



Australian
National
University

REGNET RESEARCH PAPER

No. 2013/11

*'Strategic socialism, strategic privatization
and crisis*

John Braithwaite

The RegNet Research Paper Series is published electronically by the Regulatory Institutions Network (RegNet) at the Australian National University.

Please visit our website to find out more about the work we do at

regnet.anu.edu.au

RegNet is an internationally acclaimed interdisciplinary program that serves as the central node for a network of centres, projects, institutions, practitioners and academics involved in exploring and understanding critical domains of regulation.

Our mission: Regulatory research at the highest international standards that makes local contributions to good governance.

© Copyright is held by the author or authors of each research paper. Electronic and paper copies may be made of a research paper, but its format may not be altered in any way without the author's permission.

Note: The views expressed in each paper are those of the author or authors of the paper. They do not represent the views of the series editor, RegNet, or the Australian National University.

Series Editor: Dr Jeroen van der Heijden

Please forward any feedback, submissions or requests to: Regnet@anu.edu.au

Strategic socialism, strategic privatization and crisis

John Braithwaite, The Australian National University

Working Paper

Abstract:

An increasing proportion of the largest corporations in the world are majority publicly owned; a growing proportion of the biggest national economies have higher levels of public ownership than the North Atlantic economies that dominated the twentieth century. The Cold War contest between purer forms of capitalism and communism has given way to a more vibrant competition among different capitalist--socialist hybrids. The most successful economies in the twenty--first century will be those that are most strategic about when to privatize and when to opt for public ownership. The most fertile legal systems will be those that enable both strategic privatization of the public and strategic publicization of the private. That includes strategic privatization of the law itself, policing, prosecuting, judging and strategic publicization of self--regulation. Crises create the key opportunities for recalibrating varieties of capitalism by change agents who are in a more Rawlsian original position as a result of crisis.²

Crises of Mitterand Socialism

I was never a Marxist socio-legal scholar, rather a Francois Mitterand social democrat who applauded when Mitterand became President of France in 1981. His 1981 platform was a mixed economy, a wealth tax, nationalizing a short list of firms at the commanding heights of the French economy, especially the largest banks, and supporting publicly owned high technology corporations in transport that came to produce the TGV fast trains and the growing competitiveness of Airbus. A dramatic response came quickly when Banque Rothschild was nationalized. Baron Guy de Rothschild marched across the pond to set up a new Rothschild Bank in New York, announcing that he was "A Jew under Petain, a pariah under Mitterand".³ The political optics were awful for Mitterand. The first six months of his Presidency saw massive capital flight from France. Mitterand pulled back from the nationalizations and survived to become France's longest serving president.

¹ This was a presentation to the 2013 Australian Corporate Law Teachers Association conference in Canberra. I thank participants at the conference, especially Kath Hall, for their feedback and Harry Hobbs for research assistance. It has been submitted to the *Australian Journal of Corporate Law*. It draws on a variety of previous research projects funded by the Australian Research Council.

² This essay explores a wider range of state capitalisms and regulatory capitalisms than the original consideration of liberal and coordinated capitalisms by the inventors of the 'varieties of capitalism' idea. See P Hall and D Soskice (eds.), *Varieties of Capitalism: The Institutional Foundations of Comparative Advantage*, Oxford University Press, Oxford, 2001.

³ I Finel-Hongiman, 'Mr. Hollande, Which Mitterand will you be?' *Huffington Post* (7 June 2012). Available at: http://www.huffingtonpost.com/irene-finelhongiman/hollande-mitterand_b_1654934.html.

Whether we Mitterand enthusiasts were right or wrong in thinking that the banks which posed the largest systemic risks to a financial system should be nationalized, I know not. Post-Mitterand this became a question that was a waste of time contemplating; globalized capital flight risks had made that reform impossible. The day another political hero of the last century, Nelson Mandela, walked from prison, he announced a Mitterand-style program that included nationalizing the largest banks and miners. We gasped sadly that the great man had lost sight of how capital had globalized while he was in prison; Mandela was convinced to recant even more quickly than Mitterand.

Soon after the Mitterand U-turn, I found myself in all-day monthly meetings of Australia's Economic Planning Advisory Council between 1983 and 1987. These were chaired by Prime Minister Bob Hawke, dominated by his successor Paul Keating, included state premiers, the nation's trade union and business leadership. I was the most insignificant person in the room, representing consumer and community groups. My colleagues in the Australian Labor Party, of which I am a life member, would have been shocked to know that we were discussing on that Council transformations of the Australian economy that included the possibility of the ultimate privatization of the state telecommunications monopoly, parts of Australia Post, Qantas, the Commonwealth Bank and other public enterprises. I found myself convinced by some of the arguments that some of those privatizations would add public value for the people of Australia.

Within a few years of his ascent to the Presidency of South Africa, Mandela had privatized the electricity industry, which under white conservative governments had been inefficient and sometimes corrupt. The new private providers were mostly neither. The year Mandela became President, only 36 percent of his population had access to grid electricity. By 2010, that was 82 percent.⁴ Amidst a long list of ANC failures in redistributive policies, one of its great successes was privatized provision of electricity to the poor.⁵

The Australian Labor party became in the 1980s the party that was diagnostic and analytic about when privatization was a good or a bad thing, as opposed to ideologically dogmatic about it. That became one reason to vote Labor in my view. We should also be careful about how we read the lessons of Mitterand's U-turn of 1981. People forget that Mitterand also authorized the first private TV (Canal+), giving rise to a French private broadcasting sector. While the world's leading social democrats of the 1980s were boldly analytic about when it was good and bad to privatize and nationalize, today there is a frigid global consensus between conservative and social democratic parties in the west that privatizations are usually good, nationalization always bad. What had happened was that an exaggerated fear of the spectre of capital flight had caused leaders to become analytically lazy and vacuously ideological on questions of the private and the public.

⁴ M Plaut and P Holden, *Who Rules South Africa?*, Jonathan Bull, Johannesburg, 2012, p 336.

⁵ Ibid.

Broadcasting is a good lens through which to view the stupidity of this consensus. Western democracies that have socialist broadcasters like the BBC and ABC have citizenries that are unified in believing that they would hate to lose 'their ABC'. The national broadcasters preserve investigative journalism traditions that are embattled by the crumbling of the print media. They also preserve other forms of public value that are important, but not commercial, such as the Science Show on the ABC, and the vibrancy of orchestral, operatic and jazz musical traditions. The folly of contemporary orthodoxy is well illustrated by the fact that any democracy that today does not have a public broadcaster could never create one. That would be howled down as socialism.

Private ratings agencies such as Standard & Poor's and Moody's made an appalling contribution to the onset of the Global Financial Crisis. Standard & Poor's were afflicted with an executive who could say: 'let's hope we are all wealthy and retired by the time this house of cards falters'; another who said 'We rate every deal. It could be structured by cows and we would rate it'; another, 'Profits were running the show'.⁶ A good policy response of the European Union might have been to create a publicly owned European ratings agency to compete with the private American agencies. A European public competitor might have not only attracted most of the ratings business for European firms, but also some from the BRICs, Asia and even some clients from Anglo-Irish economies like Australia, New Zealand and Canada that had lost confidence in Moody's and Standard & Poor's for very good reasons. Of course there was no semblance of a debate about strategic socialism as a policy response to ratings in Europe.

We need a better theory of when the best transformation of the state in response to creative destruction of one of its institutions is to privatize part of it, to regulate the state by an institution that is independent of its executive, or to grow the state by nationalizing a private institution that contributed to a crisis. This paper no more than outlines some preliminary considerations for such a theory. A key contention is that we also need a theory of how to put custodians of regulatory institutions in a more Rawlsian original position during transitions out of crisis.⁷ Schumpeterian creative destruction of poorly performing firms is a useful legacy of crisis that can be strategically harnessed.⁸ So is creative destruction of regulatory institutions such as ratings agencies and even state constitutions.

Publicization of the Private

Rather than become too negative about the dead hand of contemporary anti-socialist orthodoxy, I want to construe corporate law as a terrain of socialist salvation (!), or rather more healthy analytic neutrality about the public and the private. Jody Freeman advanced the important insight that contemporary capitalism, even in its American heartland, has witnessed not only a privatization

⁶ J O'Brien, *Engineering a Financial Bloodbath*, Imperial College Press, London, 2009, p 75.

⁷ J Rawls, *A Theory of Justice*, Harvard University Press, Harvard, 1971.

⁸ J A Schumpeter, *Capitalism, Socialism and Democracy*, Unwin Paperbacks, London, 1943.

of the public, but also a publicization of the private.⁹ By the publicization of the private Freeman means the percolation of public law values into private law and into corporate self-regulation. I would say these include the most critical public law values such as transparency, accountability, stakeholder voice and separations of powers. Private separations of powers are manifest in institutions like board audit committees and ethics committees of independent directors, Safety, Health and Environment Committees with participation from environmental groups and unions.¹⁰ This progress toward the publicization of the private that is evident under regulatory capitalism is not only descriptively accurate; it is a good thing about regulatory capitalism. Freeman sees the publicization of the private as a result of privatization in that it is a concession business makes to get access to markets that were formerly public prerogatives.

