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ON SPEAKING SOFTLY AND
CARRYING BIG STICKS: NEGLECTED DIMENSIONS
OF A REPUBLICAN SEPARATION OF POWERS†

I *The Concentration of Private Power*

A. TOWARDS THE 'PURE DOCTRINE' OF THE SEPARATION OF POWERS

The separation of powers may be the most central idea in the theory of institutional design. Yet this has only been true of thinking about public institutions. This paper extends the relevance of the doctrine into thinking about checking the power of private institutions. The practice of separating powers dates at least from the Code of Hammurabi¹ when laws were carved in literal stone that would constrain the actions not only of subjects but also of the king. There follows a more or less cumulative history of separations of powers that we see sedimented in the institutions of contemporary Western democracies. Among the important moments in this history were the mixed Spartan Constitution,² the Roman Senate and Justinian's Code,³ Magna Carta,⁴ the jury, the growth of universities

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1 W.F. Leemans, *Legal and Administrative Documents of the Time of Hammurabi and Samsuiluna (Mainly from Lagaba)* (Leiden: J.E. Brill, 1960).

2 W.B. Gwyn, *The Meaning of the Separation of Powers* (The Hague: Martinus Nijhof, 1965) at 88 [hereinafter *Meaning*].

3 Justinian, *The Digest of Roman Law: Theft, Rapine, Damage and Insult*, trans. and ed. C.F. Kolbert (Harmondsworth: Penguin Books, 1983).

4 A. Pallister, *Magna Carta: The Heritage of Liberty* (Oxford: Clarendon Press, 1971); W.I. Jennings, *Magna Carta and Its Influence in the World Today* (London: HMSO, 1965).

as accumulators and communicators of knowledge that become progressively more independent of church and state, the rise of judicial independence, and bicameral parliaments.

Notwithstanding the important contributions of Locke⁵ and other enlightenment scholars,⁶ the practice of separation of powers was ahead of the theory until Montesquieu published *The Spirit of the Laws*.⁷ The richest development of these ideas flowed from the debates between the federalists⁸ and anti-federalists⁹ in the drafting of the US Constitution. The political philosophy of both the federalists and anti-federalists was republican. Philip Pettit has been the primary inspiration in a program of work at the Australian National University to excavate the foundations of the republican approach to the checking of power as a commitment to freedom as non-domination.¹⁰ In that work, checking power under a rule of law designed to minimize the capacity of others to exercise arbitrary power over us is seen as the keystone of the freedom republicans cherish.

While the republican theorizing and Constitution-writing of the late eighteenth century clarified thinking about the separation of powers, its legacy was also to narrow vigilance to the checking of state power. What Vile characterises as the 'pure doctrine' of the separation of powers illustrates

It is essential for the establishment and maintenance of political liberty that the government be divided into three branches or departments, the legislature, the executive and the judiciary. To each of these three branches there is a corresponding identifiable function of government, legislative, executive or judicial. Each branch of government must be confined to the exercise of its own function and not allowed to encroach upon the functions of other branches. Furthermore, the persons who compose these three agencies of government must be kept separate and distinct, no individual being allowed to be at the same time a member of more than one branch. In this way each of the branches will be a

5 J. Locke, *Two Treatises of Government* (Cambridge: Cambridge University Press, 1960).

6 For example, James Harrington & John Milton on mixed government. See M.J.C. Vile, *Constitutionalism and Separation of Powers* (Oxford: Clarendon Press, 1963) at 29–30.

7 C. de Secondat Montesquieu, *The Spirit of the Laws*, trans. and ed. A.M. Cohler, B.C. Miller & H.S. (Cambridge: Cambridge University Press, 1989).

8 A. Hamilton, J. Madison & J. Jay, *The Federalist Papers* (New York: Mentor Books, 1961).

9 R. Ketcham, ed., *The Anti-Federalist Papers and the Constitutional Convention Debates* (New York: Mentor Books, 1986).

10 P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997); J. Braithwaite & P. Pettit, *Not Just Desserts: A Republican Theory of Criminal Justice* (Oxford: Oxford University Press, 1990); S. Bronitt & G. Williams, 'Political Freedom as an Outlaw: Republican Theory and Political Protest' (1996) 18 A.L.R. 289.

check to the others and no single group of people will be able to control the machinery of the State.¹¹

B. BEYOND THE PURE DOCTRINE

The autocrat of the state was seen as the threat to our freedom. As a result, when we think of the separation of powers today, we think of separations among these branches of the state – the legislature, the executive, and the judiciary. Yet equally important in the history of the separation of powers has been the separation of church and state. More important in terms of contemporary effects is the separation of business and the state. Today, the largest fifty transnational corporations all have greater resources, stronger political connections in the world system, more practical coercive capabilities, and more sophisticated private policing technology than most of the world's states.¹² The technology that monitors all our financial transactions, the trace of our movements about the city as we make them, the actual things we do in the most private spaces of the metropolis are captured on video not by the state tyrant that George Orwell feared,¹³ but by private repositories of power. The legacy of the republican tradition is obsession with the powers of state police in societies with twice as many private as public police.¹⁴ In nations like Australia, a Rupert Murdoch has more influence over the Prime Minister and Cabinet than any member of the judiciary. Moreover, that is only a tiny part of Rupert Murdoch's power compared to the influence he has in the United States, China, and beyond. Through influence in a number of states, such private actors sometimes shape global regulatory regimes in ways that make the citizens of all states subservient to them.¹⁵

11 Vile, *supra* note 6. Distinguishing these three branches is no simple matter, as Sir Anthony Mason explains '[t]he lesson of history is that the separation of doctrine serves a valuable purpose in providing safeguards against the emergence of arbitrary or totalitarian power. The lesson of experience is that the division of powers is artificial and confusing because the three powers of government do not lend themselves to definition in a way that leads readily to a classification of functions (Anthony Mason, 'A New Perspective on the Separation of Powers,' *Reshaping Australian Institutions: Australian National University Public Lecture*, Lecture 1, 25 July 1996 at 5).

12 R.J. Barnet & R.E. Muller, *Global Reach: The Power of the Multinational Corporations* (New York: Simon and Schuster, 1974); R.J. Barnet & J. Cavanagh, *Global Dreams: Imperial Corporations and the New World Order* (New York: Simon and Schuster, 1994).

13 G. Orwell, *1984* (New York: Harcourt, Brace, Jovanovich, 1949).

14 For the seminal collection on the privatization of policing, see C.D. Shearing & P.C. Stenning, eds., *Private Policing. Sage Criminal Justice System Annuals*, vol. 23 (Beverly Hills: Sage, 1987). Also see C.D. Shearing & P.C. Stenning, 'Modern Private Security: Its Growth and Implications,' *Crime and Justice: An Annual Review of Research*, vol. 3, eds., M. Tonry & N. Morris (Chicago: University of Chicago Press, 1981).

15 For example, Peter Drahos and I are documenting the influence of 16 chief executives of American companies in reshaping the world intellectual property order

Today, therefore, the separation of business and state has an importance that the separation of church and state and separation of powers within the state once had. Even more neglected in the scholarly literature, however, is the separation of powers within business. The major exception is the vast literature on national antitrust and the breaking of global cartels such as OPEC.¹⁶ If the reason why we take the separation of powers seriously is the republican concern to protect liberty from domination by concentrations of power, then separation of private power must be of equal importance today to state power. One objective of this paper is to help redress this imbalance in the separation of powers literature by focusing primarily on separations of private power. I will show that the different perspective I develop on the separation of private powers is relevant to public power as well.

The way the need for a separation of powers is reconceptualized in this paper is in terms of certain deep practical difficulties in monitoring and deterring abuse of power. I will show why attempts to deter abuse of power often rebound, making things worse for citizens who suffer the abuse of power. Then I will show how innovative separations of powers can ameliorate this problem. Using research on corporate regulation and self-regulation, I will suggest that the most innovative practice is decades ahead of theory in this matter.

An aspiration of the paper is to make a minor contribution to republican political theory. Two ideals under that theory are the separation of powers and dialogic democracy, 'deliberation in governance in order to shape as well as balance interests (as opposed to deal making between prepolitical interests).'¹⁷ Hitherto, these have been regarded as separate desiderata, albeit ones that can both be justified in terms of the promotion of freedom as non-domination.¹⁸ A contribution of this paper will be to show how the separation of powers nurtures the possibility of dialogic decision making.

C. PLAN OF THE PAPER

The next section (Part II) clarifies the reconceptualization of the separation of powers that will be sought in this paper and the method by which we will seek it. Part III reviews an increasingly coherent body of theory and data on why attempts to deter abuse of power with countervailing

through the GATT. For a preliminary product of this work, see P. Drahos, 'Global Property Rights in Information: The Story of TRIPS at the GATT' (1995) 13 *Prometheus* 6; P. Drahos, 'Information Feudalism in the Information Society' (1995) 11 *The Information Society* 209.

16 See, for example, R.D Blair & D.L. Kaserman, *Antitrust Economics* (Irwin: Homewood, 1985); D.W. Carlton & J.M. Perloff, *Modern Industrial Organization* (Scott Foresman: Illinois, 1990); D. Dewey, *The Antitrust Experiment in America* (Columbia University Press: New York, 1990).

17 C. Sunstein, 'Beyond the Republican Revival' (1988) 97 *Yale L.J.* 1539.

18 P. Pettit, *supra* note 10.

power evoke defiance and counter-control. Part IV shows why weak sanctions, especially dialogic ones, generally do better than strong sanctions directed against those who abuse power. Part V shows that those weak sanctions are least likely to work when directed against those who actually benefit from the abuse of power; they are more likely to work when directed against non-beneficiaries of the abuse who have preventative capabilities. Part VI shows that plural separations of power both within and between the public and private sectors create the conditions in which dialogic mechanisms to control abuse of power can flourish. Part VII explains what separation of powers means within the private sector, while Part VIII sketches some implications of the analysis for the economic efficiency of the separation of powers. The conclusion, Part IX, is that a plural republican separation of powers is the midwife of deliberative democracy wherein dialogue is more important than deterrence to the control of abuse of power. Dialogic responsibility among powers with richly pluralized separations means that abuse of power is checked through the process of soft targets simply being persuaded or shamed by discussion into accepting accountability for putting things right. Republican dialogue itself is also concluded to be the best guarantee we can hope for to protect us against economically inefficient ways of transacting the separation of powers.

II *The Concept of the Separation of Powers*

A. ON METHOD

The method in this paper is not to analyze the history of the idea of the separation of powers. Rather it is to move inductively toward a reconceptualization of the idea from (1) an understanding of contemporary practices of separating private and public powers, and (2) from the revelations of empirical social science about the difficulties of deterring abuse of power with countervailing power. At the same time, the method is to move deductively from a republican political theory to a proposed reshaping of the doctrine of separation of powers.

An analysis of the history of the idea of the separation of powers is of less use to making such a contribution to the theory of institutional design than the abductive¹⁹ analysis of practice employed here because of the limited theoretical coherence of the distinctions that have been made in the great historical contests between the competing, yet related,

19 Abduction means shuttling backwards and forwards between induction and deduction. See T.J. Scheff, *Microsociology: Discourse, Emotion and Social Structure* (Chicago: University of Chicago Press, 1990).

ideas of the separation of powers, mixed government, balanced government, and checks and balances. A mixing or balancing of powers logically entails a separation of powers;²⁰ yet these labels in the history are attached to distinctive and competing concrete programs of institutional reform, and indeed to very different reform programs in different nations. Moreover, as M.J.C. Vile showed,²¹ the competing reform programs of the separation of powers, mixed and balanced government, and checks and balances have all left their traces in the complex constitutional theories that are the contemporary inheritance of these contests.

B. FROM SPARTA TO MADISONIAN SEPARATIONS OF PRIVATE POWERS

Mixed government is the oldest idea, figuring in the writing of Aristotle and Plato and justified in terms of securing moderation rather than excess in government and avoiding arbitrary rule.²² The mix in Sparta was between the powers of dual kings (replicated in recent times by transnational corporations such as Philips which have had dual CEOs), a Council of Elders and Ephors elected by lot.²³ During the transition from feudalism to capitalism, the reform program of mixed government involved the king or queen, the lords and the male bourgeoisie sharing power so that no single power would predominate. 'The importance of the ancient theory of mixed government ... is its insistence upon the necessity for a number of separate branches of government if arbitrary rule is to be avoided.'²⁴ It was not based on a separation of the functions proper to each branch, as each branch was expected to check the arbitrary power of other branches by getting involved in all aspects of government. The mid-seventeenth-century theory of the balanced Constitution was a hybrid of mixed government between king, lords, and commoners, and some division of functions among them.²⁵ Then in the late seventeenth century, the American anti-federalists embraced a purist conception of the separation of powers which mapped onto a strict division of the functions of executive, legislative, and judicial branches.²⁶

20 You cannot 'mix' or 'balance' powers that are unified; they must be separated first.

21 Vile, *supra* note 6.

22 Plato, *Laws, II, The Dialogues of Plato*, vol. 72, 3rd ed., trans. B. Jowett, (Oxford: Clarendon Press, 1892).

23 Vile, *supra* note 6 at 35.

24 *Ibid.* at 36.

25 *Ibid.* at 39-40, 98-101.

26 B. Manin, 'Checks, Balances and Boundaries: The Separation of Powers in the Constitutional Debate of 1787,' *The Invention of the Modern Republic*, ed. B. Fontana (Cambridge: Cambridge University Press, 1994).

The contemporary republican reconceptualization of the separation of powers I will advance has it that the ancients were wise to see the objective of mixed government as the checking of arbitrary power.²⁷ Historically contingent judgments are then needed about whether arbitrary power will be better checked by associating more or less clearly separated functions with the powers that different branches of governance exercise. Neither a purist commitment to dividing power as strictly as possible among branches which do not interfere in each other's functions nor a purist commitment to empowering all branches to be equally involved in all functions of government will prove attractive if one's objective is the republican one of checking arbitrary power.²⁸ Sometimes we will need a strong state to exercise countervailing power against strong private interests, or vice versa. Sometimes we will want to constrain one branch from a kind of interference in the governance of another branch which would completely compromise the latter's capacity for independent action.

International relations theorists of balance of power have provided more useful formulations for consequentialist republicans who must reject such purisms. For example, Hans Morgenthau conceptualizes 'balance of power' as 'allowing the different elements to pursue their opposing tendencies up to the point where the tendency of one is not so strong as to overcome the tendency of the others, but strong enough to prevent the others from overcoming its own.'²⁹ While this is useful, Morgenthau is even more myopic than Montesquieu in the powers he sees as contesting the balance. They are unitary nation states, while for Montesquieu they are limited to the legislative, executive and judicial branches of states. Closer to the position I will reach here is Madison's in *Federalist* No. 10 that more rather than fewer factions in a republic provide better protection against domination of our liberty by one faction because of 'the greater security afforded by a greater variety of parties, against the event of any one party being able to outnumber and oppress the rest.'³⁰ Madison also made passing reference to the importance of separating private powers, 'where the constant aim is to divide and arrange the several offices in such a way that each may be a check on the other.'³¹

27 See further P. Pettit, *supra* note 10.

28 *Ibid.*

29 H. Morgenthau, *Politics Among Nations*, 5th ed. (New York: Alfred A. Knopf, 1973) at 169.

30 J. Madison, A. Hamilton & J. Jay, *supra* note 9 at 128. See also 'Federalist No. 51' at 321.

31 *Ibid.* at 320.

Contrary to Montesquieu, my conclusion will be that it is better to have many unclear separations of public and private powers than a few clear ones. The republican canvas Madison sought to paint was more a Jackson Pollock than a Mondrian. The canvas I will splash will be one where private powers will need to be granted some autonomy from state powers and vice versa, yet where private power is able to check public power and vice versa. It will be a canvas where powers are separated between the private and the public, within the public and within the private sphere, where separations are many and transcend private-public divides. The ideal is of enough independence for one branch of private, public, or hybrid governance for it to be able to make its best contribution to advancing republican freedom without being prevented from doing so by the domination of some other branch. The ideal is also of enough interdependence for many branches to be able to check the power of one branch from dominating others. I will argue for the ideal of many semi-autonomous powers³² recursively checking one another rather than a few autonomous branches of governance. The more richly plural the separations into semi-autonomous powers, the more the dependence of each power on many other guardians of power will secure their independence from domination by one power.

Just as this conception of separations of powers in the modern world is pluralist about the variety of branches of private and public power that should be involved in pursuing and checking power, so we should be pluralist about what we mean by the nature of the power that is separated. Both Madison and I are loose in the way we switch between talking about the power of factions, of parties, of 'the multiplicity of interests,' 'the multiplicity of sects,'³³ of branches of governance, of guardians. Many different kinds of power can be exercised by many different kinds of individual and collective actors. Some of the separated powers will be the power of one actor to impose their will on others,³⁴ some will be the power to write rules which the writer has no power to impose,³⁵ some will be Lukes' second face of power as a capacity to keep items off the agenda without a need for any imposition of will,³⁶ some will be a Latourian capacity to enrol others to one's projects without directly imposing one's

32 On the notion of semi-autonomy in law, see S. Falk Moore, *Law as Process: An Anthropological Approach* (London: Routledge & Kegan Paul, 1978).

33 J. Madison, A. Hamilton & J. Jay, *supra* note 9 at 321.

34 This is a classic Dahlian conception of power. See R.A. Dahl, 'The Concept of Power' (1957) 2 *Behavioral Science*. 201.

