

connected to an individual. Although corporate culture is currently the most compelling approach to attach corporate criminal liability, it suffers from evidential burdens too high to meet with any practical certainty. Successful prosecution will inevitably rely upon the 'reasonableness' of the testimony of the individual accused of the physical act as to whether or not a culture of non-compliance exists. While the 'reasonableness' of the testimony is rebuttable by the corporation through evidence of a culture of compliance, judicial reluctance to ratify AS 3806 as an appropriate benchmark, or provide reasoning as to what constitutes an 'effective' compliance plan raises significant evidentiary concerns. For the corporate culture provisions to successfully transition from 'academic purity' to 'practical utility', legislative reform is desirable. Harmonisation of Australia's Commonwealth and State-based criminal laws is imperative to expand the limited scope of offenses. Guidance on interpreting fundamental aspects of the provisions, including how to prove a corporation's culture will be required. Arguably, however, corporate culture is most practical as part of robust sentencing guidelines that extend beyond mere pecuniary penalties. As the US Guidelines have demonstrated, consideration of corporate culture as part of a sentencing decision will have the same deterrent effect as an original basis for liability: to incentivise corporate self-monitoring and the creation of a general culture of compliance.

Conclusion

Cultures of Redemptive Finance

John Braithwaite

I STORYTELLING AND CULTURAL REDEMPTION

The editors' Introduction catalogues well the significance of each chapter to the aims of this book. In this chapter I draw selectively from all the chapters to paint the ambition of the book in even more ambitious terms than we authors commenced this journey. This book ponders the integration of purposes, principles, rules and trust into a framework for transforming harmful corporate cultures of finance. It can be an apt jibe that resort to culture as explanation happens when scholars are despairing and desperate to explain. Yet I see this book in the tradition of seeking to understand how institutions enable actions which enact cultures that reproduce institutions. Such a framework is not necessarily platitudinous. It can make distinctions. Consider trust as something that on the one hand can reduce transaction and agency costs and on the other invites abuse, actively constituting the opportunity structure of financial crime. This is a book about how to institutionalize distrust and enculturate trust. How can institutions create spaces for dialogue to allow trust to build between Wall Street and Main Street, among regulators, regulatees and critics of both? At the same time, how do we institutionalize distrust, for example, by rules against abuse of power that are enforceable?

The book establishes a good case for regulating finance through culture. Its chapters are convincing that the culture of banking has globalised as one of greed that is widely oblivious to legal and ethical obligations. This is clear in the breadth, depth and routinised nature of fraud in the Libor allegations that have been growing since 2012 as discussed in the chapters by George Gilligan,¹ Andrew Campbell and Judith Dahlgreen,² Eric Talley and

¹ G Gilligan, "Bad" Behaviour in International Financial Markets: National and Multi-Lateral Perspectives', this volume.

² A Campbell and J Dahlgreen, "The Future Role of the Bank of England: Role and Power of the Bank of England from 2013", this volume.

Samantha Strimling,³ and in the sheer magnitude of the Libor fraud that Seumus Miller's chapter⁴ argues was worsened by global interdependence. The problem of the culture of finance was clear in diagnoses of the root causes of the crash of 2008, in the run of scandals of 2001 than included Enron in the US and HIH in Australia, in the BCCI and Barings scandals of the 1990s, in the Savings and Loans scandals across America in the 1980s and the 'greed is good' scandals on Wall Street of that time. Institutionally, the book shows that we learnt little from each wave of scandal. This when in historical terms they occurred in relatively quick succession.

How appalling that we only seem able to brace ourselves for the next catastrophe. The authors of this book are to be commended for sticking with analysis of the fundamentals of the problem. Those of us who sought since the 1980s to build interdisciplinary communities of regulatory scholars to confront what we saw as the analytic errors of myopic legalism and economism have also failed as an interdisciplinary scholarly community to tackle these fundamentals until now. We failed to persuade governments, the dominant professions, regulatory institutions that a new compact for transformative change is needed to secure our future. The same is true of the failure of the interdisciplinary regulatory academy to champion solutions that are implemented and that work to confront climate change and wider environmental challenges. Many settled for getting behind the economists' advocacy of emissions trading schemes as the potentially most helpful train leaving the station. This when we well know that this is not nearly enough. We also know that its trading rules will be gamed as a result of the same cultural problems that caused the financial crises that are the focus of this book.

I was among those who hoped, with the election of President Obama, that widespread recognition of these two massive crises could deliver a Green New Deal.⁵ When the sheer audacity of the Enron fraud became public, President Bush gave speeches on how terrible his former friends, the bad apples, were. He did not give speeches like those of FDR quoted by Justin O'Brien,⁶ that championed the New Deal as root and branch cultural transformation of business. Rather we saw a suite of piecemeal reforms in both 2001 and 2008 instead of a new social compact with business. President Roosevelt's speeches went to the need for a fundamental cultural change in the way business values are seen in government, by regulators, in the courts, in the community and in business itself.

An argument of this chapter is that banking culture and financial regulatory culture is not a rulebook, but a storybook.⁷ President Roosevelt was reading his speeches in the 1930s from a different kind of storybook than Presidents Bush or Obama in the 2000s. President

³ E Talley and S Strimling, 'The World's Most Important Number: How a Web of Skewed Incentives, Broken Hierarchies and Compliance Cultures Conspired to Undermine Libor', this volume.

⁴ S Miller, 'The Libor Scandal: Culture, Corruption and Collective Action Problems in the Global Banking Sector', this volume.

⁵ 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*, (London, Green New Deal Group, 2008); E Barbier, *A Global Green New Deal: Rethinking the Economic Recovery*, (Cambridge, Cambridge University Press, 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.

⁶ J. O'Brien, 'Back to the Future: James M Landis, Regulatory Purpose and the Rationale for Intervention in Capital Markets', this volume.

⁷ C Shearing and RV Ericson 'Towards a Configurative Conception of Action' (1991) 42 *British Journal of Sociology*, 481–506.

Obama put insiders in charge from the business, economic and legal elites whose technocratic style was a root cause of the problem. Their storybook came to dominate the culture of the Obama White House and continued to rule across the executive branch.

Technocratically capable Presidents who work into the night understanding the details of new legislative rules, like Jimmy Carter, tend not to be those who change the course of history. His successor, Ronald Reagan, was not as technocratically competent, did not work as hard, yet had a paradigmatic impact because he changed the stories America told about itself. Abraham Lincoln could be seen as an incompetent President who failed to steer his country away from a bloodbath of a civil war. Once war started, Lincoln managed to choose generals who lost battles against a foe with inferior human resources and industrial might. Lincoln's greatness was that in his final months he could restore what it meant to be an American. Whether North or South, black or white, to be an American after his Gettysburg address was to be a victim of a terrible institution, slavery, to be part of a nation whose identity is tied to the struggle to overcome the legacy of that institution.⁸ Just as Nelson Mandela restored South African identity, black or white, in terms of transcending apartheid as an institution.

Not only is Presidential leadership important to restoring business culture, so is the storytelling of business leaders, regulatory leaders, leaders of professions, educational leaders, leaders of families. Ideological leaders like Ayn Rand,⁹ who had a significant influence on the mentality of US Federal Reserve chairman Alan Greenspan,¹⁰ and religious leaders like Dullah Omar and Osama Bin Laden, also accomplished potent restoring of the work of the institutions of finance and Islam respectively. This storytelling power is not mediated by persuading a majority of business executives to become libertarians or a majority of Muslims to become salafist jihadists. The story can execute a power to transform the world in the hands of but a tiny minority. Part of the power of the story is that the precept of a libertarian script can be enacted by a young trader who is illiterate in libertarian theory. A teenager who cannot read the Holy Quran can follow the script of strapping himself into a suicide vest to enter paradise.

