

Regulating Law

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Conclusion

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INTRODUCTION

The Introduction to this volume asked if it might be productive to study law as something that both regulates and is regulated. Centuries ago in the common law world, law did not touch as many spheres of life as it does today. There was no corporations law, little financial law, no income tax law, virtually no intellectual property or competition law, little administrative law, tort had yet to be clearly differentiated from criminal law, and an International Criminal Court would have seemed a bizarre notion. While the spread of the institutional reach of law is a centuries-long process, advocates of deregulation accurately point out that most of the exponential growth in the number of pages of law in existence has occurred since 1970, indeed since 1990 in some nations.¹ Even with contemporary developments in labour law, said to be about 'deregulation', Richard Johnstone and Richard Mitchell in Chapter 5 point out that the moves in some countries towards more market-based labour arrangements have required an increase in the quantity of labour law. With labour law, as with competition law in many nations, what we see is legally regulated marketization.² Our chapters have touched on many of the different ways that the reach of law has expanded in modern history.

In addition, today we see legal missionaries from the developed economies, supported by institutions like the International Monetary Fund (IMF) and the World Bank, pushing developing countries to acquire a 'rule of law' as one of the 'good governance' essentials for their development. Intellectual property lawyers

¹ The Australian case illustrates. In 2002 the Commonwealth Attorney-General's Department estimated there were 1,800 Commonwealth Acts in force; 170 of these were promulgated in 2001, 148 in 2002. But, more tellingly, the number of rules per Act, the complexity and length of Acts, is increasing. For the 1990s the number of pages of law per Act was twice the number for the 1980s and three times the quantity for the 1970s: S. Argy, *Mechanisms for Improving the Quality of Regulations: Australia in an International Context* (Canberra: Productivity Commission, 2003). Tax law is probably the most extreme example, which has grown twenty-seven-fold in its pages of law since 1970 according to Michael Inglis: 'Why we Urgently Need a Proper, Working Systemic Model for the Australian Federal Tax System', Paper presented to Centre for Tax System Integrity, Australian National University, Canberra Sept. 2003. Moreover, it is post-1970s rules in commercial areas such as tax and corporations law that account for the largest part of the growth in litigation. The most dramatic growth in a single locus of litigation has been the use by business litigants of the 1974 Trade Practices Act, Australia's competition and consumer protection law. Globally, growth in the quantity of the latter kind of law has also been from a zero base in most countries, substantial and even more recent than in Australia. Most of the world's nations now have competition laws and competition enforcement agencies. Most have acquired them since 1990: CUTS Centre for Competition, Investment, and Economic Regulation, 'The Role of International Cooperation in Building an Effective Competition Regime', *CUTS Newsletter*, 6/2003, 1.

² Maher, Ch. 9 in this volume.

head south and east with Western intellectual property statutes tucked in their suitcases, tax lawyers with Western tax codes in theirs. Some of this missionary work is motivated by a desire to spread justice ideals, but mostly it is explicitly funded to help developing countries regulate their societies in ways that will promote economic growth, either for themselves, or for the developed economies that are 'helping' them. That there has been an empirical proliferation of law across time and space motivated by regulatory objectives and sharp growth in the number of regulatory agencies is beyond question.³ Whether a regulatory lens for viewing the whole of law is genuinely distinctive and revealing, and whether it is normatively desirable for law, in all its range, to be viewed as primarily a regulatory institution, are both very much in question in this volume. In this concluding chapter we will come to reconsider law, in light of some of the insights in our chapters, as in some ways a 'meta-regulator', a regulator of other (non-legal and quasi-legal) forms of regulation in society. In this conception, law is just one strand, albeit a particularly significant one, in a web of regulatory institutions that regulate one another to greater or lesser degrees. Firstly, we will examine the growth of other mechanisms and institutions of regulation as something that sets up this meta-regulatory web.

LEGAL AND REGULATORY PLURALISM

In Chapter 11, 'Regulating Constitutions', Colin Scott argues that while political science increasingly assumes a pluralist structure of political power, legal research clings more tenaciously to a strong notion of sovereignty 'vested variously in the legislature or in the legislative, executive, and judicial branches of government'.⁴ Regulatory scholarship, in the political science governance⁵ or Foucauldian governmentality traditions,⁶ is less wedded than legal scholarship to hierarchical visions of order as handed down from legislatures and implemented by judiciaries, and favours more heterarchical conceptions of control.⁷ For example, Scott illustrates how constitutions work more by conventions

³ J. Jordana and D. Levi-Faur, 'The Rise of the Regulatory State in Latin America: A Study of the Diffusion of Regulatory Reforms across Countries and Sectors', Paper presented to the Annual Meeting of the American Political Science Association, 28 Aug.–2 Sept. 2003.

⁴ Ch. 11 in this volume, p. 227.

⁵ 'It takes a society to run a society': K. Webb, 'Sustainable Governance in the 21st Century: Moving beyond Instrument Choice', in P. Eliadis, M. Hill, and M. Howlett (eds.), *From Instrument Choice to Governance: Future Directions for the Choice of Governing Instrument* (Montreal: McGill-Queen's University Press, forthcoming). See also M. Bevir and R. Rhodes, *Interpreting British Governance* (London: Routledge, 2003), and R. Rhodes, *Understanding Governance* (Buckingham: Open University Press, 1997).

⁶ G. Burchall, C. Gordon, and P. Miller (eds.), *The Foucault Effect: Studies in Governmentality* (London: Harvester Wheatsheaf, 1991); D. Garland, '"Governmentality" and the Problem of Crime: Foucault, Criminology, Sociology', *Theoretical Criminology*, 1 (1997), 173.

⁷ J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a Post-regulating World', *Current Legal Problems*, 54 (2001), 103.

enforced by community opinion from below than by formal law enforced by courts with constitutional jurisdiction. He also points out how international (or supranational) governmental organizations are important enforcers from above of national constitutional norms. To make the picture even more richly plural, Scott shows that horizontal self-regulation of constitutional compliance by the legislature of the legislature (through the variety of mechanisms for review of bills to audit compliance with human rights and other constitutional obligations) is important, and has been for many years. In Chapter 12, Hilary Charlesworth and Christine Chinkin paint a complementary picture of an international law where, in terms of compliance, states do not seem to differentiate between non-binding instruments (enforced at most by naming and shaming) and legally binding instruments.

This basis for legal norms and authority is by no means restricted to constitutional and international law. In the context of 'Regulating Families' (Chapter 4), John Dewar recounts the 'norm-form' project. The norm-form project found that the factors most conducive to settlement of legal cases in a number of core legal fields were 'comprehensibility to the lay person and predictability of result to the lawyer'.⁸ But there was no evidence that the form of norms, most notably how precisely they were formulated as rules, explained these factors or indeed anything about lawyers' negotiating behaviour. As in Scott's chapter, it turns out that 'Conventions matter more than formally expressed rules.'⁹ Even in criminal law, perhaps the paradigm of centralized top-down legal norm creation, Nicola Lacey (Chapter 7) argues that articulation with community norms is a key to legitimacy, with community norms exerting a pull over the enforcement and even interpretation of formal legal norms. The importance of lay comprehensibility and professional predictability underwrote the take-home message of the norm-form project: 'there is a case for assisting parties to bargain in the *light* of the law rather than its shadow'.¹⁰ The challenge is how to craft the relationship between law and conventions so that both lawyers and ordinary citizens do bargain in that light.

