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ANALYSING REGULATORY SPACE:
FRAGMENTED RESOURCES AND INSTITUTIONAL DESIGN

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Political orthodoxy clings to the view that classical or hierarchical regulation works. Regulation provides a relatively inexpensive instrument for demonstrating symbolic commitment to improvement. Building on a legacy bequeathed it by a Conservative administration the Labour government elected in 1997 has introduced a number of new regulators such as the Financial Services Authority and the Food Standards Agency,[1] and has made significant reforms to other regimes, enhancing the powers of utilities regulators and competition authorities[2] and introducing new external regulation over health care[3] and the Crown Prosecution Service.[4] Scholarly critique suggests important limits to the effectiveness of hierarchical regulation. There is some evidence that the theory of 'responsive regulation' espoused by John Braithwaite and Ian Ayres[5] has been taken up in some areas of government where there is greater evidence of enforced self-regulation,[6] tri-partism[7] and the 'benign big gun'[8] at work. The hierarchical model of regulation and some of the responsive regulation alternatives are each vulnerable to criticism on the basis that the central problem of control in regulatory domains is the fragmented possession of key resources. This article suggests that the metaphor of 'regulatory space', initially proposed by Hancher and Moran,[9] can, when suitably extended and developed, provide a way of reconceiving regulatory processes which is consistent with the findings of empirical research on regulation and provide a more robust basis for institutional design and reform. This approach locates the understanding of regulation more closely to dominant approaches to governance within political science,[10] while encouraging us to consider more squarely the limits (and implicitly) the potential for law as one instrument of governance.

The chief idea of the regulatory space metaphor is that resources relevant to holding of regulatory power and exercising of capacities are dispersed or fragmented. These resources are not restricted to formal, state authority derived from legislation or contracts, but also include information, wealth and organisational capacities. The possession of these resources is fragmented among state bodies, and between state and non-state bodies. The combination of information and organisational capacities may give to a regulated firm considerable informal authority, which is important in the outcome even of formal rule formation or rule enforcement processes. Put another way, capacities derived from possession of key resources are not necessarily exercised

hierarchically within the regulatory space, regulator over regulatee. We recognise the presence within the space not just of regulators and regulatees, but of other interested organisations, state and non-state, possessing resources to a variable degree. Relations can be characterized as complex, dynamic horizontal relations of negotiated interdependence. This re-conceptualisation of regulatory processes is important in understanding the limits of law within regulation.[11] The dispersed nature of resources between organisations in the same regulatory space means regulators lack a monopoly both over formal and informal authority. This observation draws our attention to the need to conceive of strategies of regulation as consisting of a wide range of negotiated processes, of which rule formation and enforcement are but two.

Good institutional design might seek to harness and develop the dispersed resources which would be likely to support the public policy objectives of the regulatory regime. The design process might pay attention not only to the making of norms (whether explicit legal rules or implicit informal conventions or anything in between) but also to the diverse mechanisms through which compliance with such norms is monitored or fed back into the regime and by which regulated actors are held within the acceptable limits of the regime (whether through formal enforcement or through other mechanisms by which behaviour deviating from the norm is corrected). Regulatory reform, 'renegotiation of regulatory space',[12] might then focus not exclusively, or even mainly, on a single organisation, but rather on the whole configuration of resources and relations within the regulatory space. Some capacities might be enhanced and some constrained. Reform would take the form of a modest reorientation of relations within the space, building on what was already there. This conception of organic reform supports normative approaches to law and regulation which argue for greater responsiveness or reflexivity as an alternative to the dead-end of legalization or juridification.[13]

Regulation in Space

For purposes of analysis which considers the full range of alternative instruments for achieving public policy objectives, we can think of regulation as any process or set of processes by which norms are established, the behaviour of those subject to the norms monitored or fed-back into the regime, and for which there are mechanisms for holding the behaviour of regulated actors within

the acceptable limits of the regime (whether by enforcement action or by some other mechanism). The definition of regulation can be narrowed somewhat by thinking of it is an instrument of governance which takes as its focus the deployment of authority.[14] The 'regulatory space' metaphor draws attention to the fact that regulatory authority and responsibility is frequently dispersed between a number of organisations, public and private,[15] and that authority is not the only source of power within a regulated domain. The regulatory space approach is 'holistic' in the sense that it looks at the interactions of each of the players in the space, and can recognise plural systems of authority and of other resources and a complex of interests and actions.[16]

The metaphor of regulatory space was adapted by Hancher and Moran from Crouch's deployment of the 'policy space' metaphor. Hancher and Moran's starting point is to observe that '[e]conomic regulation under advanced capitalism – its formation as much as its implementation – invariably involves interdependence and bargaining between powerful and sophisticated actors against a background of extensive state involvement.'[17] This characterisation challenges both the orthodox view of regulation as being hierarchically exercised by the state over firms (and prone to 'capture') and conventional distinctions between public and private roles and actors. 'Regulatory space' is defined by 'the range of regulatory issues subject to public decision'.[18] 'Discovering who has power in regulation involves playing close attention to the relations between organizations which at any one time occupy regulatory space.'[19] For Hancher and Moran 'the key matters requiring explanation – inclusion and exclusion, the relative power of the included, the scope of regulatory issues – will be illuminated in terms of the characteristics of the operating organizations: the cultural environment within which they work, their standard operating procedures, the customary assumptions which govern their interaction, and the resources at their disposal.'[20] The general legal and political culture of any particular society will shape the ways in which relations within particular issue arenas are managed. The shape and character of all the organisations involved, again a matter of national peculiarity, is also central to understanding relations within regulatory space.[21] The 'regulatory space' metaphor has been taken up by political scientists,[22] sociologists,[23] organisational theorists,[24] and lawyers[25] in developing a more fruitful way of casting regulatory relations.

The regulatory space metaphor clearly belongs to the family of theories of public policy and law which emphasize pluralism in legal and policy processes. Legal pluralism, which has its

origins in the anthropological investigations of legal systems, emphasizes the coexistence of plural systems of norms and authority in both modern and pre-modern societies. Researchers often find 'that the national (public, official) legal system is often secondary rather than a primary focus of regulation.'[26] One of the key lessons of research on legal pluralism is that formal and state ordering can be used to facilitate and support the indigenous and informal ordering processes which are so ubiquitous.[27] 'Regulatory pluralism' has been identified in operation in studies of occupational health and safety.[28] The regulatory space metaphor also has a family relationship with social theories which challenge monolithic and hierarchical conceptions of governance, using spatial and other metaphors.[29] For Blomley 'local legal knowledge' is an important facet of a pluralistic conception of governance involving local agencies within which '[l]egal meaning emerges…as place-specific, structured by the complex milieu within which the agency is located'.[30] Pluralist approaches to law and regulation have particular application to global governance.[31] International regulatory norms, formal and informal, are developed in multiple sites, public and non-governmental.[32] Braithwaite and Drahos' study of global business regulation found no overall central locus of control in most of the domains examined, and concluded that 'regulatory policy became a matter of managing a network rather than managing a hierarchy.'[33]

The 'regulatory space' metaphor is linked to the economic, sociological and political theories which emphasize the role of institutional structures (such as legal culture and organisational forms) in shaping change and public policy outcomes.[34] Hancher and Moran themselves emphasize the importance of legal culture and of custom and convention in deciding which issues to process and how they are to be processed within particular regulatory domains, and the role of organisational structures not only in shaping standard operating procedures, but also in delimiting beliefs about about what is thinkable or possible within the regulatory domain.[35]

We are left overall with a conception of regulation in which relations between organisations within regulatory domains are perceived as interdependent and the subject matter of strategic action, but within which the institutions of culture and organisational form play an important role in delimiting the range of possible actions which the interdependent actors may take. This article explores further the reasons for interdependence developing the regulatory space metaphor so as to re-evaluate central propositions concerning core regulatory processes. Though not a central theme of this article, any empirical investigation of a particular domain deploying the

regulatory space metaphor would need also to recognise the role of institutions (such as culture and organisational form) in delimiting the range of possible actions within the space.[36]