Cultures of mainstream storytelling must fight back against destructive minority stories. Storytelling can convince Muslims of the shamefulness of suicide bombing, business people of the shamefulness of greed and exploitation. The fight back is also best through stories because lectures and writings of political theory or theology miss these marks. The criminal law does not do the job of evocative storytelling with financial crime as well as it does with murder because the technical complexity of the conduct can be hard to narrate and trials usually do not occur until the years of national soul searching have moved on in the media attention cycle. Sometimes trials occur after the nation has ceased feeling sorry for the sins of its last affairs with greed as it embraces the seductive allure of the next boom. In that climate, one of the worries political leaders have about convictions of their old business cronies is that they will dampen the 'business confidence' that is finally lifting the economy and the electorate. They are right that 'business confidence' does lift the economy. The problem

⁸ R Meister, 'Forgiving and Forgetting: Lincoln and the Politics of National Recovery.' In C. Hesse and R. Post (eds), *Human Rights in Political Transitions: Gettysburg to Bosnia* (New York, Zone Books, 1999.)

⁹ M Bustillos 'When Ayn Met Ayn: "Atlas Shrugged" and our Tanked Economy,' www.theawl.com/2011/04/when-alan-met-ayn-atlas-shrugged-and-our-tanked-economy (Tuesday, April 12th, 2011).

¹⁰ *ibid.*

is that hope, humility and history never rhyme on Wall Street.¹¹ Yet legal processes that draw out stories in a timely fashion to reset society's compass before it is seduced by the next wave of 'business confidence' is vital to preventing, delaying, ameliorating the next crisis.

Restorative justice is a more narrative style of justice, and a speedier form, that can be fit for this purpose. The empirical criminology of Shadd Maruna found that serious Liverpool criminals were more likely to 'make good', turning away from a life of crime, when they adopted a 'redemption script'.¹² Such a redemption script can be about the bad influences, the domination the offender once suffered, but how she has now found a positive path to be a contributor to society rather than a destroyer of it. A society like Indonesia, which has been successful in reducing Islamist terrorism, which once had the highest incidence of terrorist bombings of any country, has quite a high density of former terrorists with a public profile in which they denounce violent jihad.¹³ There is a shortage of former white-collar criminals who narrate stories of redemption with a high western profile. Convicted Watergate criminal Charles Colson, who died in 2012, was one. Though he was not a financial criminal, he was a white-collar offender who worked through his redemption script in prison to found Prison Fellowship International, which has become one of the global leaders of advocacy for restorative justice. It is actually hard to think of financial crime redemption narratives that have a high narrative profile. Bill Gates pouring his stupendous wealth into solving root causes of poverty and disease is inspiring; but it is no redemption narrative of redeeming monopolistic practices of his Microsoft Corporation. There is no redemption narrative in Rockefeller, Carnegie and Ford in establishing their great foundations. Nor is the founding of Bond University in Australia a redemption narrative! The Michael Douglas character in the two Wall Street movies after the 1987 and 2008 crashes supplies the best known narrative, hardly a redemption script. The Michael Douglas character was loosely based on Michael Milkin, inventor of the junk bond, arguably the greatest genius of Wall Street in the 1980s, and Ivan Boesky, the convicted insider trader who made famous the expression 'greed is good'. I horrified my consumer movement colleague Ralph Nader at the time when I argued that the prosecutor should take Michael Milkin into a restorative justice process to pick up his proposal that an alternative to prison could be for Milkin to work on his ideas to resolve the Third World debt crisis of that time. Part of my ethical reasoning was about broadening our conception of justice beyond punitive justice to 'justice as a better future'.¹⁴ Another was enabling high profile redemption narratives on Wall Street that might have restored finance capitalism.

Redemption narratives have a special power over peoples' ethical imaginations because they involve the humility of wrongdoers shaming their own past. This has more persuasive power than Main Street stigmatizing Wall Street, Wall Street denying their crimes,¹⁵

condemning sermonizing on Main Street as naïve and unhelpful to moving forward, political elites agreeing that responses like the occupy movement are 'unhelpful', and ultimately Main Street capitulating to this hegemony once 'business confidence' returns and their pension accounts, house valuations and job opportunities start to lift. Finance capitalism suffers a redemption bypass in comparison say with military culture, which exposes us frequently enough to retired generals, even former US Defence Secretaries, who condemn the criminality of the wars they fought and through that redemptive cultural work lay a foundation for peace on the ashes of war. Perhaps a Truth and Reconciliation Commission might have been established on Wall Street in 2008. There would have been Wall Street equivalents to Archbishop Desmond Tutu and Nelson Mandela who might have elicited redemptive narratives. Hope, humility and history might have rhymed at that moment because it was so clearly true, whether one worked for Lehman Brothers, owned a home in Peoria, or had investments in a pension fund, almost all were victims of American banking institutions.

Even when criminal law lacks the redemptiveness of restorative justice, it still has a limited role in delivering a spoonful of deterrence to resist the shovelfuls of sugar gorged by criminal traders. In addition, as Ferguson's chapter¹⁶ concludes, reputational stock price impacts of a conviction can be nine times the size of fines imposed, at least when misconduct directly affects parties who trade with the firm such as customers and investors.¹⁷ More importantly, criminal law still has a role in signifying, in the most solemn way our culture allows, that this behavior was shameful. Shaming is more powerful when it is reintegrative and redemptive. But even when redemption is bypassed, it is better for the society to signify the shame of crimes to those who deny them than for the state to be complicit in denial. It follows that while institutionalized storytelling that drives cultural reform after a crisis is crucial, law reform is also important even as it fails to connect to a cultural politics of redemption.

II BACK TO LAW REFORM

Many of the law reforms that the Europeans and President Obama's finance technocrats put in place were needed. Hanrahan's chapter argues arrestingly that fiduciary law reform in the aftermath of the crisis in Australia shows the risks of complexity displacing simplicity, of a compliance industry that profits from codes and rules without catalyzing individual and corporate responsibility.¹⁸ While some law reforms will prove counterproductive, as argued in other chapters of this book, of course a good debate was needed in the aftermath of crisis on how the nuts and bolts of rules needed to change. This did happen. It would be wrong to say that none of the changes were major. This book shows that what did not change was our reform mentality. That continued to be that we make use of a crisis to render the rules more

in the early post-crisis years there was a problem of hegemonic denial in which the media, academia, political and business leaders joined to suggest that the problems were about negligence and mismanagement rather than criminality. In contrast, Gilligan suggests the literature now finds fraud as a central factor in 70 to 80 percent of the Savings and Loans failures of the 1980s.

¹⁶ B Ferguson, 'Sanctions, Incentives and Better Behaved Banks', this volume.

¹⁷ J Armour, C Mayer and A Polo, 'Regulatory Sanctions and Reputational Damage in Financial Markets' Oxford Legal Studies Research Paper No. 62/2010 3 (2012) available at ssrn.com/abstract=1678028.

¹⁸ P Hanrahan, 'The Fiduciary Idea in Financial Services Law', this volume.

¹¹ This is because finance is cyclical, with booms always sowing seeds of the next bust. The expression 'when hope and history rhyme' comes from Seamus Heaney, see S Heaney, *The Cure at Troy* (London, Faber & Faber, 1990).

¹² S Maruna, *Making Good: How Ex-Convicts Reshape and Rebuild their Lives* (Washington, DC, American Psychological Association, 2000).

¹³ J Braithwaite, V Braithwaite, M Cookson, and L Dunn, *Anomie and Violence: Non-Truth and Reconciliation in Indonesia* (Canberra, ANU E Press, 2010) Chapter 1.

