



Kent Academic Repository

Ireland, Paddy (2010) *Limited Liability, Rights of Control and the Problem of Corporate Irresponsibility*. *Cambridge Journal of Economics*, 34 (5). pp. 837-856. ISSN 0309-166X.

Downloaded from

<https://kar.kent.ac.uk/11406/> The University of Kent's Academic Repository KAR

The version of record is available from

<https://doi.org/10.1093/cje/ben040>

This document version

UNSPECIFIED

DOI for this version

Licence for this version

UNSPECIFIED

Additional information

Versions of research works

Versions of Record

If this version is the version of record, it is the same as the published version available on the publisher's web site. Cite as the published version.

Author Accepted Manuscripts

If this document is identified as the Author Accepted Manuscript it is the version after peer review but before type setting, copy editing or publisher branding. Cite as Surname, Initial. (Year) 'Title of article'. To be published in *Title of Journal*, Volume and issue numbers [peer-reviewed accepted version]. Available at: DOI or URL (Accessed: date).

Enquiries

If you have questions about this document contact ResearchSupport@kent.ac.uk. Please include the URL of the record in KAR. If you believe that your, or a third party's rights have been compromised through this document please see our [Take Down policy](https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies) (available from <https://www.kent.ac.uk/guides/kar-the-kent-academic-repository#policies>).

Draft

**Limited Liability, Rights of Control and the Problem of Corporate
Irresponsibility**

Paddy Ireland

Abstract

There has long been a tendency to see the corporate legal form as presently constituted as economically determined, as the more or less inevitable product of the demands of advanced technology and economic efficiency. Through an examination of its historical emergence, focusing in particular on the introduction of general limited liability and the development of the modern doctrine of separate corporate personality, this paper takes issue with this view, arguing that the corporate legal form was, and is, in large part a political construct developed to accommodate and protect the *rentier* investor. It is, moreover, a construct which institutionalizes irresponsibility. Against this backdrop, different ways of trying to resolve the problem of corporate irresponsibility are explored. The key, the paper suggests, is to be found in decoupling the privilege of limited liability from rights of control.

Key Words

Corporate governance; corporate irresponsibility, limited liability; *rentier* investment

p.w.ireland@kent.ac.uk

Paper first delivered at the *Corporate Accountability, Limited Liability and the Future of Globalisation* Conference, SOAS, July 2007

Limited Liability, Rights of Control and the Problem of Corporate Irresponsibility

Paddy Ireland

Free incorporation by registration came to Britain in 1844, followed in 1855 by general limited liability, putting in place two of the central elements of the corporate legal form which has come to dominate business organisation around the world. There has long been a tendency to see the emergence of the corporate legal form as not requiring much in the way of explanation. It is widely seen, as one group of corporate law scholars recently put it, as 'induced by economic exigencies' (Kraakman et al, 2004, p. 1). Its key elements - legal personality, limited liability, transferable shares, delegated management and shareholder primacy - are thought to be economically indispensable, so much so that 'corporate law everywhere must, of necessity, provide for them' (pp. 1, 215). It is this belief that underlies the recent claim that we have reached 'the end of history for corporate law'; that, driven by economic forces, corporate law around the world is converging on a shareholder-oriented model of the corporation with the same essential legal features (Hansmann and Kraakman, 2001).

The view that the corporate legal form as presently constituted is a product of economic imperatives is underlain by a very particular account of its historical emergence. In industrialised and industrialising economies, this account suggests, the joint stock company (JSC) is the 'natural' – meaning most economically rational and efficient - organisational form for businesses. Unlike the 'ordinary' partnership, the JSC is a business association built not around a relatively small group of specific people but around a capital fund composed of freely transferable shares owned by a large and fluctuating body of company members. It is this, together with its separation of ownership and management, that gives the JSC the ability to unite small capitals and to aggregate the large amounts of capital demanded by competitive production in a technologically advanced world. In order for JSCs to be formed and to function, however, they need to be provided with a suitable legal framework. Most importantly, they need corporate status to give the company a separate legal existence from that of its constantly changing membership, and limited liability to enable the company to attract capital from investors who will not be actively involved in management. Given its economic superiority, explaining the rise to dominance of the JSC requires little more than an examination of the processes whereby a framework of this sort was provided and the legal, political and cultural impediments to the JSC formation lifted. In the UK, the key moments in this regard are usually said to have been the repeal of the Bubble Act (of 1720) in 1825 and the replacement by the Companies Acts 1844-62 of a legal regime in which corporate privileges were meagrely rationed by the state by a regime of free incorporation and general limited liability. From this perspective, the rise of the corporate legal form was inevitable, 'the story of an economic necessity forcing its way slowly and painfully to legal recognition' (Hunt, 1936, p. 13), hence the claim that until British law provided the kind of legal framework required by the JSC, 'full economic development was impossible' (Shannon, 1931, p. 12). These truths are, moreover, universal, hence the further claim that nowadays 'corporate law everywhere' must provide for the smooth formation and operation of incorporated, limited liability, joint stock companies.

One of the effects of the dominance of this economically determinist account, in which corporate law is seen as a simple expression of economic and technological imperatives, is the naturalization and de-politicization of the corporate form and its

key constituent elements: separate corporate personality, limited liability, shareholder primacy and so on. They are, in effect, placed beyond critical examination and evaluation, and a case is implicitly made for their global extension (Hansmann and Kraakman, 2001; Soederberg, 2004). But how accurate is the traditional account? This paper takes issue with it, arguing that an examination of the emergence of the corporate legal form - of 'company law' - in England in the nineteenth century casts serious doubt on it. Focusing on the introduction of free incorporation with limited liability and the development of the modern doctrine of separate corporate personality, it argues that the triumph of the corporate legal form was more the product of the growing political power and needs of *rentier* investors than it was of economic imperatives, an argument which might easily be extended to the current attempts to universalize corporate law in its resolutely shareholder-oriented Anglo-American form (OECD 2004; Soederberg, 2004). The corporate legal form as presently constituted is not an economic necessity but a political construct developed to further the interests of particular groups. It is, moreover, the paper argues, a construct which has not only been ruthlessly manipulated in ways which are highly questionable but which has institutionalized irresponsibility.

Recognition of these manipulations and of the particular forms of corporate irresponsibility they have generated has recently led some commentators to call for the abandonment of limited liability, either in general (Campbell & Griffin, 2006) or in the specific context of parent-subsidiary relations (Blumberg 1986; Muchlinski 1995) and/or non-contractual corporate liabilities (Hansmann & Kraakman 1991). In making these calls, these commentators implicitly question in various ways the validity of the principle of separate corporate personality. It should, they suggest, in certain contexts at least, be taken *less* seriously and corporations more closely identified with their shareholders. This questioning of the corporate legal form as currently configured is to be welcomed. It should not be taken for granted and presented as an unproblematic, economically determined necessity. As political constructs, the corporate legal form and its constituent elements – separate personality, limited liability and so on - should be subjected to critical analysis. However, this paper argues that history suggests that while in some contexts it may indeed be appropriate to take separate corporate personality *less* seriously in order to tackle the problem of corporate irresponsibility, in many others it might be more appropriate to take it *more* seriously and to emphasise, rather than to downplay, the separation of companies from their shareholders. The key, it argues, lies in the decoupling of limited liability from control rights.

The JSC and Industrialization

It is now clear that the 'industrial revolution' of the late eighteenth and early nineteenth centuries was predominantly carried out by 'ordinary' partnerships, not because of the impediments to the formation of JSCs but because of the relatively modest capital requirements in most industries (Payne, 1974; Musson, 1978). In the few sectors - canals, public utilities and, later, railways – where capital needs were unusually high, rendering resort to the JSC form necessary, Parliament regularly granted corporate privileges to facilitate JSC formation. In the industries most associated with the industrial revolution such as cotton and iron, however, unincorporated, unlimited liability partnerships sufficed and dominated. 'The simple fact', says David Landes, 'is that Britain did not need JSCs to finance her industrial revolution' (1960).

