



The Corruption of Accountability

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Corruption, Indignation and the Limits of Legal Accountability

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1 Introduction

In his 2011 discussion of campaign finance in the United States, and pathways to reform, Lawrence Lessig described a ‘corruption’ that is undermining American democracy. This, he tells us, is “not a corruption caused by a gaggle of evil souls”:

On the contrary, a corruption practised by decent people, people we should respect, people working extremely hard to do what they believe is right, yet decent people working with a system that has evolved the most elaborate and costly bending of democratic government in our history. There are good people here, yet extraordinary bad gets done (Lessig 2011, p.8).

The foundation of the corruption, on the contrary, is a ‘privately financed’ electoral system that relies on gift exchange between the political and business classes. “Relationships, not cash,” Lessig writes “are the currency within these economies. These relationships import obligations. And the exchanges that happen within gift economies try to hide their character as *exchanges* by tying so much of the exchange to the relationship” (Lessig 2011, p.108), with corporate welfare being the “payback” for campaign finance (Lessig 2011, p.269).

The commentator Fintan O’Toole makes a parallel point about business people’s payments to politicians in Ireland, pointing out that (with some notable exceptions) what business people were buying was not direct services but access to an inside track, “being in the know, getting your calls returned, being able to have that quiet word” (O’Toole 2010, p.41). Going further, O’Toole suggests that

The other side of this warm glow of inclusion was the fear of exclusion. If membership of the circle gave you the sense that you were being ‘sorted out’ by the Minister for Finance, . . . not being one of the lads made you wonder whether a rival was being sorted out ahead of you (O’Toole 2010, p.42).

Payments we made, in other words, for *defensive* as much as for than aggressive reasons. Corruption emerged, correspondingly, as a *social space* that people occupied more or (very often) less happily, defined more by the mutual management of risk than by self-conscious deals between business and political insiders.

Our aim is to focus on one dimension of these social spaces as they emerge in the interface between powerful private organisational actors and law-making. We do not deny that there are other dimensions but we seek to contribute to the debate by deepening our understanding of the *accountability spaces* where the kinds of corruption Lessig, O’Toole and others¹ are interested in emerges. By accountability spaces we mean those social spaces, where mutual relations and the ‘thick and thin’ (Dubnick & O’Kelly 2005; O’Kelly & Dubnick 2006) normative commitments they entail lead to the emergence of ‘real-world’ outcomes for law, policy, distributions of power and the like.

That these outcomes are in turn very often understood through narratives of accountability (or, more often, *unaccountability* (see O’Kelly & Dubnick 2014)) is itself significant, if only in highlighting both the fact that the concept of accountability as a *social phenomenon* often describes layers of relationship and commitment and the the fact that the concept of accountability as an *expression of judgement* depends very much on how any conduct is viewed. As we see it, whether or not actors are ‘good people’ and whether or not their actions are ‘extraordinary bads’ may be a matter of perspective. They almost certainly do not regard *themselves* as bad: one person’s vampire squid is another person’s ‘God’s work’ (Arlidge 2009; Taibbi 2010), so to speak.

We call the accountability spaces we discuss here ‘*monastic*’, given that they are characterised by strong internal narratives and associative obligations, and that they persist in the context of tacit or explicit support, through law, from the state (on which more below). Conduct that is the subject of disapprobation from without – conduct that is deemed to be corrupt – is the subject of respect and esteem within the spaces. Legal but corrupt conduct, in the end, is as much a function of *mutual incomprehension* as anything else.

Our discussion, in other words, focuses on the state’s ceding administrative sovereignty over some aspect of social life to autonomous ‘experts’, to

¹See for instance Jos (1993); Sandel (2012); and see Anechiarico & Jacobs (1996) for a discussion.

privileged insiders and/or to other special claimants for the state's *inattention*. Legal corruption, by our lights, is less about explicit or implicit exchange relationships, and more about law being employed to carve out spaces where the state actively cedes spaces to private 'sovereigns' – sovereigns within the space, after it has been carved out – where they can regulate themselves as they see fit and where they can project their power over others without the state stepping in.

We see the discussion as contributing to an understanding of legal corruption because it helps us to step away from a 'normative' frame where we seek out instances of conduct that meets our disapproval and towards a more 'analytic' frame, where we seek out the systemic factors that help distinguish legal corruption from trades in influence and favours, or from bribery, or from conduct that might very reasonably be seen as unjust. So we should step beyond the idea that, for instance, the market for votes provides the context for legal but corrupt. We should think instead of the *market itself*, when it is imagined as a zone of expertise. When this happens the state purposefully places, say, the financial services industry outside its regulatory vision, ceding policy and power and allowing private actors complete sovereignty to formulate their own ends and to project power as they see fit across society. Likewise, as happened in post-independence Ireland, the state imagined religious organisations, with their air of charitable action, as expert in fields of education, healthcare and so carved out spaces for the Church to control these zones of action, to engage in their own processes of self-regulation and discipline and to project power across society as a result.

