

CHAPTER 7

REGULATION

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1 WHAT IS REGULATION?

FOR some, regulation is about rules. Regulation can mean more than just the enforcement of legal rules. It is normally taken to include the enforcement of informal rules that are not state laws as well as formal rules promulgated by supranational bodies such as the World Trade Organization or the European Union, and subnational bodies such as professional associations. On its broadest reading, regulation means even more than that. Much regulation is accomplished without recourse to rules of any kind. It is secured by organizing economic incentives to steer business behaviour, by moral suasion, by shaming, and even by architecture. On this broadest view, regulation means influencing the flow of events. Conceived in this broad way, regulation means much the same thing as governance or Foucauldian governmentality (as opposed to government, which is more narrowly something state organizations do). Indeed, the distinction between governance and regulation is narrowing as governments shed their responsibilities for service provision and shift more of their energies to regulating the service provision of other types of actors (a development we call the 'new regulatory state').

The study of governance in political science is informed by a progressively narrowing focus, like a set of Russian dolls, from 'intergovernmental networks' studies, to 'whole of government' studies, to national government studies that exclude local and state government, to studies of legislatures that exclude courts and executives,

to studies of cabinets, and so on. Julia Black (2001) has argued that for different intellectual purposes there is merit in conceptualizing regulation in different ways—excluding or including regulation by non-government actors, including only administrative action by specific kinds of ‘regulatory agencies’, excluding or including governance without rules, and so on. Our hope for regulatory studies is that the whole set of Russian dolls will inform big-picture theories of regulation conceived in the broadest way. Moreover, this regulatory theory might become a significant influence on other theoretical frameworks that are broader still in some ways (though narrower in others)—regulatory influences on the theory of governance, economic theory, and psychological theory, for example.

The plan of the chapter is first to lay out a short history of regulation conceived in this broad way. We then consider whether ours is a society that regulates more because it has become a ‘risk society’. Next we will use Gunther Teubner’s model of the ‘regulatory trilemma’ and a consideration of the key regulatory mechanisms to review the literature on the finer grain of how regulation works. Finally we return to pluralization of regulation as a crucial dynamic in creating spaces where ‘democratic experimentalism’ is emerging as a possibility.

2 A SHORT HISTORY OF REGULATION

Regulation is an older activity than states and law. The regulation of incest was fundamental to the survival of our genes. As soon as money was invented, there emerged a need for macroeconomic regulation of some sort, for example in Babylon from at least a millennium before the Code of Hammurabi. But regulation by taxes (paid in goods and services) is probably older than money; the 5,300-year-old Egyptian fragments of clay and ivory that recently challenged the view that writing was invented by the Sumerians were actually receipts for tax payments. The next major development was formal law. Its most important moment was Justinian’s codification of Roman law which has a surviving influence on all the world’s formal legal systems. While the latter are what lawyers primarily study, regulatory researchers primarily study the next fundamental development in the history of regulation—the emergence of specialized administrative agencies to enforce particular kinds of standards.

Tax administrations aside, nearly all of the important regulatory agencies emerged in the nineteenth and twentieth centuries. An important moment was Peel’s creation of the Metropolitan Police in London in 1829 and the even more internationally influential model of the colonial police in Dublin in a process that ends with every significant city in the world having such a specialized, paramilitary crime-fighting agency. Police until the eighteenth and early nineteenth centuries in Europe continued

to mean institutions for the creation of an orderly environment, especially for trade and commerce. In other words, until 1829 police meant regulation. Police certainly included enforcement of rules related to theft and violence, but also of standards for weights and measures. It also included other forms of consumer protection, liquor licensing, health and safety regulation, building, road and traffic regulation, and early forms of environmental regulation. The institution was rather privatized, subject to considerable local control, heavily oriented to self-regulation and infrequent (if sometimes draconian) in its recourse to punishment.

The crime-fighting police came to rival and even surpass tax administrations as the largest regulatory bureaucracies. It was not many decades after the first police forces were established that other new regulatory agencies began to specialize in forms of enforcement that had once counted among general police responsibilities. In the mid-nineteenth century the first inspectorates of factories, food, shipping, mines, and weights and measures emerged. Other types of regulatory agencies came much later. There was very little environmental legislation until the end of the nineteenth century and most of the environmental agencies of industrialized nations were established in the late 1960s and early 1970s. Still more specialized nuclear inspectorates emerged only after the splitting of the atom. The earliest of the antitrust agencies were established in North America after the first state and federal antitrust laws in the 1890s and now most of the world's nations have them. Yet most of these agencies were established in the 1990s. By the 1980s in a nation such as Australia, there were eight police forces and more than a hundred specialized business regulatory agencies, some of them with thousands of officers.

Of course, all nation states and all localities within nation states have distinctive histories of regulation. The comparative literature is limited to comparisons of a small number of states, so it does not help us to understand the differences between Chinese and Russian regulation. The most researched comparison is between the United States and the United Kingdom. On the one hand, Atiyah and Summers (1987) probably correctly claim that American law is more substantive, British law more formal. Paradoxically, we also know, however, that American rule-making is much more procedurally formalized and that American regulatory enforcement across a range of regulatory domains from nursing homes to environmental enforcement is more formal, rule-bound, and less discretionary than British regulation (e.g. Vogel, 1986). It is likely that it is the United States and not the United Kingdom that is exceptionalist in these respects. Japan is one example of a society much less litigious than the UK that relies on an even less rule-bound form of administrative guidance to achieve regulatory outcomes. Robert Kagan and his co-authors are probably on the right track in identifying US adversarial legalism as distinctive (Kagan, 1991). It is possible that the exceptional distrust Americans have of executive government in the regulation of domestic affairs explains both why regulators are given less discretion to solve problems as they see fit and why courts have felt encouraged to make substantive law that thwarts the decisions of executive governments.

3 RISK SOCIETY OR NEW REGULATORY STATE?

One view of the rise of the regulatory state is that it is a response to new fears and tensions about our relationship to science and technology. This is the risk society thesis most popularized in the academy through the writing of Ulrich Beck and Anthony Giddens (see Garland, 2002). Nuclear energy is the paradigm case. Like genetically modified organisms or Internet transmission of computer viruses, nuclear energy is a completely new twentieth-century technology that has created unprecedented risks and fears, redefined the way we invest in our security, and necessitated the creation of new national and transnational regulatory agencies. Nuclear risks are different from the major risks of previous centuries in that they are the technological creations of human beings and are potentially more catastrophic and mysterious than natural risks. Nevertheless, we do not live in a risk society in the sense of risks being in aggregate greater. On average, people live longer than they ever did.

As David Garland (2002) has pointed out, we are a risk society in the sense that we invest much more in risk management than we once did, and we are better at it. Nuclear risks are a case in point. Nuclear power plant scrams (automatic emergency shutdowns) per unit declined in the United States from over seven per unit in 1980, to one by 1993, to 0.1 by 1997. Rees (1994; see discussion below) has shown how early nuclear safety regulation was less effective because it was oriented to strict rule enforcement. Operators became rule-following automatons who lacked systemic wisdom of the safety systems they were managing. It was a shift to more 'communitarian', less command and control regulation that produced dramatic improvements in safety.