Indeed, even after the passing of the Companies Acts of 1844-62 - which, by making incorporation with limited liability freely available, paved the way for the mass formation of incorporated, limited liability JSCs – the organisation of British industry changed very little for many years: unincorporated, unlimited liability partnerships continued to dominate (Cottrell, 1980). Moreover, when the number of JSCs did begin significantly to increase towards the end of the century, it was not only, or even primarily, the result of technological development and growing capital needs as the traditional account would have it, but of the desire of businessmen to eliminate competition. The ‘Great Depression’ of 1873-96 saw businessmen confronted with chronic overproduction, severe price cutting and falling profits. Their response was to try to fix output and prices, initially through Trade Associations, cartels and other similar agreements, and later, when these failed (as they usually did), through mergers in which large numbers of unincorporated, unlimited partnerships, many of them family firms, amalgamated to form large incorporated, limited liability, joint stock companies with control over a significant proportion of the market (Jeans, 1894; Macrosty, 1907; Utton, 1972). In the inter-war period, similar processes underlay the increasing dominance of the JSC and the ‘rise of the corporate economy’ (Lucas, 1937; Hannah 1976).

It is also clear that there was little pressure from industry itself for the introduction of free incorporation with limited liability. ‘Because manufacturing concerns continued to be organized as private partnerships’, Cottrell explains, ‘industrialists for the most part were not affected by either the slow reform of the law or hostile legal doctrine’ (1980, p. 42). Indeed, there is considerable evidence that industrialists in mid-Victorian Britain were generally opposed to the changes effected by the Companies Acts 1844-62, particularly the controversial introduction of general limited liability (Mercantile Laws Commission 1854; Bryer 1997). But if the ‘dramatic’ legal changes of the mid-nineteenth century ‘had little to do with the financial requirements of manufacturing industry’ (Cottrell, 1980, p. 41), why were the Companies Acts passed? And why was the introduction of general limited liability, now widely regarded as an economic necessity and an expression of the free market and freedom of contract, so controversial?

JSCs and the Principles of Partnership

It is important to remember that in the early nineteenth century the principles of partnership, including that of unlimited liability, were themselves regarded as ‘natural’ and beneficent. By the close of the eighteenth century the law of partnership, which embodied these principles, was a well-established body of law (Watson, 1794). It was premised on the belief that all partners were and should be active participants in the firms of which they were members. This assumption underpinned the partnership principles of mutual agency, whereby partners could bind one another; of joint asset ownership, whereby partners were joint owners of the partnership property; and, of course, of unlimited liability, whereby all partners, including so-called ‘dormant’ or ‘sleeping’ partners who provided money but took no active part in management, were deemed to be joint and severally liable for partnership debts to ‘their last shilling and acre’ (Gow, 1823). It was widely believed that by ensuring that success was properly rewarded and failure properly punished the law of partnership not only accorded with the principles of eternal justice and providence - ‘in the scheme laid down by Providence for the government of the world’, argued J.R. McCulloch, ‘there is no shifting or narrowing of responsibilities, every man being personally answerable to the utmost extent for all his actions’ (1856) - but operated in

the public interest by ensuring that firms were run conscientiously and efficiently. The 'partnership system of commerce', it was argued, was the foundation of Britain's commercial success. Moreover, partnership principles were not only considered to be natural and just but were widely thought to accord with the laws of what we now call 'the market'. In rewarding success and punishing failure, many contemporary political economists believed, the law of partnership allowed for the genuinely free play of economic forces (McCulloch, 1856; Taylor, 2006; Hilton 1988).

Although JSCs were considered to be types of partnership – they were, to use the contemporary jargon, 'public' partnerships, distinguishable from 'ordinary' or 'private' partnerships (Ireland 1996) - they were thought to operate in violation of a number of key partnership principles. With their relatively large memberships, inactive shareholders (or 'co-partners'), separation of ownership and management, freely transferable shares and in some cases corporate privileges, they lacked many of the features that made the ordinary partnership economically and morally sound. It was for this reason that they were not well regarded and famously met with the disapproval of Adam Smith. Unlike individual proprietorships or 'private' partnerships, Smith argued, JSCs separated ownership and management and were as a result inherently inefficient. Owned by *rentier* shareholders who didn't pay much attention to the affairs of the companies in which they held shares and run by managers who were managing other people's money rather than their own, JSCs were bound to be characterized by 'negligence and profusion'. There were some circumstances in which Smith nevertheless thought JSCs defensible: where the capital required in an industry was beyond that which could be collected into a partnership, where the risks were unusually great, where the operations of the business could be reduced to 'routines', and where there was an identifiable *public* benefit from their formation. In Smith's view, however, only where these conditions were met was it appropriate for the state to sanction joint stock company formation and grant companies the legal privileges (such as corporate status and limited liability) which took them outside the general laws of partnership (Smith 1776)

Smith's views on the inherent inefficiency of JSCs and the limited circumstances in which it was legitimate to grant them legal privileges were very influential. Indeed, they shaped state policy well into the nineteenth century, with corporate privileges and exemptions from the law of partnership being for many years granted to JSCs only when Smithian conditions were satisfied (Taylor, 2006). When added to the continuing belief in the justice and efficacy of the law of partnership and to the continuing ability of industry to meet its financial needs within the partnership form, the lack of pressure from industry for the introduction of free incorporation and limited liability becomes more easily understood, as do the controversies which surrounded the introduction of general limited liability in 1855.

The Law of Partnership and the *Rentier* Investor

The explanation for the introduction of free incorporation and general limited liability and the gradual development of the modern corporate legal form is to be found not in the needs of industry but in the needs of finance. Their emergence is inextricably linked to the rise of the *rentier* investor. During the course of the early nineteenth century, as wealth grew, the upper and middle class search for profitable investment outlets intensified. Although both government debt and land provided outlets, they were limited in scope and did not generally offer particularly good returns. One result of this was that from the early nineteenth century British capital began to flood abroad in search of secure outlets offering better returns (Jenks, 1927). Part of the problem facing

rentiers, foreshadowing the City-Industry divide, was that with industrialists generally able to meet their financial needs within the partnership form and to fund expansion through the plough back of profits, it was difficult for them to tap into, and claim a share of, the growing wealth being generated by industry.¹ Moreover, even if investment opportunities in industry did become available to *rentiers*, they had to contend with the law of partnership and the threat posed by unlimited liability. *Rentiers* were strongly urged by contemporaries to take an active interest in any firms in which they thinking of becoming partners, for not only their capital but their whole personal wealth was at stake (Ward, 1852). They could, alternatively, *lend* money to partnerships at fixed rates of interest, rendering them creditors rather than partners ('owed' rather than owning'), but while this was less risky the maximum rate of return was limited by the usury laws which remained in force until their repeal in 1854. With their numbers steadily increasing, investment in JSCs was another possibility, but in *unincorporated* companies, of course, the partnership principle of unlimited liability still applied and even in incorporated companies with limited liability the continued existence of extensive unpaid liabilities on shares meant that *rentier* investments of this sort were still potentially risky (Ward, 1852).

