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Introduction

In assembling this collection I have endeavoured to identify key journal essays which seek to reconceptualize, or problematize law in regulatory settings. The scholarly literature defines regulation in different ways for different purposes. Lawyers have tended towards a definition which emphasizes sustained oversight by reference to rules, whereas scholars in other disciplines have extended the set of activities covered by the term to include all interventions by government to steer the economy and, the broadest of definitions, all mechanisms of social control (cf. Black, 2001a; Daintith, 1997, pp. 3–5). The interest in this volume in concepts of law in regulation has led me to adopt the narrow definition generally, but with some reference both to other forms of government intervention and other forms of social control.

Scholarship among regulation specialists remains a growth industry with important contributions from disciplines as diverse as economics, political science, sociology, law, anthropology and management studies (Noll, 1985). The diversity of the literature is sometimes masked by the relative success of economic theories of regulation which focus on market-like behaviour of politicians, bureaucrats and businesses. The economic approach is well represented in a number of standard texts in regulation (Baldwin and Cave, 1999; Ogus, 1994). A number of the central themes of investigation for economic theories, such as the normative basis for regulation and deregulation (Keeler and Foreman, 1998), have yielded little new understanding of law, nor have they been much influenced by legal research. From the perspective of this volume, economic theories of regulation are significant to the extent that they generate or elaborate distinctive conceptions of law. I suggest that these theories tend to share with ‘public interest theory’ an instrumental conception of law as a neutral technology for implementing policy choices. Consequently, they have contributed less than might have been anticipated to a project of rethinking law to meet the challenges of a regulatory age. Accordingly, alternative theories which place regulatory law at the their centre have considerable prominence in this volume.

The Character of Regulatory Law

The study and theorization of law in both civilian and common law jurisdictions has placed considerable emphasis on the generality of legal norms, whether contained in codes, judgments or legislation. Paradigmatic legal rules within these traditions have been those which have applied to all society with a relatively low degree of specificity as to what the norms require. The nineteenth-century revolution in government in industrializing nations entailed significant departures from the principles of generality of law, with the introduction of quite specific rules and the development of specialized enforcement bureaucracies, particularly in safety-critical domains such as factories, food manufacture and retailing, and transportation (Carson, 1979; Paulus, 1974; MacDonagh, 1961). This tendency creates a significant dilemma for law, in that it is displaced to some extent by the new requirements of particular regulatory regimes, but not wholly dispensed with. The ‘persistence of legalism’ in contemporary governance arrangements provides legal scholarship with one of its most interesting challenges (Murphy, 1997, pp. 148–53). The British constitutional scholar, Albert Venn Dicey, responded to deviation from the generality of legal norms and concomitant extension of bureaucratic discretion with alarm. He gave an influential series of lectures on the topic at Harvard Law School in the early years of the twentieth century attacking collectivism and outlining his concerns that contemporary administrative developments challenged his conception of the rule of law (Dicey, 1914; cf. Hayek, 1982, vol. 1, pp. 141–44). Horwitz has suggested that Dicey’s
‘praise for a lost age of laissez-faire individualism was warmly received in the only Western society where that doctrine continued to dominate public philosophy’ (Horwitz, 1992, p. 226). Dicey’s legacy, in both policy and academic circles, is a certain scepticism as to the appropriateness of delegation of power to administrative agencies both in the United States and Commonwealth countries (Duxbury, 1995, pp. 149–58; Arthurs, 1979). The first essay in this volume, by Edward L. Rubin (Chapter 1), outlines the potential for reconceptualizing law for an administrative (or regulatory) age. Rubin’s call for a ‘new public law’ squarely addresses the necessity for regulatory law scholars to address what goes on within administrative bureaucracies if they are to contribute meaningfully to the policy discourse with a distinctive legal voice.

The problems presented to law by the administrative revolution in government have been most clearly elaborated by scholars working within the German tradition. Jürgen Habermas observed the ‘materialization’ of law as the demands of the German welfare state forced legislatures to specify more minutely in legal rules the requirements of regimes of welfare and social regulation (Habermas, 1996, ch. 9). Building on Niklas Luhmann’s hypothesis of the functional differentiation of political, economic and social sub-systems, Gunther Teubner has suggested that an instrumental conception of law as servant to the intent of the legislature or the requirements of the economic system cannot be sustained. In Chapter 2 Teubner sets out his diagnosis of the ‘regulatory crisis’ which emerges from recognizing the limits of instrumental conceptions of regulatory law. It is in this essay that Teubner set legal scholars down the path of investigating ‘proceduralization’ as a solution to the problem that norms originating from the political or economic system cannot be reliably translated into the legal system (Black, 2000, 2001b; Prosser, 1999).

