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Snaring Leopards: Tracking the Efficacy of Financial Regulatory Reform in the Aftermath of Crisis

At a rhetorical level, significant progress has been made towards establishing a coordinated global framework for the governance of capital markets. Implementation remains some way off, however, not least because of a failure to address pivotal structural issues. What constitutes systemic risk? What are the specific responsibilities of specific epistemic communities, such as the legal and audit professions? The failure to engage in substantive discussions about the causes and consequences of the erosion of social norms within these professions means that regulatory and policy authorities risk privileging symbolic over substantive change. This Article examines the trajectory of reform since the onset of the global financial crisis and argues that a failure to address the ethical dimensions of the identified problems preordains failure.

I
INTRODUCTION

The global financial crisis (GFC) demonstrated how individual, corporate and regulatory misjudgments were exponentially

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exacerbated by a myopic faith in ideational constructs. This was accompanied by an ongoing failure to resolve an existential conflict between the demands of public and private law.[1] Subsequent political rhetoric holds out the tantalizing promise of the most far-reaching review of corporate governance, corporate law and financial regulation in a generation.[2] There is undoubtedly political capital to be gained from introducing such reframing mechanisms.[3] At the same time, reform of such magnitude is also exceptionally difficult to render operational in a domestic, let alone international context. As a consequence, the practical focus has been on technical issues. The danger moving forward is that a reliance on technical solutions will provide the illusion of substantive reform but fail to address the substantive problems. Moreover, the alacrity with which loans to the banking sector have been paid back, particularly in the United States, has reduced direct influence over the internal governance arrangements of the very institutions that caused the crisis. Senior banking figures there have made it clear that the febrile nature of

1 David Millon, *Theories of the Corporation*, 1990 DUKE L.J. 201, 201–02 (1990); *see also* Christopher D. Stone, *Corporate Vices and Corporate Virtues: Do Public/Private Distinctions Matter?*, 130 U. PA. L. REV. 1441, 1442 (1982); for explication of the case for breaking down the artificial boundaries, see HUGH COLLINS, REGULATING CONTRACTS 53 (1999) (noting the normative advantages associated with the "[p]roductive [d]isintegration of [p]rivate [l]aw").

2 *See* Prime Minister Gordon Brown, Remarks on the Global Economy, at the Reuters Building, London, (Oct. 13, 2008) *available at* http://image.guardian.co.uk/sys-files /Politics/documents/2008/10/13/reutersspeech13102008.pdf. Brown subsequently went further, calling for international coordination and arguing that the G20 needed to "discuss whether we need a better economic and social contract to reflect the global responsibilities of financial institutions to society." Gordon Brown, Press Conference, G2O Finance Minister Meeting, St. Andrews, Scotland, (Nov. 7, 2009) *available at* http://www.real clearworld.com/articles/2009/11/10/the_uk_prime_ministers_speech_to_g20_finance_min isters_97341.html; *see also* Barack Obama, Remarks on Financial Regulatory Reform, Press Conference, White House, Washington D.C., (June 17, 2009) *in* DAILY COMP. PRES. DOC. DCPD200900474, *available at* http://www.presidency.ucsb.edu/ws/?pid=86287; Nicholas Sarkozy, Opening Address to the World Economic Forum, Davos, (Jan. 27, 2010) *available at* http://www.weforum.org/pdf/Sarkozy_en.pdf.

3 *See* Sarkozy, *supra* note 2. Of critical importance here is France's impending chairmanship of the G20. *See also* Gillian Tett, *Do Not Dismiss Sarkozy's Back to the Future Currency Plan*, FIN. TIMES (London), Jan. 29, 2010, at 34 *available at* http://gcalhoun.files.wordpress.com/2010/02/10-01-29-ft-do-not-dismiss-sarkozys-back-to -the-future-currency-plan-carry-trade.pdf (the respected Capital Markets Editor noting the speech "reveals more about France's determination to shape the global intellectual debate—at a time when America is looking increasingly confused—than any clear policy initiative").

capital markets could necessitate further intervention at a time when state capacity is stretched to and beyond capacity.[4]

Irrespective of the utility of reducing leverage ratios, restricting proprietary trading, or the capacity of banking licenses from holding stakes in alternative asset classes, such as hedge funds and private equity, it is essential to remember that the crisis is derived essentially from ethical failure. It reflects an erosion of restraint. It represents the delayed manifestation of past failure to take into adequate consideration the social, economic, and political consequences of the expansion of the financial sector or the dynamics of capital market regulation. Of particular relevance here is the privileging of emasculated conceptions of regulatory and corporate responsibility. If we are to reengineer the corporate contract, it is essential that we understand much better the forces that "denatured" financial capitalism.[5] Moreover, that understanding needs to be rooted within a broader practical and philosophical conversation—namely, what is the purpose of the financial sector? What restraints should be placed on growth to protect society from externalities, conveniently excised in the past from macroeconomic models and legal and regulatory policy frameworks? What specific duties and responsibilities should be demanded of particular communities of practice in enhancing market integrity? Without such an examination, there is a profound danger that we will not only fail to engender meaningful change. We will privilege existing flawed power relations.

The interlocking governance, regulatory and political failures that generated the GFC provided a fin de siècle moment. Globalization, deregulation and innovation, each informed and legitimated by the

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4 *See, e.g.*, *First Public Hearing of the Financial Crisis Inquiry Commission*, 111th Cong. (2009) [hereinafter *Blankfein testimony*] *available at* http://fcic.gov/hearings/pdfs/2010-0113-Transcript.pdf (testimony of Lloyd Blankfein, Chairman and CEO, Goldman Sachs).

5 The French President, Nicholas Sarkozy described the GFC as a "crisis of globalization" and noted:

> The crisis we are experiencing is not a crisis of capitalism. It is a crisis of the denaturing of capitalism—a crisis linked to loss of the values and references that have always been the foundation of capitalism. Capitalism has always been inseparable from a system of values, a conception of civilisation, an idea of mankind. Purely financial capitalism is a distortion, and we have seen the risks it involves for the world economy. But anti-capitalism is a dead end that is even worse. We can only save capitalism by rebuilding it, by restoring its moral dimension. I know that this expression will call forth many questions. What do we need, in the end, if it is not rules, principles, a governance that reflects shared values, a common morality?

Sarkozy, *supra* note 2 at 1, 3.

transmission of a neo-liberal agenda that progressively dominated in the aftermath of the Cold War, all came under sustained question. Nowhere was this rupture more keenly encapsulated than in the extraordinary congressional testimony given by Alan Greenspan, the former chairman of the Federal Reserve, in October 2008.[6] Greenspan admitted that what had been represented as the economically rational was politically constructed; that his faith in the capacity of the markets to self-correct was, in fact, based on what turned out to be flawed ideological assumptions.[7]

Watching Greenspan give evidence, one was acutely reminded of Don Fabrizio Corbera, the antihero of Giuseppe Tomasi Di Lampedusa's masterpiece, *The Leopard*.[8] Set in Sicily on the cusp of Italian unification, the novel is a meditation on the impact of potentially epochal change on existing power relations. While Greenspan shuffles off the world stage, his reputation for sagacity in ruins, the fight for legitimacy transfers to a new generation of financiers, symbolized in *The Leopard* by the aged count's nephew, Tancredi, who admonishes his mentor not to give up hope, telling him, "[i]f we want things to stay as they are, things will have to change."[9]

The epigram provides a telling indication of how even the most radical ruptures can be subverted. It also serves as a metaphor for a more pressing and contemporary danger. This centers on the dispiriting reality that the conceptual and practical implications of the GFC may have neither been internalized by communities of practice nor necessarily understood at policy level. Notwithstanding the enormous dislocation caused by the crisis, beyond the rhetoric, fundamental change is, therefore, by no means assured. As such, the window of opportunity for more fundamental reform is closing. With it, the possibility of reengineering a social and economic compact capable of global application and global legitimacy also recedes from view. It is only through mapping the trajectory of actual and proposed reform against both the causes and the rhetorical response to the crisis and the choice of forum that this myopia becomes apparent. The critical but unexplored question is why this occurred.

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6 Evidence to House Committee on Oversight and Government Reform, U.S. Congress, Washington D.C., 23 October 2008, 1 (Alan Greenspan).

7 *Id.*

8 GIUSEPPE DI LAMPEDUSA, THE LEOPARD (1958) (Archibald Colquhoun trans., Pantheon, 1960).

9 *Id.* at 40.

A necessary first step is to generate a more granular understanding of how accountability is conceived within specific communities of practice. Part II sets out four distinct and potentially incommensurable interpretations of accountability's function in capital market discourse. It links this to Oliver Williamson's identification of four equally distinct domains of analysis.[10] The maintenance of the integrity of each level forms a critical component in designing workable systems of governance. To be effective, accountability strategies must be capable of engineering change within and between each domain. Part III maps how these competing interpretations have been used in official discourse to explain the crisis and for what purpose. Part IV provides a detailed account of the limitations associated with advancing solutions that do not address the normative dimension through an extended case study of the approach adopted by the Republic of Ireland, one of the European countries most impacted by the GFC. Part V argues that substantive reform requires the identification of public duties within a dynamic and responsive system of oversight in which the non-calculative social contract is itself revisited.

