

MARXISM, THE MARKET AND CORPORATE RESPONSIBILITY: A COMMENT ON PADDY IRELAND

ABSTRACT

This article is a response to Professor Paddy Ireland's proposals for altering company law to reduce the excessive protection it offers to 'irresponsible' investment. It argues that, although Professor Ireland most valuably seeks to refine the Marxist perspective on the market, his proposals are insufficiently thoroughgoing in their embrace of the openness of market outcomes. Professor Ireland's proposals seek to prevent investors limiting their liability, but the basic issue of corporate governance is determining the optimal level of insulation of investors from risk, and this very well may involve some, even extensive, limitation of liability. It is argued that the Marxist perspective on company law must more thoroughly embrace the possibility of a welfare-enhancing market in investor liability, though this will, of course, have radical implications for that perspective.

INTRODUCTION

Professor Paddy Ireland has recently put forward some highly interesting proposals for reform of corporate governance¹ which, in part, build on a suggestion made in a paper I published with Stephen Griffin in 2006, that the general limited liability of incorporated companies should be abolished.² The 2006 paper explicitly invited such proposals and, as the original suggestion was in large part the product of reflection on Ireland's outstanding work on the Victorian companies Acts, proposals by him are particularly welcome. However, I nevertheless wish to register a disagreement with an important aspect of his proposals: a disagreement which, I think, cuts to the heart of current thinking on company law and corporate governance from the Marxist perspective which Ireland and I share.

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¹ P Ireland, 'Limited Liability, Shareholder Rights and the Problem of Corporate Irresponsibility' *Cambridge Journal of Economics* (advance access published on 28 November 2008). I am grateful to Professor Ireland for letting me see this paper in draft.

² D Campbell and S Griffin, 'Enron and the End of Corporate Governance' in S MacLeod (ed) *Global Governance and the Quest for Justice* (2006), vol 2, *Corporate Governance*.

THE CRITIQUE OF LIMITED LIABILITY

I can readily see that there was great warrant for Ireland to interpret the 2006 paper as resting the case for the abolition of general limited liability on the argument that it leads to excessive risk taking by the major owners and controllers of public companies. By more or less insulating them from personal liability for the failure of their companies, it completely unbalances their calculations of potential profit and loss. Though published in 2006, the paper was drafted in 2002, in the immediate aftermath of the failures of Enron and WorldCom, and takes these as its starting point. The case against general limited liability which insulated ‘annual salaries and bonuses so huge as to constitute above average lifetime incomes’ had earlier been used by Sol Picciotto and I to criticise the excessive risk taking in derivatives trading generally that has now led to the ‘credit crunch’³. It is the critique of such excessive risk taking that is developed in Ireland’s stinging attack on ‘corporate irresponsibility’.

However, though the 2006 paper did start from instances of excessive risk taking, this was not its main point. Its main point was that general limited liability was not a market institution but rather a state intervention which ousted a crucial dimension of the then prevailing market. On this basis, it was claimed that it can now plausibly be argued that the intervention has produced an inferior outcome to the one which would be produced by now reinstating a more complete market. Prior to the Victorian companies Acts, limited liability was exceptional, the principal examples being the major investments conducted under state charter, such as the East India Company. The normal position was that investors were generally personally liable for the outstanding liabilities left by the failure of the companies in which they had invested, even when those companies were based on shares. Now, it was always possible for investors to limit their liabilities by such general techniques as paying-up their shares, or by negotiating contracts for investment on the basis of bespoke limitations of their liabilities. This required taking steps away from a default position of unlimited liability which (making certain assumptions about disclosure) would have raised questions about why such steps were being taken in the minds of other investors, and in the minds of those from whom lasting contractual relationships were to be developed and of those from whom credit would be sought. The legislation replaced this default position with a default of limited liability which, avoiding unnecessary legal detail about the subsequent development of the nature of the share, has become effectively a position of zero personal liability for the major owners and controllers of large public companies.⁴

In these circumstances, the common talk of the capitalist elite normally bearing the risk of investment is laughable. This is the rather unfunny joke at the heart of the ideology of the corporate capitalist economy. Investors will lose (some or

³ D Campbell and S Picciotto, ‘The Justification of Financial Futures Exchanges’ in A Hudson (ed) *Modern Financial Techniques, Derivatives and Law* (2000).