35 On this distinction, see S. Clegg, *Power, Rule and Domination* (London: Routledge & Kegan Paul, 1975) at 67-75.

36 S. Lukes, *Power: A Radical View* (London: Macmillan, 1974).

will on the object of control,³⁷ some will be a Gramscian hegemony which constitutes individuals who cannot recognize that they are being dominated,³⁸ some will be Foucauldian disciplinary networks partially advanced through the practices of agents rather than intended or willed as acts of power,³⁹ some will be Foucauldian shepherds governing and caring for their flock.⁴⁰ Normatively, what republicans of my stripe want preserved is freedom as non-domination; in different contexts different types of power exercised by plural agents of power will do that job best. So one wants such plural separations of disparate modalities of private and public power as will maximize freedom as non-domination. None of this is particularly novel; it is simply a somewhat radicalising extension of tendencies that can be found in the writings of James Madison. There is, however, novelty in the analysis of speaking softly and carrying sticks that is my reason for pushing far with this pluralising of Madison.

There are a number of reasons why Madison and other advocates of the separation of powers found the doctrine attractive. There is the desire to limit the damage that one all-powerful bad ruler can do, to expand the diversity of perspectives that have influence in politics, to foster deliberative democracy by requiring one branch of governance to persuade another that it has exercised its power wisely, to constrain the rule of men by the rule of law, to empower those who might otherwise be powerless. This essay will not systematically evaluate the desirability or feasibility of these rationales for the separation of powers. The analysis will be limited to a fresh perspective on just one rationale for the separation of powers, albeit what republicans should regard as the most fundamental one⁴¹ – checking abuse of power.

Before we can reach the point of understanding why pluralities of checks is the reconceptualization of the separation of powers we need for the contemporary world, we must begin with an understanding of the empirical literature on why efforts to check abuse of power so often backfire.

37 B. Latour, 'The Powers of Association,' ed. J. Law, *Power, Action and Belief: A New Sociology of Knowledge? Sociological Review Monograph 32* (London: Routledge & Kegan Paul, 1986).

38 A. Gramsci, *Selections from the Prison Notebooks of Antonio Gramsci*, trans. and ed. Q. Hoare & G.N. Smith (London, Lawrence & Wishart, 1971).

39 M. Foucault, *Discipline and Punish: The Birth of the Prison* (Pantheon: New York, 1977).

40 B. Hindess, *Discourses of Power: From Hobbes to Foucault* (Oxford: Blackwell, 1996).

41 It is the most important one for those who, like me, share Pettit's view that the most fundamental value in the design of political institutions is the assurance of freedom as non-domination (P. Pettit, *supra* note 10).

A. DETERRENCE FAILURE

The starting point for reaching the conclusions promised in the Introduction is to abstract from what we have learned empirically about the way the regulation of private power works, or rather why it so regularly fails to work. The republican idea of checking power with countervailing power is often read as a deterrence model for controlling abuse of power. Indeed, deterrence will have an important place in the conclusion ultimately reached in the present analysis.⁴²

This section will explain first why deterrence often does not work well, drawing on research about emotion and rationality. Then we will see that deterrence often backfires and explain why deterrence has this capacity to defeat its own objectives. In subsequent sections, the argument will be that if we understand these problems properly, the separation of powers will prove relevant to their amelioration.

The discipline that has grappled most systematically with why deterrence does not work well is criminology. People almost universally value their lives. So it is surprising that introducing capital punishment is not shown to significantly reduce the crime rate, nor does abolishing the death penalty increase it.⁴³ It is surprising that building more prisons and locking up more people in them for longer periods, tougher sentencing, does not have predictable effects in reducing the crime rate.⁴⁴ Even the

42 Abuse of power might of course be controlled by rewards rather than sanctions. Rewards are not as seriously considered as deterrence in this role because giving even more resources to the rich and powerful for doing what it should be their citizenship obligation to do is unappealing to republicans. While rewards should be taken more seriously than they are in the theory and practice of checking power, some of the empirical limitations of control by deterrence will also be found to apply to control by reward.

43 W.C. Bailey & R.D. Peterson, 'Murder, Capital Punishment and Deterrence – A Review of the Evidence and an Examination of Police Killings' (1994) 50 *Journal of Social Issues*. 53; J.K. Cochrane, M.B. Chamlin & M. Seth, 'Deterrence Brutalization – An Impact Assessment of Oklahoma Return to Capital-Punishment' (1994) 32 *Criminology*. 107; B. Forst, 'Capital Punishment and Deterrence: Conflicting Evidence?' (1983) 74 *Journal of Criminal Law and Criminology*. 927; T. Sellin, *The Penalty of Death* (Beverly Hills: Sage, 1980); Schuessler, 'The Deterrent Influence of the Death Penalty' (1952) 284 *Annals of the Academy of Political and Social Sciences*. 54; R. Hood, *The Death Penalty: A World Wide Survey* (Oxford: Oxford University Press, 1989).

44 A. Blumstein, J. Cohen & D. Nagin, eds. *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington, DC: National Academy of Sciences, 1978). J.P. Gibbs, *Crime, Punishment and Deterrence* (New York: Elsevier, 1975); E.A. Fattah, 'Deterrence: A Review of the Literature,' (1977) 19 *Canadian Journal of Criminology*. 1; P.J. Cook, 'Research in Criminal Deterrence: Laying the Groundwork for the Second Decade,' *Crime and Justice: An Annual Review of Research*,

optimists about imprisonment do not conclude it has large effects.⁴⁵ It is surprising that we can experimentally double or halve the number of police patrol cars in neighbourhoods, without the experimental areas experiencing changes in crime rates in comparison to control neighbourhoods.⁴⁶ It is surprising that people who perceive the expected severity of punishment for committing a crime to be high are not more likely to refrain from crime than people who expect the severity of punishment from committing a crime to be low.⁴⁷ The US, with a death penalty that

vol. 2, eds. N. Morris & M. Tonry (1980) at 211. The latter review and an update soon to be published in the same series by Daniel Nagin ('Criminal Deterrence Research: A Review of the Evidence and a Research Agenda for the Outset of the 21st Century') are more optimistic about the existence of a deterrent effect. Nagin concludes that 'evidence for a substantial deterrent is much firmer than it was fifteen years ago.' With research on the deterrent effect of imprisonment Nagin concludes that the most recent study (S.D. Levitt, 'The Effect of Prison Population Size on Crime Rates: Evidence from Prison Overcrowding Litigation' (1996) 111 *Quarterly Journal of Economics*. 319) is both the most methodologically advanced and shows the biggest crime-reduction effect of any of these studies. However, there may not be a significant deterrent effect even in Levitt's study because Nagin reports that the estimated reduction in crime from imprisonment is 'not much larger than rates of offending of incarcerated populations reported in various studies of the incapacitation impacts' (thereby leaving little residual deterrent impact after the effect of the offenders' being off the street is taken into account).

45 James Q. Wilson, 'Crime and Public Policy,' *Crime*, eds. J.Q. Wilson & J. Petersilia (San Francisco: ICS Press, 1995) at 489.

46 D.H. Bayley, *Police for the Future* (New York: Oxford University Press, 1994). The classic study here, the Kansas City Preventive Patrol Experiment is not without its methodological problems as Lawrence Sherman & David Weisburd have shown. Sherman & Weisburd show, moreover, that increased police activity targeted on known hot spots, as opposed to random patrol as in the Kansas City experiment, can have a significant effect on crime. L. Sherman & D. Weisburd, 'General Deterrent Effects of Police Patrol in Crime "Hot Spots": A Randomized, Controlled Trial' (1995) 12 *Justice Quarterly*. 625-49. For the original study see G. Kelling *et al.*, *The Kansas City Preventive Patrol Experiment: A Summary Report* (Washington, DC: Police Foundation, 1974).

47 While this is mostly the result in the following studies, the expected certainty of punishment is also in the majority found to have an effect, at least in some contexts. G.P. Waldo & T.G. Chiricos, 'Perceived Penal Sanction and Self-reported Criminality: A Neglected Approach to Deterrence Research' (1972) 19 *Social Problems*. 522; W.C. Bailey & R.P. Lot, 'Crime, Punishment and Personality: An Analysis of the Deterrence Question' (1976) 67 *Journal of Criminal Law and Criminology*. 99; R.E. Kraut, 'Deterrent and Definitional Influences on Shoplifting' (1976) 23 *Social Problems*. 358; M. Silberman, 'Towards a Theory of Criminal Deterrence' (1976) 41 *American Sociological Review*. 442; M.W. Spicer & S.B. Lundstedt, 'Understanding Tax Evasion' (1976) 31 *Public Finance*. 295; J. Teevan, Jr., 'Deterrent Effects of Punishment: Subject Measures Continued' (1976) 18 *Cdn. Jo. Corr.* 152; J. Teevan, Jr., 'Subjective Perceptions of Deterrence (Continued)' (1976) 13 *Journal of Research in Crime and Delinquency*. 155; J. Teevan, Jr., 'Deterrent Effects of Punishment for Breaking and Entering and Theft,' *Law Reform Commission of Canada, Fear of Punishment*

other developed nations do not have, with more private and public police than they, with imprisonment rates several times higher than the OECD average, has not the lowest crime rates, but the highest of any of the wealthy nations. How can this be so?

B. EMOTION AND DEFIANCE

One reason is that the protection we get from many of the worst crimes is not bound up with calculative deliberation. For most of the people who

(Ottawa: Law Reform Commission, 1976); L.S. Anderson, T.G. Chiricos & G.P. Waldo, 'Formal and Informal Sanctions: A Comparison of Deterrent Effects' (1977) 25 *Social Problems*. 103; R.F. Meier & Weldon T. Johnson, 'Deterrence as Social Control: The Legal and Extra-legal Production of Conformity' (1977) 42 *American Sociological Review*. 292; W. Minor, 'A Deterrence Control Theory of Crime,' *Theory in Criminology: Contemporary Views*, ed. R. Meier (Beverly Hills: Sage, 1977); L. Cohen, 'Sanction Threats and Violation Behavior: An Inquiry into Perceptual Variation,' *Quantitative Studies in Criminology*, ed. C.F. Welford (Beverly Hills: Sage, 1978); G.F. Jensen & M. Erickson, 'The Social Meaning of Sanctions,' *Crime, Law and Sanction: Theoretical Perspectives*, eds. M. Krohn & R. Akers (Beverly Hills: Sage, 1978); R. Mason & L. D. Calvin, 'A Study of Admitted Income Tax Evasion' (1978) 13 *Law and Soc'y Rev.* 73; K.E. Waerneryd & B. Walerud, 'Taxes and Economic Behavior – Some Interview Data on Tax Evasion in Sweden' (1982) 2 *Journal of Economic Psychology*. 187; R.L. Akers *et al.*, 'Social Learning and Deviant Behavior: A Specific Test of a General Theory' (1979) 44 *American Sociological Review*. 635; H.G. Grasmick & G.J. Bryjak, 'The Deterrent Effect of Perceived Severity of Punishment' (1980) 59 *Social Forces*. 471; R.F. Meier, 'Jurisdictional Differences in Detering Marijuana Use' (1982) 12 *Journal of Drug Issues*. 51; R. Paternoster *et al.*, 'Estimating Perceptual Stability and Deterrent Effects: The Role of Perceived Legal Punishment in the Inhibition of Criminal Involvement' (1983) 74 *Journal of Criminal Law and Criminology*. 270; R. Paternoster *et al.*, 'Perceived Risk and Social Control: Do Sanctions Really Deter?' (1983) 17 *Law and Soc'y Rev.* 457; D.M. Bishop, 'Legal and Extralegal Barriers to Delinquency: A Panel Analysis' (1984) 22 *Criminology*. 403; F.P. Williams III, 'Deterrence and Social Control: Rethinking the Relationship' (1985) 13 *Journal of Crim. Just.* 141; K.A. Kinsey, 'Theories and Models of Tax Cheating' (1986) 18 *Criminal Justice Abstracts*. 403; R. Paternoster & L. Iovanni, 'The Deterrent Effect of Perceived Severity: A Re-examination' (1986) 64 *Social Forces*. 751; I. Piliavin *et al.*, 'Crime, Deterrence and Rational Choice' (1986) 51 *American Sociological Review*. 101; S. Klepper & D. Nagin, 'The Deterrent Effect of Perceived Certainty and Severity of Punishment Revisited' (1989) 27 *Criminology*. 721; S. Klepper & D. Nagin, 'Tax Compliance and Perceptions of the Risk of Detection and Criminal Prosecution' (1989) 23 *Law and Soc'y Rev.* 209; H.G. Grasmick & R. Bursik, 'Conscience, Significant Others and Rational Choice: Extending the Deterrence Model' (1990) 24 *Law and Society Review*. 837; S.R. Burkett & E.L. Jensen, 'Conventional Ties, Peer Influence and the Fear of Apprehension: A Study of Adolescent Marijuana Use' (1975) 16 *Sociological Quarterly*. 522; C.R. Tittle, *Sanctions and Social Deviance* (New York: Preager, 1980); K. Williams & R. Hawkins, 'The Meaning of Arrest for Wife Assault' (1989) 27 *Criminology*. 163; S. Simpson, 'Corporate Crime Deterrence and Corporate Control Policies: Views from the Inside,' *White-Collar Crime Reconsidered*, eds. K. Schlegel & D. Weisburd (Boston: Northeastern University Press, 1992).

caused us problems last week, we did not deal with those problems by killing them. Our refraining from murder was not because we weighed up the benefits against the probability of detection and likely punishment; it was because murder was right off our deliberative agenda; murder was simply unthinkable to us as a way of solving our problems. It is understanding what constitutes that unthinkableness that is the key to crime prevention. Whether the penalty for murder is death or something else is mostly quite unimportant to that understanding.

Moreover, when murder does become thinkable, it often does so in a way that is not rationally deliberative in a way the deterrence model assumes. It sometimes becomes thinkable in the context of emotions temporarily hijacking those more calculative processes in the brain on which deterrence depends.⁴⁸ This emotional short-circuiting of rational calculation in our brain had survival value in the history of our species. The emotion of anger sends blood rushing to our hands so we are ready to fight, to grasp a weapon. The emotion of fear sends blood to our feet so we are ready to flee. The emotion of lust sends blood rushing to a place in between. The short circuit gives our bodies the capacity to exploit windows of opportunity to attack, defend, flee, procreate before the opportunity has passed.

In the contemporary world, as opposed to the world of our biological creation, the means of risk management and procreation are institutionalized in ways that make more doubtful the survival value of a brain that is liable to have its faculties for rational deliberation pre-empted by emotion. So the plight of modern humans is to experience regular regret for things we do during those moments when the emotions hijack the brain. For most of us, this is a weekly occurrence, for some a daily one. It does not take something as drastic as a man attacking us with a spear for threat to trigger anger; the brain makes connections of lower-level threats like an angry voice to fire up our anger. This is why emotional defiance to regulatory threats is relevant not only to 'crimes of passion' like murder. Overbearing threats by a government official can engender emotional defiance to what economists would expect to be rational business compliance with regulatory laws. Toni Makkai and I examined compliance by chief executives of 410 Australian nursing homes with 31 regulatory standards. We found that the subjective expected level of punishment did not predict compliance in any of a variety of more simple and more complex multivariate models we were able to

48 For a readily digestible account, if neurophysiologically dubious in parts, of this phenomenon see D. Goleman, *Emotional Intelligence* (New York: Bantam Books, 1995).

construct.⁴⁹ Diagram 1 shows, however, that this result conceals the fact that there were contexts where deterrence worked and other contexts where it not only failed to work, but where there was a counter-deterrent effect. A scale to measure the psychological trait of the emotionality of the chief executive was the only variable we could find which specified when the deterrence model would work and when it would not. When managers were low on emotionality, they responded to perceived increases in threat in a 'cold and calculating' way. But the CEOs who were high on emotionality responded to escalated threats by getting mad rather than by ceasing to be bad. In Diagram 1 if deterrence simply failed for high emotionality managers, the high emotionality line would be flat. In fact it slopes downwards, meaning that for emotional managers, the stronger the deterrent threat, the less compliance. Deterrence fails as a policy not so much because it is irrelevant (though it is for many) but because the gains from contexts where it works are cancelled by the losses from contexts where it backfires.