Fragmented Resources

Governmental resources are not restricted to legal authority, but include also wealth (or 'treasure'), information (or 'nodality') and organisational capacities.[37] The objectives of regulatory regimes can, of course, be sought through the deployment of governmental resources other than authority. Within the regulatory space, other actors have resources too, in varying mixes, which give them some degree of power.[38] It is the fact that other actors possess such resources which leads us to challenge hierarchical conceptions of regulation and displace them with a notion of interdependence.[39] More broadly, contemporary social theory has questioned the radical distinction between state and social power.[40]

Strangely, the problem of information asymmetry - that regulated firms will typically have more information about the regulated activity than does the regulator - has long been recognised as one of the key challenges of regulation by economists.[41] Yet the full implications of this have not been sufficiently developed to challenge hierarchical conceptions of regulation.[42] A related point is that law is more marginal to actions within the regulatory space than lawyers might assume. That political systems seek to use law instrumentally for regulatory purposes does not give law the pre-eminence in ordering society which some argue it had when adjudication was a central form of governance in an earlier period.[43] Indeed, the argument that law is increasingly used to coordinate 'pre-existing relationships of power' is at odds with the dominant, but symbolic conception of law as being exercised hierarchically.[44]

There are other non-hierarchical conceptions of regulatory power, notably those based on the metaphors of contracts and games.[45] A partial problem with the deployment of the contract metaphor is that the assumption that contractual relations are non-hierarchical has been challenged in research both on public and private sector contracting.[46] Furthermore, in contrast with games and contracts, authority in the regulatory space is multiple rather then bilateral. A related conception of regulatory relations being managed by means of conversations, though highly

suggestive, appears to retain an assumption that such relations are managed hierarchically.[47] The image of relations within the space as non-hierarchical mirrors the attempt to see the role of law within society in a horizontal rather than hierarchical relationship with other social systems, while recognising that internally law may still perceive itself to be in a hierarchical position.[48] At its simplest the problem of perception within regulation may be expressed in the form that the actors perceive regulatory agencies to wield hierarchical power over regulatees, when more detached analysis suggests a markedly different pattern of negotiated interdependence.

The fragmented possession of resources within the regulatory space is central to the more pluralistic re-conceptualisation of regulatory processes. Reflection suggests, for example, that even formal legal authority is more dispersed within regulatory space than might be assumed. First, dealing with state bodies, formal authority is commonly split between the executive, agencies and the courts. It is common in the UK to find that the executive has retained key powers of rule-formation, and high level sanctions (such as removal of licences) while the rhetoric suggests agencies are independent. In addition the executive controls the latent potential for legislative reform. Agencies typically have duties to monitor and powers to enforce, but key powers to apply sanctions, such as levying of fines and awards of civil damages, are reserved to courts or tribunals.[49] A cultural reluctance to allocate executive or judicial powers to agencies partially explains both the reluctance to employ American regulatory agency models in the UK, and in other European jurisdictions, and a related tendency to give only limited powers to such agencies as are created.[50]

The effect of such fragmentation within state bodies is to place the instrumental orientation of agencies in tension with the rather different form of instrumentalism of the executive and the non-instrumental orientation of the courts.[51] Of the state bodies which possess some authority, only agencies are likely to be 'pure' or instrumental regulators. For the other organizations regulatory concerns are likely to be diluted by other objectives in deploying their resources. Regulated firms and other interest groups are likely to have access to legislative and governmental bodies in a way which dilutes the state commitment to the stability and autonomy of regulatory regimes.[52] The tension between enforcement agencies and courts is exemplified in the application of criminal law rules in regulatory domains such as trading standards, where the courts have often sought to maintain the integrity of procedural and other assumptions about the nature of criminal

law, thus undermining the apparent instrumental orientation of the legislation.[53]

Formal legal authority is often vested in non-state actors. Legislation may empower professional bodies, interest groups or trade associations to form and/or enforce rules which have legal force. Legislative authority may be central to the commercial activities of regulated firms (such as powers to lay out infrastructure over public or private property), or may, in mediating the relationship with the regulator, give resources to regulated firms.[54] Trade associations and firms can derive formal, but non-statutory, legal authority from contracts, as where a trade association regulates its members through contracts, or where firms regulate their suppliers through contractual specifications, and monitoring or certification provisions. Such private government is not restricted to the domestic order, but also is found in the emerging *lex mercatoria*, a private international system of dispute resolution.[55] Third parties may also be given formal authority as part of a regulatory regime to seek compliance with regulatory rules and standards, either acting as interest groups or as aggrieved individuals, typically, though not exclusively, through an action in the courts.[56]

The possession of formal legal authority is by no means determinative of the way in which authority is actually exercised, and may be significantly tempered by the informal authority possessed by other actors. Indeed distinctions between public and private government and between formal and informal processes are likely to be misleading.[57] The strength of private governance arrangements, and of non-state social arrangements more generally, has been offered as a partial explanation for the lack of effectiveness of regulation.[58] The possession of one or more of the other key resources, information, wealth and organisation often confers informal authority. This may be dispersed within the regulatory space both between state actors and between state and non-state actors. The possession of key regulatory information may permit state bodies or regulated firms to challenge or dominate decisions about when the criteria of rule compliance have been met. The possession of organisational resources such as marketing, lobbying and professional advice may permit actors to dominate rule-formation, rule-enforcement or processes by which sanctions are applied in which they possess no formal authority. The possession of wealth may allow firms or interest groups directly or indirectly to corrupt regulatory processes.

Just as regulatory authority is not restricted to state actors, so the subjects of regulation are not restricted to non-state actors. Regulatory functions are carried out over governmental activities too, both by state bodies such as auditors and inspectors,[59] and even by private sector bodies, as with the oversight of print advertising of both public and private actors by the UK Advertising Standards Authority, and the implicit regulatory activity of credit rating agencies such as Standard and Poor and Moodys over the creditworthiness of public sector bodies. 'Deregulation', ironically, often involves the development of systematic regulation over state bodies which develop and administer regulation.[60] Supra-national regulation of governments may follow where assurance is required that governments comply with obligations not to prefer or assist their own national firms, in breach of trade rules.[61]

The dispersal of regulatory authority creates relationships of interdependence negotiated between the actors within the regulatory space. [62] If we recognise that the possession of resources by non-state actors enables them effectively to exercise some degree of regulatory power, then we can conclude that even policies of deregulation cannot completely displace regulation. An official investigation into some aspects of the New Zealand telecommunications regime, created without a regulator or the kind of special regulatory rules common to other jurisdictions, concluded that in the absence of state authority, the privatized company, Telecom New Zealand, had, in effect, become the regulator of the market.[63] Within that statutory framework the relevant government department's subsequent actions to regulate the market were substantially based on informal authority.[64]

Linked to the analysis of dispersed resources the regulatory space conception encourages us to rethink the nature of accountability, and linked issues of democratic control and regulatory capture. Where regulatory processes are assumed to be focussed on discrete regulatory agencies, powerful and independent, we can see that there are risks both that they may not follow their democratically determined mandate, or worse that they may take on a distinctive self-interested mandate from those whom they regulate. Formal accountability may appear to be considerably weaker for agencies than for the executive.[65] These concerns are amplified in the context of self-regulation.

If we view the key resources of regulation as dispersed rather than concentrated the

perception of both these problems changes. First we realize that agencies are not as independent as they might appear.[66] There is a form of extended accountability (or at least a functional equivalent to it) in the day-to-day interactions of regulatory bodies with other stakeholders such as regulatees, user groups and government departments which agencies or self-regulatory bodies can rarely escape.[67] This extended accountability includes the continuing presence of the legislative authority within what appears to be a delegated regime. Interdependence rather than independence characterizes the relationship between agencies and the executive. There is also potential for greater inclusiveness within the space of non-state organisations perhaps more representative of, or more informed of, the democratic will. Second, if regulatory authority is dispersed then capture becomes difficult, both as a technical matter of identifying who to capture, and putting in place the capture of multiple institutions at the one time, and because the fragmented and overlapping nature of authority will make the detection of and compensation for capture of one actor within the space more straightforward.[68]

Regulatory Origins and Reform

The regulatory space approach draws our attention to the multiplicity of actors who do, or have the potential to, participate in public policy making, and the dispersed nature of public policy power because of the fragmented possession of key resources. Within political science this insight has provided the foundations for approaches to public policy variously labelled corporatism and pluralism and policy network/community approaches.[69] With a focus exclusively on regulatory policy domains attention can be more tightly focussed on the establishment, reform and characterization of authority systems.