It is true then that much growth in regulatory surveillance is about risk management, yet that escalating intrusiveness from command and control regulation is not necessarily how this is accomplished (Vogel, 1986). Increasingly, contemporary regulation is meta-risk management, risk management of risk management systems (Gunningham and Grabosky, 1998; Parker, 2002). So prudential regulation of banks used to work by mandating how much gold had to be in their vaults. In time these became more complex capital adequacy ratios. But the Asian financial crisis of 1997 taught us that financial risks in a world of derivatives trading are rather more volatile and complex than they used to be. Capital adequacy rules cannot adjust fast enough or be sufficiently contextually attuned to specific markets to do the job. With great difficulty, prudential regulators today are attempting to reorient their work to regulating the risk management systems of major international trading banks. If a particular bank is seen as unusually exposed to the yen, the regulator might say 'Run your risk management software and prove to me that you remain solvent if there is a 40 per cent fall in the value of the yen at midnight'.

While it is correct to say that fundamental to what central banks do is managing the risks of a financial crisis, that is not their only objective. They regulate the macroeconomy not only to avert risks but also to promote growth. Environmental regulators not only seek to prevent pollution catastrophes. They also seek to promote growth in the number of fish in the rivers, whales in the sea, trees that are planted. Labour market regulators seek to manage not only discrimination against women, the disabled, or ethnic minorities. They also tend to seek to affirmatively expand opportunities for such groups. Food standards regulate not only food poisoning but the nutritional properties and freshness of food as well. Indeed, very often the same regulatory technologies that are used to monitor and manage risk are used to monitor and promote quality-of-life improvements. This is also why it can be a poor analytic judgement to marry the concept of regulation too closely to rules. Rules are mostly used to specify a minimum standard below which certain risks are unacceptable; but regulatory monitoring and management is often oriented to continuous improvement. This is often best achieved by enticing the best performing firms to extend themselves further, to invent new self-regulatory technologies that will pull most of their competitors along with them. Regulation can break through ceilings in ways that pull everyone above risk-management floors.

More fundamentally than becoming a risk society, or even a risk-management society (as Garland (2002) might have it), ours is becoming a regulatory society in ways it once was not. While concern to manage risk is an important part of this, so is learning to improve through monitoring and exhortation. Some readers will think this an odd claim. What about deregulation? What about the Thatcher and Reagan revolutions? One answer is to say that some important deregulatory shifts did occur from the late 1970s in Western democracies, but that these pale in significance compared to the regulatory growth that occurred under the New Deal in the United States, and everywhere in the 1960s and early 1970s. Moreover, it is not empirically correct to say that the pages of regulatory laws or even the numbers of business regulatory bureaucrats actually decreased under Reagan or Thatcher (e.g. Tramontozzi and Chilton (1989)). For instance, numbers of police went through the roof, with the number of private police (private security guards) growing even more in recent decades than the number of public police (see Shearing *et al.*, forthcoming).

What did change from the late 1970s onwards was that governments provided less in the way of goods and services. The watchword of the Clinton administration in the United States became that government should be reinvented to do less rowing and more steering. The British in the 1990s called this the 'new public management'. Indeed, this is what even the Reagan and Thatcher governments had been doing in the 1980s. Mrs Thatcher would privatize something such as telecommunications and then create a new regulator—the Office of Telecommunications (OfTel) in this case. Even the supply of water was partially marketized, and regulated by the Office of Water Supply (Ofwat). In Australia when the Keating Labor government moved privatization into the heartland of the Keynesian welfare state by privatizing the

Commonwealth Employment Service's job placement service for the unemployed, it had to create an Employment Service Regulatory Authority. When John Howard's new conservative government decided it could continue the privatization without the new regulatory agency it soon found itself embroiled in fraud scandals involving private providers of job placement services. So in the last decades of the twentieth century, governments learned that privatization and deregulation did not actually go together in the way the Thatcherite ideological package contended. This was an ideological smokescreen for the reality of what was happening. Thatcher herself accompanied most of her privatization initiatives with considerable investment in enhanced steering capability in an attempt to ensure that the privatizations advanced her political objectives. A particularly bitter learning experience for libertarians in the 1990s was the way the inadequately regulated privatization of the Russian economy passed a huge portion of it, including much of the banking system, into the hands of the Russian mafia on the strength of bribes and patronage by exiting nomenclatura.

Michael Dorf and Charles Sabel (1998) describe changes in the nature of public sector governance as 'democratic experimentalism'. Democratic experimentalism is an emergent pragmatic form of management with its origins in the complexity and flux of the post-industrial private sector. Production systems of recent decades in developed economies have increasingly required decentralized, collaborative design of innovations. In these volatile conditions, one of the first things firms do as they explore how to improve their efficiency is to benchmark—survey current or promising products or processes that are superior to those they use. Benchmarking is designed to disrupt expectations of what is feasible by a comparison of actual and potential performance. Benchmarking is thus designed to spur exploration of new possibilities. Then independent production units, some collaborating with other firm insiders, others collaborating with organizations outside the firm, simultaneously engineer competing visions of crucial components of the project. This throws up quite a steering challenge to select which of the collaborating groups will become the producers of the final design and to integrate the different components. Dorf and Sabel see successful firms as accomplishing this through 'learning by monitoring'. Error-detection, error-correction, and continuous pragmatic adjustment of means to ends are features of these innovative production systems. There is a shift from Fordist control of a systematically specialized, broken-down production system to post-Fordist steering of more volatile systems that are partially contracted-out and partly contracted-in to shifting collaborative groups that compete for growth with outsiders and insiders. This competition is part of the error-detection system; work groups watch for flaws in the work of competing groups so they can show how their output can surpass the benchmarks set by these competitors. Excellence is grounded in collaboration, detection of poor performance in competition. Everyone is learning how to continuously improve by monitoring everyone else. Monitoring and steering (regulation) is therefore not only top-down. End-of-century production methods institutionalize more participatory and complex forms of self-regulation of production. Rules and routines shape agendas less than in the past. Of course, Fordist production

lines also persist; collaborative learning through monitoring expands alongside older systems of production.

Dorf and Sabel argue that these technologies of governance have begun to infiltrate the public sector in a major way. Contracting-out and continuous improvement supplant command-and-control, freeing up managers from public service rules. There are fewer rules but more monitoring of outcomes and competing collaborations across the whole of government to tackle problems from drug abuse to security against terrorism, where the best collaborations are supposed to attract more funds. Public sector-centred collaborations have more profound possibilities for enriching democracy because learning by monitoring does not only lead to contracting out to the market. It can also lead to extensive collaboration with NGOs in civil society. Learning by monitoring can also involve expanded collaboration between business and civil society and more participatory styles of private-civic governance.