¹⁴ J Froestad and C Shearing 'Practicing Justice-The Zwelethamba Model of Conflict Resolution', in Slakmond et al (eds), *Justicia Restaurativa, Brasília*, (Brasília, Ministerio da Justiça do Brasil, 2005).

¹⁵ This is not just a matter of individual and corporate denial. As Gilligan above n1 points out in relation to the Savings and Loans scandal, and as is now apparent from the content of this book for the 2008–2012 scandals,

serviceable for the large challenges of financial regulation. Then later in the reform cycle, the conservatives, sometimes rightly, get the upper hand in the public debate by arguing that the law reform went too far, is too much of a burden on firms as they seek to recover. So law reform grinds to snail pace—until the next crisis. Yet again, the big change that we fail to put in place is to render the law more continuously responsive—a law constantly adapting to the gaming of the law by finance capitalism. Grand post-crisis regulatory reform projects that bog down before they become genuinely grand are part of the problem. Regulatory scholars like myself have contributed to that problem by putting too much emphasis on the strategy of having reform blueprints in the top drawer waiting for the moment of the next crisis. Peter Drahos and I called this the ‘model monger’ strategy that links up to the strategies of ‘model missionaries’ in constituencies like reform NGOs and ‘model mercenaries’ like new compliance professions and the mainstream professions of law and accounting.¹⁹ It is energising to be a reform romantic, but how romantic were we with our Green New Deal hopes? No FDR arrived on a shimmering stallion to crack the whip on Wall Street.

From this perspective, one of the disappointing ways the British debate post-crisis, as opposed to the Australian, American and other national debates, has run, concerns hand-wringing over whether there was error in moving from a more rule-based to a more principle-based regulation. This is a topic helpfully addressed in Campbell and Loughrey’s chapter.²⁰ As I have argued elsewhere,²¹ it is a mistake to have either a fundamentally rule-based regulation or an overwhelmingly principle-based regulation. Any regulatory regime has little hope of effectiveness without many rules²² that allow specificity of enforcement where certain bright lines can and should be drawn. And it has little hope without a well-crafted set of principles that save regulation from collapse in the face of gaming and other problems of criss-crossing bright lines. That writing makes the point simply by reference to the game of tennis. The foot-fault rule is a good one, quintessentially bright line. It is never grossly or intentionally violated. Infrequently, it is unintentionally breached by millimeters. When this happens the probability of sanction is high. Enforcing bright line rules is generally the best way to get compliance when a regulated phenomenon is not overly complex, not subject to flux or gaming.

Yet tennis has not always had an ethical culture. The 1970s and 80s saw the rise of a type of tennis player who sought to unsettle the ethical majority who still embodied the gentlemanly and ladylike culture of the pre-1970 game by calculated tantrums, racket smashing, abuse of umpires and line officials, or just standing their ground refusing to continue. Obviously it was easy to execute this gamesmanship in the face of any new rule against, for example, ‘racket abuse’. Tennis, like all professional sports, must complement its suite of rules with principles of broad reach concerning ‘unsporting conduct’, ‘conduct that brings the game into disrepute’, ‘physical abuse’, ‘umpire abuse’, ‘verbal abuse’ that vary in name from sport to sport. Most professional sports have enforced such broad principles very effectively in response to periods and players where this problem has reeled out of hand.

The complexity and dynamism of banking of course means that it needs both rules and principles that cover each others’ weaknesses even more than tennis.

In tennis, both foot-faults and tantrums are fairly consistently sanctioned. The thing about rules and principles in banking is that they are not, either formally by the courts or informally through the culture. Of course a move to principles is not going to work with a particular regulatory challenge if we rely on courts²³ to enforce them and if judges are more comfortable with rules and reluctant to enforce principles. This chapter’s analysis goes to six ways in which our response to financial crises may have been insufficiently transformative:

1. A transformation of transnational judicial culture is needed toward accepting a regulatory approach that requires rules to be interpreted in the light of overarching principles when those rules are gamed. This is a shift from extant judicial culture where rules are seen as trumping principles.
2. A transformation of judicial, rulemaking, drafting cultures is needed to become continuously, dynamically responsive to new forms of gaming, new kinds of financial products, new kinds of business entities and business environments. More nimble legal institutions must strike down old rules that no longer work and rely on judicial enforcement of principles to fill the gap while better, newer rules are continuously redrafted for new realities.
3. Increased reliance on the more holistic justice of restorative justice is needed for front-line enforcement. However well it is reformed, the formal law of finance will continue to deliver impunity to most offenders and will continue to allow individuals and entities who are not the largest villains to be scapegoated in attempts to make the rule of law appear to work. The key move of restorative justice is to displace proportionate punishment as a cardinal virtue with a more plural lens for seeing the multidimensionality of justice, so that some kind of enforcement and some kind of justice, holistically conceived, is possible in response to any and all crimes of finance. This involves a sacrifice of proportionality to end impunity.
4. A restorative justice approach is also needed to jump start ethical deliberation among professional stakeholders, such as lawyers, accountants and compliance professionals who mostly have lower levels of culpability than the principals who directly stuff the cash in their pockets. Formal law tends to let the lawyers off, almost always.
5. The most fatal flaw of any approach like that in points 1–4 above is that it fails to come to grips with the problem that the regulatory state can be as corrupted, as afflicted with the diagnosed pathologies, as banks themselves. Because public enforcement is regularly captured by the ethics and the hegemony of finance capitalism, a radical privatization, rather a radical hybridity, of enforcement is needed as a check on public enforcement.
6. It is wrong to conclude that because regulatory bureaucracies, enforcement staffs, and cases investigated have grown progressively across the histories of most countries that increased investment in regulatory infrastructure is irrelevant to solving the problem. Yes they have grown, but they have not grown in proportion to growth in the number of transactions banks make, to the variety of financial instruments and organizational forms and to the sophistication of the financial rocket scientists who launch their

²³ Campbell and Loughrey’s above n 20 discussion of the British struggle to enforce principles which only reached fruition after the FSA adopted its policy of credible deterrence in 2008 is instructive on this.

¹⁹ J Braithwaite and P Drahos, *Global Business Regulation* (Cambridge, Cambridge University Press, 2000).

²⁰ D Campbell and J Loughrey, ‘The Regulation of Self-interest in Financial Markets’, in this volume.

²¹ J Braithwaite, ‘Rules and Principles: A Theory of Legal Certainty’ (2002) 27 *Australian Journal of Legal Philosophy*; J Braithwaite, *Markets in Vice, Markets in Virtue* (Sydney, Federation Press, 2005).

²² Rules and principles are defined here simply in the way chosen by Joseph Raz: ‘Rules prescribe relatively specific acts; principles prescribe highly unspecific actions,’ see J Raz ‘Legal Principles and the Limits of the Law’ (1972) 81 *Yale Law Journal*, 823. Safe driving in light of road conditions is a principle; a proscription of speed over 80 km per hour is a rule.

rockets. Regulatory growth and innovation must be continuous and must be responsive to business growth and innovation.

Let us now consider in turn these six reforms as suggestions for a new way of layering the ideas in this book, starting with the first two grouped together.

1 and 2. Rules should not trump principles; both rules and principles must become continuously responsive.

