Changing the Rules of the Game:

Recasting the Legal and Ethical Foundation of Business and Management

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Introduction

The neoliberal critique tends to pit the state—and its multifarious appendages—in opposition to the market, with the former typically depicted as a negative, debilitating, inefficient entity, in contrast to the market which is presented as a ‘natural’ phenomenon and the solution to virtually all socio-economic problems. Buoyed up by transaction cost economics, which sees markets as natural and organisations—both public and private—as instances of ‘market failure’, the neoliberal critique has waged an incessant war on the state, seeking to minimise and marginalise its remit, while, at every turn, questioning its need for and use of resources. In short, the state (and its bureaucracy) is bad and the market is good. However, this critique is problematic because the historical record indicates that markets are either directly or indirectly produced by government action, and, paradoxically, attempts to create a ‘free’ market have increased rather than reduced the size of the state’s bureaucracy (Graeber, 2015). What is clear is that the state, through legislation, enables business to happen, and is also deeply implicated in monitoring and controlling business practice. Connecting to this EGOS stream, legislation has had we think a
significant constitutive impact on the financialization of corporate governance, constituting to a large degree the possibilities of shareholder capitalism. In this paper, we focus on the state’s legislative system, which includes parliament, legislators, civil servants, police, regulators, courts, prisons, etc. Our central argument is that research in management and organisation studies (MOS) is almost completely devoid of a legislative dimension in its discourse and that this misses the ethical significance of law in MOS.

Thus, the question addressed by this paper is, ‘Why does management scholarship have so little to say about the law?’. This paper is organised in the following way. We begin by providing some evidence of the absence, and then we identify some of the implications. We then posit possible explanations for the phenomenon, before discussing what we might do differently in the future. Our initial discussions for the paper were focused on the declining role of Quakers in business but as we progressed with the paper a wider contribution became more evident. So whilst we still draw on the history of Quakers in business, in this paper we focus more substantially on the role of the law in business.

Evidence of absence

Taking games as a metaphor, our argument is that the focus of MOS has been on the playing of the game, rather than on the rules of the game and how these might be changed. When attention is paid to rules, as we find in neo-institutional theory, it is with rules that are law-like rather than with rules formulated and implemented by the state’s legislative system. In other words, rules are depicted in particular and dominant ways in MOS.

This is clear when we contrast MOS and legal scholarship, with most publications in the latter domain peppered with references to particular Acts of Parliament and judicial rulings in court cases, while such references are almost wholly absent from the former. The International Journal of Law and Management does sit on the boundary between MOS and law studies, but it can be discounted as it does not feature in the list of ABS ranked journals. There are also a number of journals at the intersection of law and economics—such as The Journal of Law and Economics; The Journal of Law, Economics & Organization—although articles in these journals typically involve the application of microeconomic theory to explain the effects of
laws, or to assess the efficiency of legal rules, or to predict the diffusion of legal rules, and, as such, are outside the scope of MOS. Likewise, the journals at the intersection of sociology and law—e.g. *Journal of Law and Society; International Journal of Sociology of Law*—are outside of what we would routinely consider MOS, while there appear to be few direct links between critical legal studies—instantiated in journals like *Law and Critique* and *The Crit*—and critical management studies, even though both fields would seem to have a similar orientation.

One place where we do find a connection between MOS and legal scholarship is in the field of industrial relations, or, more specifically, in the sub-field of employment law. In particular, the *Industrial Law Journal*—an ABS three-star journal—publishes articles and commentary aimed at practising lawyers, academics and industrial relations experts. However, the journal’s focus is very much on UK employment law, as evidenced by the fact that all but two of the 32 members on its editorial board are from the UK.

References to Acts of Parliament and court cases also sometimes appear in the corporate governance literature. Here, we do find that publications quite often present evidence from a single legal jurisdiction. For instance, of the 47 most recent (June 2017) articles published in *Corporate Governance: The International Journal of Business in Society*, 34 are studies based in a particular legal jurisdiction. However, these studies are typically concerned with the effect of laws in a specific context rather than with formulating potential changes to the laws (again, and necessarily, in context). To illustrate this point, we briefly examine the case of corporate manslaughter.