The most concentrated research effort criminology has seen was on the deterrence of domestic violence.⁵⁰ It tends to bear out a similar picture. In a first randomized experiment, Sherman and Berk⁵¹ found that arrested domestic violence offenders were less likely to re-offend than those dealt with less punitively. This study had a major effect on public policy. However, subsequent experiments found no net effect of arrest in reducing violence. Again, this overall result concealed the fact that for employed men arrest reduced subsequent violence, while for unemployed men it escalated violence. Sherman interprets this as a result of underclass men who have experienced repeated stigmatizing and unfair experiences with the criminal justice system responding with anger and defiance when they are arrested. Unfortunately, while there are fewer unemployed than employed men in most communities, the violence-escalation effect of arrest for the unemployed was about twice the violence-reduction effect among the employed, giving a nil result overall in most of the studies. How to interpret the various methodological weaknesses of these studies is riddled with controversy.⁵² What is clear,

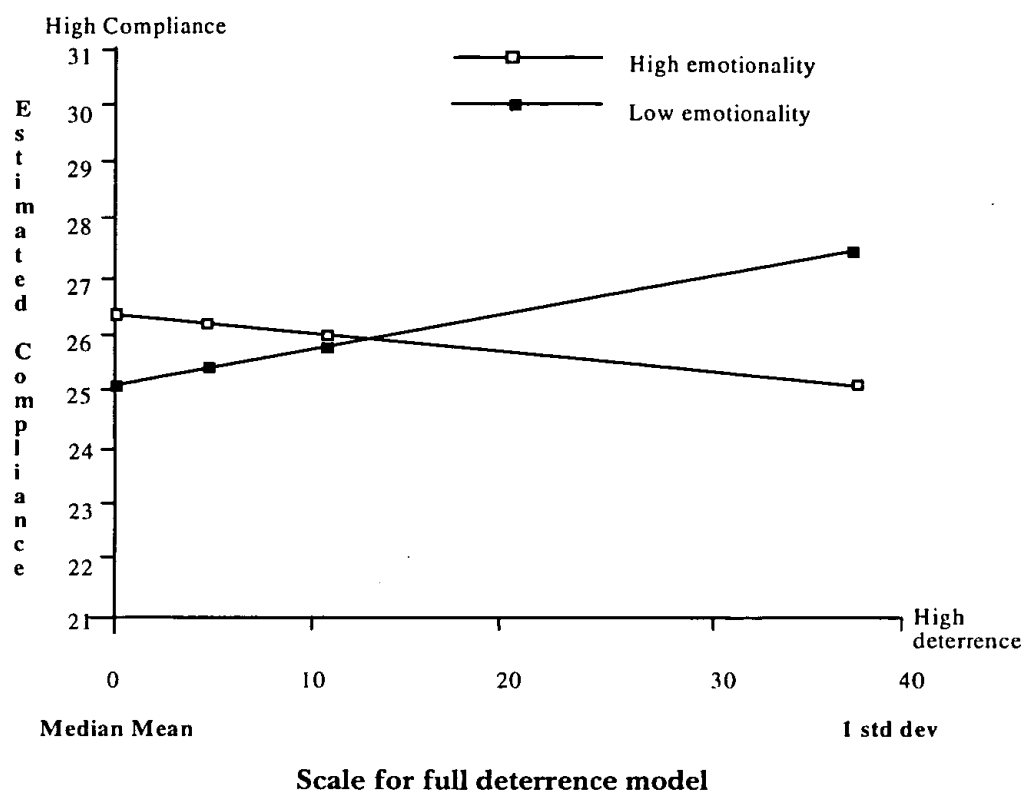
49 J. Braithwaite & T. Makkai, 'Testing an Expected Utility Model of Corporate Deterrence' (1991) 25 *Law and Soc'y Rev.* 7 [hereinafter 'Testing']; Toni Makkai & John Braithwaite, 'The Dialectics of Corporate Deterrence' (1994) 31 *J. of Res. Crime & Del.* 347 [hereinafter 'Dialectics'].

50 For a review of the research effort by its most central participant, see L. Sherman, *Policing Domestic Violence* (New York: Free Press, 1992).

51 L.W. Sherman & R.A. Berk 'The Specific Deterrent Effect of Arrest for Domestic Assault' (1984) 49 *American Sociological Review*. 261.

52 See E. Stanko 'Policing Domestic Violence: Dilemmas and Contradictions' (1995) *Austl. & N.Z. J. Crim. Criminology*, Special Supplementary Issue. 31.

Diagram 1

Effect of interaction between emotionality and deterrence on compliance with the law⁵³

however, is that never in my lifetime are we likely to see such a large investment of public money in systematic randomized tests at multiple sites of a deterrence hypothesis. If we are not likely ever to get better data than this, at least we need to settle on the conclusion that it is problematic to claim that deterrence is more likely to produce negative than positive effects on those who abuse power.

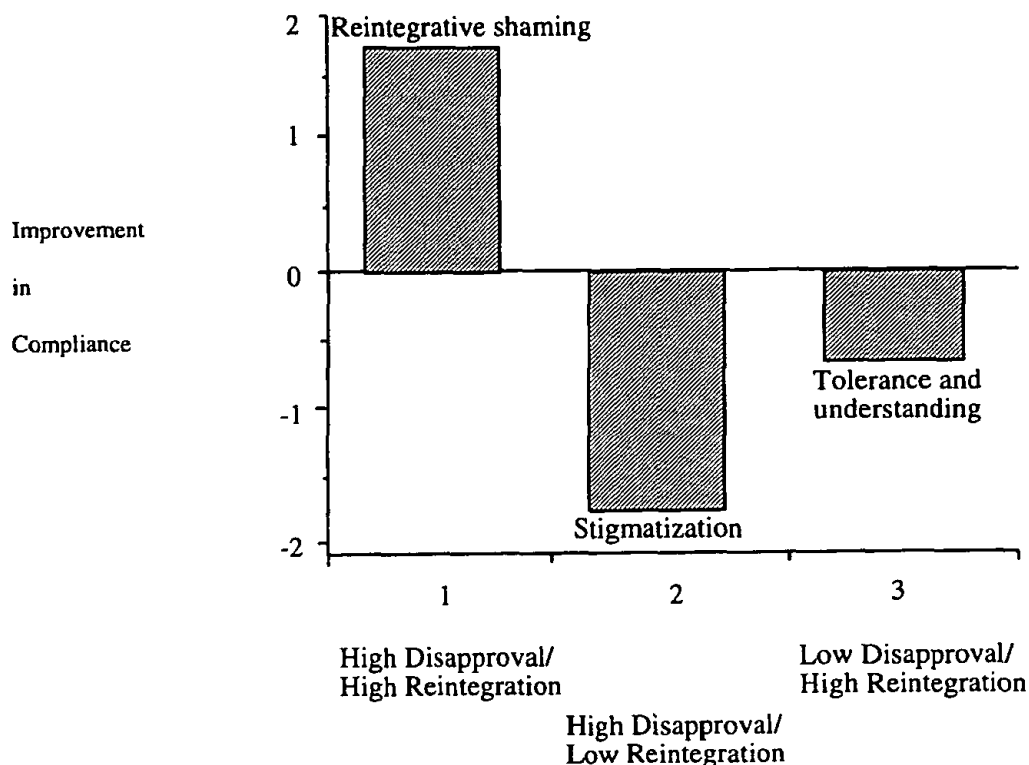
C. COGNITIONS OF STIGMA AND PROCEDURAL INJUSTICE

Moreover, on the same nursing home compliance data set as in Diagram 1, Sherman's approach to interpreting positive and negative effects of deterrence receives support. It was found that nursing home inspectors with a highly stigmatizing approach to law-breakers reduced compliance by 39 per cent in Diagram 2, while inspectors with a reintegrative shaming philosophy for securing compliance improved compliance in the two years following their inspection by the same amount. With reintegrative shaming, the non-compliant act is disapproved, while those responsible

⁵³ Ibid.

Diagram 2

Mean improvement in compliance for nursing homes where inspectors used high disapproval and high reintegration styles; high disapproval and low reintegration styles; low disapproval and high reintegration styles (N=129; F-Value=3.58; $p=.03$)



are treated with respect as responsible citizens. With stigmatization, they are shamed disrespectfully, labelled as bad people who have done the bad act. Inspectors who one might call captured, inspectors who were 'nice,' tolerant, and understanding of law-breakers, also made things worse, though the deterioration in compliance following their inspection was less than with the stigmatizing inspectors.

Sherman's invocation of the literature showing that compliance is more likely when actors perceive regulation to be procedurally fair suggests that the reasons big sticks rebound are to be found in the psychology of cognition as well as the psychology of emotion.⁵⁴ More

⁵⁴ See T. Tyler, *Why People Obey the Law?* (New Haven: Yale University Press, 1990). A.E. Lind & T. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988). For the nursing home data discussed in Diagrams 1 and 2, only one of the standard facets of procedural justice – process control – had a significant effect in improving compliance, see T. Makkai & J. Braithwaite, 'Procedural Justice and Regulatory Compliance' (1996) 20(1) L. & Human Beh. 83.

police can increase crime if police are systematically procedurally unfair or stigmatizing in the way they deal with an underclass; more police can reduce crime if they are procedurally fair and reintegrative in their policing. When we increase the number of police, one reason we do not generally achieve a measurable reduction in crime is that we put on the beat a mixture of extra stigmatizing police who make things worse and extra fair, and reintegrative police who make things better.

The cognitive mechanisms that produce a 'reactance' against threat have now been the subject of an enormous experimental research effort. This work shows how foolish it is to follow the institutional design advice of Hobbes⁵⁵ and Hume⁵⁶ of preparing for the worst – assuming that people are knaves. Unfortunately, when we treat people as knaves they are more likely to become knaves. The less salient and powerful the control technique used to secure compliance, the more likely that internalization of the virtue of compliance will occur. Experimental research on children and college students demonstrates the counter-productive effect salient rewards and punishments can have: long-term internalization of values like altruism and resistance to temptation are inhibited when they view their action as caused by a reward or punishment.⁵⁷

Over 50 studies examining the effect of extrinsic incentives on later intrinsic motivation indicate that inducements that are often perceived as controlling (e.g., tangible rewards, surveillance, deadlines), depending on the manner in which they are administered, reduce feelings of self-determination and undermine subsequent motivation in a wide variety of achievement-related activities after the reward is removed.⁵⁸

These findings seem to be of fairly general import, being supported in domains including moral behaviour, altruism, personal interaction, aggressive behaviour, and resistance to temptation.⁵⁹ Just as strong

55 T. Hobbes, *De Cive* (New York: Appleton-Century-Crofts, 1949).

56 D. Hume 'Of the Independency of Parliament,' *Essays, Moral, Political and Literary*, vol. 1 (Oxford: Oxford University Press, 1963).

57 M.R. Lepper, 'Dissonance, Self-Perception and Honesty in Children' (1973) 25 *Journal of Personality and Social Psychology*. 65; M.R. Lepper & D. Greene, *The Hidden Costs of Reward* (Hillsdale, NJ: Erlbaum, 1978); T. Dix & J.E. Grusec, 'Parental Influence Techniques: An Attributional Analysis' (1983) 54 *Child Development*. 645; M.L. Hoffman, 'Affective and Cognitive Processes in Moral Internalization,' *Social Cognition and Social Development*, eds. E.T. Higgins, D.N. Rubble & W.W. Hartup (New York: Cambridge University Press, 1983).

58 A.K. Boggiano *et al.*, 'Use of the Maximal-Operant Principle to Motivate Children's Intrinsic Interest' (1987) 53 *Journal of Personality and Social Psychology*. 866.

59 M.R. Lepper, *supra* note 57; R.A. Dienstbier *et al.*, 'An Emotion-Attribution Approach to Moral Behavior: Interfacing Cognitive and Avoidance Theories of Moral Develop-

external incentives retard internalization, using reasoning in preference to power-assertion tends to promote it.⁶⁰

D. REACTANCE

Such findings are an important part of an empirical grounding for why republicans should have a preference for dialogue over coercion as a means of checking power. Brehm and Brehm⁶¹ constructed a theory of psychological reactance on the basis of the kinds of studies we have been discussing. Diagram 3 shows that the net effect of deterrent threats⁶² is the sum of a deterrence effect and a reactance effect. Diagram 3 also shows that reactance is least when we seek to restrict freedom to do something that is not very important to us, greatest when the freedom subjected to control is something the regulated actor deeply cares about. Hence, if freedom to park our car where we want is not an especially important freedom, the way we react to the size of parking fines will be rather like the left-hand panel in Diagram 3. The net effect of threat on compliance will be close to the prediction of a crude rational actor model. If freedom of religion is a vitally important freedom to Christians, then throwing more Christians to the lions may only strengthen their commitment to martyrdom, adding rather than detracting from the growth of Christianity, as in the right-hand panel of Diagram 3.

For republicans, the pattern of empirical results summarized in Diagram 3 has an ominous implication. Countervailing threats to check

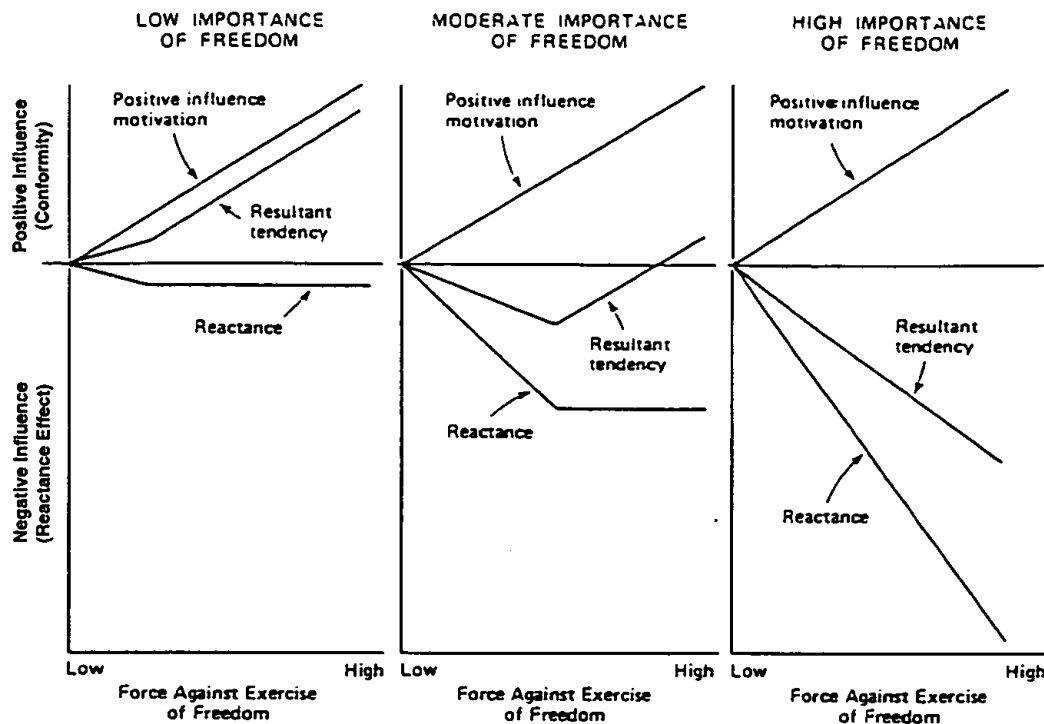
ment' (1975) 82 *Psychological Review*. 229; T. Dix & J.E. Grusec, 'Parental Influence Techniques: An Attributional Analysis' (1983) 54 *Child Development*. 645; A.K. Boggiano *et al.*, 'Use of the Maximal-Operant Principle to Motivate Children's Intrinsic Interest,' *ibid.*

60 J.A. Cheyne & R.H. Walters, 'Intensity of Punishment, Timing of Punishment, and Cognitive Structure as Determinants of Response Inhibition' (1969) 7 *Journal of Experimental Child Psychology*. 231; R.D. Parke, 'Effectiveness of Punishment as an Interaction of Intensity, Timing, Agent Nurturance and Cognitive Structuring' (1969) 40 *Child Development*. 213; M.L. Hoffman, 'Moral Development,' *Carmichael's Manual of Child Psychology*, ed. P.H. Mussen (New York: Wiley, 1970); D.Baumrind, 'The Development of Instrumental Competence Through Socialization,' *Minnesota Symposium of Motivation*, vol. 7, ed. A.D. Pick (Minneapolis: University of Minnesota Press, 1973); C.Z. Zahn-Waxler, M.R. Radke-Yarrow & R.A. King, 'Child Rearing and Children's Prosocial Initiations Towards Victims in Distress' (1979) 50 *Child Development*. 319.

61 *Ibid.*

62 The theory posits the same form of relationship as in Diagram 3 for reactance to rewards as to punishments. However, the data suggest that reactance to punishment is stronger than to rewards. See S.S. Brehm & J.W. Brehm, *Psychological Reactance: A Theory of Freedom and Control* (New York: Academic Press, 1981) at 229-46.

Diagram 3

The interactive effects of force and importance of freedom⁶³

the power of tyrants will work well when it is a power the tyrant cares little about. But try to check the power of a tyrant to enslave his people (when he sees that enslavement as central to his power), try to force a patriarch to desist from family violence when domination of family is a prerogative of utmost importance, then one confronts maximum defiance.

At the same time, we will find an encouraging republican implication of the pattern of results in Diagram 3. If deterrence works well (without reactance) for freedoms that actors do not care deeply about, what we can do about organizational abuse of power is target the actors within the organization who care least about the freedom being deterred. In the next section we will find that such deterrable soft targets with the capacity to prevent abuse of power can usually be uncovered by processes of dialogic regulation.