II
THE NEBULOUS MEANING OF ACCOUNTABILITY

In the aftermath of crisis, regulatory theory and practice has often moved progressively through solutions based on the practical and normative advantages of *governance*, *responsibility*, *integrity*, and *accountability*. The problem is that we rarely stop to examine what these nebulous cluster concepts actually mean. The GFC provides a particularly stark example of past failure to examine the incremental effect of transactional imperatives on the integrity of the overarching system. This derives, in large part, from misguided confidence in the restraining strength of what Oliver Williamson has termed the underpinning "non-calculative social contract."[11] As Figure 1 below demonstrates, this refers to the combination of values that generate societal obligation. Critical in this regard are the traditional virtues, including integrity and honesty. Although a weak facsimile of these

10 Oliver E. Williamson, *The New Institutional Economics: Taking Stock, Looking Ahead*, 38 J. ECON. LITERATURE 595, 597 (2000).

11 *Id.* at 596–600. Williamson notes that analysis of this "level one" component of social theory is conspicuous by its absence within regulatory studies. The other three levels comprise institutional arrangements viewed primarily through property rights and positive political theory, governance mechanisms through transaction cost economics and resource allocation frameworks generally examined through agency theory.

values can be represented in legal form through requirements of fiduciary obligation, for example, the concept of the non-calculative social contract suggests commitment to a much broader sense of societal empathy, one that cannot be transacted around through the privileging of individual rights. Moreover, it suggests the inherently moral basis of social relations within the marketplace.[12] The practitioner and policy community, including academics primarily associated with the law and economics tradition, focused on reducing transaction costs as the primary (if not sole) indicator of efficiency.[13] The impact of this privileging within and between each level of analysis on market participants' adherence to values (such as reputation, integrity and trust—all key determinants of confidence) was left unexplored. The entire construct was based on the belief that the terms of the underpinning social contract would remain unaffected.

Level	Frequency of intervention	Purpose

12 For a critique from within mainstream economics, see Amartya Sen, "Introduction" in Adam Smith, *The Theory of Moral Sentiments* (1759; London: Penguin, 2009 ed.) vii–xxiv (noting that neglect of Smith's opus has led to stunted appreciation of the complexity and "plurality of human motivations, the connections between ethics and economics and the co-dependent—rather than free-standing—role of institutions in general and free markets in particular in the functioning of the economy": at viii).

13 *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001); for critique, see Kent Greenfield, *September 11th and the End of History for Corporate Law*, 76 TUL. L. REV. 1409 (2001). For original formulation, see Frank Easterbrook & Daniel Fischel, *The Corporate Contract*, 89 COLUM. L. REV. 1416 (1989). Some have gone further, see Amartya Sen's stinging rebuke on rational choice and its proponents in the legal community in Smith, *supra* note 12 (in which he decries the "experts in so-called law and economics [who] have been cheerfully practicing the same narrow art. And they have been citing Smith in alleged support of their cramped and simplistic theory of human rationality" at x). As Claudio Bario of the Bank of International Settlements has acknowledged, self-deception is not a basis for credible policy calibration. "To varying degrees, policymakers, just like everyone else, underestimated the threat. They were caught up in what, in retrospect, has partly turned out to be a Great Illusion. And even had the threat been fully recognized—and some no doubt did—the political economy pressures not to change policies would have been enormous. On the face of it, the regimes in place had proved to be extremely successful. A lot of reputational capital was at stake. And not even the often more critical academic community provided any support for change. Indeed, as regards macroeconomic policy, that community turned out to be part of the problem, not of the solution." *See* Claudio Borio, 'The Financial Crisis of 2007-? Macroeconomic and Policy Lessons' (G20 Workshop on the Global Economy, Mumbai, 24–26 May 2009) 13 http://www.g20.org /Documents/g20_workshop_causes_of_the_crisis.pdf.

Social norms	100–1000 years	Noncalculative social contract
Institutional environment	10–100 years	Overarching legal, political and bureaucratic framework
Governance arrangements	1–10 years	Aligning transactions within accepted rules of the game
Resource alocation	Continuous	Incentive alignments

FIGURE 1. Williamson's Governance in Action[14]

This was both a conceptual and practical mistake of enormous import. As the crisis of confidence intensified beginning in August 2007, significant and sophisticated major markets did not merely behave sub-optimally. In the memorable phrasing of analysts at the French investment bank BNP Paribas they simply "vaporized."[15] As a consequence, central banks were forced to inject unprecedented levels of liquidity. The logic of competitive markets came under sustained assault and so too did previous policy choices that allowed for a magnification of systemic risk. It became apparent that the progressive hollowing out of regulatory and legal frameworks throughout the 1990s—particularly in London and New York—and the demise of relational banking, and the creation of a shadow banking system combined to displace rather than eliminate risk and responsibility. Fears that the increasing sophistication of financial markets inevitably would be accompanied by enhanced volatility and chronic instability were ignored.[16]

The unintended implications of privileging innovation over security across the financial sector are now apparent for the corporation, the market in which it is nested and the underpinning

14 Williamson, *supra* note 10, at 597.

15 Floyd Norris, *A New Kind of Bank run Tests Old Safeguards*, N.Y. TIMES, Aug. 10, 2007, at B1.

16 HYMAN MINSKY, STABILIZING AN UNSTABLE ECONOMY 315 (2002).

legal and regulatory frameworks.[17] As a consequence we have reached a tipping point in the theory and practice of financial regulation.[18] Despite this acknowledged failure, we appear to remain wedded to falsified conceptions of what markets can achieve without guidance and, where necessary, intervention. In part, the faith is linked to purposive ambiguity over the concept of accountability itself and how it is understood by communities of practice as a framing device to delineate duties and responsibilities and emphasize rights.[19]

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17 *Regulatory Restructuring and the Reform of the Financial System*, *H. Comm. on Fin. Serv.*, 110th Cong. (2008) (statement of Joseph Stiglitz); *see also* ROGER BOOTLE, THE TROUBLE WITH MARKETS 239 (2009); Edward Connors, *Future Fund Chief Sees Day Of Reckoning for Banks*, AUSTL. FIN. REV., Jan. 14, 2009, at 1, 38 (quoting David Murray, head of the Australian Future Fund: "Everybody got carried away by the concept of a 'millionaires factory' which was not culturally good. Where you don't want your brightest, or at least too many of them, is in jobs which spend time interpreting or arbitraging rules. This is not really effective work[,] and a lot of investment banking is that type of deal structuring, which is not very constructive. It produces over-engineered stuff that is the first to break when anything goes wrong."); *see also, generally*, *The Financial Crisis and the Role of Federal Regulators: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 110th Cong. 3 (2008) [hereinafter *Greenspan Testimony*] *available at* http://oversight.house.gov/images/stories/documents/20081024163819.pdf (testimony of Dr. Alan Greenspan, Former Chairman of the Federal Reserve) (discussing his admission of regulatory fealty to an "ideological construct").

18 *Compare* Stiglitz testimony, *supra* note 9 *and* Joseph E. Stiglitz, *Principles of Financial Regulation: A Dynamic Portfolio Approach*, 16 WORLD BANK RES. OBSERVER 1, 2 (Spring 2001) *available at* http://www-wds.worldbank.org/external/default/WDSContentServer/IW3P/IB/2003/08/23/000094946_03080904003983/Rendered/PDF/multi0page.pdf (discussing "an ideological agenda [which] has pushed excessive reliance on . . . capital adequacy standards"; arguing that "[d]espite its long history, financial market regulation is poorly understood"; and suggesting the need for strong regulation to address "[f]ailures in the banking system [which] have strong spillovers, or externalities, that reach well beyond the individuals and firms directly involved") *with* opponents of Stiglitz who have rejected claims of ideological bias and negligence in either policy design or corporate executions, *e.g.*, Eric Dash & Julie Creswell, *Citigroup Saw No Red Flags Even As It Made Bolder Bets*, N.Y. TIMES, Nov. 23, 2008, at A1, http://www.nytimes.com/2008/11/23/business/23citi.html (quoting an April 2008 interview in which Robert Rubin assessed his efforts as a director of Citigroup: "In hindsight, there are a lot of things we'd do differently. But in the context of the facts as I knew them and my role, I'm inclined to think probably not."); this reprised an argument made in his autobiography on the financial reporting scandals at the turn of the millennium, ROBERT RUBIN, IN AN UNCERTAIN WORLD 337 (2003) ("[T]he great bull market masked many sins, or created powerful incentives not to dwell on problems when all seemed to be going well—a natural human inclination"). *See also, generally*, JOSEPH STIGLITZ, THE ROARING NINETIES 159–62 (2003) (recounting internal conflicts within the Clinton administration over the regulation of financial markets).

19 This requires sophisticated mapping of regulatory domains. *See* CHRISTOPHER HOOD, HENRY ROTHSTEIN & ROBERT BALDWIN, THE GOVERNMENT OF RISK 8 (2004). It also requires deep ethnographic investigation of actual practice and how innovation is both conceived as a social good and therefore legitimated. The classic example is insurance. *See, e.g.*, VIVIANA A. ZELIZER, MORALS AND MARKETS: THE DEVELOPMENT OF LIFE

Figure 2 below posits two critical dimensions played by accountability in the discourse surrounding the financial crisis.[20] Along one dimension, accountability is presented as either the cause and/or cure. It is the absence or failure of effective accountability that provides the focus of the discourse. In contrast, accountability is also central to many discussions about how to deal with specific failures. These include, but are not limited to, malfeasance and misfeasance such as deceptive or misleading conduct, unethical conduct linked to defective internal corporate codes of conduct or governance arrangements, and/or the operation of the external regulatory architecture.

It can also be deployed as a counter to the overall conditions that caused the crisis, for example the need to respond to the danger posed by technical compliance within specific communities, such as among lawyers, auditors, rating agency professionals, investment bankers or other groupings that play a gatekeeping function.