Neil Gunningham and Darren Sinclair's insightful new book on coal mine safety¹¹ reveals a structurally important way the past century saw the publicization of the private work. For four of the most recent seven years of data, Australia experienced zero coal mine fatalities. The progress Australia has made in reducing these fatalities during the past half century when Australia has been the world's largest coal exporter is something our country can be proud of. It has also helped make our coal internationally competitive compared to countries with coal mines that still regularly blow up. We should also be proud of the contribution that Australian socio-legal researchers like Gunningham and Sinclair, Andrew Hopkins, Richard Johnstone, Peter Grabosky, Liz Bluff and many others have made to this.¹² And we should be proud of internationalizing safety initiatives like the Australia-China Coal Mine Safety Demonstration Project. Fatalities per million tons of coal produced among the world's other large producers in recent decades have been more than ten times as high in the United States and more than 100 times as high in China (where many fatalities are not recorded). Historically, this accomplishment is even more dramatic. Compared to Australia's modal annual fatalities of zero this century, US coal mine fatalities peaked at 3,242 in 1907. In Britain before World War I there were also years with more than a thousand coal mine deaths, while France in 1906 had a single explosion that killed 1,099 miners. Australia today produces more coal than the United States, Britain or France did before World War I. We must never lose sight of how dramatically positive some of the accomplishments of regulatory capitalism have been during the past century. In this case, however, strategic socialism was also important.

⁹ J Freeman, 'Extending public law norms through privatization' (2003) 116 *Harv. L. Rev.* 1285-1291.

¹⁰ J Braithwaite, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republication Separation of Powers; (1997) 47 *UTLJ* 305.

¹¹ N Gunningham and D Sinclair, *Managing Mining Hazards: Regulation, Safety and Trust*, Federation Press, Sydney, 2012.

¹² Gunningham and Sinclair manifest part of the reason when they lament in their book that progress with coal mine safety in Australia has plateaued and emphasise the danger of a failure to renew continuous improvement.

In the middle decades of the twentieth century, British coal mines became much safer than Australian or American coal mines.¹³ Some analysts,¹⁴ including me, diagnose great leaps forward in coal mine safety as caused by the nationalization of the coal industry in Britain from 1946. A good number of rapacious mining magnates were replaced by professional managers who invested in safety self-regulation, empowered the National Union of Mine Workers and invested in R & D on how to make mines safer. Interviews at *Charbonnages de France* in Mitterrand's France of 1981 also led me to suspect that they and other European nationalized coal industries also made strategic global contributions to making mines safer.¹⁵

The era of nationalized coal is long gone in the west. But under globalized privatized coal, the safety gains of nationalized coal were not lost. Continuing progress in improving the safety of mines was internalized as part of the social license that privatized coal had to satisfy. Jody Freeman might say that privatized coal had been publicized by public law values, particularly about stakeholder voice in their own safety, during the socialist interregnum of coal production systems. Progress continued apace in the safety of western coal production, though it has been set back by authoritarian capitalist coal production from China to the Democratic Republic of Congo. In the west, strategic socialism was a kind of circuit-breaker on the road to a more civilized capitalism. This case study of regulatory capitalism should be a clue for scholars to be more focused on the possibilities for temporary socialism as a path to a less destructive capitalism.

New Deals After Crises

Regulatory states cannot waste good crises; the Great Depression was not wasted on the New Deal. The 2008 crisis was largely wasted. There was no Green New Deal that jointly confronted climate and financial crises.¹⁶ When capitalism socialized banks' losses in 2008 in the US, Britain, Ireland, Spain, Italy, Greece

¹³ J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety*, State University of New York, Albany, 1985, p 76-77.

¹⁴ See for example Turton's plot of the incidence of major explosions in British coal mines since 1851 that concludes nationalization was one of two major watersheds that reduced their incidence: F B Turton, 'Colliery Explosions and Fires: Their Influence Upon Legislation and Mining Practice' (September 1981) *Mining Engineer*, p 157-64. Remarkably, even the US General Accounting Office at the beginning of the Reagan Administration concluded that 'British coal mines are probably the safest because they are managed by the National Coal Board, an arm of the British government': General Accounting Office, *Low Productivity in American Coal Mining: Causes and Cures*, General Accounting Office, Washington, 1981.

¹⁵ Fatalities per million tons mined also more than halved during the decade after nationalization of Indian coal mines in 1971. See M P Narayanan, *Safety in Indian Coal Mines: Issues and Challenges with Special Reference to Coal Mine Methane (CMM): Recovery and Utilisation*, 2012, available at: <http://www.docstoc.com/docs/122558699/SAFETY-IN-INDIAN-COAL-MINES-%EF%BF%BD-ISSUES-AND-CHALLENGES-WITH-SPECIAL>.

¹⁶ Green New Deal Group, *A Green New Deal: Joined-up Policies to Solve the Triple Crunch of the Credit Crisis, Climate Change and High Oil Prices*, Green New Deal Group, London, 2008; E Barbier, *A Global Green New Deal: Rethinking the Economic Recovery*, Cambridge University Press, Cambridge, 2010; K Tienhaara 'A Tale of Two Crises: What the Global Financial Crisis Means for the Global Environmental Crisis' (2010) 20 *Environmental Policy and Governance* 197.

and other countries, this lever was not used to require them to be greener in lending and investment policies,¹⁷ taking risks to lend to innovators in new technologies that might preserve the planet. In fact, there was little publicization of the private extracted from Wall Street on behalf of the struggling taxpayers of Main Street. The reason was not so much the scale of campaign contributions to politicians from finance capital, though that was a factor. It was more about the hegemonic power of ideas promoted by finance capital. It was about misplaced confidence in quantitative risk models, in financial engineering through unregulated derivatives as a leading way to manage risk, in ratings agencies as institutions that were competent and spoke the truth. Leaders like President Obama did not understand the economics of this hegemony. He succumbed to it by appointing disciples of that hegemony from Wall Street to lead his financial regulation reform process.

Interestingly, Obama better understood industrial capitalism, doubtless because it was easier to understand. General Motors (and Chrysler) came to him in 2008 saying in effect that he had no alternative but to bail them out, as Presidents had done in past crises. These past Presidents were later rewarded by fat campaign contributions as the auto industry returned to profit. Obama behaved differently than past Presidents with the 2008 crisis of industrial capitalism. He did deploy vast taxpayer funds to temporarily socialize the auto industry. But in the process he fired General Motors CEO Rick Wagoner. He announced that he wanted renewed top management that would give the auto industry states of Michigan and Ohio a sustainable future by greening the industry. This was an apt response to sclerosis in an industry that had learnt that it was cheaper to invest in political lobbying to save its profits than in innovation. In 2013 we have seen the release of a General Motors environmental sustainability report card that reveals some progress toward greener factories that produce greener cars.¹⁸ Partly because of that, American autos are becoming more competitive with European and Asian cars.¹⁹ The politics of breaking with management's interpretation of 'What's good for General Motors is good for America' were not bad in the event. The voters of Michigan and Ohio were grateful to Obama in the 2012 Presidential election for saving their economies.

¹⁷ While the *American Recovery and Reinvestment Act (2009)* (Pub Law 111-115), also known as the US economic stimulus package, does not compel US banks to become greener, it does provide financial incentives for renewable energy projects that could indirectly motivate banks to be so. Legislative incentives take the form of a 30% tax credit for investments in renewable energy projects (known as an energy investment tax credit or 'ITC') and a tax credit of up to 2.2 cents per kilowatt-hour for electricity produced from renewable sources (known as a renewable energy production tax credit or 'PTC'): *American Recovery and Reinvestment Act (2009)*, ss. 1101-1104, 1603. The Act also mandated a federal 'renewable energy grant' scheme in lieu of tax credits for investment in renewable energy facilities, which expired on 31 December 2011. In short, the Act encouraged voluntary bank activity in renewable and clean tech spaces: banks have exploited the tax credits and grant scheme to satisfy their business case imperatives. For more detail see Bowman M (2012) *Banking on Climate Change: The levers and limits of voluntarism and lessons for effective regulation*, unpublished PhD dissertation, The Australian National University, Canberra, Australia.

¹⁸ General Motors, 'Innovation: Environment', 2013, available at: http://www.gm.com/vision/greener_vehicles.html.

¹⁹ For an account of the superior regulatory accomplishments of Europe and particularly Japan in greening their car industries compared to the poor US performance, see J Mikler, *Greening the Car Industry: Varieties of Capitalism and Climate Change*, Edward Elgar, Cheltenham, 2009.

One could conceive the public benefit here as of the same kind as the nationalization of coal mines in the mid-twentieth century. The General Motors public benefit is not one of permanent socialization of the commanding heights of the economy. It is a benefit of temporary socialism that in this case pushed a greening of a car industry that would survive by investing in better cars rather than investing in lobbying. Obama might have done better in 2008 by replicating this temporary strategic socialism more widely. The 2008 crisis probably would not have plunged so deeply if Obama had also saved Lehmann Brothers through temporary socialism that extracted valuable publicizations of the private in return.