Within federal or proto-federal systems of government, jurisdiction may be shared or contested. Interest groups may have important resources, not just votes and money, but also information. The possession of information resources is not restricted to firms alone, but may extend to other public bureaucracies, for example with enforcement experience, and user groups who may be able to draw on substantial expertise in the operation of the activities which are the target of regulation. Though the various actors may behave strategically, their capacity to control policy processes and determine outcomes may be limited. It will also vary over time and according to variable levels of interests or to other external factors which may impinge on the

regulatory space such as economic conditions.[70]

Research on regulatory origins and reform has largely focussed on the activities of governments and, to a lesser extent, of powerful interest groups. Governments have been seen to set standards and establish oversight regimes in respect of those standards (frequently not together and often with standard-setting preceding the development of effective oversight mechanism). These governmental activities have variously been explained as pursuing the public interest through rational, scientific policy making, providing symbolic responses to public concerns,[71] (notably crises[72]) selling policies to powerful interest groups,[73] and maintaining the class structures of capitalist societies either by providing benefits to capital,[74] or legitimating capitalism through ameliorating social regulation.[75]

Some strategic players who may wield considerable influence have not always been fully recognised, as recent research on the turf-wars between professionals has recognised. The juridical character of the European Union legal order has made it a fertile territory for lawyers, and thus a regime for which the lawyers have sought strategic enhancement. The national legal systems of many of the member states, in contrast, might be characterized as forms of bureaucratic governance, whether on the French *Grand Corps* model[76] or the British discretionary model. In the United States it was the displacement of lawyers by a corps of professional economists which is said to have driven the ideological aspect of deregulation in the 1980s.[77] The presence of these multiple actors provides a partial explanation for the persistence of institutions, with change characterized by evolution and adaptation, rather than the total displacement of old regimes by new.

As a consequence of recognising the complexity of processes leading to the establishment and reform of regulatory regimes, instrumental conceptions of how such processes occur become less plausible, giving a greater role to cultural and institutional dynamics.[78] The oversight of public and contracted-out prisons in the United Kingdom provides a good example of a regime which has developed in ways which do not appear to be instrumental, at least when viewing the system as a whole, but are nonetheless explicable by reference to conceptions of institutional development. The oversight regime has multiple origins: in the concern of central government to oversee local prisons administration prior to nationalization in 1877 (prison visitors and the

Prisons Inspectorate); in government responses to inquiry reports triggered by crises in prisons administration (the revived Prisons Inspectorate and the Prisons Ombudsman); and in new mechanisms of control to balance the loosening of managerial controls associated with New Public Management reforms, notably the hiving off of prisons administration to an executive agency and the contracting out of some prisons to private operators (the Prison Service Monitoring Unit and Controllers of contracted-out prisons).[79] Thus regulatory development in prisons represents a response to recognised problems of dispersed authority in respect of prisons administration. The dispersal of authority makes capture of the regulatory system difficult, if not impossible, as multiple and sometimes hidden regulators must be captured alongside the most immediate regulator. For example, contracted-out prisons are subject to all the oversight mechanisms associated with public prisons, plus the local prison controller who is answerable to the area Prison Service manager, and managers within the company awarded the contract. The companies have incentives to out-perform public prisons on compliance with regulatory standards so as to demonstrate the viability of contracting-out generally and win further contracts for their own company. Even if local prison controllers were captured, there would be a very good prospect of other regulators, notably the Prisons Inspectorate and Prison Visitors detecting the problems and blowing the whistle.[80] If we took account of the investigative and whistle-blowing activities of various non-state organisations, such as the National Association for the Care and Resettlement of Offenders, The Prison Reform Trust and the Howard League for Penal Reform, which lack any formal authority for their work, the fragmented picture would be still more complex.

Telecommunications provides a second example. The origins of the UK sectoral regulator, the Office of Telecommunications (Oftel) derive from government decisions made in the 1980s to privatize the state-owned telecommunications operator. The government made these decisions for financial, political and ideological reasons.[81] However, the regulatory space into which Oftel was born in 1984 was not empty. British Telecom (BT), the former state monopoly operator, had been accustomed to regulating itself and acting as chief policy adviser to government on telecommunications matters. As part of a gradual process of liberalization, BT's formal powers were handed over to the new regulatory agency, Oftel. The executive nevertheless retained a strong interest in telecommunications policy, and a considerable quantity of formal regulatory power, notably the power to issue licences through which entry to the market was granted to new operators. Within the executive any policy of liberalization that might have been espoused by

ministers and bureaucrats in the Department of Trade and Industry might have been at odds with the policy of the Treasury, which had maintained a deep financial interest in the well-being of BT through the retention of nearly half the shares in the company for later sale to the public (ultimately in 1991 and 1992, eight years after the nominal privatization).[82]Appreciation of the origins of the regime in this case demonstrate how unlikely it would be that Oftel would turn out to exercise autonomy from government or fully hierarchical power in respect of the dominant incumbent, BT. This situation only began to change when government policy altered to permit full liberalization in 1991/92 and the existing and new players within the space had to renegotiate their relationships.

In some instances regulatory change and innovation is attributed precisely to the competitive interplay between rival jurisdictions, seeking to develop a regulatory regime which is attractive to mobile factors of production, such as capital. Debates concerning the merits of such competition, as against the coordination of federal or supranational jurisdictions, highlight the prospects for bringing decision making closer to those affected, and providing comparative data to compare regulatory regimes and guard against capture within the competitive model.[83]

Standard-Setting

Standard-setting has conventionally been the subject matter of research on discrete regulatory institutions. But the setting of standards is often undertaken not by regulatory agencies but by the government executive or by non-governmental organisations. The United States is rather exceptional in having a tradition of delegation of rule-making powers to independent agencies. Standard-setting is likely to occur at the outset and then incrementally during the life of a regulatory regime. The extent to which the authority of the original standard-setter will continue is dependent in part upon the form which standards take. Highly specific rules may offer little scope for reinterpretation by enforcement officers or regulated firms. More general or open-textured standards may require a considerable amount of further activity to define what does or does not comply with the general standards. While such work may be carried out exclusively within the office of a regulatory agency, it is more likely to form the subject matter of an interpretive community more widely dispersed within the regulatory space.[84] Attention to the implementation of regulatory rules or standards suggest that 'no clear cut distinction...between rule formation and

rule application' can be sustained.[85] The processes by which broad standards are made may be more inclusive of regulated bodies, and consequently secure greater cooperation in their enforcement.[86] A significant trend in some domains, such as occupational health and safety, has been a shift towards systems-based standards, both set by state bodies and by private bodies such as standardization institutes and management consultancies.[87] This trend is based on the recognition of the competence of non-state bodies both to design and monitor standards directed more towards procedures rather than specification and performance. For Gunningham and the responsive regulation school more generally the challenge is to find ways to balance the potential for voluntary standard setting and self-regulation with the credible commitment of the state to act where such processes fail or are unlikely to succeed.[88]

Within European and UK regulatory standard-setting a hierarchy of state and non-state norms has been created in a number of sectors as detailed public technical standards have been displaced by general or framework rules.[89] In some areas, such as financial markets, this shift has been addressed in part at concerns that formal compliance with detailed rules may actually evade the spirit of regulatory requirements.[90] In other sectors the shift towards framework rules reflects concerns about the limited capacity of legislatures to minutely specify standards. The European Community General Product Safety Directive (92/59/EEC), for example, requires member states to prohibit the supply of unsafe products. The legislation creates a hierarchy under which producers can satisfy the requirement of safety by showing that products complied with a standard set by either a EU or national legislative regulation. If there is no such standard then compliance with a non-legislative standard from an EU standard-setting body such as the Centre Europeen pour Normalisation (CEN). Failing this compliance with other standards, for example non-legislative standards from national standard-setting bodies will suffice. Only in the event that there is no applicable standard will enforcement authorities and courts fall back on the factors set down in the directive for determining whether a product is safe.[91] Given the paucity of legislative standards, the effect of using general rules combined with such a hierarchy is to transfer standard setting decisions from the legislature to public and private standard setting bodies of various kinds, and to enforcement authorities and the courts. Thus standard-setting becomes highly fragmented.