Perspective	Focus on cause	Focus on cure
Accountability-as-mechanism (i.e., control)	Failure of instrument	Reform, replace, repair the instrument

INSURANCE IN THE UNITED STATES (1979). A similar dynamic applied to the emergence of financial derivatives. A social network comprising former regulators, academics and leading practitioners changed perceptions of the moral utility of options; what had once been a dubious gamble came to be regarded as a respected financial instrument. *See* Donald MacKenzie & Yuval Millo, *Negotiating a Market, Performing Theory: The Historical Sociology of a Financial Derivatives Exchange*, 109 AM. J. OF SOC. 107 (2003). This process can generate a powerful ideational paradigm. *See* Jonathan Remy Nash, *Framing Effects and Regulatory Choice*, 82 NOTRE DAME L. REV. 313 (2006); *see generally* Tony Porter & Karsten Ronit, *Self-Regulation as Policy Process: The Multiple and Criss-Crossing Stages of Private Rule-Making*, 39 POL'Y SCI. 41 (Mar. 2006); Tony Prosser, *Regulation and Social Solidarity* 33 J.L. & SOC'Y 364, 372 (2006) (noting most conflicts in regulation are about fundamental values).

What is at issue, therefore, is the extent to which obligation is conceived self-reverentially in narrow technical terms or more expansively, taking into account individual transactions, while legal, may at the same time erode market integrity. Thomas Clay Arnold, *Rethinking Moral Economy*, 95 AM. POL. SCI. REV. 85, 90–91 (2001) ("Constitutive social goods establish and symbolize important senses of self. . . . Insofar as constitutive social goods structure the status and obligations of persons, their value includes the meaningfulness of the relationships and the senses of self generated.").

20 Original framing in Melvin J Dubnick, *Toward a "Responsible" Future: Reframing and Reforming the Governance of Financial Markets*, *in* THE FUTURE OF FINANCIAL REGULATION 395, 407 (Iain MacNeil & Justin O'Brien eds., 2010).

Accountability-as-setting (i.e., normative infrastructure)	Absence or collapse of norms, mores, standards	Reestablishing, rebuilding moral community based on effective norms/standards

FIGURE 2. Accountability's Discursive Function

The second dimension highlights another distinction. Here, accountability can be conceived in either mechanistic or normative terms. In the former sense, being accountable means being subject to mechanisms designed to impose some form of control or guidance. It means being answerable, liable, legally obligated, etc. Alternatively, accountability is also treated as a manifestation of the normative condition of "being accountable"—as something an agent is or ought to be. What form accountability could or should take is enormously controversial. More specifically, it cuts against the enabling underpinning of corporate and contract law.[21] This creates two interlinked problems. First, can ethical behavior be evidenced solely through compliance with functionally understood legal obligation? Second, if acting ethically requires transcending legal obligation, who should adjudicate compliance, on what basis, and by what specific measure?

	Specificity of Accountable Activity	
	Low	High

21 The refusal to intervene in the governance of the corporation was indeed deemed as its most valuable characteristic. *See* Henry Hansmann & Reinier Kraakman, *The End of History for Corporate Law*, 89 GEO. L.J. 439 (2001) (citing "the recent dominance of a shareholder-centered ideology of corporate law among the business, government, and legal elites in key commercial jurisdictions" as the critical driver); for contemporary critique, see also Dalia Tsuk Mitchell, *The End of Corporate Law*, 44 WAKE FOREST L. REV. 703 (2009) ("in the course of the past century corporate law has been used first to legitimate corporate power and then to exempt those exercising it from liability").

Autonomy of accountable agent	High	Constructive	Managerial
		Creation of accountable space of internalized norms and standards	Establishing what agent is accountable for (objective or standard), allow agent to determine "how"
	Low	Regulative	Performative
		Creation and externalized oversight of actions of agent within accountable space	Establishing what agent is accountable for and how to proceed

FIGURE 3. Accountable Strategies

These are enormously complex questions. The courts, particularly in the United States, have traditionally been loath to intervene in the internal affairs of the corporation (and for good reason). The lack of consensus on the purpose of the corporation has privileged managerial and performative approaches to accountability. The relative dominance of each is linked to the boom-bust-regulate-deregulate-boom-bust cycle.[22] Moreover, this desultory spin should remind us that the application of ever more detailed proscriptive and prescriptive rules does not necessarily lead to the reduction of agency problems or inculcation of higher ethical standards. These rules can be and indeed often are transacted around. The failure of the Sarbanes-Oxley Act, which was designed to ensure the efficacy of

22 For trajectory of corporate governance reform, see Kevin Keasey, Helen Short & Mike Wright, *The Development of Corporate Governance Codes in the UK*, *in* CORPORATE GOVERNANCE: ACCOUNTABILITY, ENTERPRISE AND INTERNATIONAL COMPARISONS 21 (Kevin Keasey, Steve Thompson & Mike Wright eds., 2005); for a global perspective, see Jennifer Hill, *Evolving "Rules of the Game" in Corporate Governance Reform*, *in* PRIVATE EQUITY, CORPORATE GOVERNANCE AND THE DYNAMICS OF CAPITAL MARKET REGULATION (Justin O'Brien ed., 2007) 29–54.

internal controls, makes this abundantly clear.[23] Likewise principles alone cannot act as a restraining force, as the poor performance of the much vaunted risk-based regulatory framework in the United Kingdom shows. As we have seen, traditional regulatory solutions, underpinned by performative, managerial and regulative conceptions of accountability, have drawbacks if viewed in narrow technocratic terms. What is required, therefore, is a much greater understanding of how rules and principles are interpreted within specific communities of practice. Contrary to the assertions of the former chairman of the Federal Reserve (in office and in retirement), it is not only possible but also necessary to engage in ex ante investigation of the factors leading to bouts of irrational exuberance.[24]

The presence of actual commitment needs to be investigated (e.g., individual corporations and professions charged with gate-keeping functions, such as the legal and auditing professions).[25] This requires a renewed emphasis on how to constitute a truly accountable space that simultaneously empowers and enhances personal, professional and corporate responsibility. Here, the professions play a critical

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23 *See* Roberta Romano, *The Sarbanes-Oxley Act and the Making of Quack Corporate Governance*, 114 YALE L.J. 1521 (2005) 1549–68 (condemning the flawed empirical justification); Donald C. Langevoort, *The Social Construction of Sarbanes-Oxley*, 105 MICH. L. REV. 1817 (May 2007) (arguing that the Act was designed to achieve a much more coherent objective but that its legitimacy is undermined by the dominance of the ill-conceived panic discourse); for application to the GFC, *see* Justin O'Brien, *Re-Regulating Wall Street: Substantive Change or the Politics of Symbolism Revisited?*, *in* THE FUTURE OF FINANCIAL REGULATION, *supra* note 12, at 423.

24 Alan Greenspan, The Challenge of Central Banking in a Democratic Society, Remarks at American Enterprise Institute Dinner (Dec. 5, 1996), *available at* http://www.federalreserve.gov/boarddocs/speeches/1996/19961205.htm (asking rhetorically, "[H]ow do we know when irrational exuberance has unduly escalated asset values, which then become subject to unexpected and prolonged contractions as they have in Japan over the past decade?") The remarks provided the title for a seminal analysis into the dynamics of speculative bubbles, ROBERT SHILLER, IRRATIONAL EXUBERANCE (2000). Shiller, along with a Nobel Prize-winning economist at the University of California, Berkeley, have applied similar reasoning to the global financial crisis, *see* GEORGE A. AKERLOF & ROBERT J. SHILLER, ANIMAL SPIRITS (2009) 4 ("[The crisis] was caused precisely by our changing confidence, temptations, envy, resentment, and illusions—and especially by changing stories about the nature of the economy"); *see also* Alan Greenspan, *We Will Never Have a Perfect Model of Risk*, FINANCIAL TIMES, Mar. 17, 2008, at 13; *Greenspan testimony*, *supra* note 9.

25 Doreen McBarnet, *Financial Engineering or Legal Engineering? Legal Work, Legal Integrity and the Banking Crisis*, *in* THE FUTURE OF FINANCIAL REGULATION, *supra* note 12, at 67. The framework utilized, based on close observation, builds on a considerable body of empirical work on creative compliance, *e.g.*, DOREEN MCBARNET, CRIME COMPLIANCE AND CONTROL (2004); for application to audit community, *see also* DOREEN MCBARNET & CHRISTOPHER WHELAN, CREATIVE ACCOUNTING AND THE CROSS-EYED JAVELIN THROWER (2001).

monitoring and enforcement role. A critical determinant of what it means to be a member of a profession is to act in the interests of the client. This conception of responsibility is linked to an even more vague conception of acting in the public interest. The conception of fiduciary duty becomes problematic, however, when applied to large multidisciplinary practices, where boundaries between professional groups are exceptionally porous. This process leaves determining the parameters of societal obligation contested. This constitutive dimension of accountability rests at the apex of Williamson's conception of the non-calculative social contract. It is critical that we evaluate the extent to which current professional practice acts as a restraining force or justifies symbolic posturing. These issues are explored more fully below in Part V. First, however, it is necessary to identify how official discourse on the GFC has framed both the problem and the solutions to the recognized accountability deficit.

