

## PROPERTY IN LABOUR AND THE LIMITS OF CONTRACT

Claire Mummé

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The employment relationship is generally conceived of as a creature of contract. Although employment regulation takes different forms in different countries, a contract of employment is at the core of all models.<sup>1</sup> The employment contract is referred to as the ‘bedrock’ legal institution for the regulation of waged work, or as ‘the corner-stone of the edifice of labour laws’.<sup>2</sup> The contract of employment is often depicted as providing the core conceptual features that define access to and the content of the various legal regimes that regulate labour and employment.<sup>3</sup>

At the same time, the contractual regulation of work is often criticized. One of the most important critiques of regulating employment through a contractual frame is that it hides from view the inequality of bargaining power that exists between employers and employees. The argument of this paper is that a contractual framework obscures more than the inequality of bargaining power between the parties – it also obscures the

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<sup>1</sup> The regulation of labour and employment takes different forms in different countries and jurisdictions. These differences, as outlined by Mark Freedland, tend to turn on the degree to which the employment relationship is statutorily regulated, and the degree to which that statutory regime takes up the central role in the overall regulation of the employment contract. In some countries, for example, employment is primarily regulated through specific legal regimes, which either impose terms, rights and obligations between the parties, or create processes and procedures for collective bargaining of employment rights and responsibilities. In other countries, such as the United States, Canada and England, a core contractual common law model of employment law occupies a central regulatory role, which is supplemented by various statutory regimes, which are not highly integrated with that common law model. cf Mark Freedland, ‘Burying Caesar: What Was the Standard Employment Contract?’ in Harry Arthurs and Katherine Stone (eds), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (Russell Sage Foundation 2013).

<sup>2</sup> Otto Kahn-Freund, ‘Legal Framework’ in A Flanders and H A Clegg (eds) *The System of Industrial Relations in Great Britain: its History, Law and Institutions* (Blackwell 1954) 45.

<sup>3</sup> Mark Freedland and Nicola Kountouris, ‘Towards a Comparative Theory of the Contractual Construction of Personal Work Relations in Europe’ (2008) 37(1) *Industr L J* 49; Simon Deakin, ‘The Many Futures of the Contract of Employment’ in Joanne Conaghan, Richard Michael Fischl and Karl Klare (eds), *Labour Law in an Era of Globalization* (OUP 2002) 177.

proprietary basis of the exchange. The employment contract is a legal mechanism designed to transfer wages and rights of control over workers' capacity to labour. Conceived of in this way, the employment relationship is fundamentally a contest for control over property (labour power) waged through contract. For this reason, analysing the property parameters of the employment relationship opens up another window for examining the strengths and weaknesses of regulating employment through contract.

As has long been recognized, the contract of employment depends on the commodification of labour power. And notwithstanding debates amongst political theorists and trade union activists about whether individuals should be viewed self-owners, and whether it is possible to sell one's capabilities without selling one's self, the law *does* treat labour power as a commodity.<sup>4</sup> There has been little research on the ways in which the law does so, however, for the simple reason that self-ownership of one's laboring capacities is often taken as fact, as the starting premise for analysis, and treated as a necessary pre-condition for individual self-realization through contract.<sup>5</sup> Moreover, proprietary and contractual forms of regulating work are often presented as diametrically opposed: a proprietary method of labour regulation creates a relationship of slavery, in which the worker has no sovereignty over the self and cannot leave the relationship.<sup>6</sup> By contrast, contract is presented as an institution of choice, in which the worker chooses to enter and retains the capacity to exit.

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<sup>4</sup> cf John Locke, *The Second Treatise of Government*, ch.5 (first published 1689) <<http://history.hanover.edu/texts/Locke/J-L2-001.html>> accessed 1 January 2015; cf Karl Marx, *Capital, Volume 1: A Critique of Political Economy* (first published 1867, Ben Fowkes tr, Penguin 1977) 270-280; Karl Polanyi, *The Great Transformation* (first published 1944, Beacon Press 2001) 71-80; C B Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke* (Clarendon Press 1962); Carole Pateman, *The Sexual Contract* (Stanford UP 1988) at chapter 1; cf Paul O'Higgins, 'Labour is Not a Commodity: an Irish contribution to international labour law' (1997) 26 (3) *Industr L J* 225 (for the trade union history of the slogan).

<sup>5</sup> Pateman (n 4) 39-75.

<sup>6</sup> See sources infra n 50.

But an analysis of labour power as property, and its relationship to contract, emphasizes that both contract and property are enmeshed in the legal regulation of waged employment. Examining the ways in which the courts have given shape to individual's proprietary rights over their labour power, and set the terms for its exchange, demonstrates that the limitations on employers rights of control are not inherent to the contractual form. Instead, they often depend on wider social processes, such as production methods, collective bargaining, and statutory regulation. Examining proprietary rights over labour power provides another window onto the malleability of the contractual form, and the degree to which political choices are made by courts and legislators in determining the terms of the employment relationship.

This paper will investigate the relationship between labour power as property and contract in the regulation of employment. I will begin by outlining the background role property plays in normative arguments over the value of regulating work through contract, before laying out the more overt property-based claims that are made in regards to employment. I will then turn to examining the employment relationship as the sale, or more specifically, lease of labour power. To do so I will discuss the historical evolution of contractual limitations on employers' rights of control over the 20th century, and the ways in which these limitations are now fraying. In particular, I will describe the development of the managerial prerogative from a property to a contract-based interest, and the ways in which concepts of working-time have theoretically operated to separate in law the commodification of labour power from the commodification of self. Finally, I will conclude by examining the ways in which these limiting mechanisms are beginning to disappear, as collective bargaining protections dissipate and the statutory protections are rolled back. The result is, amongst other

things, the expansion of employers' proprietary rights of control over workers labour power. To flesh out these arguments I will draw primarily from Canadian and English common law principles and legal history, but the analysis conceptually should hold across much of the common law world.

### I. The Legal Content of the Employment Contract

In legal terms, the contract of employment at common law is usually explained as a bilateral negotiated exchange between two parties equal in law, who determine mutually beneficial terms and conditions for organizing their relationship. It is thought of as an open-ended relationship of ongoing duration, in the sense that while some basic elements of the relationship will be set *a priori*, many are likely to shift over time.<sup>7</sup> Mark Freedland describes it as a single continuing contract, which is often explained as relational.<sup>8</sup> The open-ended nature of the relationship is managed through the concept of the managerial prerogative, which allows the employer to direct and allocate work, and to adjust job tasks and schedules.<sup>9</sup> As part of employers' right to make decisions about the organization of their businesses, the managerial prerogative carves out a zone of unilateral employer action in which they may make changes to those terms of the employment contract that are not fundamental.<sup>10</sup> Within that zone of unilateral employer decision-making, employers have an exclusive right of control over the direction of work, which is given effect in law through a series of implied contractual duties that the

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<sup>7</sup> This is because the legal regulation of employment is built around a paradigm of long-term, ongoing employment, often referred to as the Standard Employment Relationship (SER).

<sup>8</sup> Mark Freedland, *The Personal Employment Contract* (OUP 2005) 20; Ian MacNeil, 'Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law' (1977-1978) 72 *Nw U L Rev* 854, 890.

<sup>9</sup> Rebecca Loudoun, Ruth McPhail, and Adrian Wilkinson, *Introduction to Employment Relations* (Pearson 2009) 26.

<sup>10</sup> *Farber v Royal Trust Co* (1997) 1 SCR 846 (*Farber*).

employee owes the employer, such as the duties of obedience, loyalty, fidelity, good faith and confidence.<sup>11</sup>

The implied duties impose a series of obligations on employees, the breach of which gives rise to dismissal for cause.<sup>12</sup> Employees must obey all lawful orders given to them by their employers by virtue of the duty of obedience.<sup>13</sup> The duties of loyalty, fidelity and confidence stipulate that employees may not engage in competitive business with their employers during the life of their employment contract, may not make a secret profit from their employment duties, and may not divulge any confidential information or trade secrets imparted to them while on the job.<sup>14</sup> Violation of these duties provides cause for dismissal, and in some cases, entitles the employer to an injunctions and/or damages. The primary implied duty that employers hold under Canadian law is the duty to provide reasonable notice of termination, absent cause for dismissal. Employees are said not to contract for their jobs, but rather for the right not to be dismissed without cause or reasonable notice.<sup>15</sup> For this reason, the primary claim available to employees dismissed without cause is a wrongful dismissal claim for reasonable notice damages. The wrongful dismissal claim is framed around what Freedland calls the wrongfulness/damages nexus, in which the only wrong from dismissal is the failure to

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<sup>11</sup> cf Innis Christie, Geoffrey England and Brent Cotter, *Employment Law in Canada* (Butterworths 1993) 484-86 (for a general description of the implied duties in Canada).