The paper continues in the next section with a deeper discussion of actors, social spaces and law. We focus on the social spaces around which legal but corrupt conduct might emerge. Following from that we discuss first the revelations about cover-ups of abuse within Irish Catholic Church and then, at greater length, the regulatory dimensions of the Global Financial Crisis (GFC). We discuss the question of how 'legality' was and is negotiated between the state and the finance services industry. Regulation, we argued, allowed for the emergence of a private regime with a major public role but that was largely autonomous from broader regulatory dynamics. We then go on to discuss the construction of responsibility within financial services, from the point of view of senior officers' reflections on what 'went wrong.' We highlight the manner in which market dynamics were presumed to hold financial institutions and their officers in their sway. Finally, third, we link these two issues to explain the continuing pressure to force financial services regulation to step back and allow self-regulation to come to the fore again. In the conclusion we make a number of remarks about the necessity for exchange to be present – or rather the *lack* of outright necessity for exchange to be present – for conduct to be legal but corrupt.

2 Actors, Spaces and Law

The kinds of issue Lessig raises relies on us deciding when, and then to what extent, collaboration between private parties and the makers of law ought to be the subject of resentment. Our task cannot be simply to point to conduct as legal but corrupt because we fear the conduct’s consequences, or because we are concerned with other points of principle that might emerge. Legal but corrupt conduct must be identifiable on its own merits and must be distinctive from conduct that is legal but unjust conduct or from conduct that, though illegal, is pursued by private actors with state support (on which see for instance the discussion of extraordinary rendition in De Londras 2011). The corruption suggests, as Lessig says, a *relationship* and/or an *exchange*. It must be rooted in some specific link between law-making and private action. It must focus on some *subversion* of law, for private ends, with the law-makers’ active collaboration.

We want to set out here one way in which this relationship might have an impact on law and law-making, but in a way a way that a) need not be founded on cynicism, b) need not require actors to see themselves as motivated by self-interest and c) need not require a sense of exchange. These elements may well be present, but they are not required.

For us, rather, legal corruption lies precisely in the insider relationships that drive the disconnect between outsider disapprobation and insider esteem. When we speak about ‘monastic’ and other accountability spaces, we mean both formal and informal institutional structures through which agents’ interactions, purposes and motives are orchestrated, communicated and organised (see North 1990). These structures are reproduced, though never absolutely, through the evolution of informal norms and/or through the dissemination of more formal rules and through the negotiation of agents’ places in hierarchies and other relationships. Reasons for action are evaluated and are given a context and actors themselves are the subjects of esteem and disesteem. Their actions are negotiated and then evaluated in the context of internal norms, both in terms of constraints on action and in terms of standards against which action can be measured and judged.

Individuals exist in, are subject to and seek to present themselves within a multitude of social spaces that they enter and exit, some naturally, some through relatively informal social interaction and some through their interactions with contractual or otherwise legal forms. Within those more formal organisational settings, the parameters of interaction are in large part articulated as kinds of ‘legal consciousness’ (Hoffmann 2003; Ewick & Silbey 1998; Silbey 2005) often with organisational structures and managerial purpose setting out to mediate between readings of law and the construction of the internal spaces through which people shape and evaluate their work (see Edelman et al. 1991; Edelman 1992; Edelman & Suchman 1999). Understandings of how law is to be negotiated and used are key to the emergent

character of these spaces. Law enters not as a fixed and determined 'grammar' but as one, albeit relatively authoritative, source of norms, rules and standards that guides people's conduct. And it is authoritative as something to be *invoked*, not simply by virtue of any innate qualities on its part.

The democratic legitimacy of law-making, and thus its normative power, arrives filtered within social spaces, existing at one or more removes from individual reasons and actions. How it is used as a resource depends on a range of other factors, including but not limited to hierarchical tone, broader consciousnesses of law on all actors' parts, the emergence of 'multiple, diverse and often conflicting expectations' (Dubnick 2014) between people as their relationships form and persist and the patterns of recognition and esteem through which people evaluate their own conduct and that of others.

Our perspective regards the individual as an active participant in the construction and reproduction of their social environments. Their participation emerges most directly through their recognition and esteem of others, and their expectations for recognition (always) and esteem (where it is merited) as equals in return (following Darwall 2006). They are not passive subjects of institutional forces, but shape the integrity of institutions through their voices, through entry and exit and through acceptance, toleration or (quiet perhaps) rejection of common relationships and of supposedly shared norms.