By such processes, the public sector is transformed under the influence of management consultants, and as a result of political demands for partnership from business and NGOs, and the competitive pressures on governments to perform well in order to attract foreign investment and hold domestic capital. The upshot is a world where the private-public divide is increasingly blurred, where steering collaborations is everything, and controlling production by doing it yourself is less important. We see this even with the military and policing, the sphere of governmental activity that is supposed to define what a state is, namely an organization that has a monopoly over the means of violence in a particular territory. In Australia, when you visit military or Australian Federal Police headquarters, it is a private security firm that manages your entrance to the building. Most police in contemporary societies are private police and often they have impressive arsenals. Following the published ideas of one of its members, Clifford Shearing, the Patten Commission on policing in Northern Ireland recommended abolishing the police budget and replacing it with a policing budget that could be contested by local NGOs wanting funding to organize their own nightwatch of a housing estate, for example. For Shearing *et al.* (2003), governance has become and should become more 'nodal' and less statist.

When war breaks out in a serious way, the militaries of various states are likely to be installed by the UN to fracture the indigenous state's monopoly of violence precisely when it counts. Most of the large number of Australian soldiers serving overseas at the time of writing—from Afghanistan to Somalia to Sierra Leone—are not regulars but reservists, part-time soldiers whose main work commitment is in civilian life. Most of the troops on the other side of the barricades are also irregulars in the pay of warlords rather than state commanders-in-chief. And in some economies there are even the beginnings of a debate about cutting defence expenditure to increase international competitiveness, using the cuts to drive down the national debt, while increasing the will to greatly expand that debt in a time of crisis by large loans to hire mercenaries. The final element of that debate is about the need to regulate the professional standards of mercenary armies such as Sandline and Executive

Outcomes to assure compliance with the Geneva Conventions via contractual assurance of democratic accountability. In 2002 the British Home Office issued a Green Paper on the licencing of 'private military companies'; *The Economist* (16 Feb. 2002, 53) quipped that the regulator might be named Ofkill.

With regulatory functions of the post-Keynesian state, such as environmental protection, we see plural paradigms of 'smart regulation' (Gunningham and Grabosky, 1998) that involve energizing third party regulators of many different kinds—private insurance companies, environmental NGOs, non-governmental standard-setting agencies such as the British Standards Institution (the originator of ISO 14,000, the global environmental management system standard), industry association self-regulatory schemes such as the international chemical industry's Responsible Care, hybrid business-NGO international accreditation schemes such as the Forest Stewardship Council, trade unions, even skin-diving networks for monitoring historic shipwrecks! Parker's (2002) work in *The Open Corporation* argues that particularly strategic actors in such collaborative networks that steer environmental protection and other regulatory spaces are compliance professionals—environmental managers, occupational health and safety officers, equal employment opportunity officers, intellectual property managers. Part of their strategic importance is that they translate public regulatory discourses into business discourses (the 'business case for an environmental initiative') and vice versa.

Thus, in the new regulatory state, not only does the state do less rowing and more steering, it also does its steering in a way that is mindful of a lot of steering that is also being done by business organizations, NGOs, and others. In such a world, strategic planning by a single decision-maker (say cabinet) at the apex of a hierarchy of command is passé. Learning by monitoring and partially decentralized steering increasingly supplants command-and-control.

4 THE REGULATORY TRILEMMA

Michel Foucault's corpus of work on the different disciplines and neo-liberal governmentalities that regulate our lives, mostly unhinged from the direct will of any Leviathan ('regulation at a distance'), is a highly relevant theoretical frame for comprehending the kind of regulatory society we have been describing. However, regulatory scholars mostly prefer to rely on a combination of more conventional historical, quantitative, experimental, and ethnographic methods than Foucault's genealogical method of tracing a history of the present. We have seen that the historical work documents the global spread and growth of complex bodies of regulatory law and the rise of a large number of specialized regulatory institutions in the past two centuries.

Much of the earlier regulatory research analyses the genesis of particular regulatory policies, standards, and agencies in the political economy—the political, state-centred process of mediating between the demands of capitalism and interest groups' influence (Snider, 1991). Regulation was seen primarily as a law and state-centred process of legislative action combined with administrative enforcement (now often referred to as 'command-and-control'). The major focus was on the ability of the political process and agencies of the state to deliver appropriately democratic regulation, regulatory decisions that reflected the will of the people, not capture by interest groups.

In the new regulatory state, policy-makers and researchers have lost confidence in the ability of traditional regulation via 'command-and-control' to adequately govern conduct, especially business conduct. Contemporary regulatory research has, to a large extent, been concerned with charting the failures in impact and legitimacy of state-centred regulatory intervention in action. Teubner (1987: 21) pointed out that any regulatory intervention that attempts to change social institutions will face a 'regulatory trilemma'—it is 'either irrelevant or produces disintegrating effects on the social area of life or else disintegrating effects on regulatory law itself'. Much contemporary regulatory scholarship explores the horns of Teubner's trilemma—effectiveness, responsiveness, and coherence. To a large extent, the focus of the research has moved from the 'high' politics of legislative enactment to the 'low' politics of regulation in action—what regulators actually do, the monitoring and enforcement strategies they use, how regulatees respond to enforcement and how they negotiate and avoid the meaning of the rules.

4.1 Effectiveness

Regulation, including legal rules, may fail to shape social practices. Much of the research is concerned with the extent to which target populations comply with the law, why people comply, or fail to comply, and how regulators and the targets of regulation construct the meaning of compliance. Researchers investigate the impact of different styles of rules, legal instruments, monitoring and enforcement techniques on compliance, and attainment of regulatory objectives (see Baldwin *et al.*, 1998: 14–21). One strand of research is concerned with the impact of the cost of compliance on actual compliance levels. Another focuses on whether laws and regulations are put on the books to pacify public concerns, without being effectively enforced. This may occur through lack of availability of adequate resources, or lack of wisdom and leadership to monitor and enforce strategically. From regulatees who are unwilling from the start to act responsibly, legalistic command and control regulation invites evasion through loopholes and 'creative compliance' (McBarnet and Whelan, 1997). Overly technical rules can also increase non-compliance by encouraging

evasion and creative adaptation. As the technicality of rules increases so does the possibility for less scrupulous players to find loopholes.

4.2 Responsiveness

Government regulation may be so effective that it subverts and destroys otherwise desirable social practices. Regulatory research therefore looks at the responsiveness of legal regulatory institutions (both rule-making processes and enforcement) to the practices and norms of the targets of regulation, including issues of efficiency and practicality of compliance and the extent to which the values represented in regulation and the techniques used to monitor and enforce compliance with regulatory standards fit with pre-existing norms and social ordering in the target population. Much of the evidence shows that apparently effective legal regulation that is not responsive to non-legal normative orderings will ultimately fail to accomplish the goals of justice because of its failure to connect with social reality (see Selznick, 1992: 463). Cotterrell (1995: 304–5) describes at least five dimensions of the ‘moral distance’ between the normative expectations of ‘law-government’ and those of the field of social interaction it attempts to regulate—that regulation is too generalized, absolutist, inflexible, impressionistic, and democratically weak. Empirical research in business regulation has frequently demonstrated the existence of these limitations. It has also shown that non-responsive regulation will not only fail to be just, but also be ineffective as people refuse to comply with legal regulation that does not seriously engage with their concerns, values, and social milieu. Overly legalistic regulation can be ineffective because its very legalism dissipates voluntary responsibility—the will to comply with reasonable regulatory objectives. The normative literature on regulation has specialized in describing, evaluating, and proposing alternative, more responsive strategies for the design, implementation, and enforcement of regulatory instruments. A central concern has been ‘to consider how regulation can acquire the qualities of being simultaneously rationally planned and purposeful, and also deeply rooted in social and cultural life’ (Cotterrell, 1995: 308). There is an increasing emphasis on styles of government regulation that facilitate and enable private regulation, rather than overriding it. These include enforced self-regulation, co-regulation, corporate compliance systems, incentive-based regimes, harnessing markets, conferring private rights and liabilities, and relying on third party accreditation to standards and insurance-based schemes (e.g. Gunningham and Grabosky, 1998).

