Chapter 7 Regulation in theory: challenging the underlying assumptions

Regulation is typically framed in the binary terms of the market and the state's regulatory bureaucracy[1] and can be considered the expression of the acceptable limits to entrepreneurial autonomy at any given time. While it promotes the perceived virtues of capitalist endeavour, for example by delimiting anti-competitive practices that hinder the operation of the market mechanism, it also seeks to restrict the undesirable consequences of legitimate endeavours, such as environmental damage, labour exploitation and risks to safety and health. As such the role of regulation is inevitably fraught with ambiguity and its terrain is one littered with obvious inherent tensions. Furthermore, having emerged and evolved on a contingent basis, in response to the unique legal, political, economic and social heritage of each jurisdiction, the various regulatory approaches are now feeding into a new global process. The development of that process is of an equally organic nature, the result of an increasing convergence of standards and cooperation between national regulatory frameworks and an increasing convergence of standards.[2] Absent of any overarching scheme or design, it is the product of both political negotiation and the unilateral externalisation of regulations by market mechanisms, perhaps most keenly evidenced by the extraterritorial spread of EU regulatory standards.[3] While the role of criminally-backed compliance has emerged as a prominent feature of the new collaborative approach, the duplicitous nature corporate activity still bears heavily on the process and form of criminal disposal, the social utility of large corporate enterprises justifying distinctive, non-stigmatising treatment that is not extended to individual offenders. Given the typical domination of economic and, therefore, political arenas by corporations in modern capitalist societies, it is unlikely that legal enforcement efforts alone will succeed in constraining corporate excesses.

However, while the threat of legal enforcement can incite corporate self-regulation, it can also occur as a rational, prudential response to informal market mechanisms by exploiting the links between wrongdoing, corporate reputation and market response. Accordingly, this chapter considers alternative, non-legal mechanisms that can induce corporate self-regulation and the extent to which these may act as a legitimate and effective counterweight to the relative power imbalance observed in the exercise of formal regulatory intervention. Although a backdrop of the popular theories of regulation will be sketched, the historical perspective underlines the fact that abstract theorising followed in the wake of actuality and therefore tended more to the accommodation of already evolving practices than the provision of normative perspectives. However, since it is equally apparent that legally enforced regulation has been unable to provide the panacea for all corporate excesses, the empirical evidence must also cast doubt over the veracity of the dominant theories. The early part of this chapter is therefore devoted to a consideration of the prevailing theoretical framework and in particular the underlying assumptions upon which the regulatory ideal is premised. In proposing that these foundational assumptions are irreconcilable with the true nature and purpose of corporations in capitalist economies, it goes on to consider whether the increased opportunity for deliberative democracy, through digitalisation, presents the dynamic by which the weaknesses of the formal regulatory approach can be buttressed, filling both the theoretical and practical regulatory lacunas. By way of prelude, bearing in mind the empirical roots of regulatory intervention, an historical snapshot illuminates the emerging problems that inspired the innovation

[1] Edward J Balleisen, *Fraud: An American History from Barnum to Madoff* (Princeton University Press 2017) Ch. 1.

[2] Anu Bradford, 'The Brussels Effect', Northwestern Uni Law Rev (2012) 107 (1); Brandon Garrett, 'International Corporate Prosecutions' in Darryl Brown et al (eds) *Oxford Handbook of Criminal Process* (OUP 2019) 419.

[3] See Chapter 5 for a full discussion.

of regulation as a distinct legal form of business intervention. Although the origins hark back over two hundred years, it is certainly not the distant land one might expect and reveals a striking resonance with the issues still confronted in the effort to contain corporate excess today. While the brief account therefore provides a useful touchstone for the discussion that follows, it also offers an explanation of sorts for the theoretical assumptions that have underpinned the development of regulation.

First attempts at business regulation

As a suitable lens for the historical perspective, there is arguably no better synopsis than that provided by W.G. Carson in his research into *The Conventionalization of Early Factory Crime,*[4] building on Michael Foucault's earlier work.[5] Detailing the earliest struggles to address the excesses created by the first factory systems that emerged during the industrialisation process in Britain, the textile industry and the securing of cheap labour offer the context. In many respects, Carson's account reads as a prognostic for the general problems of, and responses to, commercial wrongdoing that are still of pertinence today. Indeed, it is of note that the first factories legislation has had a profound and enduring influence on the regulatory approach taken in the common law jurisdictions. The article also portrays a real sense of the exploratory and experimental approach as an unfolding process effected through a series of confrontations between opposing forces and responses borne of pragmatism in the face of both asymmetries of power and an overriding commitment to capitalist ideology. The initial step in the development of the regulatory model was the enactment of the Health and Morals of Apprentices Act 1802 which, aimed at providing limited protection to parish apprentices, was the first legislative response to the ill-treatment and exploitation of child labour. However, the introduction of steam power radically altered the pattern of child-employment and in 1819, when further legislative intervention occurred in the cotton industry, there were ten times the number of "free" child labourers than protected apprentices.[6] Although subsequent measures in 1825[7] and 1831[8] extended protection, these early enactments were largely ineffectual and, in practice, factory owners could break the law with impunity. Justices of the Peace, in whom responsibility was entrusted, performed only a perfunctory and uncritical inspection of factories, if at all, and private prosecutions, funded by groups of manufacturers in an attempt to check competition, were typically thwarted by a lack of witnesses willing to give evidence against their employers. In 1833 the Royal Commission examined the unsatisfactory state of affairs and calls for draconian penalties were made on the basis of efficacy and the moral culpability of offending employers, whose transgressions were considered the equivalent of, or worse than, those of ordinary criminals. However, in the face of arguments that the imposition of penalties would "create a serious objection to the investment of capital in manufacturing industry in this country"[9] the Factories Act 1833 adopted a scale of minimal fines, gave magistrates power to discharge offenders if the transgression had not been wilful or the result of gross negligence and introduced a number of procedural protections that rendered to a minimum the likelihood of conviction to a minimum.[10] Although the Act did provide for the appointment of inspectors, they were instructed to communicate exclusively with employers and with a view to making the law acceptable to them such

[4] W.G. Carson, 'The Conventionalization of Early Factory Crime' (1979) 7 Int'l J Soc Law 37-60.
[5] Michael Foucault, *Discipline and Punish* (Penguin 1991).
[6] Cotton Mills, etc. Act 1819.
[7] Cotton Mills, etc. Act 1825.
[8] Labour in Cotton Mills Act 1831.
[9] P.P. 1833, XX, p. 44.
[10] Labour of Children, etc., in Factory's Act 1833

that a relationship of "close collusion" between the inspectorate and influential mill owners transpired.[11] When the additional restrictions envisaged by the Act did not receive parliamentary support in 1836, as a result of mill owners predicting that they would lead to economic catastrophe, the Board of Trade gave an undertaking that the existing provisions would be fully enforced. While this marked the start of more active enforcement, Carson suggests that this was only because the emergent social order recognised that effective regulation would create the conditions under which they, and laissez-faire capitalism, could flourish. While fair competition demanded the enforcement of formal restrictions to working hours, emphasis on regularity and uniformity, the keeping of time sheets and records of machine operation helped to instil discipline into an unaccustomed workforce.[12] Furthermore, as the inspectorate's administrative safeguards increasingly influenced the development of legislation, the factory issue was gradually depoliticised such that problems came to be perceived not as political but as administrative. Finally, enforcement addressed the real and obvious danger of insurgence should the state fail to protect labour and also, no doubt, the general implications for the law as ideology that would result from such a failure.[13]

However, recurring and deepening economic crises affected the cotton industry particularly badly during the 1830s and 40s and when factory inspectors set out to enforce the law, after the Board of Trade's undertaking in 1836, they found widespread and pervasive violation. Robust enforcement would have meant the mass criminalisation of otherwise socially respectable men of both status and growing political influence. The criminal treatment of administrative violations therefore raised the tricky issue of moral culpability and it was still virtually impossible to obtain evidence of breaches occurring between the inspectorate's factory visits. The problem of finding employers criminally liable was addressed in two ways. Firstly, the penalties imposed were mitigated by magistrates to such an extent that the notion of fault was itself diluted and, consequently, it was more profitable for employers to disobey the legislation than to observe it. Secondly, employers could evade criminal liability altogether by satisfying magistrates that the offence had been committed without their consent, concurrence or knowledge. Inspectors therefore evolved the practice whereby emphasis was on advising and encouraging employers to comply with the law and only when this approach failed did they resort to coercive enforcement. According to Carson, these strategies of control became so institutionalised that legal violation was considered a conventional feature of factory production and prosecutions were only instigated in exceptional circumstances and where there was clear evidence of intent. This contrasted the approach taken in court where, to address the improper use of mitigation and transfer of responsibility to employees, the issue of intention was dispensed with altogether. Thus, while those enforcing the law were unduly importing a notion of *mens rea* into their decision-making process, the courts were diluting the perception of fault at the point of disposal. Accordingly, from 1837 onwards inspectors prepared draft bills for Parliament proposing that the employer should be presumed guilty and that the power to mitigate penalties for the non-wilful commission of an offence should be abolished. The Factories Act 1844 subsequently provided that the employer would be criminally liable save where he could prove due diligence on his part and that the employee had acted without his knowledge, consent or connivance.

While this brief synopsis does scant justice to Carson's contribution, it is clear that the meaning of crime in the commercial context was a the result of a negotiated process and that the approach

[11] W.G. Carson, 'The Conventionalization of Early Factory Crime' (1979) 7 Int'l J Soc Law 37-60, 44.
[12] See too E.P. Thompson, 'Time, Work-discipline and Industrial Capitalism' (1967) 38(1) Past and Present 56-97.
[13] Ibid.

taken was to forge an enduring genetic blueprint for the regulation and control of corporate behaviour that would follow. Indeed, the formulation of the strict liability approach to corporate criminality, tempered by the availability of a due diligence type defence, is very much the essence of the criminally backed compliance regimes that are now established in many national jurisdictions. That this is a negotiated process is now even more explicit, evidenced by the increasing use of deferred prosecution agreements, and there remains a steadfast commitment to avoid the stigmatising effect of the criminal law. While the law has clearly undergone radical development in the specific context of labour protection, it is clear that the general approach to business regulation remains largely unchanged, save for the fact that the individual employer of the distant era is now the corporate enterprise of the modern age. The theories underlying regulation, and the assumptions on which they are based, provide insight into the reasons for this stagnation.

Regulation's core assumption – capitalism as a common good

In terms of the theories that have developed to accommodate and justify regulatory intervention in capitalist democracies, what can be found at their irreducible core is an essential faith in capitalism as a common good,[14] with the attendant recognition that profit maximisation is the legitimate corporate imperative.[15] From this flows the central hypothesis that profit maximisation should be pursued within the boundaries of the law. However, whether commercial decisions should be guided by profit maximisation alone or should involve considerations of social welfare is a matter of longstanding and central debate,[16] broadly expressed in the respective public and private interest theories.[17] Since the successful operation of markets is central to the neoliberal ideal, public interest theories are founded on the desirability of regulation to correct market failures. Private interest theories, essentially premised on the moral indifference of the egoistic *homo economicus,*[18] focus on the assumption that all economic agents pursue self-interest and that public benefit, measured terms of the maximisation of social wealth, will only flow as a corollary to that.[19] As an increase in social welfare is the overall aim, regulation should therefore ensure the best possible allocation of scarce resources and, because the neo-classical model of perfect competition assumes perfect information,[20] it follows that regulation is typically designed to promote information symmetry via disclosure requirements.[21] Furthermore, since the logic of the regulatory agency is to correct market-failures, regulation is also justified to address inequality in bargaining power and exchanges

[14] Laureen Snider, 'Accommodating Power: The 'Common Sense' of Regulators' (2009)18 Soc and Legal Stud 179; Philip Stenning et al, 'Controlling Interests: Two Conceptions of Order in Regulating a Financial Market' in Martin Friedland (ed.) Securing Compliance (University of Toronto Press 1990).

[15] Pearce F and Tombs S, 'Ideology, hegemony, and empiricism: compliance theories of regulation' Brit J of Criminology (1990) 30 (4), 423 – 443.

[16] J E Parkinson, *Corporate Power and Responsibility* (OUP 1993), pointing to Adolf A. Berle and Gardiner Means, *The Modern Corporation and Private Property* (Commerce Clearing House 1932) as the starting point for discussion.

[17] Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (Cambridge University Press 2009).

[18] Hartmut Berghoff and Uwe Speikermann, 'Shady business: On the history of white-collar crime' (2018) 60(3) Business History 289-304.