Corporate manslaughter is defined as an act of homicide committed by a company or an organisation. Since 2008, it is a criminal offence in English law, as a result of the Corporate Manslaughter and Corporate Homicide Bill (2007) which was introduced to the House of Commons after a series of tragic events in which management failure, either directly or indirectly, caused multiple deaths, but there was no clear legal process for redress. The first significant event occurred in 1987 when the Herald of Free Enterprise capsized with the loss of 193 lives. The DPP brought charges against the ferry company and seven employees but the trial judge held that the various acts of negligence could not be attributed to any individual who was a ‘controlling mind’. A year later, 35 people died when three trains collided in
Clapham. In this case, the British Rail Board admitted liability but, while compensation was paid, nobody was prosecuted for manslaughter. In 1993, the owner of an activity centre was convicted for gross negligence manslaughter and jailed for three years after four teenagers drowned in the Lyme Bay kayaking tragedy. This case indicated that it was easier to convict where the company was relatively small and the ‘controlling mind’ could be easily identified. In 2003, an appeal court in Scotland rejected a charge of ‘culpable homicide’ brought against a gas pipeline firm, Transco, after four people died in Larkhall, though the company was fined £15m for breaches of the Health & Safety at Work Act. In 2005, senior managers in Network Rail and Balfour Beatty were cleared of charges arising from the Hatfield rail crash in which four people died, though again both companies were fined for breaching health and safety regulations. Collectively, these cases exposed a gap in the legislation that the Corporate Manslaughter and Corporate Homicide Bill (2007) sought to fill. The Irish parliament published a similar bill in 2016.

The topic of corporate manslaughter and corporate crime has been discussed extensively in the legal studies literature, at least as far back as the 1960s when the legal scholar, Alfred Conard, examined the economics of injury reparation (Conard et al., 1964). Perhaps the most influential contribution was the 74-page manuscript on corporate punishment by another legal scholar, John Coffee (1981) written not long after the Ford Motor company was unsuccessfully prosecuted for manslaughter for allegedly failing to correct known defects in the design of its Pinto car. Coffee’s paper has 901 citations in Google Scholar (the vast majority in law publications) and 204 in the Web of Science, but of the latter, only seven are in what would be considered the MOS literature. Another notable contribution was by Clarkson (1996) and again most of the 57 citations to his paper are in the law literature. Significantly, the five citations to his paper in the MOS literature are all authored by Jeroen Veldman. The absence of any discussion in the MOS literature about corporate manslaughter is also clear from a search of the ABI/Inform database, which found no scholarly article written by management academics on the topic before 2008 when the UK Act came into force.

Why might this be? Why does MOS have so little engagement with the legal dimensions of organisations? The critical management studies journal, *Organization*, has been around since 1994 so there was, one would think, a ready outlet for
contributions. The notion that the corporation had the capacity to murder was well-known, not least because of Joel Bakan’s book, *The Corporation*, in which he likened the corporation to a psychopath (Bakan, 2004). Why, then, had MOS little or nothing to say about corporate manslaughter, at a time when legal scholars, practitioners and legislators were heavily involved in changing the law, so that corporations could be held to account?

And we can extend the corporate manslaughter story to make the more general point that management academics have not engaged in discussion about the law of the land, nor been active in seeking to change the law. (The law of the land is a legal term, equivalent to the Latin *lex terrae*, that refers to all laws in force within a country or region, including statute law and case-made law.) In the next section of the paper we consider some possible explanations for this.

**Explaining the Absence**

Perhaps the most straightforward explanation is that management academics have collectively accepted and agreed that changing the law is not their responsibility and that it should be left to lawmakers and those with a deeper and specialist knowledge of the law. The UK Companies Act (2006) is the longest Act in British Parliamentary history—with 1,300 sections covering nearly 700 pages—and analysing or contributing to its formulation is beyond the expertise of management scholars, whose contributions must necessarily be more indirect. How many of us have read such statutes? Instead, the argument might go, the role of management scholars is to set the agenda, and then it would be up to other fields, law in particular, to handle the technical implementation. However, the corporate manslaughter case suggests that this explanation is unsatisfactory. What that case shows is that management scholars were *not* involved in the conversation, either directly or indirectly, and were in no way part of either setting the agenda or articulating necessary legislative changes. For instance, there is no reference in any article published in the journal *Organization* to either corporate manslaughter or to any of the five disasters that prompted the change in the law.