A related, but distinct critique of legal instrumentalism derives from the theory of legal pluralism with its emphasis on the variety of sources of norms, particularly within colonial and developing economies (Neves, 2001). Legal pluralism has had particular purchase on regulatory scholarship because of perceptions of ‘fragmentation’ of authority associated with the development of the regulatory state (Cotterrell, 1992, pp. 161–66). This pluralist perspective on law in contemporary societies is represented in Chapter 3 by Boaventura. de Sousa Santos and provides one of the foundations for the elaboration of ‘de-centring’ of regulation both as empirical observance and as a governance strategy (Black, 2001a; cf. Scott, 2001).

**Legal Theories of State and Market**

There are a number of theoretical perspectives which have as one of their concerns the appropriate balance between state and market in contemporary societies. Some reject the distinction between state and market, pointing out the importance of traditional state law (property rights, contracts and so on) and even of regulatory law in constituting markets (Llewellyn, 1925 cited in Duxbury, 1995, p. 325; Shearing, 1993; Hunt, 1993, ch. 13). Legal theorization of the state-market relationship has been dominated by questions of the appropriate content and interpretation of constitutions. The contrasting normative structures to be found within constitutions or other aspects of legal institutions is a somewhat neglected variable in explaining variety in capitalist arrangements (Daintith, 1997, pp. 7–8).

As noted above, Dicey saw the incursion of collectivist, discretionary law into market activities as, above all, a constitutional issue, although the peculiarities of the British constitution have substantially inhibited the development of a constitutional theory of the statemarket relationship. By contrast, Supreme Court jurisprudence in the United States did elaborate a constitutional theory to delimit the legitimate boundaries of state action with legal norms (Siegel, 1984). The constitutional literature on the legitimate boundaries of regulation has focused centrally on the property rights of citizens and viewed state incursion on those rights as a matter requiring justification (Daintith, 1998; Epstein, 1985). Among the most powerful applications of the property rights conception has been an economic approach which sees constitutions, and subconstitutional rules, as solutions to the significant problem of creating credible commitment of governments to
create a stable market environment so as to foster investment by businesses. In Chapter 4, Douglass North and Barry Weingast deploy the property rights approach to develop an institutional account of the success of the processes of industrialization in eighteenth- and nineteenth-century Britain. Within this approach the constitution is seen as a regulator of government. This literature is significant not least because it has underpinned programmes of research and institutional reform in developing countries overseen by the World Bank (Levy and Spiller, 1996).

Recent developments in governance in industrialized commonwealth countries, and notably programmes of privatization and re-regulation, have caused legal scholars to examine afresh some of the older doctrines governing regulatory relationships (Taggart, 1995). Chief Justice Hale’s theory of the relationship between property rights and state activity, developed in the eighteenth century (Hale, 1787), was influential in the development of nineteenth-century American doctrines governing the constitutional legitimacy of regulation. In Chapter 5 Paul Craig contrasts the constitutional significance of property rights in the United Kingdom and the United States, arguing that Hale’s doctrine explicitly recognizes that the ownership of private property can carry with it public obligations. The significance of this theory for contemporary economic regulation is elaborated by Tony Prosser (Chapter 6) in which he argues that policies of privatization in European Union countries have generated a new set of principles which he gathers together under the rubric of ‘public service law’. This doctrinal development is an unintended consequence of public policy initiatives in regulation.

While American constitutional theory underpins a certain regulatory conservatism, this may be contrasted with the German position where scholars within the Freiburg School, in particular, attempted explicitly to theorize a stronger role for the state in regulating or ordering markets. The ‘ordo-liberal’ theory was extremely influential in recasting state-market relations after the Second World War (Vanberg, 1998). In Chapter 7 Wernhard Möschel examines the distinctive features of the ordo-liberal theorization of the state-market relationship, showing how it manages to reconcile a strong role for the state in regulating markets with a conception of the rule of law. Within this perspective, law is not an instrument for protecting citizens from the state, but rather a mediator between the interests of the state in ordering a competitive market and the interests of businesses in pursuing their economic activities unhindered.