Just as the last two centuries have seen an enormous spread in the regulatory relevance of law, so they have seen a proliferation of non-state forms of regulation. The roots of this pluralization of regulation are themselves plural, yet structurally specific, manifestations of late modernity. In parliamentary systems, backbenchers sidelined by growing centralization of power in the prime minister's office fight back with an opportunity to monitor legislative compliance with human rights obligations through a parliamentary committee system. More subordinated levels of government—local government, provincial governments in federal systems—attempt to reassert some of the regulatory prerogatives they may have exercised in the era before strong nation states entered that regulatory domain. The fourth estate also occasionally seizes

⁸ Dewar, Ch. 4, in this volume, p. 94. Stephen Bottomley, one of the other authors in this collection, was also a participant in the norm-form project.

⁹ Ibid. 94.

¹⁰ Quoted *ibid.* 94.

opportunities to assert their relevance to democratic will formation by stirring up community concern about the flouting of conventions by governments, as in the reporting around the Hutton Inquiry, which threatens the future of the Blair government at the time of writing. Globalization animates a diverse array of supranational regulatory institutions. In part as a reaction against both globalization and its nodes of bureaucratic power (such as the World Trade Organization, IMF, and World Bank) and more centralized and remote national political power, non-governmental organizations (NGOs) and social movements strive, with some success, for more regulatory power.¹¹

Yet the most powerful reason for the heterarchic pluralization of regulation is more sociologically fundamental: it is the progressively more pluralized division of labour within societies first theorized a century ago by Émile Durkheim.¹² Once a profession like accounting is differentiated in the division of labour, it is inevitable that part of the professional project will be the creation of accounting standards, the mastery of which becomes a precondition ('barrier') to entering the profession. Julia Black's description, in Chapter 2, of the self-regulatory significance in British financial regulation of the London Stock Exchange, the International Swaps and Dealers Association, the International Accounting Standards Committee, the Basel Committee on Banking Supervision, the International Securities Market Association, and the Bond Market Association, among others, is the most variegated illustration in the volume of how a progressively more complex division of labour institutionalizes a progressively more complex range of self-regulatory orders to which the law has little choice but to respond. As law itself becomes historically more professionalized, self-regulation by the legal profession assumes greater significance.¹³ As the Civil Service becomes more professionalized, regulation of government by functionaries of government is given a special new significance.¹⁴ So while there are a lot of drivers of the pluralization of regulatory influences beyond formal law, the three more structurally profound ones are an increasingly elaborated division of labour, globalization (transgovernmental networks that cross national boundaries),¹⁵ and the rise of social movement

¹¹ See Charlesworth and Chinkin, Ch. 12 in this volume, on international NGOs; Johnstone and Mitchell, Ch. 5, on unions; Lacey, Ch. 7, on the social movement for restorative justice.

¹² '... since the division of labor becomes the chief source of social solidarity, it becomes, at the same time, the foundation of the moral order': É. Durkheim, *The Division of Labor in Society* (New York: Free Press, 1960), 401.

¹³ While barristers self-regulated for centuries in inns of court, solicitors, the lower branch of the profession, only took on self-regulation as they professionalized in the 19th and early 20th centuries: B. Abel-Smith and R. Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System 1750-1965* (London: Heinemann, 1967); A. Paterson, 'Legal Ethics: Its Nature and Place in the Curriculum', in R. Cranston (ed.), *Legal Ethics and Professional Responsibility* (Oxford: Clarendon Press, 1995), 175.

¹⁴ C. Hood, O. James, G. Jones, and C. Scott, *Regulation inside Government: Waste-Watchers, Quality Police, and Sleazebusters* (Oxford: Oxford University Press, 1999).

¹⁵ A. M. Slaughter, 'The Real New World Order', *Foreign Affairs*, 76 (1997), 183; G. Teubner, 'Global Bukowina: Legal Pluralism in the World Society', in Teubner (ed.), *Global Law without a State* (Aldershot: Ashgate, 1997).

politics associated with the exponential growth of NGOs, first in the North but more recently in the South.¹⁶

Noting this growth in the plurality of regulatory actors is not to deny that non-state regulatory actors of great importance have always been with us. Richard Johnstone and Richard Mitchell give a powerful example in the authority of craft guilds to regulate the terms of labour in medieval Europe. Just as this great medieval regulator no longer regulates, so with one of the most powerful of medieval European regulators, the Catholic Church, we also see a sharp decline in regulatory authority. While the long-run historical trend to regulatory growth seems structurally profound, it is not unidirectional or monotonic, and it is riven with contradictions and puzzles.

At the conference where the draft papers for this volume were presented, one of our commentators, David Soskice, attempted to summarize schematically the array of internal and external regulatory influences on the law that he saw instantiated in our essays. These included private ordering that both lobbies governments and generates cases for judges to digest in their interpretation of the common law and statutes. We think it an instructive exercise for readers to attempt to draw their own diagram of this kind. The sheer diversity of types of regulatory influence on the law rendered the diagrammatic summaries of the multiple directions of influence that we attempted to summarize from our essays troublingly complex, yet incomplete. This could lead to a kind of analytic despair: there are now such a vast plurality of actors and regulatory mechanisms influencing such a plurality of private and public regulatory institutions that we see through the regulatory lens many trees without being able to discern the contours of the forest. Our aim in this conclusion is to suggest that the complexity and plurality required need not lead to analytic despair but to possibilities for a more meta-regulatory analysis.

NETWORKED GOVERNANCE IN THE REGULATORY WEB

If we are right that in the twenty-first century we have both a greater quantity of law than ever, and a greater quantity of private ordering by business associations, professions, standards associations, and NGOs than ever—and proliferating interactions between the two—then standing back to view all this complexity from multiple angles is likely to become more fruitful. When we do, we no longer see a simple hierarchy of legislation handed down to be implemented and interpreted by judges, which results in changes of behaviour. But just as it

¹⁶ The Commission on Global Governance found that more than 90 per cent of the growth in NGOs between 1909 and 1995 has occurred since 1970, and it was also after 1970 that the proportion of participation accounted for by Asian and African NGOs grew: Commission on Global Governance, *Our Global Neighbourhood: The Report of the Commission on Global Governance* (Oxford: Oxford University Press, 1995), 32–3. See also J. Braithwaite, and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000), 497–501.

compels us to reject a simple hierarchical story of how the rule of law is potent to change the world, it also requires us to reject the view that law is unimportant. How could we think that when we observe the metaphor of government by contract gripping the imagination of governments? Peter Cane in Chapter 10 has a different legal interpretation of contracting out from that of Hugh Collins. There is debate over the meaning of what is happening but not over the fact that legal ideas are important to big changes we can see happening in the world. Contracting out of services to the public can be seen as resulting in the erosion of public law values, as traditionally public functions are executed in the private sector.¹⁷ Yet Jody Freeman intriguingly sees contracting out as infiltrating public law values into the private sector.¹⁸ Perhaps there is some truth to both ways of seeing—the privatization of the public and the publicization of the private. With the proliferation of hybrid forms of private–public corporate governance, Angus Corbett and Stephen Bottomley's chapter, 'Regulating Corporate Governance' (Chapter 3), certainly enables us to see both a publicization of the private and privatization of the public.