⁴ The position typically is very different for small companies limited by shares, for their owners may well have to give personal guarantees to secure investment; and it is, of its nature, different for partnerships of the normal sort, for personal assets typically are regarded as partnership property.

all of) the capital bound up in shares at the time of the failure of a company, but their other assets (including previous income derived from their shareholding) are insulated against those with unsatisfied claims against the company. This obviously gives an incentive to take speculative risks which will maximise relatively short-term income which, if not held as shares in the company, will then be insulated against any subsequent failure. Senior managers, whose salaries (leaving aside their own equity holdings) are positively correlated to growth in shareholder value, will translate this incentive into company policy. This incentive to be irresponsible on the part of the *rentier*, as Ireland characteristically has it,⁵ is one of the main reasons for the failures now constituting the credit crunch. The credit crunch is somewhat unusual in that it is such a dislocation that even great fortunes are being lost or substantially diminished as entire portfolios are badly hit. But the attitude to risk that has brought much of the developed world to its current pass, and did not contemplate this extent of disaster, is perfectly normal. This was the main point the 2006 paper made about Enron, and Ireland notes it about the credit crunch. Following Henwood,⁶ Ireland holds that limited liability is, in general, good for *rentiers*, but ‘bad news for everybody else’.

Limited liability did not lack for a rationale, and Ireland’s work on the Victorian companies Acts is one of the principal contributions to our detailed understanding of that rationale. Obviously, given the typical size of large companies’ working indebtedness, unlimited liability would mean that those investing in large public companies would be exposed to, precisely, a liability which is unlimited in the sense that it is far beyond their ability to absorb it, and they would be loathe to invest on this basis. Therefore, general limited liability has typically been claimed to be an institutional condition of capitalist growth and an indispensable condition of industrialisation. Though there have been interesting qualifications entered about the positive correlation between limited liability and growth (which are discussed in the 2006 paper), and although Ireland is himself unsure about it, I myself do not doubt it. If I am right, and if we continue to assume a context of private ownership of corporate capital, then to respond to the shortcomings of limited liability by seeking to hammer home general unlimited liability on investors is a mistake. It is bound to chill growth, and the more it does so, the more it will itself be an intervention which has its own unacceptable costs.

⁵ Those who really bear the risk of the failure of large public companies are, of course, employees (including lower management), particularly those who invest in developing skills specific to their employment by the company, who may be made redundant, and those relatively small, passive ‘investors’, such as Professor Ireland and myself, whose personal savings, pensions pots and mortgages might be caught up in the failure. For Marx and Engels, purely passive investment was a signal that the capitalist *qua* provider of finance was redundant, and Professor Ireland is the UK’s leading contemporary legal contributor to this criticism of the ‘parasitic lack of function’ of the capitalist elite as *rentiers*. It is on this important aspect that I wish to dwell. But the immense growth of wealth since Engels completed *Capital* does now mean that Professor Ireland’s characteristic way of viewing the *rentier* as a member of the capitalist elite avoids the problems posed by the fact that all but the poor are *rentiers* now.

⁶ D Henwood, *Wall Street* (1997) 293.

The 2006 paper sought to argue that the formally draconian Sarbanes-Oxley Act of 2002,⁷ which made much of the sort of conduct pursued by Enron's management even prior to the corporation getting into difficulty subject to very serious criminal sanction, was itself indefensibly excessive.⁸ Ireland's suggestion for institutional reform is far more sophisticated, and I very much hope it receives the discussion it deserves, but, in essence it is of this excessive nature as it seeks to prevent controlling investors ever having limited liability:

the corporate legal form as presently constituted combines limited liability — meaning de facto no-liability — with control rights. This is one of the main sources of corporate irresponsibility ... Where the corporate legal form is being used (or manipulated) by groups of companies (or, indeed, by individuals), the solution to irresponsible corporate behaviour lies not in divesting parent companies of control rights but in 'lifting the veil', denying separate corporate personality to subsidiary companies and denying parent companies the protection of limited liability. The more general problem, however, has arisen from the complex processes whereby no-liability, no-obligation, no-responsibility shareholders (and their agents) have regained the ability effectively to use their residual corporate control rights. This has enabled them to reassert their power over the corporate sector and to impose upon it, with the complicity of a reconfigured and increasingly self-interested managerial class, the goal of maximizing shareholder value. The solution to this aspect of contemporary corporate irresponsibility is unlikely to be found in denying corporate shareholders the privilege of limited liability. It requires, rather, a reconceptualisation of the corporation in which its separate existence is taken more seriously and the idea of it as a shareholder-owned, private enterprise jettisoned. Shareholders would be permitted to retain the privilege of limited liability but it would be decoupled from the possession of exclusive control rights.