Regulatory Rules

Turning from high-level justifications for the regulatory role of the state to the micro-level of regulatory regimes, we find that greatest emphasis in the legal regulation scholarship is placed on rules and norm types (Diver, 1983). Functionalist accounts of which types of rule are best suited to particular regulatory objectives sit somewhat uneasily with the anxious challenges to instrumental theories of regulatory law noted in Part I of this volume. As Julia Black notes (Chapter 8), processes of rule-making have tended to be neglected in the wider literature on regulation. The making of rules, and thus the consideration of appropriate rule types, is a job for legal scholarship. Many regulatory rules are open-textured and invite bureaucrats to exercise wide discretion in reaching decisions. This is precisely the tendency in regulatory law which so worried Dicey. More recent scholarship, building on the work of Kenneth Culp Davis (1969), has sought to link choice of rule types with the development of broader norms of institutional decision-making which take proper account of the problem of regulatory discretion (Pratt, 1999; Rubin, 1997). The emphasis of Chapter 9 by Robert Baldwin and Keith Hawkins lies in securing a systematic understanding of regulatory discretion in its many different contexts and using this as the basis for reconceptualizing the problem of discretion as multilayered and amenable to a variety of solutions well beyond Davis’ own proposals for structuring and checking discretionery power.

Scepticism about the capacity of rules to secure regulatory outcomes has tended to be reasoned inductively from empirical research into regulatory regimes (Baldwin, 1990; Lange, 1999; McBarnet and Whelan, 1991). John and Valerie Braithwaite (Chapter 10)
question the effectiveness of attempts to provide for optimal provision in rule-making and to constrain discretion. They suggest that attention to the precision of rules in one part of a regulatory regime may affect the overall reliability of the regime in generating particular outcomes. Thus they argue for the potential of a more context-specific set of principles for the deployment of different rule types. An underdeveloped theme of this literature is the contingency of law within regulatory settings upon the relationships between the various actors (Reichman, 1992). The context of ‘regulatory conversations’ between actors within regulatory regimes is the theme of Chapter 11 by Julia Black. Recognizing that such conversations about rules are both an inevitable and necessary part of the way that the meaning of a regulatory regime is constructed, Black argues for a form of proceduralization within which attention is paid to the commitment of actors, access to the process, the distribution of authority and accountability of those involved. The positions of the various actors can be adjusted to secure compliance with these principles for the ‘regulation’ of regulatory regimes. Black has subsequently elaborated on these arguments to develop a more theoretical basis for ‘proceduralization’ within regulatory regimes which is targeted at the twin problems of effectiveness and legitimacy of regulation (Black, 2000, 2001b; see also Croley, 1998).

An alternative approach to understanding the approach to rules within regulatory regimes uses comparative analysis of regimes in similar domains in different jurisdictions both to secure a better understanding of both variation and the conditions under which the deployment of rules may be effective. Important studies comparing the United Kingdom and the United States (Vogel, 1986), the United Kingdom and Japan (Vogel, 1996) and the United States and Japan (Kagan, 2000) have used measures of ‘formalism’ as one of their key variables. In emphasizing the formalistic tendencies in American regulation in both rule-making and enforcement — a style labelled as adversarial legalism’ by Kagan (2000) — this research suggests that regulatory practice in general and the conception of regulatory law in particular in the United States is rather exceptional— Japan and the United Kingdom have, historically, shared a tendency towards informal state-industry relations which has fed through into contemporary legal relations (although such informalism has come under significant pressures in many policy domains in recent years). Discussion of such variety leads us into the discussion of institutions in Part IV.

Institutions and Institutional Variety

It is frequently assumed that regulation is simply what regulatory agencies do. By contrast, a regimes analysis demonstrates that the regulatory functions of standard-setting, monitoring and enforcement are often widely dispersed among a variety of actors (Hood, Rothstein and Baldwin, 2001, ch. 2). A key question, therefore, is how to explain and justify variety in the institutional forms of regulation. The regulatory agency model has been of particular importance in the United States and has been theorized as a response to the weaknesses of court-like adjudication in addressing ‘polycentric’ issues (Fuller, 1978). A cultural reluctance to assign wide powers to regulatory agencies arguably creates a greater urgency in understanding institutional variety in regulation in Europe (Hancher and Moran, 1989). New institutionalism is an important theoretical strand in contemporary theory in sociology, economics and political science which has been deployed in the investigation of regulation. However it has, to date, been fairly marginal in generating new theorizations of regulatory law (Cooney, 1996; Black, 1997; Suchman and Edelman, 1996).