While we are led to reject both the view that law is the centrally dominant regulatory institution and that law is unimportant to regulation that changes the world, in different ways our authors all see law as somewhere in the loop. As in the rather complex flow diagram that David Soskice put up for our consideration in the conference, there are many non-legal forms of ordering shaping outcomes, but law is also of importance in the complex of forces shaping results. We can understand the regulatory project as delineating a web of regulatory controls where different branches of legal institutions are among the strands in the web. Sometimes when we see law as a weak and unimportant regulatory influence that explains little of the variance in outcomes, we will be failing to grasp the fact that the total fabric of the web of private and public controls has quite profound effects, and that law is important in holding that fabric together. Strategic regulatory action that has big effects, according to this model, involves having the wisdom to know which is the right strand to pull at the right moment to tighten the web. And knowing which strands of control when pulled too forcefully will cause the whole web to unravel. In a majority of cases legal strands will not be the most crucial ones which, when tugged, have the biggest effects in either direction. But it would be wrong to conclude from such an empirical observation that the same result would apply if law were not part of the fabric of the web. Again this leads us to the virtues of seeking a holistic understanding of how whole webs of regulatory controls interact. The web metaphor may also help resolve some of the concerns of our contributors over what regulation is. If regulation is the intentional act of seeking to steer the flow of events by intentionally pulling one of the strands in a web of controls, there

¹⁷ A similar analysis of the privatization of the public might also be applied to using contractual practices to control relations between different parts of government: see Collins, Ch. 1 in this volume.

¹⁸ J. Freeman, 'Extending Public Law Norms through Privatization', *Harvard Law Review*, 116 (2003), 1285.

is no implication that any or all of the other strands in that web of control are intentional regulatory creations. They might be a common law that has evolved without any coherence of purpose or mute forms of architectural control.¹⁹

Jane Stapleton, in Chapter 6, on 'Regulating Torts', warns us against going too far with the implications of this kind of analysis: 'judges seem rightly to appreciate that the system is too complex to allow great accuracy about predictions of how a doctrinal shift will work its way through the complex systems in which it is embedded'.²⁰ John Dewar also warns that empirical studies of family law in action reveal more about unintended than intended consequences.²¹ While this is true, it is also the case that empirical socio-legal research is a comparatively recent branch of the social sciences. So it is too early to say how predictive a more mature body of research will become. Hope can be found in the field where there has been the largest public investment for the longest period in testing the effect of regulatory interventions: criminal law. Right through the 1980s it is probably true that most criminologists subscribed to something close to Robert Martinson's famous review of the evidence on the effectiveness of correctional interventions popularized as 'nothing works'.²² Most of us who work in this field were therefore more interested in persuading courts to do more justice or less injustice in criminal cases than in having them consider how their actions might regulate crime more or less effectively. By the end of the 1990s, however, few criminologists subscribed to the 'nothing works' philosophy. A lot of different kinds of intervention—mediated through hierarchy, community, competition, and design-architecture²³—had been shown either to work or to be promising, with growing numbers of randomized controlled trials that provided greater assurance of the robustness of effects than multivariate methods in the traditions of econometrics and epidemiology.²⁴ Moreover, these demonstrated effects were not just about the narrow regulatory objective of reducing crime, but about a plethora of criminal justice objectives like reducing victim fear and emotional distress, reducing cost, and improving perceived procedural fairness.²⁵

¹⁹ For examples of mute or self-executing forms of architectural control, see L. Lessig, *Code and Other Laws of Cyberspace* (New York: Basic Books, 1999); and C. Shearing and P. Stenning, 'Say "Cheese!": The Disney Order that is not so Mickey Mouse', in Shearing and Stenning (eds.), *Private Policing* (Newbury Park, Calif.: Sage, 1987).

²⁰ Ch. 6, p. 139. However, also note Stapleton's argument rehearsed below that in some circumstances courts do and should choose to take other regulatory policies and influences into account.

²¹ Ch. 4, p. 91.

²² R. Martinson, 'What Works? Questions and Answers about Prison Reform', *Public Interest* (Spring 1974), 22; D. Lipton, R. Martinson and J. Wilks, *The Effectiveness of Correctional Treatment: A Survey of Treatment Evaluation Studies* (New York: Praeger, 1975).

²³ See Lacey, Ch. 7 in this volume.

²⁴ L. Sherman, D. Gottfredson, D. MacKenzie, J. Eck, P. Reuter, and S. Bushway, *Preventing Crime: What Works, What Doesn't, What's Promising: A Report to the United States Congress* (Washington: US Department of Justice, 1997).

²⁵ On reducing victim fear, see H. Strang, *Repair or Revenge: Victims and Restorative Justice* (Oxford: Oxford University Press, 2003). On emotional distress, see B. Winick and D. Wexler (eds.), *Judging in a Therapeutic Key: Therapeutic Jurisprudence and the Courts* (Durham, NC: Carolina Academic Press, 2003). On reducing cost, see J. Braithwaite, *Restorative Justice and Responsive*

This does not change Jane Stapleton's basic point that most of the time judges will and should make doctrinal judgments on doctrinal grounds. But it does suggest that somewhat more frequently, as socio-legal science improves in the decades ahead, judges, and perhaps more significantly other legal actors, will be able to predict the effects of legal change on regulatory outcomes that are mediated through complex chains of non-legal variables. As the body of higher-quality empirical research on the effects of legal interventions grows, it also becomes less possible for lawyers to say: 'Because judges cannot predict the effects of their cumulated decisions, they should stick to what the law is best at: securing legal certainty and procedural fairness.' This will not wash because socio-legal research reveals that staying on a narrowly legalistic path often empirically reduces certainty and procedural fairness in comparison with law that is purposefully open to influence by private ordering.²⁶ If we do not allow law to be regulated by changes in custom, it can be the more pervasive rule of custom that will generate most certainty, with occasional guerrilla attacks from the law inflicting uncertainty upon the rule of custom. Legal certainty, like any legal outcome, is mediated through a web of non-legal influences. If there is an uncertainty problem, then the only way legal actors can be effective in seeking to remedy it is by working through the webs of controls that matter for that particular outcome.