A transformation of the judicial culture of finance transnationally is needed toward accepting a regulatory approach that requires rules to be interpreted in the light of overarching principles when those rules are gamed. Most national judicial cultures hold that if specified rules exist, those rules will be found to trump principles. Better to craft rules as instantiations of principles. So there must be legal principles set down in statutes that guide the design of financial products and finance organizations. Then there can be detailed rules that define what you can and cannot do if you call yourself a bank and/or are licensed as a bank, other rules for when you are licensed as a credit union, others for a partnership of financial advisors. The important thing is that all financial organizations and all financial products follow rules that the law justifies in terms of general principles. This means it is no longer possible to create unregulated financial products or financial organizations of a form that the law has never conceived. If your new financial organization does not fit the rules a bank or a credit union must follow, whatever kind of entity it is, it must follow the principles regulating all financial organizations. Even though it does not have a positive licence as a bank or a credit union, a regulator can take it before a judge, argue that its unethical conduct fails to meet the principles that regulate all financial organizations, and request that the judge negatively licence it (close it), nationalize it, or order its reorganization under the supervision of the regulator in compliance with the principles of the law.

Likewise, such an approach would have made the concept of 'unregulated derivatives' impossible. Any financial product would be regulated by the principles that justify the rules that apply to all financial products. New kinds of derivatives will be traded without rules to guide that trade, but are always vulnerable to being struck down by the courts for non-compliance with the principles of financial law. When particular kinds of derivatives become popular enough, it becomes economically efficient for the state to invest in rule adaptation to give the law specificity of content in relation to those newly common derivatives. Why is this important? It gives less innovative players who are not financial engineers, who cannot afford a sophisticated legal adviser, a path to trading this new product that lowers their transaction costs and increases certainty for them through a law that in effect lays down an acceptable recipe for a particular kind of product and a legal way of trading it.

Conceptually, this is not particularly radical in financial law. Many national tax laws in recent decades have acquired General Anti-Avoidance Rules. These are mis-named 'rules' because they are actually principles. Their legal formulation varies from nation to nation and varies in breadth, being quite narrow in the range of tax behavior touched in US law, for example, compared to Australian, New Zealand or Canadian law. When the US Treasury initiated a discussion in 1999 on the need for a general anti-avoidance principle, which in the US literature is called a General Anti-Abuse Rule (GAAR), its conception of an abusive tax shelter was similar to the Australian conception of 'aggressive tax planning'. A shelter that would be caught by the GAAR involved attempting to 'obtain a tax benefit in a tax avoidance transaction' where a 'tax avoidance transaction' is any transaction (i) 'in which reasonably

anticipated pre-tax profit ... is insignificant relative to the reasonably expected tax benefits', or (ii) 'that inappropriately eliminates or significantly reduces tax on economic income'.²⁴ In Australia, aggressive tax planning can mean engineering transactions that generate tax losses, excluding income from taxation, deferring recognition of income into a later year, or converting income into a different, lower-taxed form. Contrivance is used to 'shelter' income, wealth or capital gain from being taxed, for example by artificially valuing intellectual property rights that are moved to tax havens. Most aggressive tax planning involves the asymmetric treatment of losses and profits across two or more taxable entities. Funds are shuffled among entities so that the losses will be held where they generate a maximum tax loss and the profits flow to where they are untaxed (or less taxed). Because aggressive tax planning is characterized by innovation in finding new ways of getting around the intended effects of tax rules, legal definitions with too much specificity and insufficient adaptability risk capturing known tax shelters without netting newly emerging tax products. I have argued for a broad definition of aggressive tax planning as 'a scheme or arrangement put in place with the dominant purpose of avoiding tax'.²⁵ In terms of Australian law, this conceives of any tax planning that the courts find to be a breach of Part IVA of the Income Tax Assessment Act 1936 (Cth), Australia's general anti-avoidance provision, as aggressive tax planning. Michael Graetz in a more light-hearted, but more communicative vein, characterizes shelters as deals 'done by very smart people that, absent tax considerations, would be very stupid'.²⁶

Some readers may think this heads on a tangent from this book. They would be in error in two ways. The most important proximate cause of the Global Financial Crisis up to 2008 was flaws in the financial regulation of banks. In 2012 and early 2013 that is no longer the proximate reason the crisis continues, why most of the west continues to be in recession. Fiscal crisis driven by aggressive tax planning is now a more important proximate cause. All western economies now face a situation where many of the most profitable companies that operate on their shores pay no company tax or almost none. This is not a problem China faces. A company that makes profits in China but fails to leave a reasonably proportionate tax payment behind knows they risk being sent packing. This is one reason authoritarian capitalist societies like China²⁷ are building formidable competitive advantages over liberal capitalist economies in contemporary conditions of financial engineering. In the west, this new proximate cause of national insolvency is driven by corporate cultures and professional cultures of greed akin to those that caused the banking crisis, and permitted by the same overly narrow ruthlessness of financial law. Ruthless competition between lawyers, accountants and financial advisers in the tax advice market, just as in the market for advice on financial products, is also a shared root cause, as explained by one distinguished New York tax lawyer interviewed in 2001:

In Arcadia, tax lawyers would discuss with each other what was a fair interpretation confident that the IRS would be looking for that fair interpretation and that the courts would be looking for it as well. The worm in the apple was progressively more ruthless competition for tax business that was

²⁴ E Kleinbard 'Corporate Tax Shelters and Corporate Tax Management' (1999) 51 *Tax Executive* 235.

²⁵ Braithwaite, above n21, 16.

²⁶ M Graetz quoted in Department of the Treasury, *The Problem of Corporate Tax Shelters: Discussion, Analysis and Legislative Proposals* (Washington, D.C., Department of Treasury, 1999) v.

²⁷ The term authoritarian capitalism comes from W Thornton and S Thornton, *Toward a Geopolitics of Hope* (Thousand Oaks, Calif., Sage Publications, 2012).

not under the control of any single set of professional norms, certainly not those of tax lawyers alone. Accounting firms, investment banks, financial advisers, all with in-house lawyers compete with law firms for advice.²⁸

With tax law, as with banking law, it is important for the law to be sufficiently principle-based to support many spaces for ethical deliberation about the purposes of the law, deliberation that is ultimately refereed by legislatures and courts that enforce and resettle principles which dynamically adapt. In both tax and banking law it is vital to reap the benefits of rules—clear guidance to taxpayers, investors, depositors in common situations—while judicially enforcing principles informed by ethical deliberation in business to regulate the pathologies of rules discussed in chapters such as that of Campbell and Loughrey.²⁹ One is reminded of the lessons Joseph Rees³⁰ and the Kemeny Commission³¹ drew from the Three Mile Island near nuclear meltdown as one reads this book. The problem they found was that operatives and managers of the plant had become rule-following automatons in response to an excessively rulish regime. Consequently, when a massive systemic crisis in the engineering environment arose, they had lost the art of thinking systemically about their own safety system. How can one but compare this to our editors' discussion of the conclusion of the British Treasury Select Committee in 2012 that 'The FSA has concentrated too much on ensuring narrow rule-based compliance, often leading to the collection of data of little value and to box ticking, and too little on making judgments about what will cause serious problems for consumers and the financial system.'³²

It has been demonstrated to a degree in some tax jurisdictions that it is possible for tax law to list rules for transactions that are common, leaving judicial enforcement of principles, and in particular a general anti-avoidance principle, to mop up when unusual transactions or entities, such as those engineered to be unusual, are in contest. In the list of suggestions below, I attempt to be specific with the tax example about how a transformation of transnational legal culture could be accomplished that would create a space for continuous dialogue about an ethical legal and financial culture:³³

- (a) Define the overarching principles and make them binding on taxpayers.
- (b) Make one of those overarching principles a general anti-avoidance principle which states that schemes are illegal when their dominant purpose is a tax advantage, even if the scheme "works" as a shelter from detailed tax rules.
- (c) Define a set of rules to cover each complex area of tax law.
- (d) Urge the legislature to lay down, perhaps through an Acts Interpretation Act,³⁴ that in a contest between a rule and an overarching principle, it will not be the rule that is binding.

