Theory, Politics and the Reform of Corporations Law (or Corporations Law as a Glob)

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Corporations law sits on the intersection of many larger forces in society -- labour and capital, market and organisation, global and local, public and private, and so forth. In the mediation between these, corporations law can play a large part, as between market and organisation, or a small part, as between global and local. Even were you not to believe in forces writ large (*pace* Ireland 2002), corporations law is that environment of business relationships which in part constructs the power people exercise. Collective entrepreneurial activity is defined by corporations law, power being exercised through the acceptance of such risk-taking as both accommodating and constructing the future. The ideas which imbue corporations law therefore resonate throughout society.

Over the last decade or so, corporations law, much to the chagrin of those poor unfortunates condemned to teach it, has undergone extraordinary change. The relevant legislation has been vastly expanded while 'simplified', shifted in constitutional justification, mostly rewritten, subjected to numerous enquiries, and attacked by Task Forces formulated in two different ways. There is considerable tracing, if not exegesis, of the changes in the literature. Yet there is remarkably little examination of this process of change as a societal matter.

This essay is about the processes of change in corporations law in the context of the relationship between theory, research and action, the focus of the workshop for which this paper was originally written. In outline, the essay accepts a familiar (at least to readers of this journal) way of looking at processes of change in law and applies it to what has happened in corporations law. It concludes from this that theorising let loose possibilities of action in the reform process. These possibilities were seized in policy formulation and deployed as reforms. The consequent actions were not necessarily the ones contemplated by the initial theorising. Moreover, unreflective theorising limited the appreciation of these events and could not constrain the consequential action. The essay is, therefore, a morality play about what researchers do. The issues surrounding the Manhattan project surround us too, if not quite so dramatically.

In talking in this way about the topic, theory research and action, in corporations law, this essay is itself involved in theory, research and action. As my action, it develops a theory and applies it to the actions of law reform. Consequently it cannot escape its own critique -- that social theory is dangerous too. Hence it posits a way out of the dilemma; it qualifies the critique. This qualification is that we should not deny the purposes of research. Acknowledging purpose forces consideration of consequences. Apart from the self interest of career advancement and recognition, my purpose here is to free up change in corporations law from the present hegemony of neo-liberal thinking by formulating ways of thinking about that sort of theorising in the context of corporations law. In so doing I hope to allow other ethics into the field.

Extant Theory

There is no single theory of anything in particular of or within corporations law: a metatheory is absent (Tomasic et al 2002: 66). The more any proposition is investigated, the less certain it becomes. The company itself is a mysterious apparition, famously used by HLA Hart to deny the utility of 'What is ...?' questions in legal theory (Hart 1954: 49-59). There are many different ways in which the word is deployed, at one more assiduous point in my life 1 counted 18 (Wishart 1994: 84-7). The idea of the share puzzled the High Court of Australia mightily in *Gambotto v WCP Ltd* more than 150 years after it came into common use. To these puzzles we could add the antimony of risk and trust in managerial discretions, the role of purpose in corporate criminal and civil liability, even the way a corporation makes contracts. This is not even a contest of ideas, rather a muddle of discordant voices. There is simply insufficient commonality between them.

Corporations law, or even a Corporations or Companies Act does not work as a text, despite where you have found this essay. What is one to make of a section which states that a company's constitution has 'effect as a contract' 'so far as it appl[ies] to that person' (*Corporations Act* 2001 s140(1))? The purpose

of the section appears to have been to bind to the constitution those who receive shares by devolution or succession yet, while admitting that, the courts take the section as stating the constitution of a company is a contract and at the same time as confirming cases deciding that not all provisions of a company's constitution bind as a contract. Further, the accepted canons of statutory interpretation are thoroughly ignored by courts when dealing with directors' duties: the statutory duties are treated as subordinate to the general law duties. In content and style, the present *Corporations Act* is a compendium of 150 years of amendment and change. There is even a 'Small Business Guide' which purports to be a summary of the main provisions of the Act of which it forms a part (*Corporations Act* 2001 s111J(2)). To treat the whole as a text is to render insignificant the differences between the parts.