Indeed Stapleton argues that even though constantly moving complexes of influence may be hard for all actors, including legal ones, to understand and respond to, they can also deliver productive kinds of dynamism and unpredictability that we might relish. Stapleton uses the example of the evolution of a 'plethora of schemes that provide compensation for personal injuries . . . each respond[ing] in a subtly specific way to different complex sets of concerns'.²⁷ Hence, for example, 'we might hold a particular view of the role of tort in this area but still be in favour of there being a separate additional no-fault compensation scheme in certain limited contexts because the scheme encourages very specific conduct that we believe benefits society as a whole'.²⁸ Courts may be the primary location for tensions to emerge between the varying, disparate purposes of law (such as in instrumental law set down by legislatures or bureaucracies) and older legal norms. In webs of regulatory controls, courtrooms may be distinctive nodes where knots are sometimes tied between different strands of the web. What do courts do in practice when confronted with this complexity?

Regulation (New York: Oxford University Press, 2002), 124–5. Just a few years ago, for example, it was not known that randomly assigning youth violence cases to restorative justice conferences, as opposed to criminal trials, could substantially reduce some types of repeat offending, offender fear and emotional distress, and a variety of different forms of procedural fairness in the eyes of victims, offenders, and their families: Braithwaite, *Restorative Justice*, 45–71. On the procedural justice literature, see T. Tyler, *Why People Obey the Law* (New Haven: Yale University Press, 1990); T. Tyler and Y. Huo, *Trust in the Law* (New York: Russell Sage Foundation, 2002).

²⁶ J. Braithwaite, 'Rules and Principles: A Theory of Legal Certainty', *Australian Journal of Legal Philosophy*, 27 (2002), 47.

²⁷ Stapleton, Ch. 6 in this volume, p. 140.

²⁸ *Ibid.* 140.

According to Stapleton,

Tort courts have always appreciated that their decisions will have larger social impact than merely on the parties. Indeed, they often speculate as to the ways their decisions might impact on the wider world. Sometimes this speculation influences a decision, sometimes it is given no weight, and sometimes a decision is taken despite the acknowledged inevitability that it will have a profoundly unsettling impact on social or regulatory norms. Sometimes the court declines to address an issue that is critical to the decision of how parties respond to the judgment.²⁹

Put another way, sometimes courts cut themselves off from outside regulatory influences upon them, deciding to defend the integrity of a branch of the law's subtly specific way of responding to a particular problem. Sometimes courts succeed in coming to terms with the empirical realities of the complex of social forces surrounding the case and then allow the understanding of that complexity to influence the law. Sometimes they try to understand it and give up in the face of the empirical imponderables of doing so. Stapleton implies that courts should leave all of these options open. We are not inclined to disagree.

Stapleton's observations on what courts do, and should do, are of a piece with Les Metcalfe's observations on how executive agencies should plan.³⁰ He wonders how state plans can work in a world where state policy prerogatives are increasingly usurped by globally networked governance in which business organizations, voluntary standards bodies, professions, international organizations, and NGOs are all increasingly important players. In the mid-twentieth-century world of top-down state power, it made some sense for state agencies to think in terms of strategic plans, indicative planning, five-year plans, and other such dreams of yesteryear. Metcalfe says that in a world of globally networked governance where there are many and different nodes of local and international regulatory influence in the network, states have stopped doing synoptic top-down planning. Yet he says we cannot and must not give up on steering through planning. In a world of networked governance, Metcalfe suggests that each node in the network, including state nodes, must do their strategic planning taking into account the strategic plans of all the other important nodes of governance in the network.³¹ Obviously, these have to be more rolling plans than the old five-year plans because they have to be recursively responsive to changes in the plans of other key nodes in the network. If we want to understand how governance changes the world today, the object of study is not so much government plans as the interplay between the plans of state agencies and those of other nodes of governance with some clout. It is less the ideologies of government regulators and more

²⁹ Ibid. pp. 137–138.

³⁰ L. Metcalfe, 'The Weakest Links: Building Organisational Networks for Multi-Level Regulation', in Organization for Economic Cooperation and Development, *Regulatory Cooperation for an Interdependent World* (Paris: OECD, 1994), 49.

³¹ On the idea of nodal governance, see C. Shearing and J. Wood, 'Nodal Governance, Democracy and the New "Denizens": Challenging the Westphalian Ideal', *Journal of Law and Society*, 30 (2003), 400.

those of epistemic communities or regulatory communities³² that bring together strategic state, business, legal, and NGO actors to share the sensibilities and the practice recipes that Pierre Bourdieu calls the *habitus* of a field.³³

Courts obviously have limited capabilities for data-gathering on the plans of other strategic nodes of governance and the havoc this is likely to create for their decisions. This is why, as Julia Black documents in Chapter 2, courts often simply defer to other strategic nodes of governance, such as the accounting rules of professional or industry associations, and the standards of voluntary standard-setting bodies. The limited data-gathering capabilities of courts is also why Jane Stapleton says it can make more sense for them, in the face of interrelationships they do not have the resources to comprehend, to decide certain matters purely in terms of legal doctrines, oblivious to the imponderables. If, in the event, the decision creates havoc because of the way other nodes of governance respond to it, then executive government has better resources for changing legal plans in ways that are responsive and synoptically prudent.³⁴

Yet when courts reasonably believe their decision will have large predictable knock-on effects, they sometimes are and sometimes should be responsive to the plans of other nodes of governance.³⁵ This is possible more often than one might think in the face of the complexity of regulatory pluralism documented in this collection. This is because regulatory influences that are important in some contexts are almost never important in most contexts. Specific international treaties and their secretariats, for example, are potent regulatory influences in some contexts, but in most contexts are so politically and legally impotent that they are safely ignored by judges. As Julia Black points out, justice might occur in many rooms, but most of the rooms are separated from one another for most specific purposes. So while Hugh Collins may have put a persuasive case that private and public law collide to produce a productive disintegration in the realm

³² P. Haas, 'Do Regimes Matter? Epistemic Communities and Mediterranean Pollution Control', *International Organization*, 43 (1989), 377; E. Meidinger, 'Regulatory Culture: A Theoretical Outline', *Law and Policy*, 9 (1987), 365.

³³ P. Bourdieu, *Distinction: A Social Critique of the Judgment of Taste* (Cambridge, Mass.: Harvard University Press, 1984), 169–244; P. Bourdieu and J. Wacquant, *An Invitation to Reflexive Sociology* (Chicago: University of Chicago Press, 1992). One commentator on this paragraph said that economic forecasting is alive and well and seems to be a form of planning. Yes, and it is a form of planning increasingly dependent for its utility on surveys of the plans of a vast plurality of private actors, central banks from states other than that of the state doing the forecasting, and so on.