The growing desperation (and greed) of the burgeoning *rentier* class seeking outlets for, and better returns on, their money fuelled a series of booms in JSC promotion in the first half of the nineteenth century (see Hunt 1936; Harris, 2000; Taylor, 2006). These booms invariably ended in collapses and were invariably characterised by widespread fraud. For many years, however, the misery caused to *rentiers* elicited little public sympathy. JSC shareholders, *The Times* complained in 1840, wanted to 'enjoy the profits of trade consistently with the luxury of being sleeping partner[s]'. They wanted to be able 'to be able to embark in business without being a man of business; to be able to share in the profits of trade without knowledge of trade, or any education in it; without abilities, without character, without any attention or exertion ...'. JSCs were 'a means or making money in idleness, in compulsory idleness'. There was, the paper added, 'only one more quality wanting to make the morsel wholesome as well as tempting' to the idle *rentier*: limited liability. Fortunately, the 'force of experience' and 'good sense' stood against this. JSCs, the paper concluded, were not only 'inconsistent with the solid and proper principles of trade' but 'contradict[ed] the proper principles of partnership' (October 9th 1840; October 22nd, 1840). As this suggests, while it was by now fully accepted that invested money was entitled to a return, it was also thought that there was a limit to the return which passive providers of money could reasonably or legitimately expect. There was little compassion for *rentiers* who lost money speculating in the hope of securing the higher rates of return which were the just reward for active participation in 'trade'.

Accommodating the *Rentier*: The Retreat from the Law of Partnership

From the 1830s, however, with the growth of the railways, the number of *rentier* investors began rapidly to increase and with this so too did their political and legal influence. From around 1840 more and more modifications were made to the law of

¹ In *Capital*, Marx argued that 'the complete rule of industrial capital has been acknowledged by English commercial capital and by the "moneyed interest" (financial aristocracy) only since the abolition of the corn duties etc'. It is often thought that Marx was claiming here that the people who owned and ran industry (the 'industrial bourgeoisie') had by the 1840s and 50s taken control of state power. It seems clear, however, that he was referring not the political dominance of industry but to the recognition by the 'financial aristocracy' that industry and the exploitation of industrial wage labour was now the primary source of surplus value: Marx 1893; Bryer 1997.

partnership as it applied to JSCs. These departures from partnership principles were nearly all aimed at accommodating and protecting the *rentier* JSC shareholder. From the mid 1830s, for example, as a developed market in JSC shares emerged for the first time, the JSC share was judicially redefined. Having previously been deemed an equitable interest in the assets of a company (a 'share' in the literal sense), the JSC share was legally re-conceptualized as a right to profit, a form of property in its own right quite separate from the assets of the company.² Thereafter there were two quite different pieces of joint stock property: the concrete assets owned by 'the company', and the shares, intangible rights to profit owned by shareholders (Ireland, 1996). The share had become a form of what Marx called 'fictitious capital' with a capital value of its own determined by the stock market (Marx 1893,: chapters 25 and 29; Hilferding, 1910). In this process, shareholders themselves were re-characterized. No longer were they conceptualized by law as industrial capitalists, as active, asset-owning partners; they were conceptualized, rather, as passive, money-providing 'investors', as money capitalists, owners of income rights external to 'the company' and the process of production (Marx 1893; Ireland, Grigg-Spall and Kelly, 1987).

The introduction of free incorporation without limited liability by the Joint Stock Companies Act 1844 also sought to protect the *rentier* investor. The Act implemented the recommendations of a Select Committee, chaired by a youthful William Gladstone, which had looked into the frauds which had accompanied the most recent boom in JSC promotion. It was aimed not at encouraging JSC formation but at trying to protect *rentier* shareholders from fraud. To this end, it sought to *compel* JSCs to incorporate and to provide detailed information about their operations. The hope was that compulsory incorporation coupled with 'publicity' (what we would now call 'disclosure') would provide *rentiers* with the information they needed to make better informed investment decisions.

At around the same time, a number of other partnership principles were abandoned in the struggle to provide more protection to JSC shareholders. The partnership doctrine of mutual agency, for example, was jettisoned. In 1849 in *Burnes v Pennell*, the House of Lords held that shareholders in JSCs were not at all like ordinary partners: 'All who have dealings with a JSC know that the authority to manage the business is conferred upon the directors, and that a shareholder as such has no power to contract for the company'. For these purposes, there was no difference between incorporated and unincorporated companies.³ The effect of this, when coupled with the judicial development of the doctrine of 'constructive notice' which fixed third parties dealing with companies with knowledge of the contents of its 'public documents'⁴, was to offer protection to *rentier* shareholders at the expense of creditors. The 1840s also saw the judicial construction of the doctrine of ultra vires, involving still further departures from partnership principles (Ireland, 2003). Again, the object was to protect *rentier* shareholders, in this case from their own greed. Given the 'vast property which is invested in railways and how easily it is transferable', argued the Master of the Rolls Lord Langdale in 1846, it was imperative that investment in shares be made 'safe' so that 'prudent persons might, without improper hazard, invest their monies in [them]'.⁵

The 1844 Act did not, however, succeed in eliminating fraud, in part because it continued mistakenly to assume that *rentiers* would be mentally, if not physically,

² *Bligh v Brent* (1837) 2 Y & C 268.

³ *Burnes v Pennell* (1849) 2 H.L.C. 497.

⁴ *Ernest v Nichols* (1857) 6 H.L.C. 401.

⁵ *Colman v Eastern Counties Railways* (1846) 10 Beaver 1.

active and take steps to protect themselves. Indeed, during the railway mania of the 1840s JSC fraud reached new heights. Nor did the Act successfully effect a marriage between industry and finance and provide the latter with new investment outlets: by the 1850s the volume of capital seeking investment outlets offering good, secure returns was greater than ever (Jeffreys, 1938). The result was a radical change in strategy (Hirst, 1979). Shortly after the repeal of the usury laws in 1854, the regulatory framework of the 1844 Act was abandoned and replaced in 1855-56 by a much more permissive legal framework which combined free incorporation with general limited liability. Indeed, the 1855-56 Acts went further than many of the proponents of limited liability had been demanding. Most of the latter had sought only the introduction of continental, limited partnerships along the lines of the French *société en commandite* in which passive, money-providing, 'sleeping' partners got the benefit of limited liability while active managing partners remained unlimitedly liable. What they got instead was general limited liability with few regulatory strings. It was, as Cottrell says, a 'sharp', 'dramatic' and 'total' liberalization (1980, pp. 41-45).

It was clearly hoped that the new regime - which, while recognising the *rentier* nature of shareholders, was nevertheless still heavily reliant upon shareholder vigilance - would prompt the formation of JSCs and generate new investment outlets for *rentiers*, protected now by limited liability rather than by extensive regulation. Limited liability, its advocates argued, would not only encourage investment but encourage the creation of outlets for investment - there were frequent references to the abundance of unused capital - for the benefit of the country as a whole. The strategy had only limited success, however. Although there was a major boom in JSC formation in the 1860s, culminating in the Overend Gurney crisis of 1866, manufacturing industry continued to be dominated by family firms and partnerships. As Cottrell says, the problem of finding higher yielding but still reasonably secure investment outlets 'was not solved by the introduction of limited liability ... [for] manufacturers generally neither took immediate advantage of the change in the law nor complained about a shortage of capital' (1980, p. 47). The limited liability legislation nevertheless marked a 'victory for the investing classes over the industrialists' (Jeffreys, 1938)⁶, shifting risk and responsibility from shareholders and turning many of the principles of partnership on their head. This was why it was so controversial. Until its passing, argued Edward Cox, the editor of *The Law Times*, the law of partnership had been:

... that he who acts through an agent should be responsible for his agent's acts, and that he who shares the profits of an enterprise ought also to be subject to its losses; that there is a moral obligation, which it is the duty of the laws of a civilised nation to enforce, to pay debts, perform contracts and make reparation for wrongs. Limited liability is founded on the opposite principle and permits a man to avail himself of acts if advantageous to him, and not to be responsible for them if they should be disadvantageous; to speculate for

⁶ Within the *rentier* class, it was widely seen as a triumph for the small investor over the large. The 'great capitalists', it was argued, were already able to find outlets for investment - in things like the great trading companies - by virtue of their connections: see Hunt 1936, 133. Indeed, as a result they were often referred to as 'monopolists'. It was the smaller capitalists - those 'other persons, not capable of actively engaging in trade [who] should possess safe channels of investment, which were at the moment closed to them' - who would benefit from limited liability: Robert Collier M.P., *Hansard*, 27 June 1854, col. 757; Bryer 1997.

profits without being liable for losses; to make contracts, incur debts, and commit wrongs, the law depriving the creditor, the contractor, and the injured of a remedy of the property or person of the wrongdoer, beyond the limit, however small, at which it may please him to determine his own liability (Cox, 1856, pp. i-ii).