In a wide range of product sectors self-certification of compliance with standards has

become the norm. Thus with toys, producers engage in self-certification that products comply with some applicable standard, and then apply the CE mark to their products, without which toys may not legally be sold in the European Union.[92] In other instances certification of quality by a third party, for example with production processes, may form a private regulatory precondition to entry into contracts for supply of goods or services, or an element under which public regulatory requirements, for example in relation to product safety, are satisfied.[93]

Monitoring and Enforcement

A considerable body of regulatory research has explored both approaches by regulators to monitoring and enforcement, and the steps taken by firms to promote their own compliance. Such research has commonly discovered that regulators do not routinely enforce rules where they find infractions, but are likely to offer education and advice to those in breach, thereby pursuing a compliance rather than a deterrence approach.[94] Indeed regulatory enforcement has been characterized as 'a matter of continual interpretation, adjustment and discussion'.[95] This finding has been evaluated in a number of ways. In instrumental terms it has been claimed that the compliance approach may represent a more efficient use of typically-limited enforcement resources. From another perspective the reluctance of enforcement authorities to prosecute offenders routinely has been criticised on moral grounds, for example as unjustifiable discrimination in favour of largely white-collar criminals.[96] From a cultural perspective the strictness or otherwise of enforcement has been linked to factors such as social or relational distance between regulators and regulatees, and the frequency of contact between them.[97] Less strict enforcement has also been linked, in different terms, to the revolving door between regulators and regulatees, and problems of regulatory capture.[98]

The notion of regulatory space offers an alternative conception of the problems of enforcement. If we recognise authority is dispersed, an assumption that strict enforcement was ever possible would be surprising. Authority over enforcement is likely to be fragmented between state bodies, between the executive, agencies and the courts,[99] and between state and non-state bodies, for example between regulators and regulatees.[100] The interpretation of legal rules is not simply contingent on litigation processes and the decisions of the courts. Indeed within a model of non-hierarchical regulatory relations formal enforcement could often be seen as pathological, an

indicator that relations have broken down, rather than a routine and decisive process controlled by a single state body. For a regulatory agency, as for others involved, outcomes will rarely be certain.

To view the possible set of responses to enforcement activity by a regulatory agency as consisting in compliance, non-compliance and enforcement[101] may be to neglect the potential which regulatees have to seek to re-shape the regime through interaction with others in the space, or with the regulator to reinterpret the rules. The interaction between the formal authority of the regulator and the informal authority of the regulatory subject is likely to be more important to the interpretation of rules on the ground than formal enforcement processes.[102] The regulated firm is likely to possess considerable informal authority itself in respect not only of decisions about efficient prosecution, but also the definition of regulatory infractions. Indeed, this process could be seen as the joint construction of meaning, rendering concepts of compliance and non-compliance problematic. The regulated firm may know that the regulator places the preservation of resources and maintenance of long-term relationships above the pursuit of prosecution, and this reflexively reduces the credibility of strict enforcement and thus the regulator's power.[103] The extent of such informal authority will vary between sectors and regimes and over time.

Research in some areas of social regulation in the UK has found that regulated firms typically had little knowledge of the applicable regulatory law, and enforcement staff were able to eke out their formal authority through the deployment of their information resources.[104] Regulators in these conditions are able to bluff both in respect of the substantive regulatory requirements and the powers possessed by the regulators to secure compliance. In contrast, research on UK economic regulation in the telecommunications sector found that over the early years of the regime the regulated firm, British Telecom (BT), had been the senior partner in defining the meaning of the licence conditions which formed the main regulatory rules. In the event that Oftel, the regulator, objected to particular BT conduct it was BT which effectively determined whether this amounted to a licence breach. If BT thought it was in breach it modified its own behaviour. If BT thought it was not in breach there was little or no prospect of Oftel enforcing a contrary view.[105] Indeed BT had apparently used processes of licence modification, within which it exercised considerable authority, formal and informal, to render rules applying to itself more complex and less capable of being enforced. The process by which the regulator sought

to assert control over the interpretation of obligations was in itself a key change in regulatory relations within the space.[106] In this case, one mechanism through which change was brought about was substantially changing the regime through negotiated processes of rule development, an important potential response to infractions.[107]

The capacity of regulated firms to dominate the interpretation of regulatory obligations is linked to the firms' resources in terms both of organisation and information, reflected, for example, in contrasting levels of professional assistance. Regulatory professionals may be thought of as forming epistemic communities crossing government and regulatory offices, regulated firms and sometimes interest groups. The presence of professionals, so characterized, has been identified as a source of 'osmosis' or blurring of boundaries between institutions.[108] The loyalties of such professionals are likely to be split between their employers, their professional affiliation, and the distinctive community within their regulatory sector.[109]

Regulators often make use of the resources of those they regulate to secure compliance. Formal mechanisms include the creation of mandatory compliance teams within firms. The regulation of public sector bodies can also use such compliance units, as with the better regulation units within government departments overseen by the Regulatory Impact Unit (formerly Deregulation Unit and Better Regulation Unit) within the Cabinet Office in the UK. Informally, too, inspectors or other regulators may rely on the capacities of regulatees to monitor their own compliance.[110] Another approach is to recognise the potential of 'gatekeepers' such as accreditation bodies, classification societies, auditors, insurance companies and banks and target enforcement activity on the activities of these bodies which may have less more incentive to develop and apply high standards, and less immediate reward to derive from minimal compliance.[111]

Sanctions

Much research on regulatory enforcement has been carried out in domains where breach of regulatory rules is a criminal offence. A stark dividing line between 'real' enforcement and other non-enforcement approaches has been drawn. Much regulatory activity, however, takes place within regimes where the possibility of criminal enforcement is not a central feature. In such

regimes regulators may have available civil or administrative sanctions. Whatever the legal character of formal sanctions, they are likely to be supported by other lower level sanctions such as issuing warnings, writing letters, publicising details of infractions and so on. These lower level sanctions are no less real, and may be as effective. Where the regulator has the capacity to escalate the level of sanctions, combined with a credible threat to do so, lower level sanctions may be sufficient to secure the required behaviour modification.[112] Indeed, to the extent that the deployment of high-level sanctions reduces levels of responsibility and trust among regulated units such enforcement practices may be counter-productive.

Recognition of the fragmentation of authority within the regulatory space requires us to qualify the Ayres and Braithwaite 'enforcement pyramid' model to some degree. We need to explain why regulators often lack control over the credibility of escalation of sanctions. This may be because the regulated firm possesses considerable informal authority, or because the formal regulatory authority is fragmented between state organisations.[113] This latter form of fragmentation, a feature of the UK, is typical of parliamentary systems of government. Dependence of the regulator on the courts for the application of sanctions may be a factor putting the issue of credibility beyond the control of the regulator to some degree.[114]

Conversely, the fragmentation of formal authority creates the potential for 'cross-sanctioning' where sanctions are cross-applied from one regime to another.[115] Hood uses the term 'cross-sanctioning' to refer to a situation where non-compliance leads automatically to a sanction from another regime to apply. The subject has to weigh the decision to breach the rule against such automatic disadvantages coming into play. I use the term in a looser sense to refer to what may be the discretionary application of sanctions from one regime to punish breach of a different regime. This may be attractive where two regulators share common purposes, and one has greater power to punish than the other. Such cross-sanctioning is exemplified within the European Union regime for oversight of expenditure by member states of EU structural funds. Structural funds regulators (who oversee compliance with programme objectives and financial requirements) routinely check for compliance with other rules, for example over public procurement and environmental protection, and can impose financial penalties from within their regimes for breach of such rules which formally fall within the ambit of other regulatory units within the European Commission.[116]

The Implications of Regulatory Space Analysis for Institutional Design

The fragmented and dispersed nature of regulatory authority presents considerable difficulties for instrumental conceptions of regulation. If state regulatory authorities do not have a monopoly over the definition, interpretation and application of authoritative standards, how can we expect regulatory regimes to secure behavioural modifications which are sought as a matter of public policy? This problem can be expressed in terms of the limited capacity of the political system directly to control the operation of the economic and legal systems. This is regulatory failure not in the sense that those involved should have done better, but rather in the sense that the assumption that direct control is possible is flawed.[117]

