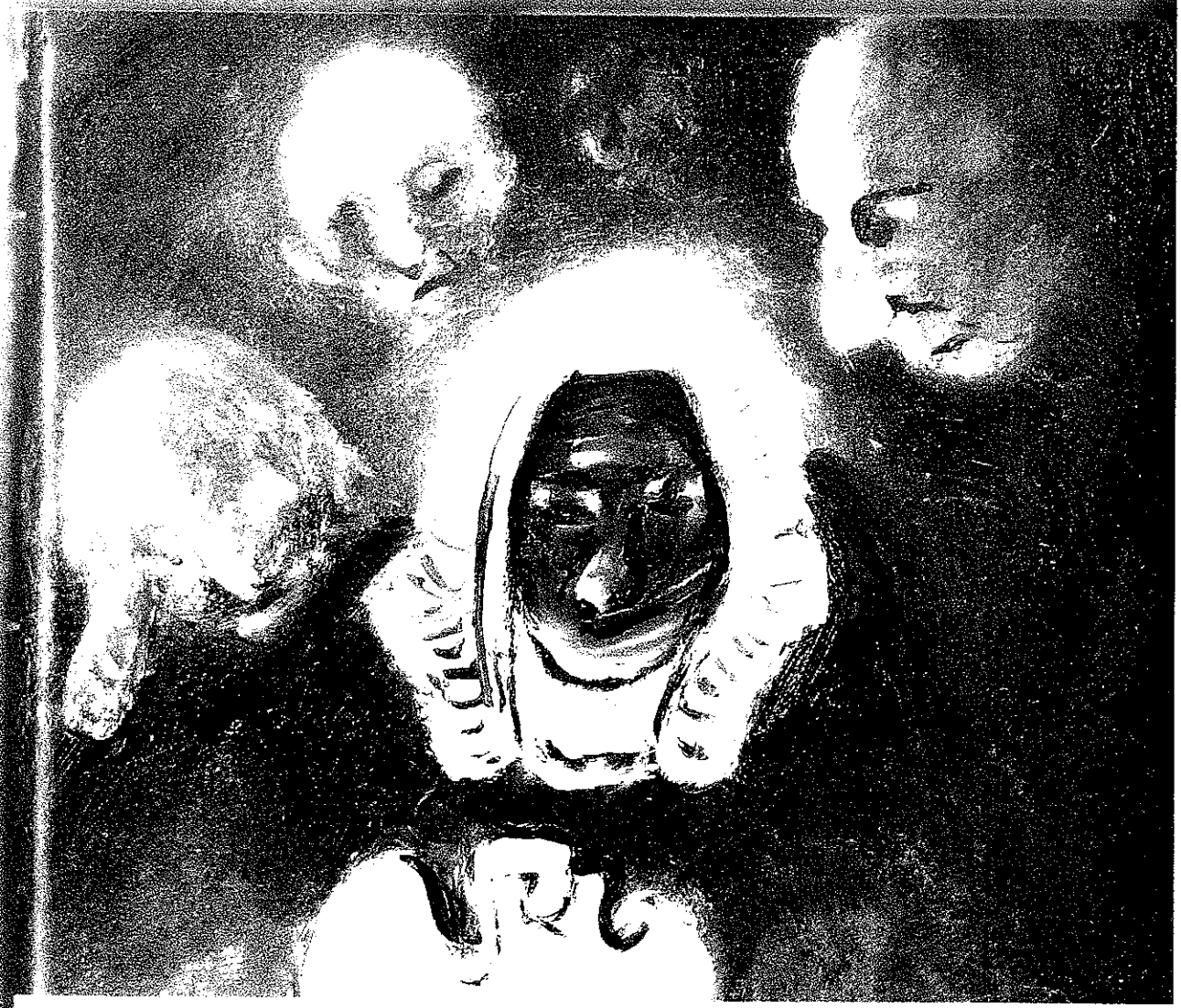

REGULATING LAW

EDITED BY
CHRISTINE PARKER,
COLIN SCOTT, NICOLA LACEY,
AND JOHN BRAITHWAITE

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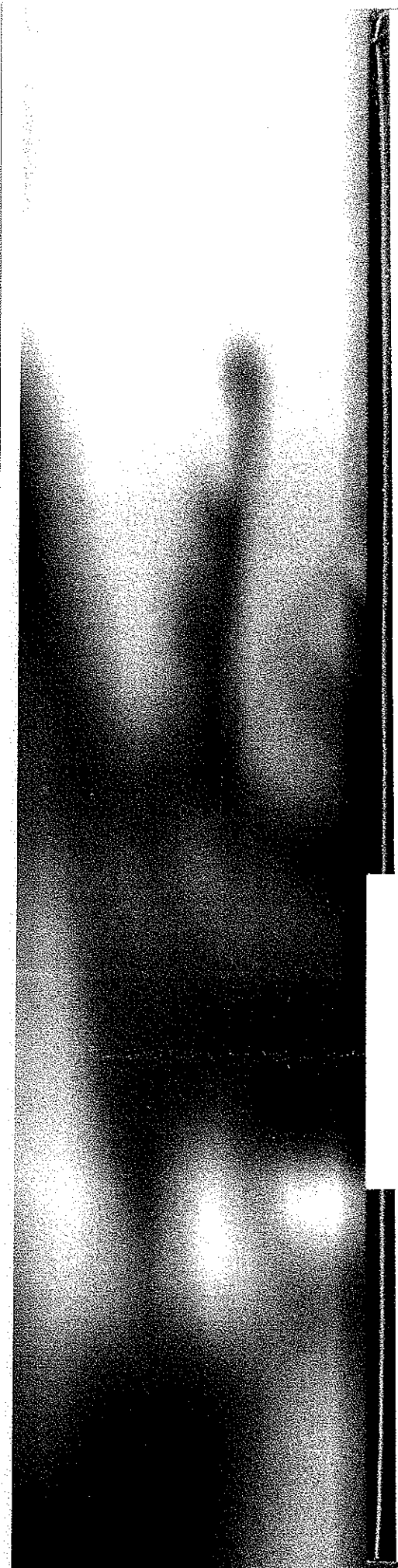