Though the 2006 paper countenanced this basic idea, as a *general* response to the shortcomings of limited liability, it is, I believe, wrong. Neither general limited liability nor general unlimited liability is sufficiently flexible to meet the case. What is needed is an institution that can flexibly employ a large range of investment vehicles to balance the liabilities of major owners, managers and potential residuary claimants over the large range of possible situations. The 2006 paper maintained that it was arguable, in the light of the acknowledged failure of company law and corporate governance, that a market in liability may well be the best available governance structure.

⁷ Public Company Accounting Reform and Investor Protection Act, Pub L 107–204, 30 July 2002, 116 Stat 745.

⁸ It is therefore bound ultimately to be ineffective in its own terms as, after an initial flurry of activity whilst the indignation which led to the quick passage of the Act is still felt, the will to prosecute in this way was bound to wane, and indeed, has waned, with Sarbanes-Oxley not, it appears, doing anything much to prevent the credit crunch.

In the theoretical fully contingent market, both the potential profits and the potential risks of an investment will be factored into the pricing of that investment. Of course, no market will ever be fully contingent, but the tendency of a properly regulated empirical market will be to equilibrate the profits and the risks of an investment for the investor. This was the working market contemplated by Adam Smith which lay behind Smith's dislike of joint stock and his anxiety that it be confined to a minimum of exceptional cases. The Victorian companies Acts massively intervened in the prior investment market by doing a great deal to generally insulate the investor from those risks, and make joint stock the characteristic form of capitalist firm structure. Though the egregious misdescription of the company in the 'agency theory' of the firm as a 'nexus of contracts'⁹ does not seem to have the currency it once did, it is still not sufficiently widely appreciated that the Victorian legislation and the resultant firm structure runs profoundly counter to the spirit of Smith's advocacy of the market.¹⁰ It is perhaps as well to give, once again, Smith's views on joint stock:

The trade of a joint stock company is always managed by a court of directors. The court, indeed, is frequently subject, in many respects, to the control of a general court of proprietors. But the greater part of those proprietors seldom pretend to understand anything of the business of the company; and ... give themselves no trouble about it, but receive contentedly such ... dividend ... as the directors think proper to make them. This total exemption from trouble and risk...encourages many people to become adventurers in joint stock companies who would, upon no account, hazard their fortunes in any private copartnery. Such companies, therefore, commonly draw to themselves much greater stock than any private copartnery can boast of ... The directors of such companies ... being the managers of other people's money than their own, it cannot well be expected that they should watch over it with the same anxious vigilance ... Negligence and profusion must always prevail, more or less, in the management of such a company.

When a company of merchants undertake...to establish a new trade ... it may not be unreasonable to incorporate them into a joint stock company, and to grant them, in the case of success, a monopoly of the trade for a certain number of years. It is the easiest and most natural way in which the state can recompense them for hazarding a dangerous experiment...But upon the expiration of the term, the monopoly ought certainly to determine...and the trade be laid open to all subjects of the state.

The joint stock companies...over and above managing their own affairs ill, to the diminution of the general stock of society, can in other respects scarce fail to do more harm than good [for their method of operation] necessarily breaks, more or less, that natural proportion which would otherwise establish

⁹ D Campbell, 'The Role of Monitoring and Morality in Company Law: A Criticism of the Direction of Present Regulation' (1997) 7 *Australian Journal of Corporate Law* 343.