<sup>12</sup> In Canada, Justice Schroeder's comment in dissent in *Regina v Arthurs, Ex Parte Port Arthur Shipbuilding Co* (1967) 2 OR 49 (CA) (*Arthurs*) is often quoted as the standard expression of cause for dismissal. If an employee has been guilty of serious misconduct, habitual neglect of duty, incompetence or conduct incompatible with his duties, or prejudicial to the employer's business, or if he has been guilty of wilful disobedience to the employer's orders in a matter of substance, the law recognizes the employer's right summarily to dismiss the delinquent employee. The Supreme Court adopted a proportionality analysis in *McKinley v. BC Tel*, 2001 SCC 38 which examines whether the misconduct raises to a level such that it gives rise to a breakdown in the relationship.

<sup>13</sup> *Pearce v Foster et al* (1886) 17 QBD 536 (Eng); *Spain v Arnott* (1817) 2 Stark 256 (Eng); *Callo v Brouncker* (1831) 4 C & P 518 (Eng); *Markey v Port Weller Dry Docks Ltd* (1974) OJ 1914 (Ontario) (*Markey*); *McKinley v BC Tel* 2001 SCC 38 (Canada) (*McKinley*).

<sup>14</sup> *Robb v Green* (1895) 2 QB 315 (Eng CA); *Merryweather v Moore* [1892] M 876 ( Eng Ch Div) [*Merryweather*]; Geoffrey England, *Individual Employment Law in Canada* (Irwin Law Inc 2008) 56-82.

<sup>15</sup> *Bardal v Globe & Mail Ltd* (1960) OJ No149, 24 DLR (2d) 140.

provide reasonable notice of termination, and the only losses relate to the wages and contractual benefits that would have accrued over the reasonable notice period.<sup>16</sup> In Canada reasonable notice is determined by a series of judicially crafted factors, which in theory it seeks to put the worker in the position they would have been if the contract had been performed, and thus provide wages and contractual benefits over the length of time reasonably necessary to find alternative employment.<sup>17</sup> The entitlement to reasonable notice of dismissal, absent cause, is the primary common law mechanism for protecting workers against the economic and social dislocation of dismissal.<sup>18</sup>

## II. Employment as Contract: Its Normative Value, Content and Role

### a. Freedom or Subordination?

For some, the contractual principles described above allow the parties the individual freedom necessary to make the choices that best suit their personal and production needs. Others view employment's contractual form as less benign. For those critical of the contractual regulation of work, a significant amount of commentary proceeds from the idea that the description of waged work as a contractual relationship between two equal parties is either incomplete, and/or intentionally obfuscates the structural inequality of the relationship.

From one perspective the employment contract is viewed as an institution of individual freedom. Although most economic and legal analysis does not directly deal

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<sup>16</sup> Freedland (n 8) 355.

<sup>17</sup> *Bardal v Globe & Mail Ltd* (n 14). These factors include the character of the employment, length of employee's service to the company, employee age, and availability of alternative employment given employee's training, qualifications, and training. These factors are not necessarily accurate predictors of the length necessary for finding alternative employment, and so in practice reasonable notice tends not to operate as an expectancy measure. cf *Wallace v United Grain Growers* (1997) 3 SCR 701 (Canada) para 89 and 103; Lee Stuesser, 'Wrongful Dismissal – Playing Hardball: Wallace v United Grain Growers' (1997-1998) *Man L J* 547.

<sup>18</sup> *Wallace v United Grain Growers* (n 16) para 95; cf Justice Abella's dissent on other grounds in *Evans v Teamsters Local Union 31* (2008) SCC 20 (Canada) para 94.

with questions of property in employment, it has been a central issue for political theorists. Social contract theorists, starting with Locke, argue that individuals *own* their physical capacities, that is, that labour power is a form of property. ‘Every man has a property in his own person,’ Locke tells us. ‘This no body has any right to but himself. The labour of his body, and the work of his hands, we may say, are properly his.’<sup>19</sup> This notion of self-ownership had profound political significance over the 17th, 18th and 19th centuries. As Macpherson and Steinfeld have argued, property in the person upended traditional notions of citizenship in which political rights were distributed only on the basis of land ownership. As self-owners, everyone holds sufficient property to be entitled to political rights. Moreover, in contrast with the pre-20th C status-based system, in which one’s socioeconomic and legal rights were based on social status, once individuals are viewed as self-owners holding a property interest in their own labour, the choice to enter into an employment relationship and the terms of that relationship’s operation can be cast as the product of individual choice. Employer and employee are thus viewed as approaching each other as legal equals, because they each hold property that the other wishes to acquire – labour power and wages. Thus if a proprietary form of employment regulation constitutes slavery, the contract of employment is an institution of individual freedom.

Others, however, are more critical of the contractual regulation of work. One strain of argument focuses on the degree to which a contractual form intentionally obscures the social and economic power differential between employers and employees. From this perspective, conceiving of employment as a contractual relationship serves to legitimize an inherently unequal exchange. While the parties to the employment

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<sup>19</sup> Locke (n 4) chapter 5, section 27a.

contract are theoretically equal in law, that very same legal equality, according to Otto Kahn-Freund, serves to mask the economic disparity between the parties that skews the bargaining process.<sup>20</sup> With trademark eloquence Kahn-Freund argues that:

[T]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. *In its inception it is an act of submission, in its operation it is a condition of subordination*, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the ‘contract of employment’.<sup>21</sup>

Similarly Lord Wedderburn argues that the contractual model that ‘emphasises the personal and voluntary exchange of freely bargained promises between two parties equally protected by the civil law alone [...] is of course suffused with an individualism which necessarily ignores the economic reality behind the bargain.’<sup>22</sup> If the contract of employment masks the economic inequality between the parties, it also obscures their social inequality, which is rooted in the bureaucratic power held by the employing organization.<sup>23</sup> As Hugh Collins has argued, even where workers are able to exert some market leverage in their contractual bargaining, they are likely unable to exert significant bureaucratic power, and are thus subject to the role allocation and institutional rules of hierarchy which have developed within the employing organization.<sup>24</sup> The ongoing social power of the employer is deployed through the

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<sup>20</sup> Otto Kahn-Freund, *Labour and the Law* (Stevens and Sons 1972) 8.

<sup>21</sup> *ibid.*

<sup>22</sup> K W Wedderburn, *The Worker and the Law* (Penguin 1971) 77.

<sup>23</sup> Hugh Collins, ‘Market Power, Bureaucratic Power, and the Contract of Employment’ (1986) 15(1) *Ind Law J* 1.

<sup>24</sup> *ibid.*



managerial prerogative, which legalizes the employer's ability to direct the work relationship.

For many therefore, the contract of employment is designed to legitimize an exchange that is structurally unequal. It is unequal in economic and bureaucratic terms, and indeed, to the extent that one party has the unilateral power to change some of the terms of the exchange during the contract's term, it is also unequal in law.<sup>25</sup> For Ken Foster, the contradictions between equality and subordination in law exist by design and are integral to the employment contract form. 'The contract of employment constitutes the employee both as equal partner and obedient subject at one and the same time. The contract has both formal equality and subordination.'<sup>26</sup> Arguing from a Marxian perspective, Foster suggests that the continued existence of the managerial prerogative is not simply an issue of inherited historical remnants but rather that 'the duality of the contractual form reflects the dual nature of the labour process under capitalism itself.'<sup>27</sup> This argument is an emanation of a broader Marxian critique of liberal law.<sup>28</sup> The common law contract of employment in its idealized form represents an almost paradigmatic example of liberal law. By framing the employment relationship as one of contract, individual and formal equality is prioritized as the basis for the law's application. Formal equality constitutes workers and employing entities as commensurable, hiding from view the differences in lived experiences, economic needs and desires of the parties, rendering them simple objects of formal freedoms and

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<sup>25</sup> Most commentators do not characterize the contract of employment as one that is unequal in law, and are instead concerned with understanding the relationship between the theoretical equality of the parties in law to the inequality of the relationships on the market. But cf Christopher Tomlins, *Law, Labor, and Ideology in the Early American Republic* (CUP 1993) 227-28.