Regulating Law explores how the goals and policies of the new regulatory state are fundamentally reshaping jurisprudence in the domains of public law, private law, and the regulation of work and business. Fourteen areas of the core legal curriculum are reassessed from the standpoint of the impact of regulation on mainstream legal doctrine. This volume examines the collision of regulation by law with regulation by other means and provides an innovative regulatory perspective for the whole of law.

To date, regulatory scholarship has mainly been applied to specific legislative programs and/or agencies for the social and economic regulation of business. In this volume, a cast of internationally renowned legal scholars each apply a 'regulatory perspective' to their own area of law. Their contributions provide a rich analysis of the limits and potential of legal doctrine as an instrument of control both in regulatory settings, and in settings traditionally immune from regulatory analysis. The result is an examination of the regulation of the doctrines of law itself, of the way in which law regulates other forms of regulation and social ordering, and of law as a subject and object of regulation.

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Edited by

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We would like to thank and acknowledge here our debt to all our contributors not only for the work they put into preparing, presenting, and then revising their own papers after the workshop, but also for their contributions to each other's papers and to the whole project. We especially need to single out Hugh Collins for thanks, not only for contributing a new paper on regulating contract law to this collection and a mini-keynote address to the workshop, but also for being such a good sport in suffering with good humour the criticism of all the other authors who were asked to emulate and improve upon his pioneering juxtaposition of regulatory theory and legal doctrine in *Regulating Contracts* (Oxford University Press, 1997) in their own domains. Clifford Shearing, David Soskice, and Terence Daintith were each co-opted into pre-reading and presenting commentaries on the papers at the workshop. We are most grateful for their comments and for those of Suzanne Corcoran, Paul Finn, and the other observers at the workshop.

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Introduction

CHRISTINE PARKER, COLIN SCOTT, NICOLA LACEY, and JOHN BRAITHWAITE

Just as we think it is useful to look at regulation through a legal lens, we hypothesize at the outset of this project that it might prove useful to look at law through a regulatory lens. We consider what it means to see law as a form of regulation and as something that is itself regulated by other forms of regulation. The chapters of this book, therefore, use the tools of regulatory theory to ask questions about a variety of areas of legal doctrine. They were chosen by reference to the main subject areas in the legal curriculums of the common law countries.[1] The concluding chapter will come to see law as one (significant) strand in a regulatory web that is growing in its complexity and plurality. This final chapter will deploy the inductive methodology frequently used in regulatory scholarship to ground new explanatory and normative theory and shed light on existing scholarship.[2]

When we speak of applying a regulatory lens to law, what do we mean by regulation? Definitions of 'regulation' abound, and for different intellectual purposes there is merit in defining regulation in different ways—excluding or including regulation by non-government actors, excluding or including governance without rules, including only intentional attempts to influence behaviour, or including all actions that have regulatory effects.[3] For scholars of regulation, the core area of study is 'regulation' in the sense of 'the intentional activity of attempting to control, order or influence the behaviour of others'.[4] This definition is broad in the sense that 'regulation' is not limited to targeted rules that are enforced and monitored, nor is it limited to state intervention in the economy and/or civil society. It incorporates three basic requirements for a regulatory regime: the setting of standards; processes for monitoring compliance with the standards; and mechanisms for enforcing the standards.

For the purposes of assessing the regulatory significance of law, however, this definition of regulation may be in certain respects too narrow. For example, if we were analysing how the invisible hand of the market sets the price of

[1] Some areas, such as environmental law, where a regulatory perspective is already pervasive, have been left out.

[2] See e.g. J. Braithwaite, 'Beyond Positivism: Learning from Contextual Integrated Strategies', *Journal of Research in Crime and Delinquency*, 30 (1993), 383; C. Parker, *Just Lawyers* (Oxford: Oxford University Press, 1999), 4–6.

[3] See J. Black, 'Decentring Regulation: Understanding the Role of Regulation and Self-regulation in a Post-regulating World', *Current Legal Problems*, 54 (2001), 103. See also the introduction in R. Baldwin, C. Scott, and C. Hood (eds.), *A Reader on Regulation* (Oxford: Oxford University Press, 1998), 1, 2–4; C. Parker and J. Braithwaite, 'Regulation', in P. Cane and M. Tushnet (eds.), *Oxford Handbook of Legal Studies* (Oxford: Oxford University Press, 2003), 119.