A better explanation probably centres around the understanding of social science research that has been in the ascendancy in Management Studies (if not Organisation Studies) since the early 1960s, especially in US business schools. The
story is well-known, but it centred on the belief in mathematical modelling and deductive reasoning above all else. The narrative may usefully be traced from the advances in probability theory and statistics in the late-19th and early-20th centuries, to their application in biology and thermodynamics in the 1920s and then, in the 1930s, to the formulation of mathematical models of socio-economic phenomena (as exemplified by individuals associated with Harvard’s Pareto Circle and the Cowles Commission for Research in Economics). The application of mathematics was demonstrably important during the second World War and the enthusiasm for this approach provided the funding, via the Ford Foundation, for a new model of the business school that was road-tested during the 1950s in, in particular, Carnegie Institute of Technology’s Graduate School of Industrial Administration. (Between 1956 and 1961 the Ford foundation donated $22.5 million—almost $200 million in today’s money—to eight business schools, with the specific purpose of making business more scientific). In 1959, the Ford and Carnegie Foundations published two highly influential reports on the state of US business education which they criticised as being too descriptive and ‘unscientific’ (Gordon and Howell, 1959; Pierson, 1959). These reports, and contemporaneous proselytising of the application of mathematical modelling as a way of understanding social phenomena, proved hugely influential in reorienting business research. But mathematical modelling is essentially a retrospective activity, drawing on existing data, and while it can have a prospective dimension, this rarely extends to postulating—much less proposing—changes to the laws of the land. Instead, the focus was and is on identifying the ‘laws’—akin to Newton’s Laws of Motion or Boyle’s Law—inherent to the system being studied. Ironically, the modellers largely ignored (and ignore) the legal domain, glossing over the fact that the laws of the land are not the same as scientific ‘laws’, and there are political and legal processes through which they can be changed.

Some sub-fields of business research took longer than others to embrace the new paradigm, but by the late 1960s it was almost hegemonic in business schools. Accounting provides a good example, not least because accounting rules, as set out by the International Accounting Standards Board, play an important role in accounting practice (see Kavanagh (2014) for a study of the evolution of marketing thought). Up until the early 1960s, accounting research was primarily ‘normative’ in
that it critiqued existing accounting rules and saw it appropriate for accounting academics to prescribe changes to these rules. On foot of the move towards a more ‘scientific’ approach, as advocated by the Ford and Carnegie reports of 1959, there was a gradual shift, during the early 1960s, to what came to be known as ‘Positive Accounting Theory’ that espoused a scientific, empirical, economics-based approach to the study of accounting practice (Jeanjean and Ramirez, 2009). Seminal contributions occurred in 1968 with the publication of articles by Ball and Brown (1968) and Beaver (1968) (see Watts and Zimmerman (1986) for a compendium of other important contributions). In due course, Positive Accounting Theory became, according to Chambers (1993), a ‘cult’ and came to dominate accounting research. The shift is important, not least because PAT shunned the idea of prescription and saw no role for academics in changing the rules of accounting that was a feature of normative research: ‘… theory as we describe it yields no prescriptions for accounting practice... It is designed to explain and predict which firms will use a particular method of valuing assets, but it says nothing as to which method a firm should use’ (Watts and Zimmerman, 1986, p. 7). Precluding discussion on what the rules should be is not only epistemologically facile—because the social world is only superficially similar to a canister of gas molecules—but it is also inadequate ethically because current (accounting) practices are always the result of past political struggles out of which come winners and losers.

The shift towards a mathematical modelling paradigm in US business schools during the 1950s and 1960s was not accepted by everyone, and it is no surprise that an alternative paradigm emerged around that time. This alternative paradigm is variously labelled interpretivist, qualitative, phenomenological but is invariably defined by its opposition to the mathematical modelling paradigm, which is often called positivism, or functionalism, or quantitative, or hypothetico-deductive. While there are certainly major differences between interpretivism and positivism, what is important for our purposes is that interpretivism also absents itself from engaging with the law, and changes to the law. The tradition harbours many variants, but we will illustrate the point by focusing on ethnomethodology, which emerged in the late 1950s and early 1960s, just when the mathematical modelling paradigm was being promulgated across US business schools.
Ethnomethodology, as originally developed by Harold Garfinkel, seeks to describe how social order is constructed through the everyday methods and practices employed by a socio-cultural group. As well as being opposed to mathematical modelling, Garfinkel also distanced himself from Talcott Parson’s attempt to develop a general theory of society. What concerns Garfinkel—and others in the related field of symbolic interactionism—is how participants produce order through shared sense-making practices and how interpretations of the world are produced and shared. So, for example, the ethnomethodologists were interested in behaviour in queues and other ‘micro’ situations. This focus on micro-social order is evident in related fields such as symbolic interactionism, conversation analysis, and social constructivism, and in derivative research methods such as grounded theory. What we wish to emphasise is that since the focus is on social order, examined through micro-sociological methods, changes to the law are well beyond the horizon of interest (even if Garfinkel’s earliest study was of the conduct of jury members).