The concept of regulatory space 'decentres the state as a source of regulation and points to the role that can be played by a whole host of regulatory schemes'.[118] It suggests alternative ways to shape regulatory regimes with the potential to affect outcomes indirectly, both through the sensitive deployment of oversight regulation, and through the use of other mechanisms which regulate without the classic public institutional focus.[119] For those who retain a notion of a sovereign regulatory agency, a broader idea of institutional design goes no further than 'altering the external environment'.[120] A regulatory space analysis encourages us to go further. Effective regulation is the product of the resources, perspectives and relationships of the various actors within the space. Accordingly institutional design or regulatory reform should focus on each of those to exploit the potential for what is recognised as a *de facto* separation of powers within the state and between state and non-state actors.[121]

This analysis causes us to question the capacity of regulators to make expert, technical decisions on rules and enforcement. This inclines us more towards procedures which draw on and shape the multiple and overlapping authority within the space.[122] Such regulatory procedures would be conceived as a means to contain power and promote access more generally rather than as a check on the discretion of the regulator.[123] Freeman's model of 'collaborative governance' emphasizes the collaboration on rule making and enforcement between public agencies and private actors, involving a problem-solving orientation, broad participation, exploratory and provisional solutions (and thus a willingness to revisit them) and accountability arrangements which recognise interdependence among the actors involved.[124] Collaborative governance is

exemplified by a number of regulatory developments in the United States, including negotiated rule making and the Project XL processes of the Environmental Protection Agency, under which firms can bargain over more flexible global permits to pollute in place of individual licences in respect of different pollutants.

Information can be dispersed more widely, diluting the authority of those rich in information and other resources, beyond the single or multiple regulators. Braithwaite and Drahos conclude their study of global business regulation by suggesting that their investigations of a number of international regulatory domains shows that the participation of non-governmental organisations is 'the key to invigorating good global governance'.[125] The perspective of regulatory bodies, and thus behaviour within the space, can be changed indirectly also by changing the mix of functions which the regulator is asked to carry out. Thus a regulator who takes on the handling of consumer complaints is likely to behave differently from one that does not.[126] More generally the behaviour of government departments which mix regulatory functions with broader policy tasks is likely to be very different from that of the 'pure' regulator.[127]

Procedural reforms are possible which do not implausibly seek to sweep away old procedures, completely replacing them with new and alien procedural rules (as some British commentators have advocated in adopting American procedural models.[128]) Rather procedural changes would build on what is already in place, sensitively adapting existing ways of doing things. Such adaptation is clearly exemplified by the non-statutory procedures developed by the UK Office of Telecommunications. Changes to individual licence conditions (which form the main type of agency rule-making, and are subject only to a single 28 day statutory consultation) were subjected to debate within inclusive industry workshops and a triple consultation procedure under which interested parties could comment on two consultation documents prior to the statutory consultation, and on the comments of others.[129] The development of such transparent and inclusive procedures both enhanced the legitimacy of the regulator, and improved its capacity to obtain and test information supplied by regulatees and others. In this context, however, a risk is that decision-making procedures appear more transparent and consultative than they are in fact, owing to the continuing privileged position of the dominant incumbent (BT) in respect of modifications to its licence. Legislative reform of the licence modification procedure has subsequently gone some way to modifying this structural constraint on developing inclusive

procedures.[130]

If the structural advantages of one or more regulated firms are difficult to remove, an alternative approach is to make changes to the organisation of the firm which in turn change its perspective, and finally alter its behaviour within the regulatory space. Organisational theorists have explicitly recognised the potential for extending Hancher and Moran's metaphor 'to emphasize the internal dynamics of the organization within the regulatory space.'[131] Regulatory research on compliance by firms draws on understandings of the contrasting attitudes to be found among regulatees to regulatory regimes. The responses of regulatees differ, ranging through patterns of non-compliance (resistance and disengagement) to compliance (accommodation and capture).[132] These 'postures' are a response to a number of internal features of regulatees. The regulatee may be entirely focused on securing profits to shareholders. Fostering of new arrangements within the firm which promote other objectives such as community development, industrial relations or environmental protection could be sought, for example by requiring the appointment of non-executive directors charged with pursuing such responsibilities, or through tax incentives. Equally requiring the appointment of compliance departments, insulated from ordinary line management, has the potential to modify the perspective of staff subject to positively competing management regimes concerned variously with responsibility, compliance and profit.[133] Thus without any change to the formal regulatory regime such changes would modestly re-engineer the regulatory space. Research within a number of paradigms has emphasized the potential for bringing firms' own compliance capacities into line with the objectives of the regulatory regime, whether this is seen as creating incentives, or exploiting the capacities of firms to be trusted. An example of incentivization is provided by the EU regulation of compliance by Member State governments requirements in relation to expenditure of EU funds. In most cases EU expenditure is only permitted up to a certain percentage of the total expenditure. Thus Member State governments are also required to contribute financially and thus have a stake in monitoring such expenditures properly. Some areas of expenditure, particularly in the agricultural area are perceived to be peculiarly vulnerable because all of the funding comes from the EU and Member States lack incentives to self-regulate.[134] Parker has cautioned that the success of regulatory models built on the internal capacities of firms (or, by extension, states) to monitor their own compliance is dependent on the existence of vigorous communities of compliance professionals who stand between the firms and regulatory norms.[135]

To recognise the capacities and informal regulatory authority of firms could assist in developing a healthier attitude to self-regulation, which exploits these capacities. Self-regulation and public regulation can be seen as occurring within a single 'spectrum containing different degrees of legislative constraints, outsider participation in relation to rule formation or enforcement (or both), and external control and accountability'.[136] One model is Braithwaite's enforced self-regulation scheme, within which firms are required to draw up standards, which are submitted to a public authority for approval. Compliance activities are then monitored.[137] Regulators then take on the task of meta-evaluation of the activities of compliance professionals.[138] The UK regime under which the Office of Fair Trading approves trade association codes of practice has some correspondence to this model and has, in practice, been more important than the formal consumer protection powers given to the Office of Fair Trading under the Fair Trading Act 1973.[139] Public authorities may bargain with firms and trade associations 'in the shadow of the law', in other words with the threat of more intrusive public regulation should self-regulation not meet public objectives.[140] It was in this way that self-regulatory regimes not only for insurance contracts, but also print advertising were developed in the UK, and periodically reformed and improved through government bargaining against a backdrop of threatened legislative intervention.[141] A third model seeks to foster competition between self-regulatory authorities thereby reducing the need for public oversight. Providers of financial services in the UK had the choice of being regulated by a self-regulatory organisation (SRO) or by the public Securities and Investment Board (SIB) under the Financial Services Act 1986, forcing the SROs to compete for regulatory business with SIB. More generally firms could be given a choice of which of a number of self-regulatory jurisdictions they come within, encouraging self-regulators to do as much as possible to maintain their credibility, and therefore the credibility of the industry they regulate, at the least cost.[142] In all three models, government uses its authority not directly to regulate, but to stimulate or trigger self-regulatory activity among firms.[143]

We should not limit our attentions to the capacity of private actors to commercial firms' monitoring of their own conduct. There are many examples where the monitoring and enforcement activities of firms of their competitors form part of the regulatory environment, for example with anti-trust/competition enforcement in the United States and the European Union.[144]

Interest groups such as trade unions and consumer groups also have capacities which could be drawn closer into the centre of the regulatory space, not just through enhanced rights in respect of participation in regulatory standard-setting, but also in relation to enforcement.[145] Such a private or representative enforcement strategy gives representatives a greater stake in regulatory enforcement, and has the potential to prevent or by-pass complacency on the part of the public agency. It also transfers some monitoring, negotiating and enforcement costs away from the public sector. It creates also the risk that enforcement may be over-zealous, that litigation would be routinely used where persuasion was adequate, or that vexatious litigation would be brought.[146] Thus, paradoxically the enfranchisement of public interest groups in the interests of responsive regulation risks upsetting the delicate balance of credible capacity to escalate enforcement by public regulatory authorities. Given the funding constraints on public interest groups combined with their desire to retain credibility and the capacity to work cooperatively with firms it is difficult to see that public interest will be any less selective in prioritising enforcement actions. Such groups may select different cases, operating within a different rationality.