[4] J. Black, 'Critical Reflections on Regulation', *Australian Journal of Legal Philosophy*, 27 (2002), 1.

a particular product, we would say this was economics, not regulatory studies. If, however, we were studying decision-making about how and when to design institutions so as to increase exposure of prices to the non-purposive control of the market, we would say this was an example of regulatory studies. If we were undertaking Foucauldian research on how the mute bars and barriers of Disney World make certain kinds of hazardous conduct impossible, we would not be doing regulatory research.[5] But if we incorporate such research within a study of the agency of the designers of the architecture of Disney World, or the internet, with their intent to shape the way we play and compute, then this is regulatory research.[6] The most influential theories of regulation involve some conception of private or public intent to shape the flow of events. Yet it makes no sense to study the effects of our intended agency without simultaneously examining the unintended effects of that agency. We cannot study competition law as a regulatory activity without also examining structural effects of markets; we cannot study how Bill Gates regulates cyberspace without analysis of how the architecture of the internet shapes our information choices; we cannot assess the regulatory significance of criminal law or the law of torts without understanding the indirect, legitimizing effects of doctrines which, though not designed for specifically regulatory purposes, may be a condition for such regulatory efficacy as these areas of law have. Our methodological bias is that we see best when our regulatory lens is multifocal, sometimes narrowly focused on intentional rule-making by public actors, sometimes widening its horizon to private, non-rulelike, or non-intentional, modalities of control over the flow of events.

In applying a regulatory lens to legal doctrine we are assuming that all law can fruitfully be seen as 'regulation'. Few would argue that law is not intended to regulate, even if just by maintaining order or regulating the resolution of disputes through the courts. Yet, as the contributions to this book show, finding clear regulatory purposes in some areas of doctrine is difficult. This does not mean it is not fruitful to see those areas of law as 'regulation' (although they might be less tightly coupled to the insights of regulatory theory). It does mean that much of the work in applying a regulatory perspective may lie in identifying implicit, indirect, or partial regulatory purposes and effects. It also means that much of the value in a regulatory perspective on law is likely to be the insight it gives us about how different areas of law with different levels of regulatory intent interact, and interfere, with one another.

There are at least three different, but overlapping, ways in which the contributors to this collection apply a regulatory lens to law.[7] In each, the meanings and levels of analysis of 'law' and 'regulation' differ. But the three connect

[5] C. Shearing and P. Stenning, 'Say "Cheese!": The Disney Order that is not so Mickey Mouse', in Shearing and Stenning (eds.), *Private Policing* (Newbury Park, Calif.: Sage, 1987), 309.

[6] L. Lessig, *Code—and Other Laws of Cyberspace* (New York: Basic Books, 1999).

[7] The following three sections follow Hugh Collins's informal keynote to the Regulating Law Workshop, in which he set out three themes that he thought the project was intended to have.

and interrelate in ways that give us a fuller perspective on regulating law. The *first* involves a dialogue between lawyers and regulationists[8] about the questions and methodologies in their respective areas of scholarship and how they can and do intersect. The *second* involves the consideration of the varying regulatory purposes or orientations of different areas of law, and how they interconnect and compete with each other. The *third* focuses on how law (seen overall as just one form of regulation in society) interacts with other forms of regulation or normative ordering.

Dialogue between Legal and Regulatory Scholarship

At one level this book is about bringing together what lawyers and regulationists do as scholars, the different methods, questions, and foci that each style of scholarship brings to the study of law, and asking how they can enlighten one another. Typically regulationists concern themselves with analysing various types of regulatory norms, techniques, and organizations (legal and non-legal) and how effective each is in different circumstances. In relation to law,[9] a regulatory perspective asks empirical questions about the proactive effects of law on society as a whole (or at least the target segment of society)—for example, the extent to which enforcement prevents and remedies wrongful conduct—and normative questions about how law and regulatory technique can be designed to be most effective at accomplishing social goals. The methods of regulation research are often empirical, and theory is generally aimed at elucidating the impact of law on social practices and institutions external to law and vice versa. Legal scholars, by contrast, typically take an internal approach to law that focuses on the content of legal doctrine and its coherence.[10] In common law systems their methodology is influenced both by the case-based reasoning of the common law (a form of inductive reasoning) and by the principles-based approach which is common to both civilian and common law traditions.

In most systems, legal scholarship is to a significant degree oriented to eliciting and examining distinctive legal doctrines characterized by a certain degree of normative complexity and autonomy. Of course many legal scholars already find it helpful to use sociological and political science regulatory research in their own scholarship. Nevertheless, regulatory scholarship has mainly been applied, by both lawyers and regulationists, to certain areas of law, in particular, specific legislative programmes and/or regulatory agencies for the social and

[8] The term is ugly but is a useful shorthand for scholars of empirical and theoretical research on regulation.

[9] Regulation researchers also concern themselves with a variety of non-legal regulatory practices.

