Introduction

Regulating Culture: Problems and Perspectives

Justin O'Brien and George Gilligan

I CULTURE, TRUST AND THE FINANCE SECTOR

Trust in our corporations and in our institutions, both secular and religious, is at an all-time low. Across myriad domains and jurisdictions, from policing to the media, faith-based schooling to banking, governance failures have blighted individual lives, ruined reputations and, in the case of the global financial crisis, social cohesion.[1] Irrespective of domain, corporate culpability for individual ethical failures is invariably and inevitably informed by the relative strength or weakness of organizational culture (ie, the degree to which egregious conduct is informed by a disconnect between stated and lived values).[2] The disjunction can lie along a continuum. It ranges from willful neglect, through reliance on formal but transacted around compliance programs, to misaligned incentives.[3] It is equally dispiriting but nonetheless inescapable that neither commitments to enhanced self-regulation nor strengthened external oversight have proved capable of arresting a decline in the trustworthiness of the financial sector.[4] This is the case irrespective of whether rules or principles-based approaches to regulatory design have been privileged.[5] Indeed, recent legislative

[1] See MD Higgins, 'President's Remarks at the Launch of Up The Republic,' (Speech delivered at the Royal Irish Academy, Dublin, 14 November 2012).

[2] J Sorensen, 'The Strength of Corporate Culture and the Reliability of Firm Performance' (2002) 47 *Administrative Science Quarterly* 70, 72 (defining culture narrowly as a system of shared values (that define what is important)) and norms that define appropriate attitudes and behaviors for organizational members (how to feel and behave); see also L Smircich, 'Concepts of Culture and Organizational Analysis' (1983) 28 *Administrative Science Quarterly* 339 (noting that research into corporate culture is an inquiry into the social order: at 341).

[3] G Rossouw and L van Vuuren, 'Modes of Managing Morality: A Descriptive Model of Strategies for Managing Ethics' (2003) 46 *Journal of Business Ethics* 389 (noting a five-stage process in which corporate activity moves from '(1) immorality; (2) reactivity; (3) compliance; (4) integrity; (5) total alignment: at 391).

[4] J O'Brien, 'Re-Regulating Wall Street: Substantive Change or the Politics of Symbolism Revisited,' in I. MacNeil and J. O'Brien (eds.), *The Future of Financial Regulation* (Oxford, Hart Publishing, 2010).

[5] K Keasey, H Short and M Wright, 'The Development of Corporate Governance Codes in the United Kingdom,' in K Keasey, S Thompson and M Wright (eds), *Corporate Governance: Accountability, Enterprise and International Comparisons* (2005) 21 (noting that reform impulses are driven by scandal).

innovations have resulted in the design of suboptimal regulatory structures; suboptimal, that is, to society if not the financial sector itself, ostensibly the target but ultimately the beneficiary of flawed implementation.[6] This is particularly apparent in the United States.[7] The *Public Company Accounting Reform and Investor Protection Act* (2002), better known as Sarbanes-Oxley, designed to enhance audit standards in the aftermath of the Enron and associated scandals, for example, transmogrified into an enormous rent-seeking opportunity for the accounting profession.[8] Equally, the *Wall Street Reform and Consumer Protection Act* (2010), or Dodd-Frank, has facilitated ongoing trench warfare between the Securities and Exchange Commission (SEC) and regulated entities over its nature, scope and legislative intent.

These conflicts and tensions are unsurprising consequences of the cultural realities of the financial sector, both past and present. More generally societies, firms, professional associations, specific industries and other groups (including regulatory actors), develop modes of preserving and transmitting through time and generations the mental programming that constitute routines, or *the ways that things are done* in processes that may be difficult to discern specifically, but which nonetheless are well understood, not only by those who may be involved directly but also by those who are not.[9] These mental programs interact with individual and collective value systems, which simultaneously are reflexively interacting with prevailing cultural influences, and thus inevitably shape behaviours. So, the City of London or Wall Street for example, develop patterned modes and mechanisms for evaluating issues and events that are transmitted within their core groups as well as to the broader populations at home, and abroad, as the routine and legitimate ways of doing business – in short, the operational culture of an industry.[10]

Culture can be simultaneously local and general. A universal hermetic definition of what constitutes culture is perhaps impossible. It is, therefore, perhaps more fruitful to accept the conceptual imprecision that permeates debates about culture and understand it as a complex

[6] See, for example, A Haldane, 'The Dog and the Frisbee,' (Speech delivered at Federal Reserve Bank of Kansas Annual Symposium, Jackson's Hole, 31 August 2012), available at www.bankofengland.co.uk/publications/Documents/speeches/2012/speech596.pdf.

[7] D Mitchell, 'The End of Corporate Law' (2009) 44 *Wake Forest Law Review* 703 ('In the course of the past century corporate law has been used first to legitimate corporate power and then to exempt those exercising it from liability': at 703); see more generally H Collins, *Regulating Contracts* (Oxford, Oxford University Press, 1999) 59 (describing private law as 'the index finger of the invisible hand that guides the markets'); for the importance of political framing, see E Orts, 'The Complexity and Legitimacy of Corporate Law' (1993) 50 *Washington & Lee Law Review* 1565 (noting 'corporate law involves the simultaneous pursuit and coexistence of a number of ends or purposes, with the mix a preponderance of different values depending on particular legal context': at 1565).

[8] J O'Brien, *Redesigning Financial Regulation: The Politics of Enforcement* (Chichester, John Wiley & Sons, 2007); for discussion of the role of politicians as active rent extractors, see F McChesney, *Money for Nothing* (New York, Oxford University Press, 1987) 157 (characterizing politicians 'not as mere brokers redistributing wealth in response to competing private demands but as independent actors making their own demands to which private actors respond.').

[9] The residual, seemingly perennial relative regulatory autonomy (especially in the Anglo-American context), of the financial sector to shape its own regulatory discourse and infrastructures over many centuries is testimony to this power. For a detailed analysis of these forces at work in the UK context, see: G Gilligan, *Regulating the Financial Services Sector* (London, Kluwer Law International, 1999).

[10] G Hofstede, *Culture's Consequences: International Differences in Work-Related Values*, (Beverley Hills, CA, Sage, 1980) 25 (Culture could be defined as 'the interactive aggregate of common characteristics that influence a human group's response to its environment. Culture determines the identity of a human group in the same way as personality determines the identity of an individual.').

interaction between networks of specific epistemic communities that aggregate interweaving dimensions. For example, Becker views culture as a set of shared understandings that permit a group of people to act in concert with each other.[11] Cotterrell sees culture as having four general components: beliefs/values; traditions; instrumental (economic/technological) matters; and matters of effect (emotion).[12] These elements can be especially mutually reinforcing amongst professional communities that have a history of shared customs and business practices. So, when one analyses how a regulatory culture evolves within any given industry, numerous sources of regulatory culture are apparent. Significant amongst these are: general culture (especially in a national context); social structures; law (particularly statutes and court decisions); regulatory traditions; and the practice of regulatory work itself.[13] It is important to remember that as these regulatory sources emerge and grow, the groups that comprise *the regulated* are almost invariably much larger than the regulatory agencies charged with regulating them. Moreover, the former may well have far greater resources available to shape the discourses and evolutionary pathways of ostensibly more powerful regulatory sources.