III
OFFICIAL DISCOURSE AND THE GLOBAL FINANCIAL CRISIS

The GFC first displayed its symptoms in the residential securitization finance market in the United States but metastasized ferociously, particularly across the North Atlantic.[26] The major identified causes of the meltdown are far from unique.[27] The dangers associated with excessive reliance on short-term calculations, made manifest by flawed remuneration policies, have long exercised the academic and policy communities, particularly in the United States.[28] Likewise, the dangers of speculative trading have long been

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26 The most complete, if U.S.-centric and partially referenced, accounts are to be found in WILLIAM COHAN, HOUSE OF CARDS: A TALE OF HUBRIS AND WRETCHED EXCESS ON WALL STREET (2009); ANDREW ROSS SORKIN, TOO BIG TOO FAIL (2009); GILLIAN TETT, FOOLS GOLD (2009); for application to economic theory, see also JOHN CASSIDY, HOW MARKETS FAIL (2009); GERALD F. DAVIS, MANAGED BY THE MARKETS (2009).

27 *See* CARMEN M. REINHART & KENNETH S. ROGOFF, THIS TIME IS DIFFERENT: EIGHT CENTURIES OF FINANCIAL FOLLY 203–22 (2009) (arguing that macroeconomic "indicators showed the United States at high risk of a deep financial crisis in the run-up to 2007 . . . but many [of the specific] problems were hidden in the 'plumbing' of the financial markets").

28 *See* LUCIAN BEBCHUK & JESSE FRIED, PAY WITHOUT PERFORMANCE: THE UNFULFILLED PROMISE OF EXECUTIVE COMPENSATION (2004); Lucian Arye Bebchuk et al., *Managerial Power and Rent Extraction in the Design of Executive Compensation*, 69 U. CHI. L. REV. 751 (2002); for application to the fall of Lehman Brothers and collapse of Bear Stearns, see also Lucian A. Bebchuk, Alma Cohen & Holger Spamann, *The Wages of Failure: Executive Compensation at Bear Stearns and Lehman 2000–2008*, 27 YALE J. ON REG. 257 (2010).

recognized and ignored.[29] Less well explored are the cultural and ideational factors, such as the privileging of the individual over community and the distrust of governmental intervention, that coalesced to form the "economically rational."[30] These factors tacitly condoned the elevation of short-term considerations over longer-term interests within and across the corporate, regulatory and political spheres in ways that remain not fully understood.[31]

Official discourse has not advanced the debate on how to transcend the technical gaming. This can be traced in part to the propensity for policymakers in engage in futile blame games rather than thorough investigation. The power of official discourse to provide a compelling independent account of the causes and consequences of a specific failure has long been the main but not sole justification for independent review.[32] Other justifications include the need to be seen as dealing decisively with a matter of pressing public concern, thus defusing short-term political pressures, legitimizing governmental responses, or providing a route-map for policy change.[33] Official discourse may serve to legitimate existing public policy. As Burton and Carlen have claimed, a critical function of the mechanism is "to represent failure as temporary, or no failure at all and to re[]establish the image of administrative and legal coherence and rationality."[34] There is no guarantee that this will occur, especially in cases where technological advances and sophisticated uses of that information allow for the cross-referencing of disclosed source material and the creation of alternative narratives.[35] Indeed, following the "Hutton

29 *See* LAWRENCE MITCHELL, THE SPECULATION ECONOMY (2007) 1–7.

30 *Greenspan* testimony, *supra* note 9.

31 FRIEDRICH HAYEK, THE ROAD TO SERFDOM 177 (1944) ("We shall not grow wiser until we realize that much of what we did before was foolish.").

32 For a useful review, focusing primarily on the Commonwealth, see CRIME, TRUTH AND JUSTICE: OFFICIAL INQUIRY, DISCOURSE, KNOWLEDGE (George Gilligan & John Pratt eds., 2004).

33 *See* Scott Prasser, *Royal Commissions and Public Inquiries: Their Uses and Scope*, *in* ROYAL COMMISSIONS AND THE MAKING OF PUBLIC POLICY 1, 6–8 (Patrick Weller ed. 1994).

34 FRANK BURTON & PAT CARLEN, OFFICIAL DISCOURSE: ON DISCOURSE ANALYSIS, GOVERNMENT PUBLICATIONS, IDEOLOGY AND THE STATE 48 (1979).

35 A talismanic example is the "Hutton Inquiry" in the United Kingdom, set up to investigate the causes of the death of a British weapons inspector who committed suicide after he was disclosed as the primary source for a British Broadcasting Corporation report that accused the government of "sexing up" intelligence in the lead up to the invasion of Iraq. The Hutton website allowed for cross-referencing of source material to an extent not seen before. *See* THE HUTTON INQUIRY, www.the-hutton-inquiry.org.uk (last visited Jan. 10, 2011). By contrast, the "Iraq Inquiry," chaired by Sir John Chilcot into the reasons for invading Iraq has a much less sophisticated website, which suggests that placing

Inquiry" into the death of a weapons inspector, the cogency of alternative critiques was a critical factor in the decision to cede the "Butler Inquiry" into the legality of the decision to go to war and the quality of governance arrangements.

The U.K. government's decision to hold proceedings in camera, in turn, created the impetus for the convening of the "Chilcot Inquiry,"[36] which culminated in a public cross-examination of the then-Prime Minister Tony Blair, on January 29, 2010, a sitting designed primarily to perform a cathartic function. This cathartic function extends to the United States. It has privileged the use of independent commissions to deal with matters of acute public concern, such as Watergate and the 9/11 attacks on Washington and New York. Convening an inquiry provides reassurance that lessons will be drawn and acted upon (although here too there is no guarantee that the reform agenda will be enacted, in particular if the investigative body lacks either subpoena power or the willingness to deploy it).[37] The decision by the United States to convene a Financial Crisis Inquiry Commission (FCIC or the Commission), under the auspices of the Senate provides evidence of both dynamics.[38] In interpreting its terms of reference, the Commission chairman, Phil Angelides, asserted that the FCIC has a mandate to provide a

> full and fair investigation in the interests of the nation—pursuing the truth, uncovering the facts and providing an unbiased, historical accounting of what brought our financial system and our economy to its knees. This is what the American people deserve and this is

documents into the public domain is less of a priority; *see* THE IRAQ INQUIRY, www.iraqinquiry.org.uk (last visited Jan. 10, 2011). The point here is not that the "Chilcot Inquiry" is less than robust or is designed to blindly advance government policy. Rather, it is to suggest that commissions with judicial power have exceptional power to place information into the public domain and allow for electronic cross-referencing, and that such power is infrequently used.

36 Marina Hyde, *My Alternative to Another Round of Iraq Whitewashing*, GUARDIAN (London), July 31, 2009, *available at* http://www.guardian.co.uk/commentisfree/2009/jul/31/iraq-inquiry-fourth-plinth-chilcot; *see also* THE IRAQ INQUIRY, www.iraqinquiry.org.uk (last visited Jan. 10, 2011).

37 This is precisely the reason media outlets opined that it was essential for any inquiry into the financial crisis to have congressional authority, including subpoena power, with the Pecora and Watergate Hearings held up as talismanic of best practice; *see* Editorial, *Questions for Reform*, N.Y. TIMES, Mar. 29, 2009, at WK8.

38 Editorial, *The Show Must Not Go On*, N.Y. TIMES, Jan. 17, 2010, at WK7.

> what we are obliged to do. In this critical instance, if we do not learn from history, we are unlikely to fully recover from it.[39]

Although the FCIC has the capacity to subpoena documents there is no evidence to date that it has done so. Initial public hearings with the nation's top bankers did not elicit granular information about strategic motivations and internal processes.[40] This failing was most apparent in the superficial questioning associated with the credit default swap market. In testimony to the Commission, the chief executive of Goldman Sachs, Lloyd Blankfein, rejected charges that the bank was profiteering from betting against the very securities it was marketing.[41] According to Phil Angelides, the practice "sound[ed] . . . a little like selling a car with faulty brakes and then buying an insurance policy on the drivers of those cars."[42] Blankfein claimed Goldman Sachs was compliant with disclosure obligations and was merely fulfilling market desires.[43] The exchange generated more heat than light. The critical issue was why Goldman Sachs and other banks felt it both morally acceptable to engage in such trading activities and designed its compliance and codes of conduct accordingly.

Although the FCIC will eventually have a full time staff of between forty and fifty investigators and an operating budget of $8 million, there is a lack of detail about just what it will investigate and how. Moreover, the Commission has been exceptionally tardy in creating a communications strategy, a move in sharp contrast to the Congressional Oversight Panel (COP) established to ensure that that the Department of Treasury was accountable in managing the Troubled Asset Relief Program.[44] Not only did the COP hold a series of meetings outside the Washington Beltway, it actively solicited comments from the public. The COP chair, Elizabeth Warren, used her position to advance significant policy recalibration based on a

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39 *First Public Hearing of the Financial Crisis Inquiry Commission*, 111th Cong. (2009) (opening remarks of Phil Angelides, Commission Chairman) (Sept. 17, 2009), *available at* http://fcic.gov/hearings/pdfs/2010-0113-Transcript.pdf.

40 *See* Editorial, *supra* note 29 (noting the goal was "not to air issues and foster debate, but to test views, resolve contradictions and arrive at evidence-based conclusions. . . . Serious investigative work is the only way to counter the banks' political power and alter the course of a reform effort that is headed in the wrong direction.").

41 *Blankfein testimony*, *supra* note 4.

42 Financial Crisis Inquiry Commission, Washington D.C., Jan. 14, 2010 (P. Angelides).

43 *Blankfein testiomony*, *supra* note 4.