The idea is not very new or radical. The American regulatory state does this frequently in the regulation of nursing homes.²⁰ Old people are often put at risk, and die painful, uncomfortable deaths, as a result of nursing homes falling into the hands of rapacious proprietors who cut corners on quality of care, or into the hands of incompetents or alcoholics. Having the courts revoke the proprietor's licence is rarely a good remedy. Nursing home beds are always in short supply, especially outside large cities, so closing a home may put frail aged on the street. There is also evidence that the disruption of moving from one facility even to a better one increases mortality for frail aged.²¹ A more common thing states do when quality of care gets dangerously bad is to use laws that allow states to take over the home or laws that allow the state to impose a management team of its choosing as a condition for retention of a license.²² In other words, in most western countries it is common in this large industry for states to save failing capitalist firms by temporarily socializing its management or its ownership. Usually, these nursing homes return to economic viability and excellent quality of care under the new management team hand-picked by the state to save the day. Often enough this facility seizes the special opportunity to lead the whole industry up through new ceilings of quality of care. This is a general dynamic of regulatory capitalism.²³ If you want to find the firms that are leading an industry up to new levels of excellence in safety, consumer protection or environmental protection, check the firms that have been in deepest legal trouble with the relevant regulator in recent times.

²⁰ While most US states had the capacity to do this, at the time of our research only Illinois and Indiana did so frequently: J Braithwaite, T Makkai and V Braithwaite *Regulating Aged Care: Ritualism and the New Pyramid*, Edward Elgar, Cheltenham, 2007, p 64.

²¹ There is some contestation in the literature of the extent to which this is true: Ibid., at p 262; J Borup, 'Relocation Mortality Research: Assessment, Reply and the Need to Refocus on the Issues', (1983) 23 *The Gerontologist* 235; N Bourestom and L Pastalan, 'The Effects of Relocation on the Elderly: A Reply to Borup, Gallego and Heffernan', (1981) 21 *The Gerontologist* 4.

²² Braithwaite et al, above n 20, p 40-145.

²³ On the concept of regulatory capitalism see: J Jordana and D Levi-Faur, 'The Politics of Regulation in the Age of Governance', in J Jordana and D Levi-Faur (Eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance*, Edward Elgar, Cheltenham, 2004 at 1; J Jordana and D Levi-Faur, 'The Diffusion of Regulatory Capitalism in Latin America: Sectoral and National Channels in the Making of a New Order' (2005) 598 *Ann. Am. Acad. Polit. Soc. Sci* 102; J Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better*, Edward Elgar, Cheltenham, 2008.

Improving the quality of capitalism through strategic socialism is common with nursing homes but uncommon with banks or ratings agencies because finance capital is hegemonic in a way nursing homes are not. How can the long-suffering taxpayers of Main Street confront that hegemony? What President Obama did to Rick Wagoner and his team at General Motors, what aged care regulators do with nursing homes run by drunks or crooks, is the clue. If the state saves a firm from bankruptcy on the condition that the top management team must go, the outside directors have no choice but to accept their resignations. In that transitional moment of leadership vacuum, the firm is in a kind of Rawlsian original position.²⁴ No one knows who the new leadership will be.

In the law we are familiar with this Rawlsian point with Constitutional transformation. Crises of the state are most productive when they usher in constitutional moments that put political leaders in a Rawlsian original position where none can be sure who might seize power in the successor regime after the constitutional moment has passed. The most inspiring and transformational constitutional moments in the history of democracy illustrate this phenomenon. The American Revolution created a context where no one knew whom among the founding fathers of the federalist debates would come out of the ruck to become the first President of the United States. Many of those founding fathers became presidents – Jefferson, Adams, Hamilton, Madison – but they had to live under Washington’s Presidency first. They all argued for changes that would restrain an executive government they feared they would have to live under themselves, as opposed to a disposition they would rule over as incumbents. The 1945 German and Japanese Constitutional moments²⁵ were both unusually inspiring ones that took western constitutionalism to new heights for similar reasons – all incumbents of executive power were out of their seats during the process. Australia’s long-awaited constitutional moment of 2001, in contrast, went nowhere because Prime Minister John Howard was firmly in his seat.

The most potent example of this Rawlsian insight²⁶ about constitutions is the 1996 South African Constitution, a wonderful document that replaced a tawdry

²⁴ Rawls, above n 7.

²⁵ The post-war German constitution is widely regarded as a cutting edge document in the west. Perhaps this claim about the Japanese constitution is more unusual. Japan’s post-war constitutional moment restored its incipient parliamentary democracy of the 1920s that had been suppressed by militarization of the state. Re-militarization was foreclosed for the future by unprecedented clauses in the constitution that forbade wars of aggression and investment in forward defence. The new Japanese constitution was also at the cutting edge of constitutionalism of that era on gender equality and on the right to education that had previously been a privilege of elites. Grass roots lobbying by a coalition of teachers delivered this creative destruction of educational inequality. See for example J Downer, *Embracing Defeat: Japan in the Wake of World War II*, Norton, New York, 1999 at 392. The legacy for both Japan and Germany was high growth (until the 1990s) and low violence – in both domestic crime and international aggression. Has the world ever had as peaceful a number two economic power as Japan was during its half century as number two (combined with a very peaceful number three in Germany)?

²⁶ A first step toward the original position insight was taken by Rousseau in *The Social Contract*. Rousseau argues that his people’s assembly should only settle matters of general law and then should be precluded from being the leaders who go on to exercise executive authority under those laws. This issue is discussed by Philip Pettit in P. Pettit, *On the People’s Terms: A Republican Theory and Model of Democracy*, Cambridge, Cambridge University Press, 2012 at p13; J

one, from the perspective of social democratic, civic republican preferences. When its parameters were first laid down in the peace negotiations from 1990, no one knew who would ultimately seize executive power. All the good money was on Mandela rather than de Klerk or Chief Buthelezi. Yet everyone knew that Mandela would only rule the transition, soon to hand over to a successor. No one knew if that would be Thabo Mbeki, Cyril Ramaphosa, Jacob Zuma, Alan Boesak or someone else. Indeed no one knew whether the ANC would end up ruling in its own right, on the basis of power sharing, or in coalition. The greatness of the South African Constitution was born of a group of political leaders who were in a more original position than is normally the case in politics.

So the idea is to use crises by putting the commanding heights of both capitalism and regulatory institutions in a more original position during their aftermath. This can be accomplished by cleaning out their leaderships after major crises of capitalism for which those leaders bear some responsibility. Crises create opportunities for renewal that might only be realized if incumbent CEOs are marched off to the guillotine. That is the republican way.²⁷ Better banks, better ratings agencies, better regulatory institutions crafted in a dialogue of technocrats, politicians, NGOs, academics and ordinary people who are all in an unusually original position. Probably better still if aging Nelson Mandela figures, who are committed to only an agreed short period at the helm, allow space for the contest of transformational ideas among a new generation. The key to understanding why temporary socialisms have a better track record of creating public value than long-term nationalizations is that both the transitions into and out of temporary socialism supply moments where the seats of long-term executive incumbency are vacated so that creative destruction and reconstruction become possible.

New Frontiers of Strategic Socialism

Graham Dukes, James Maloney and I have argued that banning all advertising of pharmaceuticals and replacing this with public provision of independent information to health professionals funded by the industry is one publicization of the private that should be considered if that industry continues to fail to improve its marketing ethics.²⁸ Our advocacy is not of doing this soon, but for states to signal that they are considering it as an option in a repertoire of escalated options in a regulatory pyramid. Other options signalled in the pyramid could include punitive taxes on pharmaceutical promotion expenditure to encourage a shift in investment from advertising and other forms of marketing to investment in R & D for the discovery of new and better products – the major alternative path to increasing sales.²⁹ More modest

Rousseau, *Rousseau: 'The Social Contract' and Other Later Political Writings*, trans. Victor Gourevitch, Cambridge, Cambridge University Press, 1997.

²⁷ This is intended as a touch of dark republican humour. Please do not quote it literally!

²⁸ G Dukes, J Braithwaite and J Maloney, *Corporate Crime, Medicines and the Public Health*, Edward Elgar, Cheltenham, (forthcoming), chapter 8.

²⁹ There are economists who argue as a general matter for supplementary taxes on advertising because they believe the amount of advertising in contemporary societies is excessive in terms of

escalations in the pyramid include putting more teeth into self-regulatory enforcement and then public prosecution for misleading advertising. The idea is that keeping a socialist spectre seriously alive in the imagination of the industry at the peak of a pyramid can motivate them to make capitalism work more ethically.