[19] J E Parkinson, *Corporate Power and Responsibility* (OUP 1993).

[20] Ibid., Ch 10; Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (Cambridge University Press 2009).

[21] Laureen Snider, 'Accommodating Power: The 'Common Sense' of Regulators' (2009) 18 Soc and Legal Stud 179; Ronald Burns et al, *Environmental Law, Crime, and Justice* (LFB Scholarly Publishing 2008).

where costs manifest as negative externalities that are not reflected in prices charged.[22] Accordingly, values such as workplace safety, public welfare and a healthy environment temper the pursuit of optimum wealth maximisation and the regulation that promotes these other goals is broadly described as social regulation.[23] Since a balance must then be struck between the desirability of the particular productive activity, commercial enterprise generally[24] and conflicting policy objectives,[25] regulation involves a process that is inevitably both discretionary and political.[26] In that some harms are the unavoidable by-products of otherwise valuable activities, regulation also circumscribes the measure of harm that will be tolerated in pursuance of the useful aim and it also responds to the fact that the relative strengths of competing claims will ebb and wane over time, depending upon factors such as shifts in societal conscience, scientific advancements and the development of knowledge. Economic efficiency, defined by free market operation and perfect competition, is thus constrained by ever changing values-based considerations such that the precise scope of regulation is inevitably contested[27] and characterised by blurred and shifting boundaries.[28]

Regulation - the duplicitous ethos

Aside from its nebulous parameters and shifting centre of gravity in relation to competing values, the ethos of regulation is inherently duplicitous in that it simultaneously serves to both encourage and to deter entrepreneurial risk-taking.[29] The regulatory agency confronts this ambiguity in its educative and persuasive role on the one hand and as a punitive enforcement authority on the other. In that the punitive role defies the orthodox form and classification of the criminal law, some of the legal concepts and safeguards traditionally associated with the criminal law are also absent. Thus, for example, the regulatory "toolbox"[30] includes civil sanctions that can be punitive in nature, rules that can be administrative in form but criminal in substance[31] and strict liability offences that are criminal in form but administrative in nature, lacking the blameworthiness and stigma normally associated with "real crime". Furthermore, while businesses can be the subject of these various forms of punitive or "quasi-criminal" sanctions, they can also be prosecuted for "truly" criminal

[22] Ronald Burns et al, *Environmental Law, Crime, and Justice* (LFB Scholarly Publishing 2008) i.e. they do not affect the market price and invoke the market mechanism; J E Parkinson, *Corporate Power and Responsibility* (OUP 1993) Ch. 10.

[23] J E Parkinson, *Corporate Power and Responsibility* (OUP 1993).

[24] Ronald Burns et al, *Environmental Law, Crime, and Justice* (LFB Scholarly Publishing 2008); Anthony Ogus, 'Regulation and its relationship with the criminal justice process' in Hannah Quirk et al, *Regulation and Criminal Justice* (Cambridge University Press 2010).

[25] Johan den Hertog, 'Review of Economic Theories of Regulation' Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series nr: 10-18 December 2010 at https://www.uu.nl/sites/default/files/rebo_use_dp_2010_10-18.pdf accessed April 29, 2021.

[26] Mitsilegas V, Fitzmaurice M, Fasoli E, (2015) Fighting Environmental Crime in the UK: A Country Report, Study in the framework of the EFFACE research project, London: Queen Mary University of London at https://efface.eu/sites/default/files/EFFACE_Fighting%20Environmental%20Crime%20in%20the%20UK.pdf accessed April 28, 2021.

[27] Anthony Ogus, 'Regulation and its relationship with the criminal justice process' in Hannah Quirk et al, *Regulation and Criminal Justice* (Cambridge University Press 2010); Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (Cambridge University Press 2009).

[28] Hartmut Berghoff and Uwe Speikermann, 'Shady business: On the history of white-collar crime' (2018) 60(3) Business History 289-304.

[29] Laureen Snider, 'Accommodating Power: The 'Common Sense' of Regulators' (2009) 18 Soc and Legal Stud 179.

[30] Richard B Macrory, Regulatory Justice: Making Sanctions Effective, Final Report, November 2006.

[31] See eg Christopher Harding and Jennifer Edwards, *Cartel Criminality: The Mythology and pathology of Business Collusion* (Ashgate 2015).

offences in an increasing number of jurisdictions, albeit the line between quasi-criminality and real criminality is slippery,[32] and, as observed in the previous chapter, this is particularly emphasised with the introduction of deferred prosecution agreements and the tendency to the settlement approach.[33] However, the amorphous quality of regulatory intervention is unsurprising given that, unlike the criminal law, regulation is designed primarily to address conduct that is not in itself harmful but which may be conducive to a harmful outcome[34] and, as was the case with the early factory inspectors, it is often the addition of an element of blameworthiness, for example intentionality, recidivism or conspiratorial behaviour, that tips the conduct over the criminal law's threshold. Thus the dominating form of regulation still comprises a preventative, prescriptive, rules-based approach[35] whereby persuasion and education are emphasised as the means to encourage voluntary compliance.[36] This is typically backed up with an escalating scale of civil sanctions for failure to respond to that encouragement,[37] described by Braithwaite in terms of the "pyramid of regulation", with criminal punishment available as a measure of very last resort.[38]

References to regulatory breach therefore address a vast spectrum of corporate behaviour, ranging from minor and "harmless" administrative oversights to serious misconduct that causes widespread harm[39] and, necessarily vested with considerable discretion, regulatory agencies consider the suitability of any proposed enforcement action by reference not only to the breach in question but also with regard to their knowledge of the organisation's compliance history. In an ideal sense, the regulatory relationship overcomes many of the difficulties and constraints associated with adversarial legal confrontations of both a private and public nature. Relative to private action, regulatory enforcement is particularly adept where losses are difficult or impossible to identify and/or quantify, where the harm caused is indirect[40] or is such that it manifests over a long period of time and, of note, the regulatory relationship is conducive to enhanced access to internal information by the regulatory body where evidence may be otherwise difficult to obtain.[41] Furthermore, the regulatory approach ensures that enforcement decisions are made by those with not only special knowledge of the commercial entity itself but expertise in the particular field of business such that they can provide a basis and mechanism for enforcement where an expansion of private law might overly inhibit enterprise.[42]

As has become evident, the multi-purpose and multi-functional nature of regulation, characterised by regulatory discretion and shifting boundaries of civil and criminal enforcement, is more the result

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[32] For example, the UK's corporate bribery offence is contained in a criminal statute but the availability of the due diligence defence has led to its description as "quasi-regulatory", Ministry of Justice, Bribery Act 2010: Post Legislative Scrutiny Memorandum, Cmnd 9631, June 2018, 34, para. 132.
[33] See the discussion at Chapter 6.
[34] Law Commission, *Criminal Liability in Regulatory Contexts* (Law Com No 195, 2010) p 8, para 1.28.
[35] Steven Bittle and Jon Frauley, 'The Profits of recognition: a praxeological approach to corporate crime' (2018) 26 J Crit Crim 611-630.
[36] Genevre Richardson, 'Strict Liability for Regulatory Crime: The Empirical Evidence' (1987) Crim LR 295-306.
[37] Richard B Macrory, Regulatory Justice: Making Sanctions Effective, Final Report, November 2006.
[38] Ian Ayres and John Braithwaite, *Responsive Regulation* (OUP 1992).
[39] For example, the regulatory approach was used to address the mis-selling behaviour prevalent in the banking industry, Alison Cronin, *Corporate Criminality and Liability for Fraud* (Routledge 2018).
[40] Hartmut Berghoff and Uwe Speikermann, 'Shady business: On the history of white-collar crime' (2018) 60(3) Business History 289-304.
[41] Julia Black, *Rules and Regulations* (Clarendon Press 2003).
[42] Ibid., referring to how the employment of fiduciary law in the financial services industry would affect banking activity.

of pragmatic response to contingent needs than of any overarching theory. Certainly, as regards punitive enforcement for the most serious breaches, the orthodox underpinnings of the substantive criminal of law are absent, neither applied nor readily applicable. The primary argument for this, the preference for the regulatory over the criminal process, is economic efficiency. In particular, the regulatory approach circumvents the cumbersome process necessary for the introduction and amendment of the criminal law, dispenses with many of the procedural safeguards afforded to criminal suspects and avoids the higher costs associated with information asymmetry where the evidential burden and higher standard of proof can be especially problematic in the context of corporate conduct and agency.

Regulatory economic efficiency – the assumptions

The economic efficiency rationale is underpinned by two fundamental assumptions about the nature of corporations. The first is that that they are rational actors par excellence, thus supposing that they are ethically neutral, and the second, premised on the notion that individuals are essentially "reasonable, of good faith, and motivated to heed advice",[43] assumes that corporate actors are not inherently criminal[44] but are likewise well-meaning and responsible political citizens that serve the public interest.[45] Furthermore, placing trust at the heart of the regulatory relationship, it would appear that the greater the size of the economic actor, the greater the trust assumed.[46] While such an assumption is questionable, the greater concern is the recognition that, while economic theory conforms to the former assumption of rationality, that view can only be maintained at the cost of the latter. Since economic theory is premised on the aim of increasing net social wealth and the optimal level of violations of the law is not zero,[47] it follows that ethically neutral rationality demands corporate misconduct where this is conducive to profit maximisation.

In addition, the core assumption that the corporate actor is the paradigm of rationality, such that economic efficiency is the sole driver for corporate conduct, is itself questionable and there is a growing body of academic support, not least from behavioural economists, for the view that corporations can and do behave irrationally.[48] It is acknowledged that corporations can deviate from the economically ideal action such that corporate agency may shift between manifestations of *homo economicus* and *l'uomo delinquent.* Irrational motivations for corporate behaviour may include, for example, a gambling instinct, an urge for power, the enjoyment of doing "battle" in the market place

[43] John Braithwaite, *Crime, Shame and Reintegration* (Cambridge University Press 1989) 131.
[44] Steven Bittle and Jon Frauley, 'The Profits of recognition: a praxeological approach to corporate crime' (2018) 26 J Crit Crim 611-630; Steve Tombs and Dave Whyte, *Safety Crimes* (Willan Publishers 2007).
[45] Frank Pearce and Steve Tombs, 'Hazards, Law and Class: Contextualising the regulation of corporate crime' (1997) Social and Legal Studies 6(1), 79-107; Steve Tombs, *Social Protection After the Crisis: Regulation Without Enforcement* (Policy Press 2016); Steve Tombs and Dave Whyte D, 'The myths and realities of deterrence in workplace safety regulation' (2013) Brit. J. Criminol. (53) 746 – 763.
[46] Laureen Snider, 'Accommodating Power: The 'Common Sense' of Regulators' (2009)18 Soc and Legal Stud 179.
[47] J E Parkinson, *Corporate Power and Responsibility* (OUP 1993); Fischel, 'The Corporate Governance Movement' (1982) 35 V&L Rev 1259.
[48] Steven Bittle and Jon Frauley, 'The Profits of recognition: a praxeological approach to corporate crime' (2018) 26 J Crit Crim 611-630, citing H Glasbeek, *Class Privilege: How law shelters shareholders and coddles capitalism* (2017 Between the Lines) and Steve Tombs and Dave Whyte, *The corporate criminal: Why corporations must be abolished* (Routledge 2015). Christopher Harding, 'The System of EU Antitrust Law: Characteristics, safeguards, and differences from tradition criminal law' (2019) 90 Revue Internationale de Droit Penal.

or feelings of animosity or vengeance towards other market actors.[49] Indeed, there is also an established link between entrepreneurial innovation and criminality[50] that points to fundamental differences in the psychology and character of successful businessmen. The entrepreneurial personality is typically risk tolerant or risk seeking and is therefore much more likely to engage in criminal behaviour than a risk averse individual.[51] Often ingenious and creative in finding the means to accrue wealth, power and prestige there can be a tendency for this personality to do so regardless of the legality of the conduct. In any event, the entrepreneurial propensity to risk-taking means that the line between rational and irrational behaviour may be difficult to draw and the distinction between acceptable risk-taking and what amounts to the criminally excessive is equally problematic. However, acknowledgment that corporate actors can and do deviate from the rational and responsible regulatory ideal would legitimise the application of the competing aims and values of penal policy in appropriate cases, and thus the transfer of jurisdiction from the regulatory to the criminal sphere. Since the criminal law involves norms of retribution and equal treatment, in principle it would support a relationship of proportionality between the harm caused and the severity of the sanction imposed,[52] a step that would also further the deterrent aim.