³⁴ By 'synoptically prudent', we mean taking account of a general survey of the risks involved. Executive governments have more resources and time to commission programmes of research and analysis on all the risks and benefits at issue in a legal policy domain. In contrast, as Lon Fuller has argued, the comparative advantage of courts is on 'yes-no questions' (Did she do it?) and 'more or less questions' (How much should be paid?): L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1964), 33. Polanyi distinguishes 'polycentric' problems from these, as problems not well suited to the judicial model: M. Polanyi, *The Logic of Liberty* (Chicago: University of Chicago Press, 1951), 174–84.

³⁵ Both Peter Drahos (Ch. 8 in this volume) and Hugh Collins (*Regulating Contracts* (Oxford: Oxford University Press, 1999), 188) cite as a leading example Lord Mansfield's responsiveness to the customs of trade and the nodal governance of merchants' courts in effecting profound improvements in commercial law.

of contract,³⁶ and Angus Corbett and Stephen Bottomley may see a somewhat similar collision in the domain of corporate governance, this collision may be more absent in tort, family law, labour law, and administrative law. Alternatively, collisions may produce productive integrations rather than productive disintegrations, as Imelda Maher finds in competition law (Chapter 9), or collision may produce what Julia Black prefers to characterize as mutual learning between common law and regulatory law that amounts to 'productive cherry-picking' more than disintegration.

Remember that the Metcalfe thesis of how different state agencies increasingly do strategic planning in an era of networked governance is that they still plan, but in a way that is mindful of the planning at other key nodes in the network—only the key ones. The strategic plans of a national trade union movement may be something the regulatory ambitions of the ministry of labour must be responsive to, but the ministry of justice or the environment ministry can for the most part ignore them. Regulation can occur in many rooms, but for most specific regulatory questions legal decision-makers can assume that the occupants of most of those rooms will be asleep. A law that makes strategic decisions on when to follow its internal logic unencumbered by a consideration of the justice being transacted in different rooms, and when to take a lot of notice of private ordering, should be neither particularly surprising nor offensive. When we drive a car, we can normally do so without paying attention to the mechanics of what is going on in that adjacent room under the bonnet. But occasionally we do and must. A task of regulatory theory might be to develop parsimonious theories of when regulatory actors can and should be selectively responsive to regulation by other nodes in a regulatory network. Metcalfe's method may be one building block towards such theory.

HOW MANY LENSES?

None of this discussion of selective attentiveness to what is seen from a different vantage point is to deny the virtues of having a capability to see through other lenses. In questioning our too simple juxtaposition of the differences between the legal and the regulatory lens in the Introduction, Julia Black admonishes: 'Not all lawyers are concerned with doctrine, and not all regulationists are concerned with effectiveness, coherence, and responsiveness.'³⁷ Not only is this descriptively correct, but we might obversely hypothesize that, under certain conditions, it is a good prescription for regulationists to be able to see regulation through a legal doctrinal lens, and for lawyers to be able to see law through the lenses of effectiveness, coherence, and responsiveness. Whether their concern is to interpret or to prescribe, it is good for the lawyer to be inquisitive about the regulatory relationships of which law is a part, and good for the

³⁶ Collins, *Regulating Contracts*, and Ch. 1 in this volume.

³⁷ Chapter 2, p. 40.

regulationist to be inquisitive about doctrine. Yet, while we should not want either to be blind in one eye, we should not want to prescribe endless frenetic alternating of lenses. A strategic approach to seeing and attending is as vital to the legal and regulatory crafts as it is to regulating the movement of a car along the highway. The theory of driving a car is well developed through useful heuristics like 'Try not to be distracted by the scenery, the children in the back seat, or the mobile phone, but do focus on the road signs.' A theory of the heuristics of what to focus on when understanding networks of regulatory governance is still a challenge before us.

Julia Black raises the stakes on this challenge by pointing out that there are not just two lenses we must be concerned about, but multiple lenses.³⁸ Gareth Morgan has made the same point in his influential contribution to organization theory.³⁹ Morgan works through a number of different ways of imagining organizations metaphorically, starting with a simple metaphor of a bureaucracy as like a machine. While this machine image is all too simple, the camera in Charlie Chaplin's *Modern Times* captures it as a metaphor far from devoid of insight. What we must do is add perspective to what we see through that lens with the image we imagine through other metaphors of the organization that Morgan proceeds to develop, such as the organization as organism, brain, culture, and psychic prison. Morgan paradoxically argues that seeing a phenomenon, such as an organization or indeed law, through multiple lenses enables us both to see it as many things at once and to see it more holistically. This is the appeal of the lens metaphor. The parable of the blind Hindus and the elephant is about being able to acquire a more holistically veridical understanding by being able to sense the world in more than one way and from more than one angle. While there is no consensus among our contributors on the possibilities for a more holistic vision of the normative purposes of law and regulation, we can agree that we do acquire a more rounded appreciation of law in context by viewing it through a multiplicity of lenses beyond a doctrinal lens.

In different ways our authors have taken up Julia Black's multiple-lens challenge. For example, Hilary Charlesworth and Christine Chinkin productively look at international law through the lens of gender domination.⁴⁰ When a case is presented to us of a Bosnian woman raped by a peacekeeper, arguably it is imperative that we view the regulatory encounter through that lens. When the case is a contract dispute between two equally powerful male businessmen, the gender domination lens is one we might ignore. The trick is to have observers and practitioners of the legal process who are sensitized to when they must attend to that recurrently important lens, lawyers who have been made sensible through the stories they heard in law school of how to use that lens.

³⁸ Chapter 2, pp. 34–36.

³⁹ G. Morgan, *Images of Organization*, 2nd edn. (Thousand Oaks, Calif: Sage, 1997).

⁴⁰ Ch. 12.

This collection has demonstrated that regulatory effects are complex, ambiguous, and paradoxical. Our contention is that well-educated judges and other legal actors have access to a rich plurality of lenses for looking at a regulated phenomenon. They read the site of a legal contest diagnostically, applying many metaphors to reveal useful potential interpretations of it. Next they make a critical evaluation of these different interpretations and the possibilities for high-integrity legal interventions that enable change. In the end, legal action is imagined as many things at once, but not everything at once, because there is a critical attitude to the value of all lenses.

COHERENCE AND THE LAW'S RESPONSE TO PLURALISM?

Our conversation about legal and regulatory pluralism certainly raises questions about the coherence of law and regulatory purpose. How can we ever find coherence in doctrine or analysis where such pluralism reigns? In this section we conclude that rather than being cause to jettison coherence as an ideal, pluralism can be a provocation to rethink our notions of what counts as coherence.