Burrell and Morgan’s famous two-by-two taxonomy of research paradigms is a useful framing device. The horizontal axis is a subjective-objective continuum, while the vertical axis maps a continuum from regulation to radical change. Both functionalism (objective/regulation) and interpretivism (subjective/regulation) are rooted in the sociology of regulation (i.e. order), and in this sense both are conservative traditions. The two ‘radical change’ paradigms—‘radical humanist’ (subjective/change) and ‘radical structuralist’ (objective/change)—provide potential alternatives, but, tellingly, neither provides much counterweight to the dominance of functionalism (positivism) and interpretivism. The radical humanist paradigm is defined by a concern with radical change from a subjectivist standpoint, and is constituted by French existentialism, anarchic individualism, critical theory, and anti-organisation theory. Postmodernism wasn’t in fashion when Burrell and Morgan wrote their book, but it probably sits most easily within this paradigm. Moreover, an important strand in philosophical thought, which we can trace back to the death of Socrates, is that philosophers have been largely content to stay out of politics, only requesting that the government give them the protection and freedom to think. That, along with the central concern with consciousness and individual experience probably explains why the paradigm was never associated with substantive thinking about what changes should be made to laws within particular legal jurisdictions.
Instead, one would expect this to be found within the radical structuralist paradigm which advocates radical change from an objectivist standpoint. The difficulty here is that that paradigm owes its major intellectual debt to Marx, and, notwithstanding the depth and compelling nature of his analysis, the US has long been hostile to Marx and communist ideology (Heale, 1990). The attractiveness of Marxism as a primary theory of socio-political change was then fatally undermined by the collapse of the Soviet Union (which in many ways was a great experiment in Marxism) in the late 20th century. Moreover, Marx’s emphasis on revolutionary violence is at odds with the slow, inexorable work involved in changing the law of the land through the in situ legal system.

Another focus of MOS has been to view managing and organisations in terms of practice—something which we return to later in the paper. As a practice, managing is considered not a science amenable to mathematical modelling—although managers may use such models to make judgements—but instead something practiced and learned in context (Mintzberg, 2013). Neither, the argument continues, is managing a profession with a stable stock of knowledge and expertise that all managers should be aware of before or while they practice managing: there is no agreed checklist of agreed know-how that those in management roles need to know a priori in order to undertake their tasks and responsibilities.

One of the effects on this is that business education programmes rarely cover in any depth (accounting may be the exception to this if linked to professional bodies), for instance, fiduciary duties as contained within legal frameworks such as those set out in the Companies Act (2006) in the UK (e.g. duties of obedience to the organisation’s purpose; duty of loyalty to the company and any shareholders; duty of care for the best interests of the company; duty of good faith and fairness; and a fiduciary duty of disclosure). Yet directors, managers and employees alike—individuals in positions of trust—all owe their company’s fiduciary duties whether they are aware of them or not.

By contrast to the lack of focus on law, regulation and standards, virtually all business school programmes comprise of explicitly covering ethical theories and moral dilemmas as a central element of their curriculum. The teaching of business ethics has gained tremendous ground since the early 2000s. In fact, coverage of ethical approaches and issues is often mandated (especially post-Enron) by
accreditation bodies such as the AACSB, where ethics is assessed through appropriate behaviours. Some of the debate in ethics has focused on the ethics of ethics (Jones, 2007), particularly the way which ethical decision making requires a decision rather than slavishly following a company’s code of conduct. But another critical feature of the ethics of ethics would be to question the very boundary - the gap - between the ethical and legal, to show that it is the ethical significance, the value-laden nature, of law that is absent when ethics and law are understood as separate domains.

The currently high-profile VW diesel engine emissions scandal is the latest example of the emphasis on business ethics with the focus on VW’s dysfunctional organisational culture and the scapegoating of individual personalities or particular experts for its emissions ‘cheat technology’. What is largely missing from much of the discussion is that VW could not design and build a diesel engine that would meet mandatory carbon dioxide emissions. The new mandatory standards effectively changed the rules of the game for the automotive industry—and the socially constructed nature of the emissions standards became taken for granted and indeed reified. In response, VW would have had, we assume, to consider licensing electric technology from a competitor such as Toyota, stop selling diesel cars because they did not meet the standard required or create a ‘workaround’ with regards to the emissions standard - VW did the latter and cheated the system. That VW decided on the latter remains fascinating, but for our purposes it is the way the legislation embodied in environmental standards changed the rules of doing business, structuring the forms of decisions around new consequences for profitability, social impact and legitimacy.