4.3 Coherence

Regulation that is too responsive to customs from civil society may subvert the doctrinal coherence of law’s analytic framework. Simultaneously, doctrinal coherence can be threatened by the primacy of instrumental policy concerns in legislative

regulation (see Cotterrell, 1995: 283–4). Scholars of legal regulation have been particularly concerned with the extent to which constitutional guarantees, human rights and fundamental legal principles of openness, accountability, consistency, proportionality, and procedural fairness are observed (or not observed) in the practice of instrumental, policy-oriented public regulation, and also in the diverse sites, methods, and agents of enforcement in the pluralized regulation of the new regulatory state (e.g. self-regulation). They are also concerned with the potential failure of effective and responsive regulation to secure certainty, consistency, and predictability in legal principles and values.

5 REGULATORY MECHANISMS

We have already begun to glimpse something of the new modalities of pluralized and decentralized regulation that are involved in the shift from the Keynesian welfare state to steering of private–public partnerships. Just as private firms and public agencies are abandoning command-and-control as a policy ideal in favour of outsourcing and networks of service delivery combined with monitoring, at the same time the focus of empirical regulatory research has also shifted from regulation by means of formal law to a more pluralized understanding of what regulation is and how social control works. The growing literature that describes and evaluates various regulatory mechanisms reflects the fact that regulatory pluralism is, and always was, a reality. The state is not, and never has been, the sole font of regulation.

The empirical research on regulatory mechanisms breaks down the classical orthodoxy that regulation only occurs through a mechanism of deterrence that works via commands against misconduct spelled out in legal rules, monitoring of compliance by a state regulatory agency, and application of punitive sanctions for breach. Early empirical studies of how regulatory officials actually enforce the law found that they often prefer in the first instance to use strategies of education, persuasion, and cooperation to coax businesses to comply voluntarily with regulatory rules (e.g. Hawkins, 1984), rather than to use adversarial and punitive means to sanction non-compliance. Classical deterrence theory assumes an essentially adversarial and antagonistic relationship between regulators and regulatees. Therefore cooperative strategies were previously thought to be the result of ‘capture’ of the regulator by regulatees. In practice ‘capture’ is multiplex and it is hard empirically to pin down strong structural capture effects. There is limited empirical evidence of capture actually affecting regulators’ public interest orientation (Ogus, 1994: 94–5). Indeed, not all social bonds between regulators and regulatees are undesirable. The ‘capture’ problem is one of orthodox command and control sometimes positing an unachievable, and possibly undesirable, social disjunction between regulator and regulatee.

These descriptive findings prompted a fruitful empirical and normative debate about how regulatory agencies should approach enforcement—‘compliance’ (i.e. a cooperative, persuasive style) versus ‘deterrence’ (punitive enforcement). The simple compliance/deterrence dichotomy has not stood up to empirical scrutiny. The focus has therefore moved from the evaluation of discrete mechanisms of *legal* regulation to empirical and policy-oriented analysis based on a conception of a regulatory society where *social control* works through webs of regulatory influences.

5.1 The Classical Deterrence Approach

Traditionally, the deterrence approach assumes that enterprises will only comply to the extent that it is in their self-interest to do so. For example, some theorists argue that since all corporations have profit-maximization as their main goal, they will always be ‘amoral calculators’ who only ever comply with regulatory requirements when the penalties are heavy enough to ensure their calculations come up with the correct answer. Law-and-economics theorists see compliance as a function of the benefits of non-compliance versus the probability of being discovered and punished, and the severity of the penalty (see Ogus, 1994: 90–2 for a summary). On the whole, the assumption is that deterrence motivates via fear of punishment or rational calculations of the potential cost of penalties or sanctions.

While the deterrence approach holds some attraction as an explanation of how targets of regulation decide whether to comply, it is also now clear that it will only apply in some circumstances. Scholz (1997) has argued that the basic model of deterrence is only valid when (a) corporations are fully informed utility maximizers; (b) legal statutes unambiguously define misbehaviour; (c) legal punishment provides the primary incentive for corporate compliance; and, (d) enforcement agents optimally detect and punish misbehaviour given available resources. Scholz (1997) and other researchers have concluded from empirical tests of the deterrence model that these assumptions usually do not hold true, and that a simple model of deterrence is therefore generally not a helpful explanation of what motivates organizations to comply with the law.

One reason for this is that regulatory agencies are often not as powerful and efficient as they would need to be in order for the deterrence model to work. The deterrent effect of sanctions will depend on their certainty, severity, celerity, and uniformity, especially certainty. Another reason is that because so many kinds of business law-breaking have high rewards and low penalties, the threatened application of sanctions is not a severe enough threat to deter non-compliance (Ogus, 1994: 93). In order to cope with these realities, researchers have abandoned the simple economic model of deterrence as an explanation for compliance in favour of a more sophisticated analysis of how deterrence mechanisms work, and how they interact with a number of other factors that together accomplish social control.

Research on deterrence also shows that when individuals or management do think about the disadvantages of non-compliance, they do not make a simple calculation based on the direct economic costs of non-compliance. Other factors, particularly the indeterminate costs of bad publicity on the firm's reputation and morale are very significant. This undermines the basic premise of deterrence theory that the size of the expected financial penalty relates directly to the level of compliance. For example, occupational health and safety research (Scholz, 1997) found that although workplace safety in plants improves after penalties are imposed, the size of the penalty has little impact on safety improvements (indeed most of the penalties were very low). Fisse and Braithwaite (1983) studied the impact of publicity on corporate offenders in seventeen high profile cases in great detail. They found that 'Adverse publicity is of concern not so much by reason of its financial impacts but because of a variety of non-financial effects, the most important of which is loss of corporate prestige' and that 'corporations fear the sting of adverse publicity attacks on their reputations more than they fear the law itself' (Fisse and Braithwaite, 1983: 247, 249). Indeed, maintaining or advancing corporate reputation and counteracting negative publicity is an important reason why enterprises are interested in ensuring compliance. Even where regulators only have small penalties at their disposal, actual or potential bad publicity can overcome otherwise bounded rationality (i.e. inability to consider all the costs and benefits of every potential course of action simultaneously) and put compliance issues on management agendas.