A number of the chapters question the coherence of legal doctrine in specific areas of law. One cannot read the essays without concluding that there can be no general answer across the legal domains studied here as to how coherent legal doctrine is or should be. Most legal fields, our authors suggest, tend to normative complexity. Moreover, the political ideology of legal theorists engenders starkly different normative complexes, as Peter Cane illustrates for administrative law: 'For liberals, the prime goal of administrative law is the protection of individual rights and interests, whereas for republicans it is the promotion of rational public deliberation.'⁴¹ Constitutional law doctrines in some significant senses regulate all other areas of national and subnational law towards an element of coherence. In a less profound way, this is also true of international law. While international law doctrines might have limited effects on most private law domains, at least they have an impact when there are international conflicts of laws, which globalization increasingly engenders in private law disputing. In some of our chapters there is a substantial story of mutual influence of private and public law doctrines (such as Chapters 1 and 3 on contract law and corporate governance, respectively). In others there is a story of rather limited influence (such as Chapters 2, 4, 6, and 7 on financial services, family, tort, and criminal law). John Dewar sees a fundamental threat to coherence in family law from the empirical evidence that 'the forum in large part determines the meaning of legal rules'.⁴² So the meaning rules have before a judge is very different from the meaning they have in the hands of a solicitor advising a client, a mediator conducting a mediation, or a prosecutor conducting a plea negotiation. On a hierarchical vision of law, we would privilege the interpretations

⁴¹ Cane, Ch. 10, p. 214.

⁴² Dewar, Ch. 4, p. 97.

of judges among these multiple sites of legal interpretation. But why, asks Dewar, would we privilege judicial interpretation over mediators' interpretations in a field like family law where 95 per cent of cases do not advance past mediation? It is difficult enough to find coherence within specific fields of law and between different legal areas. But once we begin to consider legal and regulatory fora beyond the courts, doctrinal coherence is all the harder to identify.

It seems plausible to conjecture that as the total number of pages of law in existence doubles or quadruples each decade, the number of purposes being pursued by the law has also grown, though hardly proportionately. Both the quantitative proliferation of law and the proliferation of philosophically incompatible theories of law make coherence at least as elusive today as it has ever been. Jane Stapleton, as we have seen, has an interesting perspective on the reflex response to despair about finding doctrinal coherence, which Peter Cane also endorses in his chapter, 'Administrative Law as Regulation'. Stapleton questions why we should be worried about whether we can find coherence in this complexity. 'We do not regard a complex biodiverse ecosystem in dynamic flux as problematic. Quite the contrary!' As we have seen, there is much to celebrate in constantly moving, plural sources of influence. Indeed it may provide greater scope for dynamism and innovation in proceeding towards normative goals than the alternative.

This does not mean that doctrinal coherence is something we should not care about. But it does mean that coherence is likely to be more complex than simple rule consistency. For example, one view that holds some appeal among the editors of this book is that legal institutions should be organized around the meaning of justice as a social purpose. Yet the meaning and applications of justice will always be contested. Indeed it could be argued that, at the meta-analytical level, justice (and democracy) is all about making sure that people are able to contest exercises of power by reference to their own conceptions of justice.⁴³ For example, for some political theorists of a deliberative democratic stripe,⁴⁴ Hilary Charlesworth and Christine Chinkin's conclusion that international law is mostly devoid of centralized law-making or enforcement mechanisms means that it has the possibility of being constituted and enforced by a more deliberated form of consent. On this account, if there were a world government, international law would be impoverished by becoming less responsive to deliberative norm creation and norm enforcement. Similarly, many legal teachers believe that law schools should not be zones of value-free scholarship, but nor should they indoctrinate students in one unified conception of justice.⁴⁵ Rather law schools should be spaces where students (and legal scholars) learn to debate competing visions of what it means to be just. Likewise, a regulatory

⁴³ On the idea of contestatory democracy, see P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997), 63, 183–200.

⁴⁴ J. Dryzek, *The Politics of the Earth: Environmental Discourses* (Oxford: Oxford University Press, 1997).

⁴⁵ C. Menkel-Meadow, 'Can a Law Teacher Avoid Teaching Legal Ethics?', *Journal of Legal Education*, 3 (1991), 3.

space can be conceived as one where plural 'regulators' (legal and non-legal, different areas of law or different legal decision-makers) and citizens can argue over different meanings of justice and how to safeguard justice in the pursuit of regulatory objectives. Justice becomes the subject of ongoing contest and debate. Coherence is contended for at the level of principles and values. But it is rarely found in any simple unity in rules or doctrines. Indeed such unity could be considered insignificant compared to a coherence in principles and values that might never be fully expressed in unified rules.

So our tentative response to the challenge to rethink our notions of what counts as coherence comes at three levels. Firstly, it is to see it as a project that is always necessarily incomplete because, quite properly, it is contested by both democratic actors and environmental change. It is a sandcastle actors keep patting into shape from different sides as waves of change continually erode its form. Secondly, just as there is the possibility of confusion from seeing the castle from different angles, so is there the possibility of a more holistic comprehension of its form(s). The contest of interpretative frames hands us a struggle between chaos and holistic insight. This unresolved struggle is a better dispensation than myopia. Thirdly, it is at the level of rules that chaos is more likely to prevail in that struggle. Sometimes this is a benign, pragmatic chaos that 'works'. Other times it is a chaos that is diabolical, everyone agreeing it to be a mess that works for no one. At the level of values and principles, there is more prospect of holism emergent in the struggle with chaos.⁴⁶ Practical reason can settle on a pragmatic chaos of rules as a good outcome that at times passes tests of democratic deliberation.⁴⁷ But this does not mean that debates about how to think coherently about our values and principles will not have moments when most citizens in a democracy will feel rewarded by the enhanced clarity that comes from a democratic conversation that, for example, rewrites a values preamble to a post-Apartheid South African Constitution.

A constitution is an institution designed to foster what we call institutional meta-regulation, the regulation of one institution by another. This is no more than a theoretical reframing of the idea that a constitution is about embedding checks and balances in a system of governance of a state, corporation, or other entity. Reciprocal checking of power opens up a path where different institutions

⁴⁶ There are deeply structured features of human psychology that render high levels of consensus around values, when defined as transsituational beliefs, compared to attitudes, defined as beliefs that apply to specific objects, such as rules: M. Rokeach, *The Nature of Human Values* (New York: Free Press, 1968); M. Rokeach, *Beliefs, Attitudes and Values* (San Francisco: Jossey-Bass, 1973). See also J. Braithwaite, 'Community Values and Australian Jurisprudence', *Sydney Law Review*, 17 (1995), 351. Empirically, there tend not to be consensus attitudes around many rules. But in the face of that attitudinal dissensus, there is frequently remarkably high consensus about the values that motivate the rules. So dissensus is rife in attitudes to an abortion law. Yet abortion law debates tend not to be about contesting underlying values—respect for human life, health, freedom of choice. The pro-abortionist does not say, 'Who cares about human life?', but rather argues about the proper context for applying this value and the relative weight to be given to other values.

⁴⁷ Cass Sunstein has made a sustained case for this: C. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1998).

may learn shared sensibilities about abuse of power each from the other. Meta-regulation is thus one important strategy for the possibility, only the possibility, of coherence to be retrieved at times from contestation in conditions of complexity.