²⁸ Braithwaite, above n21, 197.

²⁹ Campbell and Loughrey above n20; Braithwaite, above n21, also summarizes some of these pathologies, 145–149.

³⁰ J V Rees, *Hostages of Each Other: The Transformation of Nuclear Safety Since Three Mile Island* (Chicago, University of Chicago Press, 1994).

³¹ JG Kemeny (Chairman, *President's Commission: The Need For Change: The Legacy Of TMI* (Washington DC, 1979).

³² House of Commons Treasury Committee, *Fixing LIBOR: Some Preliminary Findings* (London, HM Government, 18 August 2012) 112.

³³ This list is only a slightly revised version of the list that appears in Braithwaite, above n21, Chapter 10.

³⁴ Other elements of the legislative history of specific statutes can also be mobilized to this end, for example explanatory memoranda and second reading speeches in the Australian parliamentary context. Both New Zealand and Australia revised their Acts Interpretation Acts to complement their General Anti-Avoidance provisions. See Sections 15AA and 15AB, Acts Interpretation Act 1901 (Cth); Section 6-6B, Tax Administration Act 1994 (NZ).

That is, the principle is not merely used to assist in interpreting the rule. Rather it is the principle that is binding, with the rules used to assist in applying the principle.

- (e) In a complex field of tax, write specific sets of rules for the most commonly used types of transactions or business arrangements. This might involve a dozen different sets of rules to regulate concrete arrangements. Such rules actually merely specify examples of how the principles apply.
- (f) Follow each of the dozen sets of illustrative rules with the explanation that the reason for the rules being this way in this concrete situation is to honour specified overarching principles. This is a way for the legislature to make it clear to judges that it is the principles that are the binding feature of the law. Hence when a legal entrepreneur reengineers concrete financial product number 11 as an 11A, or corporate structure number 9 as a 9A, to get around the law, judges must go back to the principles to decide what to do.
- (g) When judges fail to do this, reverting to old habits of privileging rules, enact a simple statute that says the 11A shelter violates named principles in the tax law and should be disallowed in future. Its effect is simply to strike down the court's precedent in the 11A case and to engage the judiciary in an ethical conversation with the legislature on the clarity of its intention to have principle-driven tax rules.³⁵
- (h) Foster educative dialogue with judges, company directors and the community about the principles in the tax law in the hope that conversations among judges and tax practitioners, around the Boardroom table and around the table of dinner parties will develop shared sensibilities and corporate cultures oriented to those principles.

A transformation of judicial, rulemaking and drafting cultures to become continuously, dynamically responsive to new forms of gaming, new financial products and business environments can be pursued through this roadmap for more nimble legal institutions.

3 and 4. Increased reliance on more holistic justice that creates spaces for deliberation of ethical cultures.

However well it is reformed, the formal law of finance will continue to deliver impunity to most offenders. It will continue to allow individuals and entities who are not the largest villains to be scapegoated to create the false appearance that the rule of law works. This is a long established empirical finding about corporate crime enforcement in finance and beyond.³⁶ The US pharmaceutical industry in the 1970s even had 'Vice Presidents Responsible for Going to Jail'; lines of accountability were structured so that they would take the rap if top management broke the law. After a period of faithful service as the Vice President Responsible for Going to Jail they were promoted sideways to a safe vice presidency.³⁷ Experience with restorative justice in corporate regulation, such as with enforceable undertakings at the Australian Competition and Consumer Commission of the 1990s,³⁸ shows that a regulator

³⁵ I am indebted to conversations with Daniel Shaviro of New York University and Ernst Willheim of ANU for this thought.

³⁶ B Fisse and J Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993).

³⁷ J Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (London, Routledge, 1984).

³⁸ For a discussion of this program as it operated in the 1990s see C Parker, 'Restorative Justice in Business Regulation? The Australian Competition and Consumer Commission's Use of Enforceable Undertakings' (2004) 67 *Modern Law Review*, 209.

can initiate a large number of restorative justice conferences to repair the harm of many different offences at a lower cost than a single criminal or civil case in the courts.

The key move of restorative justice in response to the scapegoating challenge is to displace proportionate punishment as a cardinal virtue with a more plural lens for seeing the multidimensionality of justice. This allows for the possibility of 'emotionally intelligent justice'³⁹ based on high profile rituals of apology and leadership toward 'justice as a better future'.⁴⁰ It allows for corporations to requite their criminality by taking compliance up through a new ceiling for their industry, combined with formal undertakings to measure the performance of competitors to evaluate whether they follow the reformed bank up through that ethical ceiling.⁴¹ It allows for organizational renewal by replacing culpable leaders with more ethical ones as a just remedy, combined with cultural retaining for middle and lower-level people. It allows for victim compensation, for environmental clean-up, for consumer education initiatives toward the prevention of future victimization. It allows for a program of corporate cultural transformation. Indeed it allows for, but of course cannot guarantee, whatever it is that stakeholders in an injustice say would allow them to believe that just repair has occurred. Of course there must be upper limits placed on unjust excess in demands, but under those limits, restorative justice does not pre-judge what proportional justice means. That is something for stakeholders to settle in a conversational contest of what justice should mean.

Of course formal law also allows these things. Indeed we saw in Chapter 9 (O'Brien)⁴² that deferred prosecution agreements (also discussed in Ferguson's chapter)⁴³ can create a space for a more restorative form of justice that allows many of them. Generally they have not done so in the past, with only 79 of the 258 negotiated prosecutions in the University of Virginia database cited by O'Brien involving an external monitor.⁴⁴ Even when there are external monitors, they can approach their task as a purely technocratic one of compliance system reform rather than as catalysing culture change. O'Brien finds culture change to be a hopeful prospect in monitor cases like HSBC. Monitors can emulate the light John J. McCloy put on the hill as an external monitor of the Gulf Oil Corporation in the 1970s.⁴⁵ McCloy challenged, cajoled, coaxed and caressed the ethical core of Gulf. He engaged with their corporate culture and invited external audiences to join in a conversation with that corporate culture to transform it.

The idea of deferred prosecutions is an evidence-based one. Criminological data on common crime shows that prosecution is more greatly feared before it happens, but once felons have been prosecuted they mostly conclude it is not the end of the world; thenceforth the prospect of future prosecution no longer holds an imponderable fear in their imaginations. Interestingly, in the randomized controlled trials of restorative justice in Canberra, a restorative justice conference increased the fear of a future prosecution, sharpening the

Sword of Damocles.⁴⁶ There is also strong evidence from the United States that when a full-time resident inspector is located at a coal mine with a corner-cutting safety culture, the best of these resident inspectors work with unions and local communities to challenge that safety culture in a way not dissimilar to the corporate cultural work of McCloy at Gulf. Mines selected for having an unusually high risk profile in the US were put into the resident inspector program; these mines finished with accident and fatality rates that were well below the national average.⁴⁷ For the same reason that restorative justice is an evidence-based idea for improving regulatory outcomes,⁴⁸ the reform we have seen in South Korea, Australia and beyond since the Asian Financial Crisis of tax authorities like the Australian Taxation Office and securities regulators like ASIC basing a resident supervisor in the corporate headquarters of many firms is also a good idea. In practice, however, these 'key client managers' routinely succumb to a client service mentality and eschew the challenge of being the irritant to the corporate culture that McCloy was at Gulf. Or worse, they can become merely a post-box from regulatory HQ, delivering advice on new rules and policies.