5.2 The Significance of Maintaining Legitimacy

Similarly, regulatees are often motivated to comply with the law, or at least to appear to comply, in order to maintain their legitimacy in the eyes of government, industry peers, and the public. The insight here is that the possibility of fines, sanctions, and inspections acts less as a deterrent threat than as a way to focus management attention on institutional expectations that may affect the legitimacy and operation of their enterprise. The 'new institutional' scholarship in economics, political science, and organization theory finds that individuals and enterprises do not always make decisions solely on the basis of atomistic, financial self-interest, and that various other social and environmental factors including their own values and the expectations of others will affect their actions. These institutional influences include historical legacies, cultural mores, cognitive scripts (i.e. taken-for-granted ways of seeing the world), and structural linkages to the professions and to the state.

Thus there are three ways in which regulated organizations adopt practices and structures from their normative environments beyond what is required by the technical and financial parameters under which they operate: they submit to the demands of powerful external actors, such as the regulatory agencies of the state; they import the practices of professionals and other organized value-carriers; and they copy the apparently successful practices of other, similar organizations.

These three mechanisms are respectively regulative, normative, and cognitive (see Hoffman, 1997: 36–8). Hoffman sees regulative institutions as based on legal sanctions and coercion. Their logic is instrumental and their legitimacy based on law. Normative institutions are a matter of social obligation, and are based on values and social expectations. Cognitive institutions are taken for granted. They are seen as ‘orthodox’, deeply rooted in cultural assumptions and ways of seeing the world. They are a matter of unconscious compliance on the basis that it is almost unthinkable to do anything else. In any particular company’s ‘organizational field’, these three pillars may be consistent or inconsistent with each other, and may affect different groups within the company differently. A regulative institution that fits pre-existing normative and cognitive institutions will be much more ‘successful’ at achieving compliance than one that is in conflict with them. For example, Prohibition in the United States did not fit the culture of the time. Equally, however, a company or industry may find that it has to change the cognitive institutions of its internal culture in order to avoid conflict with newly emerging normative and regulative institutions adopted by the society at large as these new influences enter its organizational field.

Edelman (1990) has used neo-institutional theory to explain the growth of employee due process rights designed to protect against a wide spectrum of arbitrary management behaviour in US companies, including indiscriminate firing, failure to promote, safety violations, unequal discipline, sexual harassment, and discriminatory employment opportunity structures. She argues that the civil rights movement and legal mandates of the 1960s together created a normative environment that put pressure on employers to create formal protections of due process rights. She shows how novel models of due process were initially accepted by some companies as a matter of legitimacy and survival in an environment in which they felt strong public scrutiny and employee expectations of change. Those that were most exposed to public scrutiny and government control changed first. Others followed in an effort to remain ‘up to date’. Due process rights that were unheard of for private companies early in the century eventually became institutionalized in the normal bureaucratic structure of the corporation in the role of the personnel department and the professionalism of personnel officers. Now few large companies lack programmes for safeguarding basic employee rights; they are simply part of the basic operations of a company. However, as Edelman shows, a concern with legitimacy can motivate enterprises to manage their image of compliance, without necessarily complying substantively with the requirements of the regulation.

Hoffman’s (1997) study of corporate environmentalism in the US petroleum and chemicals industry also demonstrates the power of institutions on corporate behaviour through the period 1960 to 1993, a period during which ‘The corporate environmental management function grew from a small subsection of the engineering department to . . . a central aspect of corporate strategy driven by a core business constituency’ (Hoffman (1997), 143). Hoffman’s content analyses of industry journals showed that corporate attention to environmental issues did not follow the linear

trends in volume of environmental laws and regulation, nor growth in industrial expenditure on environmental issues. So corporate attention to environmental issues cannot be explained solely by the motivation to regain control of capital and operating expenditure in relation to the environment, nor as a response to the threat of regulatory penalties and punitive damages (see Hoffman (1997), 144). Rather, Hoffman's analysis of the up-and-down trends in public concern for environmental issues between 1960 and 1993 matched exactly his analysis of corporate concern with environmental issues from the trade journals. He also points to the way that organizations made similar shifts in management structures for environmental issues at the same time as each other (not just technological shifts as required by regulation) to illustrate the influence of social factors (1997: 145).

Thus, Hoffman sees the history of corporate environmentalism over the last thirty years in the US petroleum and chemical industries as a 'story of institutional negotiation over corporations' rules, norms, and, ultimately, beliefs regarding legitimate environmental management' (1997: 152). The field moved from being dominated by cognitive institutions in which industry defined its environmental actions in terms of engineering advances to being dominated by regulative institutions when the EPA was established. The EPA was weakened by Reagan, but the public backlash against this weakening showed that environmentalism had now emerged as a normative institution. The chemical and petroleum industries therefore adopted environmentalism as a matter of social obligation. By the twentieth anniversary of the first international Earth Day (in 1990), insurance companies, investors, and competitors had entered the field and prominent environmental events and disasters sharpened public concerns. Environmentalism therefore moved from being an external community concern to an internalized strategic issue for corporations and reached new levels of cultural primacy, bringing it much closer to a cognitive institution: 'The heresy of the 1960s became the dogma of the 1990s' (Hoffman, 1997: 143).

5.3 Informal Sanctions and the Internalization of Compliance

The evidence also suggests that in general informal sanctions have a greater deterrent impact than formal legal sanctions (Paternoster and Simpson, 1996), and that regardless of what kind of social control is attempted it is usually not its formal punitive features that make a difference, but its informal moralizing features (Braithwaite, 2002: 106). Informal sanctions include negative publicity, public criticism, gossip, embarrassment, and shame. Formal sanctions are official sanctions such as fines, compensation, licence revocations and restrictions, and prison sentences. However, formal sanctions often trigger informal sanctions.

Some impressive evidence has been collected suggesting that, although cooperative and persuasive strategies are not always appropriate, when they are successful

they are superior to punitive sanctions in effectively and efficiently accomplishing long-term compliance. A large body of empirical sociological and psychological research converges on the finding that non-coercive and informal alternatives are likely to be more effective than coercive law in achieving long-term compliance with norms, and coercive law is most effective when it is in reserve as a last resort (Braithwaite, 2002: 30–4; 106). This is because people are less likely to internalize the virtues of compliance when they see compliance as a response to extrinsic rewards and punishments; reasoning and dialogue promote feelings of self-determination that support internalization. Quantitative research on nursing home regulation suggests that cooperative strategies of trust, restorative shaming, praise, nurturing pride in corporate social responsibilities, and avoidance of stigmatization are more effective at increasing business compliance with regulation than the application of formal sanctions (Braithwaite, 2002: 17–18, 112).

5.4 Trust

A significant sub-theme of research on compliance is the importance of trust in securing compliance. Trust between regulator and regulatee simultaneously builds efficiency and improves the prospect of compliance. If regulatees trust regulators as fair umpires who administer and enforce rules that have important substantive objectives, then the evidence is that compliance levels will be higher, and resistance and challenges to regulatory action will be low. For example, Scholz and Lubell (1998) found that tax compliance increases as trust towards the government increases, and also that the sense of duty to pay taxes increases when government policies prove beneficial to the taxpayer. If regulatees feel that regulators treat them as untrustworthy, then defiance and resistance build up so that inefficiency and non-compliance both increase (see V. Braithwaite, 1995).