The inexact science of rationality, the flawed conception of collateral damage and the fallacy of the Andersen effect

The pursuit of optimum economic efficiency, expected under the assumption of ethically neutral corporate rationality, clearly does not involve the rejection of a course of conduct or behaviour on the grounds that it is non-compliant or criminal. Furthermore, in as much as the line between rational and irrational risk-taking is hard to draw, economic rationality demands a complex calculation, or rather estimation, of future events and probabilities. This cannot be an exact science and in the pursuit of profit maximisation that involves non-compliant or criminally deviant behaviour, the actor will therefore estimate the gain to be made, factoring in the probability of being caught and calculate the costs likely to be imposed by the enforcement authority should this occur. This calculation will inevitably reflect the relative optimism or pessimism of the actor's outlook but, more crucially, because of the universal attitude towards the avoidance of collateral damage, large corporations are effectively assured continued financial viability whatever the gravity of the offending behaviour.[53] With potentially high gains at stake, the provision of what is essentially a "stop loss" is an economic recipe for unconstrained risk-taking or criminality. The collateral damage brake on enforcement is symptomatic of the fact that enforcement authorities also operate by reference to cost-benefit evaluation, albeit from the macroeconomic view. From the regulatory perspective, the costs of corporate misconduct in capitalist societies, whether inflicted directly on individuals or on the market mechanism, are always outweighed by the perceived social value of the otherwise legitimate commercial enterprise. It follows that corporations conceive penalties imposed for misconduct exclusively in terms of a business cost and, since regulatory sanctions are not

[49] Ibid.
[50] Malcolm S Salter, *Innovation Corrupted* (Harvard University Press 2008); Harmut Berghoff and Uwe Speikermann, 'Shady business: On the history of white-collar crime' (2018) 60(3) Business History 289-304.
[51] Gary S Becker, 'Crime and Punishment: An Economic Approach' (1968) 76(2) J Pol Econ 169-217.
[52] R Kraakman, 'The Economic Functions of Corporate Liability' in Klaus J Hopt and Gunther Teubner (eds.) *Corporate Governance and Directors' Liabilities* (De Gruyter 1985) 194.
[53] Nicholas Ryder, ''Too Scared to Prosecute and Too Scared to Jail?' A Critical and Comparative Analysis of Enforcement of Financial Crime Legislation Against Corporations in the USA and the UK' (2018) 82(3) JCL 245; Laureen Snider, 'Accommodating Power: The 'Common Sense' of Regulators' (2009)18 Soc and Legal Stud 179.

intended to involve moral condemnation, it is an ethically neutral cost at that.[54]

An additional, significant problem with regulators' use of economic methodology is that it necessarily demands consensus as to what constitutes a benefit or a cost for the purpose of the calculation and, in reality, this is a matter of complexity for which there is no common understanding.[55] Furthermore, since costs and benefits are subjective concepts, attempts at categorisation will vary according to the relative standpoints of the different stakeholders involved. Absent of the usual compass points by which the disposal of individual deviance is determined, the cost-benefit approach also transforms the issue from a legal to a socio-political one and it is therefore weighted in favour of the more economically and politically influential party. In the grand scheme of cost-benefit enforcement, it is perhaps unsurprising that "collateral damage" is elevated to such an extraordinary position of weight, an evil to be avoided at all costs, that it will always support the preservation of the trading entity. It follows that a different conception of collateral damage, and what constitutes an unacceptable cost, would lead to a different enforcement outcome for the offending corporation. For example, an alternative understanding of collateral damage might include the wider economic and social costs that are incurred through the preservation of incalcitrant corporations. Most obviously there are the costs of financial penalties themselves which are ultimately borne not only by shareholders but by other innocent stakeholders, such as employees and consumers[56] and other interests affected by a consequent lack of investment and/or the potential streamlining of the company. Less obvious are the ongoing costs of maintaining corporate compliance regimes which inevitably increase as the quantity and complexity of regulation grows. Furthermore, the imposition of progressively higher penalties, as an attempt to address the deterrence deficit, has resulted in an increasing "lawyering-up" of corporate compliance activities[57] with the compliance department now being the equal of the legal department. The figures involved are eye-watering[58] to the extent that corporate compliance is now viewed as a vibrant and lucrative niche industry in itself. Again, whether this development is perceived as a social cost or as a benefit depends upon your standpoint and view of the broader shift from industry, or production, capitalism to the dominance of business capitalism.[59] In view of the exponential growth and complexity of corporate regulation, a case has certainly been made elsewhere for the use of simple but robust criminal law, in its traditional form, on the basis of economic efficiency.[60] The process of "lawyering-up" has not only raised the direct cost of compliance for businesses but it has also resulted in ever more legalistic and juridified forms of regulatory enforcement proceedings.[61] With increased

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[54] Christopher Harding, 'The System of EU Antitrust Law: Characteristics, safeguards, and differences from tradition criminal law' (2019) 90 Revue Internationale de Droit Penal.

[55] Department for Business, Innovation and Skills and Cabinet Office, The Business Impact Target: cutting the cost of regulation, 28 June 2016 at https://www.nao.org.uk/wp-content/uploads/2016/06/The-Business-Impact-Target-cutting-the-cost-of-regulation.pdf > accessed April 30, 2021.

[56] H Beales et al, 'Government Regulation: The Good, The Bad, & The Ugly' released by the Regulatory Transparency Project of the Federalist Society, June 12, 2017 p.5, citing Fred L Smith, Jr, 'Countering the Assault on Capitalism', Institute of Economic Affairs, Blackwell Publishing, Oxford (Feb 2012).

[57] Laureen Snider, 'Accommodating Power: The 'Common Sense' of Regulators' (2009) 18 Soc and Legal Stud 179.

[58] See Chapter 5.

[59] Thornstein Veblen, *The Theory of the Leisure Class: An Economic Study of Institutions* (1899).

[60] Stephen Copp and Alison Cronin, 'The failure of criminal law to control the use of off balance sheet finance during the banking crisis' (2015) 36(4) Co Law 99-120.

[61] Colin Scott, 'Regulation in the age of governance: the rise of the post regulatory state in Jacint Jordana and David Levi-Faur (eds.) *The Politics of Regulation* (Edward Elgar 2004); Snider defines juridification as the jumble of complex, contradictory rules that results from cyclical increases in regulatory efforts and the institutional attempts to evade, avoid or nullify them, Laureen Snider, 'Accommodating Power: The 'Common Sense' of

formalisation, the costs incurred by regulators spiral in tandem and, while none of this is currently considered collateral damage in the conventional sense, it amounts to a sizeable and expanding expenditure that is ultimately borne by both corporate stakeholders and the public purse. Although the popular perception of such "damage" is less dramatic than the striking impacts evoked by the notion of corporate collapse, the "unseen" social costs of regulation include higher prices, fewer available products, a reduction in services and opportunities, lower wages and decreasing job opportunities. Indeed, empirical evidence suggests that while businesses can benefit from regulatory intervention,[62] and thus positively lobby for it in practice,[63] the dispersed costs are disproportionately borne by those who can least afford them,[64] with low-income consumers being hit the hardest[65] and decreases in wages for the lower 75% of wage earners.[66] These costs are not insignificant and, although governments are unable to provide precise calculations,[67] perspective can be gained from the estimation of regulation costs to businesses for 2005, notably prior to the global financial crisis, which amounted £100 billion each year to the UK economy alone.[68] While regulation serves to ensure social benefits, such as environmental quality, public health and consumer protection, a more encompassing view of compliance costs, to include those incurred as a result of preserving criminogenic corporations, might alter the economic calculus such that the "unseen" expense of the regulatory edifice is deemed excessive.[69]

The economic argument for preserving the trading status of corporate wrongdoers diminishes yet further with the recognition that excessive corporate self-interest, manifesting as unlawful conduct, does not serve the social interest by increasing the economic pie but operates only to redistribute it in a non-efficient way.[70] Accordingly, if parasitic organisations were driven from the market through robust enforcement, the gap in the market would ultimately be filled by law-abiding, socially responsible corporate citizens. Disruption to wider stake-holder interests would undoubtedly occur in the short-term, and this is the current understanding of "collateral damage", but arguably those interests would be resurrected in the longer term as the consequent gap is filled. A more expansive

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Regulators' 18 Soc and Legal Stud 179 (2009) citing Fiona Haines, 'Safety, Security, Politics and Fact: Shaping the Regulatory Solution', paper presented to Law & Society Annual Meetings, Baltimore, 6-9 July 2006.

[62] Gordon Tullock, 'The Welfare Costs of Tariffs, Monopoly and Theft' 5(3) Economic Enquiry (1967) 224 – 232.

[63] Ibid.

[64] Diana W Thomas, 'A Process Perspective on Regulation: Who bears the dispersed costs of regulation?' (2018) 31(4) Review of Austrian Economics 395 – 402; George J Stigler, 'The Theory of economic regulation' (1971) 2(1) The Bell Journal of Economics and Management 3–21; S Peltzman, 'Toward a more general theory of regulation' (1976) 19(2) Law and Econ 211–240.

[65] Richard McKenzie and Hugh Macaulay, 'A bureaucratic theory of regulation' (1980) 35 Public Choice 297-313

[66] Joe Anderson and Gail Werner-Robertson, Regressive Effects of Regulation on Wages in the US, Nov 22, 2016 at http://typo3.creighton.edu/fileadmin/user/EconomicInstitute/Research_Scholars/16502_anderson.pdf accessed April 30, 2021.

[67] See for example UK Dept for Business, Innovation and Skills and Cabinet Office, The Business Impact Target: Cutting the Cost of Regulation, 28 June 2016

[68] Ibid.

[69] Stephen Copp and Alison Cronin, 'The failure of criminal law to control the use of off balance sheet finance during the banking crisis' (2015) 36(4) Co Law 99-120; H Beales et al, 'Government Regulation: The Good, The Bad, & The Ugly' released by the Regulatory Transparency Project of the Federalist Society, June 12, 2017, p. 11; UK Dept for Business, Innovation and Skills and Cabinet Office, The Business Impact Target: Cutting the Cost of Regulation, published by National Audit Office, HC Session 2016-17 29 June 2016; Fred L Smith, 'Counting the Assault on Capitalism' Institute of Economic Affairs, Blackwell Pubs, Oxford, February 2012.

[70] Hartmut Berghoff and Uwe Speikermann, 'Shady business: On the history of white-collar crime' Business History (2018) 60(3) 289-304; William Baumol et al, *Good Capitalism, Bad Capitalism, and the Economics of Growth and Prosperity* (Yale University Press 2007) 79.

notion of collateral damage in the grand scheme of cost-benefit analysis, one that recognises the cost of regulation itself and that unlawful conduct does not increase the economic pie, is required. Together with the acknowledgement that corporate behaviour can be deserving of moral condemnation, it can be concluded that criminogenic corporate entities should not necessarily be preserved at the expense of lawful actors.

In any event it is now well established that corporate conviction is rarely fatal, contrary to the Andersen theory, and it is the avoidance of an adversarial trial that apparently serves to align the interests of enforcement authorities with those of defendant corporations.[71] Indeed, this continues to be the case notwithstanding evidence that the settlement approach adopted in non and deferred prosecution agreements appear to be relatively more costly to the corporation. It would therefore seem that a primary motivation for corporations to enter into settlement agreements is to avoid negative publicity, since criminal trials attract far greater media attention than regulatory enforcement.[72] Indeed, the open justice principle, which has no real application in the relatively sheltered regulatory arena, should ensure that criminal court proceedings attract media interest and thereby improve transparency while serving the expressive function of the criminal law. Where corporate misconduct is deserving of criminal condemnation, other aims of the penal institution can be met. In contrast, the content of the published facts in agreements for deferred prosecutions are also a matter of negotiation and one in which the corporation, with the weight of its superior knowledge of reputational issues specific to its market, can therefore demand a pruning out or dilution of toxic, reputation-risking facts. That the avoidance of negative publicity is high on the corporate agenda is further supported by evidence of the recent US trend in which defendant corporations are increasingly pushing for non-prosecution agreements which thereby dispense with the need to file any documents whatsoever at court. Since reputation and investor confidence go hand in hand, and since corporate failure signals the loss of investor confidence, it follows that the "avoidance of collateral damage" objective can be reconceived in terms of the aim to preserve investor confidence.