44 For discussion of the role of the Congressional Oversight Panel (COP), see JUSTIN O'BRIEN, ENGINEERING A FINANCIAL BLOODBATH 98–104 (2009).

stated need, she saw as unfulfilled, to understand the root causes rather than merely the symptoms of the crisis. This myopia had, according to the COP, undermined the consistency and coherence of the Treasury Department's response to the crisis as well as that of other financial services regulators.[45] For the COP then, it was incumbent that any redesign must reflect the inadequacies within the theory and practice of regulation. It remains to be seen whether the FCIC will examine these foundational maters but the lack of policy coherence to date does little to inspire confidence.

Across Europe, policymakers face similar pressures, perhaps nowhere more so than in Iceland, where a truth commission has been established alongside a criminal investigation headed by an investigating magistrate brought in from France to assure the public that, where possible, wrongdoing would be prosecuted.[46] The truth commission model allows for the venting and cauterization of anger and addresses sectoral responsibilities. By providing a holistic mapping of a crisis it can provide the evidence base on which to recalibrate policy. One of the defining aspects of the South African Truth and Reconciliation Commission was its extensive mapping of sectoral responsibility, including the complicity of the judiciary and the media.[47] Of particularly more significance is the normative justification of introducing a redistributive agenda that comprises political, social and economic dimensions. Establishing one, however, requires cognizance of the need to address fundamental, if not revolutionary, change.[48]

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45 CONGRESSIONAL OVERSIGHT PANEL, ACCOUNTABILITY FOR THE TROUBLED ASSET RELIEF PROGRAM 9 (Second Report, 2009) ("For the Panel, it was important for the Treasury and our financial services regulators to have an analysis of the causes and nature of the financial crisis to be able to craft a strategy for addressing the sources, and not solely the symptoms, of the problem or problems.").

46 For background to the Icelandic crisis, see Michael Lewis, *Wall Street on the Tundra*, VANITY FAIR, Apr. 2009, *available at* http://www.vanityfair.com/politics/features/2009/04/iceland200904.

47 *See* Stephanie Leman-Langlois & Clifford Shearing, *Repairing the Future: The South African Truth and Reconciliation Commission at Work*, *in* CRIME, TRUTH AND JUSTICE: OFFICIAL INQUIRY, DISCOURSE, KNOWLEDGE, *supra* note 32.

48 The South African Truth and Reconciliation Commission is the best-known example of how to manage expectations in the aftermath of conflict. *See* Stephanie Leman-Langlois & Clifford Shearing, *Repairing the Future: The South African Truth and Reconciliation Commission at Work*, *in* CRIME, TRUTH AND JUSTICE: OFFICIAL INQUIRY, DISCOURSE, KNOWLEDGE, *supra* note 32 at 222, 231 (noting that the "truths" established were not "scientific truth. The TRC Report was not science, and it was not meant to be. Commissions and the TRC provides an excellent example, establishes truths but they are not truth-finding in a scientific sense. They are rather modern morality plays that mobilise facts to articulate and promote normative agendas.").

The chair of the Icelandic commission, Justice Pall Hreinsson, argues: "It is paramount that we understand. So that we can change the things we need to, and live with what we have to live with."[49] Iceland, outside the protection of the European Union, with a small population and facing economic devastation had little choice but to accept a degree of collective soul-searching. As Prime Minister Johanna Siguroardottir puts it:

> Icelanders are both angry and full of sorrow and anxiety. They feel betrayed in many ways by the state, by the banks and by our allies. But the anger is also directed inwards—at ourselves as individuals and as a nation. Why did Icelanders let this happen? Sorting out those feelings will be a long and difficult process.[50]

Other countries at the periphery of Europe, including Ireland, attempted to cauterize the problems by blaming global forces. It is a predictable and to an extent self-serving response. In Ireland, tens of thousands have taken to the streets to protest against the costs associated with bailing out the banking sector, in particular the rescue of Anglo-Irish Bank, a deeply flawed institution that has become talismanic of poor corporate governance practice.[51] The Irish government has further sought to deflect blame by commissioning a series of semi-private investigations. As will be explored below, this response presents a paradigm case in emasculated responsibility.

IV
BANKING ON THE TRUTH?

The scale of the calamity now facing Ireland far exceeds situations faced by any of its European partners, with the possible exception of Greece. Throughout the boom years of the Celtic Tiger economy, the population was encouraged to engage in an act of stunning self-

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49 Simon Bowers, *Iceland One Year On: Small Island in Big Trouble*, GUARDIAN (London), Sept. 28, 2009, *available at* http://www.guardian.co.uk/business/2009/sep/28/iceland-crisis-one-year-on.

50 Alyssa McDonald, *Johanna Siguroardottir—Extended Interview*, NEW STATESMAN (London), Jan. 15, 2010, *available at* http://www.newstatesman.com/international-politics/2010/01/iceland-interview-economy.

51 Michael Wall & Stephen Collins, *Change to Cuts Strategy Ruled Out as Protests Seek "Fairer" Way*, IRISH TIMES, Nov. 7, 2009, at 1; Rob Brown, *Failed By Fianna*, NEW STATESMAN (London), Jan. 11, 2009, *available at* http://www.newstatesman.com/economy/2010/01/ireland-irish-social-dublin. For discussion of the broader issues raised by the failure of the Irish banking system, see also FINTAN O'TOOLE, SHIP OF FOOLS 212 (2009), (noting caustically that one consequence of the decision to nationalize Anglo-Irish Bank was that "the state was making its citizens responsible for an institution whose books were the most inventive work of Irish fiction since [James Joyce's] *Ulysses*.").

deception. Unsustainable property valuations created not just a speculative commercial and residential bubble but also a speculative economy. In a rare admission of failure, the Taoiseach, Brian Cowen, accepted "arrogance" played a role in transforming the country from "unknown prosperity to suddenly [facing] survival stakes."[52] Brian Cowen displayed reticence, however, in accepting political responsibility for corporate and regulatory failure.[53] At the same time, the government has been slow to release information about the underlying fragility of the economy, the dependence of the banking sector on unsustainable practices and the extent to which regulatory and political authorities had knowledge of this vulnerability prior to the collapse and, just as significantly, the introduction of the banking deposit guarantee and subsequent policy recalibration, including the nationalization of Anglo-Irish Bank in January 2009. This was followed by the creation of the National Asset Management Agency (NAMA), which is designed to restore the capital adequacy of remaining banks by buying (at a discount) impaired property loan portfolios.

In January 2010, a full year after the government was forced to nationalize the Anglo-Irish Bank, the Finance Minister, Brian Lenihan, partially changed tack, arguing that the

> public is entitled to a full examination of what went wrong in our banking system. More than that, we need an inquiry in order to restore international and domestic confidence in our banks. We need, as a country, to understand the origins of this crisis so that we can ensure that we do not make the same mistakes again.[54]

The solemnity of the announcement, made in the Irish parliament, mirrored the rhetorical commitment offered by the FCIC in the United States. Significantly, however, the terms of reference set by the Irish government and method of inquiry differ dramatically. Although the Irish finance minister has not foreclosed the possibility of a wide-ranging investigation, a truncated two-stage process is envisaged:

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52 Brian Cowen, Speech delivered at the Chamber of Commerce Annual Dinner, Dublin, (Feb. 5, 2009), excerpted in Harry McGee, *Cowen Says Recession to Cut Living Standards By Over 10%*, IRISH TIMES, Feb. 6, 2009, at 1.

53 *See* Jeremy Grant & John Murray Brown, *ISE Chiefs Say Irish Opacity Must Be Stopped*, FIN. TIMES (London), Jan. 30, 2010, at 14 (quoting the chief executive of the Irish Stock Exchange, Deirdre Somers, saying "companies must consider whether their historical practices, although accepted in the past, will meet market expectation in the future." The same article quotes the concerns of the chairman of the ISE, Padraig O'Connor, about "a cultural malaise" that must "utterly be changed.").

54 Press Release, Statement By the Minister of Finance on Banking, Brian Lenihan, (Jan. 19, 2010) http://www.finance.gov.ie/viewdoc.asp?DocID=6166.

> First, the Government will immediately commission two separate reports—one from the Governor of the Central Bank on the performance of the functions of the Central Bank and the Financial Regulator and the second from an independent "wise" man or woman with relevant expertise to conduct a preliminary investigation into the recent crisis in our banking system and to inform the future management and regulation of the sector. These reports will also consider the international, social and macro[]economic policy environment, which provided the context for the recent crisis. I expect both reports to be completed by the end of May this year and laid before the Houses shortly thereafter. The second stage of the inquiry will be the establishment of a statutory Commission of Investigation, which will be chaired by a recognized expert or experts of high standing and reputation. The terms of reference for this commission will be informed by the conclusions of the two preliminary reports. The aim will be for the commission to complete its work by the end of this year. Its report will then be laid before the Oireachtas for further consideration and action by an appropriate Oireachtas committee.[55]

The impetus is credited to the newly appointed governor of the Irish Central Bank, Patrick Honohan, who is charged with compiling the first document on regulatory failure (but not significantly the interaction with the political establishment). The terms of reference also depart in fundamental ways, however, from proposals provided by the governor himself the previous month. Then the governor argued that Ireland should follow the U.S. in convening a broad-ranging commission.