Much of what passes at present for theory in the field of corporations law focuses on corporation law's role as regulation. To do so assumes the processes and functions of the law, and the very ideas of the law and the way they interact with society. This is so whether the regulation is of a contractual form, an ontological entity (Whincop 2001: 24) or something constituted by regulation. 'Contractual form' refers to an assumed neo-liberalism, more of which later. The 'ontological entity' has never been convincingly explained (Wolff 1938, Hallis 1930). As a closed system doctrinal formalism provides no perspective on how corporations law operates within society; it leaves that to other disciplines (Bottomley 1990, Frug 1984).

The limitations of these perspectives from corporations law itself force, for present purposes, a retreat to conceptualisations of how law works in society. Hunt's 'technologies of governance' are useful here (Hunt 1993: ch 6). It produces what I like to call, with some irony in this essay about unreflective research, the 'Glob Theory of Corporations Law'. Without suggesting for a moment that it is the only way of understanding what has happened in the last 10 years or so in Australian Corporations Law, or even that it is particularly original, it does lift the level of abstraction of theory or shift perspective sufficiently to see how other understandings have worked within the process of change.

The Glob Theory of Corporations Law

Let us consider laws to be acts in the process of acting on society, howsoever it is constructed or envisaged. Laws are expressions of the power to govern (Burchell 1993: 267). To be sure, law is but one of many techniques by which the power to govern may be exercised, thus let us further consider that laws are marked out by the power of the state behind them and that this power is that which is exercised by a variety of specific state institutions. Each law, then, is an attempt by an institution of government to do something by a specific technique or set of techniques: proscribing, demanding, penalising, declaring, setting up further institutions, conferring discretions, awarding, and so forth: we can describe law as sets of techniques, or 'technologies'; the whole comprising a broader technology of governance. Parenthetically, I might add that for present purposes there is no need to expound on the distinguishing features of law, although it is a question of some, perhaps all-encompassing, significance to some theorists. That I don't see the distinction as vital here does not mean that it cannot be integrated into what follows, perhaps through some concept of legitimacy.

Imagining law as technologies of governance enables the study of law to be more than of the meaning of a defined and limited set of formulae of words -- it rids us of the idea of the law as text. The way in which institutions work, the ideas and discourses behind what is done within them, the effects of laws and their effectiveness in relation to particular objectives -- all are added to conventional ideas of the substance of laws in order to understand laws as techniques and the law as technology. Rather than elucidating differences by describing discrete laws, we look at techniques in their relation to one another, how they articulate and draw on one another, work in concert and so forth. We map the terrain, rather than describe individual trees, houses, roads, hills and dales as is done in excruciating detail in most textbooks on corporations law.

Consider, for example, that area of law we call securities regulation. It is contiguous to, or even part of, corporations law. The very term 'securities regulation' implies 'command and control' technology and hence at best we read critiques of this type of law (Corbett 1995, Green 1991); mostly, however, we read simple description of what particular pieces of legislation command and what judges have said to resolve problems. Within that schema the role of law in creating and defining the property which is bought and sold and about which advice is given, and establishing the market in which that property is traded is conceptualised as controlling particular people or institutions in society. The nature of the

property and the role and importance of these people and institutions are assumed or perhaps described as context (Nelken 1996), designed to add understanding of the law. Law as technology would concede that commanding is a technique used in this area of law, but would also emphasise the constitutive character of law in propertising securities and establishing, or allowing, the market. This is not to deny that markets arise and things are traded without any necessary legal intervention, it just asserts that by providing that securities are property (*Corporations Act* 2001 s1070A) and that there are licensed markets, like the Australian Stock Exchange, on which securities may be traded (*Corporations Act* 2001 ss767A, 795A-C) the legislature is not simply commanding that these happen. In a complex interaction between institutions of the state and other institutions and people, to have the statement made by the legislature that securities are property and the ASX is a securities market is a technique of governance, legislation, that we may invest with objects illuminated by theories, within knowledges if you like, the effects of which we may attempt to describe. The theories are about markets and the necessity of defined property to those markets, the knowledges are of the economic workings of society.