From Limited Liability to No Liability

The introduction of general limited liability did not, however, completely eliminate the liabilities of the shareholder. JSC shares in the early nineteenth century were nearly all of high denomination and although denominations fell somewhat during the railway boom as companies tried to widen the cast of their investment nets, shares of at least £50 and £100 remained the norm (Jeffreys 1938). In the mid-nineteenth century, however, the usual practice was still to issue shares with only a small proportion of their nominal value paid up. Companies could then make calls on the shares as and when further capital was required. Although this enabled companies to attract not-so-wealthy shareholders who could afford the initial payments, it was also a source of problems as very often these shareholders were unable to meet the subsequent calls on their shares. More importantly, the prevalence of shares which were only partially paid up meant that even under the new regime of general limited liability, shareholders still carried substantial residual liabilities (Ward, 1852).

From the 1860s onwards, however, aided once again by the courts, who recognised ever more ways in which share capital could be paid up, and by the legislature, who relaxed the rules on capital reduction, the residual liabilities attaching to JSC shares were gradually eliminated. By the turn of the century nearly all JSC shares were fully paid up, transforming the *de jure* regime of limited liability into a *de facto* regime of no liability. Not only did JSC shareholding no longer entail liabilities, however, it also increasingly entailed neither obligations nor responsibilities, for managing power was increasingly vested by companies (through the provisions of the standard statutory articles) in boards of directors, and the power of shareholders, both individually and collectively, had been greatly circumscribed. JSC shareholding was coming to take its modern form, comprising ownership of an unencumbered, free-standing right to revenue, external to the process of production and entailing no particular obligations, contractual or otherwise, either to the company itself or to outsiders. Shareholders were now 'in' the (stock) market rather than 'in' the company (Pettet, 2001) and shares - no longer sources of new capital now that they were fully paid-up - had become instruments for the appropriation of the profits of industry divorced from responsibility or function. For increasingly detached *rentiers* for whom shares were nothing but rights to profit, the reduction in their rights mattered little. By the 1870s, the more astute and wealthy among them were beginning to diversify their holdings in investment trusts, spreading what remained of their risk (Scratchley, 1875). They were also beginning to benefit from the emergence of an increasingly sophisticated accounting profession and from the development of modern financial reporting and the publication of independently audited, cost-based accrual accounts (Bryer 1993). Equally importantly, they had retained their exclusive right to appoint and dismiss directors (Ireland, 2003).

Irresponsibility was now firmly built into the corporate legal form, as it still is (Mitchell, 2001). The no-obligation, no-responsibility, no-liability nature of corporate shares permits their owners – or their institutional representatives - to enjoy income rights without needing to worry about how their dividends are generated. They are not

legally responsible for corporate malfeasance, and in the event of failure only their initial investments are at risk. As one commentator has observed, the shareholders in corporations 'have little financial incentive to ensure that the managers involved behave legally, ethically, or decently ... [because] in law, [they] are personally untouchable...' (Glassbeek, 2002, p.129). The curious shareholder mind-set that this regime encourages was recently thrown into sharp relief by two cases involving the former Railtrack. In October 2005, the High Court ruled against the Railtrack Private Shareholders Action Group (RPSAG) in their action against the Secretary of State for Transport, Stephen Byers (*Weir v Sec of State for Transport*). Following a sustained and determined campaign, over 48,000 of the company's shareholders, outraged by the decline in the value of their shares, had clubbed together to raise over £4 million to challenge Byers' decision to force the company into administration. Alleging misfeasance in public office and breaches of the Human Rights Act 1998, they argued in effect that their property had been expropriated without proper compensation. Just one week before the court handed down its decision, Network Rail (the company which replaced Railtrack) and the engineering firm Balfour Beatty had been fined £13.5 million for their part in the Hatfield rail disaster of 2000 in which four people died. Hatfield was one of a long series of fatal rail accidents in which Railtrack's working practices and safety record was implicated (Wolmar 2001). On this issue the shareholders were silent. At no point had they spoken up, let alone campaigned, about the company's safety record. They did not, apparently, feel in any way responsible for the behaviour of the company from which they had been drawing dividends and whose management was legally bound to act in their interests. The cases are illustrative of the tendency, not confined to shareholders, to schizophrenically identify companies very closely with their shareholders for some purposes, while seeing them as completely separate from them for others.

The Reification of the Company: Separate Corporate Personality

The rise of the fully paid up share and no liability shareholding proved to be of significance in other ways too, contributing to the development of the modern doctrine of separate corporate personality and, through this, to important changes in the way in which companies and their relationship to their shareholders were conceptualized. As we have seen, until the middle of the nineteenth century, JSCs were regarded as types of ('public') partnership. As such they were not only thought to be subject in principle to the law of partnership but were closely identified with their shareholders. As a result, like 'ordinary' or 'private' partnerships, JSCs were conceptualised as aggregations of people and regularly referred to as 'theys'. This was true even of incorporated companies, the separate corporate entity simply being seen as the company's shareholders merged into one legally distinct body. Reflecting this, the 1856 JSC Act permitted seven or more persons to '*form themselves*' into an incorporated company, implying that 'the company' and the corporate entity was composed of its shareholders. At this time, then, there was nothing like the modern conception of separate corporate personality, with its 'complete separation' of company and shareholders (Gower, 1997, p. 79), and its conception of companies as 'its', (reified) entities in their own right, quite separate from their shareholders.

However, a combination of the economic changes wrought by the increasingly detached, *rentier* nature of shareholding and the legal changes which had been made to the law of partnership in its application to JSCs to accommodate and protect the shareholder began to impact on the way in which JSCs and their relationship to their shareholders was conceptualized. The redefinition of the JSC share, for example, had

effectively doubled the property of JSCs. Whereas previously there had been only the assets, owned legally by the company and equitably by the shareholders, there were now two quite discrete property forms: one, the assets, owned wholly by companies; the other, shares, owned wholly by shareholders. Similarly, after the passing of the Companies Acts 1844-62, the liability of shareholders to creditors was a secondary liability: creditors had to seek payment from 'the company' as a separate, property-owning entity and could no longer directly take action against individual shareholders. Any residual shareholder liabilities, resulting from shares which were not fully paid up, were owed to 'the company' not to the company's creditors. Reflecting the growing separation of companies from their shareholders, the Companies Act 1862 declared not that people 'formed themselves' into companies, as had the 1856 Act, but that they 'formed' companies, objects external to them, made *by* them but not *of* them (Ireland 1996).