5.5 Effective Motivations for Compliance Vary among People and Contexts

The strands of research summarized above give us a more complex picture of what motivates people to comply with regulation than the simple deterrence model. This picture is further complicated by the finding that effective motivations for compliance vary between persons and contexts. Various motivations are likely to apply in different enterprises, in different parts of the same enterprise and at different times in the same enterprise.

Paternoster and Simpson (1996) looked at intentions to commit four types of corporate crime by MBA students, and found that these intentions were affected

by sanction threats (formal and informal), moral evaluations, and organizational factors. They found that where people did hold personal moral codes, then these were more significant than rational calculations in predicting compliance. If moral inhibitions were high then cost-benefit calculations were virtually superfluous. But when moral inhibitions were low, then deterrence became relevant. Companies frequently respond to weak sanctions including adverse publicity. This is because there are usually a variety of actors associated with any wrongdoing. Although some will be 'hard targets' who cannot be deterred even by maximum penalties, others will be 'vulnerable targets' who can be deterred by penalties, and still others will be 'soft targets' who can be deterred by the mere exposure of the fact that they have failed to meet some responsibility they bear (Braithwaite, 2002: 109-13). Differing motivations and responses will also be partially determined by economic circumstances and place in the economic and social structure (see Gunningham and Grabosky, 1998) as well as by individual dispositions of particular corporate managers.

Indeed, most accounts that find people to be compliant in response to cooperation, goodwill, and trust also find that deterrence is necessary as a back-up for the minority of organizations that do not voluntarily comply. They also find that cooperative compliance is generally contingent upon persuading those of goodwill that their compliance will not be exploited by free riders who will get away with the benefits of non-compliance without being held to account for it. Thus deterrent and punitive sanctions must still be available in the background.

5.6 Creative Compliance and Regulatory Community

Finally, it is evident that even where regulatees do appear to 'comply' with legal rules, their compliance may be a sham. Because rules can be under- or over-inclusive and always require interpretation (Black, 1997: 6), regulatees can evade the letter of the law through loopholes or creatively interpret its requirements to avoid substantive compliance. For example, Edelman's (1990) work suggests that many companies are highly motivated to preserve legitimacy by responding to external norms and setting up compliance programmes, but these will not necessarily reflect legal norms in substance. Similarly much empirical research, especially that of McBarnet and Whelan (1997), shows that corporate lawyers can ensure that their clients comply scrupulously with legal requirements while completely missing its spirit, substance, and foundation. Indeed 'compliance' with legal regulation is rarely clearly defined, and is created and modified on the ground by a variety of players including regulatory inspectors, company lawyers, industry associations, and many more.

Black (1997: 30, 31-2) argues that one important way in which these problems can be addressed is through ensuring that the context in which rules are formed, followed, and enforced is that of a shared understanding of regulatory goals, norms,

and definitions. This type of 'regulatory community' will share a tacit understanding of how regulatory rules should be interpreted and applied in particular circumstances. It occurs where regulators, regulatees, and their advisors have continuing relationships and in their dialogues and disagreements, constitute, define, and redefine appropriate norms of behaviour. Habituated compliance happens when regulatory enactments are communicated into a world of shared understandings in which regulatees can effectively respond to regulatory signals, and the parties deliberate effectively about their responses to them which, in turn, create shared commitments to regulatory goals.

6 PLURALIZED REGULATION IN THE NEW REGULATORY STATE

A central insight in the literature on regulatory mechanisms is that there exist many forms of formal and informal, legal and non-legal ordering in society, and multiple motivations and normative commitments amongst targets of regulation. Regulation is not confined to law. There are plural sources of regulatory ordering, and compliance is often constructed through webs of social controls. For example, Lawrence Lessig (1999: 235-9) proposes the following typology of regulatory mechanisms in *Code and Other Laws of Cyberspace*.

Law defines rights, constitutes or regulates structures of government (e.g. establishing a bicameral legislature), and expresses the values of the community, but its most important role as a regulatory mechanism is that of issuing commands and imposing sanctions for transgressions against them.

Social norms, like law, are commands, but they are enforced according to Lessig by the community rather than the state, by informal social disapproval rather than by formal sanctions.

The *market* constrains through price. To some, it is controversial to describe the market as a regulatory mechanism because in a market there is no regulator who decides on a price in order to regulate something—the market is the antithesis of intentional social engineering (Black, 2001). There is no doubt, however, that public and private policy-makers do make decisions to move transactions 'from hierarchy to market' to steer the achievement of objectives such as efficiency or pollution control.

Architecture is the environment built around an object of regulation that physically constrains it. Disney world regulates by a Foucauldian architecture of bars, guard rails, and other physical barriers (Shearing and Stenning, 1987). A reinforced door to a cockpit is a way of regulating hijackers, as is a lock. Architecture can organize

natural surveillance to focus on hot spots of vulnerability to crime—for example, kitchen windows in a housing estate that look out onto children's playgrounds. The basic idea is the same as that which underlies Jeremy Bentham's Panopticon prison design. Lessig's special contribution to regulatory scholarship is to show the profound consequences of software code as an architectural regulator of cyberspace. Both Bill Gates and the US-dominated regime of copyright and trademarks have structured the architecture of the Internet to advantage certain commercial interests and disadvantage others. Lessig argues that a lot of the power of architectural mechanisms of regulation resides in their self-executing properties. Legal constraints need to be mobilized, and this may result in delay and uncertainty. This is why architectural regulation was so favoured a feature of safeguards the United States and USSR put in place to make it impossible for one to activate a warhead without an electronic alert automatically being triggered in the other state.

Further, each form of regulation is itself modified as it refracts through other forms of regulatory ordering. Indeed, it can be fruitful to think of compliance with regulation occurring in a 'regulatory space' in which various regulatory regimes simultaneously operate and compete with each other to secure compliance (Scott, 2001). Government regulators have to compete with, form alliances with, or influence these non-state forms of regulation in order to be effective at gaining compliance with public policy goals. Legal sanctions rarely achieve prime legitimacy and efficacy automatically in social and economic life. In order to understand the impact of legal regulation, it is therefore necessary to understand how law connects or fails to connect with the other sources of normative ordering. The different modalities of regulation may be mutually constitutive or destructive. For example, a market cannot be constituted without laws and norms about honouring contracts and eschewing cartels, or without the architectural feature of an electronic or bricks-and-mortar stock exchange.

Regulatory effects always depend on the extent to which regulatory norms are incorporated into informal and self-regulation, whether at the level of a corporation's management, an industry, a local community, or socialization within a family. One strand of regulatory research focuses on the possibilities for enterprise and industry self-regulation to improve compliance with government policy objectives in a way that satisfies both business and communities (e.g. Parker, 2002). Another emerging theme in regulatory scholarship is the role of third parties and civil society in regulation and compliance either because they are (a) coopted into the formal regulatory system via government regulation, or (b) responsible for regulatory orderings distinct from or subordinate to government regulation. For example, can standards developed by national and international standardization organizations be adequate alternatives to regulatory requirements in some situations, and to what extent can we expect markets to spontaneously make compliance with these standards widespread? The ISO 14,000 series on environmental management systems has attracted particular interest (Gunningham and Grabosky, 1998: 172–87). A further

emerging theme is the effectiveness of regimes that attempt to coopt market mechanisms to regulatory purposes in improving overall regulatory policy outcomes such as the creation of trading regimes or tax incentives to control total allowable emissions of sulphur dioxide or greenhouse gases.