One check on this risk of capture can be bounty programs for whistleblowers, a prospect that Justin O'Brien also signals.⁴⁹ Empowered whistleblowers pose the danger to a resident financial supervisor who is overly comfortable with an abusive corporate culture, the danger of revealing something the supervisor failed to expose. More variegated checks and balances as a way of thinking about the separation of powers is the key idea here, where separated private powers can be just as useful as separated public powers.⁵⁰ There are many ways of doing this. For example, there is a current strategic policy conversation in Canberra about experimenting with private contracting of tax audit combined with contracting to a different firm measurement of the effectiveness of different private auditors and their outcomes compared with those achieved by state auditors. One advantage of such a privatization could be that it would provide a more independent check on ATO key client managers who were slothful or captured. Yet another option is a corporate policy, perhaps mandated by law, that any individual who observes a breach of any corporate ethics policy must not only report it to their supervisor. If they do not receive a written report back from their supervisor that either concludes that no breach occurred or indicates what has been done to fix it, the employee is then in breach of the ethics policy if she does not report both the original alleged breach and the failure to hear back on its resolution to the Board Audit Committee.⁵¹ Given that Board Audit Committees in most countries mandate outsiders whose job it is to challenge the ethics of the corporate culture, a policy that forces a free route to the top prevents middle managers protecting top management from the taint of knowledge of illegality.

³⁹ L. Sherman 'Reason for Emotion: Reinventing Justice with Theories, Innovations and Research' (2002) 41 *The American Society of Criminology*.

⁴⁰ Froestad and Chearing, above n14.

⁴¹ This was one of the things Solomons Carpets did in one of the Australian consumer protection cases; see Parker above n38.

⁴² J O'Brien 'The Sword of Damocles: Deferred Prosecution and the Search for Accountability', this volume

⁴³ Ferguson, above n16.

⁴⁴ B Garrett and J Ashley, *Federal Organizational Prosecution Agreements*, University of Virginia School of Law, at lib.law.virginia.edu/Garrett/prosecution_agreements/home.suphp.

⁴⁵ J McCloy, *The Great Oil Spill* (New York, Chelsea House, 1976).

⁴⁶ For a discussion of this aspect of the Canberra Restorative Justice experiments led by Lawrence Sherman and Heather Strang and for a wider discussion of the criminological literature on the Sword of Damocles, see J Braithwaite, *Restorative Justice and Responsive Regulation*, (Oxford, Oxford University Press, 2002) 117–122.

⁴⁷ J Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (Albany, State University of New York Press, 1985) 82–83.

⁴⁸ J Latimer, C Dowden and D Muise, *The Effectiveness of Restorative Justice Practices: A Meta-Analysis* (Ottawa: Department of Justice, Canada, 2001); Braithwaite above n46; L. Sherman and H. Strang, *Restorative Justice, The Evidence* (The Smith Institute, 2007).

⁴⁹ O'Brien above n42.

⁵⁰ J Braithwaite 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republican Separation of Powers' (1997) 47 *University of Toronto Law Journal* 305.

⁵¹ The Exxon corporation had and probably still have a policy to this effect. Interviews with the Controller, General Counsel and Auditor-General of Exxon Corporation, New York.

What formal western law lacks when it applies techniques such as deferred prosecution is a philosophy of why allowing justice as repair and redemption should be the mainline response even when doing so involves a breach of the principle of proportional punishment. A restorative justice philosophy allows us to accept that if a victim wishes to forgive in return for some other dimension of justice beyond proportional sanctioning, after discussing the option with other stakeholders, this can be just. Again, there is nothing new or radical in this approach. Islamic law and most forms of indigenous law across the world allow victims to forgive even murder after a ritual of healing and exchange of gifts if that is the justice their family wants. It is western criminal law jurisprudence that sees forgiveness as selling justice short. Western legal traditionalists obsessed with proportionality of punishment must now confront the recent criminological evidence that forgiveness can greatly reduce the suffering of victims,⁵² can reduce crime and violence,⁵³ including financial crime.⁵⁴

We need the greater frequency of formal criminal enforcement of financial crime that would be allowed by reforms 1 and 2. Restorative deliberation might also be considered because it is quicker and cheaper, being based on consensual deliberation among the stakeholders in a breach of law or ethics. This also means it can be deployed on a wide front compared with costly litigation, and for early intervention, as soon as any stakeholder asserts a credible challenge to the ethics of a corporate culture. Because it is cheaper, preventative and open to non-zero-sum solutions that leave both the corporation and its victims better off, restorative justice can improve the performance of an economy. We need a restorative justice that creates more participatory (and reconciliatory) spaces where many players of the banking game can engage in ethical deliberation about something that allegedly went wrong and how stakeholders can be actively responsible for a future that prevents recurrence. This contrasts with the western legal tradition's approach of holding wrongdoers passively responsible for the past, as traversed elegantly in Dixon's discussion of the alternatives of reactive fault, preventive fault and corporate ethos in Chapter 13.⁵⁵

⁵² C Coyle and R Enright, 'Forgiveness Intervention with Post-Abortion Men' (1997) 65 *Journal of Consulting and Clinical Psychology* 1042; S Freedman and R Enright, 'Forgiveness as an Intervention Goal with Incest Survivors' (1996) 64 *Journal of Consulting and Clinical Psychology* 983; M McCullough, E Worthington and K Rachal, 'Interpersonal Forgiving in Close Relationships' (1997) 19 *Journal of Personality and Social Psychology*, 43; C Witvliet, T Ludwig and K Vander Laan, 'Granting Forgiveness or Harboring Grudges: Implications for Emotion, Physiology and Health' (2001) 12 *Psychological Science* 117; E Worthington and M Scherer, 'Forgiveness is an Emotion-Focused Coping Strategy that can Reduce Health Risks and Promote Health Resilience: Theory, Review, and Hypotheses' (2004) 19 *Psychology and Health*, 385; H Wallace, J Exline and R Baumeister, 'Interpersonal Consequences of Forgiveness: Does Forgiveness Deter or Encourage Repeat Offences?' (2008) 44 *Journal of Experimental Social Psychology* 453; C Struthers, J Eaton, N Shirvani, M Georgiou and E Edell, 'The Effect of Preemptive Forgiveness and a Transgressor's Responsibility on Shame, Motivation to Reconcile and Repentance' (2008) 30 *Basic and Applied Social Psychology* 130; BR Kelln and JH Ellard, 'An Equity Theory Analysis of the Impact of Forgiveness and Retribution on transgressor Compliance' (1999) 25 *Personality and Social Psychology Bulletin* 864.

⁵³ E Ahmed and J Braithwaite 'Forgiveness, Shaming, Shame and Bullying' (2013) 38 *Australian and New Zealand Journal of Criminology* 298; E Ahmed and V Braithwaite, 'Forgiveness, Reconciliation and Shame: Three Key Variables in Reducing School Bullying' (2006) 62 *Journal of Social Issues* 347.

⁵⁴ K Murphy and I Helmer 'Testing the Importance of Forgiveness for Reducing Repeat Offending' (2013) 46 *Australian and New Zealand Journal of Criminology* 142.

⁵⁵ O Dixon, 'Corporate Criminal Liability: The Influence of Corporate Culture' in this volume also discusses helpfully both the potential for catalyzing ethical deliberation and the legal limits of the guidance for preparation of a compliance plan set out in Australian Standard 3806–2006 (AS 3806) under four broad sets of principles: commitment; implementation; monitoring and measuring; and continual improvement.