Crucially, however, as long as the regime of limited liability was coupled with shares which were only partially paid-up, a complete conceptual separation of company and shareholders was impossible. While shares were still not fully paid-up, for example, it still mattered to companies who their shareholders were: companies didn't want to have large numbers of shareholders who might not be able to meet calls. In similar vein, it also still mattered to shareholders who their fellow shareholders were: in the event of corporate failure, if your fellow shareholders were men of straw unable to meet calls, your own contribution to the payment of corporate debts might increase. When the regime of limited liability became a regime of *de facto* no liability, however, this changed. Thereafter it mattered far less to companies who their shareholders were and far less to shareholders who their fellow shareholders were. For creditors, the only assets available to meet their debts were now those of 'the company'; the property of which was no longer backed by a reserve fund composed of residual shareholder liabilities. The process of 'defensive asset partitioning' was thus completed (Hansmann and Kraakman 2001), and with this so too was the separation of companies from their shareholders. In the last quarter of the nineteenth century the modern doctrine of separate corporate personality, with its reified corporations and 'complete separation' of shareholders and company, crystallised out. Indeed, by this time, the law relating to JSCs had so departed from partnership principles that 'company law' – previously regarded as a mere branch of the law of partnership – emerged as a legal category in its own right (Ireland, 2003).

Extending Separate Personality and Limited Liability: From One-Man Companies to Corporate Groups

The significance of the emergence of the modern doctrine of separate corporate personality, which lay at the heart of the new legal category of 'company law', grew, however, in the closing years of the nineteenth and opening decades of the twentieth centuries. As we have seen, company law had been developed by the legislature and courts for application to JSCs populated by large numbers of inactive, *rentier* shareholders. It is clear, for example, that those responsible for the Companies Acts of 1844-62 thought and intended them to be applicable to JSCs and JSCs alone, and that for many years, as intended, only JSCs incorporated under the Acts and gained the privilege of limited liability (Ireland 1984). From around 1880, however, confronted with the economic difficulties associated with the Great Depression of 1873-96, more and more unincorporated sole traders and small partnerships began to incorporate under the Acts to get the benefit of limited liability, using 'dummy' shareholders to comply with the 1862 Act's minimum requirement of seven members. The legitimacy

and legality of this practice was widely questioned, however, and matters came to a head in the mid 1890s when the celebrated case of *Salomon v Salomon & Co Ltd* reached the courts. Salomon, a boot-maker, had not only incorporated his firm to limit his liability (he had 20,000 shares in the company and his wife, daughter and four sons one share each) but taken steps to ensure that he was a secured creditor of the firm by issuing debentures to himself. He later sold these to try to save the struggling firm, but to no avail. The company folded and the assets sold, but they were insufficient to meet the company's debts. The liquidator stepped in and sought to make Salomon personally liable for the debts of the company. Refusing to treat Salomon and his company as genuinely separate entities, both the Court of Chancery and the Court of Appeal found in the liquidator's favour. 'The object of the whole arrangement', Lord Lindley argued, was 'to do the very thing which the legislature intended not to be done': Parliament had never contemplated the extension of limited liability to sole traders. Interpreting the Companies Act 1862 literally, however, the House of Lords insisted that Salomon had complied with the requirements of the Act: the company had seven members and had been properly formed and should be treated as a completely separate entity from Salomon, who should therefore benefit from limited liability. 'The company, argued Lord Macnaghten, 'is at law a different person altogether from the subscribers to the memorandum'. The radical separation of company and shareholders which had come to characterize the modern doctrine of corporate personality, and which had of course been developed in the specific context of *joint stock* companies populated by large numbers of passive *rentier* shareholders (pure money capitalists), thus came to be applied to one-man and other small, 'private' companies – companies which were, in reality, nothing more than incorporated individual proprietorships and small partnerships. It wasn't long before nearly all significant business enterprises were incorporated, limited liability companies (Ireland, 1984).

Equally importantly, in the inter-war period, when corporate groups began to emerge in the UK for the first time, again in significant part as a result of the continuing attempts of businessmen to suppress competition (Lucas, 1937; Hannah 1976), the *Salomon* principle was formalistically extended to subsidiary companies with little or no debate. Parent companies came to be regarded as completely separate entities from the subsidiaries they controlled and often wholly owned, and, as such, entitled to the protection of the laws on limited liability (Dine 2000). The application of limited liability to corporate groups was, says Philip Blumberg, an 'historical accident' (1986, 605), but it made possible the construction of strings of parent, subsidiary, sub-subsidiary and associated companies, each of which is a separate legal person whose shareholders (often simply one or more other companies in the group) benefit from limited liability. This remains the case even when a parent company has complete effective control of a subsidiary whose directors may be the nominees or even the same persons as the directors of the parent (Muchlinski 1995, Blumberg 1986). The rigid application of the *Salomon* principle, coupled with *de facto* no liability shareholding, has thus greatly extended the scope for opportunistic behaviour, institutionalizing corporate irresponsibility. It is not, perhaps, surprising that the leading legal academic Otto Kahn-Freund, writing in 1944 when group structures were beginning to proliferate, described *Salomon* and its rigid application by the courts as 'calamitous' (1944).

Taking Separate Corporate Personality *Less* Seriously: A Return to Unlimited Liability?

The introduction of free incorporation with general limited liability and the construction of the corporate legal form in nineteenth century England was, then, 'induced' less by the imperatives of economic rationality and efficiency and more by the political power of the *rentier* class – an argument which might equally apply to the determined attempts in recent years by international agencies to extend the global reach of a fiercely shareholder-oriented, stock-market-based, Anglo-American model of the corporation (OECD 2004; Soederberg 2004). Rigidly followed by the courts and legislature, the principles of separate corporate personality and limited liability have since been manipulated in ways which are highly questionable. There are good reasons for re-assessing them.

At present, corporate shareholders (including parent companies) enjoy the best of all possible legal worlds. In that they are not personally responsible for the debts or liabilities (or behaviour) of the companies in which they hold shares and from which they draw dividends, they are 'completely separate' from them. On the other hand, the companies in which they hold shares must be run exclusively in their interests: for these purposes the interests of 'the company' (formally a separate entity) are synonymous with those of its shareholders. The law thus treats separate personality very seriously in some contexts (shareholder liabilities), while ignoring it in others (shareholder primacy, shareholder control rights). The result is a shareholder's paradise: a body of law able to combine the ruthless pursuit of 'shareholder value' without any corresponding responsibility on the part of shareholders for the losses arising out of corporate failure or the damage caused by corporate activities or malfeasance.

This has led some to argue for a return, either in whole or in part, to unlimited liability. Thus, for some, shareholders should be unlimitedly liable for the tortuous liabilities of companies; for others parent companies should in many, if not all, circumstances be made liable for the debts of the subsidiaries they control. For still others, there should be a more general return to the old partnership principle of unlimited liability. Limited liability, they argue, creates incentives for reckless and irresponsible risk taking; it makes them 'rational and legitimate'. It 'does not provide rational encouragement to business initiative' but rather 'by eliminating the fear of incurring personal liability should risk-taking even in disastrous loss, gives an unbalanced incentive to such risk-taking' (Campbell and Griffin 2006: 48). Indeed, echoing the early nineteenth century defenders of the principles of the law of partnership, this argument is commonly framed in terms of a restoration of 'the market'. Limited liability, it is suggested, represents a legislative 'ousting' of the market which 'isolate[es] investors from the full range of market influences' and cocoons them from 'the most fundamental market pressure, fear of personal bankruptcy'. From this perspective, the remedy for corporate irresponsibility and recklessness is a restoration of the principle of unlimited liability and the true, 'undistorted' market. Even if, they argue, this led to a lower overall rate of growth as the current orthodoxy would have it - which is by no means certain – the shape and pattern of growth might nevertheless be more welfare-enhancing (Campbell & Griffin 2006).⁷

⁷ A return to unlimited liability is also urged by free market libertarians: 'a libertarian society would be a full liability society where everyone is fully responsible for his actions and any harmful consequences they might cause': Rothbard, chapter 13). This does not, presumably, rule out the possibility of

Taking Separate Corporate Personality *More* Seriously: A Challenge Shareholder Primacy?