Consider, also, corporate personality itself. Rather than assuming that law regulates individuals and the question which group activity forces upon the law is how to conceptualise such enterprises, we should ask what were the objects, and societal and legal effects of allowing the label 'corporation', and of maintaining and developing it.

These examples demonstrate that laws as part of the process of governance exist to do things. In both examples, the questions my theoretical posture would indicate, beyond simply identifying and describing the technique or technology, are the purpose and effect of the adoption or maintenance of that technology. Neither of these can be ascertained from the study of the techniques themselves, we need an understanding of society, including how law works within society. Both are therefore theory-dependent, even to the point of denying that a technique can have a purpose, rather people may and institutions reflect this in various ways; and that data collection about effect is contingent on the theory adopted. Further, our readings of the law will vary with our theories, thus not even that is a fixed point of reference.

Importantly, and this is my point, theories within or about corporations law can each be placed within this open-ended and paradoxically circular framework of purpose, technique and effect. Each theory will vary not only in its particular descriptions of each of these three elements, but also in its construction of what those terms mean. All that is fixed is the concept of power and the denotation of certain exercises of power as our field of interest. The evidence of those exercises, meaning the ones in which we happen to be interested, are the words we recognise as law. This framework is, then, well suited to thinking about processes of change and the theories that imbue them.

To pursue the corporate personality example further, it is quite possible to reason that law does not necessarily regulate or take the human being as its subject. Regulation of life may be subsequent to law (McHoul & Grace 1993: 61). This reverses the conception of legal subject. Legal subject comes before human being. Taking *The Case of Sutton's Hospital* as one of the earliest to consider corporations, we may well find that the case is remarkable not for the reason for which it is frequently cited, that is that it decided corporations are to be recognised and dealt with as fictions, real legal persons being human beings, but rather because it moves the law towards assuming power over life by distinguishing humans from corporations. In other words, *The Case of Sutton's Hospital* recognises humans as a special and superior species of legal person. We might then consider the vital force in the development of corporations law to be the notions expressed in privity of contract constraining liability for voluntary acts. Privity and corporate personality grew together, hence corporations law specialises in the unexplained terrain of the interior of persons marked out by the notion of a contracting party. Privity thus establishes the private domain, itself conceptualised within corporations law as relationships founded in contract, but equally subject to associative impulses. Corporations law is both a response to liberalism, as the theorists say, and yet also the foundation, for it makes the governance of human beings possible. We might also consider the structural elements in society as identified by Marx, and consider how developments affected class interests, noting the theoretically more or less complex relation between the superstructure and economic foundation. In this identifying purposes may be a matter of analysis of interests served, although we might want to be careful to make the theoretical presuppositions which isolate those interests from others explicit.

Imagining corporations law as technologies of governance is no more than a subtle change in the usual

expression of law. However it demands, and for present purposes legitimises, a far more comprehensive study of society than a 'contextual' approach. The framework of the study is purpose, technology and effect, but any description of these is as contingent on the theoretical posture adopted as the outcome of the study. This does not imply some sort of mechanistic determinism, a machine-like character where purpose leads to law leads to effect, and all we have to do is figure them all out. That is to ignore the contingent nature of our explorations, and hence prompts the following discussion of the relationship between law and conduct.

The legal system is implicated in the establishment of a set of power relationships, which themselves partly constitute the institutions which govern, perhaps using legal technologies. Any study of these power relations can focus on small change or large structure, yet still the questions are matters of the technique of governance, its purposes and effects. We may map the discontinuities and gaps between the three. Thus in corporations law the practices of small and large business may fit into the preconceptions of the governing institution but more often behaviour is a matter of utilising the terrain of power relations to subvert those intentions (de Certeau 1984: 29-42). We do not talk within this schema of 'abusing', or even 'using', the law, rather how the technology is conceived in varying institutions, whether of government or business, and what this means for the power relations in society, and how power may be exercised over those institutions to change the power relations. Rather than enquiring into the regulatory structure as a static phenomenon, we endeavour to understand how the regulatory process of change worked to produce what is now. Clearly this is Foucault's question, whether it could have been otherwise.