META-REGULATION

Imelda Maher's chapter is distinctive in that the lens she finds to be the most significant juxtaposition to the legal lens in practical regulation is another disciplinary lens—an economic lens. Maher finds competition law to be regulated by the normative ordering of economics, so much so that competition law would make no sense without the discourse of economics. Competition law also, however, regulates economics. The courts and the regulators tell firms with substantial market power what sort of economic analyses they must do, with what level of rigour, before they will be persuaded that, for example, a merger should be permitted. The courts are not resourced and trained to do the econometrics themselves, but they are required to meta-regulate the economic analyses that regulate the private decision-making of firms.

While constitutional and international law meta-regulation of the regulation of other branches of public and private law is decidedly vertical,⁴⁸ much meta-regulation is horizontal, as when a branch of private law doctrine regulates a branch of public law or an NGO regulates a business self-regulatory scheme. Indeed perhaps the latter is not even horizontal, but meta-regulation from below. Peter Drahos (Chapter 8, 'Regulating Property') finds in Locke's *Second Treatise of Government* an account of property rights being regulated by government and in turn regulating government. This is a story both of secure property rights for citizens putting a limit on the confiscatory power of government (regulation from below) and of horizontal regulation of the executive by a judiciary that enforces those rights. Yet three centuries on, Locke's beautiful regulatory theory becomes an ugly practice as intellectual property regulation is captured in a way that allows powerful Northern corporations to dictate top-down the terms of intellectual property law on states of the South that are politically weaker than those US corporations.

Whether the regulation of other regulators is top-down, bottom-up, or sideways, it may be that intended regulatory objectives are more likely to be achieved if the regulation is 'responsive' to those being regulated. For example, governments should be responsive to how effectively regulated businesses are regulating themselves through corporate compliance systems and industry-wide self-regulation schemes. But of course regulators must be responsive not only to business interests, but also to public interests represented by governments and NGOs. Tripartite or multi-party mutual responsiveness enables the ideas of

⁴⁸ However, Hugh Collins seeks to problematize this in the conclusion to Chapter 1 in this volume.

checks and balances and responsiveness to be realized simultaneously, with the concepts applying equally to regulation of the private and public sectors.⁴⁹ Thus one theoretical resolution to the limb of the trilemma that institutions may be so responsive to a regulated actor that the integrity of its own values is threatened is: have a multiplicity of separated powers checking and balancing one another in such a responsive manner that none has so much unchecked power that it can dominate, and none is so over-regulated that the integrity of its own regulatory capability is lost.

The theory may be wrong empirically, but it is a theoretical building block that makes some predictions that apply regardless of the direction of regulatory influence. Julia Black is surely right that the rooms where the doctrines of one branch of the law work their effects are often effectively sealed off from other branches of law. Contingency seems to abound in such sealing off. This should mandate an empiricism about a search for doctrinal regulation of one branch by another, as opposed to a theoretical assumption that we will find them. Black's observation should cause a sigh of relief that there are not an infinite number of meta-regulators for the regulating law practitioner to scan.

A responsive regulatory perspective on law certainly overturns the taken-for-granted assumption of some lawyers that access to legal justice in the courts is the normative ideal of justice. Responsiveness means that access to legal justice in the courts is not the normative ideal of the meta-regulatory perspective on law. Rather the ideal is access to justice, where that justice is more likely to be a self-regulatory accomplishment of principles and rules in civil society. The costs of litigation make it economically implausible that access to justice could ever substantially become distributively just, available to the poor, via the courts. The good law is the law that delivers access to justice conceived as a justice that occurs in many rooms beyond the courtroom even when those rooms are rather sealed off one from the other.⁵⁰ This normative perspective means the law should often refrain from fixing obligations in detail; often it should even restrict itself to a set of principles and a set of default rules, leaving self-regulation in civil society the flexibility to deliver an access to justice that makes contextual sense. Not only does this leave the justice of the law more democratically open to the contextual justice of the people, it also permits experimentation with novel ways citizens, businesses, and governments might choose to organize their relationships with one another.

This is the ideal of a justice of the law that filters down into the justice of the people and a justice of the people that more effectively bubbles up into the

⁴⁹ See J. Braithwaite, 'On Speaking Softly and Carrying Sticks: Neglected Dimensions of a Republican Separation of Powers', *University of Toronto Law Journal*, 47 (1997), 305; I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press), ch. 3; and the discussion of checks and balances in Cane, Ch. 10 and Scott, Ch. 11, in this volume.

⁵⁰ M. Galanter, 'Justice in Many Rooms', in M. Cappelletti, (ed.), *Access to Justice and the Welfare State* (Alphen aan den Rijn: Sijthoff, 1981), 147; C. Parker, *Just Lawyers: Regulation and Access to Justice* (Oxford: Oxford University Press, 1999), chs. 3 and 4.

justice of the law.⁵¹ This might involve, for example, a radical rethinking of the relationship between informal justice and courtroom justice to enable the justice of the law and the justice of the people each to be a better check and balance on the other.⁵² Even if we get a law that is less holistically coherent as a result of such a productive disintegration, we might get a more holistic infusion of justice into society. This is another version of 'bargaining in the light of the law' where the law filters down to ordinary citizens in a way that makes sense to them (as suggested by John Dewar), and the conventions of private ordering bubble up in a way that clarifies the focus cast by the light of the law, translating it into worlds of naturally occurring custom. On this analysis, observations in some of our chapters that law is not about regulation but about vindicating certain procedural values, or simply about expressing values, can be interpreted as valorizing law's most distinctive regulatory potential for improving justice, even if in limited ways.

Braithwaite has previously argued that there are some tentative empirical grounds for seeing justice as 'immanently holistic'.⁵³ For example, there is a strong positive correlation between procedural justice and restorative justice.⁵⁴ Procedural injustice that allows, say, powerful white people to dominate powerless black people conduces to social injustice. The argument is not that justice is fully holistic—otherwise there would be no point in distinguishing procedural justice and its various facets from restorative justice and social justice⁵⁵—but that it is immanently holistic. Regulatory institutions work most decently when they create spaces where procedural, restorative, and social justice do reinforce one another. Obviously, then, an appeal of Hugh Collins's *Regulating Contracts* for radically rethinking legal institutions in this way is that interpenetration of private law and public regulation might foster the search for more holistic instantiations of justice. For example, if public regulation can transform private conflicts into public issues, the gender dominations that concern feminists, and other forms of social injustice, have better prospects of being flushed into the open and confronted.

Nicola Lacey is dubious about this kind of whole of law, whole of regulation, normative project because what she sees in criminal law is that it tends to be short on real justice and long on the ideology and rhetoric of justice. Critically exposing practical injustice therefore becomes the more pressing immediate

⁵¹ Parker, *Just Lawyers*, ch. 3, 4, and 9.