The financial sector is one of the areas in which these regulatory source imbalances have been most pronounced over the years. Professional, structural and cultural embeddedness condition the interplay of regulatory authority and regulatory responses. These coalitions of embeddedness allow those players or firms with the requisite resources and inter-organisational alliances to build up and legitimate their image of regulatory authority.[14] If their regulatory authority is strong, then they can subsequently challenge and/or negotiate the rules of regulation. Contemporary regulatory conditions shape future regulatory structures. It is clearly in the self-interest of powerful actors within an industry like financial services to be as reflexively influential as possible on current regulatory practice, so as to maintain or increase future levels of influence.

Historically, more aggressive enforcement has proved problematic in changing corporate culture, with the imposition of ever increasing fines written off as part of the cost of doing business.[15] Paradoxically, in the contemporary crisis accusations of 'overreach'[16] frequently accompany judicial complaints that a façade of enforcement is being privileged.[17] In cases in which insiders have been brought to trial, juries have been reluctant to

[11] H S Becker, 'Culture: A Sociological View' (1982) 71 *The Yale Review* 513.

[12] R Cotterrell, 'Law and Culture–Inside and Beyond the Nation State' (2008) 31 *Retfærd: Nordisk Juridisk Tidsskrift* 23.

[13] E Meidinger, 'Regulatory Culture: A Theoretical Outline' (1989) 9 *Law & Society* 355.

[14] The term regulatory authority is being used advisedly. It refers to those situations in which it is deemed legitimate for the regulated to have power and this legitimacy is recognised by regulators. The larger and more influential a firm is within the financial services sector, the more likely it is that it can legitimately build up its image of regulatory authority.

[15] H Rockness and J Rockness, 'Legislated Ethics: From Enron to Sarbanes-Oxley, the Impact on Corporate America' (2005) 57 *Journal of Business Ethics* 21 (noting the need for meaningful sanctions, increased investigatory capacity and external fines that exceed expected gains).

[16] JB Stewart, 'Another Fumble By the SEC on Fraud,' *New York Times*, 16 November 2012, available at www.nytimes.com/2012/11/17/business/another-fumble-by-the-sec.html?_r=0.

[17] T Hemphill and F Cullari, 'Corporate Governance Practices: A Proposed Policy Incentive Regime to Facilitate Internal Investigations and Self-Reporting of Criminal Activities' (2009) 87 *Journal of Business Ethics* 333, 335–342 (noting the increased prosecutorial arsenal); for critiques of its application, see J Hasnas, 'Ethics and the Problem of White Collar Crime' (2005) 54 *American University Law Review* 579; M Koehler, 'Revisiting a Foreign Corrupt Practices Act Compliance Defense' (2012) *Wisconsin Law Review* 609; M Koehler, 'The Façade of FCPA Enforcement' (2010) 41 *Georgetown Journal of International Law* 907.

convict.[18] At a broader strategic level, judicial skepticism over the agency's use (or misuse) of cost-benefit analysis has significantly curtailed the efficacy of its discretionary ability to introduce enhanced standards.[19] Despite the long-standing antagonism between the DC circuit in particular and the SEC, deference to agency discretion remains intact. The unresolved question is how that discretion is applied, a question to be explored more fully below. The point to underscore at this stage, however, is the abject failure of moral exhortation alone as a regulatory strategy. For example, huge bonuses in the banking industry, even when firms are reporting massive losses or are being rescued by taxpayers, is an issue that highlights the seemingly willful blindness and deafness of finance industry professionals towards strident criticism from the media, community, governments and regulators alike.[20] In far too many instances, boards remain impervious to exhortations from the SEC that 'those who act on behalf of a company give life to the corporate conscience.'[21] There is, of course, an inherent tension between monitoring and the provision of strategic advice.[22] The failure of the 'conscience' metaphor calls into question the extent to which self-regulation is possible, a fact acknowledged by the SEC.[23] If exhortations from regulatory agencies are viewed with derision, so too are common law precedents. Guidance to corporations and their advisors as to what should constitute minimal compliance standards has served little better.[24] Transactions have been carried out around codes of conduct through a combination of hubris, myopia and the decoupling of ethical considerations from core business.[25] Taken together, the failure to articulate and integrate purpose, values and principles within a functioning ethical framework has created toxic and socially harmful corporate cultures.

It is equally dispiriting that policymakers have conflated the essential function provided by banking with the security of individual banks, a compromise that because of the

[18] See P Henning, 'Mixed Results for SEC in Financial Crisis Cases,' *New York Times*, 19 November 2012, available at dealbook.nytimes.com/2012/11/19/mixed-results-for-s-e-c-in-financial-crisis-cases.

[19] See J Fisch, 'The Long Road Back: Business Roundtable and the Future of SEC Rulemaking' (2012) *Seattle University Law Review*, forthcoming.

[20] See A Cuomo, *No Rhyme or Reason: The Heads I Win, Tails You Lose, Bank Bonus Culture*, (New York, State Attorney General Office, 2009).

[21] C Glassman, 'Sarbanes-Oxley and the Idea of "Good" Governance' (Speech delivered at the American Society of Corporate Secretaries, 27 September 2002). The belief in common purpose animates SEC policy formulation; see M Shapiro, 'Address to the Practising Law Institute' (Speech delivered at PLI Securities Regulation Seminar, New York, 4 November 2009): 'We might sit on opposite sides of the table in any given matter, but I believe that all of us—regulators, attorneys, and business people alike—all share the common goal of ensuring that our capital markets work—and work fairly and effectively.'

[22] J Fisch, 'The New Federal Regulation of Corporate Governance' (2004) 28 *Harvard Journal of Law and Public Policy* 39.

[23] See 'Securities and Exchange Commission's Chairman Cox Announces End of Consolidated Supervised Entities Program' (Press Release, Washington, DC, 26 September 2008), noting that 'self-regulation does not work,' available at www.sec.gov/news/press/2008/2008-230.htm.

[24] *In Re Caremark International Inc Derivative Litigation*, 698 A.2d 959 (Delaware Chancery Court) at 970 (holding that directors can be held liable and this can be easier to prove in the absence of an effective compliance program).