Another possible frontier of strategic socialism is replacing private testing of the safety and efficacy of pharmaceuticals with requiring the industry to fund independent public testing of drugs. One reason for considering this strategic socialization is Ben Goldacre's³⁰ summary of recent systematic reviews which shows that industry-funded trials of pharmaceuticals are about four times as likely to report positive results compared to non-industry research. Goldacre documents a more devastating litany of specific frauds than I did in *Corporate Crime in the Pharmaceutical Industry* in 1984.³¹ Beyond outright falsification of data and suppression of studies showing dangerous effects of drugs (enforced by gagging clauses in contracts with researchers), Goldacre shows patterns of "testing your treatment in freakishly perfect 'ideal' patients", testing it "against rubbish", wilfully running trials that are too short, stopping trials early when the results are on the up, stopping them late if they are down at the planned point of completion, trials that bundle outcomes in misleading ways, and trials that ignore drop-outs that hark back to the 'reincarnated rats' revelations of the 1970s, where rats that died after exposure to a drug were replaced with healthy ones.³²

The strategic publicization ideas of Ian Ayres in our work together were mostly ignored because they did not fit contemporary neoliberal thought. In Chapter 5 of *Responsive Regulation* on "Partial-Industry Intervention," Ian showed that fully deregulated private markets in some contexts are less competitive than they would be were the state to nationalize or bail out a strategic player in the market—to replace a private with a mixed private-public market structure.³³ 'Second sourcing' is a common strategy in the private sector, for example in the auto industry, and by the public sector in defence contracting. When a dominant auto manufacturer enjoys price and quality benefits from competition between two suppliers of a component and one of those competitors teeters toward bankruptcy, the auto manufacturer will sometimes bail them out to preserve its price and innovation benefits from competition. The Pentagon has also bailed

what is best for economic efficiency. Part of this economic case with the pharmaceutical industry is that firms increase sales in two principal ways – by bigger, better marketing, or by R&D to discover products with greater appeal to consumers. Punitive taxes on promotional expenditure would shift investment to R&D as a preferred way of increasing sales. This is because a tax on promotion would increase the comparative returns on the other major way of growing sales – R&D. In general, more social value is created by increasing investment in R&D on the quality of medicines than in advertising the sale of existing products. See: T Buxton, and D Ciaran, 'Legal, Decent, Necessary and Effective', (1998) 10 *Euro. Bus. J* 172 at 172-175. See also: A Dixit and V Norman 'Advertising and Welfare', (1978) 9 *RJE*, 1.

³⁰ B Goldacre *Bad Pharma: How Drug Companies Mislead Doctors and Harm Patients*, Fourth Estate, London, 2012.

³¹ J Braithwaite, *Corporate Crime in the Pharmaceutical Industry*, Routledge, London, 1998.

³² *Ibid.*, at p 75-80.

³³ I Ayres & J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York, 1992, at p 133-157.

out defence contractors to preserve the benefits it derives in the price and quality of weapons systems from second sourcing.

Ayres cited the example of US Justice Department approval of the merger of the airlines People's Express and Texas Air in 1986. This may have been inferior to policy paths not taken such as taxpayer investment in People's Express shares to maintain its solvency as a competitor. People's Express was a price cutter, charging sometimes as little as a third of the going fare. It had dramatically changed the nature of competition on the routes it served, making for a more efficient American transport infrastructure. The demise of People's Express as an independent market force almost immediately was followed by fare hikes in the markets it served. Just as it can be efficient for General Motors to prop up a second source to preserve the efficiency of its supplier markets, so it can be efficient for the US state to prop up a second source that preserves the efficiency of key infrastructure of the American economy. This is especially so in this case where a substantial proportion of domestic airfare costs are paid by taxpayer-funded travel of public employees. Airline price-cutting is a risky business, so in strategic contexts where cutting is genuinely deep it could be good policy to motivate price competition (and spurning of takeover by a dominant competitor) by a bailout that invests some public equity in the firm. This can be attractive if a dominant firm is succeeding in driving the price cutter into bankruptcy or toward merger.

Private funding of this kind of second sourcing is embarked upon reluctantly, cautiously, and after a great deal of analysis of the contextual risks by auto manufacturers and large defence contractors. Likewise it should be undertaken infrequently, prudently and with rigorous ongoing evaluation of competition impacts when the state attempts socialist second sourcing as a tool of competition policy. Socialist competitors that served a strategic role in creating public value for decades, such as Australia's Commonwealth Bank did during the decades it was steered by the great econocrat, Nugget Coombs, later can blossom further as privatized corporations. When Paul Keating floated Commonwealth Bank shares in 1991, they sold at \$5.40; today they are \$68.63 and the Commonwealth Bank is the most highly ranked Australian company on the Forbes list of the world's Biggest Public Companies, higher than General Motors.³⁴

New Frontiers of Strategic Privatization

What then of strategic privatization? Because of the prevailing hegemony of what contemporary scholars like to call neoliberalism,³⁵ there are likely to be more low hanging fruit for strategic publicization than for strategic privatization. The social democratic ideology advanced here is that just as private institutions

³⁴ Forbes, 'The World's Biggest Public Companies', April 2012, available at: <http://www.forbes.com/global2000/list/>.

³⁵ I am somewhat reluctant to use the term neoliberalism because I am inclined to see its ordinary language use as having evolved into an oversimplified descriptor of the realities of contemporary regulatory capitalism that lacks nuance; J Braithwaite, above n 23, at p 1-32.

can perform better if they are at some risk of strategic publicization, likewise managers of public institutions may sometimes perform better when exposed to the chill winds of the risk or reality of privatization. Privatization has been widespread during the past three decades. Strategic privatization hardly needs laboring given the lessons of Australian history. Perhaps the most socialist governments Australia has seen were those of the brilliant Queensland premiers TJ Ryan and 'Red' Ted Theodore from 1915 to the early 1920s.³⁶ Many of their socialist experiments quickly proved less than brilliant. Socialist butcher shops fell into the hands of party hacks and started losing money. Queenslanders being the great learners that they are, the socialist butcher shops were quickly re-privatised.

Under the sway of the hegemony of privatization in contemporary Australian capitalism, there are not large numbers of equivalents to the socialist butcher shops waiting to be privatized. Even so, we have had quite a high quality public debate in Australia about whether a mix of private and public prisons delivers a cheaper, more innovative, rights-respecting prisons system than a public monopoly.³⁷ We have had a good debate about whether a mix of commercial arbitration and a public judiciary makes for better dispute resolution in commercial matters than a public monopoly,³⁸ about whether a mix of restorative justice in civil society and court adjudication makes for better criminal law.³⁹ We have had a good debate in the academy, if not in the public

³⁶ D Murphy, *TJ Ryan: A Political Biography*, University of Queensland Press, Brisbane, 1975.

³⁷ See, for example, R Harding, *Private Prisons and Public Accountability*, Transaction, New Jersey, 1997; R Harding, 'Private prisons in Australia' *Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice* No. 36, May 1992; M Stutchbury, 'Private prisons are best', *The Australian*, 21 May 2011, available at: <http://www.theaustralian.com.au/national-affairs/opinion/private-prisons-are-best/story-e6frgd0x-1226059946691>; D Biles, 'The advantages of private prisons in Australia', *The Canberra Times*, 22 January 2012, available at: <http://www.canberratimes.com.au/opinion/editorial/the-advantages-of-private-prisons-in-australia-20120122-1te53.html>. For a broader discussion see J J Dilulio, 'Private prisons?' (1988) 20 *Police* 18; M Ryan & T Ward, *Privatization and the Penal System: The American Experience and the Debate in Britain*, State University of New York, New York, 1989; M Gold, 'The privatization of prisons' (1996) 28 *Urb. Law*. 359; M McShane & F Williams III, *The Philosophy and Practice of Corrections*, Routledge, New York, 1997; T C Pratt & J Maahs, 'Are private prisons more cost-effective than public prisons? A meta-analysis of evaluation research studies' (1999) 45 *CAD* 358; V Johnson, 'Privatization of prisons: Management, productivity, and governance concerns' (1990) 14 *Public Performance & Management Review* 189.

³⁸ T Bathurst, 'Justice for hire: Have gavel will travel (or arbitrators and the judicial duty)' (Address to the Annual Dinner of the Diploma in International Commercial Arbitration, Law Society of NSW, 26 July 2012); P A Keane, 'Judicial support for arbitration in Australia' (Speech delivered to the Financial Review International Dispute Resolution Conference, Sydney, 15 October 2010). For a broader discussion see for example, H Kronstein, 'Business arbitration – instrument of private government' (1944) 54 *Yale L. J.* 36; C Drahozal, 'Is arbitration lawless?' (2006) 40 *Loy. L. A. L. Rev.* 187.

³⁹ K Daly & H Hayes, 'Restorative justice and conferencing in Australia' *Australian Institute of Criminology: Trends & Issues in Crime and Criminal Justice* No. 186, February 2001; K Daly & R Immarigeon, 'The past, present, and future of restorative justice: Some critical reflections' (1998) 1 *Contemp Justice Rev* 21. See also L Sherman & H Strang, *Restorative Justice: The Evidence*, The Smith Institute, London, 2007; C Bader, "'Forgive me victim for I have sinned": Why repentance and the criminal justice system do not mix – a lesson from Jewish law' (2003) 31 *Fordham Urb. L. J.* 69; E O'Hara, 'Victim participation in the criminal process' (2005) 13 *J.L. & Pol'y* 229; E Luna,

sphere, about the privatization of policing.⁴⁰ Once when we went shopping or to the football, there would be public police who would provide security as we watched and shopped. Today private security firms do this at sporting venues, shopping malls, universities, airports, even as we enter the Australian Federal Police headquarters. On Clifford Shearing's account, public police are mostly reserved to do the job when we are in those public spaces that connect one bubble of private security to another.⁴¹ There has been a healthy debate about the virtues and vices of this privatization of policing and the regulatory response appropriate to the regulation of privatized policing. We also had a healthy debate in the aftermath of the bribery in Saddam Hussein's regime of the Australian Wheat Board as to whether this should be a public monopoly, deregulated, temporarily or permanently privatized or corporatized in some way. Perhaps we will also have this with the bank note manufacturing activities of the Reserve Bank that originally became part of the umbrella portfolio of the Commonwealth Bank in the time of Nugget Coombs. In all these cases, the fertile opportunities for institutional transformation usually come of a crisis and some unseating of incumbent executive power.