<sup>26</sup> Ken Foster, 'From Status to Contract: Legal Form and Work Relations, 1750-1850' (1979) 3(1) Warwick Law Working Papers 6.

<sup>27</sup> *ibid.*

<sup>28</sup> Isaac Balbus, 'Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law' (1977) 11(3) *L & Socy Rev* 571.

political equalities.<sup>29</sup> Socioeconomic questions are separated from the interests of the law, relegated to a private zone of market activity in which the law takes no content-oriented role.<sup>30</sup> In doing so the question of whether workers *actually* have the ability to exit is eliminated from view: whether they are in fact constrained by social and economic forces in their decision to accept an exploitative relationship is hidden behind the formal equality of contract law.

The critique of contract's formal equality treats the issue of property as one of background rules. Robert Hale famously described the ways in which underlying property rights serve to limit workers bargaining power in the employment context.<sup>31</sup> Workers are dependent on wages for income and subsistence. They are dependent on employment because every other socioeconomic decision they might make to avoid wage dependence is conditioned by the rules of property. Access to food, access to land on which to grow food, acquiring the means to produce goods for oneself, all require property; they require land, or the means of production, or the payment of rent or a purchase price to a property owner. In this context, the wages and working conditions a worker will accept is determined by his or her level of wage dependency, which, in turn, is determined by the degree of access to property.<sup>32</sup> Property therefore forms the context in which employment contracts are negotiated and formed, and sets the balance of bargaining power between the parties. It is the fact that contract is an institution of formal equality that is deformative because it does not acknowledge the bargaining power differential between them, and because it provides no analytical role for the very

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<sup>29</sup> *ibid.* 575-76.

<sup>30</sup> *ibid.* 578.

<sup>31</sup> Robert Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38 *Political Science Q* 470.

<sup>32</sup> *ibid.* 472-474.

different nature of the worker's reliance on wages in comparison to employers' reliance on financial productivity.

b. The Relational Standard Employment Contract and Property Rights to Employment

But if arguments over the normative value of regulating employment through contract rest on ideas about the underlying effect of property entitlements, analysis of the relational nature of the contract of employment provides more direct arguments for workers' property rights in employment.

Some scholars study the contract of employment by analysing the features that set it apart from other types of contract. If the paradigmatic contractual relationship is a bilateral executory contract of short-term duration, the paradigmatic employment relationship is the Standard Employment Relationship (SER) of the Fordist era.<sup>33</sup> The SER has been defined as employment 'which is continuous, long-term, fulltime, in at least a medium sized or large establishment [...]', focused on the male family breadwinner.<sup>34</sup> Arising over the mid-20th C and sparked by collective bargaining, the bureaucratization and systemization of scientific management theories, and the development of internal labour markets, the SER emerged as the defining concept of employment around which labour laws, employment practices and welfare state

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<sup>33</sup> Piore and Sabel define Fordism, or mass production, as the substitution of highly specialized machinery for skilled labour, machinery operated by semi-skilled workers on assembly lines, capable of producing large quantities of goods. Michael Piore and Charles Sabel, *The Second Industrial Divide: Possibilities for Prosperity* (Basic Books 1984) 19-20. In addition to changes to methods of production, the post-Fordist era is characterized by the vertical disintegration of corporations, the dissolution of internal labour markets, a weakened trade union movement and increased wage pressure through wage competition. cf Matt Vidal, 'Reworking Postfordism: Labor Process Versus Employment Relations' (2011) 5/4 *Sociology Compass* 273.

<sup>34</sup> Ulrich Muckenberger, 'Non Standard Forms of Work and the Role of Changes in Labour and Social Security Regulation', (1989) 17 *Intl J of Soc'y of L* 387, 389.

regulation were built across much of the industrialized world.<sup>35</sup> The SER is a contractual relationship, but in many respects it operates differently from discrete commercial contractual relationships. Employment relationships will often be of long-term duration; they are open-ended, and will change over time, allowing workers to progress up (or down) the ranks within a single employing entity. Starting in the 1930s and 40s, the central features of the SER were inscribed into law for unionized workers through collective bargaining agreements, but for non-unionized workers they arose less by law and more through a series of economic and psychological norms that operated within a loose contractual frame. The open-ended nature of the employment contract, and the layers of economic and psychological expectations that guided its ongoing operation, created a relational legal structure that operated as a framework for cooperation rather than as a precise delineation of the terms of the relationship.<sup>36</sup> It was a contract ‘incomplete by design’, creating an ongoing series of exchanges within the framework of an explicit bargain, whose adjustment was mediated by an array of social norms.<sup>37</sup>

According to David Marsden, over the second half of the 20th C workers accepted the open-ended employment arrangement despite its exploitative potential because it created a number of incentive mechanisms that matched the psychological expectations and economic interests of workers.<sup>38</sup> The psychological contract was two-fold. At a broad level it rested on a series of tacit understandings of the expected

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<sup>35</sup> Katherine Stone and Harry Arthurs, ‘The Transformation of Employment Regimes: A Worldwide Challenge’ in Arthurs and Stone (n 1) 1; Alain Supiot and others, *Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (OUP 2001); Judy Fudge and Leah Vosko, ‘Gender, Segmentation and the Standard Employment Relationship in Canadian Labour Law, Legislation and Policy’ (2001) 22 *Econ and Industr Democr* 271.

<sup>36</sup> David Marsden, *The Employment Relationship: Theory of Employment Systems* (OUP 1999) 668; MacNeil (n 3) 900-01.

<sup>37</sup> Collins (n 7) 9-10.

<sup>38</sup> Marsden (n 36).

behaviour between the parties and of their respective obligations towards each other in regards to workplace practices. This was buttressed by professional training and social expectations associated with specific skill sets and job titles. These rules and expectations could be counted on to be respected to the extent that there was a relationship of trust between the parties.<sup>39</sup> That trust, in turn, was built on economic incentives that provided a rationale for expecting their implementation. Labour economic research modeling the career wage trajectory in internal labour markets demonstrates that wage rates were not based solely on market rates but on a deferred compensation over workers' working lives, which would see them earn a continuing stable and increasing wage over time, even as their productivity levels fell in later years.<sup>40</sup> It was this deferred compensation scheme that created long-term economic stability for workers in SERs, and the reason for which they acquiesced to the employer's unilateral right of control.<sup>41</sup> It was an exchange, in the words of Alain Supiot, of security for subordination.<sup>42</sup>

For workers, wage stability over long-term employment was a key feature of the SER bargain – the reason to accept a relationship of subordination. But outside the unionized sector, the courts have rarely been willing to acknowledge and enforce a contractual right to job security, except, in Canada, through the implied duty to provide reasonable notice of dismissal without cause. In the 1960s, 1970s and 1980s workers came before the common law courts making contractual arguments for compensation for the loss of long-term employment and the mental distress and reputational harm that

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<sup>39</sup> *ibid.* 665-66.

<sup>40</sup> *ibid.* 666-67; Katherine Stone, 'Policing the Employment Contract Within the Nexus-of-Contract Firm' (1993) 43(3) *Uni of Toronto L J* 353, 363 ; Ronald Ehrenberg and Robert Smith, *Modern Labor Economics: Theory and Public Policy* (Pearson Education 1991) 430-52.

<sup>41</sup> *ibid.* 667.