Empirical research about how big sticks rebound has been much more manageable (and amenable to random assignment) in relatively micro-

⁶³ S.S. Brehm & J.W. Brehm, *Psychological Reactance: A Theory of Freedom and Control*, *ibid.* at 60.

contexts, such as families and nursing homes. Yet there are now the beginnings of an historical scholarship applying the theoretical framework to how stigmatization and punitiveness that is perceived as unjust can threaten violence between nations, indeed how it can risk global tyranny.⁶⁴ The way Hitler exploited the humiliation of the German people at Versailles is the most thoroughly researched instance of this kind of macro-reactance.⁶⁵

E. RATIONAL COUNTER-DETERRENCE

At all the levels we have discussed – individuals, families, small organizations like nursing homes, transnational corporations and states which are major powers – the conclusion is that simple rational choice models of compliance do not work especially well because empirical results sum contexts where rational threats are productive, non-productive, and counter-productive. In addition to reactance effects that have emotional and cognitive dimensions not captured by rational choice models (rage, defiance, perceived procedural injustice, stigmatization, devaluation of the intrinsic virtue of compliance) the stronger deterrents are, the more rational actors will find countermeasures that effectively undermine the deterrents. Hence, in Diagram 3, we need to discount the rational deterrence effect not only by the reactance effect, but also by measures which rationally subvert the deterrent effect. These grow with the size of the deterrent because the more severe the deterrents, the more reason regulated actors have to invest in counter-deterrence. And of course, the more powerful the regulated actors are, the more capacity they have to mobilize counter-deterrence. An unemployed person convicted of a crime is relatively powerless to do anything to duck the stigma, while a transnational corporation convicted of crime can hire a public relations firm to convince people through full-page counter-publicity that what it did was, all things considered, in the public interest, and that the prosecution was vindictive.⁶⁶

More fundamentally, TNCs (transnational corporations) have a well-documented capacity to organize their affairs so that no one can be

64 T.J. Scheff, *Bloody Revenge: Emotions, Nationalism and War* (Boulder, CO: Westview Press, 1994); T.J. Scheff & S. Retzinger, *Shame, Violence and Social Structure* (Lexington: Lexington Books, 1991). J. Braithwaite, 'Thinking About the Structural Context of International Dispute Resolution,' *Whose New World Order: What Role for the United Nations?*, eds. M.R. Bustelo & P. Alston (Sydney: Federation Press, 1991).

65 A. Offer, 'Going to War in 1914: A Matter of Honour?' Paper to Australian War Memorial Conference (1994). See also *ibid.*

66 For the most systematic empirical investigation of corporate counter-publicity, see B. Fisse & J. Braithwaite, *The Impact of Publicity on Corporate Offenders* (Albany, NY: State University of New York Press, 1983) [hereinafter *Impact*].

called to account.⁶⁷ The larger and more powerful the organization, the more inherently complex and hard to prove are their abuses of power. But more than that, complexity is something powerful actors are able to contrive into their affairs. This includes organizational complexity as to who is responsible for what, jurisdictional complexity as to the nation in which each element of the offence occurs, complexity of the accounts and complexity that repeat corporate players have been able to contrive into the law on previous occasions when they have 'played for rules' rather than played for outcomes. The more punitive a regulatory regime is, the more worthwhile it is for TNCs to have 'vice-presidents responsible for going to jail.'⁶⁸ Lines of responsibility and reporting are drawn in the organization so that if someone has to be a scapegoat for the crimes of the CEO, it will be the vice-president responsible for going to jail. The latter was promoted to vice-president on the basis of assuming this risk. After a period of faithful service in the role, they would be moved sideways to a safe vice-presidency. Again, the empirical nature of rational contriving of sophisticated counter-deterrents is ominous for republicans. The more powerful the corporate or state actor, the greater the capability for putting countermeasures in place; the more credible is the checking of power, the more reason tyrants have for counter-deterrence.

F. THE DETERRENCE TRAP

This connects to one final problem. Precisely when the stakes are highest with an abuse of power, the regulator is likely to fall into a 'deterrence trap.'⁶⁹ Because of the inherent and contrived complexity associated with the biggest abuses of organizational power, probabilities of both detection and conviction fall. Imagine, for example, that the risks of conviction for insider trading are only one in a hundred for a corporate stock market player who can afford quality legal advice. (In fact, in Australia they had been zero until recently when the first private actor was convicted of this crime.) Imagine that the average returns to insider trading

67 This is one of the rationales for corporate/enterprise liability. If there is only individual liability, the corporation can simply set up the kinds of liability avoidance mechanisms discussed here. See Fisse & Braithwaite, *Corporations, Crime and Accountability* (Cambridge: Cambridge University Press, 1993) [hereinafter *Corporations*].

68 These were executives I discovered and interviewed in my research on corporate crime in the pharmaceutical industry. J. Braithwaite, *Corporate Crime in the Pharmaceutical Industry* (London: Routledge & Kegan Paul, 1984) [hereinafter *Pharmaceutical*].

69 This concept was coined by Coffee. J.C. Coffee, Jr., 'No Soul to Damn, No Body to Kick: An Unscandalized Essay on the Problem of Corporate Punishment' (1981) 79 Mich. L. Rev. 413.

are a million dollars. Under a crude expected utility model, it will then be rational for the average insider trader to continue unless the penalty exceeds 100 million dollars. That would be a large enough penalty to bankrupt many medium-sized companies, leaving innocent workers unemployed, creditors unpaid, communities deprived of their financial base. This is what is required to deter the average insider trader under these crude assumptions. But the criminal law cannot be designed to deal simply with the average case. It should be designed so it can deter the worst cases, which, with sophisticated corporate crime, involve not millions, but billions. Here the deterrence trap seems inescapably deep. These problems are further compounded with public sector abuse of power. The public trading enterprise may have some capital or assets that can be seized, but with a purely administrative agency, the compensatory or deterrent resources that can be accessed are limited to the savings of culpable public servants. Beyond that point, innocent citizens are taxed for compensation payouts to other innocent citizens (the victims) and for organizational deterrent payouts, which are a practical irrelevance to the individual beneficiaries of the crimes.

In Parts IV and V, I will advance two counter-intuitive strategies for beating the emotional and cognitive reactance, the rational countermeasures and the deterrence traps that make legal checks on abuse of power difficult at best, counter-productive at worst:

1. Replace narrow, formal and strongly punitive responsibility (the 'find the crook' strategy) with broad, informal, weak sanctions;
2. Separate enforcement targeting from identification of the actor who benefits from the abuse of power.

Part VII will show that at the macro level of the polity, these strategies depend on plural separations of powers both within and between the public and private sectors.

IV The Strength of Weak Sanctions

A. OVERDETERMINATION AND SOFT TARGETS

These two strategies for beating reactance rely on an obvious fact about the abuse of power: the more serious the abuse, the more likely it is that many people will be involved. The most egregious abuses of power arise when whole armies, police forces, bureaucracies, or transnational corporations can be mobilized to prosecute the exploitative conduct at issue. Brent Fisse and I have concluded from our various empirical studies that a feature of corporate crime is that it is over-determined, as the philosophers say, by the acts and omissions of many individuals,

organizations, and sub-units of organizations.⁷⁰ While only a small number of people may be involved in committing a corporate crime, our empirical work shows that a much larger number usually have the power to prevent it. These people vary in the degree they care about the freedom being regulated and, therefore, in their susceptibility to reactance. The data here relate only to corporate crime, but it is plausible that the same feature is true of non-criminal abuses of power.

It may be that rational dollar-maximizing actors need a fine of 100 million dollars if they are to be deterred from insider trading from which they benefit. But they, the beneficiary(ies) of the crime, are not the only potential deterrence targets. They may have a boss; their boss may have a boss who is in a position to stop the misconduct. They may have a variety of subordinates who can prevent the wrongdoing by exposing the crime. A secretary, for example, who is privy to information, could do the 'whistle blowing' that lands their employer in jail for major frauds.⁷¹ Then there are auditors, law firms, consultants, investment bankers, suppliers, other organizations upstream and downstream who know what is going on in the criminal organization.⁷² Hence, Fisse and Braithwaite concluded

In a complex corporate offence there can be three types of actors who bear some level of responsibility for the wrongdoing or capacity to prevent the wrongdoing:

1. hard targets who cannot be deterred by maximum penalties provided in the law;
2. vulnerable targets who can be deterred by maximum penalties; and
3. soft targets who can be deterred by shame, by the mere exposure of the fact that they have failed to meet some responsibility they bear, even if that is not a matter of criminal responsibility.⁷³

70 B. Fisse & J. Braithwaite, *Corporations*, supra note 67.

71 Among the empirical studies of fraud that have documented the secretary blowing the whistle on the boss is J. Braithwaite, *Pharmaceutical*, supra note 68.

72 Often, they get to know as a result of explicit auditing practices that put them in a better position to regulate malpractice than any government regulator. For example, in analysing the implications of the chemical industry's Responsible Care program, Neil Gunningham explains that 'Dow insists on conducting an audit before it agrees to supply a new customer with hazardous material, and routinely audits its distributors. The audit involves a team visiting the distributor's operations to examine handling, transportation, storage and terminating techniques and prescribing improvements aimed at achieving environmental standards far in advance of current regulatory requirements. Many large chemical manufacturers go further....' N. Gunningham, 'From Adversarialism to Partnership? ISO 14000 and Regulation.' Paper to Australian Centre for Environmental Law, Australian National University Conference on ISO 14000 (Canberra, 1996).

73 B. Fisse & J. Braithwaite, *Corporations*, supra note 67 at 220.

B. THE SOFT TARGET AT SOLOMONS

Let me now illustrate the practical way regulators can escape the deterrence trap with a case from my own experience as a Commissioner with Australia's national antitrust and consumer protection agency, the Trade Practices Commission.⁷⁴ Solomons Carpets ran advertisements claiming that certain carpets were on sale for up to 40 dollars per metre off the normal price. This representation was false. The Commission had difficulty deciding what action to take on this alleged breach of its act. It was a less serious matter than others that were putting demands on its scarce litigation resources.

The Commission decided to offer Solomons an administrative settlement which included voluntary compensation for consumers in an amount exceeding the criminal fine that was likely should they be convicted. The facts of the matter made it fairly unlikely that any court would order compensation for consumers, but likely that a modest fine would be imposed. All the Commissioners felt that Solomons would reject the administrative settlement because it would be cheaper for them to face the consequences of litigation. Moreover, Solomons management seemed tough nuts, treating the Commission as if it were bluffing on the threat of criminal enforcement. The Commissioners (including me) turned out to be wrong in assuming that such decisions are necessarily made by companies according to a deterrence cost-benefit calculus. Unknown to the Commission at the time, there was also a soft target within the company, namely the Chairman of the Board, the retired patriarch of this family company. For him, as a responsible businessman, it made sense to accept the Commission's argument that resources should be spent on correcting the problem for the benefit of consumers rather than on litigation and fines.

The Chairman of the Board was dismayed at the prospects of allegations of criminality against his company and was concerned for its reputation. He was also angry with his chief executive for allowing the situation to arise and for indulging in such a marketing practice. The CEO, like his underlings, had proved a hard target, determined to tough it out. The chairman sought the resignation of his chief executive and instructed the remaining senior management to cooperate with an administrative settlement that included the following seven requirements:

1. compensation to consumers (legal advisers on both sides were of the opinion that the amount was considerably in excess of what was likely to be ordered by a court);

74 This case and the insurance cases are based on the account in *ibid.* at c. 7.

2. a voluntary investigation report to be conducted by a mutually agreed law firm to identify the persons and defective procedures that were responsible for the misleading advertising;
3. discipline of these employees and remediation of those defective procedures;
4. a voluntary Trade Practices education and compliance program within the firm and among its franchises directed at remedying the problems identified in the self-investigation report on an ongoing basis and at improving Trade Practices compliance more generally;
5. an industry-wide national Trade Practices education campaign funded by Solomons to get its competitors to also improve their compliance with regard to advertising of carpets;
6. auditing and annual certification of completion of the agreed compliance programs by an agreed outside law firm at Solomons' expense;
7. a press release from the Commission advising the community of all of the above and of the conduct by Solomons that initially triggered the investigation (The press release attracted significant coverage in most major Australian newspapers.).

In addition, although it was not part of the deed of agreement, Solomons volunteered to conduct an evaluation study of the improvement (or absence thereof) in compliance with the Act by its competitors as a result of the industry-wide education campaign that it funded.

C. THE ACCOUNTABILITY MODEL

Solomons was a watershed case for the Commission. The next major cases dealt with in this way were the largest consumer protection cases ever handled in Australia, one involving a settlement of at least 50 million and possibly 100 million dollars. The most egregious involved misrepresentations in selling insurance on remote Aboriginal communities. Top and middle management of the insurance companies met with Aboriginal victims and Aboriginal Community Councils to discuss the harm they had done and how it might be repaired. Some, but not all, of these insurance executives were soft targets who came away from these encounters deeply ashamed of what their company had done. They agreed to extraordinary penance, in some cases well beyond what the law would have required. In one case, the company's self-investigation report led to a rather punitive outcome – eighty employees, some of them senior managers, were dismissed.

Many subsequent cases were handled through a process of working up the organization until a soft management target was found who would trigger a dialogic process of responsive reform among those below the

soft target. Brent Fisse and I developed this strategy into an Accountability Model that seeks to mobilize corporate private justice systems to hold responsible all who are responsible (generally at sub-criminal levels of responsibility).⁷⁵ While holding the axe of criminal enforcement over an organization's head, the company is required, generally with an independent law firm, to produce a self-investigation report identifying all the persons and procedures responsible for the wrongdoing, and proposing remedies. Again, the idea is that some of the persons identified as having a responsibility under this process will be soft targets who will initiate responsive processes of reform, recompense, and prevention for the future.

D. GENERALIZED RESTORATIVE JUSTICE AND SOFT TARGETS

These Australian corporate crime cases are at the leading edge of what is now a global social movement for restorative justice as an alternative to punitive justice.⁷⁶ The Accountability Model might have less force in relation to simpler corporate wrongdoings, which are less over-determined by the causative and preventive capabilities of many hands and minds. However, the same restorative justice ideas are being found to have relevance to crimes that involve even the lowest-level abuses of power by individuals, such as the abuse of the power to drive a motor vehicle (by doing so when drunk). My colleagues Lawrence Sherman and Heather Strang are conducting an experiment in which drunk driving offenders are randomly assigned to court versus a restorative justice conference. In the conference, representatives of the neighbourhood,

⁷⁵ Ibid.

⁷⁶ Restorative justice has even made inroads in some of the most punitive societies in the world, including South Africa (where thousands of juvenile offenders were being sentenced to flogging annually until Mr. Mandela took over), Singapore (where a preliminary evaluation has concluded that a restorative conferencing program based on the theory of reintegrative shaming has reduced reoffending (W.Y. Chan, 'Family Conferencing in the Juvenile Justice Process: Survey on the Impact of Family Conferencing on Juvenile Offenders and their Families,' *Subordinate Courts Statistics and Planning Unit Research Bulletin 3* [1996]; L.L. Hsien, 'Family Conferencing Good for Young Delinquents: Report,' *IMAGE Database* [1996]), and the United States where the Assistant Attorney General has lauded the fact that 'innovative efforts are under way to 'reinvent' the justice system itself. 'Restorative' – or community – justice experimentation is taking place in jurisdictions across the country.... Community justice is also being incorporated into community policing programs...like the program in Australia that replaces formal prosecution with a 'family group conference' designed to shame the offender and explain the full impact of the crime on the victim and the community' (L. Robertson, 'Linking Community-Based Initiatives and Community Justice: The Office of Justice Programs' [August 1996] *National Institute of Justice Journal*. 6).

where the offence occurred, have the opportunity to express their concerns about letting their children cross the streets when drivers are on the road in this condition. A video message to the offender from a woman who has lost members of her family at the hands of a drink driver is played and discussed. Loved ones, drinking mates, and friends from work express their support for the offender and her commitment to responsible citizenship. They also become key players in suggesting ideas for a restorative plan of action. This may include an apology, compensation for any victims, and community service. But it may also include preventive agreements that draw on the capacity of many hands to prevent. Drinking mates may sign a designated driver agreement. Bar staff at the drinker's pub may undertake to call a taxi when the offender has had too much to drink. Uncle Harry may undertake to ensure that the car is always left in the garage on Friday and Saturday nights. Even with an offence as seemingly solitary as drunk driving, often there are many with preventive capabilities who can be rendered responsible for mobilizing those capabilities through a restorative justice dialogue. While reactance may be strong with the young, male drunk driver – who is a 'petrol head,' proud of his capacity to hold his drink – there may be no reactance from any of the other targets at a restorative justice conference. Indeed, when there is a collective reaction of non-reactance, we observe this to calm the anger of a young offender.

Common garden varieties of juvenile crime are even more collective, proffering softer targets than drink driving.⁷⁷ Hence recent work has shown that dialogic, 'whole school' approaches to confronting bullying have reduced bullying in the seminal Norwegian study, by 50 per cent.⁷⁸ Most juvenile crime is a collective phenomenon. This points up another limitation of the punishment model. By locking up some members of a juvenile gang or a drug distribution network, we can cause the group to recruit replacements from law-abiding peer groups.⁷⁹ The more we move toward more serious abuses of power involving more complex organizational forms (from school-yard bullies to motorcycle gangs to the Mafia)

77 See F.E. Zimring 'Kids, Groups and Crime: Some Implications of a Well-Known Secret' (1981) 72 J. Crim. L. & Criminal. 867.

78 D.P Farrington, 'Understanding and Preventing Bullying,' *Crime and Justice: Annual Review of Research*, vol. 17, ed. M. Tonry (Chicago: University of Chicago Press, 1993); D. Olweus, 'Annotation: Bullying at School: Basic Facts and Effects of a School Based Intervention Program' (1994) 35 Journal of Child Psychology and Psychiatry. 1171; D. Pepler *et al.*, 'A School-Based Anti-Bullying Intervention: Preliminary Evaluation,' *Understanding and Managing Bullying*, ed. D. Tattum (London: Heinemann, 1993).