[10] See E. Rubin, 'Legal Scholarship', in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Oxford: Blackwell, 1996), 562. For an extreme version of the internal perspective to law in legal scholarship, see E. Weinrib, 'Legal Formalism', in Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory*, 332.

economic regulation of business (either on an industry basis such as financial services, nuclear energy, and telecommunications, or on a topic basis such as environment, health and safety, and competition). More recently, public law, broadly defined, has also been conceived as the regulation of government and governance.[11] This book widens the range of regulatory legal scholarship by asking what light can be shed on the various branches of mainstream law using the tools, concepts, and methods of regulatory theory, regardless of whether these areas have traditionally been seen as 'regulatory' or not. This broadens regulatory scholarship by looking for the regulatory intent and effect in the content of legal doctrines that regulationists rarely consider, even if that intent and/or effect is implicit, episodic, or indirect.

The Different Ways that Law Regulates

Because the regulatory perspective in this book takes legal doctrine seriously on its own terms, the contributions are able to identify some of the ways different areas of law operate and 'think' about themselves as regulation, and how those different modes of regulation within law interact with one another. Much legal scholarship that relates to regulation draws a crude distinction between two modes of reasoning within law—instrumental, forward-looking, or policy-oriented ways of thinking and backward-looking, principled, or rule-based doctrinal reasoning.[12] The latter way of thinking about law emphasizes the autonomy of legal reasoning from society, while the former sees law as the tool of society. To draw a distinction here between legislation as embodying a modern, instrumental, and purposive approach, in contrast with the doctrinal approach of the common law, is too simple and liable to be misleading. Within some common law systems, notably that of the United States, it is widely suggested that courts have long favoured an instrumental approach to legal reasoning, even in the absence of instrumental legislation.[13] By the same token, legislation may be deployed to reinforce or develop the universalistic principles more commonly associated with the common law.

Accordingly these two distinctive 'mentalities' of law—contrasting understandings of 'how the law thinks'—are analytically elusive. We are not simply

[11] See Baldwin *et al.* (eds.), *A Reader on Regulation*, for a summary of the regulation literature. For examples of the regulation of government literature, see C. Hood, C. Scott, O. James, G. Jones, and T. Travers, *Regulation inside Government: Waste-Watchers, Quality Police, and Sleazebusters* (Oxford: Oxford University Press, 1999), and at the broadest level—the regulation of governance via international law, see J. Braithwaite and P. Drahos, *Global Business Regulation* (Cambridge: Cambridge University Press, 2000).

[12] e.g. R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective* (Oxford: Oxford University Press, 1995), 164–8, on 'voluntas' and 'ratio'; H. Collins, *Regulating Contracts* (Oxford: Oxford University Press, 1999).

[13] M. J. Horwitz, *The Transformation of American Law 1780–1860* (Cambridge, Mass.: Harvard University Press, 1979).

dealing with contrasts between statute and case-law, or public regulation and private law.[14] The instrumental mentality associated with regulation is about influencing the behaviour of people to accomplish particular social objectives.[15] The regulatory intention is frequently explicit and forward-looking, although it may be politically contested. For the doctrinal, universalistic mentality, associated with classical common law reasoning, regulatory intention is not central, although the law may have various regulatory intentions and effects in specific contexts. As some of our contributors show, there are not just two ways of thinking and regulating within law—rather law is 'multidimensional'.[16] Thus a regulatory perspective on law may be able to illuminate multiple innovations in, or recasting of, legal doctrines that have occurred as a result of the blurring of distinctions between public and private law, statute and case-law, regulation and common law.[17]

A regulatory perspective on law looks for ways in which the various regulatory goals in law connect or collide with each other, and with the more implicit regulation of the common law. It also looks for ways in which the converse is true, that common law interacts and influences the operation of law that is intended as instrumental regulation. It asks, What is the impact of the instrumental and common law mentalities upon each other, both within and beyond legal doctrine? For example, can we, as Hugh Collins does in *Regulating Contracts* (discussed below), generalize about a 'productive disintegration' of doctrinal reasoning under instrumental regulatory pressure, and under what conditions could such a productive disintegration occur?

As one would expect, chapters organized specifically around areas of doctrine—such as contract, property, and tort—that apply to a wide range of social practices and contexts tell a more complex, variable, and tentative story of law's regulatory import than do chapters organized around areas of social practice—work, competition, the family—in which law has been invoked with more specifically regulatory intent. If the objective of the collection were only to describe and understand regulation more fully, it would certainly have made more sense to assign chapters on the basis of different areas of social life.[18] This is the way that much regulation research is organized. Our decision was to allocate chapters according to doctrinal categories aimed to provoke a new dialogue between regulatory theory and research, and legal doctrinal scholarship. Whether we look at contract law or the social practices of contracting through a regulatory lens, it is possible to ask questions about the ways that law can be usefully seen as subjects and objects of regulation. How do the laws that apply in that space regulate and how are they regulated?

[14] Julia Black makes these possibilities particularly clear in Ch. 2 in this volume.

[15] Peter Cane's 'Administrative Law as Regulation' (Ch. 10 in this volume) helps to clarify this.

[16] Angus Corbett and Stephen Bottomley, Ch. 3 in this volume.

[17] Collins, *Regulating Contracts*, 53–5. Collins talks about the 'productive disintegration of private law' as its discourses of reasoning are transformed and reconfigured through clashes with the discourses of economic and social regulation.

[18] See Nicola Lacey, Ch. 7 in this volume.