Façades and false assumptions

Articulating the justification for the settlement approach under the façade of "damage avoidance" is far more palatable than a more exacting description such as "reputation preservation in the face of serious criminal offending". Packaging the rationale in terms of the "avoidance of collateral damage" therefore serves to divert attention from the troubling conclusions that can be more readily drawn from the apparent commitment to maintaining investor confidence in such a case. Furthermore, rational enforcement decisions, that seek to deter corporate wrongdoing, demand the imposition of financial penalties that are considerably higher than the economic rewards of the non-compliance. However, even if imposed at such a level, they would be of relatively limited effect since they amount to a one-off, instantaneous hit to the corporation's bottom line and one that is in any event innocuously perceived as the ethically neutral cost of doing business. Accordingly, if the criminally backed settlement approaches are serving to ensure the viability of businesses that might otherwise fail if left to market forces, it can be argued that, far from correcting it, this form of enforcement is actually a significant cause of market failure. The preservation of investor confidence through sanitised reports of corporate criminality is especially troubling in the context of the public interest

[71] See the discussion in Chapter 6.
[72] Brandon Garrett, 'International Corporate Prosecutions' in Darryl Brown et al (eds) *Oxford Handbook of Criminal Process* (OUP 2019).

theory of regulation, with which the practice is clearly at odds. There may be some force in the assertation that in appropriate cases, for example where there is serious, deliberate or repeated misconduct, a "traditional" criminal conviction would rightly serve to elicit an enduring market response.[73] In accordance with the economic approach to intervention, consequent corporate failures would then be understood in terms of the efficient operation of markets. It would seem to follow that the real threat of prosecution and potential for corporate conviction, with consequent reputational damage and market response, is far more likely to induce self-regulation.[74]

In practice, however, it is clear that the settlement approach, employing deferred prosecution agreements, overcomes budgetary constraints on enforcement authorities and the related issue of evidential obstacles. From a political perspective, it provides evidence of timely, if somewhat superficial, victories for public consumption while, under the cover of the collateral damage façade, it also masks practices that undermine the legitimacy of the law itself and, through a rationalisation process, fuels rather than inhibits incidents of corporate criminality. Given the inherent tensions at play, it is unsurprising that regulatory theory is essentially based on a framework of ill-fitting parts premised on contradictory assumptions. The flawed trinity of assumptions: that conviction causes corporate failure, that collateral damage is confined to post-failure costs and that corporate failure is to be avoided at any cost translate into further assumptions about how enforcement should be constrained. The inevitability that rational corporations will violate the law, acting on the basis that profit-maximisation is the legitimate goal of business, is especially concerning given that corporations themselves are filling the regulatory gaps left by the retreating state and are increasingly assuming a political mantle.[75]

From dual leadership theory to the public-private partnership approach

It is worth acknowledging that even before the shift to legally regulated self-regulation, involving the overt politicisation of business in the new public-private partnership approach,[76] concerns about the political influence of corporations were well-documented. These are expressed in the "dual leadership" theory which observes that governments are concerned to maintain the conditions necessary for profitability because business provides the economic security of the state. While Carson viewed the phenomenon through the lens of the conventionalisation of crime,[77] his work is equally about the reality of dual leadership. The "carrot and stick" characterisation of regulation

[73] RA Posner, *The Economic Analysis of Law* (3rd ed. 1986) 205 -12. It is of note that alternatives to the fine that have been mooted have never been fully embraced, these include equity fines that would require the corporation to issue shares to a public body, punitive injunctions and the judicial appointment of directors or other officers, see John C Coffey Jr, '"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment' (1981) 79 Mich L Rev 386; Brent Fisse and John Braithwaite, 'On the allocation of responsibility for corporate crime: Individualism, collectivism and accountability' (1988) 11(3) Syd L R 468-513; Brent Fisse, 'Recent Developments in Corporate Criminal Law and Corporate Liability to Monetary Penalties' (1990) 13 UNSWLJ 1.

[74] Hartmut Berghoff and Uwe Speikermann, 'Shady business: On the history of white-collar crime' Business History (2018) 60(3) 289-304

[75] See the discussion in Chapter 6.

[76] Andreas Georg Scherer and Guido Polazzo, 'The New Political Risk of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy' (2011) 48(4) Journal of Management Studies 899-931; Ian Bartle and Peter Vass, 'Self-Regulation Within the Regulatory State: Towards A New Regulatory Paradigm?' (2007) 85(4) Pub. Adm. 885-905.

[77] W.G. Carson, 'The Conventionalization of Early Factory Crime' (1979) 7 Int'l J Soc Law 37-60 discussed earlier in this chapter.

therefore obscures the reality that large businesses have always enjoyed considerable de facto political power in capitalist democracies. Since the success of government is inextricably linked to the success of the economy, the desired status quo inevitably involves a degree of political collaboration between government and business such that executives of large corporations can be regarded as de facto government functionaries. Aside from the obvious opportunities afforded to corporations for political lobbying, the threat of adverse economic and political effects that might result from excessive national regulation mean that regulatory intervention is constrained by the ultimate ability of corporations to transfer investment to more hospitable regulatory environments.[78] If the political reality is essentially one of dual leadership, concerns about regulators' lack of independence from government[79] on the one hand, or their capture by business[80] on the other, fade into a much bigger picture involving the interplay between government and business.[81] The regulatory arena therefore represents one point of interaction between them and an important one in which the balance of political power, or its negotiation, plays out. Furthermore, if individual corporations are understood to enjoy a degree of de facto political clout, the structural ties between organisations sharing common interests provide whole industries with a powerful capacity to exploit politics.[82] Since policy decisions will inevitably involve latent executive support of corporate entrepreneurialism, or risk-taking, there are obvious implications for regulation. These manifest in the regulatory approach adopted as well as in other legal responses to corporate wrongdoing, for example in the curtailing of regulatory enforcement activities, the lack of financial provision afforded to regulators[83] (which incentivises the settlement approach), and in the promotion of self-regulation and ideologies that legitimise minimal intervention in markets.[84] Similarly, although excessive regulation is generally described as a burden imposed on business by government, the relative power of business interests can be witnessed in the regulatory changes that, while dressed up as democratic reforms, have positively served business self-interest.[85] Obscured by the popular assumptions upon which regulation is said to be based, the dual leadership theory therefore points to an altogether different reality, and one that was always of constitutional proportion. Indeed, the assertion that corporate executives are de facto political functionaries is further strengthened by the acknowledgment that, in addition to their relationship with government, large corporations have both the resources and the necessary media to assert political influence over citizens in their various capacities as general electorate, consumers and potential investors. Indeed, with the wherewithal to dress matters of self-interest in the cloth of public interest, the corporate public relations machine not only facilitates the exercise of political influence

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[78] J E Parkinson, *Corporate Power and Responsibility* (OUP 1993); Charles E Lindblom, *Politics and Markets* (Basic Books 1977).

[79] Maurice E Punch, *Dirty Business: Exploring Corporate Misconduct: analysis and cases* (Sage 1996) p. 155

[80] Capture theory was developed mainly by political scientists, see eg. C. Veljanovski, 'The Economics of Law' (London: Institute of Economic Affairs, 2006) p. 149

[81] Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation* (Cambridge University Press 2009); Leigh Hancher and Michael Moran, *Organising Regulatory Space* (Clarendon Press 1989).

[82] Johan den Hertog, 'Review of Economic Theories of Regulation' Utrecht School of Economics, Tjalling C. Koopmans Research Institute Discussion Paper Series nr: 10-18 December 2010 at https://www.uu.nl/sites/default/files/rebo_use_dp_2010_10-18.pdf accessed April 29, 2021.

[83] MG Faure et al, 'Curbing Consumer Financial Losses: the Economics of Regulatory Enforcement', (2009) 31(2) Law and Policy (2009) 161 at 178 – 81.

[84] R Tomasic, 'The Financial Crisis and the Haphazard Pursuit of Financial Crime' (2011) 18(1) JFC 7-31. Snider also suggests that the common sense of the regulator dictates that the politically and economically weakest organisations will be targeted, Laureen Snider, 'Accommodating Power: The 'Common Sense' of Regulators' (2009)18 Soc and Legal Stud 179.

[85] Charles E Lindblom, *Politics and Markets* (Basic Books 1977) citing the example of the first English factories legislation that was supported by factory owners as a means to regulate smaller competitors.

over the electorate, it does so entirely free of the usual constraints.[86] To characterise regulation as a form of governmental economic, legal and political control has always been a dramatic oversimplification of a more complex dynamic.

Notwithstanding developments in regulatory approaches and the new global process, these issues remain. Although the new self-regulatory approach makes businesses responsible for regulatory detail through the compliance system, the state is responsible for the fundamental enforcement framework but, as a collaboration between the two,[87] the arrangement remains susceptible to objections of capture and the implications of dual leadership. Furthermore, with increasing resort to alternative prosecution agreements, even if the misconduct involves multiple enforcement authorities over a number of jurisdictions, the universally accepted collateral damage argument continues to give corporations an upper hand in the collaborative process.[88] Accordingly, it is suggested that the inclusion of non-governmental third-party participants in the oversight of regulatory enforcement can mitigate the apparent imbalance. Indeed, around three decades ago, Ayres and Braithwaite articulated the idea of "meta-regulation" involving a wider regulatory space in which a variety of institutions, including the state, the private sector and public interest groups would interact.[89] Countenancing a role for regulatory tripartism, the formal involvement of public interest groups and other civil organisations was proposed as a check on the potential for state capture such that non-governmental parties would monitor and influence the behaviour of both businesses and government regulatory agencies.[90]

Tripartism as antidote to the dual leadership problem

In practice, the involvement of third parties in the enforcement of compliance has frequently evolved. Examples include self-regulation as a result of the phenomenon described as the "Brussels effect",[91] the activities of banks and other companies that conduct business in countries with more developed compliance structures[92] and institutional investors who demand certain standards of corporate governance, employee relations and environmental management in the companies in which they invest. Similarly, banks and insurance companies exercise considerable influence over their clients where questionable practices on the part of a borrower or policyholder pose a risk to their own commercial well-being.[93] In numerous other areas private actors are legally obliged to

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[86] James Gobert and Maurice Punch, *Rethinking Corporate Crime* (Butterworths 2003); George P Gilligan, 'The Origins of UK Financial Services Regulation' (1997) 18(6) Co Law 167; J E Parkinson, *Corporate Power and Responsibility* (OUP 1993); David Marsh and Gareth Locksley, 'Capital in Britain, Its Structural Power and Influence over Policy' (1983) 6(2) W Eur Pol 36, 59; Edward S Herman, *Corporate Control, Corporate Power* (Cambridge University Press 1982) 184; Charles E Lindblom, *Politics and Markets* (Basic Books 1977); MD Reagan, *The Managed Economy* (OUP 1963).

[87] Marianne Ojo D Delaney, 'Responsive Regulation: Achieving the Right Balance between Persuasion and Penalisation' published as revised book chapter and title in *Designing Optimal Models of Financial Regulation in a Changing Financial Environment*, Nova Science Publications, May 5 2016, at https://ssrn.com/abstract=1407196 or http://dx.doi.org/10.2139/ssrn.1407196 accessed May 13, 2021.

[88] See the discussion in Chapter 6.

[89] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992) Ch. 3; John Braithwaite, 'Responsive Regulation and Developing Economies' (2006) 34(5) World Dev 888.

[90] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992).

[91] Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020).

[92] Marc Engelhart, The Nature and Basic Problems of Compliance Regimes (2018) 5 at https://pure.mpg.de/rest/items/item_2643714_7/component/file_3007899/content accessed May 13, 2021.