New institutional economics has emphasized the problems associated with giving regulatory agencies powers, and the attendant risk of 'bureaucratic drift' within a regime.[147] Bureaucratic drift refers to the tendency of agencies to use the discretion which they inevitably possess to depart from their original mandate to pursue different objectives from those set by the legislature (which may be reconceived public interest objectives or the private interests of the bureaucrats or some other group). Equally there is the threat that the residual powers of the executive may be used to intervene in decision making which properly belongs to the agency, perhaps diverting the regime from the objectives when a differently-constituted executive established it - the problem of coalitional drift.[148] In their study of telecommunications regulation in five jurisdictions, Levy and Spiller suggest that contrasting institutional features in different jurisdictions will require different solutions to the problems in terms of institutional design.[149] In the UK pendulum-swing politics meant that a credible commitment to stability in the regulatory rules for telecommunications could not be entrenched in primary legislation. But with a strong and independent judiciary, respectful of property and contract rights, licences could be used as the basis for regulatory rules. The licence conditions could only be modified with the consent of the licensee or after a review by a third party, the Monopolies and Mergers Commission.[150] Thus the fragmentation of authority is used positively to entrench the commitment to stability, and prevent

coalitional drift, without absolutely setting the regime in stone.

The regulatory space paradigm differs from the New Institutional Economics approach of Levy and Spiller, in that it places less emphasis on the hierarchical nature of relations between governments and agencies and agencies and firms.[151] Staying with telecommunications, the regulatory space conception would see the UK regime consisting of the key state and non-state players sharing the centre of the space, with a dynamic in which one or more might edge out from the centre and new actors, whether growing new firms, non-state organisations, or bolder supranational bodies edge in towards the centre of the space. Regulatory reform would consist in seeking modest movement in the location of the players within the space or internal changes in such actors which would change their perspectives. Each would affect the nature of relations within the space.

Conclusion: The Limits and Potential of The Regulatory Space Analysis

The regulatory space perspective has clear limits. Descriptively, a non-hierarchical conception of regulation does not accord with the way in which regulation is experienced by some actors. Indeed, if there are only non-hierarchical relations within space, then perhaps there is no regulation at all in a narrow sense. This might leave us with a definition of regulation so loose that it fails to distinguish a distinctive form of governance. Furthermore it risks creating a neo-liberal normative agenda which is sceptical of the capacity of the state to steer market actors. Alternatively the analysis might lead us to question instrumental conceptions of direct governance, and pay more attention to the indirect regulation of more complex control processes within which no identifiable controller exercises the control function. Thus the task of understanding regulation is made more complex, rather than simpler. Normatively the regulatory space analysis does not offer any clear prescription as to what structures and processes will have the desired behaviour modification effects in any particular policy domain, but rather leaves the identification of appropriate institutions and processes for detailed analysis in each case.

Nevertheless the regulatory space metaphor is useful in challenging over-stated claims for what is possible through regulatory activity. Though the starting point is different, the regulatory

space metaphor is capable of drawing in perspectives which question the capacities of instrumental law and regulation, and envisage greater reflexivity[152] or responsiveness[153] in systems characterized variously as post-bureaucratic or post-interventionist.[154] This article suggests a way of framing the study of regulation which appears more consistent with the evidence drawn from empirical research than are more hierarchical conceptions of regulation. This is not to say that total control models of regulation are impossible to find in practice. Rather the paper argues that before we conclude that all key resources are possessed by a single regulatory agency, we ask first whether those resources are in fact dispersed through a more fragmented pattern. In developing the concept of regulatory space Hancher and Moran were responding to evidence from European regulatory regimes. They did not challenge the validity of hierarchical models of regulation, posited for the American experience. Drawn out as a framing device, as it is in this paper, it is possible to see the regulatory space conception as of broader, universal application as a means to interrogate the experience of regulation. The description developed from such an interrogation can then be used to develop possibilities for institutional design and reform which are sensitive to the existing allocation of resources and use subtle and modest realignment as the means to secure closer compliance with public objectives for the regulatory regime.

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[1] Financial Services and Markets Act 2000; Food Standards Act 1999 respectively.

[2] Utilities Act 2000; Competition Act 1998; DTI/DCMS *A New Future for Communications*

[3] The Commission for Health Improvement was established under s.19 and Sched 2 of the Health Act 1999.

[4] Crown Prosecution Inspectorate Act 2000; C.Hood, O.James and C.Scott 'Regulation of Government: Has it Increased, is it Increasing, Should it be Diminished?' (2000) 78 *Public Administration* 283.

[5] I. Ayres and J. Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (1992);

[6] Hood, James and Scott, above n4, at 294.

[7] eg Unfair Terms in Consumer Contracts Regulation 1999 SI no 2083, schedule 1 (empowering the Consumers Association to enforce the regulations alongside public regulatory agencies).

[8] Better Regulation Task Force *Enforcement Concordat* (1998).

[9] L. Hancher and M. Moran, 'Organizing Regulatory Space' in Hancher and Moran (eds) *Capitalism, Culture and Economic Regulation* (1989).

[10] See, e.g., R.A.W.Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (1997) and the development of the notion of 'power dependence' in R.A.W. Rhodes, *Control and Power in Central-Local Government Relations* (1999).

[11] cf P.C.Yeager, *The Limits of Law: The Public Regulation of Private Pollution* (1991).

[12] M. Clarke, *Regulation: The Social Control of Business Between Law and Politics* (2000), at 25-26.

[13] P. Nonet and P. Selznick, *Law and Society in Transition* (1978); Ayres and Braithwaite, above n 5; G.Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions' in G.Teubner (ed.) *Juridification of Social Spheres* (1987).

[14] Thus the term regulation, as used in this article, is somewhat narrower than the Foucauldian concept of 'governmentality' premised upon government not by law but by 'a range of multiform tactics', but shares with Foucault's approach an interest in the disposition of resources (of which authority is one) as providing the preconditions for governance: M. Foucault, 'Governmentality' in G. Burchell, C.Gordon and P. Miller, (eds) *The Foucault Effect: Studies in Governmentality* (1991) at 95.

[15] See also W.R. Scott 'Comment' in R. Noll *Regulatory Policy and the Social Sciences* (1985).

[16] L. Nader, 'A Wide Angle on Regulation: An Anthropological Perspective' in R. Noll *Regulatory Policy and the Social Sciences* (1985) at 142-143.

[17] L. Hancher and M. Moran, above, n 9 at 272.

[18] Ibid at 277.

[19] Ibid at 277.

[20] Ibid at 278-279. On the importance of culture in shaping regulation see also E. Meidinger, 'Regulatory Culture: A Theoretical Outline' (1987) 9 *Law and Policy* 355.

[21] Hancher and Moran, above n 9 at 291.

[22] S. Wilks, 'Utility Regulation, Corporate Governance and the Amoral Corporation' in G.B. Doern and S. Wilks (eds), *Changing Regulatory Institutions in Britain and North America* (1998); A. Melville, 'Power, Strategy and Games: Economic Regulation of a Privatised Utility' (1994) 74 *Pub Admin* 385.

[23] C. Shearing, 'Towards a Constitutive Conception of Regulation' in J. Braithwaite and P. Grabosky, *Business Regulation in Australia's Future* (1993); Clarke, above n 12 at 23-25.

[24] G. Morgan and L Engwall *Regulation and Organizations* (1999).

[25] T. Prosser 'Theorising Utility Regulation' (1999) 62 *MLR* 196; P. Vincent-Jones 'The Regulation of Contractualisation in Quasi-Markets for Public Services' [1999] *PL* 304.

[26] M. Galanter, 'Justice in Many Rooms' in M. Cappelletti (ed) *Access to Justice and the*

Welfare State (1981) at 164, quoted by C. Parker, *Just Lawyers* (Oxford, Oxford University Press, 1999) at 65.

[27] Parker, above n 26 at 66.

[28] J. Rees, *Reforming the Workplace: A Study of Self-Regulation in Occupational Health and Safety* (1988); N. Gunningham, 'Integrating Mangagement Systems and Occupational Health and Safety Regulation' (1999) 26 *J. Law and Soc.* 192, 214.

[29] N. Blomley, *Law, Space and the Geographies of Power* (1994); D. Cooper, *Governing Out of Order: Space, Law and the Politics of Belonging* (1998); P. Bourdieu *The Logic of Practice* (1990) especially the discussion of *habitus* in Chapter 3.