Meta-regulation: The Interaction between Law as Regulation and Other Forms of Regulation

The insights in the second aspect of the regulatory perspective (above) relate to how different modalities or regulatory programmes *within* law interact. But regulation research is also interested in blurring the boundaries of law itself by inquiring into how law interacts with other forms of normative ordering. Thus it is useful to think about the relationship of law and society or law and economy in terms of various layers of regulation each doing their own regulating. At the same time, each layer regulates the regulation of each other in various combinations of horizontal and vertical influence.[19] The label 'meta-regulation' has been applied to this concept.[20] In Hugh Collins's book *Regulating Contracts* private law regulates the self-regulation of the parties in contract while regulatory law regulates private law, and now in the UK the Human Rights Act re-regulates the private law. Some regulatory researchers have argued that such interactions between public regulation and private law are just one manifestation of the more reflexive, meta-regulatory relationships between regulatory institutions of all types (legal and non-legal) in a 'new regulatory state'.[21]

One of the characteristic concerns in the study of regulation is how various regulatory tools impact on (or fail to impact on) daily life in their attempt to order it in accord with some set of norms;[22] and the extent to which the values represented in regulation and the techniques used to monitor and enforce compliance with regulatory standards fit with pre-existing norms and social ordering in the target population.[23] Much of the evidence shows that apparently

[19] See C. Shearing and J. Wood, 'Nodal Governance, Democracy and the New "Denizens": Challenging the Westphalian Ideal', *Journal of Law and Society*, 30 (2003), 400; C. Scott, 'Accountability in the Regulatory State', *Journal of Law and Society*, 27 (2000), 38.

[20] C. Parker, *The Open Corporation* (Cambridge: Cambridge University Press, 2002), Ch. 9; Parker and Braithwaite, 'Regulation'; C. Scott, 'Speaking Softly without Big Sticks: Meta-regulation and the Public Audit', *Law and Policy*, 25 (2003), 203. See also P. Grabosky, 'Using Non-governmental Resources to Foster Regulatory Compliance', *Governance: An International Journal of Policy and Administration*, 8 (1995), 527; B. Morgan, 'Regulating the Regulators: Meta-regulation as a Strategy for Reinventing Government in Australia', *Public Management: An International Journal of Research and Theory*, 1 (1999), 49, and R. Rhodes, *Understanding Governance: Policy Networks, Governance, Reflexivity and Accountability* (Buckingham: Open University Press, 1997).

[21] See J. Braithwaite, 'The New Regulatory State and the Transformation of Criminology', *British Journal of Criminology*, 40 (2000), 222; C. Hood and C. Scott, 'Bureaucratic Regulation and New Public Management in the United Kingdom: Mirror-Image Developments?', *Journal of Law and Society*, 23 (1996), 321; Parker, *The Open Corporation*, 12–15; G. Majone, 'The Rise of the Regulatory State in Europe', *West European Politics*, 17 (1994), 77; M. Moran, 'Understanding the Regulatory State', *British Journal of Political Science*, 32 (2002), 391.

[22] The choice of norms is often a separate question, though norm-form and tool-form are sometimes subjects of simultaneous construction of normative and explanatory theory (see John Dewar, Ch. 4 in this volume).

[23] e.g. I. Ayres and J. Braithwaite, *Responsive Regulation* (New York: Oxford University Press, 1992); R. Baldwin, *Rules and Government* (Oxford: Clarendon Press, 1995); E. Bardach and R. Kagan, *Going by the Book: The Problem of Regulatory Unreasonableness* (Philadelphia: Temple University Press, 1982); J. Black, *Rules and Regulators* (Oxford: Clarendon Press, 1997); N. Gunningham and P. Grabosky, *Smart Regulation: Designing Environmental Policy* (Oxford: Clarendon Press, 1998); N. Gunningham and R. Johnstone, *Regulating Workplace Safety: Systems and Sanctions* (Oxford: Oxford University Press, 1999).

effective legal regulation that is not responsive to non-legal normative orderings ultimately fails to accomplish its goals.[24] It can be fruitful to think of regulation occurring in a 'regulatory space' in which the operation and competition of various regulatory regimes influences regulatory impact.[25] At this level of analysis, regulatory research also examines how the intended effects of regulation are modified and mediated by social customs and structural realities (non-legal ordering). Hence it makes sense to ask how law itself is regulated by other forms of ordering, that is, how it is modified and mediated by social relations and customs so that the actual effects of the law might be quite different from those intended.

This third question about the interaction of legal and other forms of regulation raises broad historical and comparative questions about the conditions under which legal and non-legal regulation can be effectively coordinated—'structurally coupled', as Gunther Teubner has put it.[26] Some regulatory scholars have diagnosed a structural change in the regulatory approach of late modern Western states towards a style oriented to 'steering' rather than 'rowing' or 'government-at-a-distance'—a hypothesis which would suggest important changes in the interaction between legal and non-legal regulation, and in the specific (increasingly 'meta-regulatory') style of legal regulation. By contrast, several of the authors in this collection point to the long history of law's regulatory role, and question whether contemporary changes in the style and scope of state power are as radical as theorists of the 'new regulatory state' have suggested.