[93] Peter Grabosky, 'Meta-Regulation' in Peter Drahos (ed.), *Regulatory Theory: Foundations and applications* (ANU Press 2017).

undertake a regulatory role, ranging from duties imposed on financial institutions to combat, for example, tax evasion and money laundering to general requirements placed on organisations in relation to data protection. States can also require that regulated entities engage with external institutions, such as independent auditors, who also exercise some form of control over corporate behaviour. The state can reward and incentivise third parties for their role in achieving compliance on the part of the regulatory target and the state can also delegate regulatory authority to private parties such as industry associations that have the power to withdraw accreditation or certification from a member for failure to conform to required performance standards. This may be by the provision of standards prescribed by industry associations, review organisations, technical control boards or by international standards organisations operating as "gatekeepers".[94] It is also the case that where compliance programmes are relevant to criminal liability, third parties, described in the previous chapter as members of FCPA Inc., can provide guidance to corporations as to the adequacy of their compliance system. However, notwithstanding an increasing number of corporate prosecutions are being diverted with deferred prosecution agreements that require an early admission of facts by the corporation, it is still essential for the criminal justice system to be fit for purpose in the event of a corporate denial of culpability or for some other reason that may result in trial proceedings. In such circumstances, the innovative nature of corporate inquiry may well demand specialist expertise on the part of investigators, prosecutors and judges[95] or the external evaluation of the efficacy of the compliance system. While the former would require some change to the existing procedure, the latter also emphasises the role of third-party expertise.[96] Driven by the multinational activities of corporations, third party involvement will doubtless continue to play a significant role in global governance processes of a non-legal nature and are equally likely to be instrumental in the legal enforcement process at national level. It is also the case that active public interest groups can bring pressure for policy and regulatory development and call for investigation under state auspices. Indeed, self-appointed third party stakeholders can reduce the likelihood of capture[97] by energising the activities of state regulatory authorities and, from the evidential perspective, citizens may have an increasingly enhanced role in labour-intensive investigation of non-compliance.[98]

Tipping the political balance - regulated self-regulation and non-legal enforcement mechanisms

While the political power dynamic in capitalist societies typically favours the corporation, it is well recognised that this tendency is punctuated by periodical shifts in balance that follow the discovery of serious corporate scandals and high-profile media reporting of them.[99] In these conditions, governments must not only respond by ensuring that they are seen to provide "safe" markets for businesses themselves but also appease public/electoral dissatisfaction and bolster public/investor

[94] Marc Engelhart, The Nature and Basic Problems of Compliance Regimes (2018) 17 at https://pure.mpg.de/rest/items/item_2643714_7/component/file_3007899/content accessed May 13, 2021.
[95] Marc Engelhart, The Nature and Basic Problems of Compliance Regimes (2018) at https://pure.mpg.de/rest/items/item_2643714_7/component/file_3007899/content accessed May 13, 2021.
[96] Ibid.
[97] Ian Ayres and John Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP 1992).
[98] For example, the Guardian newspaper posted hundreds of thousands of documents relating to expenses claimed by MPs and over 25,000 citizens reviewed them for questionable claims, see Peter Grabosky, 'Meta-Regulation' in Peter Drahos (ed.), *Regulatory Theory: Foundations and applications* (ANU Press 2017).
[99] Steven Bittle and Laureen Snider, 'Law, Regulation and Safety Crime: Exploring the Boundaries of Criminalizing Powerful Corporate Actors' (2015) 30(3) Can J L & Soc'y 445-464, 449; ML Friedland, 'Pressure Groups and the Development of the Criminal Law' in PR Glazebrook (ed.), *Reshaping the Criminal Law, Essays in Honour of Glanville Williams* (Stevens & Sons 1978) 206-07.

confidence. Examples of such interventions include the enactment of the US Foreign Corrupt Practices Act 1977, following revelations of corrupt multinationals and corporate involvement with Watergate, the Sarbanes-Oxley Act 2002, after major corporate scandals undermined public confidence in securities markets,[100] and the enactment of the UK's corporate manslaughter offence, responding to public outrage in the wake of a string of high-profile tragedies.[101] It is clear that specific events, combined with the manner in which they are reported by the media, have mobilised public pressure sufficiently to recalibrate, at least temporarily, the so-called dual leadership dynamic.[102] There is also a degree of overlap between legal and non-legal enforcement mechanisms such that while non-legal responses to undesirable corporate practices can ultimately force the introduction of legal measures, threats of legal enforcement can equally result in shareholder or market responses. The effects of external pressure are not confined to the formal regulatory arena but also operate directly to enforce corporate self-regulation.[103] Conforming to regulatory theory in capitalist economies, constraints that are self-imposed are "prudential" and unobjectionable if they constitute an economically rational response to the preference of third parties or public opinion and occur as the effect of market pressure within the bounds of self-interested behaviour.[104] Thus, for example, the sacrificing of short term gains in favour of longer term profits is considered prudential. This can be contrasted with self-imposed profit-diminishing restraints that are theoretically problematic since they offend the classic "shareholders' money" argument.[105] Furthermore, the mobilisation of public activism to trigger corporate self-regulation coheres with the neoliberal emphasis on minimal state regulation in favour of market forces.[106]

Investigative journalism therefore has a significant role to play in challenging corporate power[107] with the ready mobilising of strong market forces, through the proliferation of digital media, as a driver for prudential self-constraint. Examples of market driven corporate self-regulation, where individuals and groups have motivated political and social change outside the conventional channels,[108] include the Greenpeace campaigns against Volkswagen,[109] Burberry, Adidas, Primark

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[100] Harmut Berghoff and Uwe Speikermann, 'Shady business: On the history of white-collar crime' (2018) 60(3) Business History 289-304.

[101] Corporate Manslaughter and Corporate Homicide Act 2007.

[102] ML Friedland, 'Pressure Groups and the Development of the Criminal Law' in PR Glazebrook (ed.), *Reshaping the Criminal Law, Essays in Honour of Glanville Williams* (Stevens & Sons 1978) 206.

[103] Gary Slapper and Steve Tombs, *Corporate Crime* (Longman 1999) 184.

[104] J E Parkinson, *Corporate Power and Responsibility* (OUP 1993) 268-69. Parkinson also refers to "other-regarding constraints" that are adopted as a response to a supposed moral imperative rather than profit maximization and these are objectionable on grounds of efficiency, sabotage of the market mechanism and overall reduction in social welfare, see too Milton Friedman, *Capitalism and Freedom* (University of Chicago Press 1962) 133.

[105] This is the argument that any self-imposed corporate policy other than profit maximization involves a morally improper non-consensual transfer of wealth from shareholders, DR Fischel, 'The Corporate Governance Movement' (1982) 35 V & L Rev 1259.

[106] Tombs S and Whyte D, 'the myths and realities of deterrence in workplace safety regulation' (2013) British Journal of criminology (53), 746 – 763, 753

[107] Maude Barlow and Thomas Clark, *Global Showdown: How the New Activists are Fighting Corporate Rule* (Stoddart Press 2002); Laureen Snider, 'Accommodating Power: The 'Common Sense' of Regulators' 18 Soc and Legal Stud 179 (2009).

[108] Brayden King, 'The Tactical Disruptiveness of Social Movements: Sources of Market and Mediated Disruption in Corporate Boycotts' (2011) 58(4) Soc Prob 491-517; Francis Fox Piven and Richard A Cloward, *Poor Peoples Movements: Why They Succeed, How They Fail* (Pantheon Books 1977).

[109] Antonio Chamorro-Mera, 'Greenpeace: The Threat of the Dark Side of Volkswagen' in M Mercedes Galan-Ladero and Helena M Alves (eds.), *Case Studies on Social Marketing* (Springer 2019) 13-23.

and APP,[110] the boycotting of Nestle over its baby milk claims[111] and of Shell and Wal-Mart over their unethical and unlawful practices.[112] The success of market driven self-regulation certainly underlines the point that corporate reputation is a valuable intangible asset[113] that goes hand in hand with trust and for businesses to survive they must repair any such erosions.[114] Indeed, there is evidence that corporations are receptive to social pressure and as a result seek to improve their management of social issues, typically via formal structural changes, such as the adoption of a social responsibility board committee, or with increased disclosure.[115] For example, Nike worked to restore its reputation after the 1990s boycott over its use of child labour and went on to be recognised as a sustainability leader.[116] However, while evidence that an increase in media attention increases not only the market response to corporate behaviour but also the firm's receptivity to future activist challenges,[117] it may also reflect an absence of genuine commitment to social issues such that future activism is consequently triggered. In that this conforms to the assumption that corporations are ethically neutral rational actors this is theoretically unobjectionable but it also underlines the fact that the aim of corporate rehabilitation, which goes to the essence of the forward looking terms of deferred prosecution agreements, is inevitably more a case of window-dressing than of substance. Rationality under the prevailing economic calculus demands wrongdoing if it is more profitable than not. Accordingly, there have been a series of Greenpeace campaigns against Volkswagen and while each appears to win a battle in the name of the environment, it is clear that the war is ongoing.[118] However, where the state is not willing to regulate, for whatever reason, public campaigns and boycotting can enforce self-regulation through their impact on both immediate corporate revenue and on corporate reputation with the potential of a more enduring decline in stock price.[119] Thus, for example, after the "Dieselgate" fraud came to light in 2015 over atmospheric emissions, the value of Volkswagen shares plummeted 36.6% in a month.

In addition to self-regulation of a responsive nature, corporations are themselves engaging in social activism whereby investment in the community, such as in the promotion of fair trade, has an intended payback. As a form of prudential self-constraint this does not offend the "shareholders'

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[110] https://www.theguardian.com/sustainable-business/blog/greenpeace-campaigns-companies-lego-mattel-barbie-shell accessed May 14, 2021. Greenpeace successfully campaigned to stop VW lobbying against EU climate change laws, the fashion houses using perflourinated chemicals in manufacturing and Asia Paper and Pulp's deforestation activities.

[111] Martine Geller, Nestle to respond to baby milk criticism in coming days, Reuters Feb 2, 2018 at https://uk.reuters.com/article/us-nestle-babymilk/nestle-to-respond-to-baby-milk-criticism-in-coming-days-idUKKBN1FM18F accessed May 14, 2021.

[112] Harmut Berghoff and Uwe Speikermann, 'Shady business: On the history of white-collar crime' (2018) 60(3) Business History 289-304.

[113] J E Parkinson, *Corporate Power and Responsibility* (OUP 1993); Laureen Snider, Accommodating Power: The Common Sense of Regulators (2009) 18(2) Social and Legal Studies 179, 186.

[114] J Memery et al, 'Conceptualising a Multi-level Integrative Model for Trust Repair' paper delivered in European Marketing Academy (EMAC) 29 May–1 June 2018, Glasgow, UK.

[115] Patricia Ann McDonnell et al, 'A Dynamic Process Model of Private Politics: Activist Targeting and Corporate Receptivity to Social Challenges' (2015) 80(3) Am Soc Rev 654-678.

[116] https://www.theguardian.com/vital-signs/2015/jan/06/boycotts-shopping-protests-activists-consumers accessed May 14, 2021.

[117] Patricia Ann McDonnell et al 'A Dynamic Process Model of Private Politics: Activist Targeting and Corporate Receptivity to Social Challenges' (2015) 80(3) Am Soc Rev 654-678.

[118] Antonio Chamorro-Mera, 'Greenpeace: The Threat of the Dark Side of Volkswagen' in M Mercedes Galan-Ladero and Helena M Alves (eds.) *Case Studies on Social Marketing* (Springer 2019) 13-23.

[119] Brayden King, 'The Tactical Disruptiveness of Social Movements: Sources of Market and Mediated Disruption in Corporate Boycotts' (2011) 58(4) Social Problems 491-517).

money" argument[120] and corporations have been quick to recognise the value in adopting a social responsibility narrative as a key marketing tool that appeals to consumers. In this context developments in corporate social responsibility (CSR) compliance have taken place and this has been accelerated by factors that include the mainstreaming of CSR in the investment community, especially in relation to environmental issues, increasing focus on CSR at board level and a willingness on the part of CEOs to engage on social issues. It is suggested that the general expansion of CSR disclosure requirements and frameworks, together with media reporting of high profile CSR issues, has also facilitated scrutiny by commercial customers and other stakeholders.[121] According to BlackRock, the world's largest asset manager,[122] society now demands that companies serve a social purpose such that,

"(t)o prosper over time, every company must not only deliver financial performance, but also show how it makes a positive contribution to society. Companies must benefit all of their stakeholders, including shareholders, employees, customers, and the communities in which they operate".[123]

Since the catalyst for increased emphasis on social responsibility is frequently public demonstration,[124] the contemporary CSR movement might be considered as an aspect of the corresponding growth in the role of civil society organisations, inspired by bodies such as Greenpeace, Save the Children, Oxfam and Amnesty International. Indeed, businesses are increasingly recognising the power of non-governmental bodies to raise public awareness and to influence corporate reputations[125] and many are actively developing working partnerships with civil society organisations as a means to marry wealth with expertise in order to project public legitimacy.[126] However, since corporate self-regulation must be economically rational, it follows that corporate claims of socially responsible practices may be lacking substance or even amount to "greenwashing"[127] and can be employed as a cynical marketing ploy to avoid formal regulation[128] and insure against public opprobrium, and/or to mask the imposition of what are essentially corporate values.[129] Given the inherent links between compliance regimes, public relations and market/consumer activity, corporate self-interest can be advanced through the manipulation of market behaviour, market responses can be distorted through the purchasing decisions that