¹⁰ D Campbell, 'Adam Smith, *Farrar on Company Law* and the Economics of the Corporation' (1990) 19 *Anglo-American Law Review* 185.

itself between judicious industry and profit, and which, to the general industry of the country, is of all encouragements the greatest and most effectual.¹¹

As is shown in the 2006 paper, during the public debate which eventuated in their passage, the Victorian companies Acts were excoriated by those committed to the existing market disciplines, such as one of Marx's classical economist *bêtes noires*, J R McCullough. Our progress will be limited unless we now acknowledge that the current corporate capitalist market's fundamental structure is based on an intervention by the state, which is consciously aimed at reducing or eliminating part of the pricing of an investment required by the theoretical market, and was significantly approximated to in the previous empirical market. It is a disabling paradox at the heart of the notion of corporate governance that the corporate form is taken to be a (seriously deficient) product of the private market, when, in a most important sense, it is quite the opposite. The main rationale for the massive state intervention that produced general limited liability was, I repeat, to give an incentive to growth. Whatever one may say of what was necessary for industrialisation, I do not think growth and welfare are now, in the era of the risk society, remotely similar, and the untrammelled incentive to growth given by general limited liability is now indefensible.

The point the 2006 paper tries to make is that market determination of the optimal level of investor liability by negotiation away from a default position of unlimited liability would appear to be superior to the intervention that created general limited liability. Forms and degrees of limitation of liability would have to be arrived at by negotiation between managers, shareholders (and other stakeholders with standing) and the company, and negotiations between the company and its counterparties. The grant of limited liability on a blanket basis has ousted the necessity of such negotiation. The point I am trying to make here against Ireland is that a reversal of general limited liability to cure investor irresponsibility is, though appealing, especially at the moment, too much the opposite error to general limitation. What is needed is a market in liability. It is impossible to make an argument like this without having to rush to stress that it is not a defence of *laissez faire*. I make this point now and will return to it below when I turn to the design of the necessary markets. For the moment, I want to turn to the implications of what has been said for the Marxist perspective on corporate governance.

MARXISM AND THE POSSIBILITY OF A SOCIALIST MARKET IN LIABILITY

In my opinion, it is essential that, if the Marxist perspective is now to have relevance to the discussion of corporate governance, that perspective must be able to countenance the possibility of an adequately regulated market producing the best available outcome. This obviously requires a dramatic abandonment of the blanket condemnation of the market as such that was central to the views of Engels and Marx themselves. I am aware that Ireland is of broadly this opinion,

¹¹ A Smith, 'The Wealth of Nations' in A Smith, *Works and Correspondence* (1976ff) vol 2, 740–58.

and in as yet unpublished work which I have been fortunate enough to read in draft, he has sought to draw particularly on Robert Hale to develop a theory of social markets. I wish to draw attention to one aspect of Ireland's use of markets. His offer of a choice between limited liability and exclusive rights of control is a choice between two alternative outcomes mandated by the state, and, of course, he rightly prefers one which does not privilege capitalists. He gives the idea of negotiating away from unlimited liability only a cursory mention in footnote 7. His account of the *société en commandite*, a nineteenth century French form of company which mixed levels of liability in a way which the 2006 paper said was worthy of contemporary consideration because it allowed for flexibility in determining the liability of controllers, makes unlimited liability the cost of control. For Ireland, the point is to make capitalists fully liable in order to stop them being irresponsible. As was pointed out in the 2006 paper, words like 'irresponsible' do too much work here. We obviously should prevent irresponsible investment, but this is merely because the persuasive definition of the investment as irresponsible makes this tautologically so. We cannot seek to prevent all risky investment, because all investment is risky. To make liability so overwhelmingly burdensome as to prevent investment because it creates excessive aversion to risk would be as irresponsible as the current position, but it is in this direction that Ireland's proposals tend.

I think it is highly interesting to consider Ireland's views carefully here, for they show us something important about the Marxist perspective, and about left-wing attempts to create social markets generally. To see why the Marxist perspective can lead in the wrong direction here, it is necessary to consider the views of Engels and Marx. Building on an earlier criticism of the unacceptable utopianism in Engels' and Marx's views to which I refer the reader,¹² those views were criticised in the 2006 paper for identifying risk with the 'anarchy' of capitalist production.¹³ Of course, this specific form of production does cause risks peculiar to itself: a point which needs no underlining at the moment. However, given bounded rationality as an existential condition, risk is also a general concomitant of any form of production, and despite their protestations to the contrary,¹⁴ Engels' and Marx's views are utopian in the bad sense because they believe that, under communism, nature will entirely lose its refractory quality. The famous account of communism in *The Critique of the Gotha Programme*, when labour has become 'life's prime want' and goods are distributed according to the principle '[f]rom each according to his abilities, to each according to his needs',¹⁵ rests on the abolition of scarcity:

¹² D Campbell, 'The Critique of Bourgeois Justice after the Failure of Marxism' in A Kerner *et al* (eds) *Current Legal Issues in the Czech Republic and the United Kingdom* (2003).