<sup>42</sup> Supiot (n 35) 1.

arose from dismissal.<sup>43</sup> Workers and academics also developed property-based arguments to highlight employees' long-term investments in their employers' enterprises, so as to entitle them to some form of job security. This type of argument can be seen in litigation over the 20<sup>th</sup> C concerning the legal nature and ownership of private pension plans.<sup>44</sup> It also initially arose in the United Kingdom over whether unfair dismissal legislation conferred a property interest in one's job.<sup>45</sup> Jo Carby-Hall quotes Sir Diarmaid Conroy, the President of Industrial Tribunals in England and Wales in 1968 as saying that: 'Just as a property owner has a right in his property and when he is deprived he is entitled to compensation, so a long-term employee is considered to have a right analogous to a right or property in his job, he has a right to security and his rights gain in value with the years.'<sup>46</sup> Property was also used as a rhetorical device to argue, unsuccessfully, that wrongful dismissal could amount to an improper taking that should be remedied by reinstatement.<sup>47</sup>

More recently some scholars have been making the case for job security and worker participation in firm restructuring by arguing that workers are not a fixed factor of production, but are rather long-term investors akin to corporate shareholders. This argument rests on the internal labour market analysis described above, which suggests that workers invest in developing firm-specific knowledge for which they will not gain compensation on the labour market, and agree to a lower than opportunity wage at early

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<sup>43</sup> cf *Magee v Channel Seventynine Ltd* (1976) 15 OR (2d) 185 (Ontario) (*Magee*); *Racine v CJRC Radio Capitale Ltee* (1977) 17 OR (2d) 370 (Ontario) (*Racine*); *McMinn v Town of Oakville* (1977) 19 OR (2d) 366 (Ontario) (*McMinn*); *Delmotte v John Labatt Ltd et al* (1978) OJ No 3625 (Ontario) (*Delmotte*); *Clancy v Family Services Bureau* (1978) OJ No 1017 (Ontario) (*Clancy*); *White v Triarch* (1979) OJ 1047 (Ontario) (*White*).

<sup>44</sup> Elizabeth Shilton, 'Gifts or Rights? A Legal History of Employment Pension Plans in Canada' (PhD Thesis, University of Toronto 2011) 63-77; chapter 5.

<sup>45</sup> Paul White, 'Unfair Dismissal Legislation and Property Rights: Some Reflections' (1985) 16 (4) *Industr Relations* J 98.

<sup>46</sup> Jo Carby-Hall, 'Redundancy' (2000) 42 *Managerial L* 1; 8.

<sup>47</sup> Hugh Collins, *Justice in Dismissal: The Law of Termination of Employment* (Clarendon UP 1992) 88.

stages of their careers on the promise of wage stability in their later working years.<sup>48</sup> By virtue of their long-term investments and deferred compensation, employees are akin to other residual corporate owners, placing their interests in the firm on par with those of corporate shareholders.<sup>49</sup> For this reason corporate directors' fiduciary duties should be exercised for the benefit of workers as much as for shareholders.

### III. The Employment Contract as Property Exchange

What is often missing from analyses of the contractual form for regulating work, however, is consideration of the property interests that are at the core of the wage-work exchange. The employment contract is fundamentally about the exchange of the human capacity to labour in exchange for wages, so that employers may use that capacity to create profit.<sup>50</sup> It is a lease of a worker's labour power to an employer for a specific period of time, and in regards to certain types of tasks. In this sense property not only provides the background rules against which the parties' contract, it is the subject of the contract itself.

In theory one of the central distinctions between the contractual regulation of work and a proprietary form of regulation, is that the t contract places limits on what

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<sup>48</sup> cf Wanjiru Njoya, *Property in Work: The Employment Relationship in the Anglo-American Firm* (Ashgate 2007); Simon Deakin and others., 'Partnership, Ownership and Control: The Impact of Corporate Governance on Employment Relations' (2002) 24 *Employee Rel.* 335; Janis Sarra, 'Corporate Governance Reform: Recognition of Workers' Equitable Investments in the Firm' (1999) 32 *Can Bus L J* 384; Margaret M Blair, 'For Whom Should Corporations be Run? An Economic Rationale for Stakeholder Management' (1998) 31 *Long Range Planning* 195; Thomas Donaldson and Lee E Preston, 'The Stakeholder Theory of the Corporation: Concepts, Evidence, and Implications' (1995) 20 *Academy Mgmt Rev* 65; Katherine Stone, 'Policing Employment Contracts within the Nexus-of-Contracts Firm' (1993) 45 *Uni of Toronto L J* 353; Jonathan R Macey & Geoffrey P Miller, 'Corporate Stakeholders: A Contractual Perspective' (1993) 43 *Uni of Toronto L J* 401; 'Symposium: Corporate Malaise-Stakeholder Statutes? Cause or Cure: Appendix' (1991) 21 *Stetson L Rev* 279; Marleen A O'Connor, 'Restructuring the Corporation's Nexus of Contracts: Recognizing a Fiduciary Duty to Protect Displaced Workers' (1991) 69 *N C L Rev* 1189.

<sup>49</sup> Blair (n 48) 195.

<sup>50</sup> Judy Fudge, 'The Limits of Good Faith in the Contract of Employment: From Addis to Vorvis to Wallace and Back Again?' (2007), 32 *Queen's L J* 529.

employers purchase of workers' labour power, and the rights of control they thereby acquire.<sup>51</sup> There are two principal ways in which this has occurred. The first is through restrictions placed on the managerial prerogative, and the second is through limitations on working time.

Under an employment contract, employers gain not only workers' time and the product of their capacities, but the right to control, possess, use and profit from that labour power through the managerial prerogative. As will be explored below, the managerial prerogative has morphed over time from a proprietary right over labour power, to a more limited right of control purchased through contract. Temporal limitations have also been central in law to determining the scope of the employment contract, and to maintaining the theoretical notion that one can sell one's labour power without selling oneself. Temporal limitations have historically operated to determine the length of the parties' obligations towards one another, and the time workers had to themselves. But, as we will see below, working time limitation are inherently politically questions, and the limits historically imposed have tended to emerge not from negotiated terms of individual employment contracts – not from anything inherent in the contractual form – but rather from surrounding patterns of production, from union activism and legislated standards.

#### a. The History of the Managerial Prerogative: From Property to Contract Right

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<sup>51</sup> The differences posited between property and contract regimes, for instance, relate to the ability to exit the relationship, and to the limitations placed on employers' rights of control. Under a proprietary regime workers transfer all of their rights to their labour to their employers, and for this reason forfeit the ability to exit the relationship. By contrast, under a contractual regime worker retain the legal right to leave the relationship if they choose, because both parties are juridical equals. The second difference, in theory, is that under a proprietary model employers hold unlimited power to control, dispose and alienate workers' labour, whereas under a contractual regime, those rights of use and control are limited by the nature and terms of the employment contract. cf Pateman (n 4) 70-72.



The managerial prerogative, as explained above, provides employers with the right to direct the workforce on issues concerning the manner of production. As the British Columbia Court of Appeal stated in *Stein v. British Columbia (Housing Management Commission)*:

An employer has a right to determine how his business shall be conducted. He may lay down any procedures he thinks is advisable as long as they are neither contrary to law, nor dishonest, nor dangerous to the health of the employees and are within the ambit of the job for which any particular employee was hired. It is not for the employee nor for the court to consider the wisdom of the procedures. The employer is the boss [...].<sup>52</sup>

Since the 1990s the Canadian courts have explained the managerial prerogative as an implied contractual term of the employment relationship.<sup>53</sup> By presenting the managerial prerogative as an implied contractual term, the courts suggest that the right of control is something purchased through an employment contract – it is a term of the bargain agreed to by the parties. Some have argued that more than the right to use workers' labour, it is the right of control that is the primary benefit acquired by employers through an employment contract. 'In return for the payment of wages, the employer bargains for the right to direct the workforce to perform in the most productive way.'<sup>54</sup>

But prior to the 1990s, in Canada at least, the managerial prerogative was not expressed as something purchased by the employer, or as an implied contractual term. There was no discussion in the case law of whence this right of control came from or of what legal authority provided employers with such a prerogative. It was, instead, simply

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<sup>52</sup> *Stein v BC (Housing Management Commission)* (1992) 65 BCLR (d) 181 (BCCA) (*Stein*).

<sup>53</sup> *Farber* (n 9).