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[120] J E Parkinson, *Corporate Power and Responsibility* (OUP 1993).
[121] https://www.ropesgray.com/en/newsroom/alerts/2018/03/Corporate-Social-Responsibility-Compliance-in-2018-and-Beyond-An-Overview-for-In-House-Legal-Counsel accessed May 14, 2021.
[122] Ibid., quoted as having 6 trillion US Dollars of assets under management.
[123] Ibid., quoting from a letter sent by BlackRock to CEOs in 2018.
[124] David Vogel, 'Private Regulation of Global Corporate Conduct, Achievements and Limitations' (2010) 49(1) Business and Society 68-87.
[125] Andrew Crane et al, 'Corporate social responsibility: in a global context' in Andrew Crane et al (eds.), *Corporate Social Responsibility: Readings and Cases in a Global Context* (Routledge 2014) Ch 1.
[126] John Elkington and Shelley Fennell, 'Partners for Sustainability' in Jem Bendell (ed.), *Terms for Endearment* (Greenleaf 2000) 150-162.
[127] Antonio Chamorro-Mera, 'Greenpeace: The Threat of the Dark Side of Volkswagen' in M Mercedes Galan-Ladero and Helena M Alves (eds.) *Case Studies on Social Marketing* (Springer 2019) 13-23.
[128] Andrew Crane et al (eds) *Corporate Social Responsibility: Readings and Cases in a Global Context* (Routledge 2014).
[129] David Vogel, 'Private Regulation of Global Corporate Conduct, Achievements and Limitations' (2010) 49(1) Business and Society 68-87, 81.

corporations make[130] and the rights of the less powerful be jeopardised.[131] Accordingly, while consumer advocate groups have proved assertive in motivating corporate self-regulation,[132] companies, as stakeholders themselves, can resist external pressure with a combination of financial clout and operational capacity that has the power to sway markets, the media, public discussion, politics and law making.

Deliberative democracy and democratic legitimacy

Given that the collaborative public-private approach to regulation involves corporations assuming an overt political role, putting self-interest inherent in the profit maximisation imperative at odds with the duty to act in the public interest, deliberative democracy is an essential condition for the legitimacy of corporate political involvement. While this must involve the participation of civil society organisations in the co-creation of global governance processes in the regulatory space, and corporations are known to assert powerful influence over public discussion in any event, deliberative democracy also raises important questions about the legitimacy and accountability of the civil society participants. In this respect the normative theory of regulated self-regulation is underpinned by two basic premises that view the parties operating in the regulatory space as inherently moral[133] and rational.[134] Echoing the assumptions about corporate actors underlying traditional regulation, these are also problematic; not only are there are well-documented problems with the notion of stakeholder morality,[135] there is also no universal and stable concept of public interest to which all parties might subscribe. Although the participation of an increasing variety of stakeholders in the regulatory process brings a further diversity of values into the corporate forum, with an expanding heterogeneity of social expectations, what constitutes public interest, and was previously a matter for governments, is now a matter that is determined by the dominant stakeholders.[136] Indeed, since there is no agreement about who is to be included in the debate[137] and there will be inevitable power differences between those who are involved, the silencing of marginalised or dissonant voices is implied.[138] Accordingly, the deliberative democratic processes involved in global governance are thought to have a de-politicising rather than re-politicising effect.[139] Furthermore, if the success of the non-legal, collaborative enforcement process demands consensus, there must be a shared understanding of risk priorities as between "regulators", the influential wider stakeholders and the

[130] Simon FC, *Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality* (Routledge 2017)
[131] Marc Engelhart, The Nature and Basic Problems of Compliance Regimes (2018) 17 at https://pure.mpg.de/rest/items/item_2643714_7/component/file_3007899/content accessed May 13, 2021.
[132] Simon FC, *Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality* (Routledge 2017)
[133] The presupposition of a "moral stakeholder", see Ian Ayres and John Braithwaite, *Responsive Regulation* (OUP 1992).
[134] Simon FC, *Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality* (Routledge 2017)
[135] Christine Parker, 'Twenty Years of Responsive Regulation: An Appreciation and Appraisal' (2013) 7(1) Regulation and Governance 2-13.
[136] Andreas Georg Scherer and Guido Polazzo, 'The New Political Risk of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy' (2011) 48(4) Journal of Management Studies 899-931.
[137] Christine Parker, *The Open Corporation* (Cambridge University Press 2002).
[138] P Edwards and H Willmott, 'Discourse and normative business ethics' in Christoph Luetge (ed.), *Handbook of the Philosophical Foundations of Business Ethics* (Springer 2012) 549-580.
[139] Marie-Laure Djelic and Helen Etchanchu, 'Contextualizing Corporate Political Responsibilities: Neoliberal CSR in Historical Perspective' (2017) 142 J of Bus Ethics 641-661, 657.

"regulated".[140] While this may be achieved through either an invited dialogue or as the result of reputational damage and, for example, consumer boycotting, it is of real concern that there are striking differences in stakeholder perceptions of even basic notions such as "compliance", "market competitiveness" and "consumers".[141]

Given the influence of dominant stakeholders, there is a pressing need for the improved public accountability of these participants that is emphasised with the existence of so-called "astroturf" organisations, such as the Global Climate Coalition,[142] that masquerade as grass roots-based citizen groups but are in fact conceived or funded by corporations, industry trade associations, political interests or public relations firms as vehicles to lobby and promote self-interest. It is also recognised that other powerful stakeholders, or self-appointed moral entrepreneurs, may be driven by personal interest, misconception or malice.[143] For the cash rich, democracy is very much for hire[144] such that transparency must be demanded regarding the funding and operations of the third party participants.[145] Equally, attention must be given to the live issue of governments "closing space" around civil society to constrain the activities of third party participants.[146]

Furthermore, while social media is the vehicle of choice for mass collaboration and for the expression of popular sovereignty through social movements,[147] democratic capacity is susceptible to manipulation. With the potential to reconfigure communicative power relations by empowering citizens to challenge the control of media production and dissemination by the state and commercial institutions, it is of note that the majority of users are attracted to a small number of nodes that therefore enjoy a disproportionate influence over information sources for them. Empirical observation suggests that the most active political users, including bloggers, comprise existing groups already fully committed to political causes and that competition between political discourses can be limited through, for example, search engine ranking algorithms that privilege access to information.[148] The financial, political and social might of big tech firms is causing such alarm that governments around the world are taking action, including the establishment of the International Grand Committee to address the impact of social media on big data, privacy, democracy and disinformation.

Having already identified the role of investigative journalism in reporting corporate misconduct as a

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[140] F Haines,'Regulatory Failures and Regulatory Solutions: A Characteristic Analysis of the Aftermath of Disaster' (2009) 34(1) Law and Social Inquiry 31-60, 39.
[141] FC Simon, *Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality* (Routledge 2017).
[142] Rob Gray et al, 'NGOs, Civil Society and Accountability: Making the People Accountable to Capital', (2005) 19(3) Accounting, Auditing and Accountability Journal 319-348.
[143] Peter Grabosky, 'Meta-Regulation' in Peter Drahos (ed.) *Regulatory Theory: Foundations and Applications* (ANU Press 2017).
[144] The phrase "democracy for hire" was coined by journalist William Greider, *Who Will Tell The People?* (Simon & Schuster 1993).
[145] Jeffrey Unerman and Brendan O'Dwyer, 'On James Bond and the importance of NGO accountability' (2006) 19(3) Accounting, Auditing and Accountability Journal 305-318.
[146] Thomas Carothers, 'Closing Space for International Democracy and Human Rights Support' (2016) 8(3) Journal of Human Rights Practice 358-377.
[147] Brian D Loader and Dan Mercea, 'Networking Democracy? Social Media Innovations and Participatory Politics' (2011) 14(6) Information, Communication and Society 757-769; Charles Tilly, *Social Movements 1768-2004* (Taylor and Francis 2004).
[148] Brian D Loader and Dan Mercea, 'Networking Democracy? Social Media Innovations and Participatory Politics' (2011) Information, Communication and Society 14(6).

key driver for social activism, it is of note that news organisations, relied upon for the dissemination of such information, typically benefit from advertising revenues received from corporate giants and are therefore in a position of obvious conflict of interest. While most news organisations are themselves for-profit corporate bodies, the journalistic role as gatekeeper requires independence and impartiality. Ongoing challenges involve finding ways to tackle issues such as fake news, subverting news and news manipulation[149] and the march of digitalisation, with the prevalence of online news journalism, spawns additional concerns that will require future attention. As a consequence of the online forum, newsworthiness is increasingly determined by metrics and analytics[150] such that news stories are considered purely in terms of "clickbait". The need to attract advertising revenue[151] means that real-time metrics are now the primary tool for the inclusion, placement and positioning of stories and analytics determine the future promotion of stories.[152] Although mainstream news media are essential to democracy,[153] the clickbait approach results in the creation and promotion of news content that does little to augment informed discourse and is lacking in news value.[154] Of real concern, this development signals the death of investigative journalism.[155] In contrast to the traditional criticism that the media tends to frame conventional crime in a way that distorts the public view and increases fear,[156] there is now a real danger, irrespective of the fundamental democratic and transparency issues, that corporate wrongdoing is under-reported and its gravity underplayed. Since perfect competition in markets assumes perfect information, and there is already an information deficit in the reporting of legally enforced corporate regulation, the power to induce self-regulation as a counterweight, through informal market mechanisms, is dangerously jeopardised if the deliberative democratic process is derailed. Publicity is a necessary feature of legitimate democratic processes but where deliberation is subject to existing social inequalities and biases, through already existing structural inequalities, the resulting democracy lacks authenticity. Questions about the value, legitimacy and accountability of civil society organisations and the concern that governments are "closing space" around them are therefore interlinked with these broader issues.

Notwithstanding these very considerable misgivings, it is certainly the case that the regulatory capacity of ordinary citizens has been enhanced in recent years, underpinned by the development of digital technology and social networking that provide the platform upon which social capital can be

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[149] It is suggested, for example, that the media frame crime in such a way that they distort the public view of crime and increase fear, Sara Sun Beale, 'The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness' (2006) 48(2) Wm and Mary L Rev 397.

[150] N Blanchett Neheli, 'News By Numbers: The evolution of analytics in journalism' (2018) 6(8) Digital Journalism 1041-1051.

[151] Of note, a conservative estimate suggests that Google made US $4.7 billion from digital news advertising on news content in 2018, almost as much as the US news industry as a whole, see https://www.nytimes.com/2019/06/09/business/media/google-news-industry-antitrust.html accessed May 14, 2021.

[152] Mel Bunce, 'Management and Resistance in the Digital Newsroom', (2017) Journalism 1-16.

[153] Madelaine Drohan, 'Does Serious Journalism Have A Future in Canada?' (2016) see Ottawa: Public policy Forum 2016 m. at https://issuu.com/ppforumca/docs/pm_fellow_march_11_en accessed May 14, 2021.

[154] Edson C Tandoc Jr, 'Journalism is Twerking? How Web Analysis is Changing the Process of Gatekeeping' (2014) 16(4) New Media and Society 559-575.

[155] Tony Harcup, 'Asking the Readers, Audience Research into Alternative Journalism' (2016) 10(6) Journalism Practice 680-696.