But Foucault's question is ultimately unsatisfying. We have also to look to the future from where we are now. We must ask of each of the various theories of corporations law produced within the metatheory, 'What purposes does this theory imagine for this technology and what presuppositions does this theory make as to value?' We must also be conscious of the degree to which the purposes are effected by the technology and what other effects it might be considered to have. There can, of course, be no absolute set of values to guide us, yet we may debate value by explicitly shifting our perspectives on society.

In these studies the technologies themselves are held constant, as the fixed reference for theorising. Yet even that is an illusion. Lawyers investigate and have always investigated and used the variety of possible meanings in the texts of law. This extends from interpretation to massive discourse shifts, as the theoretical postulates of the constructions we put on the world change. All that I advocate we hold constant is the existence of technologies and that this as a construct helps us think about research, theory and action in corporations.

Corporations law itself, then, can be taken to be a particular glob of regulatory practices sourced and effected through a variety of institutions, such as parliaments, courts, regulatory bodies, boards of directors, general meetings, shareholders, financial institutions, markets and so forth. Each institution is decomposable into opinions and understandings, often with commonalities between them. These commonalities and differences are the objects of our study here. 'Archaeology' is most appropriately deployed as describing what we should do, as the regulatory practices are the accretion of some hundreds of years and there is often only the merest whisper of an indication of what formed them. In this vein, for example, Ireland investigates the source of our understandings of the share (1999), Rubin the context of *Salomon's Case* (1983) and McQueen the administration of colonial corporations statutes (1991).

What follows here is an exploration of one set of commonalities of opinion and understanding imbuing the process of change in corporations law. This is the economic theory of the firm, itself intimately tied into neo-liberalism.

The March of Neo-Liberalism

Remarkable in the opinions and understanding of the institutions involved in corporations law in recent times has been the advance of the neo-liberal vision as defining what it is that is being regulated and what should be done to that regulation. It can be seen most obviously in the academic and text-book literature, and in the law reform effort. The courts are a zone of resistance but not so much from conscious rejection as from incomprehension. Thus, for example, Brennan J in *Gambotto v WCP Ltd* stated:

> Under these circumstances, to require shareholders to sell their shares against their will is an infringement of their rights as autonomous beings to make their own decisions and to carry out their own actions. In a society and under a legal system that is predicated on its members being free and equal agents any interference with the autonomy of any individual needs to be justified if it is not to be regarded as oppressive (354).

This is breathtakingly simplistic. Have not the shareholders contracted to have the constitution of the company altered? If so, what then the justification for interfering in the expression of their individual needs in the contract if not to protect? Yet protection against a person's own decisions is hardly a matter of ensuring the individualist character of society and the legal system. In the event, the High Court of Australia prevented Mr Gambotto's shares from being compulsorily acquired by a change in the constitution of the company. Parliament then provided a means of doing so as soon as politely possible (*Corporations Act* 2001 Part 6A).

The move in both the academic literature and that which explains the law to students has been away from the causes of law in terms of policies or political choices, analysable from a variety of perspectives, towards explanations in terms of responses to transaction costs and market pressures, with political choice a matter of competition for property rights (eg Stoddart 2000). The 'economic theory of the firm' receives increased space in the inevitable introductory sections of textbooks and a vast amount of space in the journals publishing in the field of corporations law. Whincop alone has published more than 25 such essays in the last 10 years (Whincop 2001).

The economic theory of the firm that receives this attention is now the vehicle of neo-liberal thought in the field of corporations law. Once it was different, for there were two major streams of economic thinking. The earlier relational theory saw organisation as in opposition to market, but the newer theory of the firm sees the corporation as a matter of contracting (Foss et al). My differential use of the terms 'organisation' and 'firm', 'market' and 'contracting' is not for elegant variation, rather indicates the discontinuities of these theories, even though they derive from the common ancestry of Coase's 1937 article, 'The Nature of the Firm'. Now the later theory seeks to encapsulate the earlier. In any event, the theory of the firm has come to dominate non-doctrinal theorising in Australian corporations law. And it is there we can find the expression of neo-liberal thinking for it relies on the existence of the individual rational actor for its model-building and the concept of efficiency for its recommending. Relations are conceived in terms of the transaction, the contents of which are rendered invisible. The functions of the state are to facilitate by the removal of market imperfections whether by proffering contractual forms or the removal of regulation.