[25] J O'Brien, 'Managing Conflicts: The Sisyphean Tragedy (and Absurdity) of Corporate Governance and Financial Regulation Reform' (2007) 20 *Australian Journal of Corporate Law* 317.

maintenance of an explicit 'too big to fail' subsidy facilitates risk-taking.[26] Ingrained cultural forces can distort perceptions within organisations about risk and incentives, especially in the hyper-competitive environment of international finance which may adapt ever-increasing matrices of risk as the norm.[27] Moreover, the complexity of modern finance and globalized, fragmented chains of command governing the production and dissemination of specialized knowledge increases the information asymmetry risk. As a consequence, the risk that the unscrupulous will take advantage of what the economist David C. Rose has termed the 'golden opportunities' of deception is increasing.[28] Recent survey evidence from the corruption and anti-money-laundering domain confirms this insight. The annual Ernst & Young global fraud survey, for example, is one of the most detailed snapshots of the bribery and corruption challenges facing multinational corporations.[29] One of its most 'troubling' findings is what Ernst & Young terms a growing widespread acceptance of unethical business practices (eg, 64 per cent of respondents believe that the incidence of compliance failure has increased because of the downturn).[30] The trend is particularly apparent in East Asia (eg, 60 per cent of respondents in Indonesia deemed it acceptable to make cash payments to secure new contracts; 36 per cent of respondents in Vietnam suggested it was permissible to misstate financial accounts).[31] The decline in ethical commitment is traced to a lack of training, and, more significantly, to mixed messages from senior management as to the importance of compliance with Anti-Bribery and Corruption Policies (ABACP). As Ernst & Young concludes, if action is not taken to hold offenders to account, stated commitment to high standards remains an exercise in symbolism. While many reported the existence of sophisticated compliance systems, these were not subject to ongoing external testing. Only 33 per cent reported using external law firms or consultants to provide assurance.[32] In a significant finding, 54 per cent of CFOs surveyed had not taken ABACP training,[33] while 52 per cent of all respondents reported that the board was not sufficiently aware of operating risk.[34] The report concludes, somewhat bleakly, that hard times stretch ethical boundaries.[35]

[26] See R Whelan, 'Misunderstanding the Banking Industry,' Rethinking Financial Markets Online Conference, World Economics Association, 1–30 November 2012, available at rfconference2012.worldeconomicsassociation.org/wp-content/uploads/WEA-RFMConference2012-Whelan.pdf.

[27] DC Langevoort, 'Chasing the Greased Pig Down Wall Street: A Gatekeeper's Guide to the Psychology, Culture and Ethics of Financial Risk Taking' (2011) 96 *Cornell Law Review*, 1209.

[28] DC Rose, *The Moral Foundations of Economic Behavior* (New York, Oxford University Press, 2011) 16; see also P Pettit, 'Republican Reflections on the Occupy Movements,' in F O'Toole (ed), *Up the Republic* (Dublin, Faber & Faber, 2012) 169–81 (noting 'it is a sad fact of human nature that while not many of us might be corrupt, not many are incorruptible; when opportunity offers not many are capable of resisting the temptation to make a quick buck. The timber may not be rotten but it is crooked:' at 177).

[29] Ernst & Young, *Growing Beyond, A Place for Integrity* (New York, EYGM Limited, 2012), hereinafter *Ernst & Young Survey*. The survey is drawn from a sample of 1700 senior executives. It includes respondents drawn from incumbent Chief Financial Officers (CFO) and senior executives charged with running the legal, compliance and internal audit functions of major corporations across 43 different countries

[30] ibid, Figure 1, 4.

[31] ibid, Figure 2, 5.

[32] ibid, Figure 4, 7.

[33] ibid, 3.

[34] ibid, 3.

[35] ibid, 5.

The critical importance of trust in lowering agency and transaction costs, building cooperation and innovation and creating more efficient exchanges has, of course, long been recognized.[36] Absent ongoing substantial institutionalized commitment to ethical behavior, however, credible *ex ante* detection of unthinking, blinkered or compartmentalized ethical consideration remains implausible.[37] The critical question, therefore, is how to strengthen the restraining forces and whether this effectiveness can be monitored and evaluated. As Weaver, Revino and Cochran have nicely phrased it, 'how does one ensure integrated rather than decoupled corporate social performance?'[38] Resolution of this conundrum cannot take place without critical reflection on the corporation and its place in society.[39]

Corporate cultures do not exist in a vacuum; nor are they mere reactive responses to externally mandated rules. Instead they reflect the values of the organization. The emphasis on culture underpins an influential definition of corporate governance provided by the Australian jurist Justice Neville Owen. In his investigation into the collapse of HIH Insurance, Justice Owen maintained that he was "not so much concerned with the content of a corporate governance model as with the culture of the organization to which it attaches." For Justice Owen, "the key to good corporate governance lies in substance, not form. It is about the way the directors of a company create and develop a model to fit the circumstances of the company and then test it periodically for its practical effectiveness. It is about the directors taking control of a regime they have established and for which they

[36] S Banerjee, N Bowie and C Pavone, 'An Ethical Analysis of the Trust Relationship,' in R Bachman and A Zaheer (eds), *Handbook of Trust Research* (Cheltenham, Edward Elgar, 2006) 303; more broadly see D North, 'Economic Performance Through Time' (1994) 84 *American Economic Review* 359 (noting 'societies that get "stuck" embody belief systems and institutions that fail to confront and solve new problems of societal complexity': at 364. For origins of the administrative process and its legitimation, see JM Landis, *The Administrative Process* (New Haven, Yale University Press, 1938) 4 (noting that increased complexity calls 'for greater surveillance by government of the appropriate use of these resources to further the admittedly dim but recognizable aims of our society.'). See more generally, R Frank, *Passions Within Reason: The Strategic Role of the Emotions* (New York, Norton, 1988) 19 (noting that indoctrination and practice are essential building blocks of character formation).

[37] D Murphy, 'The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics' (2002) 87 *Iowa Law Review* 697 (noting that compliance programs without an explicit framework for assessing ethical dilemmas are unlikely to work: at 716–17); for the danger of compartmentalization, see A MacIntyre, 'Social Structures and their Threats to Moral Agency' (1999) 74 *Philosophy* 311 (Compartmentalization occurs when a distinct sphere of social activity comes to have its own role structure governed by its own specific norms in relative independence of other such spheres. Within each sphere, those norms dictate which kinds of consideration are to be treated as relevant to decision-making and which are to be excluded:' at 322); for discussion of the application of virtue ethics to the problem of sustainable financial reform, see J O'Brien, 'The Future of Financial Regulation, Enhancing Integrity Through Design' (2010) 32 *Sydney Law Review* 39.