As we have intimated, other factors also come into play, such as the effect of external accreditation which has become increasingly important to business schools. In particular, the accrediting agencies have required business schools, seeking accreditation, to demonstrate their autonomy from, typically, their host university. For instance, the AACSB stipulates that an applying business school must have ‘a sufficient level of independence in four areas: (1) branding; (2) external market perception; (3) financial relationship; and (4) autonomy as it relates to the single business unit and the institution’ (Association to Advance Collegiate Schools of Business, 2016, p. 8). This drive towards autonomy has necessarily weakened the
links that business schools have traditionally had with other fields in the social sciences, particular the Law School, which was often housed with the Business School for administrative purposes.

Another reason is probably because business school academics are now so absorbed with playing the academic game, and adjusting to the new rules of that game, that they have little time or incentive to worry about, much less change, the laws of the land. These new rules privilege publications in peer-reviewed, academic journals to the exclusion of most everything else, including any potential engagements with the legal system. There is some recognition that this has led to perverse if not dysfunctional behaviour, and so there is a growing requirement that academic research be ‘relevant’ and have ‘impact’, even though it is generally accepted that proving causality is highly problematic in social science research. Notwithstanding the current fashion for talking about ‘impact’, there is little to suggest that this will lead to a deeper engagement by business school academics with the legal system within which business practice operates.

Another factor probably relates to the dominance of US business schools in the global context of business education and research as global and universal, beyond any particular context or legal jurisdiction. The first business school was founded in the US; the case study, the dominant pedagogical model of business education, was developed in Harvard; the current model of a research-based business school was fashioned in the US in the 1950s and 1960s; while US-based journals dominate the higher end of the journal rankings. One effect of this hegemony is that it works to sideline interest in the law, because, if one’s horizon only extends to a single and often national legal jurisdiction, then differences in the law are less important as a research variable and in the development and circulation of teaching material.

The way in which young academics are trained and selected may also be important. Decades ago, many, if not most business academics had significant experience in the practice of business and quite often did not have a PhD. That has changed now, and the PhD is now virtually mandatory. To produce this new breed of business academic, PhD programmes have been put in place, and these are invariably framed around a particular practice of theorizing—that seeks explanations that are general rather than confined to particular legal jurisdictions—that leaves little scope for normative, prescriptive research. Moreover, if one is starting a PhD one is unlikely to
frame one’s research around a current legal issue, as that issue may no longer be relevant four or five years later when the PhD is complete and the research submitted for publication. This particular approach to research is then institutionalised through hiring practices, reward schemes, journal rankings, and the requirements of accreditation bodies, so that the system works to self-reproduce, while the individual entities within the system became more isomorphic with one another.

There also may be more pernicious explanations as to why business school academics tend not to focus on the laws of the land. In many ways, business is a game and shares features of many games, such as the idea of winning and losing. In games, the winners of a game are typically keen to keep playing the game according to the existing rules and will block, either directly or indirectly, attempts to change these rules. And it also makes sense for the winners to influence, infiltrate or colonise those institutions or groups that have a role in changing the rules. If this is so, then it may partly explain why academics in business schools have been so reluctant to question, or try to change, the laws of the land.

**Changing the Rules of the Game**

In their influential study of US higher education for business, Gordon and Howell (1959) assert that, ‘The tasks of a business school are to train men [sic] for the practice of management (or some special branch of management) as a profession, and to develop new knowledge that may be relevant to improving the operation of business’ (quoted in Simon (1967, p. 1)). This neatly delineated a distinction between the practice of management (as a profession) and the development of new knowledge (theory), and this came to be a powerful framing device for academics working in business schools and it also structured a decades-long debate about the appropriate relationship between theory and practice. As part of this debate, the neat division between theory and practice came to be seen as too neat, and much play was made of Gibbons et al’s (1994) distinction between Mode 1 and Mode 2 forms of knowledge production. According to this scheme, Mode 1 is grounded in discipline-based scientific practice, that is focused on conceptual development rather than the applicability of its findings, while Mode 2 is problem-centred, transdisciplinary, and centred on the needs of business and agencies that fund
research. Positivist research could easily be depicted as Mode 1 and so, as it came
to dominate management studies, there were plenty of calls for the discipline to
embrace Mode 2 as its preferred model of inquiry. More recently, Van de Ven’s
(2007) influential call for ‘engaged scholarship’—undertaken by a pluralistic collective
of academics and practitioners—has resonated with many who felt that the gap
between theory and practice was widening, raising questions about the whole point
of management research.