The place and form of law in the theory of the firm is equivocal (Wishart 2002: 79-81), as it is in economics (Veljanovski 1982: part 3) and neo-liberalism generally (Eagleton 1996: 78-88). Nevertheless, in the 1990s, serious attempts have been made to describe corporations law within the context of the neo-liberal vision of law as rules subject to bargaining (Whincop 2001). These appear to be convincing for economists and there is little in law to compete with them. Certainly there was nothing that gave such a firm set of policy directions. It is these policy directions that have proven to be influential in policy-making circles as the foundation for legislative action. After all, who is to deny the importance of efficiency to business people, even if the 'efficiency' that is attractive to them is not the 'efficiency' of the economist?

To trace the influence of the theory of the firm, and hence of neo-liberalism, on the processes of change in corporations law, we have to dig back to the pre- 1989 era. 1989 marks the determined effort by the Australian federal government (a Labor one, as it happens) to bring corporations law into its sphere of competence. This is not to say that there is not a long history of such attempts (McQueen 1992), but 1989 marks a real change in the success of such attempts. After a number of vicissitudes, the States referred their constitutional power over corporations to the federal government in 2001, albeit in a limited and qualified way. The desire to take control over corporations law appears a strong motivation within the federal government and it plays a significant part in my story of what happens thereafter.

In the century and a half of corporations law preceding 1989, the major impetus for law reform was crisis. As Roe describes of the United States (1996), crisis and reform was the process of evolution, the crises being economic, the reforms being formulated by enquiries. This changed after 1989, for the federal government had to legitimate its hard-won capacity to legislate in and administer corporations

law for all the States, whether that capacity was by virtue of adoption and cross-vesting or, later, by referral of power. At the same time, there were a number of reports from committees set up, in accordance with the crisis and reform dynamic, to enquire into failings in the law that allowed 'the excesses of the 1980s', as the polemic went. These two paths of action came together in the Corporations Law Simplification Program. This was a curious affair, set up by the Attorney-General in late 1993, involving a committee ('Corporations Law Simplification Task Force') within the Attorney-General's Department but outside the normal departmental structure. Attached to it was another committee, the 'Consultative Group', which represented the business and investor communities and the professions and with this the Task Force could consult, as well as with all interested persons who turned up at the various seminars it ran. The stated objective of the Program was to 'simplify the Corporations Law and make it capable of being understood so that users can act on their rights and carry out their responsibilities' (Corporations Law Simplification Task Force 1993).

The Corporations Law Simplification Program was hugely productive. It produced three Plans of Action, 13 sets of Proposals for Simplification, two Bills together with their Commentaries, three reports on drafting issues and another report about the relationship of the Corporations Law and the *Trade Practices Act* 1974. The two Bills became Acts (the second was commandeered by the successor organisation and passed under a different name). There was virtually no controversy over any of this. That was, of course, the point. For why else would a government merely 'simplify' the law?

'Simplification' is a process by which substance is not changed. The thrust is to make the rules more directly implement the policies of law but the policies are not to be changed. Thus there is little to debate. Mind you, the Corporations Law Simplification Program did implement the most radical policy change in recent times, the abolition of par value, but as that had the total support of everyone concerned, it could be implemented without problem. That is the clue to the Corporations Law Simplification Program: it was about doing and being seen to be doing without threat to the federal compact. And it was especially important not to become bogged down in controversy because the idea of the 'race to the bottom' had become legitimised in its reformulation as 'regulatory arbitrage' (Ramsay 1990). States might compete for fee income by providing regulatory regimes attractive to business. Ironically for what follows, these ideas came out of the theory of the firm as, indeed, did the main threat to the consensus represented by the Corporations Law Simplification Task Force's recommendations. Fear of neo-liberal arguments constrained the Program's sphere of operations hence, in those areas susceptible to them, 'simplification' was emphasised.