That said, we should note that active moral agency is more difficult within formal organisations. Internal processes, including those of promotion and demotion and of esteem and disesteem (through bonuses for instance) can be recruited by senior officers to a greater or lesser extent in order to winnow dissidents out and to reward those who are more content with managerial aims. This is not to say that active moral agency is impossible, but rather that, compared to many other arenas of social life, the forces against which agency within organisations must be pitched are more clearly articulated, and consequences are more concrete.

Law, most notably, does not work solely through the establishment of lines of authority or, in the parlance we are most interested in, through the establishment of an accountability 'forum,' where an accountant may solicit accounts of and give judgement on the conduct of an accountee (see for instance Bovens 1998, pp.23–24; see O'Kelly & Dubnick 2014 for a discussion). These technological phenomena are supported by, and gain their traction from a range of more 'primordial' accountability relationships between people as they establish and manage the terms of their collaborations. Importantly, for our purposes here, the meaning of law is negotiated through the social spaces that it interacts with and as such, it gains its power both within the context of human interactions within those spaces and as a function of how people view the normative content of those spaces in the context of their broader lives.

In some ways here our view takes as its starting point the perspective articulated by Ronald Dworkin in *Law's Empire* with regard to how gen-

eral obligations to obey the law might be linked to the 'associative' norms that emerge within human associations (Dworkin 1986, p.195ff), although ultimately we take a position that moves beyond Dworkin's point. A detailed exposition of Dworkin's argument is not warranted for this paper.² In brief, Dworkin points to the common sense that we have special obligations to those with whom we have special associations: family, friends etc. He argues from there that associative obligations contain four key characteristics: that they imply *special* responsibilities; that the responsibilities "run directly from each member to each other member"; that they rely on general and mutual recognition and sympathy – "a more general responsibility each has of *concern* for the well-being of others in the group"; and that the concern is an *equal* concern for all members (Dworkin 1986, p.199ff). And from there he argues that the same precepts are constructive of obligations within political communities (relatively 'thin' though presumably holding some similar intrinsic value akin to that held by friendship). That is, that "political communities are associations of that same kind and therefore they, too, are capable of giving rise to obligations" (Perry 2006, p.195).

And so, for Dworkin, the power of law lies in political obligations arising from valuable political associations. The thrust of our paper lies where the *general* character of such obligations is replaced, in part, within accountability spaces, not quite where internal associative obligations trump broader associations but more where internal associations are brought to bear on people's capacities either to maintain the social imagination required to link themselves to their broader political and social associations or to connect to those outside the narrower associations with the levels of sympathy and recognition that they attach to fellow-insiders. In a sense, the corruption is of the *body politics* itself.

We are interested in such dynamics because we see them as foundational for legal but corrupt conduct. Conduct, that is, that is met with widespread indignation and disapprobation from without specific social spaces and yet that is understood, approved of and esteemed *within* those spaces. Importantly, we do not see legal but corrupt as drawing on norms that can be argued for as such in the social arenas where it applies. We are pessimistic about the idea that people would be open to the 'unforced force of the better argument' (Habermas 1992, p.305) in such situations, not necessarily because it would harm their material interests, but because their moral viewpoints are insulated and autonomous from the perspectives upon which such allegations are made. The problem, as such, is not one of *vicious conduct*: it is one of *incomprehension*. We hope that our discussion will help set out a conceptual frame to make sense of legal but corrupt conduct in this way.

²See the analysis in Perry (2006) for a more detailed account. See also Mason (1997); Lagerspetz (1999); Simmons (1996); and Utz (2004) for critical engagements with Dworkin on associative obligations.

3 Private Social Actors and the Autonomy of the Corrupt: Lessons from the Irish Catholic Church

In this section and the next we set out two instances of the kinds of dynamic we are interested in. The notable common factor here is that we are describing two cases where law was used to negotiate *zones of autonomous action* for non-state forces. These zones allowed the private actors involved to project significant power over social life and/or to entrench their own positions within society. Internal patterns of justification, combined with the educative effects of organisational discipline and managerial communication, lead to an insulation of these spaces from broader social norms, and from there to situations where actions can be treated as virtuous internally and – in a manner that leaves insiders bewildered – as vicious from the outside.