<sup>54</sup> Hugh Collins, *Employment Law* (Oxford UP 2010) 10.

presumed to exist. Some scholars trace employers' right of control and duty of obedience to the pre-contractual system of master and servant law in England. The traditional narrative in the field is that a contractual method for regulating work emerged in the 19th C in tandem with the Industrial Revolution and the general spread of free-will contracting. Scholars such as Philip Selznick and Alan Fox, however, argue that the contractual regulation of work never in fact shed the vestiges of status and subordination that defined the master and servant system.<sup>55</sup> They argue that the master and servant duty of obedience was absorbed into the contractual framework in the 19th C, so as to allow employers to retain managerial control.<sup>56</sup> Ulrich Muckenberger and Simon Deakin state that 'the principle of an open-ended managerial prerogative to organize work and set the terms and conditions of employment [was] grafted on to the concept of contract' in the 19th C.<sup>57</sup> The fact of subordination and the ability to control the workforce became the definitional hallmark of the employment relationship,

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<sup>55</sup> The law of master and servant law was a statutory regime for regulating employment first enacted in England in the wake of the Black Death of the 14<sup>th</sup> century. It created a penal system of compulsory labour, designed to regulate labour mobility and wage rates. It applied to the waged-work relations of servants in husbandry (agricultural workers and household servants), labourers, and artisans. In the 16<sup>th</sup> century the system was reorganized with enactment of the Statute of Artificers in 1543, and was thereafter interwoven with the Laws of Settlement and the Poor Laws in the 17<sup>th</sup> century. Together these statutes created a comprehensive system for regulating the labour market, through centralized wage-setting, prohibitions on wage competition amongst employers, control of labour mobility and parish poor relief. While statutory in nature, the laws of master and servant were bolstered by a complex body of case law, as well as particular customs and practices from different industries. The enforcement of this body of law was the jurisdiction of justices of the peace. Worker violations of their employment contracts could be punished by penal sanctions, while employers were subject to civil fines. Towards the late 18<sup>th</sup> century and into the early 19<sup>th</sup> century a series of newer statutes were enacted to regulate the work of emerging industrial occupations, just as other central features of the master and servant system began to fall into disuse. These newer statutes were mostly designed to extend and clarify the coverage of master and servant law to artisanal craft work, but they also increased the disciplinary and punitive aspects of the system. Prosecutions under the master and servant statutes increased throughout the 19<sup>th</sup> century, right up until the repeal of the penal sanctions in 1875. The master and servant statutes were exported across the British Empire, and put to work in disciplining colonial subjects. cf Douglas Hay and Paul Craven (eds), *Masters, Servants, and Magistrates in Britain and the Empire, 1562-1955* (University of North Carolina Press 2004).

<sup>56</sup> Philip Selznick, *Law, Society and Industrial Justice* (Russell Sage Foundation 1969) 132; Alan Fox, *Beyond Contract: Work, Power and Trust Relations* (Faber and Faber 1974) 184.

<sup>57</sup> Ulrich Muckenberger and Simon Deakin, 'From Deregulation to a European Floor of Rights: Labour Law, Flexibilisation and the European Single Market' (1989) *Zeitschrift für Ausländisches und Internationales Arbeits und Sozialrecht* 153,57.

distinguishing it from other forms of commercial exchanges and bringing it under the legal auspices of the laws of work.<sup>58</sup> The result, according to Fox, is a '[...] legal construction [...] put upon the contract of employment which left it virtually unrecognizable as contract.'<sup>59</sup>

The master and servant duty of obedience was intrinsically related to employers' rights of ownership over workers' labour power. It has changed over time however, and an examination of its evolution is suggestive of the modern form of the managerial prerogative. Until the turn of the 19th C, as Blackstone tells us, employment was primarily conceived of as a private, personal relationship. Domestic and agricultural servants were members of the employer's household.<sup>60</sup> Robert Steinfeld explains that employers' rights over their workers' labour stemmed from their positions as head of the household, through which they could exert both paternal rule and care.<sup>61</sup> Over the 18<sup>th</sup> century, as the theory of possessive individualism began to take hold in England, the employment relationship was reconceived as a transaction concluded between consenting individuals.<sup>62</sup> But the transaction itself continued to provide the master with rights of use and control of their servants' general labour power.

As a result of this voluntary transaction between two autonomous individuals, the hirer of labor had the legal right to control, use, and enjoy the other's personal energies for the term or purposes specified in the agreement. [...] One

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<sup>58</sup> Otto Kahn-Freund, 'Servants and Independent Contractors', (1951) 14(4) *Modern LR* 504. In Canada the legal test surrounding the definition of 'employee' has evolved beyond the strict application of the control test, but it remains a significant part of the conceptual inquiry. Cf Judy Fudge, Eric Tucker and Leah Vosko, *The Legal Concept of Employment: Marginalizing Workers*, (Ottawa: Law Commission of Canada 2002) 50-92.

<sup>59</sup> Fox (n 57) 183.

<sup>60</sup> William Blackstone, *Commentaries on the Laws of England in Four Books* (1753) Bk 1, ch 14 <http://oll.libertyfund.org/titles/2140>> accessed 1 January 2015.

<sup>61</sup> Robert Steinfeld, *The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870* (Uni of N Carolina Press 1991) 54-60.

<sup>62</sup> *ibid.*

party traded away to the other the property in his own labor for wages or compensation.<sup>63</sup>

Over the course of the 18th and 19th C, however, as industrial manufacturing grew in prominence in England, employers' right of control took on a new significance. As industrial production grew in the 19th C, manufacturing was increasingly centralized under a single employing enterprise or individual. Rather than contracting for labour through an intermediary, such as a foreman, business owners increasingly owned the factories in which workers worked, the materials and tools needed for production, and were the direct employers of the labour force needed to transform the raw materials into physical goods.<sup>64</sup> With manufacturing enterprises as the owner of the tools of production, the materials of production and the labour needed for production, labour was transformed into a commodity input into the production process. And as employers owned all of the inputs into a production process, so they therefore owned its outputs. From such ownership employers' ability to organize production to suit their business needs flowed logically, including the ability to direct its workforce:

From the instant [the worker] steps into the workshop, the use-value of his labour-power [...] belongs to the capitalist. By the purchase of labour-power, the capitalist incorporates labour, as a living ferment, with the lifeless constituents of the product. From his point of view, the labour-process is nothing more than the consumption of the commodity purchase, ie, of labour-power; but this consumption cannot be effected except by supplying the labour power with the

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<sup>63</sup> *ibid.* 80.

<sup>64</sup> Sidney Pollard, *The Genesis of Modern Management* (Penguin 1968) 18-36; Simon Deakin, 'The Evolution of the Contract of Employment, 1900-1950' in Robert Salais and Noel Whiteside (eds), *Governance, Industry and Labour Markets in Britain and France* (Routledge 2005) 208.

means of production. The labour-process is a process between things that the capitalist has purchased, things that become his property.<sup>65</sup>

The managerial prerogative, therefore, rests on concepts of status and on employers' proprietary ownership over the inputs and outputs of their businesses. Although currently framed as an implied contractual term, it is intrinsically linked to the employers' right to control their property which is given effect through legal ideas such as the implied duties of obedience, loyalty, fidelity and confidentiality.

The managerial prerogative has been tempered by contract over time. Starting in the late 19th C the courts began to narrow the scope of orders that employees had to obey to ones that were related to the employee's particular job functions.<sup>66</sup> And as of the mid-20th C, the Canadian courts also began to suggest that because the employment relationship is contractual in nature, an employer's ability to make unilateral workplace decisions through the managerial prerogative applies only to non-essential terms and conditions of employment. An employer may not make unilateral alterations to the essential terms of the employment contract without the employee's acceptance.<sup>67</sup> What constitutes an essential term, however, is notoriously slippery. According to the Supreme Court of Canada, the court must look to what would be considered essential by reasonable people at the time of contract.<sup>68</sup> Generally, demotions, significant alterations to wages and methods of calculating income are considered alterations to essential terms, which requires an employee's agreement to effect, in the absence of which the employee may consider themselves constructively dismissed.<sup>69</sup> This potentially important limitation on the employer's managerial prerogative is significantly

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<sup>65</sup> Marx (n 4) 283-305.

<sup>66</sup> cf *Price v Mouat* (1862) 11 CB (NS) (Eng).

