law*, **85**, 247. https://doi.org/10.2307/1073662.

Boonen, C. (2019) Limits to the politics of subjective rights: Reading Marx after Lefort. *Law and Critique*, **30**, 179–199. https://doi.org/10.1007/s10978-019-09238-7.

Bryan, D., Randy, M. & Rafferty, M. (2009) Financialization and Marx: Giving labor and capital a financial makeover. *Review of Radical Political Economics*, **41**, 458–472. https://doi.org/10.1177/0486613409341368.

Callaci, B. (2021) Control without responsibility: The legal creation of franchising, 1960-1980. *Enterprise and Society*, **22**, 156–182. https://doi.org/10.1017/eso.2019.58.

Carrigan, F. (2011) The parallel historical path of company and labour law. *Liverpool Law Review.*, **32**, 19–48. https://doi.org/10.1007/s10991-011-9088-y.

Coase, R. (1937) The nature of the firm. *Economica*, **4**, 386–405. https://doi.org/10.1111/j.1468-0335.1937.tb00002.x.

Cohen, F. (1935) Transcendental nonsense and the functional approach. *Columbia Law Review*, **35**, 809–849. https://doi.org/10.2307/1116300.

Crawford, B. (2023) *Workers' rights vs 'owners' rights: how structures of corporate law affect the realization of labour rights*. PhD thesis. Liverpool: University of Liverpool Repository, https://livrepository.liverpool.ac.uk/3176684/.

Crawford, B. & Whyte, D. (2023) *Working for Climate Justice: Trade Unions in the Front Line against Climate Change*. Institute of Employment Rights: Liverpool, https://doi.org/10.2139/ssrn.4709316.

De Vroey, M. (1975) PART I: The corporation and the labor process: The separation of ownership and control in large corporations. *Review of Radical Political Economics*, **7**, 1–10. https://doi.org/10.1177/048661347500700201.

Deakin, S. (2001) The changing concept of the 'employer' in labour law. *Industrial Law Journal*, **30**, 72–84. https://doi.org/10.1093/ilj/30.1.72.

Deakin, S. (2012) The corporation as commons: Rethinking property rights, governance and sustainability in the business enterprise. *Queens Law Journal* **37**, 339–381.

Deakin, S. (2013) What exactly is happening to the contract of employment? Reflections on mark Freedland and Nicola Kountouris's legal construction of personal work relations. *Jerusalem Review of Legal Studies*, **7**, 135–144. https://doi.org/10.1093/jrls/jlt018.

Deakin, S. (2017) Tony Lawson's theory of the corporation: Towards a social ontology of law. *Cambridge Journal of Economics*, **41**, 1505–1523. https://doi.org/10.1093/cje/bex044.

Dodd, E.M. (1932) For whom are corporate managers trustees? *Harvard Law Review*, **45**, 1145. https://doi.org/10.2307/1331697.

Dukes, R. (2009) Otto Kahn-Freund and collective laissez-faire: An edifice without a keystone? *Modern Law Review*, **72**, 220–246. https://doi.org/10.1111/j.1468-2230.2009.00741.x.

Dukes, R. (2019) Critical Labour Law: Then and Now. *Research Handbook on Critical Legal Theory* (E Christodoulidis, R Dukes & M Goldoni, eds). Cheltenham: Edward Elgar, pp. 345–362. https://doi.org/10.4337/9781786438898.00027.

Freedland, M. (2003) *The Personal Employment Contract*. Oxford: Oxford University Press.

Friedman, M. (1970) The social responsibility of business is to increase its profits. *N. Y. Times Magazine*. *September 13th*.

Froud, J., Sukhdev, J., Leaver, A. & Williams, K. (2006) "Financialization and Strategy" in *Financialization and Strategy*. London: Routledge, https://doi.org/10.4324/9780203414941.

Gernigon, H., Odero, B. & Guido, A. (2000) 'ILO principles concerning collective bargaining' 139. *International Labour Review*, **34**, 40.

Getzler, J. (1996) Theories of property and economic development. *The Journal of Interdisciplinary History*, **26**, 639–669. https://doi.org/10.2307/205045.

Gospel, H. & Pendleton, A. (2006) *Corporate Governance and Labour Management: An International Comparison*. Oxford: Oxford University Press.

Greenwood, D. (2017) Neofeudalism: The surprising foundations of corporate constitutional rights. *University of Illinois Law Review*, **2017**, 163–222.

Ireland, P. (1996) Capitalism without the capitalist: The joint stock company share and the emergence of the modern doctrine of separate corporate personality. *Journal of Legal History*, **17**, 41–73. https://doi.org/10.1080/01440369608531144.

Ireland, P. (1999) Company law and the myth of shareholder ownership. *Modern Law Review*, **62**, 32–57. https://doi.org/10.1111/1468-2230.00190.

Ireland, P. (2012) Financialization and corporate governance. Corporate Governance and Globalisation Colloquium, September 2008, Available at SSRN: http://dx.doi.org/10.2139/ssrn.2068478.

Ireland, P., Grigg-spall, I. & Kelly, D. (1987) The conceptual foundations of modern company law. *Journal of Law and Society*, **14**, 149–165. https://doi.org/10.2307/1410303.

Jacoby, S.M. (2008) Finance and labor: Perspectives on risk, inequality, and democracy. *Comparative Labour Law & Policy Journal*, **30**, 17–65. https://doi.org/10.2139/ssrn.1020843.