The call for a return to unlimited liability amounts, in effect, to a call to take separate corporate personality *less* seriously. It seeks to eradicate the problem of corporate irresponsibility and unaccountability by identifying corporations more closely with their shareholders, encouraging a shift towards to the older (un-reified) concept of 'the company' as an aggregation of people. It is an appealing idea. The fact that 'any argument for the rebirth of unlimited liability companies' would be greeted with 'howls of protest by the business elite', it has been suggested, is evidence that 'the Left' would be 'heading in the right direction' in making such a proposal (Campbell and Griffin 2006: 72). But is fostering the closer identification of corporations with their shareholders which a return to unlimited liability would encourage necessarily the best way to tackle the problem of irresponsible corporate behaviour? The aftermath of the 'complete separation' of companies and shareholders in the late nineteenth century suggests that this might not always be the case.

While the emergence in the later nineteenth century of a regime of *de facto* no liability shareholding, coupled with the rise of modern financial accounting and diversified portfolios, had made the position of the *rentier* JSC shareholder in many respects more secure, it was also a source of a new vulnerability. In the eighteenth century, Smith had disapprovingly noted that JSC shareholders accepted dividends without actually doing anything and Marx similarly highlighted their parasitic lack of function (Marx 1893: chapters 23 & 27). In the opening decades of the twentieth century, however, as the lack of involvement of JSC shareholders not only in management but in the monitoring of management became ever more apparent - by now they were increasingly 'mere coupon clippers', buyers and sellers of rights to profit operating in the stock market - more and more commentators began critically to comment on the nature of corporate shareholding. Thorstein Veblen, for example, variously characterised shareholders as 'absentee owners', 'anonymous pensioners', and owners of claims to 'unearned or free income', of 'prescriptive rights to get something for nothing' (Veblen 1904, 1919, 1923). Keynes also joined in, describing them as 'functionless investors' and arguing that 'interest today rewards no genuine sacrifice', before predicting with some relish the future 'euthanasia of the *rentier*' (Keynes 1936: 104, 376).

Observing the corporate shareholder's lack of traditional ownership rights (or obligations), lawyers began to query the common sense notion that they were the 'owners' of the companies in which they held shares.⁸ They increasingly likened them instead to bondholders, characterising them as 'outsiders' rather than 'insiders', as 'owed' rather than 'owning'. 'The average stockholder in the large corporation', wrote Franklin Wood, 'regards himself more as a security holder than as in any sense a responsible managing partner in the corporate enterprise'. As a result, he suggested, the legal distinction between bondholders and stockholders was 'fast becoming a distinction

contracting for limited liability, as attempted by some unincorporated companies in the nineteenth century.

⁸ As we have seen, it had already been determined that JSC shareholders did not own the assets of the company; these were owned by 'the company' as a separate legal person. What was now questioned was the common sense, but legally unsustainable, idea that had grown up in its place that the shareholders 'owned' not the assets but the company: see Dodd 1941. The myth of shareholder corporate 'ownership' continues to persist today: Ireland 1999.

unwarranted by the actual situation' (Wood 1928:59). This view was reinforced by the empirical findings contained Adolf Berle and Gardiner Means' famous *The Modern Corporation and Private Property* which concluded that the shareholders of many large US companies had become so widely dispersed and passive that more and more corporations were under the effective control of their managers (Berle and Means 1932). Crucially, this led some commentators to begin to re-conceptualize not only the nature of shareholding but the nature of the corporation itself.

As we have seen, while corporations had long been recognised for certain purposes as legal entities 'completely separate' from their shareholders, for many others they were treated as more or less synonymous with them. Most importantly, the legal duty of directors to act in the 'best interests of the company' was (as it still is) interpreted to mean the 'best interests of the shareholders', thereby cementing the principle of shareholder primacy. In the 1930s, however, some commentators began to argue that given the detached and *rentier* nature of contemporary corporate shareholding, the idea of separate corporate personality needed to be taken *more* seriously and corporations identified much less closely with their shareholders. This animated a celebrated exchange between Berle and another American corporate lawyer E. Merrick Dodd in the early 1930s. Concerned about what he saw as the growing lack of accountability of many American corporate managers, Berle had been pressing since the late 1920s for a strengthening of the fiduciary duties of directors to compel them to pursue the shareholder interest. He did so for pragmatic (rather than principled) reasons, seeing no other way of making managers accountable to *someone* and preventing them from pursuing their own interests (Berle 1926, 1931). Dodd challenged Berle, contesting the close identification of the corporation with its shareholders that his proposals entailed. Important changes were taking place in 'public opinion' about the corporation, he argued, in which society was coming to see corporations not as purely private enterprises but as public institutions with wider social obligations. Moreover, he claimed, corporate managers were beginning to accept that they had 'social responsibilities'. While such an 'extended view' of corporate managerial social responsibilities was 'difficult to justify if [one] insist[ed] on thinking of the business corporation as merely an aggregate of stockholders...', Dodd argued, it could easily be reconciled with a view of the corporation as a real entity, 'as an institution which differs in the nature of things from the individuals who compose it'. Once one recognised the corporation as a truly separate 'person', there was no reason why it should not operate, through its managerial agents, as a 'good citizen ... with a sense of social responsibility'. Dodd thus began to press for a conception of the corporation as a genuinely separate entity, a social institution that should be run in a manner which took account of a range of different interests, as though nobody owned it, rather than as a private enterprise to be run in the interests of shareholder-owners (Dodd 1932; Berle 1932; Dodd 1935).

These ideas underpinned the 'managerial' theories of the corporation which flourished in the post-war period (Nicholls 1969). By the 1950s, the idea that corporations should be run in a way which took account of the wider public interest had become commonplace. Indeed, many believed that this was already happening, hence the rise of the idea of the 'socially responsible' or 'soulful' corporation (Kaysen 1957 p. 314).⁹ During this period, even politically moderate commentators began to suggest that it might be appropriate to pare down shareholder voting rights, while others urged that the composition of Boards of Directors be modified to include not

⁹ It should be noted that the idea of the 'socially responsible corporation', prominent in the 1950s and 60s, is markedly different from the contemporary idea of 'corporate social responsibility' (CSR): see Pillay 2006.

only shareholder representatives but representatives of other 'stakeholders', most importantly employees (Ireland 2001: pp. 150-152). This idea underlay the pressure that was exerted at this time for the introduction of 'industrial democracy' and the appointment of workers' representatives on to the boards of large corporations.

Paradoxically, it was precisely the perceived weakness of shareholders collectively that persuaded some that there was no need to remove or dilute their voting powers or modify the corporate legal form and the structure of corporate rights. For Anthony Crosland, for example, as corporations were now controlled by managers who were increasingly 'independent not only of the firm's own shareholders, but ... of the capitalist or property owning class as a whole', the pattern of ownership of industry - whether it was nationalised or privately owned - was largely irrelevant. Corporations no longer operated solely to enrich shareholders but were sensitive to 'public opinion'. The talk of 'social responsibility' was 'in part genuine' and it was cultural rather than legal change that was required (Crosland 1962: 34-37, 62, 67, 74-5, 92, 362).