[156] Sara Sun Beale, 'The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness' (2006) 48(2) Wm and Mary L Rev 397.

built.[157] The democratisation of communication and unprecedented accessibility of information make the potential for citizen involvement far greater than it has ever been in the regulatory process and informal enforcement mechanisms of this nature are sure to feature in new patterns of governance beyond the traditional regulatory interplay.[158]

From liability for direct harms to responsibility for indirect involvement

The increased engagement of civil society participants has certainly introduced new approaches that are startling in their departure from legal norms. Having increasingly focused on externality problems with transnational causes,[159] these participants are seeking practical solutions to address a range of "wicked" societal problems such as climate change, pollution, poverty, social injustice and inequality.[160] This is associated with an emerging debate surrounding corporate complicity that extends expectations of corporations beyond their immediate acts to encompass a responsibility for third party abuses from which the business benefits.[161] Essentially the creation of a "social connection" liability model, the complicity criticism serves to enlarge the idea of corporate responsibility. Manifestations of the social connection approach can be seen in the now familiar concepts of supply chain accountability and management as we enter what is described as the "age of responsibilization"[162] involving a fundamental shift from the legal liability model of corporate control, from the formal and legal norms associated with traditional regulation, to an approach based on vaguer notions of responsibility or accountability. Rejecting the law's backward-looking mechanism for fault attribution, responsibilisation is a forward-looking solution-seeking approach.[163] Linked with the political corporate social responsibility movement, the challenge is not just how businesses can be induced to assume government duties, rather than exploit regulatory voids,[164] but how they can also be made responsible for societal problems where there are complex causal webs and the root cause involves structural social injustice.[165]

Justified on the basis that social problems and those responsible for them do not exist in any

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[157] Nicole B Ellison et al, 'The Benefits of Facebook 'Friends': Social Capital and College Students Use of Online Social Network Sites', (2007) 12(4) Journal of Computer-Mediated Communication 1143-68.
[158] Laureen Snider, 'Accommodating Power: The 'Common Sense' of Regulators' (2009)18 Soc and Legal Stud 179.
[159] Andreas Georg Scherer and Guido Polazzo, 'The New Political Risk of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy' (2011) 48(4) Journal of Management Studies 899-931.
[160] Juliane Reinecke and Shaz Ansari, 'Taming Wicked Problems: The Role of Framing in the Construction of Corporate Social Responsibility' (2016) 53(3) Journal of Management Studies 300-329.
[161] Andreas Georg Scherer and Guido Polazzo, 'The New Political Role of Business in a Globalized World: A Review of New Perspectives on CSR and its Implications for the Firm, Governance and Democracy' (2011) 48(4) Journal of Management Studies 899-931; Andrew Clapham, *Human Rights Obligations of Non-State Actors* (OUP 2006).
[162] Ronen Shamir, 'The age of responsibilization: on market-embedded morality' (2008) 37(1) Economy and Society 1-19.
[163] Iris Marion Young, 'Responsibility and Global Justice: A Social Connection Model' (2006) 23(1) Social Philosophy and Policy Foundation 102-130.
[164] For example through modern slavery or corporation tax avoidance, Andrew Crane, 'Modern slavery as a management practice: exploring the conditions and capabilities for human exploitation' (2013) 38(1) Academy of Management Review 49-69.
[165] Juliane Reinecke and Shaz Ansari, 'Taming Wicked Problems: The Role of Framing in the Construction of Corporate Social Responsibility' (2016) 53(3) Journal of Management Studies 300-329.

objective sense, the emerging approach is therefore to "frame" corporate responsibility.[166] Framing requires shaping perceptions of social reality and then triggering collective action on which to construct responsibility.[167] Described as "deliberative engagement" by proponents of CSR and in terms of "contentious performance" by social movements scholars[168], collective negotiation is seen as the key to the "frame shifting" that is required.[169] In theory, if actors with divergent frames can be induced to converge around a shared interpretation, this can transform into a collective understanding[170] that overcomes stakeholder conflict. This concurs with Luhmann's systems theory of self-referential and operatively-closed social systems, whereby "structural coupling" between the different stakeholders must occur to construct the social reality.[171] The process of collective action "framing" relies on diagnosis, prognosis and motivation.[172] Given the complexities of the causes of societal problems, proponents advocate the creation of a "cognitive shortcut" by sub-dividing the multi-faceted problem to reveal points of leverage that can then be linked with corporate actors albeit they are not the primary cause. Empirical evidence reveals that the use of an emotionally moving image can create "emotional connectivity" with consumers sufficient to induce the social judgment needed to draw out corporate engagement and self-disclosure.[173] Although companies may engage for purely strategic reasons at the outset, it is thought that their involvement in public deliberation results in "argumentative self-entrapment" such that companies who "talk the talk" are ultimately cornered into "walking the walk" and are thereby induced to assume a political role as co-author of the responsibility frame.[174]

However, successful responsibility framing involves the question of how much consumers and other stakeholders value the non-economic outcome, their access to information that is meaningful to them and whether they will be sufficiently incentivised to act. While corporate "framing" leading to deliberative integration[175] has worked well where the use of emotive images has evoked moral outrage, success appears to be linked to the targeting of a particular brand.[176] As a form of regulatory mechanism it therefore seems to be underpinned by emotional drivers[177] and may have negligible impact where the target corporation is selling unbranded products or does not supply

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[166] Erving Goffman*, Frame Analysis: An Essay on the Organization of Experience* (Harper & Row 1974)
[167] Juliane Reinecke and Shaz Ansari, 'Taming Wicked Problems: The Role of Framing in the Construction of Corporate Social Responsibility' (2016) 53(3) Journal of Management Studies 300-329.
[168] Charles Tilly, *Contentious Performances* (Cambridge University Press 2008).
[169] Joep P Cornelissen and Mirjam D Werner, 'Putting Framing in Perspective: A Review of Framing and Analysis Across the Management and Organizational Literature' (2014) 8(1) Academy of Management Annals 181-235.
[170] David A Snow, 'Framing and social movements' in David A Snow et al (eds.), *The Wiley-Blackwell Encyclopedia of Social and Political Movements* (Wiley-Blackwell 2013); Shahzad Ansari et al, 'Constructing a Climate Change Logic: An Institutional Perspective on the "Tragedy of the Commons"' (2013) 24(4) Organization Science 1014-40.
[171] Niklas Luhmann, *Theory of Society: Vol 2* trans R Barrett (Stanford University Press 2013).
[172] David A Snow and Robert D Benford, 'Ideology, frame resonance, and participant mobilization' (1988) 1(1) International Social Movement Research 197-217.
[173] Described as regulation by information, Marc Schneiberg and Tim Bartley, 'Organizations, Regulation, and Economic Behavior: Regulatory Dynamics and Forms from the Nineteenth to Twenty-First Century' (2008) 4 Annual Review of Law and Social Science 31-61.
[174] Juliane Reinecke and Shaz Ansari, 'Taming Wicked Problems: The Role of Framing in the Construction of Corporate Social Responsibility' (2016) 53(3) Journal of Management Studies 300-329.
[175] Ibid.
[176] Iris Marion Young, 'Responsibility and Global Justice: a Social Connection Model' (2006) 23 Social Philosophy and Policy 102-30.
[177] Juliane Reinecke and Shaz Ansari, 'Taming Wicked Problems: The Role of Framing in the Construction of Corporate Social Responsibility' (2016) 53(3) Journal of Management Studies 300-329.

direct to consumers.[178] Indeed, the potency of market activity is largely undermined where consumers either do not know, do not care or are simply confused by the proliferation of codes and standards of corporate conduct and practice.[179] Few campaigns adversely affect the sales or the share price of targeted firms.[180] It is also vulnerable to the same criticism levelled against the earlier business ethics and social responsibility approaches, that have been deemed ineffective[181] and even counterproductive,[182] it in that CSR generally fails to recognise that businesses operate within an institutional system that spreads and discounts responsibility without touching the systemic causes of unethical behaviour.[183] Moral responsibility is not only limited[184] but the "ethics management paradox", whereby the instrumental use of business ethics displaces moral sentiment, inadvertently leads to an increase in opportunistic behaviour.[185] Furthermore, viewed as an agglomerate of people in a structured environment, it is suggested that the tendency to autopoiesis[186] renders it a system susceptible to an erosion of the values of the group members and to law-breaking.[187] This is exacerbated in the context of international trade whereby corporate decision-making often takes place at a distance from the site of the consequent activity. Aside from the competitive advantages that can be gained through differences in the legal and regulatory jurisdictions, the element of remoteness makes moral disengagement,[188] and therefore the externalisation of business costs, much easier.[189]

While there is a rich seam of discourse focusing on the use of "framing", its efficacy in promoting self-induced corporate social responsibility and the various framing techniques that can be

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[178] Naomi Klein, *No Logo* (Picador 1999). Reputation is key in relation to brand value, particularly where businesses sell directly to consumers, Gary Gereffi et al, 'The NGO-industrial complex' (2001) 125 Foreign Policy 56-65.

[179] David Vogel, 'Private Regulation of Global Corporate Conduct, Achievements and Limitations' (2010) 49(1) Business and Society 68-87, 72.

[180] David Vogel, *The Market for Virtue: The Potential and Limits of Corporate Social Responsibility* (Brookings Institution Press 2005).

[181] This includes specific initiatives such as the Global Compact, S Prakash Sethi (ed), *Globalization and Self-Regulation: The Crucial Role that Corporate Codes of Conduct Play in Global Business* (Palgrave Macmillan 2013); Colin Mayer, *Firm Commitment: Why the Corporation is Failing Us?* (OUP 2013); Zsolt Boda and L Zsolnai L, 'The Failure of Business Ethics' (2016) 11(1) Society and Business Review 93-104.

[182] Luk Bouckaert, 'The Ethics Management Paradox' in Laszlo Zsolani (ed), *Interdisciplinary Yearbook of Business Ethics* (Peter Lang Publishers 2006) 199-202; Kenneth E Goodpaster et al (eds.) *Corporate Responsibility: The American Experience* (Cambridge University Press 2012); David Bevan and Herve Corvellec, 'The Impossibility of Corporate Ethics: for a levinasian approach to managerial ethics' (2007) 16(3) Business Ethics: A European Review 208-219; Knut J Ims and Lars Jacob Tynes Pedersen (eds), *Business and the Greater Good: Rethinking Business Ethics in an Age of Crisis* (Edward Elgar 2015).

[183] More specifically, it is suggested that the weakness of the institutional system lies in limited liability which serves to spread and salve responsibility and to divide the reputations of the corporation and individuals, see Zsolt Boda and L Zsolnai L, 'The Failure of Business Ethics' (2016) 11(1) Society and Business Review 93-104; Peter Rona, 'Ethics and the limited liability corporation' paper presented at 'Economic and Financial Crisis and the Human Person' workshop at the Von Hugel Institute, University of Cambridge, Cambridge 8 June 2013.

[184] Ibid.

[185] Luk Bouckaert, 'The Ethics Management Paradox' in Laszlo Zsolani (ed), *Interdisciplinary Yearbook of Business Ethics* (Peter Lang Publishers 2006).

[186] This refers to Teubner's 1985, 1987 version of systems theory, Andrew Dunsire, 'Tipping the Balance: Autopoiesis and Governance' (1996) 28(3) Administration and Society 299-334.

[187] Marc Engelhart, The Nature and Basic Problems of Compliance Regimes (2018) 17 at https://pure.mpg.de/rest/items/item_2643714_7/component/file_3007899/content accessed May 13, 2021.

[188] Albert Bandura, *Moral Disengagement: How People Do Harm and Live with Themselves* (Palgrave Macmillan 2015).

[189] Zsolt Boda and L Zsolnai L, 'The Failure of Business Ethics' (2016) 11(1) Society and Business Review 93-104.

employed, it does not address the fundamental question of legitimacy. Nike's response to social activism in the 1990s and its successful effort to restore its reputation, such that it became known as a sustainability leader in the global arena, is a case in point. Having been "framed" for serious labour and human rights abuses, as a result of its Asian outsourcing activities that were critical to its exceptional financial performance, it responded through an orchestrated "counter-framing" exercise. At its simplest, the exploitation of low-cost labour claim was countered by Nike with a careful framing of its activities which were portrayed by the corporation as a shining example of worldwide job creation in the context of responsible management.[190] Although its sales and share price had stagnated in the late decade as a result of the anti-Nike campaign, Nike had retained its former momentum by 2003 and, as a result of its commitment to out-sourcing and its successful counter-framing, continues to enjoy a dominant share of the athletic foot-ware market. Since frames are "designed to deliberately reconstitute selected aspects of reality surrounding deliberation of a public issue" they can be used by civil participants and corporations alike in the promotion of their own goals or agendas.[191] Whether outsourcing is seen as a paragon of capitalist virtue or an exploitation of gaps in regulation and an abuse of human rights is seemingly dependant on the constructed narrative that guides the frame-holder's interpretation of events. With the question of what makes multi-stakeholder initiatives legitimate and efficient unanswered,[192] confidence in market forces as a form of non-legal regulated self-regulation remains limited.[193]

With something more than pure market-focus seemingly required,[194] there has been a growing stream of discourse devoted to political corporate social responsibility (PCSR) in the last decade[195] recognising that interpretations of what is public or private responsibility have shifted with the retreat of the state.[196] Its approaches are now challenging the neoliberalist account of business, moving from the profit-only actor to encompass the political role of corporations[197] whereby businesses are more overtly involved in the co-creation of the institutional environment.[198] It is of note, however, that this shift is more reinvention than innovation, and is largely reminiscent of the age of European business/owner paternalism associated with the mid to late nineteenth century and the subsequent era of managerial trusteeship occurring in the US in the first half of the twentieth