79 A.J. Reiss, Jr., 'Understanding Changes in Crime Rates,' *Indicators of Crime and Criminal Justice: Quantitative Studies*, eds. S.E. Feinberg & A.J. Reiss (Washington, DC: US Government Printing Office, 1980).

the more force in this analysis of the limits of deterrence and the over-determined causative and preventive capability of multiple actors. Of course, some might say that the code of silence makes everyone a 'vice-president responsible for going to jail' in the Mafia. No soft targets here? Prosecutorial experience proves this not to be the case. Even in the most systematically ruthless and disciplined criminal organizations – the Colombian drug cartels, for example – there are defectors who are sick of the killing and insecurity, who would like to retire like normal 70 year olds, who are sufficiently ashamed of what they have done to not want this life for their children.⁸⁰ The fact is that such soft targets will do deals, particularly if they are allowed to pass on to their children the parts of their ill-gotten wealth that are invested in law-abiding businesses, that will enable them to lead the respectable and secure life the criminal has been denied.

Unfortunately, systematic empirical testing of whether restorative justice works better than punitive justice is more possible with juvenile bullying, young adult violence, property crime, and drunk driving, where we are randomly assigning hundreds of cases to the two kinds of justice. There are not enough detected cases of the biggest abuses of power⁸¹ for quantitative empirical work that compares outcomes.

In one domain of corporate lawbreaking, regulation of the quality of care of nursing home residents, systematic quantitative work on a sample of 410 organizations has been possible. In that domain, as discussed earlier, Toni Makkai and I failed to find support for a simple deterrence hypothesis.⁸² However, we did find support for the effectiveness in increasing compliance of a dialogic approach to regulation based on the proffering of trust,⁸³ praise and the nurturing of pride in corporate social responsibilities,⁸⁴ and reintegrative shaming.⁸⁵ The way Australian nursing home regulation works is that at the end of an inspection, a meeting occurs between the inspection team and the home's management team.

80 See, for example, W.L. Rensselaer III, 'Colombia's Cocaine Syndicates,' *War on Drugs: Studies in the Failure of US Narcotics Policy*, eds. A. McCoy & A. Block (Boulder, CO: Westview, 1992).

81 Cases like the billion dollar frauds of the Bank of Credit and Commerce International which Fisse and I have used to argue the comparative advantage of the Accountability Model. B. Fisse & J. Braithwaite, *Corporations*, supra note 67 at 222–7.

82 J. Braithwaite & T. Makkai, 'Testing,' supra note 49; T. Makkai & J. Braithwaite, 'Dialectics,' supra note 49.

83 J. Braithwaite & T. Makkai, 'Trust and Compliance' (1994) 4 *Policing and Society*. 1.

84 T. Makkai & J. Braithwaite, 'Praise, Pride and Corporate Compliance' (1993) 21 *Int'l J. Soc. L.* 73.

85 T. Makkai & J. Braithwaite, 'Reintegrative Shaming and Compliance with Regulatory Standards' (1994) 32 *Criminology*. 361.

The owner, or a representative of the Board in the case of a church or charitable home, is invited, as are representatives of the Residents' Committee. It is a meeting of the separate powers of the state, owners, managers, workers, and consumers. A dialogue proceeds for about an hour on the positive things that have been accomplished, what the problems are, and who will take responsibility for what needs to be done. In this process, most participants turn out to be soft targets, wanting to put their responsible self forward, volunteering action plans to put right what has been found wrong. The best evidence we have from our systematic research on this regulatory regime is that it succeeds moderately well in improving compliance with the law and tackling the many very troubling kinds of abuses of power that occur in nursing homes.⁸⁶

At the same time, it is clear from our data that there are cases where dialogic regulation fails – where the hardest of targets are in charge, dominating and intimidating softer targets who work under them. Empirical experience gives good reasons for assuming that even the worst of corporate malefactors have a public-regarding self that can be appealed to.⁸⁷ However, when trust is tried and found to be misplaced, there is a need to escalate to deterrence as a regulatory strategy. When deterrence fails – because of reactance, a deterrence trap, or simply because non-compliance is caused by managerial incompetence rather than rational calculation of costs and benefits – then there is a need to move higher up an enforcement pyramid to an incapacitative strategy. Incapacitation can mean withdrawing or suspending a licence for a nursing home that has proved impregnable to both persuasion and deterrence.

Hence, there are increasingly solid empirical grounds for suspecting that we can often reduce abuse of power by replacing narrow, formal, and strongly punitive responsibility with broad, informal, weak sanctions – by making the many dialogically responsible instead of the few criminally responsible. By dialogically responsible I mean responsible for participating in a dialogue, listening, being open to accountability for failings and to suggestions for remedying those failings. The theory I have advanced is that this is more likely when there are many actors with causative or preventative capability with respect to that abuse.⁸⁸ Where we

86 J. Braithwaite *et al.*, *Raising the Standard: Resident Centred Nursing Home Regulation in Australia* (Canberra: Australian Government Publishing Service, 1993).

87 See I. Ayres & J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992) at c. 2 [hereinafter *Responsive*].

88 Christine Parker in commenting on this correctly, I think, adumbrates that 'the Braithwaite argument is that there almost always are many with that capacity because we all live in a community wherein many individuals can pull strings of informal control and evoke bonds of responsibility.'

can engage all of those actors in moral reasoning and problem-solving dialogue, the more of them there are, the more likely that one or more will be a soft target. When even only one player with causative responsibility or with a powerful preventative capability turns, empirical experience shows that many other actors who had hitherto been ruthlessly exploitative suddenly find a public-regarding self that becomes surprisingly engaged with a constructive process of righting the wrong. For example, Fisse and Braithwaite's interviews at Lockheed following the foreign bribery scandals of the seventies showed that once Lockheed's auditors, Arthur Young, put their responsible corporate self forward by refusing to certify the Lockheed Annual Report, other senior managers switched to responsiveness, to public-regarding deliberation, and corporate reform.⁸⁹ As a result of this domino-effect of public-regarding deliberation, Lockheed became, in the words of Boulton, 'a born again corporation.'⁹⁰ This case also instantiates the second mechanism for beating reactance, which is about the strategic significance of gatekeepers like auditors in a separation of private powers that renders dialogic social control feasible.

V Separating Enforcement Targeting from the Actor who Benefits from the Abuse

A. TARGETING GATEKEEPERS

In the Lockheed example, within the company's separation of powers, Arthur Young was a gatekeeper.⁹¹ By refusing to let Lockheed's Annual Report through the gate it guarded, Arthur Young brought Lockheed's bribery of defence ministers and heads of state to an end, not to mention the careers of the company's Chairman and President. Large corporations have many different kinds of gatekeepers, such as the general counsel, environmental auditors, underwriters, insurers, board audit or ethics committees, and occupational health and safety committees. Each has the power to open and close gates that give the organization access to things it wants.

A gatekeeper like Arthur Young surely had an interest in doing Lockheed's bidding so it could keep the company's account. Yet Arthur Young was much more deterrable than Lockheed itself, which benefited so directly from the bribery (as did Lockheed's senior managers). Arthur Young, as a non-beneficiary of the bribes, had less to lose from stopping them; as a gatekeeper which was not responsible for paying bribes, but only for failing to detect them, it also had less to lose from the truth than

89 B. Fisse & J. Braithwaite, *Impact*, supra note 66 at 144.

90 D. Boulton, *The Grease Machine* (New York: Harper and Row, 1978) at 276.

91 See R.H. Kraakman, 'Corporate Liability Strategies and the Costs of Legal Controls' (1984) 93 Yale L.J. 857.

did those who were handing over the cash. Yet it had much to lose in reputational capital⁹² as a gatekeeper of hundreds of other corporate clients if someone else revealed the truth. In this case, they were the comparatively soft target who felt compelled to sound an alarm that led to the demise of some of the hardest targets one could find in the world at that time – such as Prime Minister Tanaka of Japan.

Most people's intuition would be that we should design enforcement systems to target the beneficiaries of wrongdoing. They are the actors who make the criminal choice on the basis of the benefits of lawbreaking exceeding its costs. So from a simple rational choice perspective we should target increased costs of lawbreaking on them, the choosing criminals, not on their guardians. There is also a moral justification for this intuition: it is the criminal who deserves to pay for the crime.⁹³

92 L. Lin, 'The Effectiveness of Outside Directors as a Corporate Governance Mechanism: Theories and Evidence' (1996) 90 North U. L. Rev. 898 [hereinafter 'Effectiveness'].

93 The moral argument has been brought into sharp relief in recent years by laws in many jurisdictions around the world requiring parents and guardians to pay for the damage from the juvenile crimes of their children. My own view is that such laws do perpetrate an intolerable injustice on the parents. Yet there is a difference between this hard-edged parental liability for the crime and exposing a parent to moral censure by concerned citizens for, say, allowing their child to wander the streets at any time of night. One reason that dialogic conferences often seem to work better as a means of controlling delinquency than criminal trials is that the parental gatekeeper is a softer target than the young offender. In New Zealand and Australian family group conferences for juvenile crime I have often observed the following scenario. The victim of the crime, aided by the victim's supporters, explain the suffering the crime has caused them. The offender, a tough with a hard shell, is unmoved. His emotional shell is a shield that protects him from shame directed at him. But when the victim sends a shaft of shame across the room, that shield deflects it so that it pierces like a spear through the heart of the mother of the offender, or the father, or sister, who sit beside him. One of them begins to sob. It then becomes the shame and the sadness of his sister that gets through the offender's hardened exterior. He internalizes the pain he has caused, experiences shame, and from then on is quite unable to sustain the delusion that he has done nothing wrong. Dialogic regulation does mean sharing responsibility for those we care about and feeling it deeply. That is something natural and human, in a way that making the sobbing sister pay the compensation to the victim is not. Dialogic regulation picks up the gatekeeper vulnerability analysis in a subtle and decent way rather than in the barbaric way of legal liability for parents. According to New Zealand Maori traditions of justice, Western justice is barbaric for allowing the offender to stand alone in the dock as an individual accused of a crime. Individuals, in their view, must take responsibility for their wrongdoing supported by those who love them, with those who love them sharing vicariously in that responsibility and voluntarily offering to help as best they can to right the wrong. The offender thereby is not alone, alienated, at risk of the pathology of individualized guilt that can eat away at a person. Rather, they are meant to feel the shame of letting their loved ones down, of causing them to share in this pain. Unlike Western guilt, this shame (whakama) can be readily transcended. As the shame of letting one's family down, it is

B. TARGETING INSURERS AND SUPPLIERS

The most powerful empirical demonstration of the power of targeting gatekeepers rather than beneficiaries of the wrongdoing comes from the most global of regulatory problems – pollution from ships at sea. Ronald Mitchell has demonstrated how the International Convention for the Prevention of Pollution from Ships (MARPOL) was an utter failure.⁹⁴ Signatories were required under the convention to impose penalties for intentional oil spills. The most important targets – petroleum exporting nations – were committed not to enforcing these laws. Most nations simply did not care to invest in proving offences that were difficult to detect. It was only a few petroleum importing nations such as the US who took the requirement seriously. This simply meant that ships had to be a little careful to discharge pollution outside the territorial waters of these few countries. Non-compliance with the regime was the norm.

Then in 1980 the MARPOL regime was reformed in a way that Mitchell estimates has generated 98 per cent compliance.⁹⁵ This was a remarkable accomplishment given that the costs of compliance with the new regime were very high for ship owners, that predictions grounded in the economic analysis of regulation were for minimal compliance.⁹⁶ The key change was a move away from imposition of penalties on ships responsible for spills to an equipment sub-regime that enforced the installation of segregated ballast tanks and crude oil washing. One reason for the improvement was transparency; it is easy to check whether a tanker has segregated ballast tanks but hard to catch it actually discharging at sea. But the other critical factor was the role of third party enforcers (a) on whom ship operators are dependent, and (b) who have no economic interest in avoiding the considerable costs of the regulation. These third party enforcers are builders, classification societies and insurance

acquitted by forgiveness and restoration within that family. Forcing a family to accept liability directly to a victim obviously cuts totally across this philosophy. (For a more detailed exposition of the gatekeeper dynamic in restorative justice conferences, see J. Braithwaite & S. Mugford, 'Conditions of Successful Reintegration Ceremonies: Dealing With Juvenile Offenders' (1994) 34 *Brit. J. Criminal.* 139).

94 R. Mitchell, 'Intentional Oil Pollution of the Oceans,' *Institutions for the Earth: Sources of Effective International Environmental Protection*, eds. P.M. Haas, R.O. Keohane & M.A. Levy (Cambridge, MA: MIT Press, 1993); R. Mitchell, 'Regime Design Matters: International Oil Pollution and Treaty Compliance' (1994) 48 *International Organization*. 425; R. Mitchell, 'Compliance Theory: A Synthesis' 2 *Receil.* 327; R. Mitchell, *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance* (Cambridge, MA: MIT Press, 1994).

95 R. Mitchell, *Intentional Oil Pollution at Sea: Environmental Policy and Treaty Compliance*, *ibid.* at 270–1.

96 C. Okidi, *Regional Control of Ocean Pollution: Legal and Institutional Problems and Prospects* (Alphen aan den Rijn, Netherlands: Sijthoff & Noordhoff, 1978) at 34.

companies. Builders have no interest in building cheaper ships which will not get certification by international classification societies nominated by national governments. Classification societies have no interest in corrupting the standards they enforce, which are the whole reason for the generation of their income. Finally, insurers will not insure ships that have not been passed by a classification society acceptable to them because they have an interest in reducing the liabilities that might arise from oil spills.

The new MARPOL regime therefore achieves 98 per cent compliance in large part because the effective target of enforcement shifted from the ship operators who benefit from the pollution to builders, classification societies, and insurance companies who do not benefit from it. However, because the ship operators (and builders) are totally dependent on classification societies and insurers, they have no choice but to accept that the regime-compliant ships, which the classification societies have an interest in ensuring, are the only ones that get through the gate.

C. THE PLETHORA OF THIRD PARTY TARGETS

The best-known examples of separating enforcement targeting from the actor who benefits from the abuse is requiring employers to withhold tax from the taxable income of their employees, which they report; or banks to withhold and report tax on the interest earned by their customers. Little enforcement is needed against the employers and banks who withhold and report because they do not benefit from any under-reporting of income. Tax cheating is only a really major problem in those domains where it is impossible to harness such disinterested gatekeepers.

Peter Grabosky has initiated a program of work which continually discovers new species of third party enforcers of regulatory regimes – from volunteer divers who check compliance with South Australia's historic shipwrecks legislation to elected worker health and safety representatives.⁹⁷ Grabosky's work shows just how disparate are the possibilities for shifting enforcement targeting – from actors who benefit

97 P.N. Grabosky, 'Professional Advisors and White Collar Illegality. Towards Explaining and Excusing Professional Failure' (1990) 13 U. New So. Wales L.J. 1; P.N. Grabosky, 'Citizen Co-Production and Corruption Control' (1990) 5 Corruption and Reform. 125; P.N. Grabosky, 'Law Enforcement and the Citizen: Non-governmental Participants in Crime Prevention and Control' (1992) 2 Policing and Society. 249; P.N. Grabosky, 'Green Markets: The Environmental Regulation by the Private Sector' (1994) 16 Law and Policy. 419; P.N. Grabosky *Beyond the Regulatory State* (1994) 27 Australian and New Zealand Journal of Criminology. 192; P.N. Grabosky, 'Counterproductive Regulation' (1995) 23 International Journal of the Sociology of Law. 347; P.N. Grabosky, 'Using Non-Governmental Resources to Foster Regulatory Compliance' (1995) 8 Governance. 527.

from the cheating to actors who do not but on whom the cheat depends for something critical to their welfare. This simple shift is capable of making headway with some of our seemingly most intractable regulatory problems.

Another colleague, Neil Gunningham, has long despaired about the way hazardous chemicals regulation succeeds in changing the practices of the top 20 chemicals transnationals, but barely touches thousands of little chemical companies who are too many, too unsophisticated, and too dispersed to be effectively supervised by state inspectors.⁹⁸ More recently, however, Gunningham has realized that most of these little chemical companies are vitally dependent on TNCs as suppliers, distributors, customers, or all three. This has led Gunningham to the insight that a private or public regulatory regime, which requires major companies to ensure not only that its own employees comply with the regulations but also that the upstream and downstream users and suppliers of its products comply, may massively increase the effectiveness of the regime.⁹⁹ The reason is that a TNC that supplies a little chemical company has much more regular contact with them than any government inspector, more intimate and technically sophisticated knowledge of where their bodies are buried, greater technical capacity to help them fix the problems, and has more leverage over them than the state.

D. BUILDING A THOUSAND GATES TO THE POWER OF CORRUPT OFFICIALS

Privatising public gatekeeping can be one way of separating powers so that enforcement can be targeted on an actor who does not benefit from the abuse of public power. Most national customs services have a lot of corruption. Both senior managers and street-level bureaucrats benefit enormously from bribes paid for turning a blind eye to the under- or over-invoicing of goods. The fact that public customs services have an organizational interest in continuing to sell favours creates a market opportunity for a private organization set up to 'sell trust.' This is just what the Swiss company, Société Generale de Surveillance (SGS), set out to do when it took over the customs service of Indonesia and other developing countries. It persuades nations to sell large parts of their customs work to SGS through a reputation for incorruptibility that

98 See, for example, N. Gunningham, 'Environment, Self-Regulation and the Chemical Industry: Assuming Responsible Care' (1995) 17 *Law and Policy* 57.