Let us explain these perspectives with reference to events within the Irish Catholic Church. The Church has been defined by institutional denial, cover-ups, and obstruction regarding child sexual abuse across a long period in modern Irish history. Note that we do not in any way seek to draw an equivalence between the underlying failings in the Irish Catholic Church discussed in this section and the systemic failings leading to the Global Financial Crisis that we discuss next. Our aim rather is to explore the negotiation of strong institutional autonomy, the idea of particular groups being ‘out of touch’ and the idea that those same groups have in some way conducted themselves in a corrupt manner. We aim to outline the difficulty state regimes, whether through law or other regulatory forms, have in negotiating a place for strong and cohesive private forces within society, perhaps in particular when those forces have a significant social presence and impact.

In July 2011 the Irish Department for Justice, Equality and Law Reform published the Cloyne Report into the abuse of children by members of the Catholic Clergy in the Diocese of Cloyne, situated around County Cork at the southern end of Ireland (Investigation into the Catholic Diocese of Cloyne 2011). The report, addressing conduct within the Diocese since 1996 when the Irish Bishops Conference published a Framework Document outlining detailed procedures for dealing with allegations of child sexual abuse involving clergy, pointed to a failure on the part of senior actors within the Church not only to recognise the scale or seriousness of child abuse but even to take an interest in the matter at all. There was a widespread failure in Cloyne as a result to implement the Church’s own procedures governing abuse (Investigation into the Catholic Diocese of Cloyne 2011, p.1.15ff). The report also pointed to the intervention of central Church authorities in the Vatican aimed at undermining the framework document, an intervention that, the report noted “effectively gave individual Irish bishops the freedom to ignore the procedures which they had agreed and gave comfort and support to those who . . . dissented from the stated official Irish Church policy” (Investigation

into the Catholic Diocese of Cloyne 2011, p.1.18). At the heart of this failure was the Church's policy of mandatory reporting of allegations of child sexual abuse to the relevant civil authorities, a matter that the Vatican had stated in communication to the Irish Church "gives rise to serious reservations of both a moral and a canonical nature" (Investigation into the Catholic Diocese of Cloyne 2011, p.1.18). The institutional imperative, it seemed was that of preserving Church autonomy and its separation and independence from state oversight, regulation and law.

Responding to the Report's publication in a speech to Dáil Éireann (the Irish Parliament), Taoiseach (Prime Minister), Enda Kenny said:

Cardinal Josef Ratzinger said: 'Standards of conduct appropriate to civil society or the workings of a democracy cannot be purely and simply applied to the Church.' As the Holy See prepares its considered response to the Cloyne Report, as Taoiseach, I am making it absolutely clear, that when it comes to the protection of the children of this State, the standards of conduct which the Church deems appropriate to itself, cannot and will not, be applied to the workings of democracy and civil society in this republic. Not purely, or simply or otherwise.

He also said that

[T]his is not Rome. Nor is it industrial school or Magdalene Ireland, where the swish of a soutane, smothered conscience and humanity and the swing of a thurible ruled the Irish Catholic world. This is the Republic of Ireland in 2011. It is a republic of laws, rights and responsibilities and proper civic order where the delinquency and arrogance of a particular version of a particular kind of morality will no longer be tolerated or ignored (Kenny 2011; the second passage is quoted in McAlinden 2013, p.189).

The Cloyne report came at a point where knowledge of historical child abuse was widespread and had been for close on two decades. The shock of Cloyne was in its outlining bureaucratic resistance to culpability, to state authority and ultimately to reform. The report acted not only as an exemplar in exposing the intimacy of symbiotic church-state relations in recent Irish history but also, as McAlinden has it, "the tendency for Church and State 'communities' to deny or minimise wrongdoing, and the stark contrast between their 'imagined selves' and the legacy of an abusive past" (McAlinden 2013, p.192)

McAlinden draws here on Anderson and Cohen's work on communities and denial (Anderson 1983; Cohen 2000), most interestingly for our purposes on the construction of 'imagined communities' in the emergence of nationalism. These imagined communities, however, can emerge among relatively

small populations and can represent only a fraction of members’ social lives. This is one interesting insight regarding legal but corrupt conduct: that those who populate the relevant spaces do not do so in total. They do so *partially* to a greater or lesser extent. They populate the spaces as occupants of *organisational offices and social roles*. The implication of this is important for our understanding of corruption – that it is not a matter of character of such, given how fungible the performance of character is when it comes to the different spaces people move between.³

Why have prosecutions for conspiracy been absent in the wake of the abuse scandals? Why, especially, when evidence of long-standing conspiracies not to report criminal acts to the state’s authorities is widespread and persuasive? In the context of this paper we suggest two reasons: first that the state was implicated in the long series of cover-ups and often actively supported Church leaders in covering up crimes. This could easily be seen as tacit (or explicit at times) state permission for the Church to maintain its autonomy and sovereignty, for instance through collusion between the Gardaí (the Irish police) and bishops (Holohan 2011, p.153ff). This enabled the Church’s senior officers to choose how abusers would be regulated (often by moving them on to other parishes where they continued to abuse). A second reason is that the state responded to the crisis by negotiating a settlement with the church – by opting for stability over confrontation – re the taxpayer footed most of the bill for compensation for victims (see McDonald 2006).