[38] G Weaver, LK Trevino and P Cochran, 'Integrated and Decoupled Corporate Social Performance: Management Commitments, External Pressures and Corporate Ethics Practices' (1999) 42 *Academy of Management Journal* 539; see also LS Paine, 'Managing for Organizational Integrity' (1994) 3 *Harvard Business Review* 106 (noting that ethics has everything to do with management: at 106).

[39] E Mason, 'Introduction,' in E Mason (ed), *The Corporation in Modern Society* (Cambridge, Harvard University Press, 1960) 19. ('[T]he fact seems to be that the rise of the large corporation and attending circumstances have confronted us with a long series of questions concerning rights and duties, privileges and immunities, responsibility and authority, that political and legal philosophy have not yet assimilated').

are responsible.'[40] Warranted commitment to moral restraint necessitates ongoing critical reflection on what constitutes obligation—to whom and for what purpose.[41] It is in this context that corporate culture plays an essential disseminating role. It informs employees of what the company stands for.[42] To be effective, it must be informed by belief not prudence (ie, the fear of detection) precisely because the risk of detection can be quite low and fines written off as part of the price of doing business.[43] As Rose puts it, 'there is no escaping the fact that why one holds the required moral tastes matters as much as having the right kind of moral tastes.'[44] This, in turn, suggests it is essential to build the governance of the financial sector on an explicit normative foundation, a fact recognized, for example, but not implemented by senior regulators.[45] Notwithstanding plausible demands for a return to

[40] Report of the HIH Royal Commission, *The Failure of HIH Insurance* (Canberra, Commonwealth of Australia, 2003) xxxii, available at www.hihroyalcom.gov.au/finalreport/index.htm. For rare recognition of failure to internalize responsibility from former head of compliance at British Bank HBOS, see Paul Moore, 'Memo to Treasury Select Committee,' Westminster, London, 10 February 2009 ('My personal experience of being on the inside as a risk and compliance manager has shown me is that, whatever the very specific, final and direct causes of the financial crisis, I strongly believe that the real underlying cause of all the problems was simply this—a total failure of all key aspects of governance. In my view and from my personal experience at HBOS, all the other specific failures stem from this one primary cause.')

[41] See J Kay, *The Kay Review of Equity Markets* (London, HM Government, July 2012) 9. (According to Professor Kay, sustainable reform must be predicated on capability to 'restore relationships of trust and confidence in the investment chain, underpinned by the application of fiduciary standards of care by all those who manage or advise on the investments of others.' This necessitates a move away from short-termism, as 'trust and confidence are the product of long-term commercial and personal relationships: trust and confidence are not generally created by trading between anonymous agents attempting to make short term gains at each other's expense': at 5), available at bis.gov.uk/assets/biscore/business-law/docs/k/12-917-kay-review-of-equity-markets-final-report.pdf.

[42] See also Paine, above n38 (noting that the task of ethics management is to define and give life to an organization's guiding values, to create an environment that supports ethically sound behavior, and to instill a sense of shared accountability among employees.' As such, 'organizational ethics helps define what a company is and what it stands for: a 111).

[43] See O'Brien above, n4. The rise of class actions, however, may change this dynamic, see J Harris and M Legg, 'What Price Investor Protection: Class Actions vs Corporate Rescue' (2009) 17 *Insolvency Law Journal* 185. Recent litigation success (through settlements) in Australia has underscored the monetary pain; see for example, the $200m settlement reached by Centro and its auditors PwC to end a class action, N Lenaghan and B Wilmont, 'Centro, PwC to Take Record $200m Hit,' *Australian Financial Review*, 9 May 2012, available at afr.com/p/national/centro_pwc_take_record_legal_hit_6CaSTKu6K1w7nJFFIZOxWL.

[44] Rose, above n28, 188.

[45] See H Sants, '*Annual Lubbock Lecture in Management Studies*' (Speech delivered at Said Business School, University of Oxford, March 12, 2010) ('We need to answer the question of whether a regulator has a legitimate focus to intervene on the question of culture. This arguably requires both a view on the right culture and a mechanism for intervention. Answering yes to this question would undoubtedly significantly extend the FSA's engagement with industry. My personal view is that if we really do wish to learn lessons from the past, we need to change not just the regulatory rules and supervisory approach, but also the culture and attitudes of both society as a whole, and the management of major financial firms. This will not be easy. A cultural trend can be very widespread and resilient—as has been seen by a return to a 'business as usual' mentality. Nevertheless, no culture is inevitable'); see more generally D North, *Structure and Change in Economic History* (New York, Norton, 1981) 47 (suggesting that ethical standards are the 'cement of social stability'); see also O Williamson, 'The New Institutional Economics: Taking Stock, Looking Ahead' (2000) 38 *Journal of Economic Literature* 595. (Williamson notes that analysis of the 'non-calculative social contract' or 'level one' component of social theory is conspicuous by its absence within regulatory studies: at 597). The other three levels comprise institutional arrangements viewed primarily through property rights and positive political theory, governance mechanisms through transaction cost economics and resource allocation frameworks generally examined through agency theory.

simplicity in regulatory design,[46] this cannot be achieved without an agonistic dialogue in which the principles underpinning obligation and the rationale for external intervention in the event of circumvented, are negotiated and accepted.[47] The advantages of associational governance, such as flexible design attuned to the interests of institutional actors, cannot be sustainable in the event that the negotiations are entered into in bad faith. It is only by returning to first principles that the relationship between law, regulatory rulemaking and society can be ascertained and evaluated.[48] Absent a theory of society it is impossible to build a theory of the corporation or the capital markets in which it is nested.[49] Writers as diverse as Hayek,[50] Schumpeter,[51] Polanyi[52] and, more recently, Granovetter,[53] have long noted the political calculation required to construct the economically rational. The interaction between market norms and economic and regulatory policy served an essential legitimating purpose.[54] The problem facing regulatory authorities is that that model has lost its legitimacy. The privileging of innovation over security and emaciated conception of responsibility and accountability has led to a profound authority crisis that can only be resolved by reconstituting the social contract governing the operation of global finance.

[46] Haldane, above n6; see also Editorial, 'Speech of the Year,' *Wall Street Journal*, 12 September 2012, A14 (noting 'a belief among regulators that models can capture all necessary information and then accurately predict future risk. This belief is new, and not helpful.')

[47] J Seligman, 'The SEC at a Time of Discontinuity' (2009) 95 *Virginia Law Review* 667, 678–79 ('Core principles are an inspiring aspiration. All of us would like to make regulation simpler and more efficient. . . . Core principles may be helpful, they are inadequate without an enabling statute, often detailed regulation, case law, and agency interpretative guidance. What, for example, is manipulation? It is not a self-defining term.').