99 I rely here on personal communications with Gunningham at ANU seminars. Also seminally relevant here are the insights in Fiona Haines work on regulation in primary and secondary capitalist markets, see F. Haynes, 'The Show Must Go On: Organizational Responses to Traumatic Employee Fatalities Within Multiple Employer Worksites' (PhD Dissertation, University of Melbourne, 1996).

enables it to deliver huge savings to governments. A 1991 Press Statement of the Indonesian Minister of Finance claimed that SGS had saved his country 4.5 billion dollars US of foreign exchange between 1985 and 1990 and earned it 1 billion dollars US in extra duties and taxes. Because it is such testimonials that bring SGS business, SGS has a financial incentive to catch cheats and weed out corruption in its own ranks. A major corruption scandal that would strike everyone as quite normal in the customs service of a developing country might cause financial ruin for SGS. SGS sets up its inspection gates in the country of export (where superior intelligence on over- or under-invoicing is available) rather than in the importing country. It accomplishes this by having over a thousand scrupulously audited offices at all the world's key exporting sites. The company constrains itself from engaging in any manufacturing or in any trading or financial interests that would threaten its independence.

'Selling trust' is profitable, so operatives are well paid. As the company's Senior Vice President, J. Friedrich Sauerlander confessed to me, in an organization of 27 000 people, his internal security organization had uncovered 'some slip-ups.' But in all major ways, it had been possible to sustain an organization with an incentive structure to reward trust. The beneficiaries of the old breaches of trust were left where they were. But through building a thousand gates to their power on the other side of the world, and guarding those gates with SGS units that flourished in proportion to how much abuse of trust they stopped, targeting enforcement on the bad guys inside the gates became mostly redundant.

From Lockheed, to polluters from ships, to employers and banks withholding tax, to chemical companies, to outside (instead of inside) Directors targeted by public interest groups over corporate abuse of power,¹⁰⁰ to big adolescent boys exposed at family group conferences for assaulting their mothers and sisters,¹⁰¹ we can see some promise in

100 The leading example here is the 'Corporate Campaign' against the J.P. Stevens company over their abusive labour practices. The top management team were very hard nuts here. But the campaign was able to so embarrass outside directors that they resigned from the board, a consequence which really did concern top management. See B. Fisse & J. Braithwaite, *Impact*, supra note 66 at c. 2.

101 Here an alternative target is an extended family with capacities to monitor, restrain, and shame the violent boy. See J. Braithwaite & K. Daly, 'Masculinities, Violence and Communitarian Control,' *Just Boys Doing Business*, eds. T. Newburn & E. Stanko (London: Routledge & Kegan Paul, 1994). Also see T. Lajeunesse, *Community Holistic Circle Healing: Hollow Water First Nation, Aboriginal Peoples Collection* (Canada: Supply and Services, 1993). G. Burford & J. Pennell, 'Family Group Decision Making: An Innovation in Child and Family Welfare,' *Child Welfare in Canada: Policy Implications*, eds. B. Galaway & J. Hudson (Toronto: Thompson Educational Publishing, 1995); G. Burford & J. Pennell, *Family Group Decision Making: New Roles for 'Old' Partners in*

shifting enforcement targeting from actors who benefit from their abuse to actors who do not but on whom the abuser depends for something critical to their welfare.

VI Separating Powers Within and Between the Public and Private Sectors

A. SUMMARY SO FAR

This paper has shown that deterrence failure is a major impediment to effective regulation and made a case for two strategies that can beat reactance, the deterrence trap, and other sources of deterrence failure:

1. replace narrow, formal and strongly punitive responsibility (the 'find the crook' strategy) with broad, informal, weak sanctions (dialogic regulation);
2. separate enforcement targeting from identification of the actor who benefits from the wrongdoing.

At the macro level of the polity, the combination of (1) and (2) means dialogic regulation combined with robust separations of powers both within and between the public and private sectors. The number of third party enforcement targets is greater to the extent that we have richer, more plural, separations of powers in a polity. For example, under a plural separation of powers, the media baron who sells editorial support and biased reporting to a politician in return for the promise of a television licence might in a more effective republic than the one in which we live have their power checked by

- courts of law;
- a statutorily independent broadcasting authority that allocates licences only to fit and proper persons and has the capacity to investigate in cases of non-compliance;¹⁰²
- industry association self-regulatory bodies;¹⁰³
- the Press Council;¹⁰⁴
- corporate charters of editorial independence;¹⁰⁵

Resolving Family Violence. Implementation Report Summary (Newfoundland: Family Group Decision Making Project, 1995).

102 Broadcasting Services Act (Cth.) (1992).

103 In Australia, the Federation of Australian Radio Broadcasters and the Federation of Australian Commercial Television Broadcasters are important.

104 P. O'Malley, 'Regulating Contradictions: The Australian Press Council and the Dispersal of Social Control' (1987) 21 Law and Society Review. 83.

105 John Fairfax Publications Proprietary Limited, Charter of Editorial Independence, adopted by the Board of Directors on 12 March, 1992.

- a vigilant journalists association that requires its members to comply with a journalists' code of ethics;¹⁰⁶
- parliamentary oversight committees that investigate abuses of power by the executive, and other (separate) committees that check diligent performance of the duties of independent regulators;
- public interest groups that are granted standing to lodge complaints to all of the foregoing institutions;
- audit committees of boards of directors (all of whom are outside Directors) with a remit to adjudicate complaints against management for ethical abuses;
- corporate ombudsmen with public reporting capabilities;¹⁰⁷
- ethical investment funds with an investigative capacity they can use to put activist shareholders on notice about such abuses of power in media corporations.

Separations of powers both within and between the private and public sectors are important to controlling such abuses of power, as is countervailing power from institutions of civil society that muddy any simple public-private divide. Moreover, the more potential targets of third party enforcement such separations of powers throw up, the better the chance that one of them will be a soft target with such leverage over the abuser of power that the simple device of a regulatory dialogue will move that third party to use their leverage to stop the abuse, trigger internal reforms to prevent recurrence, and trigger the private justice system of the organization to discipline those responsible for the abuse.

Thus, the richer and more plural the separations of powers in a polity, the less we have to rely on narrow, formal, strongly punitive regulation targeted on the beneficiaries of abuse of power. The more we can rely on a regulatory dialogue wherein an appeal is made to the sense of social responsibility of all actors with a capacity to prevent the wrongdoing, the more persuasion can replace punishment. Reasons for this are that the more hands powers are separated into (a) the more likely that one of those actors with power to prevent will be a soft target, and (b) the more third parties there will be who do not benefit from the abuse themselves

106 In Australia, journalists comply with the Australian Journalists Association Section of the Media, Entertainment and Arts Alliance (formerly the Australian Journalists Association) Code of Ethics (1996).

107 Among the companies that have or have had ombudsmen are the *Washington Post*, General Electric, Dow Chemical, and American Airlines. J. Braithwaite, 'Taking Responsibility Seriously: Corporate Compliance Systems,' *Corrigible Corporations and Unruly Law*, eds. B. Fisse & P.A. French (San Antonio: Trinity University Press, 1985) at 46.

but who hold power over the abuser. Put another way, the more plural the separations of powers (a) the more overdetermined is the capacity to prevent abuse; and (b) the more cases there are of disjuncture between an interest in the abuse and a capacity to prevent it.

B. PLURAL PRIVATE SEPARATIONS; PLURAL PUBLIC SEPARATIONS

This paper seeks to correct the bias of the republican tradition toward a focus on separations of *public* powers. Yet the arguments advanced are as relevant to abuse of power by the police as they are to a private media organization. The head of state who rigs electoral boundaries is a hard target because nothing is more important to her career than the election outcome. Citizens who ask a judge to overturn the head of state's electoral rigging approach a softer target because the judge does not benefit from the election result. The traditional separation of powers between executive government and judiciary can deliver the benefits revealed in our analysis of private sector disjunctions between interest and preventive power.

At the same time that our novel rationale for the separation of powers shows traditional republican thinking about the separation of powers in the public sphere to be somewhat impoverished, its impoverishment arises from the fact that it is not as plural as it might be. Three (executive, legislature, judiciary) is not a very big plurality. Moreover, antifederalist separations of powers (in some pre-revolutionary US state constitutions) aspired to avoid the concentration of power (as did its private sector analogue in anti-monopoly law) by having the executive responsible for X, the legislature for Y, the judiciary for Z. In the most uncharitable reading of this arrangement, each branch is left alone to abuse power without too much interference within its own sphere from the other branches of government; a strict separation of powers simply assures that the sphere of each is not too broad. This would be uncharitable, however, because in all of the early US state governments, while each branch had spheres of independence from the other branches, they also had spheres where their power was checked by the other branches of government.¹⁰⁸

108 M.S. Flaherty, 'The Most Dangerous Branch' (1996) 105 Yale L.J. 1725. Yet, late in his career, no lesser a republican figure than Jefferson (much influenced by John Taylor's, *An Inquiry into the Principles and Policy of the Government of the United States*, 1814 [New Haven: Yale University Press, 1950]) became an advocate of a total separation of the powers of three branches, rejecting the dominant view of John Adams and the Federalists that there should be some overlapping so there could be mutual checking of power. For Taylor, 'Instead of balancing power, we divide it, and make it responsible' (by which he and Jefferson meant the three branches all must be responsible to the people by direct election) (ibid. at 88). See Vile, *supra* note 6 at

Even so, the reconceptualization of the rationale for the separation of powers in this paper implies that in debates on the separation of public powers, attention is needed not just to assurance of the independence of honest judges from corrupt parliamentarians and corrupt executive governments (and vice versa). Attention is also needed to making corrupt, self-serving, nepotistic judges who flout the rule of law; patrimonial parliamentarians; and evil executives each vulnerable to the power of the other branches. One of the problems we must confront if we are to make progress with some of our tougher problems, like police corruption, is how to deal with pleas that any encroachment on the independence of the police will take us back to a world where the police lock up whomever the executive government tells them is a troublemaker. How do we get universities that are fearless in undertaking research of which the state disapproves, yet that do not use this independence to deflect responsiveness to a community which sees it as dominated by venal godfathers of disciplines of less value than other neglected spheres of scholarship?

The answer proposed is to have a police force and a university that are sufficiently autonomous from state power, business power, church power, media power, and the power of professions like law not to be dominated by them. Part of their resilience to any single source of domination will come from their very dependence on all those sources of power. We need a police that is vulnerable to publicly reported surveys of citizen satisfaction with the respect police show for rights,¹⁰⁰ to meetings of the Police-Aboriginal Liaison Committee, to meetings of the Police-Gay Liaison Committee, to meetings with local businesses concerned about break-ins at their factories, to meetings of local Neighbourhood Watch groups, to criticisms made at family group conferences that the police officer involved was unnecessarily rough, to the Ombudsman, to Parliamentary Committees, to Royal Commissions to investigate matters of extraordinary malfeasance, to a free and fearless press, to the Council for Civil Liberties, to the judiciary, and yes, vulnerable to an executive government that will sack the Commissioner if there is reasonable

163–70. The late eighteenth-century French constitutions also rejected the idea of checks and balances in favour of a strict separation of powers, at least until the lessons of Robespierre and Napoleon Bonaparte had been learnt. These were lessons about the fragility, adversarialism, and vulnerability to tyrannical coup d'état of purist democratarian separations of powers, see Vile, *supra* note 6 at 198–9. Madison had foreseen that the best way to preserve the separation of powers was 'by so contriving the interior structure of government as that its several constituent parts may, by their mutual relations, be the means of keeping each other in their proper places' (A. Hamilton, J. Madison & J. Jay, *supra* note 9 at 318–9, see also at 302–18.)

109 J. Braithwaite, 'Good and Bad Police Services and How to Pick Them,' *Policing Australia*, eds. P. Moir & H. Eijkman (Melbourne: Macmillan, 1992).

suspicion that she is corrupt. After 200 years of ugly tyranny in nations with beautiful constitutions, it is no longer persuasive to suggest that a separation of state powers will ensure that the government 'will be controlled by itself.'¹¹⁰

In other words, a police service that is enmeshed in many webs of dependency will be vulnerable to the many when it corruptly does the bidding of the one. This, I suspect, is the way of resolving the dilemma of independence for different branches of government versus checking of power between branches of government. Checking of power between branches of government is not enough. The republican should want a world where different branches of business, public, and civil society power are all checking each other. While the broad principles are clear here, the nuts and bolts of checks and balances, of independence and interdependence, require contextual deliberation for any given source of power. Clearly, there must be some sorts of power against which a police service must be protected by law ('Arrest this man or we will cut your budget.'). Republican theory of the sort Philip Pettit and I endorse¹¹¹ requires detailed empirical investigation of the different ways of organizing independence and interdependence so as to discover a set of institutional arrangements most likely to maximize freedom as non-domination. At least the principle of separating powers so that there are enough actors with the independence and preventative capacity so that one of them can be moved by dialogue to stop the abuse is clear enough.

In the public arena, the literature on separation of powers bequeaths to us a variety of reasonably well-understood heads of public power that might be separated – different houses of parliament, levels of government in a federation, lower versus appellate courts, administrative appeals tribunals, and so on. While it is a tricky business to put together or tinker with a robust public architecture of powers, at least we have some sense of the elements we might play with. In contrast, the separation of private powers is comparatively under-researched. Here most readers will need some elementary sense of what might be involved in separating private powers. The next section is a preliminary foray into what might be at issue.

VII *How to Separate Powers in the Private Sector*

A. POWERS OF SHAREHOLDERS, DIRECTORS, MANAGERS

The law review literature on corporate governance has a deal of useful guidance on accomplishing separations of powers in the private sector,

110 A. Hamilton, J. Madison & J. Jay, *supra* note 9 at 323 (James Madison).

111 P. Pettit, *supra* note 10; J. Braithwaite & P. Pettit, *supra* note 10.

but not useful enough. The concentration tends to be on the separate powers of shareholders, directors, and managers.¹¹² Important separation of powers issues are at stake here; such as whether a majority of members of the board of directors of a public company should be 'unrelated directors,'¹¹³ meaning that they have no business dealings with, nor a management position in, the company; whether the nominating committee for the appointment of new directors should have no management directors on it;¹¹⁴ whether it should be forbidden for the CEO to be Chairman of the Board;¹¹⁵ whether there should be a bicameral board with a supervisory board as in Germany, France, the Netherlands, and Indonesia;¹¹⁶ and generally how to give outside directors a role more than that of the CEO's 'pet rocks.'¹¹⁷ There is certainly merit from a republican point of view in engendering shareholder democracy, encouraging activist shareholders to call management to account,¹¹⁸ securing representation for minority shareholders on the board, and effective monitoring of the board by institutional shareholders.¹¹⁹ When the New York Stock Exchange first required a Board Audit Committee of non-Executive Directors as a condition of listing on the exchange in 1977,¹²⁰ this was an important step for the separation of private powers. It has spread to many parts of the world. Long before that, in 1862, a more important step was requiring companies as a matter of law to be audited by a pro-

112 M.A. Eisenberg, 'Legal Models of Management Structure in the Modern Corporation: Officers, Directors, and Accountants' (1975) 63 Cal. L.R. 363; K.A. Kirwan, 'The Use and Abuse of Power – The Supreme Court and Separation of Powers' (1995) 537 *Annals of the American Academy of Political and Social Science*. 76; B.H. Siegan, 'Separation of Powers and Economic Liberties' (1995) 70 *Notre Dame L. Rev.* 415; M. Hardt, 'The Non-Equivalence of Accounting Separation and Structure Separation as Regulatory Devices' (1995) 19 *Telecommunications Policy*. 69.

113 Toronto Stock Exchange Committee on Public Governance in Canada, 'Where Were the Directors?' *Guidelines for Improving Corporate Governance in Canada* (Toronto: Toronto Stock Exchange Committee on Public Governance in Canada, 1994) at 4.

114 *Ibid.* at 4–5.

115 *Ibid.* at 41.; S. Bottomley, 'From Contractualism to Constitutionalism: A Framework for Corporate Governance' (draft paper) [hereinafter 'Contractualism.'].

116 S. Turnbull, 'Governance Flaws and Remedies,' Corporate Directors' diploma Course, University of New England, Topic 7.2 (Armidale, NSW: University of New England, 1993).

117 GM outside directors are reported as having had a 'pet rock' self-image in L. Lin, 'Effectiveness,' *supra* note 92 at 898, notes 246, 940.

118 A. Fraser, 'Reinventing Aristocracy: Corporate Governance in the Civil Constitution of a Modern Republican Society' (unpublished manuscript).

119 G.P. Stapledon, *Institutional Shareholders and Corporate Governance* (Oxford: Clarendon Press, 1996); S. Bottomley, 'Contractualism,' *supra* note 115.

120 L. Loss, *Fundamentals of Securities Regulation* (Boston & Toronto: Little Brown & Company, 1983) at 484.

professionally certified auditor.¹²¹ This is the well-understood end of the separation of private powers. Useful literatures already exist on how to make these separations work better: how to improve shareholder accountability, restructure Directors' duties, bring board audit committees to life, and improve the performance and independence of auditors. The emphasis on separation of powers between management and the two other branches of corporate governance neglects the main game, however, which is separation within management. With private power, moreso even than with public power, the power in the hands of the other branches of governance is extremely modest compared with the concentration of power in the executive.