[30] Blomley, above n 29 at 47.

[31] W. Twining *Globalisaton and Legal Theory* (1999), especially chapter 8.

[32] F. Snyder, 'Governing Economic Globalisation: Global Legal Pluralism and European Law' (1999) 5 *Eur LJ* 334.

[33] J. Braithwaite and P. Drahos, *Global Business Regulation* (2000) at 550. See also S. Picciotto, 'Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism' (1996-97) 17 *Northwestern Jo. of Int.l Law and Bus.* 1014; Snyder ,above n 32 at 340-2.

[34] P. Hall, and R. Taylor, 'Political Science and the Three New Institutionalisms' (1997) 44 *Pol Stud* 936-57; T. Koelble, 'The New Institutionalism in Political Science and Sociology' [1995] *Comparative Politics* 231-243; J. Black, 'New Institutionalism and Naturalism in Socio-Legal Analysis: Institutionalist Approaches to Regulatory Decision Making' (1997) 19 *Law and Policy* 55.

[35] Hancher and Moran, above n 9 at 288, 294.

[36] Miedinger, above n 20. On the role of culture in regulating regulation in the UK telecommunications sector see C. Hall, C. Scott and C. Hood, *Telecommunications Regulation: Culture, Chaos and Interdependence Inside the Regulatory Process* (2000), chapter 3.

[37] C. Hood, *The Tools of Government* (1983).

[38] B. Hutter and P.Sorenson. 'Editors' Introduction' (1993) 15 *Law and Policy* 169 at 173.

[39] Melville, above n 22 at 387; Yeager, above n11 at 41.

[40] V. Tadros, 'Between Governance and Discipline: The Law and Michel Foucault' (1998) 18 OJLS 75; T. Daintith, 'State Power' in *The Palgrave Encyclopedia of Economics and Law* (1997). The Regulatory implications of abandoning a radical distinction between public and private power are examined in J. Braithwaite, 'On Speaking Softly and Carrying Big Sticks: Neglected Dimensions of a Republication Separaration of Powers' (1997) 47 UTLJ 303.

[41] M. Horn, *The Political Economy of Public Administration* (Cambridge, Cambridge University Press, 1995) at 42-43.

[42] cf Daintith 'State Power' above n 40.

[43] W.T. Murphy, *The Oldest Social Science* (1997) at 132; Black, above n 34.

[44] Tadros, above n 40 at 87.

[45] M.Hviid, 'Relational Contracts and Repeated Games' in D. Campbell and P. Vincent-Jones, (eds) *Contract and Economic Organization* (1995); P. Manning, 'Commentary: Regulation as a Game?' (1993) 15 *Law and Policy* 235; C. Veljanovski, 'The Regulation Game' in C. Veljanovski (ed.) *Regulators and Markets* (1991).

[46] K. Walsh, N.Deakin *et al, Contracting for Change: Contracts in Health, Social Care and Other Local Government Services* (1997) at 38.

[47] J. Black, 'Talking About Regulation' [1998] PL 77.

[48] Murphy, above n 43 at 163-172.

[49] R. Baldwin and C. McCrudden, *Regulation and Public Law* (London, Weidenfeld & Nicolson, 1987). A cultural shift in UK legislative policy may be detected in recent measures to give to regulators independent powers to apply substantial financial penalties: Competition Act 1998 s 36; Financial Services and Markets Act 2000, s 91

[50] M. Loughlin and C. Scott, 'The Regulatory State' in P Dunleavay, A. Gamble, I. Holliday and G.Peele, (eds) *Developments in British Politics 5* (1997).

[51] Yeager, above n 11 at 35.

[52] Ibid at 10.

[53] C. Scott, 'Criminalising the Trader to Protect the Consumer: The Fragmentation and

Consolidation of Trading Standards Regulation' in I. Loveland (ed) *Frontiers of Criminal Law* (1995).

[54] Melville, above n 22.

[55] G. Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in G. Teubner (ed.), *Global Law Without a State* (1997).

[56] P. Grabosky 'Australian Regulatory Enforcement in Comparative Perspective' in P. Grabosky and J. Braithwaite (eds), *Business Regulation and Australia's Future* (1993) at 22-23. The empowering of consumer groups to enforce regulatory norms is exemplified by European Community legislation on unfair terms in consumer contracts (93/13/EC) and access to justice (98/27/EC). C. Scott and J. Black, *Cranston's Consumers and the Law* (3rd ed, 2000) at 441-442.

[57] S. Macaulay, 'Private Government' in L. Lipson and S. Wheeler *Law and the Social Sciences* (1986) at 445-6.

[58] Ibid at 454ff; G. Teubner, above n 13.

[59] J. Q. Wilson and P. Rachel, 'Can the Government Regulate Itself?' (1977) 46 *Public Interest* 3; C. Hood, C. Scott, O. James, G. Jones and T. Travers, *Regulation Inside Government* (Oxford, Oxford University Press, 1999).

[60] J. Braithwaite, 'Responsive Regulation for Australia' in P. Grabosky and J. Braitwaite (eds), *Business Regulation and Australia's Future* (1993) at 84. For the history of attempts to control government through the UK deregulation initiative (subsequently renamed 'better regulation') see J. Froud *et al, Controlling the Regulators* (1998).

[61] Hood *et al*, above n 59, Chapter 8.

[62] Hancher and Moran, above n 9 at 275.

[63] New Zealand Commerce Commission *Telecommunications Industry Inquiry Report* (1992). The New Zealand experience bears out Shearing's claim that there are multiples sources of regulation in any given domain and that the withdrawal of the state will simply leave the process of ordering to some other institutional structure: Shearing, above n 23 at 72. As he notes (at 73) 'Regulation has never been a state monopoly.'

[64] C. Scott, 'The Proceduralization of Telecommunications Law' (1998) 22 *Telecommunications Policy* 243.

[65] C. Graham, *Is There a Crisis in Regulatory Accountability?* (1995) (reproduced in R.

Baldwin, C. Scott and C. Hood (eds) *Reader on Regulation* (1998).

[66] Wilks, above n 22 at 139-143.

[67] J. Freeman, 'The Private Role in Public Governance' (2000) 75 *New York University Law Review* 543 at 664-675,

[68] C. Scott, 'Accountability in the Regulatory State' (2000) 27 *Jo. Law and Soc.* 38.

[69] M. Thatcher 'The Development of Policy Network Analyses: From Modest Origins to Over-Arching Frameworks' (1998) 10 *Journal of Theoretical Politics* 389.

[70] C. Hood, *Explaining Economic Policy Reversals* (1994), chapter 2.

[71] M. Edelman, *The Symbolic Uses of Politics* (1964); Clarke, above n 3 at 228.

[72] I. Paulus, *The Search for Pure Food: A Sociology of Legislation in Britain* (1974).

[73] S. Peltzman, 'Towards a More General Theory of Regulation' (1976) 19 *JLE* 211.

[74] G. Kolko, *Railroads and Regulation* (1965).

[75] C. Offe, '"Crises of Crisis Management" in Offe, *Contradictions of the Welfare State* (1984).

[76] Y. Dezalay, 'Between the State, Law and Market: The Social and Professional Stakes in the Construction of Definition of A Regulatory Arena' in W. Bratton, J. McCahery, S. Picciotto and C. Scott (eds),*International Regulatory Competition and Coordination* (1996) at 61-62.

[77] M.A.Eisner, *Regulatory Politics in Transition* (1993), chapter 8

[78] Meidinger, above n 20.

[79] Hood *et al*, above n 59, chapter 6.

[80] cf R. Harding *Private Prisons and Public Accountability* (1997).

[81] H. Feigenbaum, J. Henig, and C. Hamnett *Shrinking the State: The Political Underpinnings of Privatization* (1999), chapter 3.

[82] C.Hall, C. Scott and C, Hood, above n 36, chapter 2.

[83] W. Bratton, J. McCahery, S. Picciotto and C. Scott, 'Introduction' in Bratton *et al* (eds), *International Regulatory Competition and Coordination* (1996) at 33.