The economic form of new institutionalism, exemplified by North and Weingast in Chapter 41 has perhaps had the greatest impact on legal regulation scholarship. The literature on the containment of agency discretion (characterized as the risk bureaucratic-drift’) represents a sophisticated application of theories originating in transaction cost economics to regulatory institutions (Horn, 1995; Mashaw, 1997). The capacity of the theory for the development of normative theories of institutional design is exemplified by Jonathan R. Macey’s essay (Chapter 12). Macey challenges the argument that Congress can effectively deploy a variety of rule types to control or ‘hardwire’ what
agencies may do, and shows that both the executive and the judiciary have means to subvert congressional intent.

A further important question of institutional variety is concerned with approaches to enforcement. A wide variety of approaches to enforcement have been identified in empirical analyses (Braithwaite, Walker and Grabosky, 1987). A key variable is the legal basis for enforcement and what we might call the ‘cultural effects’ of deploying criminal law, administrative law or private law, for example. In the United Kingdom, criminal law has been widely deployed to create offences of strict liability in regulatory domains (Richardson, 1987) In those jurisdictions and domains where criminal law is routinely used to control regulatory wrongdoing there is some evidence of a clash of cultures between the regulatory instrumentalism of the particular regime on the one hand, and the traditional culture of the criminal law on the other (Scott, 1995). This tension can be viewed through the lens of Teubner’s theory of reflexive law as a problem of communication between a Political System concerned to legislate for regulatory offences with criminal law, and an autonomous legal system concerned to protect the integrity of the criminal law (represented as both a concern with Only applying sanctions to morally wrong conduct, and providing appropriate procedural protection to those processed within the criminal law system). The underlying debate in criminal law theory is outlined and applied to the case of competition law enforcement in the essay by Karen Yeung (Chapter 13). For Yeung, one way of resolving the issue is to assess the nature and appropriateness of criminal law penalties as a means of reconciling the competing views on the appropriateness of the ‘regulatory crime’ paradigm.

Whilst the effectiveness of rigid enforcement or ‘regulatory unreasonableness’ has often been questioned by the empirical literature (Ayres and Braithwaite, 1992; Bardach and Kagan, 1982), equally, conventional conceptions of the ‘rule of law’ are challenged by more discretionary patterns of regulatory rule-making and enforcement. A key example in the United States is that of the Environmental Protection Agency’s Project XL, a programme of environmental regulation which permits firms to offer superior environmental performance in return for oversight which is less onerous than the conventional system of minute regulation by permit (Freeman, 1997, p. 55ff). Chapter 14 by Christine Parker demonstrates that attention to ‘compliance orientation’ within regulated firms provides a possible solution to the effectiveness versus ‘rule of law’ debate. A key to this institutional approach to regulatory innovation is the capacity of compliance officers within firms to secure a cultural orientation to meeting the expectations of regulatory regimes (whether defined in terms of narrow rule adherence or, more broadly, in terms of outcomes). The questions of the role of professionals and the reception of regulatory and private law within organizations are central issues in Carol Heimer’s essay (Chapter 15), which examines the conditions under which organizations receive and act upon changed legal norms in the regulatory setting of medical practice. Heimer is thus able to develop some hypotheses as to when regulatory law is likely to be effective.

Beyond agency regulation, regulatory scholarship has identified the potential for alternative forms of ordering to classical command and control (Baldwin, 1997). One basis for such analysis is recognizing that legal authority is but one form of power and, although the state may have a near monopoly of such power, other key sources of power — information, wealth, and organizational capacities — are widely dispersed (Daintith, 1997, pp. 30–34; Scott, 2001). Lawrence Lessig’s influential attempt to meet the challenge of control of cyberspace uses an alternative analytical frame for analyzing the potential for different forms of control. He posits the existence of four basic ‘modalities of regulation’ oriented to law, social norms, markets and architecture (Lessig, 1999a, 1999b). Within Lessig’s schema, law equates to the classical hierarchical control of regulation, social norms to the informal social control of the community (Posner, 2000), and markets to competitive pressures as constraints on action (Murray and Scott, 2002). The concept of architecture extends beyond the design of buildings to encompass the design of other artifacts — notably, computer software. In the difficult world of cyberspace the architecture of software provides a key means by which firms control what users can and cannot do, and this technology can be turned to public-regarding purposes through its harnessing by the state. In this way, Lessig extends the well-
established capacities of physical design to control behaviour (Shearing and Stenning, 1985). In practice, alternative modes of regulation are often hybrids of two or more modalities. Thus, in Lessig’s terms, tax incentives combine law with markets (Ogus, 1998), self-regulation forms a hybrid of norms and law and contractual governance resembles a hybrid of markets and law (Collins, 1999; Freeman, 2000b; Teubner, 1998). In Chapter 16 Peter Vincent issue of unresponsiveness of regulatory regimes and the problem of control by asking to what extent hybrid forms of contractual governance provide better solutions than command and control regulation.