While in many ways this was an appropriate response – the state’s failure to protect its citizens was at the heart of the scandal – it also served to insulate those at the pinnacle of the Church from the profound self-examination that might otherwise have been necessary. This insulation allowed the church to maintain its self-conception as an essentially private and sovereign moral community within the broader community, answering to its own rules and lines of authority that were explained by strongly enforced special ‘associative’ norms (see Dworkin 1986) – henceforth in this paper: ‘associative obligations.’

These obligations shaped Bishops’ outlooks on how they ought to interact with state investigatory agencies. This was articulated by Archbishop Connell of Dublin, who saw a direct contradiction between cooperation with police and his associative obligations to the Church.

In 2002, Archbishop Connell allowed the Gardaí access to archdiocesan files. The decision to do that, Connell told the Commission of Investigation, ‘created the greatest crisis in my position as Archbishop’ because he considered it conflicted with his duty as a bishop, to his priests. When asked why, he explained:

Was I betraying my consecration oath in rendering the

³Following Erving Goffman (1969) on the self and its roles.

files accessible to the guards? . . . you’ve got to remember that confidentiality is absolutely essential to the working of the bishop because if people cannot have confidence that he will keep information that they give him confidential, they won’t come to him. And the same is true of priests (Holohan 2011, p.120).

4 Associative Obligations and Accountability

Within the confines of this paper, as we said above, we posit two dynamics from the scandal whose interaction had a determinative effect on the situation. First, **the strong internal narratives and associative obligations allowed a peculiar kind of ‘accountability space’ to develop**, characterised not solely by the ‘forum,’ to draw on Bovens’s (Bovens 2007a; Bovens 2007b) metaphor, but by what we might call a ‘monastic’ sensibility (see Dubnick 2013). We use monastery to denote a space characterised by a strong – and strongly enforced – normative vocabulary where internal narratives of virtue and vice, combined with patterns of mutual recognition and social esteem, exist (largely at least) independently of the forms of recognition and esteem that prevail in the surrounding society. The monastery is managed both as a unified accountability space and as one that is cut off from the rest of society.

This kind of space is sustained, second, because it is licensed to do so: **it persists in the light of tacit or explicit support from the state**. While such support was of course at the heart of the longevity of actual monasteries (for one insight, see Rost et al. 2010) its role in the accountability space relates to protecting autonomous spaces both from scrutiny and from standards of conduct other than those set internally.

Deepening our first point above regarding the ‘monastery’ metaphor, the kinds of duties that attach to roles reveals one important trait in modernity: the very strength with which associative obligations are brought to bear on organisational life. A moral community’s secession from the “general framework of [reactive] attitudes” [Strawson (1974), p.25], can lead to mutual incomprehension between insiders and outsiders regarding the moral significance of actions to the decline of the patterns of moral recognition that are required for a general web of second-personal standpoints (Darwall 2006) to be sustained across society. A kind of enforced ‘*bounded*’ *moral rationality* can emerge.

In the case of scandals surrounding the Irish Catholic Church, such obligations were articulated through employment of the idea of the Church’s sovereignty under Canon Law. We might imagine special obligations forming in less obviously hierarchical ‘thick’ circumstances (on “thick” and “thin” see Dubnick & O’Kelly 2005; O’Kelly & Dubnick 2006). Importantly, inter-

nal organisational power is brought to bear on its subjects, at least when they step into the roles associated with these associative communities, through the organisation's capacity to arrange patterns of condemnation and approbation, sanctions and rewards and promotion and demotion. The exercise of power through various 'forums' (see Bovens 1998; Bovens 2007a; Bovens 2007b; Schillemans & Bovens 2011; Schillemans & Busuioc 2014) can influence the terms of more 'ground-level' accountability relationships as people seek to contend with the multiple, diverse and often conflicting expectations under which they live their lives (Dubnick 2014). While the consequence of that influence are difficult to predict, and while the power of the forum itself depends on the other relational spaces that form, the accountability spaces of firms, churches and other hierarchical organisations are themselves a kind of Coasian efficiency (Coase 1937). The desires and intentions of senior officers, that is, are communicated and enforced through the encouragement of particular patterns of conduct, the exclusion of other possible patterns of conduct and the excision of dissenters from the ranks.