A hearing such as this one is fine, by and large. However, this issue is bigger and more complicated than one that can be accommodated by such a hearing as this where people present evidence and then go away. Also, the question would not be sufficiently answered by a judicial inquiry because one is not simply trying to find out what happened and the sequence of events. We should think in terms of getting experts, including experts in economics and social science and so on, and to blend them with politicians and arrive at a panel somewhat like the U.S. congressional panels which consider particular issues on an ad hoc basis, such as the September 11, 2001 events.[56]

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55 *Id.*

56 *Discussion with Governor of Central Bank, Hearing before the Joint Oireachtas Committee on Economic Regulatory Affairs*, DÁIL DEB. Dec. 15, 2009 (Prof. Patrick Honohan), http://debates.oireachtas.ie/DDebate.aspx?F=ERJ20091215.xml&Node=H2&Page=3. In written remarks, the Governor of the Central Bank argued the need for new models of inquiry. "In considering how best to do this, I suggest that new models need to be explored. The crisis is not simply a question of discovering who did what and who

Patrick Honohan intimated in his appearance at the Oireachtas that "the crisis is not simply a question of discovering who did what and who knew what. Uncovering the deep roots of the crisis will require expertise and broad social scientific understanding more than merely forensic skills."[57] As a former academic, the governor is well placed to begin this process. It is questionable, however, whether he is permitted to publicly disclose information,[58] a point made somewhat mischievously by the opposition Labour Deputy Leader, Joan Burton, and not altogether convincingly rebutted by the Irish prime minister Brian Cowen. The primary problem with the Irish government's proposal, however, centers on the third component, namely the convening of a statutory Commission of Investigation whose terms of reference will be determined by the initial reports. Much depends on how the governor (if permitted) and Klaus Regling, a former senior official at the German Ministry of Finance and European Commission, appointed to draw up the second scoping document, interpret their brief and, crucially, the degree to which the subsequent Commission of Inquiry interprets both its own mandate and the lessons identified.[59] Moreover, there is a profound lack of transparency in the process, compounded by a lack of direct accountability afforded by public hearing or disclosure of documentary evidence.

A properly constituted Commission of Inquiry has a range of mandated powers including the capacity to subpoena documentary, written and oral evidence.[60] At the same time, however, it is envisaged that the investigation will be held in private unless "a witness requests that all or part of his or her evidence be heard in public and the commission accepts the request"[61] or "the commission

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knew what. Uncovering the deep roots of the crisis will require expertise and broad social scientific understanding more than merely forensic skills." *Id.* at 5.

57 *Id.* at 5.

58 CENTRAL BANK ACT 1942 § 31(1) (Act No. 22/1942), *available at* http://www.irishstatutebook.ie/1942/en/act/pub/0022/sec0031.html#zza22y1942s31.

59 *See* IRELAND DEPARTMENT OF FINANCE, APPOINTMENT OF INDEPENDENT EXPERT TO CONDUCT A PRELIMINARY INVESTIGATION INTO BANKING CRISIS, (Jan. 29, 2010) http://www.finance.gov.ie/Viewprnt.asp?DocID=6173&StartDate=1+January+2010 (quoting a statement by Minister of Finance, Brian Lenihan, in which he emphasized the need to analyze the "international, social and macroeconomic policy environment in which the banking crisis developed."). Note that this formulation appears to downplay domestic and in particular political factors.

60 COMMISSIONS OF INVESTIGATION ACT 2004 § 16 (Act No.23/2004), *available at* http://www.irishstatutebook.ie/2004/en/act/pub/0023/index.html.

61 *Id.* § 11(1)(a).

is satisfied that it is desirable in the interests of both the investigation and fair procedures to hear all or part of the evidence of a witness in public."[62] Moreover, the legislation specifically allows those giving evidence to challenge placing anything on the public record that could be deemed commercially sensitive, which is defined as the disclosure of information that

> could reasonably be expected to—(*a*) materially prejudice the commercial or industrial interests of the person who provided that information to the commission or of a group or class of persons to which that person belongs, or (*b*) prejudice the competitive position of a person in the conduct of the person's business, profession or occupation.[63]

In announcing the terms of reference, the Finance Minister, Brian Lenihan, argued "that for 'an investigation to proceed speedily and cost-effectively, it must be able to conduct its business in private. The only other alternative that allows us to conclusively investigate a matter is a tribunal of inquiry,' which would[, he argued,] be too costly and protracted."[64] This is, however, political dissembling. The crisis facing the banking system is not a result of recent inept policy choices; rather it is a failure to learn the lessons exposed in a series of Tribunal of Inquiries convened throughout the late 1990s, which continue their work despite corporate obfuscation and increased political hostility. In part, this can be traced to the meandering nature of the main political inquiries—an investigation into political payments made to the former Fianna Fail prime minister Charles Haughey and to Michael Lowry, a former Fine Gael Minister of Communications, and a separate inquiry into corruption in the planning process in County Dublin—that became mired in judicial disputes but which also demonstrated conclusively that corruption extended well beyond the named individuals.[65] The tribunals were convened to demonstrate that Ireland was moving forward and that more accountable governance arrangements were put in place. Attempts to compartmentalize blame—meaning effectively the denial of responsibility—along with media reporting of the costs eroded confidence in the tribunal as a mechanism of accountable governance.

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62 *Id.* § 11(1)(b).

63 *Id.* § 36(3).

64 Marie O'Halloran & Michael O'Regan, *Lenihan Rejects Oireactas Inquiry Deciding on Facts or Individuals*, IRISH TIMES, Jan. 21, 2010, *available at* http://www.irishtimes.com/newspaper/ireland/2010/0121/1224262781567.html.

65 For discussion of the role of the tribunals, see JUSTIN O'BRIEN, THE MODERN PRINCE: CHARLES J, HAUGHEY AND THE QUEST FOR POWER (2002).

This calamitous failure was masked by the illusion of sustained wealth creation brought about through the inflation of a speculative bubble.

If Ireland is to emerge from the banking crisis, it is essential that the nexus between the political establishment, the banking sector and the developers be explored in a much more systematic manner. This appears unlikely. The terms of reference specifically preclude discussion of political responsibility for either preventing the crisis or in responding to it, most notably the shoring up of the Irish banking system through the introduction of the blanket guarantee, the nationalization of Anglo-Irish Bank, the decision not to nationalize the remaining banks, and the decision to create the NAMA.[66] Indeed, the very existence of NAMA reflects the degradation of Irish corporate, political and regulatory governance. As the operation of the COP demonstrated in the United States, the fact that a rescue operation is ongoing is an insufficient barrier to introduction of effective ongoing accountability monitoring mechanisms. Moreover, the refusal to release information provided to the government immediately prior to the introduction of the banking guarantee on the grounds of cabinet confidentiality sets a worrisome precedent.

A "freedom of information" request made in relation to belatedly disclosed handwritten records of two meetings at the Department of Finance on the night before the guarantee was announced has been rejected by the Office of the Information Commissioner (OIC). A preliminary finding from a senior investigator in the OIC had held "[t]he public interest in the department [of finance] being held to account for its decision to commit billions of euro to the banking sector in the context of the guarantee would outweigh any damage in confidentiality in its dealings with the sector."[67] Significantly, the Department of Finance's objection to the OIC was backed by two of Ireland's leading banks, Bank of Ireland and Allied Irish Bank, neither of which were publicly at significant risk at the time and both of which had argued that they were adequately capitalized.[68] One

66 *See* ENGINEERING A FINANCIAL BLOODBATH *supra* note 34, at 13–21.

67 *See* Mark Tighe, *Bank Bailout Meeting to Stay Secret*, SUNDAY TIMES (London), Jan. 24, 2010, *available at* http://www.timesonline.co.uk/tol/news/world/ireland/article7000036.ece.

68 The Department of Finance had claimed that the account of the meeting was part of an incorporeal cabinet meeting and should remain undisclosed, per the Freedom of Information Act (1997) § 19 (1) (c) authorizing nondisclosure of "information (including advice) for a member of the Government, the Attorney General, a Minister of State, the Secretary to the Government or the Assistant Secretary to the Government for use by him

major problem in the Irish context was the lack of disclosure about how thinly capitalized the banking sector had become, and the degree to which this risk was known by either the boards or the regulator and actively or tacitly colluded in by adherence to Government policy. Unless this is investigated, Ireland is prone to repeat its failure.

It would appear likely from the *Sunday Times* precedent that the Commission of Investigation will come under significant pressure be forced not to disclose granular information on the grounds that it is commercially sensitive and that the Department of Finance, in particular, will retreat where possible to obfuscation and delay. In sharp distinction to the Icelandic investigation, which includes a degree of contrition, there is no evidence that Ireland is prepared to countenance political culpability. As such, despite nods to principles of transparency, accountability and best practice in investigative forums, official discourse remains rooted in a culture of denial.

In each of the jurisdictions surveyed here, with the exception of Iceland, official discourse has not gone substantially beyond rhetoric in either diagnosing the extent of the problem or its implications for the theory and practice of financial regulation. Placed on a continuum, Iceland has gone furthest in determining sectoral responsibility while Ireland the shortest. At a global level, the concentration of resources on the resolution of technical matters within unstable conceptual frameworks provides little solace that substantive change will occur, leaving intact the privileging of the politics of illusion.