B. AUDIT AND AUDIT OF AUDIT

The most important steps toward separating powers within management have involved internalising the outside audit by setting up internal reporting of audit-based accountability. This has not been restricted to financial auditing. In private companies today, environmental audit, safety audit, audits of compliance with the US Foreign Corrupt Practices Act (introduced after the Lockheed scandal), antitrust audit, and the like, are common.¹²² During the past decade, there has been a US-based movement to partially integrate these functions under the rubric of legal audit.¹²³

Companies like Exxon have long had a functional equivalent of such an internal audit of the auditors. Instead of doing it under the auspices of a legal audit by the general counsel, from 1973 Exxon used the office of the Controller, a vice president at corporate headquarters in New York. Brent Fisse and I investigated the internal auditing of Exxon fifteen years ago following the payment of 46 million dollars US in bribes in Italy, more minor payoffs in Thailand, the Dominican Republic, Indonesia and Japan and the improper recording of political donations in Australia as legal fees.¹²⁴ By 1981 there were no fewer than 400 internal auditors working for Exxon. These were by no means all financial auditors; they included engineers, for example, who would work on teams with the

121 The English Registered Companies Act of 1862. See G.R. Brown, 'Changing Audit Objectives and Techniques' (October 1962) *The Accounting Review*, 696 at 697; D.J. Fraser & M.E. Aiken, *Stettler's System Based Audits* (Sydney: Prentice Hall, 1981) at 12-3; R. Tomasic & S. Bottomley, *Corporations Law in Australia* (Sydney: Federation Press, 1995) at 15-17.

122 For example, T. Lamond & I. Watt, *Environmental Management and Audit Manual* (Sydney: CCH Australia, 1996).

123 L.M. Brown & A.O. Kandel, *The Legal Audit: Corporate Internal Investigation* (New York: Clark, Boardman, Callaghan, 1990). The journals *Preventive Law Reporter* and *Corporate Conduct Quarterly* are devoted to this topic.

124 B. Fisse & J. Braithwaite, *Impact*, supra note 66 at c. 15.

accountants to ensure that the company's environmental policies were being implemented in all subsidiaries.

Auditors in each Exxon subsidiary reported directly to their chief executive, but they also had a dotted line reporting relationship up to the Controller in New York. It was the latter who decided the size of each auditor's workforce. Auditors were therefore not tied to the purse strings of those whom they were auditing. Auditors could also bypass the Controller in circumstances where people in the Controller's office might be part of a cover-up. Indeed, the most lowly local auditor who detected, say, an improper bookkeeping practice, was required to ensure that this was reported through the general auditor to the audit committee of the Board in New York. A former Exxon general auditor, Ted Kline, explained:

Say, for example – I was an auditor and uncovered something that was unsavory or should have been reported and told my supervisor and he said to let it go. Well, auditors are briefed that their obligations do not end there. The employee who makes the report knows that his supervisor should report it up the line and that if his supervisor does not, the auditor must. He cannot seek sanctuary, so to speak, just by saying, 'It was not my job. I told my boss and that was it....' Much to the consternation, I guess, of some employees perhaps who would say, 'Surely the Company does not want me to put this in writing'; and the answer is 'yes.' We want it to be put in writing, exactly what happened, and we will send it right up to New York to the board audit committee. There is no other way we know that we can get the message across that we are very serious about this.¹²⁵

Auditors have a responsibility to report on matters that are not within their area of direct responsibility. For example, auditors in most companies who discovered a letter suggestive of a price fixing conspiracy would regard this as none of their business. An effectively working separation of corporate powers tackles such a perception, as the same former Exxon general auditor explains:

When an auditor reaches a situation where he needs to question whether we have violated antitrust laws, then he needs to go to the Law Department in order to ascertain that. Most of our auditors are not lawyers and they are not qualified to find out whether we have committed a violation. When he does contact the Law Department he makes a record of the fact that this was turned over to the Law Department and he sends word up through audit channels to New York that he has turned over a situation to the Law Department. The Law Department then sends up through the Law Department channels the fact that they are handling the situation, so the New York Law Department knows that it is

125 W. Clifford & J. Braithwaite, *Cost Effective Business Regulation* (Canberra: Australian Institute of Criminology, 1981) at 30.

not being covered up down in the individual territory someplace. Anything having to do with antitrust is both a complicated and very delicate matter so we make sure it is carried up through the Law Department. We do not let an auditor walk out on a limb and carry something all the way to the board audit committee and then the lawyers shrug their shoulders and say that it is not an antitrust violation at all. That is the way we handle things when we are not sure it is a law violation.¹²⁶

At the heart of Exxon's auditing system was a marrying of independence and interdependence designed to deliver an effective intra-corporate separation of powers. The former general auditor explained the key concepts as follows

First – the well known segregation of duties and responsibilities such that no single function, department or employee will have exclusive knowledge, authority or control over any significant transaction or group of transactions;

Second – the proper documentation of transactions and business events;

Third – the systematic and thoughtful supervision in documented reviews of managers and other employees' work;

Fourth – the timely preparation of records, reports and reviews;

Fifth – control measures designed in such a way that they are responsive to the nature and degree of risk and exposure....;

Sixth – the various aspects of control should not be so interdependent that a serious deficiency in any one would make other controls also ineffective.¹²⁷

The separation of powers became explicit when the full Board of directors annually received the report of the board audit committee on compliance with Exxon's rather encompassing Business Ethics Policy. At the same meeting, independent reports on the same subject were received from the company's external auditors, the auditor general, the controller, the general counsel, and the CEO.

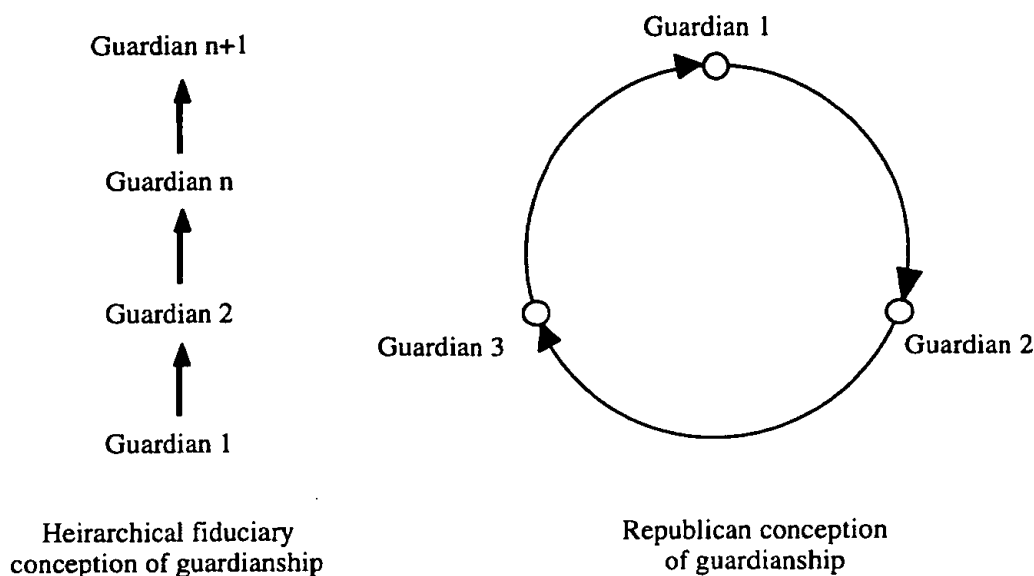
The globalization of business has enabled new separations of powers, new answers to the question of 'Who audits the auditors?' At Exxon, IBM, and in many leading US and European pharmaceutical companies, the auditors from one country regularly audit the auditors from another; regional office auditors audit the auditors of national subsidiaries, and a national auditor or the Asian regional auditors may audit the head office auditing group in New York. Arranging guardianship in a circle is an advance on the hierarchical organization of guardianship that historically allowed companies like Lockheed and Exxon to rot, like fish, from the head down. In the hierarchical organization on the left side of Diagram 4, the only guarantee against corruption by an *n*th order guardian is an

¹²⁶ Ibid. at 34.

¹²⁷ Ibid. at 24–5.

Diagram 4

Formal models of hierarchical and republican conceptions of trust



$n+1$ th order guardian; if the guardian at the top of the hierarchy is corrupt, then all assurance against abuse of power by the system collapses. Yet guardianship which is organized in a circle is still a reasonably closed system, even when the circle includes external auditors and an Ethics Committee of outside directors.

C. ENTERING THE CIRCLE WITH OUTSIDE POWER

Progress to bring into the circle utterly outside watchdogs, who do not depend on the corporation for an income, is slow in the world of corporate governance and restricted to rather special domains of accountability. In Australia, consumer movement nominees on the Banking Ombudsman Council have access to the consumer complaint records of private banks and have a public reporting responsibility.

The most widespread accomplishments in widening the circle of guardianship to give total outsiders a window to examine the audit performance of companies have arisen under the European Union's EMAS (Eco-Management and Audit Scheme).¹²⁸ These are voluntary standards, yet with considerable force in a world where many major purchasers (particularly state purchasers) and some insurers require

128 Council Regulation (EEC) No. 1836/93 (29 June 1993) Allowing Voluntary Participation by Companies in the Industrial Sector in a Community Eco-Management Audit Scheme, Official Journal of the European Community L 168/1 (10.7.1993).

EMAS certification from companies in environmentally high-risk industries. EMAS requires companies to demonstrate continuous improvement in environmental impact and product stewardship to an outside environmental auditor. The report of that outside auditor is generally public and therefore can be examined by green groups on the lookout for environmental scandals:

There is a much longer history of empowerment of constituencies internal to the corporation, which have very different interests from management, and affiliations to power bases outside the organization. The leading example here is elected union health and safety representatives who report both to the management, who pays them, and the union, which legitimates them.¹²⁹ Rights of access to safety data are often negotiated as a matter of contract between the union and the employer,¹³⁰ or as a matter of public law. These rights of access are sometimes checked by union-employed safety inspectors who conduct inspections of workplaces independently of state inspectors. In the case of large unions like the US United Mine Workers these can be many dozens in number.¹³¹ A comparison of high-accident and low-accident coal mines by Pfeifer, Stefanski, and Grether found that both safety directors and miners in mines with low accident rates reported that in the low-accident mines the union put greater pressure on management for safety through bargaining and dialogue.¹³² In Australian coal mines, elected worker inspectors do an independent check of a mine before a shift starts to double-check the assessment of company safety staff that levels of methane and other fundamental concerns are under control. Their assessment of the safety of the workplace is written in a record book at the entrance to the mine, which is available to all workers and to government safety inspectors. Union inspectors have a legal right to prevent or stop work at a mine on safety grounds until such time as a government safety inspector can get out to the mine to adjudicate whether the safety stoppage is justified. This is quite an impressive separation of private powers that has existed in the British Empire for more than a century

129 See N. Gunningham, *Safeguarding the Worker: The Role of Law* (Sydney: Law Book Company, 1984).

130 J. Braithwaite, *To Punish or Persuade: Enforcement of Coal Mine Safety* (Albany: State University of New York Press, 1985) at 8 [hereinafter *Punish*].

131 *Ibid.* at 8.

132 M.C. Pfeifer, Jr., J.L. Stefanski & C.B. Grether, *Psychological, Behavioral and Organizational Factors Affecting Coal Miner Safety and Health* (Columbia, MD: Westinghouse Behavioral Services Center, 1976); see also D.R. Biggins, M. Phillips & P. O'Sullivan, 'Benefits of Worker Participation in Health and safety' (1991) 4 *Labour and Industry*. 138.

and that can also be seen in mine safety auditing in Japan, the United States, France, Romania, and Poland.¹³³

While the union is an independent external agent of certain categories of employees for certain types of problems, professions are more general external agents. A corporate circle of accountability is less closed to the extent that a general counsel who is in it feels an allegiance to the ethics of the legal profession that approaches in strength allegiance to the corporation, an accountant who feels ethical responsibility to the accountancy profession, and so on. Western nations are witnessing a proliferation of new professionalisms relevant to penetration of corporate accountability by allegiances to values from outside the company. These include emerging professionalism in environmental auditing, occupational health and safety, the Society of Consumer Affairs Professionals in Business, pharmacology (especially important in the pharmaceutical industry), and now in Australia even an Association of Compliance Professionals, and internationally a Regulatory Affairs Professionals Society.

D. REPORTING ARCHITECTURE TO SECURE TRANSPARENCY AND INDEPENDENCE

As the earlier comments about the Exxon system imply, reporting relationships are critical to an effective separation of corporate powers. Checking of power cannot work without a transparency that renders abuses in one area visible to another sphere of power. A recurrent abuse in the pharmaceutical industry occurs when the production manager of a plant, who is paid performance bonuses and promoted on the basis of getting product out of the plant, overrules a finding of her quality control manager that a batch of drugs does not meet specifications.¹³⁴ The chances of a batch of drugs that just fails to meet specs causing side effects that would be sheeted home to this failure are slight, while the payment of the production manager's bonus may be a certainty, but only so long as she gets the batch at issue out on time. Hence, the incentive of the manager to break the law.

A simple solution to this problem was adopted by some of the more quality-conscious TNCs in the 1970s, and has now been mandated in the laws of a number of countries. This is that a production manager is not allowed to overrule a quality-control judgment on a batch of drugs. It can only be done over the signature of the CEO. The effect is to make the perverse incentives the firm creates for the production manager to break the law transparent. Another effect is to taint the CEO and people who advise her with knowledge (the reverse of a vice president responsible for

133 J. Braithwaite, *Punish*, *supra* note 130 at 9–10.

134 J. Braithwaite, *Pharmaceutical*, *supra* note 68 at c. 3.

going to jail policy). The final effect is to strengthen the hand of quality-control management against the normally more senior production managers. CEOs in practice are extremely reluctant to overrule quality-control recommendations because the cost of redoing one batch of drugs is a comparatively minor matter to them, and is perhaps a good way of sending a message to production managers to improve their performance on quality. Yet the prospect of a batch causing a fatality, however remote, could also be fatal for the CEO, as could the CEO tolerating a culture of sloppiness about quality. This then is an example of how clever reporting architecture assures the separation of powers between quality control and production, prompts the need for dialogue on a quality culture that tolerates no errors on pharmaceutical specifications, and shifts decision making following the dialogue from a hard target with incentives to abuse power (the production manager) to soft targets, with incentives to uphold the law (the CEO and the quality-control manager).

In a more generalized way, the post-scandal reporting policies Brent Fisse and I discovered at Exxon were exemplary in the way they ensured, if implemented,¹³⁵ that the soft targets in the company, who could be moved by ethical dialogue, got to know about the temptations to which hardened crooks within Exxon were succumbing.

As the Controller explained to us, effective control means having an organization full of 'antennas.' All units of the organization had a responsibility not only to report confirmed violations of the 'Business Ethics Policy' but also 'probable violations.' 'Probable violations' were defined by corporate policy as 'situations where the facts available indicate that a violation probably occurred, even though there was insufficient information for a definite determination.'¹³⁶ Hence, a matter could not be sat upon on the strength of being 'under investigation.' However, an obligation to report 'probable violations' is a less potent protection than a responsibility to report 'suspected violations' as well.

When a violation is reported, there is an obligation on the part of the recipient of the report to send back a determination as to whether a violation has occurred, and if it has, what remedial and/or disciplinary action is to be taken. Thus, the junior auditor who reports an offence and hears back nothing about it knows that his or her report has been blocked or sat on somewhere. She then must use the safety valve channel direct to the board audit committee.

135 We have no data on how rigorously these policies were implemented throughout this massive organization, though we have some doubts. On the other hand, we are confident they were policies that top management took seriously at the time of our research in the early eighties.

136 Exxon Corporation, Australian Complicance Professionals Association (New York: Exxon, 1978).

If she does not, she is in breach of the Business Ethics Policy for failing to ensure that the problem gets either resolved or put before the board ethics committee. Many companies have policies requiring the reporting of ethics violations, but not many have policies that oblige the reporter to assure that the report is not blocked. This is important because one thing we know about criminal corporations is that they are expert at structuring communication blockages into the organization to protect top management from the taint of knowledge. This had been true when Exxon was paying off politicians around the world during the seventies. We cited memos from this era with statements like '[d]etailed knowledge could be embarrassing to the Chief Executive at some occasion on the witness stand.'

E. THE STRATEGIES

The strategies of generic importance for separating private powers we have discussed are

1. better securing the separation of the powers of the three major branches of corporate governance – shareholders, directors, and managers;
2. better separating powers within management – quality and production, environment and production, for example;
3. expanding audit capabilities to a range of areas beyond finance – safety, antitrust, ethics, for example;
4. professionalizing audit so that internal auditors have an external professional allegiance to balance corporate loyalty;
5. abandoning hierarchies of accountability in favour of circles of accountability so that auditors audit auditors, ensuring that someone guards the guardians;
6. allowing outsiders with interests different from corporate interests into the circle of accountability – unions into safety management circles, consumer group representatives into consumer complaint handling circles, greens into environmental circles by mandated public reporting of corporate environmental objectives, and public reporting of audits of whether the objectives are attained;
7. guaranteeing transparency and tainting soft targets with knowledge by institutionalizing a safety valve reporting route direct to a board audit committee, a corporate ombudsman, or both;
8. in domains where serious abuse of power is at risk, independent reports on compliance to the board audit committee from separate powers – line management, legal, audit, unions;
9. obligations on all employees to report suspected violations of law and violations of all corporate policies that involve an abuse of corporate

power (e.g., corporate ethics and environmental policies). Obligations to report the suspected violations direct to the board when the employee does not receive back a written report that the matter has been satisfactorily resolved. Failure to meet this obligation being itself an ethical breach that colleagues have an ethical obligation to report.