[84] J. Black *Rules and* Regulators (1997) at 20-45. J. Braithwaite and P. Drahos, above n33 at 552 refer to 'dialogic webs' within which influence is exercised in policy processes and contrast this with the 'webs of reward and coercion' more typical of enforcement processes.

[85] J. Black, above n 47 at 78.

[86] J. Braithwaite and V. Braithwaite, 'The Politics of Legalism: Rules Versus Standards in Nursing Home Regulation' (1995) 4 *Soc & Leg Stud* 307.

[87] N. Gunningham, above n 28.

[88] Ibid.

[89] R. Baldwin, *Rules and Government* (1995) at 233-241.

[90] D. McBarnet and C. Whelan 'The Elusive Spirit of the Law: Formalism and the Struggle for Legal Control' (1991) 54 *MLR* 848 at 853-4.

[91] J. Black and C. Scott, above n 56, chapter 10.

[92] 88/378/EEC ; S. Weatherill, 'Toy Safety' in T. Daintith, (ed.) *Implementing EC Law in the United Kingdom: Structures for Indirect Rule* (1995).

[93] S. Deakin and J. Michie (eds), *Contracts, Co-Operation and Competition* (1997).

[94] For the UK B. Hutter, *Compliance: Regulation and Environment* (1997) is framed within the context of more than two decades of research. For the US see, e.g., E. Bardach and R. Kagan *Going by the Book: The Problem of Regulatory* Unreasonableness (1992) and for Australia see P. Grabosky and J. Braithwaite *Of Manners Gentle: Enforcement Strategies of Australian Business Regulatory Agencies* (1986).

[95] Black, above n 47 at 77.

[96] R. Cranston '"A Wayward, Vagrant Spirit": Law in Context Finds its Rich and Kindly Earth' in G.P. Wilson (ed.), *Frontiers of Legal Scholarship* (1995). But cf Braithwaite, above n60 at 82.

[97] Grabosky and Braithwaite, above n 94, chapter 15; Hood *et al* above n 59, chapter 3.

[98] T. Makkai and J. Braithwaite 'In and Out of the Revolving Door: Making Sense of Regulatory Capture' (1995) 12 *Jo Pub Pol* 61.

[99] Black, above n 47 *at*-103.

[100] McBarnet and Whelan, above n 90.

[101] B. Hutter and P.Sorensen, 'Editors' Introduction' (1993) 15 *Law and Policy* 169 at 170.

[102] N. Reichman, 'Moving Backstage – Uncovering the Role of Compliance Practices in Shaping Regulatory Policy' in K. Schlegel and D.Weisburd (eds), *White Collar Crime Reconsidered* (1992); Yeager, above n 11 at 40.

[103] Black, above n 84 at 42-43.

[104] K. Hawkins and B. Hutter, 'The Response of Business to Social Regulation in England and

Wales: An Enforcement Perspective' (1993) 15 *Law and Policy* 199 at 206.

[105] Hall, Scott and Hood, above n 37 at 186-7.

[106] Ibid at 153-161.

[107] C. Hood *Administrative Analysis: An Introduction to Rules, Enforcement and Organizations* (1986), at 51-52.

[108] C. Hood, *The Limits of* Administration (1976) at 202.

[109] C.Parker, 'Compliance Professionalism and Regulatory Community: The Australian Trade Practices Regime' (1999) 26 *Journal of Law and Society* 215

[110] Hawkins and Hutter above n 104 at 208

[111] J. Braithwaite and P. Drahos, above n 33 at 618-9; N. Gunningham and P. Grabosky *Smart Regulation: Designing Environmental Policy* (Oxford, Oxford University Press, 1998) pp411-2.

[112] Ayres and Braithwaite, above n 5, Chapter 2.

[113] Hall, Scott and Hood, above n 37 at 202.

[114] Scott, above n 53.

[115] Hood, above n 107 *at* 79.

[116] Hood *et al*., above n 59, chapter 8.

[117] Teubner, above n 13. J.Black 'Constitutionalising Self-Regulation' (1996) 59 *MLR* 24, 45-46; W.T.Murphy *The Oldest Social Science* (Oxford, Oxford University Press, 1997) p 172.

[118] Shearing , above n 23 at 73.

[119] A. Dunsire, 'Tipping the Balance: Autopoiesis and Governance' (1996) 28 *Administration and Society* 299.

[120] R.G.Noll, 'Government Behavior: A Mulitidisciplinary Survey and Synthesis' in Noll (ed.) *Regulatory Policy and the Social Sciences* (1985).
at 14.

[121] Braithwaite, above n 40.

[122] Compare Black, above n 117 at 46-47.

[123] Cf Horn, above n 41 at 62-68. See J. Black 'Proceduralizing Regulation' (2000) 20 *OJLS*

(forthcoming) for a detailed theoretical treatment of arguments for introducing procedures into regulatory regimes for enhancing deliberation and facilitating participation.

[124] J.Freeman 'Collaborative Governance in the Administrative State' (1997) 45 *UCLA Law Review* 1 at 21-32.

[125] J. Braithwaite and P. Drahos, above n 33 at 36.

[126] A. McHarg, 'Separation of Functions and Regulatory Agencies: Dispute Resolution in the Privatised Utilities' in M. Harris and M. Partington, *Administrative Justice in the 21st Century* (1999)

[127] Hood *et al.*, above n 59, chapter 3.

[128] C. Graham and T. Prosser, *Privatising Public Enterprises* (1991) at 256-7.

[129] Office of Telecommunications *Improving Accountability: Oftel's Procedures and Processes* (1997).

[130] Electronic Communications Act 2000 s 11.

[131] G.Morgan and K. Soin, 'Regulatory Compliance' in G. Morgan and L. Engwall (eds) *Regulation and Organizations* (London, Routledge, 1999) at 166.

[132] V. Braithwaite, 'Games of Engagement: Postures within the Regulatory Community' (1995) 17 *Law and Policy* 225.

[133] See, for example, the model of corporate accountability offered by B. Fisse and J. Braithwaite, *Corporations, Crimes and Accountability* (1993).

[134] Hood *et al.*, above n 59 chapter 8.

[135] Parker, above n 109 at 225-233.

[136] A. Ogus, 'Rethinking Self-Regulation' (1995) 15 *Oxford Journal of Legal Studies* 97,100.

[137] Ayres and Braithwaite, above n 5, chapter 4.

[138] C.Parker, above n 109 at 235-238.

[139] I. Ramsay, *Consumer Protection: Text and Materials* (1989). The approved codes of practice system is under review at the time of writing: See C.Scott and J. Black, above n 56 at 42-51.

[140] R. Lewis, 'Insurers Agreements Not to Enforce Strict Legal Rights: Bargaining With Government and in the Shadow of the Law' (1985) 48 *MLR* 275.

[141] R. Baggott and L. Harrison, 'The Politics of Self-Regulation: The Case of Advertising Control' (1986) 14 *Policy and Politics* 143.

[142] Ogus, above n 135 at 103.

[143] Teubner, above n13; Macaulay, above n 57 at 494.

[144] K. Yeung 'Privatising Competition Regulation' (1998) 18 *OJLS* 581.

[145] Ayres and Braithwaite, above n 5, chapter 3. See discussion above, n 56 for discussion of empowerment of consumer groups to enforce EC law.

[146] Ibid at 78.

[147] Horn, above n 41.

[148] Ibid. at 16-19.

[149] B. Levy and P. Spiller *Regulation, Institutions and Commitment* (Cambridge, Cambridge University Press, 1996).

[150] Under the terms of the Competition Act 1998 s 45 the MMC has been reformed, given certain new functions and renamed the Competition Commission.

[151] M. Levine and J. Forrence, 'Regulatory Capture, Public Interest and the Public Agenda: Towards a Synthesis' (1990) 6 *JLEO* 167.

[152] G. Teubner, 'Substantive and Reflexive Elements in Modern Law' (1983) 17 *Law and Society Review* 239; W. H. Clune, 'Implementation as Autopoietic Interaction of Autopoietic Organizations' [1991/1992] *European Yearbook in the Sociology of Law* 485.

[153] Nonet and Selznick above n 13*;* Ayres and Braithwaite, above n 5.

[154] Compare Nonet and Selznick, above n 13 with N. Reich 'Diverse Approaches to Consumer Protection Philosopy' (1992) *Journal of Consumer Policy* 257.