<sup>67</sup> *Hill v Peter Gorman Ltd* (1957) DLR (2d) 124 (Ontario) (*Peter Gorman*); *Farber* (n 10).

<sup>68</sup> *ibid.*

<sup>69</sup> England (n 14) 348-56.

attenuated, however, by the employer's ability to dismiss for any reason with reasonable notice. Employee consent to contract variation, therefore, occurs in the shadow of job loss.

b. Labour Power as Commodity and Changing Notions of Working Time

The second way in which employers' rights of control have historically been limited is through definitions of working time. Other than circumscribing the managerial prerogative, the primary way in which the courts have imposed limitations on the rights acquired by employers over workers' labour power is by explaining the employment contract as a sale, or lease, for specific amounts of time. That idea that the employment contract is a purchase of working time is what allows for a distinction between workers' own time, and the time they owe their employers. Such a distinction is vital to create a legal distinction between the sale of oneself, and the sale of one's labour power.

Time has always been a central limiting feature of the waged work relationship, but its conceptualization and legal use has shifted in different eras. Under the pre-20th C master and servant system, as Steinfeld explains, workers sold their whole labour power for the entire term of the contract – not just their physical or intellectual labour, but their whole labour power. The sale was not for the work day, but for all times of the day and night, for the duration of the contract even where work schedules were set by statute.<sup>70</sup> The idea that workers sold their total labour power was facilitated by the concept of the annual hire presumption. Under the terms of the 16th C Statute of Artificers and later master and servant statutes, employment contracts in England were presumed to be of

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<sup>70</sup> *An Act towching dyvers Orders for Artificers, Laborers, Servantes of Husbandrye and Apprentises* (The Statute of Artificers), (1563) 5 Eliz c 4, s 9. The hours of work for daily and weekly waged servants in husbandry and artificers was set by the Statute of Artificer, and thereon by individual statutes that regulated work in particular industries.

annual duration unless specified otherwise.<sup>71</sup> The annual hire contract operated similarly to a modern day tenancy agreement, renewing itself annually unless brought to an end by with three months notice by either party before the end of the contract's term. The employment contract therefore leased to employers workers' entire labour power over an annual hire contract, or over the express term set by the parties. The idea that waged employment differed from indentured servitude was premised on the idea that it was temporally limited by its fixed duration.

The presumption of annual hire began to lose practical force in the late 18th and early 19th C in manufacturing work, in tandem with the movement of production out of the home and into industrial manufacturing centres. As E P Thompson argues, by the 19th C in many industries labour was deployed less towards the accomplishment of tasks, set by the seasons in agriculture or specific jobs under the putting-out system, and more towards a systematized work day and work shift determined by the need to maintain continuous production lines:<sup>72</sup>

Those who are employed experience a distinction between their employer's time and their 'own' time. And the employer must use the time of his labour, and see it is not wasted: not the task but the value of time, when reduced to money is dominant. Time is now currency: it is not passed but spent.<sup>73</sup>

In this context manual and industrial workers were often hired under shorter-term contracts on shift schedules determined by employers.<sup>74</sup> At the same time as the annual hire presumption was slowly displaced over the 19th C, in England the state

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<sup>71</sup> *ibid.* s 2.

<sup>72</sup> E P Thompson, 'Time, Work-Discipline and Industrial Capitalism' (1967) 38 *Past and Present* 56.

<sup>73</sup> *ibid.* 61.

<sup>74</sup> Sanford Jacoby, 'The Duration of Indefinite Employment Contracts in the United States and England: An Historical Analysis' (1982) 5 *Comp Lab L J* 85, 97-99. By the beginning of the 19th C domestic servants were considered to work on contracts that could be terminated by one's month's notice by either party. The presumption continued to hold sway over white-collar employment until the end of the 19th century, however, when the presumption was abandoned in England, Canada and the United States.

stepped in with new regulations over the working time of women and children, just as trade unions agitated for greater limits over the working day and work week.<sup>75</sup> The annual hire presumption was fully displaced in law at the turn of the 20th C in Canada, England and the United States, as indefinite duration slowly employment emerged to take its place in law. As indefinite duration employment became the norm, the common law courts began to suggest that employers' purchase of labour time was restricted to the work day and work week, based on the presumed intentions of the parties. The presumed intentions of the parties were often derived from an examination of standard industry practices regarding working time.

That changing notions of labour time were imposing new limits on the property interests employers acquired through contract was visible in a series of cases decided by the courts of England and Canada between the 1890s and the 1920s.<sup>76</sup> In the early decades of the 20th C, employers came before the courts arguing for proprietary rights over workers' time, skill and income earned outside of work. In doing so, they relied on older concepts of exclusive service to argue for an entire proprietary right of control over workers' labour power. The courts, however, began to limit employers' proprietary rights to those that were impliedly or expressly purchased through the employment contract. In the 1904 Ontario case of *Sheppard Publishing Co. v Harkins*, for example, an employer argued that the worker had violated the exclusive service provision of their employment contract by engaging in side projects. But rather than requesting damages

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<sup>75</sup> *Factory Act 1833*, 3 & 4 Will IV, c. 103; *The Factories Act 1844*, 7 & 8 Vict c. 15; *Factories Act 1847*, 10 & 11 Vict c. 29; *The Factory and Workshop Act 1878*, 41 & 42 Vict. c. 16.

<sup>76</sup> Judicial consideration of the scope of labour power sold through an employment contract was not focused only on questions of time. Cases also arose regarding whether employers owned workers' skills, knowledge and relationships developed during their employment, as well as to issues surrounding inventions made by employees. cf Claire Mummé, "That Indispensable Figment of the Legal Mind: The contract of employment at common law in Ontario, 1890-1979", Unpublished dissertation, Osgoode Hall Law School at York University, 2013.



for breach, the employer sought an accounting of the income the employee had earned from his other jobs.<sup>77</sup> The court noted that while ‘[n]o doubt the rights of the master over the person as well as the time and labour of his servant were much more extensive formerly than they are today,’<sup>78</sup> such older principles were inconsistent with modern day notions of liberty and citizenship. A covenant to provide all one’s time and attention to an employer’s business could not mean that the worker was bound to provide services at all hours of the day or night, or in times designated for rest and relaxation. ‘To hold otherwise’, Justice Anglin stated, ‘would be in effect to place the employee of the present day in a position little, if at all, better than that of the villein of former times.’<sup>79</sup> But, the court noted, although employers could not claim any proprietary rights over workers’ labour outside of work, an employment contract did serve to provide employers with ownership over workers’ labour during the time the employer purchased. The court noted that the employee was required to work diligently for his employer’s interests during ‘such hours as it is customary for men in positions such as his to work.’<sup>80</sup> The court held that the rule remained that the ‘money obtained by the servant by the sale of time and labour which belonged to his master, [was], in contemplation of the law, the proceeds of his master’s property.’<sup>81</sup> Any income an employee made during the time sold to their employer was employer’s property.<sup>82</sup>

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<sup>77</sup> *Sheppard Publishing Co v Harkins* (1905), 9 OLR 504 (On HC Gen Div) (*Sheppard*).

<sup>78</sup> *ibid.* para 9.

<sup>79</sup> *ibid.* para 11.

<sup>80</sup> *ibid.* para 11.

<sup>81</sup> *ibid.* para 15.

<sup>82</sup> It seems unlikely that the courts would now permit an accounting for employee wages or profits made in breach of contract. This is Stephen Waddams view. He states that, ‘the courts have not held the employer entitled to the benefits derived by the employee from the alternative use of time, albeit in breach of contract. To permit such a claim would be to give the employer a sort of proprietary interest in the employee’s services: this concept has, since the nineteenth century, been generally unacceptable [...]’. cf Steven Waddams, *Dimensions of Private Law* (CUP 2003) 114. However, although not ordering an accounting of the employee’s side profit, the Canadian Supreme Court has recently held that losses that flowed from the breach of the duties of loyalty and good faith by a non-fiduciary employee entitled it to

Determining what amount of time was sold to one's employer was a matter of contract – of the presumed intentions of the parties. And in the absence of express terms, the presumed intentions of the parties could be inferred from evidence concerning the usual work day and work week in the industry.<sup>83</sup> Increasingly therefore, the courts suggested that the employment contract was premised on emerging industry standards of working time.