[48] A Turner, 'Reforming Finance: Are We Being Radical Enough' (Speech delivered at Clare College, University of Cambridge, 18 February 2011) 3 (noting 'we must understand' the crisis as one of markets and systems rather than of specific institutions. Lord Turner continued that 'today's regulators are, in a sense, the inheritors of a half-century long policy error, in which we have allowed private sector banks to pursue their private interest in maximizing bank leverage, at times influenced by a deep intellectual confusion between private cost and social optimality:' at 6).

[49] See Mason, above n39, ('to suggest a drastic change in the scope or character of corporate activity is to suggest a drastic alteration in the structure of society. . . . All of this is to suggest not that the corporation cannot be touched but that to touch the corporation deeply is to touch much else beside:' at 1).

[50] F Hayek, *The Road to Serfdom* (New York, Routledge, 1944) 29 ('To create conditions in which competition will be as effective as possible, to supplement it where it cannot be made effective. . . . provide indeed a wide and unquestioning field for state activity. In no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other').

[51] J Schumpeter, *Capitalism, Socialism and Democracy* (New York, Allen and Unwin, 1942) 137. ('No social system can work in which everyone is supposed to be guided by nothing except his short-term utilitarian ends. . . . [T]he stock market is a poor substitute for the Holy Grail').

[52] K Polanyi, *The Great Transformation* (Boston, Beacon Press, 1944) 171 ('The principle of freedom to contract. . . is. . . merely the expression of an ingrained prejudice in favour of a definite kind of interference, namely such as would destroy non-contractual relations').

[53] M Granovetter, 'Economic Action and Social Structure: The Problem of Embeddedness' (1985) 91 *American Journal of Sociology* 481 ('Idealized markets of perfect competition have survived intellectual attack in part because self-regulating economic structures are politically attractive to many. Another reason for survival, less clearly understood, is that the elimination of social relations from economic analysis removes the problem of order for the intellectual agenda, at least in the economic sphere': at 484).

[54] A Giddens, *The Constitution of Society: Outline of the Theory of Structuration* (Berkeley, The University of California Press, 1985) 25 ('The constitution of agents and structures are not two independent given sets of phenomena, a dualism but represent a duality. . . . [T]he structural properties of social systems are both the medium and the outcome of the practices they recursively organize').

II THE MORALITY OF CONTEMPORARY BANKING

We are living at a moment of potential paradigmatic change. The dominant conception of corporate governance and financial regulation, based on rational actors operating within efficient markets, is losing coherence, legitimacy and authority.[55] Effective governmental control through dominant shareholdings in major banks has forced unresolved reflection on what constitutes or should constitute optimal corporate governance and regulatory oversight. The Global Financial Crisis (GFC) has unleashed an avalanche of reform initiatives.[56] It is unclear, however, not only to what extent this will lead to convergence or facilitate ongoing arbitrage, but also how well-equipped national regulators are.[57] Implementation carries real risks that national systems will develop frameworks that may preserve short-term competitiveness but do little to improve either the quality of oversight or shift the dynamics of financial regulation. More problematically, they may not reduce the transmission of cross-border contagion. Undoubtedly, any successful proposal to extend responsibility and accountability to those involved in product design rather than clarifying the enabling conditions governing marketing and sale would constitute a seismic shift in the structure of the financial services industry. Specifically, it would breach the self-referential logic of private law. The initial fracture could lead to unintended consequences, including what Hugh Collins has vividly termed its 'productive disintegration.'[58] The integration of more interventionist normative objectives with enabling ones may also significantly change the ethical boundaries of global finance. In doing so it would render the bifurcation between investor classes conceptually incoherent.

Three intersecting trends have contributed to the embedding of narrow terms of reference within political and academic debate: liberalisation, globalisation and financialisation. Each was vital in generating and legitimating the contours of the debate on the limits

[55] Turner, above, n48; see also A Sen, 'Introduction', in A Smith, *The Theory of Moral Sentiments* (first published 1759; London, The Penguin Press, 2009 ed) vii–xxiv (noting that neglect of Smith's opus has led to stunted appreciation of the complexity and 'plurality of human motivations, the connections between ethics and economics and the co-dependent—rather than free-standing—role of institutions in general and free markets in particular in the functioning of the economy': at viii); see also John Cassidy, *How Markets Fail* (New York, The Penguin Press, 2009) 337 ('Between the collapse of communism and the outbreak of the subprime crisis, an understandable and justified respect for market forces mutated into a rigid and unquestioning devotion to a particular, and blatantly unrealistic, adaptation of Adam Smith's invisible hand').

[56] The Financial Stability Board has provided a critical coordinating role in implementing the architectural design mandated by the G20. This has buttressed the work of pre-existing sector-specific supranational regulatory groupings, including the Basel Committee on Banking Supervision, the International Organization of Securities Commissions (IOSCO) and the International Association of Insurance Superintendents (IAIS). Global trends and the domestic regulatory responses have, in turn, been tracked by the Organization for Economic Cooperation and Development (OECD) and the International Monetary Fund (IMF).

[57] Financial Stability Board, *Overview of Progress in the Implementation of the G20 Recommendations for Strengthening Financial Stability* (Basel, 19 June 2012) 2 (noting 'Many jurisdictions still need to address weaknesses in their supervisors' mandates, to ensure sufficient independence to act, appropriate resources, and a full suite of powers to proactively identify and address risks'.)

[58] H Collins, *Regulating Contracts* (Oxford, Oxford University Press, 1999). Collins' point is not that that private law has lost vitality. Indeed he goes as far as to suggest that it 'is the index finger of the invisible hand that guides the markets' (at 59). Rather, continued relevance requires the discipline to interdict with changed realities about how standards, monitoring and sanctions can, or should, be best applied.

of regulatory intervention.[59] The combination of mechanisms, processes and principles governing corporate governance and financial regulatory reform agendas generated what political scientists term a Structured Action Field (SAF).[60] Power within a SAF is determined by the salience of the ideational terms of reference, the coherence of the underpinning vision, values and norms and the degree to which the interaction between both appear to provide beneficial outcomes. Once established, such a field is remarkably resilient, particularly if framed by the inculcation of a Shared Mental Model.[61] Inefficiencies (or indeed illegalities) can be—and often are—ignored, downplayed or addressed by the application of what appears to be more stringent rules or the more granular articulation of overarching principles. This dynamic is particularly apparent in corporate governance and financial regulation reform.[62] More often that not, however, these same initiatives tend to privilege the politics of symbolism.[63] By 2007 the ideational structure had not only become merely embedded but almost impervious to challenge. Two accounts from notable insiders highlight the extent of the groupthink. The first comes from Claudio Borio, the chief economist at the Bank for International Settlements. He used a G20 forum in Mumbai to explain why policymakers were incapable of exercising *ext-ante* restraint.