Hugh Collins's *Regulating Contracts*

Hugh Collins's *Regulating Contracts* was the inspiration for this book in the sense that it demonstrates that it is possible to apply a regulatory perspective to law in a way that is salient to both regulationists and legal scholars.[27] This does

[24] See P. Selznick, *The Moral Commonwealth* (Berkeley: University of California Press, 1992), 463. Cotterrell, *Law's Community* (304–5), describes at least five dimensions of the 'moral distance' between the normative expectations of 'law-government' and those of the field of social interaction it attempts to regulate—that regulation is too generalized, absolutist, inflexible, impressionistic, and democratically weak.

[25] C. Scott, 'Analysing Regulatory Space: Fragmented Resources and Institutional Design', *Public Law* (Summer 2001), 329; C. Shearing, 'A Constitutive Conception of Regulation', in P. Grabosky and J. Braithwaite (eds.), *Business Regulation and Australia's Future* (Canberra: Australian Institute of Criminology, 1993), 67.

[26] J. Paterson and G. Teubner, 'Changing Maps: Empirical Legal Autopoiesis', *Social and Legal Studies*, 7 (1998), 451, 457.

[27] As one reviewer has said, 'Collins' book displays an attitude towards the law of contract which is exemplary. He deepens fine contractual scholarship by combining it with empirical studies and social theory in just the way that exclusively formal legal scholarship does not'; D. Campbell, 'Reflexivity and Welfarism in the Modern Law of Contract', *Oxford Journal of Legal Studies*, 20 (2000), 477, 485.

not mean that the particular theories, concepts, and historical assumptions about the development of law and the regulatory state in *Regulating Contracts* need be taken as defining hypotheses of a regulatory perspective on law more generally. Rather, *Regulating Contracts* is a model of the type of scholarship that combines regulatory and doctrinal research. It is certainly the most systematic treatment we have of any field of law as an institution that regulates and is regulated. Firstly, Collins's book uses the conceptual and empirical tools of regulatory theory to examine the law of contract and ask how effective and efficient it is in regulating markets and contracts via standard-setting, monitoring, and enforcement.[28] As Collins points out, this approach assumes that the law of contract can be seen as 'a regulatory technique, equivalent to other techniques of social and economic regulation of business, though it differs in its forms, attributes and capacities' and that 'private law pursues instrumental purposes like other types of legal regulation of markets' (at least as one strand of discourse).[29] Collins identifies a number of structural weaknesses in regulation by the private law of contract, but also argues that the 'private law' of contract has the capacity to overcome many of these limitations, especially as it interacts with public regulation.

This leads to the second theme of *Regulating Contracts*. Collins suggests that 'we have reached an interesting historical moment' in which the nineteenth-century systems of private law have been demonstrated to be 'defective instruments of regulation'. At the same time the 'welfare or public regulation' adopted in the twentieth century to resolve these problems in command and control mode has also been shown to suffer from weaknesses in efficiency and efficacy.[30] However, the interaction, interference, and dialogue between public and private law regulation of contract, according to Collins, has created a fresh productive capacity for regulation. In particular the self-referential, closed nature of private law is 'productively disintegrating' and being transformed so that instrumental or policy concerns become more dominant.[31] Nevertheless, Collins argues that in this process private law retains, and even enhances, its main advantages as a regulatory tool, that is normative complexity that gives it the 'capacity to provide a more sophisticated, contextualised, and efficient system of regulation in many instances [than public regulatory systems]'.[32] So the 'collision' that Collins describes between the private law system of contract and the public law regulation of contractual practices (e.g. consumer protection, fair rents, minimum wages) is ultimately seen as productive. The goals and policies of welfare regulation have been included in contract law's normative domain through doctrines such as abuse of rights, unconscionability, and good faith. Once incorporated into private law doctrine, these norms (originating in public law regulation) have been

[28] See esp. ch. 4, and also ch. 2. Each of ch. 5 to 16 apply a combined regulatory and doctrinal analysis to each of various issues raised by the use of contract to regulate the construction of markets and the distributive outcomes of markets.
[29] Collins, *Regulating Contracts*, 56.
[30] Summarized from *Regulating Contracts*, 361.
[31] See esp. ibid., ch. 3.
[32] Ibid. 358.

applied by private law to many more varied situations than ever contemplated by the original legislation.[33] The private law of contract informs the public law of consumer rights and is in turn regulated by and transformed by that public law. Conversely, the trend to privatization and corporatization in government has meant that concepts from the private law of contract now have an increasing significance in the public sector and its regulation.[34] So, for Collins, the regulatory lens reveals to us a productive hybridity between public and private law doctrine as these two legal traditions regulate each other.

The interpenetration of private and public law is not only descriptively accurate, it can also be normatively desirable. Public regulation can transform private conflicts into public issues. An example is individual problems of people signing loan documents they do not understand being addressed by regulatory legislation requiring disclosure in simple English. Under certain conditions, justice can also be enhanced when private law is used to enforce public standards. Here an example is Collins's discussion of contracts between businesses mandating compliance with process of production standards for assuring quality, safety, or environmental responsiveness.[35] Where private contractors have greater practical capacity to monitor compliance with the standards within the routines of their contracting than do public inspectors, then direct public regulation less adequately serves the purposes of public regulation than do public law standards that percolate into private contracting.