Market behaviour may cause traditional regulation to be avoided by actors who can adjust their affairs or location so as to fall outside the scope of a regime. In Chapter 17 Erich Schanze argues that this may be efficient and, where this is so, should be supported by the courts. This ‘regulatory bifurcation’ is reminiscent of a model of regulatory reform under which only part of a market is regulated and the remainder left to market forces (Ayers and Braithwaite, 1992, ch. 5). In other contexts, the predominance of non-state ordering may indicate a breakdown in formal governance requirements, with (often undesirable) private ordering mechanisms effectively competing for business with the state. This is particularly true for societies with less well-developed state apparatus, as with Russia (Frye, 2000), but examples of the phenomenon are also to be found in more developed state systems, such as Japan, which have permitted organized crime to prosper (Milhaupt and West, 2000).

**Accounting for Regulation**

Fragmentation of state authority and diffusion in regulatory technique has generated particular problems for administrative law theory in adapting traditional conceptions of accountability to legislatures and courts and of the rule of law to meet these new governance forms (Rubin, 1989; Scott, 2000). Legal scholars have endeavoured to work out new conceptions of public law which address the increasing importance of self-regulation by firms and locate the phenomenon within a (revised) constitutional theory (Black, 1996). They have sought to adapt thinking about public law so that it meets the challenge of recognizing that the participation of private actors in public decision-making in regulatory spheres is both normal and inevitable (Freeman, 2000a). These issues are addressed both by Edward Rubin in Chapter I of this volume and, more fully, in the volume in this series on *Administrative Law* edited by Peter Cane.

More pressing, perhaps, than the recognition of fragmentation of regulatory authority within states is the linkage of private power and globalization in contemporary regulatory governance (Braithwaite and Drahos, 2000). The problems presented to legal theory associated with sovereignty and identifying the legitimate boundaries of state action are particularly acute in developing countries which are caught between the twin economic powers of multinational enterprise and international organizations such as the World Bank and the IMF. This challenge requires the reconceptualization of the issues discussed in Part II of this volume to take into account dilutions of national sovereignty (Arnan, 2001; Slaughter, 2001). The potential for such an approach, taking Latin America as its case study, is provided in the final chapter by David Schneiderman.

**Conclusion: Future Directions for Problematizing Law in Regulation**

This volume attests to the rich variety of scholarship which addresses problems of legal and regulatory theory. A number of theoretical and analytical approaches which problematize conceptualizations of law have been developed, which could be deployed to elaborate upon discussion of established questions and develop novel questions. I make no pretence here to set out a coherent research agenda for regulatory law. Rather, I highlight some trends emergent in the literature. Questions deserving of elaboration include the reshaping of legal conceptions of accountability, the squaring of instrumental regulatory models with competing conceptions of the rule of law, the role of law in models of ordering command and control which displace regulation, and reflexive
conceptions of law as both regulating social and economic fields and being regulated by their relations with other subsystems.

Much of the newer literature is focused on institutional questions and, in contrast with earlier literature on the character of regulatory law and on the state-market relationship, is often informed by empirical observation, either at first-hand or at one remove or both. Key new themes include: understanding the role of discourse (Black, 2002), rhetoric and networks in constructing regulatory fields and relationships (Maher, 2002); the role of emotions in shaping and mediating regulatory relations (Lange, 2002); the potential for “meta-regulation” as an overarching strategy of indirect control (Grabosky, 1995; Parker, 2002); the role of law within fragmented conceptions of governance, such as the Foucauldian ‘governmentality’ model (Hunt, 1993); and competing conceptions of globalization and organizationally-focused observations of regulatory regimes (Parker, 2002). International trends in governance tend to accentuate the contingency of the meaning of regulatory law upon both narrow and broader environmental conditions, and make it more urgent that legal theory should respond with ways of making sense of such regulatory diffusion (Picciotto, 2002).

References


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