6.1 Capacity Building

There is a constitutive relationship between regulatory institutions and developmental institutions. Developing human capacity and regulating it are both generically important activities to understand if we are to grasp how the world functions. Citizens are not born democratic; democracy is something we learn in developmental institutions, particularly schools. Citizens must learn democratic virtues such as respectful listening during collaborative deliberation through, for example, restorative justice programmes to confront school bullying and create norms about it (see Sect. 6.2 on restorative justice).

Crucial roles of developmental institutions are the creation of citizens who are (a) self-regulating and (b) collaborators in creating spaces where we leave ourselves open to the normative regulation of communities. This is why developmental criminology has been such a booming subfield of criminology during the past decade or so. Many criminologists have the belief—perhaps extreme but not totally devoid of foundation—that investing in early developmental interventions to solve the learning difficulties of children in pre-school, in school, and in families, is the best way to reduce crime. The evidence is that by unblocking learning difficulties, preferably early, but even late in adult prison education programmes, we can improve self-regulatory capacities at a cost that is much less than the benefits. Learning how to learn not only has the advantage of enhancing self-regulation, it also enhances societal capabilities for learning through monitoring. Collaborative education also builds social capital (learning how to trust) as it builds human capital. Educational interventions also enrich people's lives, of course, whereas punitive interventions make them more miserable.

Developmental institutions not only achieve regulatory objectives by enhancing self-regulation; they also do so through self-capacitation, capacity building. Psychologists call this self-efficacy. Jenkins (1994) showed that sustaining the self-efficacy of managers for improving quality of care was critical to improved compliance with nursing home regulatory standards. While defiance (participation in a business subculture of resistance to regulation) did reduce compliance (Sherman, 1993), disengagement was the bigger problem (V. Braithwaite, 1995). Strategies such as praise and avoiding stigmatization were important to sustaining self-efficacy and engagement with continuous improvement.

At a more macro level, capacity building is also an important mechanism for the globalization of regulatory regimes. For example, developing countries find it difficult to join the global intellectual property regime until international organizations such as the World Intellectual Property Organization have trained their professionals in the principles of intellectual property law, in how to run a patent office, and so on.

6.2 Restorative Justice

Scholarly interest has turned towards research that evaluates alternatives to traditional 'command-and-control strategies' that relied on a simple theory of deterrence. In particular this research takes a more holistic approach towards regulation and examines the effectiveness of mixes of regulatory strategies that utilize the complexity and variety of motivations underlying compliance. The study of regulation is developing more scientific integrity, not least by the deployment of actual experiments which pass methodological tests such as random assignment. Restorative justice is one field where we have seen randomized controlled trials combined with the paradigmatic features of Dorf and Sabel's (1998) democratic experimentalism—bottom-up collaborations between state, business, and civil-society actors to solve specific crime problems and to use crime as an opportunity to confront underlying social problems, such as a school environment that is unsupportive to its students, with ultimate accountability to courts which have a duty to protect rights and police limits.

The central idea of restorative justice is that the purpose of intervention is to give the offender a chance to proactively put things right. In criminal process, restorative justice asks offenders to confront their responsibility for wrongdoing by facing their victim(s) so that together they can decide how to put the wrong right, for example, by the payment of restitution or the doing of community service. The aim is not only to provide a better remedy and healing for the victim than imprisonment or a fine would provide, but also to help transform the offender into a more law-abiding person in the future, and to assist communities to be more just and compassionate.

Notwithstanding the safeguarding role of the courts in securing accountability for the conduct of restorative justice processes, jurisprudential traditionalists have deep trouble with restorative justice. Unlike utilitarians who say crime control or deterrence is their clear objective and deontologists who say that honouring just deserts is theirs, restorativists slip and slide across seemingly dozens of objectives. For example, they want to fix up a school culture that does not support its students, use a crime as an opportunity to heal rifts in a family, compensate a victim, prevent future recurrence of the crime, confront an underlying substance abuse problem, build community, and enrich democracy! One advocate has even suggested destabilizing and transforming the entire legal system as a long-term objective (Braithwaite, 2002).

Restoring victims, restoring offenders, and restoring communities covers a cascade of objectives in tension.

Dorf and Sabel (1998) state that the philosophical underpinning of their democratic experimentalism is pragmatism. The pragmatist account of thought and action is of a world 'bereft of first principles and beset by unintended consequences, ambiguity and difference' (Dorf and Sabel, 1998: 12). According to Dorf and Sabel, this is what leads to the central pragmatist theme in the writing of Peirce, Dewey, and Mead of reciprocal adjustment of means and ends—learning through monitoring. Objectives get transformed in the light of experience of their pursuit. With restorative justice, the transformations can be profound: participants in a restorative justice circle might begin with a shared objective of deciding on a just punishment for a crime. Yet the experience of the dialogue often transforms the needs of the victim to a need to forgive, sometimes to the point where the victim requests of the other stakeholders not only the grace of forgiveness but of a gift for the offender instead of the exaction of punishment. In one famous case in New Zealand, an armed robbery victim who had been bound and gagged at the point of a knife was so touched by the life circumstances of her assailants that she invited them to live and work on her family farm, which one of them did. For Dewey, democracy was the method for collaborative investigation of differences in response to doubt, for transforming our conception of justice in light of the experience of its pursuit.

Institutional innovations in restorative justice are akin to Dorf and Sabel's (1998) descriptions of collaborative innovations in military hardware—concurrent and parallel engineering of component parts and individual machines before the weapons system as a whole has been designed. In restorative justice projects, the collaborations are rather competitive with other collaborations as well—groups developing competing models of restorative justice watch eagerly for empirical evidence of the failures of variants developed by other groups. As Dorf and Sabel point out, there is considerable irony in the military-industrial complex pioneering methods of governance that create spaces for the new forms of democracy that are manifest in restorative justice.

An example of the success of restorative justice in regulation is the Institute of Nuclear Power Operators (INPO), a US self-regulatory organization for nuclear utilities set up after the Three Mile Island accident to develop standards, conduct inspections, and investigate accidents. Safety has increased significantly since Three Mile Island across a number of indicators (see Sect. 3 above). One of the restorative mechanisms that has contributed to this success is a meeting in which senior nuclear officials from all companies gather together to hear three vice-presidents give a detailed explanation of a recent accident at their utility and what went wrong. This 'confession' of wrongdoing within the occupational community arouses remorse and repentance in the wrongdoer and reacceptance by the other members of the community, with a powerful continuous improvement effect (Rees, 1994: 106–7; see Braithwaite, 2002: 62–6 for other examples).