¹³ F Engels, 'Outlines of a Critique of Political Economy' in K Marx and F Engels, *Collected Works* (1975ff) vol 3, 433–5. As he began the publication of his later economic work, Marx was at pains to stress that this 'brilliant' paper was the starting point of his economic thinking, and, indeed, of his entire collaboration with Engels: K Marx, 'A Contribution to the Critique of Political Economy' in *Collected Works*, *ibid* vol 29, 264.

¹⁴ F Engels, 'Socialism: Utopian and Scientific' in *Collected Works*, above n 13, vol 24.

¹⁵ K Marx, 'Critique of the Gotha Programme' in *Collected Works*, above n 13, vol 24, 86–7.

it is an incomprehensible state of bliss. Engels and Marx fundamentally held, as Alfred Schmidt so memorably put it, to ‘[t]he peculiar idea that a fundamental change in the whole universe will go hand in hand with the proper organisation of human relations’.¹⁶ Engels and Marx believed that, under communism, ‘labour ... no longer appears as labour but as the full development of activity itself, in which natural necessity has disappeared’.¹⁷ They certainly did not say enough about the concrete detail of how this might be brought about, but they did depict ‘socialised man, the associated producers, rationally regulating their interchange with nature, bringing it under their common control, instead of being ruled by it as by the blind forces of nature’.¹⁸ Though they do not, of course, use this terminology, this implies the elimination of risk.¹⁹ Once we acknowledge bounded rationality, then risk must be acknowledged to be an ineliminable part of economic allocation under any conceivable economic system, and the elimination of such risk is an illusory goal.

The most important issue that recognising this throws up is the management of the risks inherent in each and every economic allocation. I have elsewhere written at great length about how the law of contract (a publicly structured form of private regulation) institutionalises the market economy’s ability to manage these risks by determining the optimal level of reliance on such allocations in a way which seems to be superior to that of any generally planned economy.²⁰ In relation to corporate governance, recognition of the impossibility of eliminating risk must mean that we try to determine and enforce the optimal level of risk aversion on the part of investors and managers. This obviously cannot be by the elimination of that risk, as limited liability currently tends to do for the major owners and controllers of public companies. It also cannot be by imposing all these risks on owners and controllers. This is because the truth of limited liability, recognised even by Smith in the case of immense investments of the type which have now become the characteristic case, is that no rational (that is to say, in this context, plausible) manager or investor will absorb such a risk, which is why Smith allowed for joint stock in exceptional cases. We need to determine the optimal level of risk and have no way of knowing this in advance, so we must determine it through the market. Once this is also recognised, then Ireland’s proposal can be seen to suffer from one-dimensionality. It seeks to place all risk on the investor and manager, but this cannot be right. It must unduly chill investment.

¹⁶ A Schmidt, *The Concept of Nature in Marx* (1971) 163

¹⁷ K Marx, ‘Outlines of the Critique of Political Economy (Rough Draft of 1857–8)’, in *Collected Works*, above n 13, vols 28–9, vol 28, 251.

¹⁸ K Marx, ‘Capital, vol 3’, in *Collected Works*, above n 13, vol 37, 807.

¹⁹ Since stating my argument on this point in Campbell, above n 12, I have come across a wonderfully economical statement of that argument in relationship to the labour theory of value in T Sowell, *Marxism: Philosophy and Economics* (1985) 197–200.

²⁰ Amongst a now large number of papers, on a book length consolidation of which I am working, I refer the reader particularly to D Campbell, ‘The Relational Constitution of Remedy: Co-operation as the Implicit Second Principle of Remedies for Breach of Contract’ (2005) 11 *Texas Wesleyan Law Review* 455 and D Campbell and D Harris, ‘Flexibility in Long-term Contractual Relationships: The Role of Co-operation’ (1993) 20 *Journal of Law and Society* 166.