By the 1930s and 40s, however, judicial discussions regarding the nature of the labour purchase in an employment contract began to recede. Over these decades, statutory restrictions, international labour standards and collective bargaining introduced further controls over the work day and work week.<sup>84</sup> At the same time the Standard Employment Relationship (SER) became the paradigmatic form of male unionized and white-collar employment, anchoring in law the psychological, social and economic norms associated with long-term employment.<sup>85</sup> During the mid-20th C Fordist era, a standardized work day and work week was increasingly the norm, which, in turn, served to implicitly limit employers' acquisition of property rights over workers' labour. 'By establishing standard working days, defined by hours not output, employers could only set tasks that could be performed in the allotted time.'<sup>86</sup> Thus over the mid-20th C labour time was increasingly standardized, which endowed employers

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recover lost profits arising from the employee's contract breach,, to the tune of \$1,483,239. *RBC Dominion Securities Inc v Merrill Lynch Canada Inc* (2008) SCC 54.

<sup>83</sup> *Thwaites v McKillop* (1925) 29 OWN 122 (Ont SC Ap Div) (*Thwaites*).

<sup>84</sup> International Labour Organization, *Hours of Work (Industry Convention, 1919 ,1)* and *Hours of Work (Commerce and Offices) Convention, 1930* (30).

<sup>85</sup> Fudge and Vosko (n 35) 271. As Fudge and Vosko argue, however, only part of the work force was ever employed in SERs, while a reserve contingent workforce of women and minority workers were used to offset production fluctuations.

<sup>86</sup> Jill Rubery, Kevin Ward, Damian Grimshaw and Huw Beynon, 'Working Time, Industrial Relations and the Employment Relationship' (2005) 41(1) *Time & Society* 89,91. As Rubery and others state, '[t]he divide between standard hours and non-standard hours further constrained employers, as employees at a minimum needed to be compensated by extra payments to give up "free" time, particularly if the hours worked were at times regarded by wider society as particularly unsocial.'

with rights of control, use and profit over the working day, but left workers with a set period of their own time.

This distinction between working time and one's own time served placed limits on the scope of labour commodification. But, as can be seen in the early annual hire presumption, working time restrictions are not intrinsically a product of the contractual regulation of work. Rather a standard working week emerged in the mid-20th C response to certain industrial production patterns, to political and collective bargaining campaigns by unions, and through legislated norms, just as the annual hire presumption first emerged in relationship to agricultural planting patterns and the related need to maintain a consistent work force in seasonal industries. Nonetheless by setting clear boundaries between work time and workers' own time, the emergence of a standardized work week in the Fordist era had a profound impact on the nature of waged work. It provided implicit contractual limits in law on employers' purchase of workers' labour power; employers owned only that time which they purchased, providing workers with time away from work in which to live.<sup>87</sup>

But as the norms of the Fordist era have crumbled since the 1980s, any social consensus over a standardized work week is receding.<sup>88</sup> Since the 1980s and 90s the SER has been displaced in labour market centrality, with a corresponding increase in part time employment, short-term contracts, temporary work arrangements and other

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<sup>87</sup> cf Piore and Sabel (n 33) 19-20.

<sup>88</sup> Such set working days and weeks were never afforded to all workers. Ann Porter argues that governmental officials viewed the role of women as acting as a labour market reserve, to enter the workforce only 'under emergency conditions'. At an aggregate level, as Fudge and Vosko argue, the higher wages earned by unionized workers over the mid-century were sustainable by providing lower wages and less job security to non-unionized workers. cf Ann Porter, 'Women and Income Security in the Post-War Period: The Case of Unemployment Insurance, 1945-1962', (1993) 31 *Labour/Le Travail* 111; Fudge and Vosko (n 85) 276.

atypical forms of work.<sup>89</sup> In some countries statutory restrictions on working-time have been loosened to permit for greater employer flexibility.<sup>90</sup> The number of women in the workforce continues to increase, and as dual income families become the norm in Western countries, new questions are emerging about work-life balance and how to manage the responsibilities of work and home.<sup>91</sup> Control over working time is at the heart of contestations over the nature of flexibilized work and work-life balance. As Rubery and others argue, ‘the wage-effort bargain, and the division between work and non-work time are inherently contested aspects of the employment relationship.’<sup>92</sup> This contestation concerns who will control the duration of working days, the timing of work and the location of work.<sup>93</sup> It is fundamentally a dispute over control of workers’ labour

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<sup>89</sup> Sonia McKay, Steve Jefferys, Anna Paraksevpoulou, Janoj Keles, *Study on Precarious Work and Social Rights, Working Lives Research Institute* (European Commission 2012); cf Andrea Noack and Leah Vosko, *Precarious Jobs in Ontario: Mapping Dimensions of Labour Insecurity by Workers Location and Context* (Law Commission of Ontario 2011); Judy Fudge and Leah Vosko, *Precarious Employment: Understanding Labour Market Insecurity in Canada* (McGill-Queen’s UP 2005); European Commission Community Research, *Precarious Employment in Europe: A Comparative Study of Labour Market and related Risks in Flexible Economies, Final Report* (2005)

<[ftp://ftp.cordis.europa.eu/pub/citizens/docs/kina21250ens\\_final\\_esope.pdf](ftp://ftp.cordis.europa.eu/pub/citizens/docs/kina21250ens_final_esope.pdf)> accessed 1 January 2015.

<sup>90</sup> Mark Thomas, *Regulating Flexibility: The Political Economy of Employment Standards*, (Queen’s-McGill UP 2009) 117-18.

<sup>91</sup> Linda Dickens, ‘Equality and Work-Life Balance: What’s Happening at the Workplace’ (2006) 35(4) *Industr L J* 445.

<sup>92</sup> Rubery and others (n 86) 92.

<sup>93</sup> Peter Berg, Eileen Appelbaum, Tom Bailey and Arne Kalleberg, ‘Contesting Time: International Comparisons of Employee Control of Working Time’ (2004) 57(3) *Industr and Labor Relat Rev* 331, 333-334. As some scholars have begun to argue, lying just below the surface of work-life policy debates are fundamental questions about the ways in which current forms of work, such as immaterial labour, produce value in late modern capitalism as well as the commodification of social reproductive tasks. Hardt and Negri’s define ‘immaterial labour’ simply as ‘labor that produces an immaterial good, such as a service, cultural product, knowledge or communication.’ This includes three types of immaterial labour: informationalized industrial production that incorporates communication technologies; analytical and symbolic tasks, and the production and manipulation of affect – labour in the bodily mode. One of the central questions to which these scholars tend is whether and to what extent immaterial labour, in its different forms, confuses and collapses the concepts of use value and exchange value, and to what extent labour time continues to provide any useful economic measure outside of physical labour. cf Michael Hardt and Antonio Negri, *Empire* (Harvard UP 2000); cf Lisa Adkins, ‘Feminism after Measure’ (2009) 10(3) *Feminist Theory* 323; Linda McDowell, *Working Bodies: Interactive Service Employment and Workplace Identities* (Wiley-Blackwell 2009); *Aufheben*, ‘Keep on Smiling: Questions on Immaterial Labour’ (2006) 14 *Aufheben* 23; Arlie Russell Hochschild, *The Managed Heart: The Commercialization of Human Feeling* (Uni of California Press 2003); Nick Dyer-Witherford, ‘Empire, Immaterial Labor, the New Combinations and the Global Worker’ (2001) 13(3/4) *Rethinking Marxism* 70; Mauricio Lazzarato, ‘Immaterial Labour’ in Michael Hardt and Paolo Virno (eds), *Radical Thought in Italy: A Potential Politics* (Uni of Minneapolis Press 1996). A few legal scholars have also begun to investigate the effects

power, and suggests that to the extent that the mid-20<sup>th</sup> century working-time consensus is dissipating, traditional legal methods which limited employers' rights of control over labour power are also dissolving. Thus, as the number of unionized workers employed under collective bargaining agreements drops, as statutory restrictions on working time are repealed, and as production practices shift towards flexibilized work arrangements, a social and legal consensus around hours of work appears to be crumbling.