One privatization imperative is for regulatory enforcement itself. The United States is leading the way on this, especially under the Obama administration, though the great initiator of this reform was Republican Senator Charles Grassley of Iowa. In 1986 Grassley introduced *qui tam* reforms to the False Claims Act.⁴² This was an old law in a long tradition of failed laws dating back to thirteenth century England that paid bounties to private prosecutors. These laws failed because of bounty hunter abuses such as fabricating evidence. The effect of the 1986 False Claims Act amendments was to pay whistleblowers 15-30 per cent of the penalty imposed by the courts against the offender. The reform only works well with whistleblowers against corporations with deep pockets. What Pamela Bucy calls its 'dual plaintiff design' is the special genius of the False Claims Act. This has secured it against the abuses of earlier *qui tam* laws.⁴³ Grassley's amendments controlled abuse in effect by making private prosecutors more accountable to public prosecutors.⁴⁴ Whistleblowers and other plaintiffs

'Punishment theory, holism, and the procedural conception of restorative justice' (2003) 1 *Utah L. Rev.* 205.

⁴⁰ Shearing and Stenning, *Private Policing*, Sage, Newbury Park, 1987; D Nina, 'Policing by any means necessary: Reflections on privatisation, human rights and police issues—Considerations for Australia and South Africa' (1997) 3 *AJHR* 157; B Forst, *The Privatization of Policing*, Georgetown University Press, Washington, 1999; C Rosky, 'Force, Inc.: The privatization of punishment, policing, and military force in liberal states' (2003) 36 *Conn. L. Rev.* 879.

⁴¹ Shearing and Stenning, above n 40.

⁴² *Qui tam* is an abbreviation of a latin phrase meaning 'He who sues as much for the King as for himself'. See *The False Claims Act* 31 U.S.C. §§ 3729 (1986).

⁴³ See the policy ideas of leading *False Claims Act* scholar Pamela Bucy for reducing vexatious litigation: P Bucy, 'Private Justice' (2002) 76 *S. Cal. L. Rev.* 1-160; P Bucy, 'Information as a Commodity in the Regulatory World' (2002) 39 *Hous. L. Rev.* 905; P Bucy, 'Games and Stories: Game Theory and the Civil False Claims Act', (2004) 31 *Fla. St. U. L. Rev.* 603; P Bucy, 'Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups', (2004) 35 *Loy. U. Chi. L.J.* 1021.

⁴⁴ Defendants' reputations are protected while allegations are kept "under seal" and the interpretation of the acts or omissions in question by public law enforcers competes with that by private law enforcers. This makes for a more circumspect approach than that familiar from tort

file lawsuits 'under seal,' so that they are concealed from the public and the defendant until the government has time to decide if it wants to join the lawsuit. The state can decide to run the case criminally, civilly or both. If the state then runs the case successfully on the basis of information in the initial filing, the whistleblower gets at least 15 per cent of the state's penalties in the suit, with the court having discretion to award to the whistle-blower up to 25 per cent of the amount the government recovers.

If the government decides not to join the lawsuit, the plaintiff who wins on her own gets a guaranteed 25 per cent and up to 30 per cent (the government still receives the rest). *Qui tam* is therefore a solution to the problem that whistleblowers tend to be permanently tainted as employees. Once they have blown the whistle, they find that their career within the firm disintegrates.⁴⁵ The False Claims Act amendments pay them handsomely enough in large cases to fund a new life and a new career. The Justice Department decides to take on most of the meritorious False Claims Act actions because if the case is meritorious and the Department declines to take it over, the whistleblower's legal team can still take a private action and win twice as large a percentage of the recovered false claims, leaving the revenue poorer and the Justice Department embarrassed by its error of judgment. On the other hand, counsel for a whistleblower with a less meritorious case will advise caution if the Department declines to adopt the suit. In that situation, they will bear all the enforcement costs and risks and find themselves facing a judge who knows that this is a *qui tam* case found wanting by the Department of Justice. The ingenious private-public hybridity of the False Claims Act is that talented private lawyers and private investigators add value to public enforcement efforts. Yet the aim of the False Claims Act bar is always to improve their chances of a broad-ranging payout by persuading the Justice Department to join with them and add what they know to the case.

Those of us who were advocates of *qui tam* before the 1986 amendments to the False Claims Act had a wider vision of the arenas in which *qui tam* might apply.⁴⁶ We wanted it to cover major crimes against consumers, workers and the environment in addition to financial fraud against the government. We foresaw consumer groups working with whistleblowers to lodge sealed complaints that would give the Food and Drug Administration or the Federal Trade Commission an opportunity to join in major antitrust or consumer protection cases. This generalizing of *qui tam* beyond false claims to all forms of corporate crime is a privatization of enforcement that Brent Fisse and I advocated from the early

litigation, in which private litigants have an untrammelled incentive to maximize their reputational assault in order to induce a quick and favourable settlement. More than that, the dual-plaintiff design of post-1986 *qui tam* 'provides a structured way for private justice litigants and regulators to maintain a dialog about regulatory policy, and for regulators to provide case-specific guidance and oversight of private litigants'. See Bucy, 'Private Justice' above n 43, at p 69.

⁴⁵ See: C Alford, *Whistleblowers: Broken Lives and Organizational Power*, Cambridge University Press, Cambridge, 2002; P Bucy, 'White Collar Criminal Law in Comparative Perspective: The Sarbanes-Oxley Act of 2002', (2002) 8 *Buff. Crim. L. Rev.* 277, at p 314.

⁴⁶ T Crumplar, 'An alternative to public and victim enforcement of the federal securities and antitrust laws: Citizen enforcement', (1975) 13 *Harvard Journal on Legislation*, 76-124; B Fisse and J Braithwaite, *The Impact of Publicity on Corporate Offenders*, State University of New York Press, Albany, 1983, at p 251-4.

1980s. The pre-1986 *qui tam* literature also prescribed some of the checks and balances that could be deployed for state lawyers to supervise private *qui tam* and to craft laws ensuring that *qui tam* actions could be dismissed by courts where suits compromised the integrity of a publicly articulated enforcement policy.

If penalties were high enough (see the discussion of equity fines below), trade unions could support strategic occupational health and safety *qui tam* actions, as could environmental NGOs with environmental crimes. In the United States there are public interest law firms that pay the living expenses of whistleblowers during the long years of unemployment that can haunt them between going public and winning a False Claims suit.

One check that could be put in place here would be a stop on *qui tam* in circumstances where a regulator was already taking enforcement action against the company at any lower level of its enforcement pyramid before the *qui tam* action was lodged, even if the action were only at the level of a restorative justice conference that led to a settlement ratified by a court. One virtue of such a law would be that it would encourage firms to disclose to the regulator abuses detected by their internal compliance systems and to ask the regulator to initiate a restorative justice process that would protect the firm against the possibility of *qui tam* initiated by a whistleblower. In circumstances where a *qui tam* suit had been launched by an NGO that was feared by the company, the regulator would hopefully invite the NGO into the restorative justice circle, and in some cases require the firm to pay the NGO's costs as part of the agreement. *Qui tam* in this way could become another force pushing enforcement action down to the more efficient and effective base of the enforcement pyramid.⁴⁷ Already the design of the False Claims Act in the US, especially as revised in 2009 and 2010, creates serious incentives for firms to have credible internal compliance systems, to report to the Department of Justice any fraud against the government detected by those systems and to persuade the Department that they have put in place a compliance plan to prevent future fraud.

If regulators sit on their hands and do nothing about a major crime, consumer groups, whistleblowers and the *qui tam* bar can collaborate in persuading regulators to be more fearless in doing their job. This is the greatest potential strength of *qui tam* extended to all types of corporate crime. There are plenty of regulatory officials who would be happy if they were forced by *qui tam* suits to show the backbone they feel they should be displaying, but who fear that their political masters will not thank them for showing it. Even in a world where politicians, and therefore in some instances regulators, are captured by political campaign contributions, a bold extension to the 1986 False Claims Act reforms extending the scope of the Act to cover all corporate crimes would surely mean that even the largest of campaign donations would not suffice to save a corporation involved in criminal activities from the networked private enforcement of NGOs, whistleblowers and a specialist public interest bar armed with *qui tam*. Bucy makes a strong case that the current design of *qui tam* under

⁴⁷ See Ayres and Braithwaite, above n 32, p 20-53.

the False Claims Act brings with it only a small risk of over-enforcement as compared to its considerable potential to remedy rampant under-enforcement.⁴⁸

It is instructive to ponder why, if it was so easy for whistleblowers to force companies that defraud the US government to pay billions of dollars in fines, the government previously did not litigate to collect its money before the advent of *qui tam*. One reason is the political capture of the state by big business. Another is reflected in Pamela Bucy's conclusion regarding the special power of private enforcement in that it can mobilise two things that public enforcement fails to elicit, namely inside information and entrepreneurial legal talent.⁴⁹ These are essentially virtues of privatization.