CONCLUSION: THE MARKET, ALIENATION AND REGULATION

My recent publication is, then, an attempt to ask whether a market in the limitation of liability might not be the best way to set the optimal levels of this limitation. One must be very careful about what one says when one advocates a 'market'. The main reason for the delay between the drafting and the publication of the 2006 paper was the dreadfully unexpected and premature death of Professor John Parkinson of Bristol University, who initially was one of the editors of the book in which the paper appeared, whilst the book was being put together. At the time of his death, Parkinson was one of the UK's leading corporate governance scholars, and the 2006 paper benefitted from his comments. I flatter myself that the paper was giving him food for thought about the principle of a market in the limitation of liability, but he rightly brought up numerous objections about the practicality of such a market, for, even if that principle is accepted, the work of institutional design necessary to put it into practice would be huge. As presently constituted, the central feature of company law is that it more or less identifies the incorporation of public companies with the extinction of the personal liability of major owners and controllers, and disentangling the two would require great economic and legal acumen²¹ (of the sort Parkinson possessed). It is not my intention to go into this in any legal detail here, but what is apposite here is to make it clear that enormous, publicly endorsed regulatory work will be intrinsic to the creation of any such market. Company law will not merely have to be rescued from its current headlong descent into overblown incomprehensibility,²² but will have to be entirely rewritten from fundamental principles.

This is not a question of deregulation or *laissez faire*. It is a question of institutional design, backed by public will expressed in law, as a specific example of what Professor Matthias Klaes and I have called 'the principle of institutional direction'.²³ Klaes does not agree with me about the importance of the Marxist perspective in properly conceiving of this principle, but I think the critique of alienation from the Marxist perspective is essential to it, though using this perspective requires that the perspective itself undergo a fundamental shift. In *Capital*, Marx shows us that capitalist markets, beneath the fetishism of commodities, are social products,²⁴ and I believe that it is on this basis that we on the left will best be able to show that a separation of 'market' and 'state' is an alienated perception.²⁵ The condition of creating welfare-enhancing markets is understanding 'the economic', not as a region of ineluctable laws governing

²¹ For a very interesting recent list of the complications from the perspective of a defence of general limited liability see S Copp, 'Limited Liability and Freedom' in S Copp (ed) *The Legal Foundations of Free Markets* (2008).

²² Campbell, above n 9.

²³ D Campbell, and M Klaes, 'The Principle of Institutional Direction: Coase's Regulatory Critique of Intervention' (2005) 29 *Cambridge Journal of Economics* 263.

²⁴ K Marx, 'Capital, vol 1', in *Collected Works*, above n 13, vol 35, 81–4.

²⁵ D Campbell and S Picciotto, 'Exploring the Interaction Between Law and Economics: The Problem of Formalism' (1998) 18 *Legal Studies* 249.

individuals, but as the product of a form of co-operation between citizens in their capacity as economic actors. Of course, when ‘the economic’ is understood in this way, it disappears as such, for it is no longer a region in which economic actors are alienated from the product of their action, but rather a region in which they are self-conscious of their productivity activity. The adequate form of ‘the economic’ is an economy composed of socialist markets explicitly founded on a public regulatory framework. Because I believe the critique of alienation, derived from Hegel but put into a rigorous social scientific shape by Marx, is the key to the analysis and improvement of modern society,²⁶ I am perfectly happy to be regarded as a Marxist. But we must now actualise non-alienated, welfare-enhancing socialist markets, because Marx’s own goal of eliminating risk by eliminating the market has to be abandoned as the utopian wrong turn that disastrously pointed to communism.

The famous passage of *The Critique of the Gotha Programme* referred to above turns on a distinction between a ‘first stage’ of post-capitalist society, retaining conceptions of bourgeois economics and right, and a ‘more advanced’ stage of freedom in which these limitations no longer apply. Marx commonly, but hardly consistently, called the former ‘socialism’;²⁷ the latter being ‘communism’. Working with this terminology, I am asking for a resolutely non-communist Marxism, the fundamental economic institution of which is the socialist market. We must not see markets as mere capitalist survivals which ultimately are to wither away. We must see them as the ineluctable foundation of welfare-enhancing economic action, but only after we produce them through socially self-conscious regulation, drawing on Coase’s definition of regulation as ‘the establishment of the legal framework within which economic activity is carried out’.²⁸ The crucial point is that such regulation cannot postulate the results, such as a pre-determined level of liability, for those results cannot be planned but can be reached only through the operation of the market.