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or her solely for the purpose of the transaction of any business of the Government at a meeting of the Government." This was upheld by the OIC, which decided that "in view of the unprecedented circumstance of this case, the only correct conclusion is to find that the primary use of the information was indeed to transact business of the Government at that incorporeal Government meeting." Case 090028, THE SUNDAY TIMES & DEP'T OF FIN., (Jan. 22, 2010) at 4, *available at* http://oic.gov.ie/en/DecisionsoftheCommissioner/LongFormDecisions/Name,11453,en.htm. The decision also addressed concerns that vital records were not disclosed to the OIC because of a "simple oversight . . . calls into question the efforts made by the Department to fully identify all relevant documents at the outset." *Id.* Moreover, although the OIC allowed the non-disclosure of two key documents, she found that 'it is disappointing that it took 9 months and extensive correspondence before the Central Government Department with overall responsibility for implementing FOI policy in the public service finally accepted that most of the records it had strenuously maintained were extremely sensitive and exempt were, in fact, suitable for release." *Id.*

V
DESIGNING AND IMPLEMENTING ACCOUNTABILITY SYSTEMS

At a technical level, work towards building a coordinated global framework has already taken place, particularly through the auspices of the G20. Implementation remains some way off, however, a point underscored by the Secretary General of the International Monetary Fund, Dominique Strauss-Kahn, at the World Economic Forum meeting in Davos.[69] At a regional level, progress has been equally glacial. The European Union has introduced a European Systemic Risk Board to be based at the European Central Bank in Frankfurt. The aim is to provide an early warning system, capable of heading of problems before they occur, the first step towards adopting a more pre-emptive approach to banking regulation. But as representatives of central banks and regulatory agencies dominate the proposed European Systemic Risk Board, there is a serious question over lack of industry and professional representation. As such, a critical information gathering mechanism is lost. Unresolved, too, are significant structural questions. In particular, there is a failure to define what constitutes systemic risk, the specific responsibilities of specific epistemic communities in ameliorating those undefined risks and what conceptual reengineering is required to take cognizance of the limitations of the efficient market hypothesis. The answers to these questions will determine the size and scope of financial markets at national, regional and global levels.

The roadblocks to substantive reform can, in turn, be traced to two interlinked factors. First, there is a lack of clarity over what precise combination of incremental factors caused the crisis. This makes it difficult to apportion blame and responsibility and design more effective restraining interlocks. Second, given that the crisis was mainly a technically legal failure in which the spirit of regulatory rules or principles were transacted around, and responsibility for the impact of ethical degradation of professional norms on market integrity compartmentalized, a failure to address this dimension in

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69 *Davos 2010: IMF Urges Global Reform Agreement*, BBC NEWS, Jan. 30, 2010, http://news.bbc.co.uk/1/hi/business/8488927.stm. In an interview with the BBC's Economic Editor, Stephanie Flanders, Klauss-Kahn suggested there was a serious risk of a race to the bottom in global finance as country's adopted piecemeal changes. In a second interview, Larry Summers, the chief economic advisor to President Obama, argued that the introduction of differing institutional and regulatory rules were not necessarily inconsistent with global rules on capital adequacy or limits on leverage capacity; *see* Stephanie Flanders, *Summers Speaks*, BBC NEWS, Jan. 30, 2010, http://www.bbc.co.uk /blogs/thereporters/stephanieflanders/2010/01/summers_speaks.html.

policy terms preordains failure. The central problem rests on the lack of any credible proposal to create a new framework capable of addressing the erosion of social norms. Here, Australia provides mixed evidence.

Australia has weathered the GFC better than most developed countries, a combination widely attributed to the quality of the regulatory regime, risk-aversion by the major banks, the stimulus provided by China, higher commodity prices, and a degree of luck. The relative strength provides both an opportunity and a risk. It is an opportunity in that Australia has significant credibility in proffering regulatory and other solutions. It is a risk that the absence of catastrophic collapse may foster complacency. The government recognized both dynamics in commissioning the "Australia as a Financial Centre Report."[70] Although the report provides substantial detail on the technical obstacles to developing Australia as a financial services hub, significantly less attention is placed on the governance agenda. In part, this can be traced to the difficulties associated with determining what accountable governance means in practice. Noting the enormous potential, the Australian Financial Centre Forum articulated a vision that cautioned policymakers against attempting to attract investment solely through pricing mechanisms. Instead it suggested aspiring towards the following vision:

A financial sector which is open, competitive and underpinned by strong, stable and sound institutions. It exhibits the lowest possible barriers to entry consistent with the maintenance of financial stability and integrity, so as to encourage new entrants and foster price competition and innovation. It is a sector with a reputation for transparency, integrity and efficiency. It is a sector where the critical mass of skills, experience and reputation encourages both domestic and international participants to do business. It thus exhibits a high volume of cross-border transactions in a wide variety of financial products, services and currencies.[71]

The vision combines the technical with the normative, i.e., not just what is but what ought to be. It envisages a much higher ethical content in regulatory and corporate practice. Crucially, it suggests that successful reform requires the creation of shared understanding of private rights and public duties. Less well explored is how this

70 AUSTL. FIN. CTR. FORUM, AUSTRALIA AS A FINANCIAL CENTRE (2009), *available at* http://www.aiia.com.au/docs/nsw%20documents/reports%20non-aiia/AFCF_Building_on_Our_Strengths_%20Report.pdf.

71 *Id.* at [p. 9 of pdf]

vision can be rendered operational. The critical design challenge necessitates resolving what Millon refers to as the existential conflicts "between a public law, regulatory conception of corporate law on the one hand, and a private law, internal perspective on the other;" and "between a body of law concerned solely with the techniques of shareholder wealth-maximization [and] a body of law that embraces and seeks to promote a richer array of social and political values."[72] President Obama has put this exceptionally neatly:

> We know that markets are not an unalloyed force for either good or for ill. In many ways, our financial system reflects us. In the aggregate of countless independent decisions, we see the potential for creativity—and the potential for abuse. We see the capacity for innovations that make our economy stronger—and for innovations that exploit our economy's weaknesses. We are called upon to put in place those reforms that allow our best qualities to flourish—while keeping those worst traits in check. We're called upon to recognize that the free market is the most powerful generative force for our prosperity—but it is not a free license to ignore the consequences of our actions.[73]

There can be no doubting the rhetorical flair. Unfortunately, as with the Australian report, it leaves unresolved the question of how to design mechanisms that allow for a more precise calibration of ethical content.

If moral accountability is to have meaning beyond rhetoric, it is essential to parse its multifaceted dimensions as both cause (i.e., through its absence) and putative cure for solving endemic market failure in capital market governance from an applied ethics perspective.[74] What also remains unclear is how to rank competing, potentially incommensurable interpretations of what constitutes appropriate behavior. Can one say, for example, that acting within the confines of the law evidences integrity? This cannot be a satisfactory answer given the ethical void experienced in both fascist and totalitarian societies, each governed by legal (if morally repugnant) frameworks.[75] The scale of ethical failure witnessed in the

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72 Millon, *supra* note 1, at 202; s*ee also* sources cited *supra* note 1.

73 Obama, *supra* note 2.

74 Integrity has also long been recognized as an important intangible asset or liability in strategic management studies. *See* MUEL KAPTEIN & JOHAN WEMPE, THE BALANCED COMPANY: A THEORY OF CORPORATE INTEGRITY 145–52 (2002) (noting that organizational structure and culture generate in a reflexive manner the execution of specific corporate practices).

75 This is the classic focus on a legendry debate in contemporary legal philosophy of what constitutes law. The positivist approach suggests law is merely what is in statute books, a historical record made by properly constituted legislatures. *See, e.g.*, H.L.A.

global financial crisis demonstrates the inherent limitations of black-letter law as a sufficient bulwark even within the liberal democratic state. It is equally unsatisfactory to root integrity lexicographically in the application of consistent behavior. Consistently, engaging in deceptive misleading practice may demonstrate "wholeness" or "completeness" but it cannot be a constituent of integrity. Integrity therefore requires of us not only duty (i.e., compliance with the law; consistent and coherent actions) but also principles that contribute to (and do not erode) social welfare (i.e., treating people, suppliers and stakeholders with fairness and respect). Seen in this context, enhancing integrity through higher standards of business ethics is a question of organizational design. The aim, in short, is to give substance to what constitutes—or should constitute—appropriate principles of aspiration for the professions.

Business ethics research tends to calcify around one of four main theoretical approaches: deontological, consequential or utilitarian, virtue-ethics and contextual ethics. The deontological approach derives from Immanuel Kant's categorical imperative, namely "act only according to that maxim whereby you can at the same time will that it should become a universal law."[76] Reliance on short-term profiteering that if universalized (and condoned by regulatory and political authorities) destroys the credibility of the market is ultimately self-defeating. In deontological terms, the crisis displays systemic unethical tendencies. Moreover, deceptive or misleading conduct debases moral capacities (indeed it may well also be illegal if the action can be demonstrated to contravene trade practices legislation). The third categorical imperative is to ensure that corporate actions have societal beneficence; a formulation that also lies at the centre of Adam Smith's landmark *Theory of Moral Sentiments* (1759). In Kantian terms, this can only be vouchsafed if the organization acts and is seen to act within defined ethical parameters. The GFC clearly demonstrates how the search for yield, at any price, trumped prudence and societal obligation.

HART, THE CONCEPT OF LAW (1961). Others have argued that properly constituted law cannot be vouchsafed unless underpinned by an explicit moral component. *E.g.* Fuller, *supra* note 26, 245–53 (outlining the case of the grudge informer); *see also* Barry Macleod-Cullinane, *Lon L. Fuller and the Enterprise of Law* 22 LEGAL NOTES 1, at 3 (1995); *see generally* David Luban, *Rediscovering Fuller's Legal Ethics* 11 GEO. J. LEGAL ETHICS 801 (1998). A third approach, suggests that propositions of law are true if they figure in or follow from principles of justice, fairness, and procedural due process that provide the best constructive interpretation of agreed legal practice, *see, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986).