The challenge such 'quasi-private but socially-public' regimes present for the public sphere is immense. Regulatory and policing regimes find it very difficult to access closed information systems and so transparency – conventionally held to be the core ingredient for accountability – becomes far more difficult. Internal cohesion, enforced through the promotion of common mentalities suggests that whistleblowers and more official sources of information are few and far between and face significant penalties when they step out of line. And so in short, the special obligations are a key component of the breakdown in the kinds of special moral measures and vocabularies that help explain situations where corruption identified from the outside are seen as loyalty, or stability, or even virtuous social service from the inside. This, rather than outright ineptitude might go to the heart – not of the terrible actions of abusers – but to the apparent confusion and even anger of Church leaders to popular rejections of their conspiracies to deal with abuse on their own partisan terms.

5 Global Financial Services

While this problem has set in stark relief with regards to Ireland's Catholic Church, as outlined above, it is also apparent with the global, highly complex and opaque firms that have come to dominate industrial economies. Our second, more detailed, case focuses on the banking sector as it has emerged through the GFC, in large part to highlight similar lessons to those learned with regard to the Irish Catholic Church above. That is, that banking has emerged as an autonomous normative space – we are loosely tracking Polanyi's arguments about the 'disembedding' of market from society here (see Polanyi 1944; Picciotto 2011a) – with, in this case, both tacit and ex-

plicit support from the state. Our argument, beyond that, is that social narratives of corruption have little traction internally within such 'monastic' spaces and that law, in the light of state support, has few if any bases upon which to negotiate its entry into such spaces.

Following on from our second point above – that 'monastic' accountability are sustained because they are licensed to do so – we ought to recall that law is not a single predictable and knowable force. We should think of it instead as “a welter of conflicting principles, imperfect analogies, and ambiguous generalities” (Suchman & Edelman 1996, p.932) that is negotiated between legislators and regulators and law's regulatory targets and subjects. Law is, as such, always bounded by the terms of acceptability upon which law-makers and organisational insiders can agree. This is one reason why the 'monastic' accountability space can be so stable and long-lasting: it provides a strong and unwavering public narrative that is often both impermeable to broader narratives (or popular outrage) and simultaneously is persuasive to elite public actors who are amenable to the power of strong private actors.

To put this differently: we need to be wary of imagining law as simply acting upon passive subjects and from there to thinking of regulatory failure as resulting at a basic level from some witting or unwitting lacuna in the law that is then subject to exploitation. Law and regulation is *fundamentally shaped* by the negotiation of terms public and private actors. That is a *crucial part of what law is*.

'Is it possible to have too much ambition? Is it possible to be too successful?' Blankfein shoots back. 'I don't want people in this firm to think that they have accomplished as much for themselves as they can and go on vacation. As the guardian of the interests of the shareholders and, by the way, for the purposes of society, I'd like them to continue to do what they are doing. I don't want to put a cap on their ambition. It's hard for me to argue for a cap on their compensation.'

So, it's business as usual, then, regardless of whether it makes most people howl at the moon with rage? Goldman Sachs, this pillar of the free market, breeder of super-citizens, object of envy and awe will go on raking it in, getting richer than God? An impish grin spreads across Blankfein's face. Call him a fat cat who mocks the public. Call him wicked. Call him what you will. He is, he says, just a banker 'doing God's work' (Arlidge 2009).

This kind of perception helps explain the fact that the crisis seemed to lack a broader educative tone for banking: those who remained in business had their skills confirmed and those who did not were able to look to systems and circumstances for blame.

Banking is already characterised by the use of legal forms – corporate personality and limited liability for instance – to manufacture highly complex value chains (see for instance Neilson et al. 2014 and other essays in the same special issue) and corporate groups (see Dine 2000; Picciotto 2011b), often as much in pursuit of tax and other kinds of arbitrage as they are in pursuit of production efficiencies (see Hadden 2012). Driven at least in part by the well-documented correlation between firm size and executive pay (see Girma et al. 2007; Bliss & Rosen 2001; Cosh 1975), and in part by the advantages for liability inherent in structures that were too complex to govern, senior officers in banks participated not only in a headlong push for risk, but also in the use of rewards and incentives to communicate and enforce norms throughout the sector. The educative effect of bonuses and gaps between banking and non-banking pay in regional economies⁴ – in London for instance – is likely to be significant both in terms of its positive effects on performance and in terms of its imposing the discipline of ‘golden handcuffs’ on workers who are tempted to dissent from ‘monastic’ norms.

The growing dominance of financial services has been matched at state level by the perception that financial services existed in a self-contained and self-regulating market, that firm complexity was best managed internally and that shareholder discipline restrained any self-serving impulses on managers’ parts.⁵ What is really interesting, however, is how the GFC, when it came, did so little to disrupt such narratives.