The chief advantage of the private law of contract, according to Collins, is its capacity to be 'reflexive' or 'responsive'[36] to other forms of non-legal regulation:

> [Private law regulation of contracts] devolves an extensive discretionary power of self-regulation to the parties. Subject to the requirement of a negotiated consensus, the rules produced will then be routinely enforced by the legal system through the agency of the ordinary courts. By conferring autonomy upon the parties to devise their own regulation, private law achieves considerable flexibility, which in turn achieves the advantage that the regulation permits experimentation with novel types of business transaction that might enhance productive efficiency.[37]

As the private law of contract is transformed by public regulation, it also develops the capacity to incorporate 'references to externalities, public goods, and the articulation of policy objectives for regulation' into its reasoning and makes 'procedural adjustments, such as permitting amicus curiae, granting standing to collective groups, the admission of statistical evidence, and using the burden of proof for the purpose of detection of violation of regulatory standards'.[38] It is 'reflexive' in that it allows itself to be regulated by other forms of instrumental regulation while also facilitating the self-regulation of those that it seeks to regulate:

> The underlying advantage of private law regulation is the way it commences with a respect for the self-enforced, self-regulation of the parties to the contract, so that every

[33] Ibid. 46–52.
[34] Ibid. 303–20.
[35] Ibid. 297.
[36] See ibid. 65–9 for an explanation of these terms.
[37] Ibid. 67.
[38] Ibid. 93.

[regulatory] intervention has to be justified as either one which better achieves their objectives or one which pursues important distributive objectives. This style of reflexive regulation ensures that interventions confront the context of transactions and provide regulation tailored to the particular circumstances of the transaction.[39]

Transformed private or common law, in Collins's conception, can occupy a significant coordinating function among the interactions of various types of regulation. According to Teubner any regulatory intervention that attempts to change social institutions will face a 'regulatory trilemma'—either the legal rules may fail to have an impact on social practice, or they may subvert desirable social practices by making impracticable demands, or the law may lose the coherence of its own analytical framework by seeking to incorporate sociological and economic arguments in its reasoning to respond to instrumental concerns.[40] Collins argues that the transformed private law of contract avoids the problem of the 'regulatory trilemma' through the 'subtle' assessment of competing discourses around contracts.[41] But can Collins's hypothesis about the responsive potential of contract doctrine be generalized to other fields of law such as crime or torts, in which there may be distinct limits on the extent to which doctrinal responsiveness to social norms is desirable?

Conclusion

As we have seen, Teubner argues that any regulatory intervention that attempts to change social institutions will face the possibility that it is either (1) 'irrelevant'; that is, it is *ineffective* because people fail to comply; or (2) 'produces disintegrating effects on the social area or social life'; that is, it is *non-responsive* to existing norms, values, and social orderings; or (3) produces 'disintegrating effects on regulatory law itself'; that is, it is *incoherent*.[42] In the original briefing document sent to contributors to this project, the editors suggested that much contemporary regulatory research could be characterized as being concerned with effectiveness, responsiveness, and/or coherence.[43] One need not adopt systems theory, as Teubner does,[44] to see these as a useful heuristic for the types of question that lawyers and regulationists might ask about regulating law. These are indeed the questions that characterize the contributions to this book.

[39] Collins, *Regulating Contracts*, 358. Selznick, *The Moral Commonwealth*, 463, also sees common law reasoning as inherently 'responsive'.

[40] G. Teubner, 'Juridification: Concepts, Aspects, Limits, Solutions', in Teubner (ed.), *Juridification of Social Spheres* (Berlin: Walter de Gruyter, 1987), 408.

[41] See Collins, *Regulating Contracts*, 358.

[42] This is Collins's paraphrase in *Regulating Contracts*, 68–9.

[43] See also Parker and Braithwaite, 'Regulation', 127–9, for an attempt to summarize the themes in the regulation literature in this way.

[44] Teubner's analysis of the regulatory trilemma is based partially on his systems theory analysis of the problem of inadequate structural coupling of politics, law, and social life. The problem arises because in contemporary society these areas are both increasingly autonomous and increasingly interdependent: Teubner, 'Juridification', 407.

Firstly, we ask questions about the *effectiveness*[45] of law as regulation. How do different areas of law operate as a form of regulation in the social world—what is its regulatory impact on daily life? Much regulation research is concerned with identifying the extent to which target populations comply with regulation, why people comply, or fail to comply, and how the meaning of compliance is adapted, interpreted, negotiated, and influenced by both regulators and regulatees.[46] It investigates the impact of different styles of rules, legal instruments, monitoring, and enforcement techniques on compliance and attainment of regulatory objectives.[47] This book asks these same questions about a wider range of laws than regulationists have traditionally examined.

Secondly, we ask questions about the *responsiveness* of law, how it fits with other forms of regulation. To what extent does each area of law include doctrines and practices that allow responsiveness to social facts and norms or that perpetuate dominations and injustice at large in society as a whole? Descriptive regulatory research often charts the extent to which the values represented in regulation and the techniques used to monitor and enforce compliance with regulatory standards compete and interact with pre-existing norms and social ordering in the target population.[48] A central concern in the normative literature on regulation has been 'to consider how regulation can acquire the qualities of being simultaneously rationally planned and purposeful, and also deeply rooted in social and cultural life'.[49] This book applies those questions to law so as to illuminate law's place in the overall scheme of social regulation.