By this time, however, in places such as the US and the UK, the previously dispersed financial property owning and shareholding class was beginning to re-unite in financial institutions. Through this medium, and with the staunch support of international agencies, they had by the 1980s become much more active and were vigorously reasserting their power, both within corporations and externally in the stock market, in the so-called 'market for corporate control'. Simultaneously, changes in the forms taken by executive remuneration - the rise of such things as share options and performance-related bonuses - were beginning radically to realign the interests of executives, bringing them closer to those of shareholders. By the early 1990s, the principle of shareholder primacy had been restored with a vengeance. Corporate managers today are much more accountable than they were - to the *rentier* shareholders with whom they are now much more closely entwined. Hence the relentless pursuit of 'shareholder value' by whatever means and whatever the human, social and environmental costs. The consequences have been only too clear: a massive increase in speculative financial exchanges, regular financial crises, numerous corporate scandals, falling growth rates, a reduction in the rates of productivity growth and soaring executive remuneration (Wedderburn 2004). In making share prices rather than production the guiding lights of economic activity (Harvey 2005: 32), activist shareholding via institutions has, as Doug Henwood says, simply added 'another layer of potential irresponsibility' (1997, 292). It has also contributed to the steady increase in wealth and income inequality (nationally and internationally) which has characterised the last two or so decades, for although it is often implied that with the rise of private pensions 'we are all (more or less) shareholders now' (see, for example, Mitchell 2001, 147), share ownership, like the ownership of financial property in general, remains very heavily concentrated in the very wealthiest.¹⁰ Despite this, more and more policymakers, with the loyal support of many academics, still insist upon the economic superiority of an unequivocally shareholder-oriented model of the corporation and are working hard to extend its global reach through the agencies of the World Bank and the OECD (Soederberg 2004; OECD 2004). Shareholder primacy and shareholder rights are now, however, defended less on the basis of the fundamental moral principles associated with ideas of private property and 'ownership' (highly problematic in the corporate context, despite their continuing

¹⁰ In the U.S. at the turn of the century, for example, the wealthiest 1% held (directly and indirectly) about 50% of corporate stocks and the wealthiest 10% held about 90% (Ireland 2005).

common sense appeal), and more on their alleged instrumental value in contributing to efficiency, growth and development. They are defended, in other words, on grounds of 'economic exigency' (Ireland 2001).

Decoupling Limited Liability from Control Rights

What we have, then, are two very different approaches to the problem of corporate irresponsibility: one which advocates taking separate corporate personality *less* seriously and a return to unlimited liability, and another which advocates taking it *more* seriously and a rejection of the exclusively shareholder-oriented model of the corporation. Can the two approaches be reconciled? History is again capable of clarifying some of the issues involved.

As we have seen, during the heated debates of the mid-nineteenth century, most of the advocates of limited liability argued for the introduction not of general limited liability but of something resembling the French *société en commandite*. This was a limited partnership in which *rentier* investors ('special' partners) were given the privilege of limited liability, while the active, managing ('general') partners operated with unlimited liability. It was a legal form which offered limited liability to *rentiers*, however, only on the condition that they remained essentially passive and inactive. Their rights and powers in the firm and their ability to intervene in management were, therefore, strictly limited. If they exceeded them and interfered too much in management, they lost their privileged status as 'special' partners and became 'general' partners subject to unlimited liability (Troubat 1853). For the *rentier* investor in a commandatary partnership, therefore, the price of having limited (or no) liability was the loss of control rights. The belief was that the risk of irresponsible behaviour by firms would be minimized by fixing those in control with unlimited liability and restricting the control rights of those with limited (or no) personal responsibility for the consequences of the firm's activities. It was, in other words, a legal form which decoupled limited liability from rights of control.

By contrast, the corporate legal form as presently constituted combines limited liability – meaning *de facto* no liability – with control rights. This is one of the main sources of corporate irresponsibility. We can now begin to see why two different approaches to the problem – one seemingly taking separate corporate personality less seriously, the other taking it more seriously – have been proposed. Both seek to decouple limited liability from control rights, but in different ways in different contexts. Where the corporate legal form is being used (or manipulated) by groups of companies (or, indeed, by individuals), the solution to irresponsible corporate behaviour lies not in divesting parent companies of control rights but in 'lifting the veil', denying separate corporate personality to subsidiary companies and denying parent companies the protection of limited liability. The more general problem, however, has arisen from the complex processes whereby no-liability, no-obligation, no-responsibility shareholders (and their agents) have regained the ability effectively to use their residual corporate control rights. This has enabled them to reassert their power over the corporate sector and to impose upon it, with the complicity of a reconfigured and increasingly self-interested managerial class, the goal of maximising shareholder value. The solution to this aspect of contemporary corporate irresponsibility is unlikely to be found in denying corporate shareholders the privilege of limited liability. It requires, rather, a re-conceptualization of the corporation in which its separate existence is taken more seriously and the idea of it as a shareholder-owned, private enterprise jettisoned. Shareholders would be permitted to

retain the privilege of limited liability but it would be decoupled from the possession of exclusive control rights. What the two different approaches to the problem have in common, then, is that they both seek to decouple limited liability from control rights.

The growing problem of corporate irresponsibility has not, of course, gone unnoticed. Thus far, however, the response has been limited in nature and ambition. In addition to the considerable effort that has gone into dealing with executive and accounting malpractice - primarily, of course, to protect the *rentier* interest - recent decades have also seen the rise of the idea of corporate social responsibility (CSR). Unlike the earlier idea of the 'socially responsible corporation' with its transformative aspirations, however, contemporary CSR is a rather conservative notion which seeks only to ameliorate (Pillay 2006). While the former entailed important changes to the way in which the corporation was conceptualized (and to the constitution of the corporate legal form), contemporary CSR, with its emphasis on voluntary self-regulation, leaves untouched the shareholder-oriented model of the corporation and the corporate legal form as presently constituted. It is hardly surprising that CSR has been so warmly embraced by so many corporations.

What needs to be kept constantly in mind is that the corporate legal form is a contingent legal construct, a complex structure of rights and privileges with many different elements (Dine 2000, chap 6). Its emergence and development in its specific contemporary form was not the economically determined product of efficiency-driven evolution. It was, rather, in significant part the product of the growing political power and influence of the financial property owning class. The same is true of its recent reinforcement and entrenchment, and of the attempts to extend its global reach. The way in which it is currently configured, with its coupling of limited (or no) liability and exclusive control rights is a recipe for irresponsibility. It may be good for *rentiers* but, as Doug Henwood says, it's 'bad news for everyone else' (1997 293).

Bibliography

- Berle, Adolf. 1926. "Non-Voting Stock and 'Bankers Control'."39 *Harvard Law Review* 673.
- Berle, A. 1931. "Corporate Powers as Powers in Trust."44 *Harvard Law Review* 1049.
- Berle, Adolf. 1932."For Whom Corporate Managers are Trustees" (1932) 45 *Harvard Law Review* 1365.
- Berle, Adolf.1954. *The Twentieth Century Capitalist Revolution*. Harcourt Brace, New York.
- Berle, Adolf and Gardiner Means. 1932, revised ed. 1967. *The Modern Corporation and Private Property*. Macmillan, New York; Harcourt Brace, New York.
- Blumberg, P. 1986. Limited Liability and Corporate Groups, *Journal of Corporate Law*, vol. 11, 573.
- Bryer, R. 1993. The Late Nineteenth-Century Revolution in Financial Accounting: Accounting for the Rise of Investor or Managerial Capitalism? *Accounting, Organizations and Society*, vol 18, 649
- Bryer, R. 1997. The Mercantile Laws Commission of 1854 and the Political Economy of Limited Liability, *Economic History Review*, L, 37
- Campbell, D. & Griffin, S., 2006. Enron and the End of Corporate Governance? In MacLeod, S. (ed.) *Global Governance and the Quest for Justice: Volume II Corporate Governance*, Oxford and Portland, Oregon, Hart Publishing.
- Cottrell, P. L. 1980. *Industrial Finance, 1830-1914*. London and New York, Methuen
- Cox, E. 1856. *The Law and Practice of Joint Stock Companies*, London, Law Times Office
- Crosland, A. 1962. *The Conservative Enemy*, London, Jonathan Cape
- Dine, J. 2000. *The Governance of Corporate Groups*, Cambridge, CUP
- Dodd, E. Merrick. 1932. For Whom are Corporate Managers Trustees? 45 *Harvard Law Review* 1147.
- Dodd, E. Merrick. 1935. Is the Effective Enforcement of the Fiduciary Duties of Corporate Managers Practicable? 2 *University of Chicago Law Review* 194.
- Dodd, E. Merrick. 1941. The Modern Corporation, Private Property and Recent Federal Legislation, *Harvard Law Review*, vol. 54, 917.