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[190] Randall L Waller and Roger N Conaway, 'Framing and Counterframing the Issue of Corporate Social Responsibility' (2011) 48(1) Journal of Business Communication 83-106.
[191] Ibid. p 87 – 88; Robert M Entman, 'Framing Bias: Media in the Distribution of Power' (2007) 57(1) Journal of Communication 163 -173.
[192] Andreas Georg Scherer and Guido Palazzo, 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy' (2011) 48(4) Journal of Management Studies 899-931.
[193] Cristie Ford, *Innovation and the State: Finance, Regulation, and Justice* (Cambridge University Press 2017). Similarly, it has been observed that although consumer preferences can dictate corporate behaviour, the buyers for large retailers are in a position to wield regulatory power, Michael P Vandenbergh, 'The New Wal-Mart Effect: The Role of Private Contracting in Global Governance' (2007) 54 UCLA Law Review 913-70.
[194] Cristie Ford, *Innovation and the State: Finance, Regulation, and Justice* (Cambridge University Press 2017).
[195] Juliane Reinecke and Shaz Ansari, 'Taming Wicked Problems' (2016) 53(3) Journal of Management Studies 299-329.
[196] Andreas Georg Scherer and Guido Palazzo, 'The New Political Role of Business in a Globalized World: A Review of a New Perspective on CSR and its Implications for the Firm, Governance, and Democracy' (2011) 48(4) Journal of Management Studies 899-931.
[197] Marie-Laure Djelic and Helen Etchanchu, 'Contextualizing Corporate Political Responsibilities: Neoliberal CSR in Historical Perspective' (2017) 142 J of Bus Ethics 641-661.
[198] Andreas Georg Scherer et al, 'Managing for Political Corporate Social Responsibility: New Challenges and Directions for PCSR 2.0' (2016) 53(3) Journal of Management Studies 273.

century.[199] Indeed, these early forms of privatisation of social responsibility were never considered fully legitimate in claiming to serve the common good and, as a means to marginalise the unaccountable power of private firms, ultimately led to at least a partial nationalisation of social responsibilities.[200] Accordingly, while the longstanding shareholder versus stakeholder primacy debate is set to continue, the political understanding of corporate social responsibility demands a root and branch reconsideration of the existing models of governance at national and international levels[201] and the implications for democracy.[202]

Regulated self-regulation – a work in progress or a clarion call for change?

While empirical evaluations of regulated self-regulation through corporate compliance are evidencing mixed results,[203] there is a growing acceptance that the collaborative approach is cost efficient for the state.[204] However, the growth of deliberative democracy and co-regulation reconfigures the traditional role of the business from "profit-only" to that of both commercial and political actor such that the dominant economic theory of the firm, and the fundamental assumptions that flow from it, are inevitably challenged. The clear division of labour between politics, business and civil society that is possible in nationally contained democracy is becoming blurred and the efficiency, legitimacy and accountability of those roles and responsibilities must now be the subject of doubt.[205]

Although formal intervention, of a regulatory and legal nature, will be the subject of an increasingly globalised effort, developments are likely to continue to develop on a piecemeal and incremental basis. While the ground remains fertile for more fundamental changes that might follow a reconsideration of the utilitarian basis of regulatory aims, the future of legal intervention is unlikely to provide any real or lasting innovation unless a recalibration of the cost-benefit analysis occurs and the steadfast aversion to the threat of corporate failure is confronted. Until then, the deterrence deficit will undoubtedly remain an enduring feature of the corporate arena such that the future of legal intervention is unlikely to provide any real or lasting innovation. Accordingly, the cyclical phenomenon of intermittent periods of increased regulation and deregulation will likely persist, the target of enforcement will continue to swing between corporations and individuals, and the ever-increasing size of punitive sanctions will lead to an ever greater juridification of the regulatory enforcement process. While this will benefit the flourishing regulation and compliance industry as well as corporations themselves, with consequent anti-competitive rewards, the mushrooming costs of formal regulation will be widely allocated, or mis-allocated, to the detriment of those who can least afford them. In terms of legally enforced regulation, little progress has been made since the

[199] Marie-Laure Djelic and Helen Etchanchu, 'Contextualizing Corporate Political Responsibilities: Neoliberal CSR in Historical Perspective' (2017) 142 J of Bus Ethics 641-661.
[200] Ibid, business paternalism was challenged by the rise of the welfare state while faith in trusteeship management was dented by the onset of the financial crisis of 1929 leading to the American New Deal.
[201] Kenneth W Abbott, 'Engaging the public and the private in global sustainability governance' (2012) 88(3) International Affairs 543-64.
[202] Andreas Georg Scherer et al, 'Democratizing corporate governance: Compensating for the democratic deficit of corporate political activity and corporate citizenship' (2013) 52 Business and Society 473-514.
[203] FC Simon, *Meta-Regulation in Practice: Beyond Normative Views of Morality and Rationality* (Routledge 2017); R Baldwin et al (eds), *The Oxford Handbook of Regulation* (OUP 2010).
[204] Michael Power, 'The Risk Management of Everything: Rethinking the Politics of Uncertainty' Demos (2004) at https://www.demos.co.uk/files/riskmanagementofeverything.pdf accessed May 14, 2021 at 21.
[205] Stephen J Kobrin, 'Private Political Authority and Public Responsibility: Transnational Politics, Transnational Firms and Human Rights' (2009) 19(3) Business Ethics Quarterly 349-74.

excesses of the early industrialists were first confronted and the enduring problem of regulating corporate conduct in the face of capitalist ideology, with the asymmetries of power this naturally involves, is seemingly insuperable.

As to the various non-legal mechanisms for corporate self-regulation, management is subject to direct pressure from institutional shareholders, indirect pressure invoked via the market for corporate control[206] and, increasingly, market forces that are accompanied by some form of social activism. However, given the link between social activism and the way in which the media reports or "frames" corporate issues, as well as the capacity for corporations to "counterframe" in pursuit of their own agenda, market forces cannot be assumed to be the expression of authentic democratic deliberation.

Since the value of the corporate reputation essentially provides the leverage for non-legal enforcement mechanisms, it is troubling that while the fundamental principle of open justice operates in court proceedings, it does not extend to regulatory enforcement and the structure of the regulatory process has enabled a culture of secrecy to develop within regulatory agencies.[207] As much as the costs and benefits of regulatory policies should be visible in any event for democratic purposes, the expressive function of penal enforcement is also failed by the absence of transparency in regulatory enforcement actions. Like the criminal law, regulation could usefully signal the limits of acceptable behaviour[208] and serve to change attitudes to some kinds of conduct.[209] Since there is an undisputed link between corporate reputation and market operation, increased disclosure of corporate non-compliance would also improve market efficiency. While some resistance from both regulators and the regulated may be anticipated,[210] it is to be hoped that information about regulators, their decisions, priorities, data and models used in rule-making and reaching financial settlements, will be the subject of increased disclosure in the future.[211] Of perhaps more immediate concern are the recent reports of a "veil of secrecy" over corporate offences being dealt with in the

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[206] J E Parkinson, *Corporate Power and Responsibility* (OUP 1993).

[207] New City Agenda and Cass Business School, "Cultural Change in the FCA, PRA and Bank of England, Practising What They Preach?", 25 October 2016 at http://newcityagenda.co.uk/wp-content/uploads/2016/10/NCA-Cultural-change-in-regulators-report_embargoed.pdf accessed May 14, 2021; H Beales et al, 'Government Regulation: The Good, The Bad, & The Ugly' released by the Regulatory Transparency Project of the Federalist Society, June 12, 2017.

[208] There is a line of argument that suggests that crime was simply an instrument of governance and used to shape conduct, Jonathan Simon, "Governing Through Crime" in Lawrence M Friedman and George Fisher (eds.) *The Crime Conundrum: Essays on Criminal Justice* (Westview Press, 1997) 174; Wolfgang Friedman, *Law In A Changing Society* (2nd ed, Penguin Books 1972). Certainly, the expressive function of the criminal law is not controversial, it is accepted as a means not only of articulating condemnation but also of providing authoritative statements about moral and social values', Lucia Zedner, *Criminal Justice* (Oxford University Press, 2004).

[209] Law Commission, "Criminal Liability in Regulatory Contexts" (Consultation Paper No 195 2010), para 4.16 p. 70. Modern examples would include the contemporary view of 'drink driving'; marital rape, *R. v R* [1992] 1 AC 599, [1991] 3 WLR 767, HL; corruption per Bribery Act 2010.

[210] Benthamite notion suggests that, like other industries, regulatory authorities have a propensity to act in their own self-interest and, given the competitive advantages they bring, are likely to be supported by the businesses they regulate, Hannah Quirk et al, *Regulation and Criminal Justice* (Cambridge University Press 2010).

[211] Howard Beales et al, 'Government Regulation: The Good, The Bad, & The Ugly' released by the Regulatory Transparency Project of the Federalist Society, June 12, 2017. Some have proposed the appointment of external social monitors to disseminate corporate information, see J E Parkinson, *Corporate Power and Responsibility* (OUP 1993), Jonathan Boswell, *Community and the Economy: The Theory of Public Cooperation* (Routledge 1990) 117.

UK criminal courts,[212] the sanitisation of facts published when deferred prosecution agreements are made and the growing use of non-prosecution agreements, at least in the US, that avoid the publication of facts altogether. While the need for adequate disclosure and transparency by both regulatory authorities and the criminal institution is essential for the efficient operation of markets, consideration also needs to be given to the news organisations relied upon for the dissemination of such information. Given the link between publication, reputation and corporate self-regulation, issues such as fake news, news subversion and manipulation[213] need urgent address. Similarly, while financial ties between news media and corporations make for an obvious conflict of interest, the journalistic role requires independence and impartiality, a commitment to investigative journalism and a departure from "clickbait" publishing. As a part of the expressive function of the penal institution, and essential to deliberative democracy, news reports of corporate criminality and non-compliance need to be covered in a way that stresses their importance as social issues.[214]

While discussion at mechanical level reduces regulation to its various overlapping components: the traditional "carrot and stick" ethos, the use of strict liability offences, quasi-criminal administrative procedures, sanctions and deferred prosecution agreements, it is the practical weakness of the regulatory approach, the failure to deter corporate wrongdoing, issues obtaining evidence and the like that dominate the discussion, albeit with increasing reference to the globalization process. More fundamentally, however, the question remains as to whether corporations themselves should be filling regulatory gaps and assuming an overt political role in the co-creation of the institutional environment.[215] Considered an affront to democratic legitimacy, history certainly suggests otherwise[216] and this will continue to be the case for as long as we labour under the prevailing dominant economic model of trade. In theoretical terms, versions of capitalist and market theory are predicated on various core assumptions. Yet, where profit-maximisation is prioritised, the core assumptions that corporations are both rational economic and politically responsible actors are set in seemingly irreconcilable conflict. Corporate rationality, under the current economic model, does not just accommodate deviance, it positively demands it. This central conflict points to a problem of an elementary theoretical nature. Tinkering with the mechanics of regulation, even on a global scale, will not solve the problem of corporate wrongdoing when what is required is a wholesale reappraisal of capitalism at the most fundamental level.

[212] Focusing on the bribery offence, media coverage of criminal proceedings is being thwarted by a combination of factors that include various failures regarding court lists, the granting of reporting restrictions without a realistic opportunity for the press to object, the charging of exorbitant fees for court documents and lengthy delays in receiving them, Rahul Rose, Corruption Watch, Veil of Secrecy, 2018 at https://drive.google.com/file/d/1RDcWNyHMQUAUIkcSiSjRXdH6OWillCMl/view accessed May 14, 2021.
[213] It is suggested, for example, that the media frame crime in such a way that they distort the public view of crime and increase fear, Sara Sun Beale, 'The News Media's Influence on Criminal Justice Policy: How Market-Driven News Promotes Punitiveness' (2006) 48(2) Wm and Mary L Rev 397.
[214] https://www.nytimes.com/2019/06/09/business/media/google-news-industry-antitrust.html accessed May 14, 2021.
[215] Andreas Georg Scherer et al, 'Managing for Political Corporate Social Responsibility: New Challenges and Directions for PCSR 2.0' (2016) 53(3) Journal of Management Studies 273.
[216] Marie-Laure Djelic and Helen Etchanchu, 'Contextualizing Corporate Political Responsibilities: Neoliberal CSR in Historical Perspective' (2017) 142 J of Bus Ethics 641-661.