The idea of the False Claims Act has not spread beyond the United States. Reform debates on *qui tam* are currently underway in the European Union, Russia and Australia, though we are not aware of a country where they have progressed far. Inside the US there is formidable corporate lobbying against spreading its reach beyond fraud against the government. Recent years have seen modest reforms to secure enforcement against tax fraud by large corporations in a follow-up to the False Claims Act and with Securities and Exchange Commission enforcement (including extension to Foreign Corrupt Practices Act cases under the Dodd-Frank securities law reforms).⁵⁰ In securities and tax enforcement, however, while the Securities and Exchange Commission and the Internal Revenue Service are required to share a percentage of penalties with whistleblowers, whistleblowers are not given the right to initiate their own *qui tam* suits.

The result in fraud against the government cases is that the False Claims Act eventually became the state's primary weapon against fraud.⁵¹ This took some years during which lawyers learned how to use the new tool and expanded the scope of cases to which it was applied with increasing creativity. *Qui tam* cases filed under the False Claims Act numbered only 33 in 1987, passed 100 for the first time in 1992, passed 200 in 1994, 300 in 1996 and have never fallen below that number since. *Qui tam* civil settlements and judgments (not including criminal penalties) passed a million dollars for the first time in 1989, passed a billion dollars in 2000 and remained above that in every year since, apart from 2004, passing three billion dollars for the first time in 2006.⁵² Jack Meyer has concluded that for every federal dollar spent on investigating and litigating civil False Claims Act health care cases, the federal government receives 15 dollars in

⁴⁸ P Bucy, 'Private Justice', above n 43.

⁴⁹ Ibid., at p 43.

⁵⁰ Phillips & Cohen LLC, Foreign Corrupt Practices Act Violations: SEC Whistleblower Reward Program Information', 2013, available at: <http://www.phillipsandcohen.com/SEC-Whistleblowers/Foreign-Corrupt-Practices-Act-violations.shtml>.

⁵¹ Department of Justice 'Justice Department Civil Fraud Recoveries total \$2.1 million for FY 2003; False Claims Act recoveries exceed \$12 billion since 1986', 2003, available at: www.usdoj.gov/opa/pr/2003/November/o3_civ_613.htm.

⁵² Phillips & Cohen LLP 'Qui tam statistics, 1986-2006', 2006, available at: www.phillipsandcohen.com/CM/FalseClaimsAct/quisat_f.asp.

return, up from eight dollars in the early years of the False Claims Act.⁵³ *Qui tam* fraud recoveries more than quadrupled between 2008 and 2012.⁵⁴

Tying socialist sanctions to privatized enforcement

Qui tam can be more powerful if reformed to hook up to the 'socialist' sanction of the equity fine. An equity fine as a sanction for regulatory non-compliance is socialist in the sense that instead of imposing a cash penalty for an infraction, it transfers to the public a percentage of the issued shares in the company. A 10 per cent equity fine would require the company to issue new shares equal in number to 10 per cent of the existing shares. The effect of this would be to dilute the market value of each existing share by 10 per cent. In a case where a whistleblower had led the charge through a *qui tam* case, 30 per cent of those 10 per cent of new shares might be awarded by the court to the whistleblower. The equity fine has particular value with offences that are international in scope.

Brent Fisse and I used the crimes of BCCI (Bank of Commerce and Credit International), which had become the 7th largest bank in the world by assets, to illustrate the potential for building on the McCloy Report⁵⁵ into the pattern of foreign bribery indulged by executives of the Gulf Oil Corporation in the 1970s. McCloy invigorated policy thinking about self-investigation reports by outside counsel.⁵⁶ Some Australian experiments with restorative justice in competition and consumer protection law enforcement two decades ago showed some McCloy-style promise.⁵⁷ Yet as with US Corporate Integrity Agreements,⁵⁸ so in Australia with the spread of Enforceable Undertakings settled with companies in trade practices, environmental protection, securities fraud and occupational health and safety, restorative justice has lost its edge and innovation. It has become either forgotten or routinized in Australian business regulation, templated by compliance practitioners who take clients in trouble with a regulator through hoops to be jumped in an enforceable undertakings process.

In 1988 Florida prosecutors in Tampa indicted BCCI for a variety of major financial crimes. BCCI was set up so it was effectively off-shore in every country

⁵³ J Meyer, 'Fighting Medicare Fraud: More Bang for the Federal Buck', 2006, available at: <http://www.taf.org/FCA-2006report.pdf>.

⁵⁴ P Mattingly, 'US Recovers Record \$5 Billion in Government Fraud Cases', *Bloomberg News*, 5 December 2012, available at: <http://www.bloomberg.com/news/2012-12-04/u-s-recovers-record-5-billion-in-government-fraud-cases.html>.

⁵⁵ J J McCloy, *The Great Oil Spill*, Chelsea House, New York, 1976.

⁵⁶ J C Coffee, 'No soul to damn, no body to kick': An unscandalised inquiry into the problem of corporate punishment'. (1981) 79 *Mich. L. Rev.* 386, at p 429-34; R Gruner, 'To let the punishment fit the organization: Sanctioning corporate offenders through corporate probation' (1988) 16 *Am. J. Crim. L* 1; B Fisse & J Braithwaite, *The Impact of Publicity on Corporate Offenders*, State University of New York Press, New York, 1983.

⁵⁷ B Fisse & J Braithwaite, *Corporations, crime and accountability*, Cambridge University Press, Cambridge, 1993; C Parker, 'Restorative justice in business regulation? The Australian Competition and Consumer Commission's use of Enforceable Undertakings' (2004) 67 *MLR* 209.

⁵⁸ C L Ford & D Hess, 'Corporate monitorship and new governance regulation: In theory, in practice and in context' (2011) 33 *Law and Policy* 509. C L Ford & D Hess, 'Can corporate monitorships improve corporate compliance' (2009) 34 *J. Corp. L* 679.

where it operated. After years of investigation and a 6-month trial, some BCCI officers were convicted; the company pleaded guilty to limited money laundering offences. Fisse and Braithwaite⁵⁹ lamented that the prosecutor did not demand a McCloy-style report. There was good reason to do so as there was more than probable cause for believing that BCCI had become the banker of choice for the world's major criminals. It laundered money for Manuel Noriega (former Panamanian dictator, now in a US prison for drug offences), Saddam Hussein, Liberian dictator Samuel Doe, Bangladesh coup leader Husain Muhammad Ershad, the Medellin Cartel and other drug traders, Abu Nidal and other terrorist groups, and laundered money for illegal arms trading and covert nuclear programs. Many believe that the head of Saudi Arabian intelligence, Kamal Adham, who secured a cosy plea agreement in 1992 (after his retirement) with the New York District Attorney for his criminal activities with the bank, pulled the strings.

BCCI was finally forced to close by bank regulators from five countries in July 1991, without significant impact on the US economy, but endangering the British financial system and parts of the Arab world, affecting a million depositors worldwide, and pushing countless small businesses into bankruptcy. Fisse and Braithwaite's⁶⁰ argument was that a McCloy-style report ordered as part of the settlement of the Florida criminal case would have easily revealed a pattern of criminal money laundering that should have been stopped before more harm was done. Prudential regulators in the UK and the United Arab Emirates might then have stepped in before 1990 to bring the bank onshore, manage reorganisation into non-criminal management before it collapsed and destabilized the international financial system. New York District Attorney Morgenthau revealed why it would have been easy to get insiders to spill the beans: 'A lot of them were angry. They were told they were shareholders. . . Then they found out they weren't'.⁶¹ Prosecutors in other countries such as the UK, Kenya, Brazil, Colombia, Sudan and Mauritius had opportunities to put such disaffected officers in a restorative justice circle, to be cosmopolitan prosecutors of BCCI financial crimes they had detected by demanding a holistic McCloy-style investigation. So did other US prosecutors spurn that opportunity, including one in Philadelphia in 1987 who investigated BCCI for illegal financing of US nuclear materials transfer to the Pakistan Atomic Energy Commission.⁶² It was no surprise that the writings of obscure foreign scholars raised not a ripple of interest from good citizens of Florida and elsewhere who had enough to worry about without calling their prosecutors to account for missing an opportunity to prevent misfortune for small businesses on the other side of the world. Perhaps it is unrealistic to expect ethical cosmopolitanism of the sort McCloy showed with Gulf Oil to rise again on the shores of the Gulf of Mexico where Gulf was headquartered.

Today, it is possible to reveal the mirror image of the plea to US citizens to

⁵⁹ Fisse and Braithwaite, above n 57, at p 222-227.

⁶⁰ Ibid.

⁶¹ J Adams & D Frantz, *A Full Service Bank: How BCCI stole Billions around the World*, Pocket Books, New York, 1992, at p 298.