We take a somewhat different tack. As we see it, the theory-practice division is a
much too simplistic view of the world and needs to be replaced with a more complex
model. The first move would be to recognise that both ‘theoreticians’ and
‘practitioners’ each are engaged in their own domain of practice. It is not that one
group is a practitioner and another group is not. Somewhat ironically, games, which
are routinely associated with children and trivia, provide the necessary complexity to
help us see things anew. Games provide a perspective on business that’s more
than simply saying that management academics have given insufficient attention to
the ‘rules of the game’. Here, we speak of game as a perspective on—rather than a
metaphor for—business as metaphors require two distinct domains (one wouldn’t
say that football is like a game, for instance).

So what have games got other than theorists and practitioners? The actors in
games include players, supporters, managers and management teams,
commentators, referees, analysts, administrators, sponsors, regulators, etc. We also
have game-developers, game manufacturers, clubs, associations, communities of
practice, as well as administrative and rule-making practices. In such a context it
makes little sense to speak of ‘practitioners’ or ‘theorists’ because the former term
applies to categorically different actors, while most of the actors are involved in
theorising in some form or other. In games, there appears to be no actor whose
remit is solely to construct theory.

What interests us is the distinction between playing the game and changing the rules
of the game. From our everyday knowledge of games we recognise that these are
different activities, but also that playing the game requires more than players. Here,
MacIntyre’s (1981/1984) distinction between practice and institutions seems to be
helpful. Tellingly, games are the exemplars when he describes his key concept of practice:

Tic-tac-toe is not an example of a practice in this sense, nor is throwing a football with skill; but the game of football is, and so is chess. Bricklaying is not a practice; architecture is. Planting turnips is not a practice; farming is. So are the enquiries of physics, chemistry and biology, and so is the work of the historian, and so are painting and music (MacIntyre, 1981/1984: 187).

And games also provide the best illustration of the difference between a practice and an institution:

Practices must not be confused with institutions. Chess, physics and medicine are practices; chess clubs, laboratories and hospitals are institutions … They are involved in acquiring money and other material goods; they are structured in terms of power and status, and they distribute money, power and status as rewards (ibid. p. 194).

While the distinction is helpful, it is also rather slippery. For example, in the game of football, there are football clubs, but also national associations of football clubs as well as international federations of national associations, suggesting at least a network of institutions if not a hierarchy. Also, the boundaries of a practice are not clear: for instance, are spectators part of the practice or the institution? MacIntyre also seems to privilege players in his important distinction between ‘internal’ and ‘external’ goods, which he explains by telling a story of an adult encouraging a child to play chess. Initially, the adult promises the child some tangible reward, for example sweets or money, if she plays the game. Over time, the child comes to enjoy playing the game and will play solely for the love of playing regardless of any reward. In a nutshell, this captures his distinction between internal and external goods: the enjoyment derived through playing the game itself is an ‘internal good’ while the sweets or money constitute an ‘external good’. However, it is not clear how the notion of external and internal goods applies to non-playing actors, such as supporters, analysts, administrators, managers, etc., all of whom have some role in the practice but for whom the notion of internal or external good seems to make little sense.