6.3 Meta-regulation and Learning by Monitoring

The new regulatory state's move from command and control towards indirect governance explicitly recognizes what has always been true—that policy outcomes are not solely the product of central government but a complex interaction between law, local government, administrative agencies, the voluntary sector, the private sector, schools, families, each of which in turn interacts with one another. What is new is that there is an increasing emphasis on styles of government regulation that facilitate and enable private regulation, rather than overriding it. In this style, government tries to work with the grain of things, to co-opt and form alliances with non-state orderings. For independent government regulators, this can mean a normative preference for winning influence through alliances with or co-optation of non-government regulatory institutions through strategies that include (Grabosky, 1995):

- Enforced self-regulation: legislation or regulatory action forces industry associations or individual firms to introduce self-regulatory programmes that meet certain standards and goals set by the government and that can be publicly enforced.
- Co-regulation: government and self-regulatory agencies work together to set and enforce standards.
- Third party oversight: third parties are required to act as whistle-blowers to ensure compliance (e.g. banks are required to report suspiciously large cash deposits to a regulatory agency) or are required to guarantee or accredit a certain level of compliance with standards (e.g. corporate financial reports must be audited to accounting standards by accredited auditors).
- Equipping consumers and competitors to take formal or informal enforcement action: private parties are encouraged to take action to receive compensation if a regulatory standard is breached or are given information and standing to enforce public interests.

The idea is that government leverages its resources by facilitating activity in markets and civil society to help accomplish public policy objectives. These forms of regulation can be characterized as 'meta-regulation' (Grabosky, 1995) not solely state regulation, not solely market ordering, but government regulation of plural regulation in the private sector and civil society.

Just as we argued earlier that the emergence of a risk management society is a less fundamental development than the movement from a Keynesian welfare state to a new regulatory state that rows less and steers more, now we must concede that the development of democratic experimentalism is more fundamental still. The role of the state is more than steering, it is also an important source of democratic accountability, albeit in a decentred demos. With the emergence of democratic experimentalism, the chief role of the legislature should be to authorize and finance experimental reform by partnerships between different levels of government, business, and civil society. The legislature provides one especially important form of democratic accountability and it legitimates

more participatory forms of bottom-up collaboration as it seeks to energize them. This model also means that the courts should have a significant role in ensuring that collaborations respect fundamental human rights and fundamental constitutional and legal values (Dorf and Sabel, 1998; Lessig, 1999: 215).

The final piece of the Dorf and Sabel analysis of democratic experimentalism takes us back to the fundamental importance of a new regulatory state that gives more emphasis to steering than to delivering government services. Learning by monitoring occurs piecemeal by watching our own organization's performance and benchmarking the performance of our collaborators and competitors. It follows that national coordination is needed to ensure that those interested in innovating will be able to find one another and pool their learnings, and that those wanting to build competing models will be guaranteed by the State a window that makes the errors of their competitors transparent to them. Especially when the greatest burden of innovation rests in civil society, as in restorative justice, substantial state funding of democratic experiments is needed with strings attached which require information pooling, evaluation, and transparency of the evaluation results. State funding is needed for the websites for the Campbell Collaboration (modelled on medicine's Cochrane Collaboration) which publishes continuously updated literature reviews and meta-analyses of the efficacy of crime prevention, educational and other social interventions. State courts are needed to enforce rights and limits. Specialist regulatory agencies have a role here as well. While democratic experimentalism favours the overthrow of centralized curriculum development in education bureaucracies in favour of school-level curriculum innovation, something like the British Ofsted, the Office of Standards for Education, is needed to enforce benchmarks and the human right of children to certain educational basics.

It is the central task of the new regulatory state to connect the private capacity and practice of pluralized regulation to public dialogue and justice. Ultimately, coordinating state agencies need to keep track of what issues suggest the need for legislative change, regulatory enforcement action, legal aid funding for test case litigation, and so on. They need to look for patterns of injustice that arise from reliance on private regulation in order to determine where extra rights need to be given to protect or promote the bargaining power of stakeholders, or where legal regulation needs to be amended to promote better pluralized regulation. In other words, we need to build institutional capacity for regulators and legislators to learn about the regulatory space in which they act, and to change law and regulatory strategy in response. This means that a fundamental strategy of the new regulatory state should be to gather and disclose information, to report it to stakeholders, and to ensure that it is adequately verified/audited so that it is reliable. This provides a basis of information on which private regulation and its impacts can be judged (by regulators and stakeholders), and a type of society where individual capacity, organizational capacity, and the capacity of states to regulate are linked through democratic participation, collaboration, and learning by monitoring.

7 CONCLUSION

We started out by conceiving of regulatory studies as a set of Russian dolls, moving from a core of studies of specific regulatory agencies out to the entire field of governance. Now we have conceived of regulatory studies itself as a middling Russian doll in a set that moves from studies of the anxieties of a so-called risk society to the practices of a risk-management society, to the more generic practices of a regulatory society, to the even more generic learning through monitoring of an experimental democracy. There is something to all these shifts, but they can all be overstated and doubtless in some respects have been in this chapter. If we look at a typical police force, command and control is still their core business. Certainly they might espouse a community-policing philosophy at meetings of their police-community consultative committee, and might even do some restorative justice in their cautioning of juveniles. They might do a good bit of collaboration with business, local ethnic communities, and private security organizations in efforts to regulate risks, for example, in the architecture and security systems of housing estates. But even if they spend only a small proportion of their time trying to arrest bad guys, their mentality remains that this is the core of what they do. Ditto with the even older regulatory agency of the tax authority: shifts towards meta-risk management there might be, but their mentality remains that the core of what they do is finding unpaid taxes through audits. Evidence that police arrests can be counterproductive by creating defiance (Sherman, 1993) or that audits can help taxpayers learn what they can get away with (Kinsey, 1986) only chips away at the old mentalities.

Nevertheless, the study of regulation is making some particularly exciting contributions to the radically reconfigured social science that democratic experimentalism implies. This is a social science organized around theories about the dynamics that are driving change in contemporary conditions, not around received disciplines that represent static descriptive categories—economics (the study of money transactions), political science (the study of political transactions), law (the study of political transactions that occur through statutes and courts), international relations (the study of transactions between nation states), and so on. Our hope is that ideas like democratic experimentalism will help usher in a re-energizing of the social sciences in the twenty-first century akin to the re-energizing of the biological sciences in the twentieth century as a result of substantially abandoning descriptively unified disciplines including anatomy, zoology, botany, microbiology, and entomology in favour of theoretically dynamic organization around ecology, molecular biology (the DNA revolution), and evolutionary biology.

While a good case can be made that at the technological cutting edge of the private sector, command and control has been partially supplanted by participatory, collaborative learning by monitoring, the inroads of democratic experimentalism into the work of the mainline regulatory agencies has been modest. Courts have embraced

efficiency elements of the New Public Management through, for example, Case Flow Management, but mostly reject experimentalism as a threat to the consistency of justice and scotch most kinds of collaboration as a threat to the independence of the judiciary. In some, but not all, respects this may be as it should be. But beyond court-rooms, in the rooms where most of the justice and injustice is done, it can be argued that it is with regulatory institutions that some of the most innovative work of democratic experimentalism is happening—for example, in South Africa from nodal governance of security in the squatter settlement of Zwelethemba ('place of hope') (Shearing *et al.*, forthcoming) to further refinement of the idea of the Truth and Reconciliation Commission and the restorative justice philosophy it embodies.

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