Finally, we ask questions about the *coherence* of law when it is seen through a regulatory lens. To what extent do plural norms and forms of regulation interact to form a whole? Or does multifaceted regulation fragment any semblance of integrity in law? For example, does the consequentialism inherent in effectiveness and responsiveness inevitably corrupt law's non-instrumental commitment to doctrines and principles associated with values such as distributive or procedural justice? Coherence is a typically legal concern compared with the other two sets of questions above. Lawyers have sometimes been concerned that the doctrinal coherence or values inherent in law's analytic framework can be threatened by the primacy of instrumental policy concerns in legislative regulation.[50] Legal scholars of regulation have been particularly concerned with the extent to which

[45] Here 'effectiveness' should be read widely to refer to the impact of law in real life, and perhaps its efficiency. Since in many areas of law there may not be one clear regulatory purpose, it cannot mean just effectiveness at achieving its purposes.

[46] e.g. H. Genn, 'Business Responses to the Regulation of Health and Safety in England' *Law and Policy*, 15 (1993), 219; B. Hutter, *Compliance: Regulation and Environment* (Oxford: Clarendon Press, 1997), and *Regulation and Risk: Occupational Health and Safety on the Railways* (Oxford: Oxford University Press, 2001); K. Hawkins, *Environment and Enforcement: Regulation and the Social Definition of Pollution* (Oxford: Clarendon Press, 1984); F. Pearce and S. Tombs, *Toxic Capitalism: Corporate Crime and the Chemical Industry* (Aldershot: Ashgate, 1998).

[47] See Baldwin *et al.*, introduction to *A Reader on Regulation*, 14–21.

[48] See references at n. 23 above.

[49] Cotterrell, *Law's Community*, 308.

[50] Ibid. 283–4.

constitutional guarantees, human rights, and fundamental legal principles[51] are observed in the practice of instrumental, policy-oriented legal regulation, and also in the diverse sites, methods, and agents of other quasi-legal and non-legal regulation (e.g. self-regulation).[52] The regulatory perspective on law in this book, however, also produces fresh insights into how different areas of legal doctrine (with varying levels of explicit regulatory purpose) can interact with one another and with other forms of regulation to produce complex, multidimensional fields of regulation. In this interaction there may be greater capacity to be responsive and effective than any one field of law or form of regulation has on its own.

[51] For example, openness, accountability, consistency, proportionality, and procedural fairness (list of principles taken from K. Yeung, *The Public Enforcement of Australian Competition Law* (Canberra: Australian Competition and Consumer Commission, 2001), 1). They are also concerned with the potential failure of effective and responsive regulation to secure certainty, consistency, and predictability in legal principles and values.

[52] For examples of this type of scholarship, see D. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Oxford University Press, 1986); C. Graham, 'Is there a Crisis in Regulatory Accountability?' (1997), repr. in Baldwin *et al.* (eds.), *A Reader on Regulation*, 482; Yeung, *The Public Enforcement of Australian Competition Law*. See also Cotterrell, *Law's Community*, 283, where the author observes that 'It is often remarked that policy-oriented regulatory practices are potentially incompatible with the ideal of the Rule of Law—regarded as a set of specifically legal values of predictability and consistency in rules, and coherence, equality and fairness in adjudication.'

1

Regulating Contract Law

HUGH COLLINS

To perceive contract law as a regulatory mechanism requires most lawyers to buy a new pair of spectacles. Instead of the conventional view that the law of contract facilitates market transactions, the application of a regulatory lens demands that we evaluate the general law of contract as a governance mechanism for steering and controlling markets or private ordering. To speak of 'regulating contract law' requires a further refocusing of the inquiry: the rules of contract law, now regarded as a regulatory mechanism, themselves become viewed as the subject of further regulatory mechanisms. That perspective invites us to investigate what kinds of regulation in fact steer and control the law of contract. We may discover such instances of meta-regulation in other branches of law such as constitutional law, in transnational legal orders, or in non-state institutional arrangements for private ordering that exclude or confine ordinary contract law.

This unfamiliar line of inquiry about the law of contract seems promising for a number of reasons. Firstly, a regulatory perspective on any aspect of governance asks whether the mechanisms function efficiently and effectively. The law of contract provides the basic rules governing most market transactions and, therefore, one of the principal sources of wealth. Every society needs to ensure that these rules function efficiently and effectively, so that they do not place unnecessary costs on market transactions, or obstruct potentially profitable deals, or permit rogue traders to subvert confidence in the market as a mechanism for generating wealth. Secondly, a regulatory perspective asks whether the effectiveness of the mechanisms of governance could be improved. In the context of globalization and regulatory competition between nation states, national governments need to be concerned that their laws governing commercial transactions do not put their economies at a competitive disadvantage, with the potential deleterious consequence of driving capital investment and business towards other jurisdictions. Similarly, to the extent that governments increasingly rely upon private companies to deliver public services and use competitive markets to ensure that those services are produced efficiently and effectively, the rules of contract law need to be assessed for their adequacy in contributing to the pursuit of that objective. Thirdly, in so far as the regulation of markets contributes to what a society regards as a fair scheme of distributive justice, we need to ask whether the rules of contract law contribute effectively and accurately to the production of an acceptable scheme of social welfare. Finally,