One reason for this might be that those who were exposed to public opprobrium and censure could fall back on systemic circumstances to explain their institutions’ failures. Here, for instance, is David Drumm, ex-CEO of Anglo-Irish Bank (reputed to be the ‘world’s worst bank’). Drumm explained the bank’s failure by saying that “everybody believed that we were in a unique situation in Ireland. We had a great economy, we had tremendous fundamentals that would see us through and therefore life was good and we would continue to grow over time.”(O’Dowd & Muldoon 2011) Similarly, for Fred Goodwin, ex-CEO of the Royal Bank of Scotland,

As you can imagine, I have gone over this time and time and time again in my own mind as to what was the point at which we should have seen this differently, and I keep coming back to at the time there was a view, not that things would continue forever, there was a definite mood that the economy in this country and generally was going to slow down, that financial markets were

⁴In the UK for instance, workers in banking and business services have been the “principal beneficiaries of increased inequality” through their access to high wages (Bell & Van Reenen 2014 F8). In the United States, working in finance carries a 50% premium over working in other sectors, adjusting for education (Philippon & Reshef 2012).

⁵Perhaps it is unsurprising that ideological dynamics at state level paralleled private interests. Snider (2000), for instance, argues that economic interest is a significant factor in determining which theoretical perspectives gain traction.

going to slow down; but at no point did anyone get the scale or the speed at which. That is really what has been so damaging about this slowdown. It was not that our business was premised on everything continuing to go upwards forever; but that things could turn as quickly as they did, I do not think anyone saw (Anon. 2009, Q1645)⁶

The line of Drumm and a number of others (see below) encapsulated a style of ‘agent regret’ where the line from actor to action is defined by ‘moral luck’ (Williams 1981; Zimmerman 1987). Action is held to be regretful but the actor does not ‘own’ it, morally speaking, because they were either acting within set roles – and so responsibility was diluted or absent (on which see Wolgast 1992) – or actions were harmful only in the light of external events.⁷ Drumm’s defence above draws on the second of the two: that harm came through (market) forces beyond his control. He excused himself by explaining that the bank’s collapse was preceded by a consensus between Anglo executives, regulators and ministers over how to proceed and, as such, that he cannot stand out as a responsible party: he cannot take individual responsibility for collective actions (for one discussion of such matters, see Silver 2006).

There is no reason to doubt either Drumm’s or Goodwin’s sincerity in their excusing their behaviour, even if they had tended to self-praise when times were good (ably assisted by scholars at times. See Nohria & Weber 2003). What is interesting, however, is how such narratives helped to avoid disrupting the internal cohesion of banking’s accountability spaces: by simply blaming circumstance, or even bad business judgement in the light of circumstance, countless problems in organisational form, corporate governance, state collaboration and the like were put aside.

This in turn might explain the willingness of the remaining population of senior bankers to respond to the crisis, if not in Blankfein’s forthright tone, then in tones that suggest a tin ear for public opinion (although no set of ears were so ill-tuned as that of Anglo-Irish Bank executives who were revealed in leaked tapes to have laughed and joked as they sought to deceive the Irish state as to the extent of their losses in an effort to lure the state into rescuing the bank (see Lyons & Sheridan 2013; on Anglo-Irish Bank’s collapse, see Carswell 2011)). So, for instance, less than two weeks after HSBC was fined for its role in money laundering activities, its Chair stated that “there was ‘an observable and growing danger of disproportionate risk aversion creeping into decision-making in our businesses as individuals, facing uncertainty as

⁶On Goodwin’s reign in the Royal Bank of Scotland, see Martin (2014) and Fraser (2014).

⁷The classic example of this being the driver who kills a child who stepped out from behind a parked car. They may feel profound regret at the event and their role in it but they tend not to be held responsible for it.

to what may be criticised with hindsight and perceiving a zero tolerance of error, seek to protect themselves and the firm from future censure“ (quoted in Arnold 2014). Or, earlier on in the crisis, Deutsche Bank CEO Josef Ackerman spoke out, telling an audience at Davos that “an ongoing ‘blame game’ and uncertainty over future regulatory changes threaten to weaken the financial sector, potentially inhibiting a recovery” (Watts 2010). Again, we ought not to take such statements as simply strategic. We ought to see them rather as reflecting general sentiments within the monastic communities that banking makes up. An apparent tin ear might well be finely tuned to the voices it can hear.