Courtroom deliberation and backroom deals with prosecutors in contrast are thin on participatory ethical conversation and settle for passive responsibility for past wrongs. Michael Legg's chapter suggests that this is also true of the frequent failure of class actions to catalyse culture change.⁵⁶ Critical conversations with outsiders are important because, as David Westbrook points out,⁵⁷ people and organizations who chase money are not always good at knowing thyself: 'the financial world is necessarily somewhat blind to itself.' From the perspective of a restorative justice philosophy, this is the problem with the way deferred prosecution agreements and Corporate Integrity Agreements in the US have been negotiated in practice as backroom deals. The negotiation of enforceable undertakings in Australia has been more restorative at times, but far from consistently so.⁵⁸

Restorative justice can help overcome formal law's scapegoating of those incompetent enough to leave themselves vulnerable to conviction beyond reasonable doubt. Scapegoating happens in corporate criminal law because senior individuals who share culpability for the crime are granted immunity in return for testimony against the selected scapegoat. When the defendant attempts to accuse them of the greater culpability, the court reminds her that it is she who is on trial. No such discipline applies in the restorative justice circle of course, in which those who turn against a scapegoat can find their culpability greatly exposed.⁵⁹ This book also shows that with a bank which is too big to fail it is important to protect a criminal corporation from a conviction that will disqualify it from a banking licence.⁶⁰ So the criminal corporation will agree to a civil penalty in return for testimony from it that turns on the criminalized individual scapegoat (while whitewashing its corporate culture in collusion with the prosecutor). So the restorative justice philosopher argues that corporate criminal law willfully creates a fiction of proportionality in a legal ritual designed to comfort the citizenry that the rule of law is not always asleep at the wheel of the justice machine.

Consider the bank, law firm or accounting firm that has made a corporate cultural contribution to financial crime and seeks to finger a fall guy to throw to baying media. The restorative justice philosopher has an interesting response. It is to praise the bank or the gatekeeping firm for its diligence in turning over the rocks to reveal culpability within its organization. The regulator invites the 'rogue partner' of the law firm who is about to be thrown to the media to a restorative justice circle with all the partners in attendance. The 'rogue partner' is encouraged to bring along supporters that would usually include their family, friends from the office and older mentors who are now retired. The latter can be robust participants in a conversation in which it is argued that the ethics of the firm have changed, that this 'rogue partner' is a scapegoat who was actually enacting the corporate culture of the firm in a way he and his supervisors have done in prior cases. Such testimony is not ruled out of order under the holistic justice norms of restorative justice.⁶¹

A restorative justice approach is therefore useful for jump starting ethical deliberation among professional stakeholders, such as lawyers, accountants and compliance professionals, who mostly have lower levels of culpability than the principals who stuff the cash in

⁵⁶ M Legg 'Class Actions and Regulating Culture in Financial Organisations: Observations from a Comparison of US and Australian Bank Class Actions', this volume.

⁵⁷ D Westbrook 'The Culture of Financial Institutions: The Influence of Political Economy' in this volume.

⁵⁸ Parker above n38.

⁵⁹ For a case study of this happening and a discussion of this issue, see Braithwaite above n46, 47–49.

⁶⁰ See O'Brien above n42.

⁶¹ Braithwaite above n46, Chapter 8.

their pockets. More commonly, their failing is what Steve Mark and Tahlia Gordon call 'ethical blindness'.⁶² Formal law tends to let the lawyers off, almost always. As Seumus Miller's chapter argues,⁶³ gatekeepers have preventive leverage. Sadly though, the potential of that gatekeeping leverage is frequently missing in the most devastating cases of financial malfeasance. Even so, the situation would be even worse if gatekeepers did not exist. As we have seen, competition between professions in the advice markets of booms can become an ethical race to the bottom.⁶⁴ A more participatory, deliberative form of professional regulation over the long haul is illustrated by the beginning New South Wales has made to driving down ethics complaints against lawyers with conversational management-based regulation mediated by 'legal practitioner directors' and self-assessment that seeks to catalyse culture change, as discussed in the chapter by Mark and Gordon.⁶⁵

5. Privatised enforcement as a check on corrupted and captured regulatory states.

This book argues that the most fatal flaw of any approach akin to points 1–4 above is that they fail to solve the problem that the regulatory state can be as corrupted and as afflicted with diagnosed pathologies as banks themselves. Seumus Miller's chapter characterises this as 'who guards the guardians'.⁶⁶ Because public enforcement is regularly captured by the ethics and the hegemony of finance capitalism, a radical privatization of enforcement is one possible check on public enforcement. This is an example of a more general approach to the dilemma of what to do when public guardians are ordered in a hierarchy and each new guardian we appoint to guard guardians below is itself corrupted. A solution is to abandon arraying guardians in a hierarchy. Instead, we can array guardians in a circle where every guardian is accountable to every other guardian (as much as possible). Then the guardianship fish is not vulnerable to rotting from the head down. The guardianship of one rotten guardian can be cross-checked by the lateral guardianship of many other guardians who are all guarding one another. This is part of the idea of guardianship in a restorative justice circle. It can make a police officer vulnerable to the guardianship of a mother in the circle who accosts the police about excessive force in the arrest of her son. If she speaks up in an attempt to do this in a courtroom, she will be silenced. This is because it is the job of someone else in the police and Ombudsman hierarchy to hold the police to account for heavy-handedness.

After Rudolf Giuliani's prosecutions on Wall Street quarter of a century ago, there was reason to be hopeful that public prosecution was on an upward trajectory of enforcement against the powerful. Some of Giuliani's techniques were crude but effective. His team would come across evidence of the crime of some comparatively minor malefactor within a target corporation. They would sit him down, say gotcha, promise immunity if he can provide testimony against a bigger fish; then that bigger fish still would turn on an even bigger fish who would be turned against a bigger fish still. This approach led Giuliani's team up to Donald Levine and Michael Milkin. We glimpse a remarkable failure to follow this approach in the documentary feature film *Inside Story*. The madam of a Wall Street brothel disclosed that she had credit cards from major Wall Street firms on which she was authorised to record prostitution services as 'payments to compliance consultants'.⁶⁷ Then

she reveals that no law enforcement authorities had asked to examine these credit card records. If US law enforcement were serious about putting Wall Street Criminals behind bars it would have used the Giuliani strategy. A comparatively minor credit card fraud of this kind is ideal for sitting someone down to say you will be going to jail for the fraud and you will suffer the shame of your family knowing your lurid motivation for the fraud unless you give me the evidence of more major fraud against a bigger fish in your organization. Then hopefully moving up from that fish to something genuinely major.

Why would prosecutors in 2008 fail to follow the same simple approach that worked so well after 1987? Perhaps they feared criticism for pursuing a minor case in a brothel when there were so many massive frauds. Perhaps they felt the Giuliani approach was crude and speculative about whether there would be a return, that a more synoptic approach that diagnosed who the big fish were would work. Perhaps they were simply less aggressive than Giuliani. After some public backlash against President Reagan's deregulatory politics there was a niche for a Republican presidential hopeful like Giuliani to get tough on Wall Street.

Whatever the reason for prosecutorial timidity in this case, we can agree that prosecutorial aggression is consistently missing around the globe when it comes to targeting the big end of town. The most simple general reason is that it does not look good for prosecutors to lose a lot and if they run cases targeting the big end of town they can lose big and often. The main reason that defendants get off in major corporate crime cases is that the defence has better access to inside information than the prosecution.⁶⁷ The False Claims Act 1986 became the reform that has been most effectively used by prosecutors to win major corporate fraud cases because it draws out whistleblowers with the inducement of large payouts if they take a fraud case to a False Claims Act law firm and persuade them to underwrite private enforcement action to get a share of the whistleblower payout. Hence, it was a reform that simultaneously dissolved the two biggest obstacles—access to insider knowledge of crime and public prosecutor timidity that was resolved by private prosecutors stepping in where public prosecutors feared to tread.