> To varying degrees, policymakers, just like everyone else, underestimated the threat. They were caught up in what, in retrospect, has partly turned out to be a Great Illusion. And even had the threat been fully recognized–and some no doubt did–the political economy pressures not to change policies would have been enormous. On the face of it, the regimes in place had proved to be extremely successful. A lot of reputational capital was at stake. And not even the often more critical academic community provided any support for change. Indeed, as regards macroeconomic policy, that community turned out to be part of the problem, not of the solution.[64]

[59] For socio-legal exploration of this process, see S Picciotto, *Regulating Global Corporate Capitalism* (Cambridge, Cambridge University Press, 2011); see more generally, T Porter and K Ronit, 'Self-Regulation as Policy Process: The Multiple and Criss-Crossing Stages of Private Rule Making' (2006) 39 *Policy Sciences* 41.

[60] N Fligstein and L Dauter, 'The Sociology of Markets' (2007) 33 *Annual Review of Sociology* 21; see more generally P Bourdieu, *The Logic of Practice* (Cambridge, Polity Press, 1990). Bourdieu refers to the importance of mapping the *habitus*–the complex social and physical institutional geography in which communities of practice assimilate and constantly adjust practice,

[61] A Denzau and D North, 'Shared Mental Models: Ideologies and Institutions' (1994) 47 *Kyklos* 3.

[62] See O'Brien, above n25; for global perspective, see J Hill, 'Evolving "Rules of the Game" in Corporate Governance Reform' in J O'Brien (ed), *Private Equity, Corporate Governance and the Dynamics of Capital Market Regulation* (London, Imperial College Press, 2007) 29–54.

[63] A case in point is Sarbanes-Oxley, the *Public Company Accounting and Investor Protection Act* (2002). Introduced in the aftermath of Enron and conflicts of interest in analyst research scandals, it privileged a rules-based approach to regulation. Rather than being seen as an early warning sign, the travails facing the US system were themselves arbitraged. The City of London exploited the unease of business, additional audit costs and litigation risk costs by suggesting an alternative framework based on the articulation of principles. Both practitioners and regulatory officials argued that the model could provide and did offer alternative and better oversight. The primary supporting evidence proffered for this derived from positive testing but the absence of an accounting scandal in the United Kingdom, see D Kershaw, 'Evading Enron: Taking Principles Too Seriously in Accounting Regulation' (2005) 68 *Modern Law Review* 594.

[64] C Borio, 'The Financial Crisis of 2007? Macroeconomic and Policy Lessons' (Speech delivered to the *G20 Workshop on the Global Economy*, Mumbai, 24–26 May 2009) 13, available www.g20.org/Documents/g20_workshop_causes_of_the_crisis.pdf.

The second comes from Raghuram Rajan. Professor Rajan gave a paper at the influential Jackson Hole retreat organized by the Federal Reserve Bank of Kansas in August 2005 at which he warned of the inevitability of collapse. In a book published in 2010, he recounted the audience reaction to the presentation he had made at Jackson Hole with the prescient title 'Has Financial Development Made the World Riskier?'.

> I exaggerate only a bit when I say I felt like an early Christian who had wandered into a convention of half-starved lions. As I walked away from the podium after being roundly criticized by a number of luminaries (with a few notable exceptions), I felt some unease. It was not caused by the criticism itself, for one develops a thick skin after years of lively debate in faculty seminars: if you took everything the audience said to heart, you would never publish anything. Rather it was because the critics seemed to be ignoring what was going on before their eyes.[65]

The material and ideational certainties associated with the privileging of this model financial capitalism have eroded. The testimony provided by Alan Greenspan in 2008 of a flaw in his 'ideological reasoning' punctured the self-referential belief in the power of free-markets to self-correct.[66] The externalities associated with introducing the austerity agenda to bail out large swathes of the financial sector in many developed countries demonstrate the bankruptcy of belief in the market's capacity to self-correct. It also demonstrates the need to resolve the existential conflict between enabling and communitarian approaches to corporate law.[67]

The claim by the Goldman Sachs chief executive Lloyd Blankfein in 2009, for example, that the bank was doing 'God's work' is a carefully circumscribed one.[68] Apparent success was measured by short-term *efficiency* criteria (eg, lower transaction costs, expansion of corporate profits, increased shareholder returns). These retrospectively justified and legitimated the innovation. The potential negative externalities were glossed over or ignored.[69] In much the same way, the 'asset-lite' strategy pioneered by Enron at the turn of the millennium suggested a new paradigm for financial reporting and the rise of private equity in the period 2004–2007 reprised claims that the leveraged-buyout governance

[65] R Rajan, *Faultines: How Hidden Fractures Still Threaten the World Economy* (Princeton, Princeton University Press, 2010) 3; see also E Dash and J Creswell, 'Citigroup Saw No Red Flags Even As It Made Bolder Bets,' *New York Times*, 23 November 2008 A1 (quoting an April 2008 interview in which Rubin argued: 'In hindsight, there are a lot of things we'd do differently. But in the context of the facts as I knew them and my role, I'm inclined to think probably not'). This reprised an argument made in his autobiography on the financial reporting scandals at the turn of the millennium; see R Rubin, *In an Uncertain World* (New York, Random House, 2003) 337 ('The great bull market masked many sins, or created powerful incentives not to dwell on problems when all seemed to be going well—a natural human inclination').

[66] Evidence to the House Committee on Oversight and Government Reform, Washington, DC, 23 October 2008 (A Greenspan).

[67] See D Millon, 'Communitarianism in Corporate Law: Foundations and Law Reform Strategies' in Mitchell, above n7, 1–34.

[68] J Arlidge, '"I'm Doing God's Work." Meet Mr. Goldman Sachs,' *The Sunday Times*, 8 November 2009 4.

[69] C Borio, above n64, 13; see also Rajan, above n65, 1 ('The problem was not that no one warned about the dangers; it was that those who benefited from an overheated economy—which included a lot of people—had little incentive to listen.').

model heralded the demise of the public corporation. Following the implosion of the securitisation market, the individual corporate and societal consequences of this myopia became clear.

The fallout impacted negatively the *responsibility* and *legitimacy* as well as long-termer *efficiency* dimensions. Investment losses triggered an enormous erosion of private wealth. Housing and capital markets went into a downward spiral and credit stopped flowing. Emergency funding to the banking and financial services sector solved neither the underlying liquidity nor solvency problems. It merely transferred the risk. Sloganeering about the inherent unfairness of 'privatized profits and socialized losses' became more than a worn-out cliché. Throughout the crisis and beyond, as we moved from the great moderation to the institutionalization of the politics of austerity, senior bankers expressed carefully couched regret. At no stage did they accept responsibility.[70] Instead a narrow technical defense was proffered. As the immediate crisis facing the banks receded, the strategies were framed even more aggressively. To preserve the sanctity of contract, there was a stated need to uphold terms entered into freely (if misguidedly). Moreover, a similar rationale justified the payments of market-determined bonuses to executives then working in de facto nationalized institutions. Second, the privileging of caveat emptor facilitated the transference of responsibility. Equally understandably, both sets of strategies fuelled public resentment. This prompted, in turn, political recognition of the need for substantive reform to safeguard legitimacy. It is in this toxic environment that the London Interbank Offered Rate (Libor) scandal emerged. To date, the still burgeoning investigation has resulted in two multi-million dollar settlements against UBS, Barclays and the Royal Bank of Scotland. The latter is rendered more embarassing precisely because the institution is under effective taxpayer control.