⁶² Fisse and Braithwaite, above n 57, at p 225.

demand ethical cosmopolitanism of corporations and prosecutors alike. On 21 August 2009 Australia suffered an off-shore blowout from a drilling platform in the Timor Sea that could not be capped for 74 days. The diagnosis was that the defective concrete base of the oil well installed by the Houston-headquartered Halliburton Co caused the spill.⁶³ This revelation was not internationalised at the time. The Australian regulator could have insisted, as part of its enforcement response, that Halliburton retain engineering consultants to investigate whether off-shore wells it had cemented worldwide posed like risks elsewhere on the world's oceans. The historical record shows that the Australian regulator did not do so and the next year a British Petroleum deep-sea drilling base cemented by Halliburton also failed many months after the Timor Sea disaster, causing a like environmental catastrophe in the Gulf of Mexico. The Deepwater Horizon spill took 86 days to cap. Given that Halliburton dominates the world's well cementing business with one other company, the Timor Sea tragedy might have drawn attention to 'a 2007 study by three U.S. Minerals Management Service officials [that] found that cementing was a factor in 18 of 39 well blowouts in the Gulf of Mexico over a 14-year period.'⁶⁴ The globalisation of fraud, environmental catastrophe, financial crisis, tax shelters and many of the most recalcitrant vices of regulatory capitalism require a conversation about the imperative of cosmopolitanism in law enforcement consciousness. It was within the power of Australian environmental enforcers to investigate and publicise a global risk in a way that might have prevented the Deepwater Horizon disaster and saved the lives of those who perished on that platform. It is a measure of the poverty of our global conversation about how to make business ethics work in contemporary conditions that citizens of the Gulf of Mexico are not protesting angrily about Australia's failure to adopt a more cosmopolitan ethic in its contribution to regulating the risks of capitalism. As with *qui tam*, so with restorative justice that demands McCloy-style global corporate integrity investigations, we should see ourselves as in an era of stimulating a richer conversation, an era of experimentation, not one where we have all or any of the answers.

One problem with expecting regulatory cosmopolitanism to work in a case like the Timor Sea oil spill is that no one in the United States might have taken any notice of a corporate integrity investigation report prepared for an Australian regulator. If an equity fine were imposed as part of the settlement, however, Wall Street and therefore American regulators would have noticed, because relevant shares would have suffered a sharp fall as soon as the fine was imposed. An equity fine could not be hidden from global markets in the way cash fines often are. A substantial equity fine would have been justified as a regulatory penalty for both these mega oil spills. Australian taxpayers with the Timor spill, and American taxpayers with the spill in the Gulf of Mexico, were put to enormous costs in clean-up, investigating and monitoring the catastrophes, and both nations suffered huge losses of environmental amenity and fish stocks. A

⁶³ R Gold & B Casselman, 'Drilling process attracts scrutiny in rig explosion' *Wall Street Journal*, 30 April 2010, available at: <http://online.wsj.com/article/SB10001424052748703572504575214593564769072.html>; K Bradsher, 'Relief well was used to halt Australian spill' *New York Times*, 2 May 2010, available at: http://www.nytimes.com/2010/05/03/us/03montara.html?_r=0.

⁶⁴ Gold & Castleman, above n 63.

proportionate penalty that was greater than these costs could be so high in catastrophic cases of this kind that if it were imposed as a cash fine, it would bankrupt or nearly bankrupt offending firms, making it harder for firms to do the things they should to compensate victims and clean up the mess. An equity fine, in contrast, can be very steep without depleting the operating capital of the firm by one cent. A 20 per cent equity fine on Halliburton ordered by an Australian court would transfer 20 per cent of the value in the hands of Halliburton shareholders into the Australian treasury.

With financial organizations that breach laws in ways that contribute to financial crises, an equity fine likewise has a better chance of reflecting the massive real costs of extreme systemic risks. If a firm is already teetering on bankruptcy after being bailed out by the state, what is the point of further worsening their survival prospects with a cash fine? An equity fine, in contrast, can be huge without adding to bankruptcy risks. If the firm survives, the state can sell the shares when the market recovers. This feature of the equity fine means that it circumvents some of the moral hazard of banks thinking that if they will be bailed out by the state, they might as well break rules for which the state is unlikely to impose a cash fine that simply defers repayment of debts to the state.

A whistleblower who proved that a bank or a ratings agency had breached appropriately crafted prudential laws could receive a bounty in the form of a percentage of a parcel of shares in the bank that would be issued to the state. Like a corporate white knight, when the state bails out a failing bank, it could be issued shares in the bank that will be more profitable for the state if the bank returns to profitability. It would also give the state a share of the fruits of liquidation alongside other shareholders if it collapses. This could dampen the moral hazard of cycles of the state socializing capitalism's losses followed by privatization of its profits. This has been a pernicious cycle in the history of the steel and auto industries of many nations. Shareholder pressure, pension fund pressure, pressure from employees who own large parcels of shares, would then be more vigilant to keep management on its toes to avert crises that would see shareholders forfeit a large slice of their equity to the state.

Strategic Reversals of Privatization

I have said something of strategic reversals of failed socialist experiments such as Queensland's butcher shops. What could be examples of needed reversals of failed privatizations? One area very central to Australian life that warrants a rethink of privatization is the nexus between sport and gambling.

The world of sport Australians grew up with was owned by neither the state nor private companies. Football clubs were neighbourhood community associations. Like athletes, swimmers and tennis players, footballers were amateurs. Rugby league broke away from rugby union over the amateurism question. The end of Australian dominance of world tennis began when our best amateurs were attracted to the US professional circuit. Kerry Packer's takeover of Australian (and global) cricket was a watershed. Cash paid in by fans was transferred from

the promotion of junior cricket, tennis and football to the pockets of highly paid sportsmen and women, managers and owners. Paradoxically, state funding stepped in to compensate some of these losses to junior sport. Another paradox is the reverse trajectory we see with drugs in sport to the historical movement described above in safety and environmental stewardship of coal mines. It was nationalized sport that first brought drugs to the fore half a century ago as the Communist East German team surged to the top of the Olympic medals table in a world where by the 1970s most medals in most sports were won by communist athletes. As these states became capitalist, their athletes won fewer and fewer medals. But their socialist innovations with drugs in sport have been taken to higher and higher levels by capitalist sport in the leading capitalist economies, particularly the United States. Desirable as it might be to go back to that world we remember before both communism and capitalism had so corrupted sport, the global realities make that more impractical than what Presidents' Mitterand and Mandela hoped to renew.

One of the drivers of drugs in sport, however, is gambling on sport. The commercialization of gambling is something Australia must begin to reverse. This is more imperative for Australia than other countries because Australians gamble more than citizens of other countries, and gambling causes more poverty, divorce and suicide than it does in other lands.⁶⁵ The biggest policy advocacy error of my professional life takes us back to that transformative era of the early years of the Hawke government. In the late 1970s and early 1980s I worked in government as a policy researcher concerned about organized crime. It was no minor problem, especially in New South Wales where there were disturbing links between organized crime and some of the state's most powerful business leaders and even state premiers. Since the 1960s, New South Wales had seen a succession of three corrupt police commissioners. One of the most important sources of revenue for organized crime in New South Wales was illegal gambling. So when I attended meetings like the National Crime Summit in 1983 that established what is today the Australian Crime Commission, I advocated legalization of gambling, such as legal casinos, as a way of removing the revenue base of organized crime. Mine was also a simple-minded libertarianism that folk should have a right to go to hell in their own fashion. Also perhaps I implicitly believed that if gambling should be legal to do, it should be legal to advertise.

It turned out that Queensland Premier Joh Bjelke-Petersen had a better policy analysis, holding out against the tide of legal gaming machines in sporting clubs, legalized betting on sport that fed back into those clubs, and legalized casinos. He was right that the seismic policy shifts on gambling that were occurring in other states during his watch, which also included the dismantling of state lottery and TAB monopolies for gambling on horse races, would cause an entrepreneurially

⁶⁵ The Australian Gambling Statistics maintained by the Queensland and Tasmanian Gambling Commission suggest that Australians lose (as opposed to gamble, a figure about nine times as high) around \$1000 a year on average, \$600 of this lost on gaming machines, though other forms of gambling are growing faster. My thanks to David Marshall and Jan McMillen for assistance with these figures: Government Statistician, *Australian Gambling Statistics 1984-85 to 2009-2010*, 289th Edition, Queensland Treasury and Trade, 2012.

driven escalation in lives shattered by gambling. Between 1979 and 2002 legal gambling on casinos increased by 6630 per cent and on electronic gaming machines by 566 per cent.⁶⁶

What we know now is that personal vices that can be addictive and deeply destructive of human flourishing, such as smoking tobacco, eating sweets, consuming psychotropic drugs, performance-enhancing drugs, peeking at pornography, exploiting trafficked sex workers and gambling do not cause mass destruction until they are commercialized in highly organized and massively profitable ways.⁶⁷ Tobacco was used for several centuries in Europe, and centuries before that in the Americas, before late nineteenth century entrepreneurs, especially Buck Duke in the United States, built large corporations with sophisticated marketing arms and research that produced more appealing drug delivery technologies such as the compact cigarette. Bolivians had been chewing coca leaves for centuries before cocaine production became a massive industry that networked marketing and addiction through street gangs in the Americas. Likewise, Indians had been eating opium for centuries without it becoming a drug of mass addiction. It was the British East India Company that created the biggest mass addition in history by the innovation of opium smoking for better drug delivery. Its other major innovation was opium dens in China for networked marketing.

And so with gambling. Gambling was an episodic vice rather than a vice of mass addiction in an era when once in a while there was a local race day where punters might lose their family savings. In that world, it was reasonable to think that the opportunity for fun most of the community could indulge on the occasional flutter was a greater good than the damage to a few families. Today in Australia one can enter a licenced club or casino any day late into the night to see races telecast from somewhere in Australia or overseas and be able to place a bet on that race at the club. Of course many Australian sporting fans have no desire to frequent either the races or such clubs or casinos. Most of them would rather watch their preferred game on television at home. Now when they do, they are bombarded with marketing from sophisticated gambling corporations that urge them to gamble on the game. They make it easy for them to do so from the comfort of their lounge chair.