It is not the purpose of this paper to retrace the pros and cons, the best ways to design this privatization of law enforcement to protect rights and prevent vexatious litigation.⁶⁸ Suffice it to say that the genius of the dual plaintiff design of the False Claims Act reforms is that law firms mostly walk away from their client if the Justice Department declines to take over their case; they almost always do so if Justice delivers a credible retort to the law firm that theirs is a vexatious litigant and that Justice intends to go before the judge to argue that the reason the it declined to join this case was the belief that the case was vexatious. The False Claims Act reforms of 1986 were limited to fraud against the government, excluding tax fraud.

The extension of its bounty concept to crimes of finance, first in tax fraud and more recently for certain securities offences, has unfortunately been much more timid than the original, jettisoning the key ingredient of the dual plaintiff design. The IRS and SEC successfully lobbied the Obama administration to forbid private prosecutions for tax and securities fraud bounties in cases where the state chose not to take on the prosecution. In this, the IRS and SEC and their political masters showed that their prime interest was in avoiding egg

⁶² S Mark and T Gordon, 'Regulating the Legal Profession: A Prototype for Change', this volume.

⁶³ Miller above n4.

⁶⁴ Braithwaite above n21.

⁶⁵ Mark and Gordon above n62.

⁶⁶ Miller above n4.

⁶⁷ P Bucy, 'Private Justice' (2002) 76 *Southern California Law Review* 1; P Bucy, 'Information as a Commodity in the Regulatory World' (2002) 39 *Houston Law Review* 905; P Bucy, 'Games and Stories: Game Theory and the Civil False Claims Act' (2004) 31 *Florida State University Law Review* 603; P Bucy, 'Game Theory and the Civil False Claims Act: Iterated Games and Close-Knit Groups' (2004) 35 *Loyola University of Chicago Law Journal* 1021.

⁶⁸ See Bucy's papers *ibid* for a rich treatment of these issues.

on their faces from rebuffing a corporate crime case that a private prosecutor then proved. They were less interested in increasing enforcement effectiveness against financial crime.

As a general proposition, the best way to fight the capture and corruption of public prosecutors and regulators is with hybrid public-private enforcement where the private regulator is a check on the capture or corruption of the public regulator.⁶⁹ One reason for regulators like the SEC and IRS to resist the dual plaintiff False Claims Act design is that they lack the litigation budget for all these cases. They also worry about privatized litigation causing systemic risk in an attack on a key bank, though they can manage this by taking over the litigation. These problems are best managed by offering restorative justice to most securities offenders who beat the whistleblower to confess to the SEC. Indeed, this policy would motivate an avalanche of confession from firms willing to foil their whistleblower by contritely confronting the deficits of their compliance culture with the SEC.⁷⁰

6. Responsive regulation implies growing investment in regulation.

Should we conclude that because regulatory bureaucracies, enforcement staffs, and cases investigated have grown, increased investment in regulatory infrastructure is irrelevant to solving financial problems? Regulators and their powers have not grown in proportion to growth in the number of bank transactions, to the variety of financial instruments and organizational forms and to the sophistication of the financial engineering. Regulatory growth and innovation must be responsive to business growth and innovation. In eras when financial engineering becomes more complex, growth in derivatives accelerates, regulators cannot begin to understand what is happening without investing in more and better people, better management, better information technology.

This is not to say that investing more in regulation will work if the wrong kind of investment is made, for example an investment that is purely technocratic and oblivious to culture and ethical renewal. It is to say that it is difficult to regulate an industry that is bigger, more complex and cleverer at contriving complexity without a regulator that is bigger and cleverer. This is a necessary but not a sufficient condition for crisis prevention.

III CONCLUSION

David Campbell and Joan Loughrey⁷¹ argue that we should not be so radical in what we ask of business as to aim for markets that are not driven by enlightened self-interest. One of Campbell and Loughrey's lessons from Adam Smith is that the interest in making profits is a great driver of invention and efficiency. Therefore this is a driver we should want to strengthen rather than weaken. It is also something we should want to steer, for example, to compliance with the Financial Stability Board's Principles and Standards on Sound Compensation so that bonuses are deferred for three years and coupled with clawback provisions to steer self-interest to long-term profitability, as discussed in Ferguson's chapter.⁷² Adam Smith was also

wise, Campbell and Loughrey conclude, about moral sentiments as things we should want to strengthen. This chapter has argued for stronger regulatory institutions that form stronger moral sentiments, which are more imperative when markets become stronger. We can be better off when the creativity and energy of markets is harnessed to solve a wider range of problems. Markets in technologies of carbon emission reduction are a good example. But if some things in life are ethically good and others ethically bad, however good and bad are defined, greater vibrancy of markets will engender both the more efficient and innovative production of goods and the more efficient and innovative production of bads.⁷³ So the progressively more vibrant market economy leaders want demands stronger regulation. At least it does if we wish to reap the benefits of markets in virtue while curbing the excesses of markets in vice.

This book helps us to see in a more complex way how to do this. It does not necessarily mean proportionate growth in the number of rules and the severity and frequency of punishment for regulatory infractions. It can mean regulators who are cleverer at harnessing and nurturing the moral sentiments in corporate cultures, regulators who dispense more emotionally intelligent justice, regulators who engender rich business engagement over the moral and legal principles that should animate financial law.

The additional take in this concluding chapter is that smart regulation⁷⁴ will:

- (a) constantly grow in a way that is responsive to flux in business realities; continually writing new rules when old ones become obsolete or are gamed;
- (b) responsively refine principles that justify those rules, cover their gaps and contradictions;
- (c) continuously create new spaces where ethical conversation around those principles can be engaged through means like deferred prosecutions that lead to external monitors, resident inspectors, privatized auditors, who are assessed according to how meaningfully they challenge unethical corporate cultures and engage outside audiences with that contestation;
- (d) deliver variegated forms of justice that are meaningful to victims of financial exploitation through restorative justice in circumstances where punishment proportionate to the harm is impossible;
- (e) displace passive with active responsibility⁷⁵ and thereby constitute cultures of ethical commitment where the combination of ethical contestation of principles and restorative dialogue among business, gatekeepers and citizens can be made to work;
- (f) contest capture of regulators by third parties in civil society, the professions and government, including privatized law enforcers.

All these options are richly opened up in this book as checks that might be layered to deliver greater redundancy to the pursuit of the good and the checking of the bad in corporate cultures. Most fundamentally, we need a democracy with more robust and relevant contestation of what is good and bad about corporate cultures.⁷⁶

⁶⁹ See I Ayres and J Braithwaite, *Responsive Regulation: Transcending the De-regulation Debate* (New York, Oxford, 1992) Chapters 3 and Conclusion.

⁷⁰ See the discussion of this issue in J Braithwaite, *Regulatory Capitalism: How it Works, Ideas for Making it Work Better* (Cheltenham, Edward Elgar, 2008) Chapter 3.

⁷¹ Campbell and Loughrey above n20.

⁷² Ferguson above n16.

⁷³ This is the argument first laid out in the introduction and then more deeply explored in the rest of the book, J. Braithwaite, above n21. As Gilligan's chapter above n1 also implies, regulatory competition can also be either competition in regulatory goods or in regulatory bads.

⁷⁴ A term adopted from Gunningham and Grabosky's book of that name because I hope the ambition here complements the ambition of that book, see N Gunningham and P Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford Clarendon Press, 1998).

⁷⁵ Braithwaite above n46, 129-130, 132-134.

⁷⁶ See the development of the republican ideal of a contestatory democracy that maximizes freedom as non-domination in P Pettit, *Republicanism* (Oxford, Oxford University Press, 1997).