In the common understanding of the ‘social market’, especially as it now informs the ‘new public management’,²⁹ the market is a mere technique, to be employed because it reaches pre-determined social goals more efficiently than the capitalist market. This is absolutely not what a market is for. The market is the mechanism by which economic actors produce freely determined optima in the absence of such a goal. The legitimacy of the market economy rests on a commitment to autonomy which identifies optima with the choices of actors, so that economic efficiency requires the political avoidance of what Robert Nozick called ‘patterning’.³⁰ That the coordination of these choices is simply too hard for planning is a subsidiary, if itself enormously important, point. When we construct a market, we must do

²⁶ D Campbell, *The Failure of Marxism: The Concept of Inversion in Marx’s Critique of Capitalism* (1996).

²⁷ K Marx, ‘The Class Struggles in France 1848–1850’ in *Collected Works*, above n 12, vol 10, 127.

²⁸ R H Coase, ‘Advertising and Free Speech’ (1977) 6 *Journal of Legal Studies* 1, 5.

²⁹ D Campbell, ‘Relational Contract and the Nature of Private Ordering: A Comment on Vincent-Jones’ (2007) 14 *Indiana Journal of Global Legal Issues* 279.

³⁰ R Nozick, *Anarchy, State and Utopia* (1974) 163.

so in order to allow the market to produce a result which cannot be determined in advance but must be determined through the operation of the market.³¹ Markets socially self-consciously established to carry this out are what I would call socialist markets.

I fully acknowledge that this is a sort of defence of spontaneous order (within a publicly endorsed regulatory framework), and as such is ultimately theoretically indefensible. Our understanding of the ‘social alchemy’,³² which turns ‘private vices’ into ‘public virtue’,³³ has not really much improved upon Smith’s metaphor of ‘the invisible hand’.³⁴ This obviously is not good enough. Actually, for Smith himself, the invisible hand was not a mere metaphor but described the operation of divine wisdom,³⁵ and, obviously, this is anathema to Engels and Marx, whose views were militantly atheistic. Like all modern social theory, the Marxist perspective has not provided a basically satisfactory account of the coordinating mechanism which allows markets to yield spontaneous *order* rather than ‘anarchy’. However, in the current state of knowledge, we must simply accept this. I register this only to make clear what currently is involved in a non-communist Marxist perspective and in the concept of the socialist market I would place at its core.

In my opinion, Ireland limits the effectiveness of his Marxist critique of limited liability because he is reluctant to let the market determine outcomes such as levels of liability. Seeing markets as merely a technique for achieving pre-determined goals when one concludes they cannot be reached by planning is a very common, debased currency, but Ireland’s views are better than this, and, if they are in error, it is an error which follows from a principled communism in the sense set out above, which the Marxist perspective now must reject.

However, I feel it highly appropriate to conclude that Ireland is, of course, in one sense right. For, as Marx insisted, an alienated perception rests on an alienated form of life, and the reason why Ireland is one of the UK’s most powerful legal critics of the corporate capitalist economy is that he indisputably demonstrates that, as presently constituted, company law indefensibly does much to create and shamelessly protect a capitalist elite in the name of the ‘market’.

³¹ The case for piecemeal intervention arises when the transaction costs of a market are higher than those of a hierarchy, but it must be remembered, though so very often it is not, that the social choice of a social goal to be pursued by the hierarchy must be in opposition to the results of choice in the market, for the market did not identify that goal.

³² P H Wicksteed, *The Common Sense of Political Economy* (rev ed 1933) 166.

³³ B de Mandeville, *The Fable of the Bees* (1997). On expressions of this idea prior to Mandeville see J M Keynes, ‘The General Theory of Employment, Interest and Money’ in J M Keynes, *Collected Works* (1971ff) vol 7, 359–62.

³⁴ Smith, above n 11, 456.

³⁵ A Smith, ‘Theory of Moral Sentiments’, in *Works and Correspondence*, above n 11, vol 1, 236.