76 IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 30 (1785).

Even if one views the global financial crisis from the less demanding utilitarian perspective, the consequential impact—unintended, to be sure–makes both the activity itself and the underpinning regulatory framework equally ethically suspect. Here it is essential to differentiate between the product and the clearly inappropriate uses to which it was put to work. There is nothing unethical about securitization per se. However, from an ethical perspective it is a deficient defense to claim ignorance of either how these products were structured or how unstable the expansion of alchemistic engineering had made individual banks or the system as a whole. It is now recognized, for example, that the originate-distribute-relocate model of financial engineering significantly emaciated corporate responsibility precisely because it distanced institutional actors at every stage of the process from the consequences of their actions. Likewise, given the huge social and economic cost, it is deficient for policymakers to profess shock at the irresponsibility of banks, insurance companies and the rating agencies.[77] The failure to calculate the risks and design or recalibrate restraining mechanisms at the corporate, regulatory and political levels has now grossly exacerbated the costs borne by the wider society.

The third major approach to evaluate the ethical dimension of corporate activity is, perhaps more demanding. It is also more fruitful in terms of refashioning corporate and regulatory action. While the policy response to scandal has traditionally been to emphasize personal character, much less attention has been placed on how corporate, professional, regulatory and political cultures inform, enhance or restrain particular character traits.[78] The focus of virtue-based analysis is not on formal rules (which can be transacted around) or principles (that lack the definitional clarity to be enforceable). Rather, it focuses on how these rules and principles are interpreted in specific corporate, professional or regulatory practice. This ultimately, is a question of individual and collective character, or integrity. There is prescience to Alasdair MacIntyre's argument that the "elevation of the values of the market to a central social place" risks creating the circumstances in which "the concept of the virtues might suffer at first attrition and then perhaps something near total

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77 *See* Brown, *supra* note 2; *Greenspan testimony*, *supra* note 9; Obama *supra* note 44.

78 *But see* RICHARD SENNETT, THE CULTURE OF THE NEW CAPITALISM (2006) *and* RICHARD SENNETT, THE CORROSION OF CHARACTER (1998).

effacement."[79] This builds on earlier insight that suggested that "effectiveness in organizations is often both the product and the producer of an intense focus on a narrow range of specialized tasks which has as its counterpart blindness to other aspects of one's activity."[80] Compartmentalization occurs when a "distinct sphere of social activity comes to have its own role structure governed by its own specific norms in relative independence of other such spheres. Within each sphere those norms dictate which kinds of consideration are to be treated as relevant to decision-making and which are to be excluded."[81] For MacIntyre, the combination of compartmentalization and focus on external goods, such as profit maximization, corrodes capacity for the developments of internal goods, which should be developed irrespective of the consequences.[82]

It is incumbent upon regulatory authorities (formal and informal) to identify and break down the compartmentalization imperatives at corporate and professional levels and integrate the form and purpose of business ethics into a wider social contract. It is in this context that the fourth key dimension of business ethics theory comes into play: the contextual material and ideational environment in which social norms play out.[83] It is mistaken to assume that social norms, once accreted remain static, impervious to environmental corrosion.[84] A

79 ALASDAIR MACINTYRE, AFTER VIRTUE 254, 196 (1984).

80 Alasdair MacIntyre, *Why Are the Problems of Business Ethics Insoluble, in* MORAL RESPONSIBILITY AND THE PROFESSIONS 358 (Bernard Baumrin & Benjamin Friedman eds., 1982).

81 Alasdair MacIntyre, *Social Structures and their Threats to Moral Agency*, 74 PHILOSOPHY 311, 322 (1999); *see also* John Dobson, *Alasdair Macintyre's Aristotelian Business Ethics: A Critique*, 89 J. BUS. ETHICS 43 (2009). For application of the need to avoid compartmentalization from a practicing law perspective, *see* Sandra Day O'Connor, Commencement Address, Georgetown Law Center, May 1986 ("Lawyers must do more than know the law and the art of practicing it. They need as well to develop a consciousness of their moral and social responsibilities. . . . Merely learning and studying the Code of Professional Responsibility is insufficient to satisfy ethical duties as a lawyer"). *See also* ANTHONY KRONMAN, THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION 16 (1995) (lamenting a lost deal in which reputation was defined by who the person was as much as his technical mastery).

82 Macintyre, *supra* note 79.

83 For the need to bifurcate and map the distinction between the universality of moral sentiment and the particularity of application, see DAVID SMITH, MORAL GEOGRAPHIES: ETHICS IN A WORLD OF DIFFERENCE 14 (2000).

84 The importance of context now informs the work of prominent behavioral economists. *See* Shiller & Akerlof, *supra* note 16; for analytical framework highlighting the (lost) importance of social norms as an underpinning construct, see Williamson, *supra* note 10 at 597. Williamson notes that analysis of this "level one" component of social theory is conspicuous by its absence with regulatory studies. The other three levels comprise institutional arrangements viewed primarily through property rights and positive

critical feature of the global financial crisis was the fact that much of what occurred was legal.[85] Indeed earlier empirical work conducted in late 2006 and early 2007 highlighted just how corroded restraining mechanisms had become in the City of London and New York and how unstable the underpinning framework had become.[86]

The search for answers and the putative solutions necessitate that we pay much more attention to the normative dimension of the regulation of capital markets. This, in turn, suggests that regulatory effectiveness cannot be vouchsafed merely by reforming the institutional structure, articulating the parameters of what constitutes "smart regulation," which lacks a normative dimension, nor on the questionable efficacy of enrollment, without articulating precisely what is meant by business integrity and accountability within specific contexts.[87]

CONCLUSION

The central argument of this article is that we require a synthesis between an appreciation of context, the need for virtuous behavior and the importance of deontological rules and consequential principles of best practice within an overarching framework that is not subverted by compartmentalized responsibilities.[88] The policy problem is not the relative importance of virtue but whether it can be rendered operational in a systematic, dynamic and responsive way, with specific benefits to business.[89] Accountability is, therefore a

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political theory, governance mechanisms through transaction cost economics and resource allocation frameworks generally examined through agency theory. *Id.*

85 *See* Williamson, *supra* note 10, and accompanying text.

86 Justin O'Brien, *Charting an Icarian Flightpath: The Implication of the Qantas Deal Collapse*, *in* PRIVATE EQUITY, CORPORATE GOVERNANCE AND THE DYNAMICS OF CAPITAL MARKET REGULATION 295 (J. O'Brien, ed., 2007).

87 *See* John Wright & Brian Head, *Reconsidering Regulation and Governance Theory: A Learning Approach*, 31 L. & POL'Y 192, 197 (2009).

88 One suggested approach derives from an integrative social contracts theory approach, which set out corporate and reciprocal arrangements and expectations. Micro social contract norms must be compatible with hyper norms (i.e., norms sufficiently fundamental that they can serve as a guide for evaluating authentic but less fundamental norms), *see* THOMAS DONALDSON & THOMAS DUNFEE, TIES THAT BIND: A SOCIAL CONTRACTS APPROACH TO BUSINESS ETHICS (1999).

89 For application to business as an intangible asset, see Joseph Petrick & John Quinn, *The Challenge of Leadership Accountability for Integrity Capacity as a Strategic Asset*, 34 J. BUS. ETHICS 331 (2001); for original formulation of the model, see Joseph Petrick & John Quinn, *The Integrity Capacity Construct and Moral Progress in Business*, 23 J. BUS. ETHICS 3 (2000). The current chairman of the Securities and Exchange Commission has implicitly recognized the need for constitutive engagement: "We might sit on opposite

design question at both corporate and regulatory levels, which to be effective needs to be mutually reinforcing and address dynamically the calculative, social and normative reasons for behaving in a more (or less) ethically responsible manner.[90] This is the challenge of our time.

Resolving this issue in capital markets can have an enormous demonstrative effect on other wicked problems, such as climate change and national security. It is no longer sustainable to allow institutions deemed too big to fail to trade in a manner that maximizes its own self-interest, exacerbates the risk of market instability and yet benefit from public largesse in the event that it requires guaranteed funding from a lender of last resort. Equally, it is no longer sustainable to expect markets to self-correct. As even the most ardent defender of free markets Fredrick Hayek has pointed out, there is "indeed a wide and unquestioning field for state activity." In no system that could be rationally defended would the state just do nothing. An effective competitive system needs an intelligently designed and continuously adjusted legal framework as much as any other.[91] Uncommonly sane words indeed from the intellectual godfather of the Chicago school.

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sides of the table in any given matter, but I believe that all of us—regulators, attorneys, and business people alike—all share the common goal of ensuring that our capital markets work—and work fairly and effectively." Mary Schapiro, Chairman of the Securities and Exchange Commission, Keynote Address at the Practising Law Institute: Securities Regulation Seminar (Nov. 4, 2009) http://www.sec.gov/news/speech/2009/spch110409mls.htm.

90 Soren Winter & Peter May, *Motivation for Compliance with Environmental Regulations*, 20 J. POL'Y ANALYSIS & MGMT. 675 (2001); *see generally* IAN AYRES & JOHN BRAITHWAITE, RESPONSIVE REGULATION (1992); for study suggesting the power of outsiders to frame the emphasis on effective internal controls only if there is a perception within the company that performance is being monitored, see Vibeke Lehmann Nielsen & Christine Parker, *To What Extent Do Third Parties Influence Business Compliance?*, 35 J.L. SOC'Y 309 (2008) (reporting survey evidence from 999 large Australian companies); for broader theoretical issues, see Melvin J. Dubnick & Justin O'Brien, *Retrieving the Meaning of Accountability in Capital Market Regulation* (Paper presented at the American Political Science Association Annual Meeting, Toronto, 4–6 September 2009) http://mjdubnick.dubnick.net/papersrw/2009/dubobr2009.html.

91 Hayek, *supra* note 31, at 29.