When it came to the state’s role in the crisis, the British state has been proactive in self-examination with regard to its regulatory role. As a consequence we do get a sense of how little capacity for action there was in the Financial Services Authority especially (see for instance FSA 2011), because the regulators themselves had abandoned the space to the insiders. In Ireland the situation was, if anything, even worse, with senior financial regulators both reluctant to regulate for fear of undermining Ireland’s ‘competitive’ climate and even participating in roadshows helping to drum up business for the financial services sector (see Honohan 2010, para.7.27).

Indeed, when three executives were placed on trial for an illegal loans scheme that had been designed to boost Anglo-Irish Bank’s shares as it neared collapse, and two were found guilty, they were spared a custodial sentence because, as the trial judge put it, “a State agency had led them into error and illegality” (quoted in Gartland 2014). The impression was not of a regulator who was colluding in corrupt actions, but of one who had self-consciously stepped away from regulating on the grounds that powerful insiders simply ought not to be regulated at all.

6 Conclusion

The close relationships between political and regulatory actors and bank executives in Ireland and elsewhere is symptomatic of a common perception that the ‘disembedded’ autonomy of the financial economy is not problematic. This is at its heart the crux of ‘legal but corrupt:’ that law is itself disempowered by its authors, who use it to remove administrative zones from the state’s vision. This in turn facilitates conduct that is at odds with broader senses of ‘moral economy’: the associative obligations and patterns of equal recognition that people in general are held to share. We should also recall that such conduct is likely not done simply in the face of public opinion – financial market actors, as with any others, rarely behave from self-consciously bad faith or motives. Instead they simply disagree with broader notions regarding the value of what they do or they are simply unaware of those broader notions – or of their depth.

We should note that this perspective on corruption does not rely on explicit or implicit exchange as either a necessary or sufficient condition for us to identify conduct as legal but corrupt. The corruption is, rather, ideational and reflects a degeneration of the body politic – as Dworkin for instance might see it – rather than trade in public goods. The carving out of administrative zones, within which private actors have impunity, might be done innocently, so to speak. Or there might be calculating motives, but not in terms of exchange. So, for instance, the spaces carved out for the Catholic Church reflected the weakness of the new Irish state, the legacy from British attempts to nominate a voice for Irish ‘civil society’ that excluded actors who were interested in statehood, and perhaps even political calculations about the merits of outsourcing social discipline over ‘deviance’ (see O’Sullivan & O’Donnell 2007). But it is likely insufficient to describe the corruption in terms of exchange.

That said, exchange seems to be present very often *in practice*, though often in tacit ways.⁸ We suggest three mutually reinforcing forms of exchange that are evident in the financialised political and economic sphere. First, politicians may find themselves stepping, in the instance above, into banking’s accountability space, partially perhaps and perhaps partly in the knowledge that, when they leave office, they will pursue lucrative careers serving the firms in a private capacity that they ceded power to when they acted in a public capacity. Second, they may come to see the world through finance’s eyes, given the emergence of a corporatist ‘resource curse’ where the domination of economic life by giant firms crowds out other needs and alternative voices (and other avenues for tax revenue).⁹ Finally, third, they may grow to fear, following O’Toole above, competition from characters who are less scrupulous in their engagement with the loud voices of finance. This would all certainly involve exchange but we should be aware of how subtle and insidious the exchange is.

‘Corrupt’ is as such something of a misnomer, beyond pointing to serious disruptions of the body politics. Corruption it has very little explanatory power in the context, say, of the Irish Catholic Church above. Corruption is at this level in the eye of the beholder. Insulated and autonomous moral communities find it hard to concoct terms through which they can communicate about their conduct with others. Law’s role ought to negotiate those

⁸By ‘tacit’ we mean the different ways, drawing loosely on Hayek (1945), in which collaborative relationships might emerge without the collaborators being fully aware of their collaboration.

⁹Writing with regard to oil, Nicholas Shaxson points out that, as tax revenues from one source increase, the state’s reliance on other sources of revenue, and politicians’ attention to other voices wanes: “A rallying cry of the American revolutionary war against London was, ‘No taxation without representation’ – people will pay taxes only if they feel that they get a political voice in return. But in Nigeria . . . the rulers no longer needed their citizens for their tax revenues, since they had the oil money instead. Millions of Nigerians might as well have fallen off the map” (Shaxson 2008, p.18.)

terms. But when law is not available, for whatever reason, then such terms are hard to come by.

‘Monastic’ accountability spaces, connected with strong and stable associative communities are particularly hard to access. This is even more the case when they possess economic or other social power to the degree that they can set out to neutralise law’s mediating role, in particular through the development of close relations with those in political power. Corruption in this case happens by license, but that license is not simply granted: it is part of a long-standing negotiation of sovereignty between a strong private actor and the authority of the state.

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