Simplification took place in a policy vacuum yet reform became the norm. Nevertheless, corporations law was still seen as a structural thing. Hence reform was implemented within the Attorney-General's Department and such debate as took place was in the knowledge of the usual complexity of policies and issues that besets doctrine. This changed in 1996.

The Coalition parties had promulgated policies as to corporations law. These, while indicating support for simplification, averred corporations law was to be changed to reflect the needs of business so that employment would be encouraged. There was little new in this, except in so far as it applied to a continuing process of change and not as recommendations for possible changes. It also highlighted the policy vacuum in simplification and advertised something to fill it: a 'commercial focus' (Costello 1992, Stoddart 2000: 719).

Elected on an economic platform in 1996, the Coalition Government set about implementing its platform. In early 1997 it replaced the Corporations Law Simplification Program with the Corporate Law Economic Reform Program. 'Economic' replaced 'simplification'. Its objectives were stated in terms of 'Policy Goals':

The aim of the Corporate Law Economic Reform Program will be to ensure that Australia's corporate law is consistent with promoting a strong and vibrant economy. This will involve delivering a corporate regulatory regime which:

. takes full account of the Government's economic objectives;

. encourages companies to fulfil their basic role of facilitating investment, employment and wealth creation; and

. protects investors and maintains confidence in the business environment (Business Law Division 1997a: 2).

Corporations law was seen as being able to be directed at these objectives. This represented a new element in the reform effort, one with which the then recently-developed economic theory of the firm was consistent. Thus, at this time, Treasury, and the Treasurer, became responsible for the implementation of the program. The physical location of the Program shifted to Treasury, later to be slowly submerged into its inner labyrinth as a part of the Business Law Division. Economic theory was made available and other policy inputs were cut off. A narrower perception of the role of companies and the way they work became evident in the language of the publications of the Program: cost/benefit analysis was deployed as the prime measure of the acceptability of reform proposals, the terminology of 'transaction costs' and 'barriers to entry', 'industry self-regulation' was configured as that against which government regulation was defined, and world competitiveness became a paramount concern. Corporations law reform became an instrument of on-going economic policy.

But ...

Yet economic theory is not what was then implemented in regulatory form. Examples abound. The institutional structures for setting accounting standards reflect, according to Stoddart (2000: 732-3), not merely a struggle for power amongst lobby groups, but a Machiavellian ploy by the Treasurer. Certainly international harmonisation as a transaction cost reduction device is equivocal theoretically (Goldwasser 1998) as well as not being that which was implemented despite the rhetoric of the relevant set of Proposals (Business Law Division 1997b). The ninth set of proposals, issued before the eighth clearly in a hurried response to the exigencies of the times, deal with substantially the same issues but are similarly bereft of economic logic despite the rhetoric of its Foreword (Business Law Division 2002: iii). In the regulation of takeovers fair dealing and equality are principles upon which the Australian system is founded. These are anathema to the neo-classical economics upon which the neo-liberal vision is built. Certainly there was an attempt to change just some small elements of this in the Corporate Law Economic Reform Program Bill 1998, yet the proposed changes were defeated in the Senate and the Government has not thought them important enough to revive. Similarly, the far reaching changes to the securities industry recommended in the sixth set of Proposals (Business Law Division 1997b) and implemented in the *Financial Services Reform Act* 2001 were not within a discernibly economic agenda (Hains 1998). Reforms to corporate governance appear to have been principally motivated by a desire to placate interest groups (Wishart 2000: 145).