Jensen, M.C. & Meckling, W.H. (1976) Theory of the firm: Managerial behavior, agency cost, and capital structure. *Journal of Financial Economics*, **3**, 305–360. https://doi.org/10.1016/0304-405X(76)90026-X.

Johnston, A., Veldman, J., Eccles, R.G. *et al.* (2019) *Corporate governance for sustainability*. Columbia Law School Scholarship Archive: New York, https://doi.org/10.2139/ssrn.3502101.

Kennedy, D. (1991) The stakes of law, or Hale and Foucault! *Legal Studies Forum*, **15**, 327.

Koukiadaki, A. & Katsaroumpas, I. (2017) Temporary contracts, precarious employment, employees' fundamental rights and EU employment law. *European Parliament Research Paper, PE 596 823*. <http://www.europarl.europa.eu/supporting-analyses>.

Laski, H.J. (1916) The personality of associations. *Harvard Law Review*, **29**, 404–426. https://doi.org/10.2307/1326689.

Lojkine, U. (2021) Critical political economy beyond the production/circulation dichotomy, LPE Project. https://lpeproject.org/blog/critical-political-economy-beyond-the-production-circulation-dichotomy/ (January 28, 2022).

MENKE, C. (2017) "Law and Domination." in DEUTSCHER, P & LAFONT, C. (eds) *Critical Theory in Critical Times*. New York: Columbia University Press. pp. 117–138. https://doi.org/10.7312/columbia/9780231181518.003.0006.

MENKE, C. (2020) *Critique of Rights*. Cambridge: Polity Press.

MOORE, M. & PETRIN, M. (2017) *Corporate Governance: Law, Regulation and Theory*. London: Palgrave- McMillan, https://doi.org/10.1057/978-1-137-40332-2.

NJOYA, W. (2007) *Property in Work: The Employment Relationship in the Anglo-American Firm*. England: Ashgate.

NJOYA, W. (2014) Corporate governance and the employment relationship: The fissured workplace in Canada and the United Kingdom. *Comparative Labor Law & Policy Journal*, **32**, 121.

NJOYA, W. & CARSE, A. (2015) Labour Law as the Law of the Business Enterprise. *The Autonomy of Labour Law* (A BOGG, C COSTELLO, P DAVIES & J PRASSL, eds). London: Hart Publishing.

O'CONNOR, M.A. (1990) Restructuring the corporation's nexus of contracts: Recognizing a fiduciary duty to protect displaced workers. *North Carolina Law Review*, **69**, 1189.

PAUL, S. (2019) Fissuring and the firm exemption. *Law Contemp. Probl.*, **82**, 65–87.

PAUL, S. (2020) Antitrust as allocator of coordination rights. *UCLA Law Review*, **67**, 4–62. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3337861.

PISTOR, K. (2019) *The Code of Capital: How Law Creates Wealth and Inequality*. Princeton: Princeton University Press, https://doi.org/10.1515/9780691189437.

PRASSL, J. (2012) *The Notion of the Employer in Multilateral Organisational Settings*. Oxford: Oxford University Research Archive.

ROBBINS, L. (2007) *An Essay on the Nature and Significance of Economic Science*. Aubern, Alabama: Mises Institute, https://www.google.co.uk/books/edition/An_Essay_on_the_Nature_and_Significance/nySoIkOgWQ4C?hl=en&gbpv=1&printsec=frontcover.

ROBÉ, J.P. (2011) The legal structure of the firm. *Accounting, Economics and Law*, **1**, 5.

ROBÉ, J.P. (2020) *Property, Power and Politics: Why We Need to Rethink the World Power System*. Bristol: Bristol University Press, https://doi.org/10.1332/policypress/9781529213164.001.0001.

ROBÉ, J.P. & ROGOWSKI, R. (1997) "Multinational Enterprises: The Constitution of a Pluralistic Legal Order" in TEUBNER, G (ed) *Global law without a state*. Aldershot, UK and Vermont, USA: Dartmouth Publishing Co Ltd. 45–77.

SELWYN, B. (2013) Social upgrading and labour in global production networks: A critique and an alternative conception. *Competition and Change*, **17**, 75–90. https://doi.org/10.1179/1024529412Z.00000000026.

SHAMIR, H. (2016) Unionizing subcontracted labor. *Theoretical Inquiries in Law*, **17**, 229. https://doi.org/10.1515/til-2016-0009.

STONE, K. (2019) Policing employment contracts within the nexus-of-contracts firm. *University of Toronto Law Journal*, **43**, 3, Special Issue on Corporate Stakeholder Debate: 353–78. https://doi.org/10.2307/825711.

STOUT, L.A., ROBÉ, J.-P., IRELAND, P. *et al.* (2016) The modern corporation statement on company law. October 2016. Available at: http://ssrn.com/abstract=2848833.

VAHEESAN, S. (2020) Privileging consolidation and proscribing cooperation: The perversity of contemporary antitrust law. *Journal of Law and Political Economy*, **1**, 1. https://doi.org/10.5070/LP61150255.

WILKINSON, M.A. & LOKDAM, H. (2018) *Law and Political Economy*. LSE, Legal Studies WorkingPaper No. 7/2018, https://doi.org/10.2139/ssrn.3144723.

doi: https://doi.org/10.1093/cpe/bzaf002