Duménil G. and Lévy, D. 2004. *Capital Resurgent*, Cambridge Mass., Harvard University Press

Easterbrook, F. and Fischel, D.

Glassbeek, H. 2002. *Wealth by Stealth*, Toronto, Between the Lines

Gow, N. 1823. *A Practical Treatise on the Law of Partnership*, London

Gower, L. C. B. 1997. *Principles of Modern Company Law*, 6th ed., Davies P., London, Sweet and Maxwell

Hannah, L. 1976. *The Rise of the Corporate Economy*, London, Methuen

Hansmann, H. and Kraakman, R. 1991. Toward Unlimited Shareholder Liability for Corporate Torts, *Yale Law Journal*, vol. 100, 1879

Hansmann, H. and Kraakman, R. 2000. The Essential Role of Organizational Law, *Yale Law Journal*, vol. 110, 387

Hansmann, H., and Kraakman, R. 2001. The End of History for Corporate Law, *Georgetown Law Journal*, vol. 89, 439-68.

Harris, R. 2000. *Industrializing English Law*, Cambridge, CUP

Harvey, D. 2005. *A Brief History of Neoliberalism*, Oxford, OUP

Henwood, D. 1997. *Wall Street*, London and New York, Verso

Hilferding, R. 1910, *Finance Capital*, London and Boston, Routledge and Kegan Paul (1981)

Hilton, B. 1988. *The Age of Atonement: The Influence of Evangelicalism on Economic and Social Thought, 1795-1865*, Oxford, Clarendon

Hirst, P. 1979. *On Law and Ideology*, London, Macmillan

Hunt, B. C. 1936. *The Development of the Business Corporation in England 1800-1867*, Cambridge Mass, Harvard University Press.

Ireland, P. 1984. The Rise of the Limited Liability Company, *International Journal of the Sociology of Law*, vol. 12, 239

Ireland, P., Grigg-Spall, I., and Kelly, D. 1987. The Conceptual Foundations of Modern Company Law, *Journal of Law and Society*, vol. 14, 149.

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*, vol. 17, 41

- Ireland, P. 1999. Company Law and the Myth of Shareholder Ownership, *Modern Law Review*, vol. 62, 32
- Ireland, P. 2001. Defending the Rentier: Corporate Theory and the Reprivatization of the Public Company, in Parkinson, J. and Gamble, A. (eds), *The Political Economy of the Company*, Oxford, Hart Publishing
- Ireland, P. 2003. Property and Contract in Contemporary Corporate Theory, *Legal Studies*, vol. 23, 453
- Ireland, Paddy. 2005. "Shareholder Primacy and the Distribution of Wealth." *The Modern Law Review*, 68(1), pp 49-81.
- Jeans, J.S. 1894 *Trusts, Pools and Corners*, London, Methuen
- Jeffreys, J.B. 1938. *Trends in Business Organisation in Great Britain since 1856*, Ph.D., University of London
- Jenks, L.H. 1927. *The Migration of British Capital to 1875*, New York and London, Knopf
- Kahn-Freund, O. 1944. Some Reflections on Company Law Reform, *Modern Law Review*, vol. VII, 54.
- Kaysen, C. 1957. "The Social Significance of the Modern Corporation." 47 *American Economic Review* 311.
- Keynes, J. M. 1936. The General Theory of Employment, Interest and Money, in *Collected Writings Vol VII*, London, Macmillans (1973)
- Kraakman, R., Davies, P., Hansmann, H., Hertig, Hopt, K., Kanda and Rock. 2004. *Anatomy of Corporate Law*, Oxford, OUP
- Landes, D. 1960. The Structure of Enterprise in the Nineteenth Century: The Cases of Britain and Germany, *XIe Congres Internationale des Sciences Historiques, Rapports, V, Histoire Contemporaine*, Uppsala
- Lucas, A. L. 1937. *Industrial Reconstruction and the Control of Competition*, London, Longmans, Green & Co.
- Macrosty, H.W. 1907. *The Trust Movement in British Industry*, London, Longmans
- Marx, K. 1893. *Capital Volume III*, London, Lawrence and Wishart (1974 ed.)
- McCulloch, J.R. 1856. *Considerations on Partnerships with Limited Liability*, London, Longman, Brown, Green and Longmans
- Mercantile Laws Commission 1854. *First Report*, 1854 P.P. 1854, XXVII

Mitchell, L. E. 2001. *Corporate Irresponsibility: America's Newest Export*, New Haven and London, Yale University Press

Muchlinski, P. 1995. *Multinational Enterprises and the Law*, Oxford, Blackwell

Musson, A.E. 1978. *The Growth of British Industry*, London, Batsford

Nichols, T. 1969. *Ownership, Control and Ideology, An Inquiry into Certain Aspects of Modern Business Ideology*. George Allen and Unwin Ltd, London.

OECD, 2004. *OECD Principles of Corporate Governance*, Paris, OECD

Overstone, Lord. 1854. Evidence to Select Committee on the Mercantile Laws

Payne, P. L. 1974, *British Entrepreneurship in the Nineteenth Century*, London & Basingstoke, Macmillan

Pettet, B. 2001. *Company Law*, Harlow, Longman

Pillay, Renginee G. 2006. *CSR and Development: The Mauritian Experience*. Paper presented at the International Academy of African Business and Development (IAABD) 7th Annual International Conference, Accra, Ghana, 23-27 November. Ghana Institute of Management and Public Administration, Ghana.

Rothbard, M. N. 1978. *For a New Liberty: The Libertarian Manifesto (revised edition)*, New York and London, Collier Books

Scratchley, A. 1875. *On Average Investment Trusts*, London, Shaw and Sons

Shannon, H.A. 1931. The Coming of General Limited Liability, *Economic History*, II, 6

Smith, A. 1776. *The Wealth of Nations*

Soederberg, S. 2004. *The Politics of the New Financial Architecture: Reimposing Neoliberal Domination in the Global South*, London and New York, Zed Books

Taylor, J. 2006. *Creating Capitalism: Joint-Stock Enterprise in British Politics and Culture, 1800-1870*, Woodbridge, Royal Historical Society, Boydell Press

Troubat, F. J. 1853. *The Law of Commandatary and Limited Partnership*, Philadelphia, Kay

Utton, M. A. 1972. Some Features of the Early Merger Movements in British Manufacturing Industry, *Business History*, XIV

Veblen, T. 1904. *The Theory of Business Enterprise*, New York, Scribner's

Veblen, T. 1919. *The Vested Interests and the State of the Industrial Arts*, New York, Huebsch

Veblen, T. 1923. *Absentee Ownership and Business Enterprise in Recent Times* New York, Huebsch

Ward, R.A. 1852. *A Treatise on Investment*, London, Wilson.

Watson, W. 1794. *A Treatise of the Law of Partnership*, London, Woodfall

Wedderburn, B. 2004. *The Future of Company Law: Fat Cats, Corporate Governance and Workers*, IER

Wolmar, C. 2001. *Broken Rails: How Privatization wrecked Britain's Railways*, London, Aurum

Wood, Franklin S. 1928. The Status of Management Stockholders, *Yale Law Journal* vol. 38, 57.