Notwithstanding these issues, MacIntyre’s distinction between the practice and the institution is still helpful in that responsibility for changing the rules of the game rests with the institution, and is an important part of institutional work. Here, we should emphasise that we are talking about formal rules that have a legal or quasi-legal standing, rather than, as institutional theory would have it, rules that are law-like. To
understand this distinction, consider the game of football, where, before a game, the members of each team link their bodies to form a huddle with the intention of raising their collective fighting spirit and adrenalin. This behaviour is habitual and hence it comes to be law-like, though of course there isn’t a law dictating this behaviour, which is a crucial point. In contrast, laws (or perhaps quasi-laws) in the game of football do exist and are implemented by a referee, whose decisions are supported by a quasi-legal system consisting of a hierarchy of disciplinary committees, appeal processes, etc. There are also processes by which these laws change, and it is these that are especially interesting to us, as we see them as categorically different from the processes through which ‘law-like’ rules emerge, and which have tended to be the primary concern of management researchers. So, for instance, a law was introduced in football to prevent goal-keepers from handling a ball foot-passed by a team-mate, as a delaying practice had developed that was against the spirit of the game. Similarly, the rules in the game of rugby have changed routinely, again through a formal, consultative process. For example, in 1886 a try was ruled to be worth one point, and, over the years, the rules have periodically changed so that a try is now worth five points. These rules are quasi-legal, separate from the laws of land: a player will not be brought to court for handling a ball in football. Occasionally the quasi-legal and the legal can overlap; for example, the police and courts might become involved if one player viciously assaults another during a game. What is important for us is that the substantive difference between ‘legal’, ‘quasi-legal’ and ‘law-like’ rules and the processes through which these change does not seem to be captured within contemporary research in management studies generally, or in the management sub-field focused on corporate governance.

Thinking of business as a game or a series of games provides another useful perspective that is perhaps more directly associated with corporate governance. Here, we draw on Aristotle’s distinction between poiesis and praxis. Poiesis describes an activity associated with making or fabricating something, which necessarily terminates in and brings about a separate product or outcome that provides it with its end or telos. Typical examples of poiesis include building a house or making a chair. Arguably, playing a game or performing a dance are not examples of poiesis—because a game’s end is to play the game rather than to produce a separate product—but given that we are positing business as a form of game these
activities seem to fit within the general notion of *poiesis* especially when we compare it with Aristotle’s other domain of *praxis*. *Praxis*, for Aristotle, is not structured around a separately identifiable outcome; rather it is the domain of activity where the end is realized in the very doing of the activity itself: ‘while making has an end other than itself, action cannot, for good action [*praxis*] itself is its end’ (Aristotle, 2007: 6.5 1140b7). For Aristotle, *praxis* has to do with the conduct of one’s life as a citizen; it is about activities such as being friendly, honest, truthful, loyal, helpful. In essence, the distinction between *poiesis* and *praxis* is between productive and ethical activity. A game may have an ethic, peculiar to the game, but ethics in the context of one’s life as a citizen is quite different. For example, bluffing may be acceptable, even valorised, in the game of poker but would usually be unacceptable in the life of a citizen, or, for instance, in marriage. *Phronesis*, or practical wisdom (sometimes translated into prudence and recently connected to mindfulness), is the form of knowledge associated with *praxis* and this provides the basis for determining when an activity, such as bluffing, is or is not acceptable. More broadly, practical wisdom is how we know that a game is becoming dysfunctional, too serious, or distracting from other games. And practical wisdom is also how we know that the rules of the game of business need to change, and how they must change.

**Learning from Quakers in Business**

Changes to corporate law, particularly incorporation in the mid-nineteenth century had profound implications - changes to the rules of the game - for all businesses to the extent that it seemed to undermine the ‘practice’ of the game of religiously-held values. What this tells us is that the rules of the game have an ethical and value-laden dimension to which some felt they could not engage with. Eventually, Quakers decided to focus on other games such as educational work and social reform, international cooperation, peace work and public service. Today, playing the game is challenged by movements such B Corps, which are for-profit businesses that adhere to social and environmental standards, but which nonetheless have contributed less to challenging the overall legal framework within which companies operate.

Historically, Quakers provide us with an exemplar for both challenging the rules of the game and playing the game. Quakers were involved deeply in creating the rules of the game in business contexts in the early decades of the industrial revolution
particularly in Britain and the US. Quakers also played central roles in the formation of other major companies, such as IBM (Belden and Belden, 1962), Sony, Price Waterhouse, and J. Walter Thompson (Windsor, 1980). In the sphere of management studies, Frederick Taylor was the son of a notable Quaker family in Philadelphia, while Mary Parker Follett and Wroe Alderson (often spoken of as the father of marketing) were active Quakers. It was in this American milieu that another Quaker, Joseph Wharton, founded America’s first business school, the Wharton School in the University of Pennsylvania in 1881 (Baltzell, 1996). Wharton also co-founded and was the major shareholder in Bethlehem Steel Corporation, and employed Frederick Taylor in 1898 with the express purpose of applying more scientific approaches to managing the factory (Copley, 1923). Yet, Quakers have been largely ignored in the management literature and in the history of management thought, which typically—and importantly—locates the discipline’s origins in the mid to late nineteenth century. This was precisely the point when many of the Quaker businesses were incorporating, which we see as the decisive change that marked the beginning of the end of the distinctive form of ‘Quaker’ governance, ushering in an era of capitalism based on limited liability and externalities.