For each of these strategies there is a debate to have about whether they should be mandated by the state, left to business or professional self-regulation or seen as demands that social movements should seek to extract directly from private power. These debates will not be engaged here.

VIII *Separation of Powers and Efficiency*

A. TWO CONCERNS

Since the decline of communism and fascism, not many of us believe that totalitarianism is more economically efficient than democracy with checks and balances.¹³⁷ This is not to deny that there are trade-offs between the virtues of checking power and the inefficiency of doing so. Sometimes there are significant economic costs that we are happy to bear when constitutional courts hold up decisions of executive governments. On the other hand, economists are more convinced than ever that a strict separation of powers between the central bank and other branches of government,¹³⁸ and political independence for the authority that enforces anti-monopoly law, are essential for economic efficiency.

We must consider, however, whether the reconceptualized rationale for a public-private separation of powers I have articulated raises a spectre of new inefficiencies which we may not happily bear. One worry arises from the separation of enforcement targeting from the actor who benefits from the abuse of power. According to the economic analysis of law, regulatory enforcement should be designed so as to deliver an optimal level of attainment of a regulatory objective. Pursuit of perfect compliance with, say, environmental law is an error. We should set sanctions at a level where inefficient non-compliance will always be

137 Advocates of the separation of powers such as Jefferson have always been concerned to separate powers in such a way as to allow the executive government to get on with governing. See W.G. Gwyn, *Meaning*, supra note 2 at 33–5, 58, 118–20. For my own account of why a rich republican democracy is likely to be more economically efficient than totalitarianism, see, J. Braithwaite, 'Institutionalizing Distrust: Enculturating Trust,' *Trust and Democratic Governance*, eds. M. Levi & V. Braithwaite (New York: Russel Sage Foundation, 1997).

138 O. Issing, *Central Bank Independence and Monetary Stability* (London: Institute of Economic Affairs, 1993).

deterred. But when the economic benefits of non-compliance exceed the environment costs reflected in a fine the firm is willing to pay, we should want it to break the law. Economic welfare will be enhanced when it pays the fine to compensate for the environmental damage and goes ahead with the benefits of the economic activity. This kind of analysis is based on a variety of assumptions that prove to be false in regulatory practice – as a result of vice presidents responsible for going to jail bearing costs, while presidents get benefits without costs, and other complications.

The most basic complication is that managers routinely have little idea of the costs and benefits of regulatory compliance. A study of nursing home regulatory compliance, by Makkai and Braithwaite,¹³⁹ found, for example, that while the dominant models in the economic analysis of law assume that the relationship between the expected cost of compliance and compliance is monotonic, it is non-monotonic (a curve with a turning point). The models assume that expected costs are determined by actual costs, whereas only 19 per cent of the variance in expected costs was explained by actual costs. Some of the limits of economic models in this case were explained by CEOs who were 'disengagers.' The behaviour of disengagers was to be understood not in terms of rational game playing but in terms of dropping out of the regulatory game. The disengagers were in the regulatory system but not of it and certainly not economically calculative about it. Makkai and Braithwaite show that the fit of economic models can be improved by adding attitudes of managerial disengagement to the models. What all this means is that if we use under-specified pure economic models to determine the optimum level of penalties to ensure that rational actors, who bear both the costs and benefits, make choices that maximize welfare, we will fail to do so. Economic models with a grain of truth and a gram of falsity will prescribe major under-compliance or over-compliance most of the time.

But let us assume there are some contexts where the assumptions of economic models of law are not false. The worry is that by shifting enforcement on to gatekeepers who do not care about the benefits of the polluting activity, who care only about the costs of sanctions, compliance will be secured in circumstances where compliance is inefficient. We will get over-compliance. This worry also exists in domains where false economic models have set levels of standards and penalties for their breach that cause over-compliance even before cost-bearing is separated from benefit-taking.

139 T. Makkai & J. Braithwaite, 'The Limits of the Economic Analysis of Regulation: An Empirical Case and Case for Empiricism' (1993) 15 *Law and Policy*. 271.

Another worry about the rather radical separation of powers in the US system of government is that it nurtures fiscal irresponsibility. For example, when there is a clear need to reduce the deficit by increasing taxes or cutting spending, very often this does not happen. It is a kind of mismanagement the Americans are more able to live with than other nations because of the many other sources of resilience in their economy. When failure to cut a deficit occurs in the face of a transparent need to do so, the political tradition is for the President to blame the Congress, the Congress the President. A system of mutual irresponsibility, if we paint it in the worst light.

Separations of powers can induce economic inefficiencies, either from over-compliance or from mutual fiscal irresponsibility. But there is a common solution to these two problems and it is a republican one. Both types of inefficiency arise from an adversarial approach to how regulation should work in the first case, and to how politics should work in the second. Concerns about over-compliance and mutual irresponsibility are ameliorated to the extent that we can replace adversarialism which fortifies self-regarding interests with dialogue that redefines interests in a public-regarding way.

B. OVERCOMPLIANCE

In the form of regulation described in this paper and elsewhere in the work of new regulation scholars,¹⁴⁰ actors discuss regulatory problems in a way that is not totally self-regarding. In the conferences following nursing home inspections, the discourse is public-regarding on all sides. Of course there is underlying self-interest. But it is inconceivable that a nursing home manager would dismiss a plea to reduce the pain of a resident by suggesting that she did not care about the pain, only about the costs. The more genuine the dialogue, the more seriously management internalizes the concerns of the residents; the more seriously residents and regulators internalize the concerns of management. Under such a regime of other-regarding actors negotiating outcomes with recourse to sanctions only when good faith breaks down, any conception of an economically optimal level of regulatory sanctions makes no sense.

The hope for avoiding over-compliance rejects the spurious quantification of the economic analysis of law in favour of a negotiated search for win-win solutions based on a regulatory culture wherein actors

140 E. Bardach & R. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982); V. Braithwaite, *Games of Engagement: Postures within the Regulatory Community* (forthcoming); V. Braithwaite *et al.*, 'Regulatory Styles, Motivational Postures and Nursing Home Compliance' (1994) 16(4) *Law and Policy*. 363; E. Meidinger, 'Regulatory Culture: A Theoretical Outline' (1987) 9 *Law and Policy*. 353.

are seen as virtuous when they take seriously not only their own concerns but the concerns of others, including the concerns of business about over-compliance. Empirically, it often happens that nursing home managers do speak up when they fear over-compliance – regulatory demands which deliver small benefits at such a high cost that if only some of those dollars could be spent elsewhere in the home, both sides would be better off. Indeed, it is common for regulators and residents to speak up about shifting resources from over-compliance here to under-compliance there. Republican regulatory institutions foster the creative search for optimality through sharing ideas and mutual identification with the interests of the other. The mutuality that engenders this creativity is destroyed by the adversarialism of deterrent-based regulation and, indeed, by the game-playing of tax-incentive-based regulation.¹⁴¹

In the day-to-day work of little regulatory decisions on the ground, dialogue in which all actors empathize with concerns about one another's costs and benefits is the most practical protection we can suggest against over- and under-compliance. Going after 'soft targets' would be a dangerous strategy if it were not embedded in a plural dialogue among actors with different spins on costs and benefits. More precisely, it would be a contingently dangerous threat to the efficiency of a regulatory regime – depending on whether the economic analysis underpinning it was mis-specified in a way that caused under- or over-compliance. Contextual dialogue among hard and soft targets moves the soft targets more than the hard, yet in a way that has the soft targets listen to the point of view of the hard targets. The irony in our observations of nursing home regulation is that this kind a dialogue about regulatory costs actually generates some contextual data about costs to replace the ill-informed 'gut feels' that managers have about regulatory costs when subjected to traditional command and control directed at the beneficiaries of cheating.

C. FISCAL IRRESPONSIBILITY

To the extent that the game of American politics is totally adversarial and politically self-interested, parties will simply manoeuvre to make the other party impose unpopular taxes or spending cuts while avoiding doing so themselves. Fortunately, American political life does attenuate adversarial self-interest through dialogic mechanisms. The President meets with Congressional leaders to discuss public-regarding solutions to gridlock in

141 In as-yet-unpublished data on US nursing home regulation, Toni Makkai, Valerie Braithwaite, Dianne Gibson, and I will document perverse ritualism of limited or no benefit to residents in nursing homes where extra Medicaid payments accrue to homes that perform better on performance indicators. An example is wheeling in residents who are sound asleep to be present at an activities program when the performance indicator is the number of residents present at activities programs.

circumstances where the press and the people stand ready to condemn both sides if they do not manifest a more public-regarding approach to the dilemma. To the extent that the democracy succeeds in being dialogic in this way in the President's office and in the media debate, the admitted economic inefficiency from the separation of powers is attenuated.

Considering the problem from the opposite direction, cabinet government in British parliamentary systems more or less solves the mutual irresponsibility problem. Cabinet is of the parliament and effectively controls it (or hands over to a new cabinet if it cannot). If a tough budget is needed, cabinet does in practice bear responsibility at the next election if the electorate perceives it as failing to have done what was needed. But the cost is that the budget is the creation only of the parties represented in cabinet to the exclusion of other interests represented in the legislature. A less republican concentration of power than in the American case. Again one remedy to this concentration is a dialogic one. Citizen groups have their pre-budget submissions tabled not before cabinet but before parliament. Perhaps they should be allowed to address the parliament on them. Then members of parliament from all parties have an opportunity to discuss these submissions together with Treasury forecasts relevant to the budget before the budget is framed. An alternative during the early years of the Hawke-Keating government (1983–1996) in Australia was that pre-budget submissions would be discussed by the Economic Planning Advisory Council. As a member of this council representing community and consumer groups, my job was to argue with the Prime Minister, Treasurer, and other members of the Cabinet and bureaucracy about the pre-budget submissions from that consumer-community group perspective. More importantly perhaps, the Council included state Premiers from parties other than that represented in Federal cabinet. In the private dialogue of the Council meeting, the Premiers were not performing for the media, not seeking to score points against the other party. Rather they seemed to seize a genuine opportunity to listen to the thinking of the Prime Minister and to seek to sway it through public-regarding reasoning.

Either way, the checking of power that seems most valuable is dialogic. Adversarial politics in the glare of the television cameras is good for getting the issues before the people. Efficient economic resolution of those issues depends, however, on the quality of the economic dialogue in a democracy. Be the concern about economically inefficient outcomes articulated in an American or an Australian political context, in the context of framing budgets or implementing regulation, republicans are on the economic high ground because of their commitment to institu-

tionalizing dialogue that can transcend the deepest inefficiencies. These are, at root, the outcome of self-serving adversarialism.

Bruce Chapman has raised a quite different economists' worry about stability. This is the 'danger in having an overlapping separation of powers with many sources of decision-making for the stability of any final organizational choice? One can certainly imagine that the plurality of interests might lead to a range of different and decisive coalitions (a bit like the voting paradox) cycling over a rich but unstable array of possible choices.'¹⁴² The first reply is that the deeper worry is impoverished but stable choice – the economic choices of Breznev's Soviet Union or Marcos's Philippines. The fundamental protection against pathological policy instability for the republican is constitutional conventions that guarantee all the separated powers a legitimate voice in the deliberations, followed by a constitutional method for settling the matter until such time as new circumstances can be shown to prevail.

Charles Sabel¹⁴³ sees 'the central dilemma' of economic growth as 'reconciling the demands of learning with the demands of monitoring.' The dilemma is that economic actors need to trust each other to learn by sharing know-how. At the same time, they must distrust each other by monitoring that the gains from the shared know-how are shared in the agreed way. Sabel views economic success as flowing from the design of discursive institutions that make discussion of know-how inextricable from discussion of apportioning gains or losses. Mutual dependence can resolve the paralysing fear of deceit by allowing both scrutiny and learning to be natural consequences of a joint enterprise. A fusion of identities (as we see in families even moreso than in work groups) means that untrustworthiness by one member causes other members to share the shame of the breach of trust while all share the joy of others' learning. Both learning and monitoring are products of discursive problem-solving and partial fusing of identities in joint ventures.¹⁴⁴ As in the public sector, so within the private sector, therefore, the inefficiencies from separations of power that risk uncoupling the demands of learning from the demands of monitoring are best resolved by the mutuality and deliberation commended by the republican ideal of governance.

142 Editor's comments on an earlier version of this paper.

143 C. Sabel, 'Learning by Monitoring: The Institutions of Economic Development,' *The Handbook of Economic Sociology*, eds. N.J. Smelser & R. Swedburg, (Princeton: Princeton University Press, 1986) at 137.

144 See also W. Powell, 'Trust-Based Forms of Governance,' *Trust in Organizations: Frontiers of Theory and Research*, eds. R.M. Kramer & T.R. Tyler (Beverly Hills: Sage, 1996).

A standard rationale for the separation of powers is deterring abuse of power with countervailing power. Deterring abuse of power, be it private or public, is not something we are good at. Problems like police corruption, dumping hazardous wastes and corporate fraud seem to bounce back after each wave of scandal and reform.¹⁴⁵ An increasingly coherent theoretical and empirical literature can now make sense of why deterring the abuse of power so often backfires. Emotive defiance, cognitions of stigma and procedural injustice, psychological reactance, the deterrence trap, and rational countermeasures are among the reasons big sticks often rebound. We have seen that all of these mechanisms apply to powerful actors; several of them have more force with powerful than powerless actors. Reactance and rational countermeasures are greatest with the powers the powerful care most about, which generally means the commanding heights of their power.

It has been argued that solutions to these problems are to

1. replace narrow, formal and strongly punitive responsibility with broad, informal, weak sanctions;
2. separate enforcement targeting from identification of the actor who benefits from the abuse.

Together 1 and 2 imply: (a) strong separations of powers within and between both the public and private sectors, combined with (b) another republican regulative ideal – problem-solving dialogue. The richer and more plural the separation of powers, the more over-determined will be the capacity to detect and prevent abuse of power. The more actors there are with this preventive capability, the more likely some of them will be soft targets who can be persuaded to check abuse of power by simple and cheap discursive appeals to their virtue. The more institutions for the control of abuse of power are based on moral reasoning rather than deterrence, the more public-regarding actors with preventive capability will there be.

Deterrence is certainly needed when dialogue fails to control abuse of power, as is incapacitation when deterrence fails.¹⁴⁶ But the more we can succeed in keeping deterrence and incapacitation in the background, the better the prospect that the separation of powers will check abuse of power through moral suasion and the better the chance that it will do so in a way that enhances rather than hampers economic efficiency.

145 See L. Sherman, *Scandal and Reform* (Berkeley: University of California Press, 1978).

146 I. Ayres & J. Braithwaite, *Responsive*, supra note 87.

An interesting implication of this for republican political theory is that the separation of powers and dialogic appeals to the virtue of citizens are not just separate republican ideals. The separation of powers creates a world where dialogue can displace sanctioning as the dominant means of regulating abuse of power. These republican prescriptions are not only coherent in the sense that both the separation of powers and dialogic reconstitution of interests help secure freedom as non-domination. Deliberative democracy is also causally dependent on the separation of powers.

We have shown that if appeals to the virtue of soft strategic targets is to work, the form this separation of powers must take is much more plural than the traditional separation of legislature, executive, and judiciary. The more richly plural the separations of public and private powers, the more the dependence of each fiduciary on many other fiduciaries will secure their independence from domination by any one of them.

This theory of republicanism amounts to a rejection of the radical Jeffersonianism of strict separation of powers that became influential in the early nineteenth century, that is represented in the French Constitution of 1795.¹⁴⁷ Simply dividing power and making it directly accountable to the electorate, preventing judges from meddling in the affairs of the legislature and vice versa, was a romantic theory even then, one that was bound to give birth to adversarial struggles for control that would deliver a Napoleon Bonaparte. The romantic theory of this century has been that antitrust law could democratize the new private power.¹⁴⁸ A pragmatic republicanism for the burgeoning private power of the twenty-first century will give more emphasis to the checking of power part of the republican ideal; it will pluralize the separations of powers, while rejecting any aspiration that each divided power be fully independent. Many semi-autonomous powers recursively checking one another¹⁴⁹ rather than a few autonomous branches of governance. This means rejecting the status quo of the separation of powers, rejecting radical Jeffersonianism, and creatively radicalizing Madison for a world where new and disturbing concentrations of private power continually emerge.

147 See note 109.

148 Maximizing the breaking up of private power through antitrust law that creates inefficiently small firms is politically unsustainable in a world of intense international competition. Even if one could do it, why would one want to? In some senses, it is easier for state and civil society to demand the kinds of separations of powers and dialogic justice discussed in this article from one profitable large firm than from a dozen small struggling firms. A conception of the separation of powers as simply dividing or breaking up concentrations of power is neither attractive nor realistic in the contemporary world.

149 See Diagram 4.