The regulatory fine is just the beginning for Barclays, for example, which is a defendant in some of the 24 interrelated Libor lawsuits that have been aggregated before a Manhattan federal court.[71] US liabilities may be higher because US plaintiffs are permitted to request punitive damages, while UK plaintiffs are limited to compensatory awards.[72] Criminal liability could be added to those regulatory fines and civil lawsuits. Further, the Barclays settlement is just the first in the joint trans-Atlantic investigation. For example, it has been followed in December 2012 by the announcement from the US Department of Justice (DOJ) that due to UBS's role in the manipulation of the Libor, UBS Japan not only had signed a plea agreement admitting its criminal conduct and would pay a fine of US$100 million, but also that two UBS former traders would face criminal charges. In addition, UBS AG (the Swiss parent company of UBS Japan), had entered into an Non-Prosecution Agreement (NPA) under which it would: admit and accept responsibility for its misconduct; pay a DOJ penalty of US$400 million; US$700 million due to Commodity Futures Trading Commission (CFTC) action; US$259.2 million due to the UK Financial Services Authority (FSA) action; and $64.3 million due to the Swiss Financial Markets Authority

[70] See, for example, A Hornby, 'Memo to Treasury Select Committee' Westminster, London, 10 February 2009, 38 (in a joint statement the CEO and Chairman of HBOS stated they were 'profoundly sorry' but claimed unprecedented global circumstances affected virtually all the top banks in the world but HBOS specifically').

[71] A Harris, C Harper and L Fortado, 'Wall Street Bank Investors in Dark on Libor Liability,' *Bloomberg*, 5 July 2012.

[72] ibid.

(FINMA) action for a combined total of more than US$1.5 billion.[73] While the method by which Libor is set contributed to such widespread collusion, it could not have persisted without negligent oversight and the failure to enforce by regulators. In the aftermath of the scandal, the New York Federal Reserve has played defense, stating that although in 2008 it was aware of the structural flaws in setting Libor, it lacked the jurisdictional power[74] to effect any meaningful change other than provide written recommendations to the Bank of England.[75] However, the limits of jurisdictional authority have rarely been an issue for US regulators when national interest issues have been privileged in the past and it is far from clear that this state of affairs has changed. For its part, the Bank of England claimed that the recommendations lacked the granularity to either start an investigation or set off alarm bells. The tortured justifications provided at corporate and regulatory level, while self-serving and deeply problematic, could also equally apply to regulators in the US who are faced with equally serious questions of competence. In the United Kingdom itself, the Libor scandal has had a deep impact on regulatory authority. The Treasury Select Committee stated in its report that it was 'concerned that the FSA was two years behind the US regulatory authorities in initiating its formal LIBOR investigations and that this delay has contributed to the perceived weakness of London in regulating financial markets.'[76] The strongly worded report notes that 'the standards and culture of Barclays, and banking more widely, are in a poor state. Urgent reform, by both regulators and banks, is needed to prevent such misconduct flourishing.'[77] The Committee provides a devastating critique of past, current and future trajectories. The FSA is accused of privileging a myopic approach that blinded it to the initial and ongoing systemic failure of compliance at Barclays. 'The FSA has concentrated too much on ensuring narrow rule-based compliance, often leading to the collection of data of little value and to box ticking, and too little on making judgments about what will cause serious problems for consumers and the financial system,' it finds.[78] In sharp contrast to the claims of sophistication and prudence that informed discussions of the risk-based approach of the British regulatory system prior to the Global Financial Crisis invalidating their assumptions, such as the Paulsen Review in the United States, the Committee now finds that 'naivety' and inaction underscored the 'the dysfunctional relationship between the Bank of England and the FSA which existed at that time to the detriment of the public interest.'[79] It would appear from the trenchant views expressed by the Treasury Select Committee that not much has changed. The erroneous calculation by the bank and the FSA as well as the Bank of England was that early cooperation would pay dividends. The Barclays settlement did not place the blame on any individual executive; nor was there initially any expectation from the regulatory authorities in the UK or the US that resignations

[73] Department of Justice, 'UBS Securities Japan Co. Ltd. to Plead Guilty to Felony Wire Fraud for Long-running Manipulation of LIBOR Benchmark Interest Rates' (Press Release, Washington, DC, 19 December 2012), available at www.justice.gov/opa/pr/2012/December/12-ag-1522.html

[74] S Nasiripour, 'Fed "Lacked Jurisdiction"on Libor,' *Financial Times*, 17 July 2012, 1.

[75] T Geithner, 'Libor Email from Timothy Geithner to Bank of England,' *The Guardian*, 1 June 2012, available at www.guardian.co.uk/business/interactive/2012/jul/13/libor-email-timothy-geithner-bank-england (last visited 5 February 2013).

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

[77] ibid.

[78] ibid, 112.

[79] ibid, 107.

were required or appropriate. Each was taken aback by the ferocity of political criticism of the deal and the perceived lack of accountability for infractions that point to widespread collusion, a fact belatedly acknowledged by the chairman of the FSA, Lord Adair Turner, who claimed that the activities of Barclays revealed 'a degree of cynicism and greed which is really quite shocking…and that does suggest that there are some very wide cultural issues that need to be strongly addressed.'[80]

III THE STRUCTURE AND PURPOSE OF THIS BOOK

The contributions to this book are motivated as a response to this prevailing climate of shocking cynicism and greed, entrenched for so long under Anglo-American models of finance capitalism.[81] In 2012 corrosive manipulation, deception and *poor* culture have been highlighted in scandals and prosecutions featuring names such as Barclays, Goldman Sachs, Lehman Brothers, Standard Chartered and UBS to name but a few. A decade earlier, there was widespread public outrage surrounding similar entrenched poor corporate practices at Enron, HIH and WorldCom. A decade or so before that, BCCI and Polly Peck were mired in eerily similar scandals. Indeed, if one tracks back through most decades, it is relatively easy to find many examples of poor corporate behaviour and scandal. Just like the tide, crises, especially in the financial sector, just seem to keep coming in and their impacts seem to be growing in their capacity for social and economic pollution. The carnage wrought by the GFC is yet to play out fully as seen in recent mass public demonstrations of protest in Europe against forced austerity programs and falling living standards. The GFC has illustrated dramatically that poor operational culture in business organisations, especially banks, can have devastating impacts beyond business bottom lines and across social and political structures. It is questionable just how robust the contemporary global economy would be if faced with another GFC any time soon and that possibility is by no means a far-fetched scenario. So, what potential is there to re-cast operational cultures in business, especially in the financial sector? Together the authors seek to make a contribution to a policy discourse that prioritises the need to address industry cultural deficiencies in initiatives to reconfigure financial regulatory infrastructures.