That economic theory was subordinated, despite its prime location in the Program's name, is not surprising. After all, in law making there are politicians, policy makers and advisers and a host of other people and institutions involved. Economic theory is not the strength of many of them. A better description of the views of many is 'economic rationalism', which Edwards contends is a simplified version of economic theory or a set of principles about society and the market by which issues are judged (2002: part 2). The Corporations Law Simplification Program had been set up a process of law reform to deal with a difficult situation where reform was demanded but reforms frustrated. By limiting the process to simplification a strongly directed, even authoritarian, approach was legitimised. But that which could be achieved was confined to whatever could be subsumed under 'simplification'. The Corporate Law Economic Reform Program removed the limitation of 'simplification' but retained the approach. 'Economic' was the substitute legitimising concept, made available by the development of the theory of the firm and the consequent possibility of an instrumental approach to reform, but in the end event referring to a political rhetoric used extensively during the Government's election campaign. The slippage between theory and economic rationalism allowed discontinuities in the logic by which 'economic' was applied to corporations law. 'Goals' did not impact on 'principles', nor 'principles' on 'policies' or 'policies' on 'provisions'. The spaces so created allowed for political appeasement. 'Economic' became a matter of what business thinks best for the economy. This is not even good economic rationalism, let alone good economics. It is not a neo-liberal agenda although neo-liberalism has made it possible.

Conclusion

Predicting and recommending for the future is the object of normative or welfare economics. This is the economics that recommends changes. Positive economics builds models to see what happens when

you change something and welfare economics recommends things to do to achieve efficiency. Efficiency is the maximum utilisation of resources as measured by what people express they want in their choices. This is an ethical proposition usually expressed to be exclusive. Welfare economics has a particularly rigorous framework setting out just how the ethic is to be implemented. Of course you may dispute this ethic, the manner by which it is implemented both in theory and action, and the way competing ethics are laid against it, yet it is indisputably there and is rather simple to understand. It is enormously attractive because it does solve the problem of on what basis do you decide what to do, especially in corporations law, where it is remarkably difficult to become concerned over anyone in particular.

The above story, then, is about the way law and economics theorising lead to an abandonment of more complex understandings that might have inserted social concerns into the law reform effort. Research, in this case being the development of the economic theory of the firm, led to the possibility of action: the reform of law on the basis of the efficiency ethic. However, that action was not constrained by ethics inherent in the theory. As it happened, those developing the economics of corporations law were unconscious of the ethical framework within which they researched and recommended. Take, for example, the following passage about the position of employees in a company:

> Termination is especially problematic for employees who make firm-specific investments of their human capital. ... Apart from reputational damage associated with being sacked, an employee with generic skills suffers no economic damage from termination (although there may be psychic suffering). On the other hand, terminating a worker or manager with specialised skills destroys the stream of quasi-rents associated with those skills, which leaves the worker vulnerable to opportunism by the employer (Whincop 2001: 212).

The author later asserts that to talk in any other way 'resonate[s] with legal scholars' easily aroused sympathy for labour' (215). This is extraordinarily dehumanised, shockingly marginalising personal and familial suffering.

Even were the ethical limitations of the theory to have been perceived, the instrumentalities that formulate and effect technologies of governance are far too diverse and the processes of law reform too complex for debates over values to take place. The theory, by virtue of its ethical base, merely provided a rhetorical posture to legitimate what was done and opportunism then prevailed. The story is thus bleak. Ethical research led to amoral action.

Does this story of the harm that research can do mean that I argue against research? The existence of this essay asserts otherwise. As mentioned earlier, Foucault's question is insufficient for some of us. We feel compelled to action: to recommend for the future. Of course, this is precisely what sociology and, dare I say it, the law and society movement, abjures (Eagleton 1996: ch 1). Yet my story is about what happens if we do not develop recommendations. Mere critique allowed, even promoted, seizure. The problem lay in the lack of alternative visions articulated in research and the lack of reflection on the ethic of each vision. There should be a perception of the purpose of research and an expression of research as limited by those purposes. The discussion of efficiency was merely in terms of what had to be done to promote it in corporations law, not whether there was any other way of conceiving the basis on which recommendations should have been made.

In terms of the field of study of this essay and for the future, perhaps there is in the muddle of discordant voices that is corporations law some way of thinking that allows a discussion about what is good to do. It may be that corporations law as a glob will assist in its development.

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