⁵² J. Braithwaite and C. Parker, 'Restorative Justice is Republican Justice', in L. Walgrave and G. Bazemore (eds.), *Restoring Juvenile Justice* (Monsey, NY: Criminal Justice Press, 1999), 103; J. Braithwaite, *Restorative Justice and Responsive Regulation* (Oxford: Oxford University Press, 2002), chs. 5 and 8.

⁵³ J. Braithwaite, 'Holism, Justice and Atonement', *Utah Law Review* (2003), 389. This essay includes a commentary upon Erik Luna's work on holism and justice. See E. Luna, 'Punishment Theory, Holism, and the Procedural Conception of Restorative Justice', *Utah Law Review* (2003), 205.

⁵⁴ G. Barnes, 'Procedural Justice in Two Contexts: Testing the Fairness of Diversionary Conferencing for Intoxicated Drivers', Ph.D. diss., Institute of Criminal Justice and Criminology, University of Maryland, 1999.

⁵⁵ Tyler, *Why People Obey the Law*.

project than celebrating a justice which is only ideology. It is common ground among our authors that legal institutions can never escape injustice and domination. Even when, as in Peter Drahos's account of property law, the law is established with the purpose of preventing domination (making property secure against the king), Drahos documents empirically that courts are not necessarily less vulnerable than regulatory agencies to capture by powerful business interests. In some ways they may be structurally more vulnerable, because, as Hugh Collins points out in Chapter 1, at least in the common law world, 'litigation about questions of law is a privilege of the rich'.⁵⁶ The policy orientation of much empirical regulation research, no less than the doctrinal orientation of much legal research, is wilfully uncritical about analysing and confronting injustice. Principles of law and the practice of democracy in producing justice can interact in a downward spiral of injustice, as Lacey's chapter illustrates, with criminal law infused with both a kind of tyranny of the majority and a tyranny of retributivist doctrine. How to flip this dynamic into an upwards spiral of justice through getting the right checks and balances in the relationship between legal justice and the justice of dispersed deliberative democracy is an unresolved challenge for regulatory theory and praxis.

Meta-regulation is an important topic for regulatory theorists because many of them see it as a way of simultaneously extricating ourselves from the effectiveness and responsiveness horns of Teubner's regulatory trilemma. Peter Grabosky, who first noted the phenomenon of meta-regulation, together with Parker and Braithwaite, find that, in the sociological conditions of a complex division of labour, meta-regulation is likely to be both more responsive and more effective than direct command and control regulation.⁵⁷ While some of the early empirical results from this programme of research are encouraging, in areas ranging from environmental enforcement to tax compliance, it is still early days in testing and elaborating meta-regulatory theory.

CONCLUSION

John Dewar's conclusion is that notwithstanding all the incoherence and unpredictability he finds in family law, the language of regulation and meta-regulation can be useful. He also suggests that there are connections between the three horns of the regulatory dilemma, meaning there may be interwoven strategies that enable us to extricate ourselves from all three horns simultaneously. In this

⁵⁶ Collins, Ch. 1, p. 20.

⁵⁷ P. Grabosky, 'Using Non-governmental Resources to Foster Regulatory Compliance', *Governance: An International Journal of Policy and Administration*, 8 (1995), 527; C. Parker, *The Open Corporation* (Cambridge: Cambridge University Press, 2002), ch. 9; J. Braithwaite, 'Meta Risk Management and Responsive Regulation for Tax System Integrity', *Law and Policy*, 25 (2003), 1. See also N. Gunningham and P. Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998); B. Morgan, *Social Citizenship in the Shadow of Competition: The Bureaucratic Politics of Regulatory Justification* (Aldershot: Ashgate, 2003).

chapter we too have seen responsive meta-regulation as a fruitful topic for future research on just these possibilities.

A reasonable question is whether the lessons from regulatory theory are really likely to be any different from those of the law in action and law in context movements of the 1960s and 1970s. The main difference between them and regulatory theory is simple. Law is their central focus, but law must be understood in terms of how it plays out in action in a particular context. With regulatory theory, regulation—that is, attempts to steer the flow of events—is the focus. With environmental regulation, attempts to preserve and improve the environment are the focus, and environmental law is just one of many institutions implicated in the regulatory space. Angus Corbett and Stephen Bottomley capture the regulatory theoretical perspective when they conceive of corporate governance as ‘a body of governance practices, processes, and structures’, as well as a body or category of law.⁵⁸ There is a law of corporate governance, but corporate governance is not primarily about law. The law of governance matters, yet so does the governance of law. Governance is a more general theoretical domain than regulation in that governance is also about allocating resources in ways that are not intended to steer the flow of events. Even so, it can be argued that in the era of the regulatory state, where rowing (direct provision) is a less important function of states than steering, and where organizations operate so often by contracting out and monitoring the contractors, regulatory theory is becoming an increasingly central part of the theory of governance.⁵⁹ So is legal theory in an era where the rule of law is increasingly seen as one of the central planks of ‘good governance’, as the IMF and World Bank like to put it. One of our claims in this Conclusion is that there is a structural basis for all of this. In a world where there is quantitatively more law and quantitatively more semi-formal self-regulatory ordering, and a proliferation of organizations that do it, in a world where governance is more by regulating than by doing, both legal theory and regulatory theory are bound to assume greater importance, including significance for one another.

Our authors have uncovered rather fewer powerful examples of one sphere of legal doctrine regulating another than Hugh Collins might have liked. While contracting ideas have penetrated public law in an era of government by contract, Peter Cane provides a muted account of the sweep of the doctrinal influences at play. Richard Johnstone and Richard Mitchell provide a more historically cyclical account of the rise and fall and rise of contract in labour law, but at no point are contract law doctrinal influences on the content as opposed to the form of labour law seen as central. Johnstone and Mitchell also detect a sharp *decline* in the influence of criminal law on labour law between the nineteenth and twentieth centuries.⁶⁰ While we have considered a large

⁵⁸ Ch. 3, p. 61.

⁵⁹ See M. Dorf and C. Sabel, ‘A Constitution of Democratic Experimentalism’, *Columbia Law Review*, 98 (1998), 267.

⁶⁰ Ch. 5, pp. 106–107.

number of fields of legal doctrine in this volume, each of which has the potential to regulate all of the others, for most doctrines most of the time, there is no influence of great import.

This is not to downplay collisions between different doctrines that we have found do sometimes occur in ways that deliver 'fresh productive capacity for regulation'.⁶¹ The fact that the types of collision that matter are finite rather than infinite makes it feasible to study law as something that is regulated and that regulates. Law is almost never the most important instrument of regulation. Yet important chains of causal influences on regulated phenomena where law is totally absent are hard to think of. When law is one of the links in such loops of causation, it follows that there are a variety of other variables in the loop that are regulating law. The day when we can be evidence-based about most of the regulatory influences of, and on, law is a long way off. Beginning with empirical research on the influences that appear to matter most would be an illuminating start for this inquiry.

⁶¹ Collins, *Regulating Contracts*, 361.