Part 1 explores the structural and historical dimensions that have shaped the evolution of financial regulation. In chapter 1, David Westbrook emphasises the utility of a conversational ethnography perspective, first in providing analytical purchase on how culture shapes contemporary market practice; and second in identifying what changes have to be made in institutional design to facilitate more convergence between the goals of finance organisations and the societies in which they exist. In chapter 2, George Gilligan first examines the political, economic and cultural imperatives that established and delivered high levels of regulatory autonomy to the City of London, thereby producing a model and culture of financial regulation which have been influential in other jurisdictions, most importantly

[80] P Jenkins, J Gapper and B Masters, 'The Gathering Storm: Flaws in Banking Fuel the Case for Structural and Cultural Reform,' *Financial Times* 29 June 2012, available at www.ft.com/intl/cms/s/0/26d8a33c-c1e0-11e1-8e7c-00144feabdc0.html (last visited 5 February 2013).

[81] Obviously cynicism and greed are as well rooted in other models of finance capitalism operating around the world, but the focus of this book is on the Anglo-American model.

the US; and second discusses national and international tensions regarding regulatory standard setting that affect prevailing cultures in national financial sectors. In chapter 3, Justin O'Brien argues that the Libor scandal has exposed as never before the deleterious effect of piecemeal erosion of purpose through ad hoc reframing of regulatory instruments in response to scandal. Consequently credible, sustainable reform necessitates revisiting the initial framing of capital market regulation. This in turn requires re-examining the normative impulses that informed the key architects of the administrative state, most notably the political thought of James M Landis, the driving force behind state involvement in capital market governance.

Part 2 continues the exploration of cultural influences in financial regulation with particular emphasis on the effects of incentives and integrity. In chapter 4, David Campbell and Joan Loughrey examine how self-interest in financial markets could be regulated, in particular the limits of the rules and principles approach. They use the lens of Adam Smith's writings on self-interest and market exchange and how they have been interpreted by prominent welfare economist Amartya Sen. In chapter 5, Bob Ferguson details the long history of divergence between popular conceptions of decency and the operating culture of sales-oriented financial institutions, demonstrating that what is different in recent times is not so much the behaviour of bankers as the public outrage it has prompted as man-in-the-street and inside-player conceptions of acceptable behaviour collide in the aftermath of the financial crisis. As a result, the key to change for the better lies not just in the sphere of ethics and culture but in the material incentive structures that condition the behaviour of institutions and individuals. In Chapter Six, Seumas Miller highlights the micro and macro-institutional structural problems that lead to recurring scandals such as Libor in the financial sector. He considers the Libor scandal as an example of a collective action problem which needs to be countered by processes of professionalisation and ethical acculturation.

Part 3 uses the Libor scandal as a specific lens through which to consider how culture might be regulated in the financial sector in a post-Libor environment. In chapter 7, Eric Talley and Samantha Strimling explain how distorted incentive systems and widespread flouting of compliance protocols within financial organisations involved with Libor became normal elements of operational practices surrounding the setting of Libor rates, thus creating the cultural context for sustained manipulation of the system. In chapter 8, Andrew Campbell and Judith Dahlgreen examine the new governance model of the financial sector in the United Kingdom, in particular the role of the Bank of England following the major reforms brought by the Financial Services Act 2012. In chapter 9, Justin O'Brien examines how the Libor scandal has accelerated the increased use by US regulatory actors of deferred prosecution and imposition of an external monitor as mechanisms that seek to embed increased and improved levels of integrity within the organisational frameworks of firms. In chapter 10, Steve Mark and Tahlia Gordon discuss the model of regulating lawyers that is used by the Office of the Legal Services Commissioner (OSLC) in New South Wales, an approach which integrates the positive potential of ongoing regulatory conversations between the regulator and regulated that emphasises a commitment to high ethical standards and which has the potential to be applied in the financial sector.

Part 4 evaluates the realities and limitations associated with regulating culture in the financial sector. In chapter 11, Pamela Hanrahan examines how the 'fiduciary idea' is often invoked to explain what the relationship is, or ought to be, between financial intermediaries (including broker-dealers, advisers and investment managers) and their clients. But is the fiduciary idea the right conceptual model for this relationship? If it is, why does fiduciary law struggle to deliver a culture in financial services firms in which the clients' interests are at the centre of the endeavour? Thus her chapter explores the limits, and limitations, of the fiduciary idea in financial services law in the context of the Future of Financial Advice (FoFA) reforms to chapter 7 of the *Corporations Act 2001 (Cth)* in Australia. In chapter 12, Michael Legg analyses whether class actions commenced by shareholders against financial organisations can regulate culture through the lens of the Bank of America Corporation class action arising from the acquisition of Merrill Lynch & Co in the United States and the National Australia Bank Limited class action arising from the increase in provisions for losses from its portfolio of collateralised debt obligations in Australia. The link with culture is explored by examining the following questions: who sues, who gets sued and what are the outcomes? In chapter 13, Olivia Dixon discusses the *Criminal Code Act 1995* (Cth) which is regarded as one of the most sophisticated models of corporate criminal liability in the world. However, despite repeated instances of corporate misconduct linked to a toxic culture, prosecution based on cultural culpability has been noticeably absent. The chapter considers to what extent definitional, pragmatic and ethical issues explain this. In the concluding chapter, eminent regulatory theorist John Braithwaite remarks on the various contributions to the book and ponders the prospects for situating cultural change within the financial regulatory reform paradigm. His argument that the integration of rules, principles and norms interact and are disseminated through storytelling is both erudite and intuitive. It is inescapable that credible reform necessitates a refashioning of the narrative governing the place of capital markets in society.

The extension of the role of the state through legal and other mechanisms cannot be considered in a vacuum, nor too can the role played by crisis and contingency in facilitating ideational change. As with the current crisis afflicting the Anglo-American model of capitalism, the debate in the 1930s on whether and how the government should intervene was based on a social as well as economic catastrophe in which the gullible and the unwary were beguiled by the lure of instant gratification. The resulting New Deal legislation and regulatory infrastructure in the US was a profound recalibration in which private interests were rendered subservient to societal obligation. Not for the first time in regulatory design, the contemporary search for credible reform necessitates going back to the future and reabsorbing the lessons of regulatory history, and this is a recurring theme in this book.