Having seen the historical reality of how the commercialization of tobacco by sophisticated large corporates had generated an epidemic of cancer, how large food processing corporates produced an epidemic of obesity and heart disease, how big pharma built on the foundations of the British East India Company to lay even deeper and broader foundations for epidemics of psychotropic drug abuse, how stupid was this regulatory scholar to fail to see the policy mistake of

⁶⁶ My thanks to David Marshall and Jan McMillen for assistance with these figures which are sourced from the Australian Gambling Statistics maintained by the Tasmanian Gambling Commission: Government Statistician, above n 65.

⁶⁷ R MacCoun & P Reuter, *Drug War Heresies*, Cambridge University Press, Cambridge, 2001. MacCoun & Reuter found empirically that legalization generally does not increase drug abuse in a society on its own. It is only when legalization is followed by aggressive commercialization that it is associated with a sharp increase in drug abuse.

supporting the privatization of legalized gambling and the legal advertising of the vice? And how foolish would we all be to fail to reverse those policy errors. The first step toward reversal is for the market in the vice of gambling advertising to be abolished, for no new licenses for casinos or gaming machines to be issued. Then the society can move on to non-renewal of existing licenses once they expire so the density of availability declines as the population grows and the visibility of the commercial marketing of vice in our daily lives declines.

While Australian sporting fans can see some virtue in changes Kerry Packer brought to cricket, that the Indian Premier League innovations brought with 20/20 cricket, that Nathan Tinkler brought for Newcastle football fans, most of them don't like their children being constantly bombarded with encouragement to gamble on games. They especially don't like the thought that shady people are placing bets who know who has been bribed, which player or which horse has been given illicit drugs before the start of the contest. They long for the more decent game they played in their youth. We fear our cherished world of sport becoming one where our children are seen less as junior players than as budding spectator-gamblers; we long for the footie club as a loved local community institution rather than a business.

The more general thing we can say about privatization here is that more market competition is likely to be a good thing when it enables competitive provision of goods. But when it engenders competition in bads it is a bad thing, whether that is competition in clever drugging of athletes and horses or hooking children on tobacco. Enhanced competition in goods has allowed corporations to make us all richer. But competition in bads has left us fatter, more addicted, more cancerous, more corrupted by the sexualizing of children, more vulnerable to the risk of chemical and biological weapons, in a society that has renewed growth in a slavery that we thought we abolished two centuries ago, and poorer. Unless we are more discerning about our liberalism, the undoubted power of competition policy will deliver more and more bads with one invisible hand as it delivers more goods with the other. Again the remedy is that we must be more strategic about when we privatize and when we socialize. Given that it is too late to undo the damage that commercialization has done with tobacco and heroin, these are examples of drugs where we might do better to nationalize their provision and gradually bring them under the regulatory control of the doctor-prescription-pharmacist professional nexus of a caring, healing national health service. Today we also have available to us a repertoire of regulatory tactics for flipping markets in vice to markets in virtue.⁶⁸

The New Hybrid World Order

While the United States remains the lead innovator of the post-industrial economies, China is now the leading industrial economy. China booms under an authoritarian model of capitalism still largely based on productively efficient

⁶⁸ J Braithwaite, *Markets in Vice, Markets in Virtue*, Oxford and Federation Press, Sydney and New York, 2005, at pp 12-14 and 197-208.

public enterprises. While the United States is the great inventor of lap-tops, pads and smart phones, China is the dominant manufacturer of them and is becoming more innovative. One of the ways it is glib to describe the world as in the grip of neoliberalism is that, especially since the 2008 crisis, authoritarian capitalism is a competitor to liberal capitalism of increasing appeal in the developing world. Five of the top 10 corporations on the 2012 Forbes World's Biggest Companies were majority publicly owned firms, one Japanese, one Brazilian, three Chinese, with Russia's Gazprom not far out of the top 10.⁶⁹ In 2005, none of the top 10 were publicly owned. State ownership of the largest firms has grown in East and South-East Asia since the late 1990s.⁷⁰ Variants on or degrees of authoritarian capitalism are diffused across large, booming Asian societies from the Philippines to Vietnam to Burma to Thailand to Bangladesh to Indonesia. Russia has abandoned liberalism in favour of reassembling its old empire as an authoritarian capitalist empire.

We must hope that the remaining members of the BRIC, Brazil and India, do not follow Russia and China along that authoritarian capitalist trajectory. There are reasons to be hopeful about liberal or republican democratic futures for Brazil, India and much of the developing world, but also many authoritarian strands that have momentum. China's ascent to world leadership was based on Deng Xiaoping's movement of the country away from ideological dogmatism on the privatization question. Strategic privatization is what has worked for China. It continues strategically as a stark contrast to ideological 'shock therapy' that saw other communist states indulge inefficient privatizations into the hands of mafias and old nomenclaturas whose competence was in corrupt dealmaking as opposed to sound management. There is no inevitability whatsoever that creeping privatization will be accompanied by creeping democratization. More authoritarianism is in prospect when western firms like to partner in authoritarian conditions that keep labour rights, environmental stewardship and legal contestation of abuse of power at bay. Resistance to authoritarianism is something that must be struggled for independently by strategic democracy and rights movements inside China and globally.

The argument of this essay is that during the Cold War the west allowed itself to become irrationally ideologically shackled to the privatization of the public. Thankfully the neoliberalism of western ideology has been ameliorated by practices of regulatory capitalism that involve healthy doses of the publicization of the private. That amelioration has been driven by the practices of the judicial and regulatory branches of states. If liberal capitalism, or preferably republican social democratic capitalism, are to remain competitive with insurgent authoritarian capitalism, both the left and the right in western democracies must learn to be analytic rather than ideologically blinkered about where to opt for strategic privatization and where to experiment with strategic socialism. Both the privatization of the public and the publicization of the private can add public

⁶⁹ Forbes, above n 34.

⁷⁰ R W Carney & TB Child, 'Changes to the ownership and control of East Asian corporations between 1996 and 2008' (2013) 107 *JOFE* 494.

value⁷¹ if they are done diagnostically and constantly re-evaluated under a learning model of capitalism that is anti-authoritarian. Sadly, western capitalist firms love authoritarian state capitalist production systems. They like party officials who guarantee them no trouble from unions, from human rights, environmental, consumer or shareholder activists pursuing them in the courts. Western business likes factories in China and Bangladesh that do not waste resources on fire escapes for workers and that allow firms to murder labour rights activists when they protest about this.

The survival of civility in remaining western production systems, saving capitalism from burgeoning incivility overall, can be assisted by openness to both strategic socialism and to strategic privatization. Both strategic socialism and strategic privatization must be civilized by strategic regulation and larger doses of the publicization of the private led by our legal and regulatory institutions. Schumpeter incisively instructed us that capitalism flourishes through creative destruction. Yet this creative destruction also shakes it with waves of crises.⁷² The great thing about economic crises is that they can demolish firms that we are better off without. Crises allow firms with better production systems to grow on their ashes to take over their old markets. Iceland's decisions to allow its banks to fail in 2008 and to allow the shareholders of those banks to take most of the losses (rather than Icelandic taxpayers) laid a good foundation for their recovery. Ireland looks longingly across to Iceland's superior recovery. The people of Cyprus wonder why victims of banks should be different from other victims in facing demands to pay restitution to their offender.

States, their civil societies, their academies, need to be contextually analytic about when creative destruction of banks is a good thing and when it threatens systemic risk. Crises must be seen as opportunities for creative destruction of ratings agencies, regulatory institutions and even constitutions. Japan and Germany became the boom capitalist economies in the decades after World War II not only because of the creative destruction of their factories and cartels, but also because of creative destruction of their institutions and constitutions, followed by constitutional reconstruction and reconstruction of regulatory institutions. The reconstruction was to varieties of capitalism that were more collaborative capitalisms. In the case of Germany this was also social democratic in the way Nordic capitalism also transformed after World War II. They were not institutionalized as neoliberal capitalist states.⁷³ So we must also be open to the creative destruction of capitalism itself. Schumpeter, like Marx, never had the answer to where that would lead. Nor did Hayek nor Margaret Thatcher nor theorists of 'the End of History'.⁷⁴ On such a dangerous journey for freedom and democracy, we must be attentive to steering capacities under democratic

⁷¹ Public value is the concept valorized in the work of Mark Moore: M Moore, *Creating Public Value: Strategic Management in Government*, Harvard University Press, Cambridge, 1995.

⁷² J Schumpeter, *Capitalism, Socialism and Democracy*, Routledge, London, 1943. While Schumpeter thought creative destruction of obsolete factories and production systems increased the productivity of capitalism, it would also fatally destabilize it.

⁷³ Hall & Soskice, above n 2.

⁷⁴ F Fukuyama, *The End of History and the Last Man*, Penguin, London, 1992.

control, to accountable regulatory institutions that can correct the most dangerous mistakes. As the economic collapse of the Weimer Republic showed, authoritarianism is just as likely as renewal to boom in the ashes of western capitalism. Unless we become more adept at institutional learning that is unfettered from dangerous hegemonies, we may fail to discover how to renew freedom in ways that respond well to crisis.