Alfred Chandler’s influential book on the dynamics of industrial capitalism is important because he studied British enterprises of the period, comparing them rather unfavourably with the organisational form that had emerged in the US. In his typology, the British Quaker businesses were ‘entrepreneurial or family controlled enterprises’ (Chandler 1962: 240) where the founders and their heirs recruited a relatively small cadre of managers. His analysis is that these forms of “personal capitalism” were inferior to the “extensive managerial hierarchy” found in the larger American companies. For him, “personally managed family firms were unable to exploit the economies of scope in the manner of their American counterparts” (Chandler 1962: 374). An intriguing part of the Quaker story is how and why they lost their preeminent position in business during the twentieth century when most of the companies passed out of Quaker ownership and control. Today, the most famous of these—such as Cadbury and Barclays—are now only Quaker by historical association. Perrow’s (2005) critique of efficiency theories such as Chandler who argued that particular organisational forms arose when it was efficient for them to do
so. By contrast, Perrow’s argument is that the new corporations were born out of dominant legal, political and economic power.

For Quakers the most significant events were the profound innovations in corporate law that occurred in the mid-19th century: the Limited Liability Act of 1855, the Joint Stock Companies Act of 1856, and the Companies Act of 1862. These Acts underpinned the legal revolution at the centre of business practice in the UK and the US that occurred in the latter part of the nineteenth century. In particular, they enabled the creation of the limited liability corporation, which meant that once companies had the legal right to limit their liabilities, their wider responsibility to communities becomes much more opaque. By the end of the nineteenth century many of the big Quaker businesses had converted from partnerships to this corporate form: Reckitt’s in 1888, Crosfield’s in 1896, Rowntree’s in 1897 and Cadbury in 1899.

Of course, the problems faced by family businesses of the nineteenth century were perhaps not that different from today—for instance, how to get the best out of people, maintaining a focus on the long-run, and issues around the raising of capital in order to finance growth and expansion. While internal drivers such as the falling numbers of Quakers may have undermined Quaker networks, and rising prosperity weakened Quakers’ attachment to the Religious Society of Friends, we have pointed to corporate law as a key determinant of the decline of Quaker businesses from the mid-nineteenth century. Yet, the publicly-quoted, shareholder-owned company model makes a return to the Quaker brand of responsible business impossible, as Sir Adrian Cadbury has acknowledged (foreword, King, 2014). However, while it easy to dismiss Quaker enterprises as a historical peculiarity, the community was staggering successful—providing the veritable seed of the industrial revolution (Walvin, 1997). Scholars in the responsible business tradition have understood the need for many aspects of contemporary business and corporate law to change, particularly in the area of fiscal policy to further promote alternative forms of corporate governance. But what may be equally important is the education of, and willingness of contemporary entrepreneurs to enmesh responsible business practice with Quaker or explicitly ethical secular values with available corporate structures.

The question of how to select a corporate governance structure that enables either a
faith-based, or secular, notion of responsibility in business is an intriguing, and largely underexplored, area that warrants further consideration.

Conclusion, and an Invitation

Milton Friedman famously asserted that, “There is one and only one social responsibility of business—to use its resources and engage in activities designed to increase its profits so long as it stays within the rules of the game” (Friedman, 2009: 133). This paper has argued that these rules of the game should become much more central to management studies, and to the conversations around corporate governance. In particular, rather than considering law-like or quasi-legal rules, the focus, we argue, should be on the legal rules of the game for business.

How might MOS engage in the ethical significance of legal rules of business when we as a community are distant from the legal dimensions of the business world? Our suggestion, which is embryonic at this stage, and to which we would like to invite others to join, is to create a collective experiment which gathers together MOS academics and other interested groups in an attempt to rewrite a particular section of company/corporate law. If we are right about the neglect of law in MOS, doing this would be a valuable initiative itself - what is important in going about changing the way changes to the rules of the game are enacted? - and it could be an intervention into an aspect of business that MOS has hitherto not reached out toward. Our humble suggestion it that this recognition, exploration and experimentation would help recast the the gap - the boundary - between ethics and law, aid in witnessing the ethical foundation of the laws of business while also simultaneously enriching the field of MOS.

References


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