There is conflicting data in developed countries on the percentage of workers working in non-standard work arrangements, the percentage of workers outside of the standard work week, and whether and how the numbers vary across different industries.<sup>94</sup> In general, however, over the last 20 years communication technologies have permitted some types of work to move out of the office, into the home, the coffee shop, the library, etc.<sup>95</sup> In many service-based industries, employers are moving onto 24 hour schedules with multiple work shifts throughout the day. For professional white collar employees this work-creep takes the form of requiring workers to remain permanently on-call for their employers and clients, reachable through their cell phones and laptops at all times of the day and night.<sup>96</sup> For more precarious service workers it is the lack of control over the timing of work schedules that is the most pressing phenomenon, as the organization of daily life revolves around the potential for work and

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of such questions on legal regulation. cf Judy Fudge, 'Feminist Reflections on the Scope of Labour Law: Domestic Work, Social Reproduction and Jurisdiction' (2014) 22(1) *Feminist Legal Studies* 1; Emily Grabham, 'Beyond Flexibility? Legal Form and Temporal Rationalities in UK Worklife Balance Law', [http://www.upf.edu/gredtiss/pdf/2013-LLRNConf\\_Grabham.pdf](http://www.upf.edu/gredtiss/pdf/2013-LLRNConf_Grabham.pdf), accessed February 21<sup>st</sup>, 2015.

<sup>94</sup> cf Peter Auer and Sandrine Cazes, *Employment Stability in an Age of Flexibility: Evidence from industrialized countries* (ILO 2003); Koen Breedveld, 'The Double Myth of Flexibilization: Trends in scattered work hours, differences in time-sovereignty' (1998) 7(1) *Time & Society* 129; Cynthia Cranford, Leah Vosko, and Nancy Zukewich, 'Precarious Employment in the Canadian Labour Market: A statistical portrait' (2003) 3 *Just Labour* 6.

<sup>95</sup> Melissa Gregg, *Work's Intimacy* (Polity 2011).

<sup>96</sup> A binding agreement has recently been reached in France between some unions and employers allowing workers to disconnect from remote communication tools so that they may spend the regulatory 11 hours of daily rest uninterrupted. cf Les Échos, *Mails, SMS, téléphone : Syntec reconnaît le droit des cadres à la déconnexion* <[http://www.lesechos.fr/06/04/2014/lesechos.fr/0203425126713\\_mails--sms--telephone---syntec-reconnait-le-droit-des-cadres-a-la-deconnexion.htm](http://www.lesechos.fr/06/04/2014/lesechos.fr/0203425126713_mails--sms--telephone---syntec-reconnait-le-droit-des-cadres-a-la-deconnexion.htm)> accessed 1 January 2015.

the limited capacity to plan forward.<sup>97</sup> In this context, worrying and planning for potential work ends up taking over off-work time as well. Other 21<sup>st</sup> century phenomena are also challenging the traditional boundaries between work and life. In particular, workers' non-work online activities can now be viewed by employers with relative ease, such that workers may increasingly face discipline and dismissal for things said and done on their own time. In all of these ways, the traditional boundaries between one's own time, and work time are beginning to crumble. As Melissa Gregg argues, '[i]f modernist notions of labour hinged on a set number of hours for work, often conducted at a set physical location, the fact that labour now escapes spatial and temporal measure poses obvious problems for defining work limits.'<sup>98</sup>

The absence of judicial concern for maintaining working-time limitations is visible in current common law wrongful dismissal claims. The British Columbia Supreme Court recently considered a wrongful dismissal claim from a young lawyer. Amongst other instances of misconduct claimed as cause, the employer argued that the employee was not always immediately reachable to his supervisor through phone or email. He was told he needed to be available 24/7, and that he could not take a lunch break if there was work to be done, but he nonetheless insisted on leaving the office over the lunch hour and not answering his phone. The court concluded that the claimant was insubordinate, because he did not accept that his employer had the right to determine how to run his business. When the employer's expectations in terms of the claimant's hours of work and availability were explained to him, he rejected them as

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<sup>97</sup> Michelle Chen, 'The Tyranny of the On-Call Schedule: Hourly Injustice in Retail Labour' (*The Nation*, 19 March 2014) <[http://www.thenation.com/blog/178879/tyranny-call-schedule-hourly-injustice-retail-labor?utm\\_content=buffer5a5aa&utm\\_medium=social&utm\\_source=twitter.com&utm\\_campaign=buffer](http://www.thenation.com/blog/178879/tyranny-call-schedule-hourly-injustice-retail-labor?utm_content=buffer5a5aa&utm_medium=social&utm_source=twitter.com&utm_campaign=buffer)>.

<sup>98</sup> Melissa Gregg, 'Presence Bleed: Performing Professionalism Online' in Mark Banks, Rosalind Gill and Stephanie Taylor (eds), *Theorizing Cultural Work: Labour, Continuity and Change in Cultural and Creative Industries* (Routledge 2013) 122.

unreasonable and refused to obey. But, as the court stated, ‘it was not for [the employer] to justify work terms to [the employee].’<sup>99</sup> What was noticeably absent from this decision was any question of whether it should have been a term of the contract that the employee could take a lunch hour, or any consideration of whether it was unreasonable for an employee to turn off his or her phone over night. According to the court, the nature of legal work was that it required constant availability to one’s employer, and to so refuse was insubordinate and a breach of the employment contract. What this type of analysis demonstrates is that the terms of the employment contract are determined on what the courts assume are the reasonable expectations of the parties. These expectations emerge from standard market practices, including average working times, and are then read in as terms of the contract. Thus, to the extent that a social consensus over working time dissipates, that fewer workers are operating under collective bargaining agreements, and statutory working time limitations are under threat, contract law in itself, in the absence of expressly negotiated terms, provides no mechanism by which to maintain limitations on working time.

Thus although some limitations have been placed through contract on an employer’s ability to *change* the terms of an employment contract through limitations on the managerial prerogative, and although there are some limits on the type of control employers may exercise, there are increasingly fewer boundaries placed around the terms of workers’ lease of their labour power. Insofar as working time extends, and workers are to be constantly available to their employers, the zone of managerial control itself extends, endowing employers with a greater degree of power over the labour power they acquire through contract.

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<sup>99</sup> *Gichuru v Smith (cob Howard Smith & Co)* (2013) BCSC 895 (British Columbia) para 166.

#### **IV. Conclusion**

Over the course of these pages I have attempted to lay out the relationship between property and contract in employment. The main argument of this paper is that issues surrounding property are not simply a matter of background rules, but are instead fundamental to an understanding of the operation of the employment contract itself. The reason for this is simply that the employment contract is a legal vehicle for exchanging rights over property in workers' labour. One of the primary innovations of the contractual method of regulating work, in theory, is that it places limits on the rights acquired by employers over workers' labour power, such that the lease is temporally bound and limited in scope. The two primary methods by which this is said to occur are through limits on the managerial prerogative to manage the workplace, and limitations on working time. As the above analysis suggests, however, limitations on the managerial prerogative are minimal at best, given employers' residual right to dismiss with reasonable notice, and contractual notions, although central to the analysis of contractual variations, do little in practice to protect workers from unilateral alteration of terms. Similarly, as described above, the boundaries created by temporal limitations on working time have historically emerged from market practices, through collective bargaining and statutory restrictions. But as those restrictions are loosened through changing market practices, the decreasing strength of trade unions and statutory deregulation, in many types of employment working time no longer erects a contractual boundary between one's own lives and the time we have leased to our employers. Contract provides no method of challenging the creeping extension of working time and employer control, such that in the absence of legal mechanisms like statutory regulation,



the distinctions between the temporary lease of one's labour power and the general alienation of one's self becomes more tenuous.

What this analysis suggests is two-fold: first, that limitations placed employer rights over labour power are not inherent to the contractual form, but are rather embedded in broader social and economic processes that change over time, given content and form through judicial choices at different junctures. The second conclusion is that property and contract are not separate and opposed forms of work regulation. Rather the modern contractual regulation of employment is intrinsically enmeshed with questions of property in labour power. In this sense, the question of whether or not the contractual regulation of work is an institution of freedom or subordination is not dependent solely on the legal equality constructed between the parties, but also on the degree to which it limits the proprietary rights employers acquire over labour power at any given time.