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Title	Regulation in the Age of Governance: The Rise of the Post Regulatory State
Authors(s)	Scott, Colin
Publication date	2004
Publication information	Jordana, J. and Levi-Faur, D. (eds.). The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance
Publisher	Edward Elgar Publishing
Link to online version	http://www.elgaronline.com/view/1843764644.00016.xml
Item record/more information	http://hdl.handle.net/10197/6779
Publisher's statement	This material is copyrighted and any download is for private use only.
Publisher's version (DOI)	10.4337/9781845420673

Downloaded 2022-08-23T05:11:47Z

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Regulation in the Age of Governance: The Rise of the Post-Regulatory State

Colin Scott*

1. Introduction

This chapter forms part of a larger project examining governance ‘beyond the regulatory state’. Governance has been defined in a variety of ways in both official and secondary literatures. In this chapter the ‘age of governance’ is conceived in terms of recognising the dispersal of capacities and resources relevant to the exercise of power among a wide range of state, non-state and supranational actors. It is claimed that ‘[t]he essence of governance is its focus on governing mechanisms which do not rest on recourse to the authority and sanctions of government’ (Stoker 1998: 17). An analysis in which governing is no longer seen as the exclusive prerogative of the nation state presents a challenge to the literature which argues that the last years of the twentieth century witnessed ‘the rise of the regulatory state.’ (Majone 1994).

In this chapter three core assumptions of the regulatory state movement are scrutinized using theoretical and empirical literatures which challenge one or more of these central ideas: regulation is instrumental in character; the state is necessarily central to regulatory governance; state law is a central instrument of regulatory governance. Each of these assumptions has a descriptive and a normative dimension, both of which are assessed in

the critique. The objective of the analysis is not wholly to dispense with the assumptions but rather to act as a corrective to an influential literature which, because of its neglect of the non-instrumental dimension of regulation, non-state regulation and regulation which deploys non-state law, is, incomplete in its mapping of regulatory governance arrangements.

This chapter focuses on one aspect of the critique concerning the centrality of state law to regulation. It argues for shifting the focus of analysis from state law to the wider range of norms and mechanisms through control is asserted or achieved, however indirectly. The exercise is complementary to policy moves towards ‘alternatives to state regulation’ (Better Regulation Task Force 2000). The approach constitutes something of a mirror-image to those who are arguing that the centrality of the state is too little rather than too much assumed (Weiss 1998). The question at the heart of this paper is to what extent can we or should we think of regulatory governance functioning in a manner not dependent on state law or which state law is not central (cf Black 2001a).

The chapter maps current thinking on the nature of the ‘regulatory state’ and then sets out, in critical fashion, a range of theoretical approaches which challenge thinking about regulation which is oriented to the capacities of the state. Underlying this ‘post-regulatory’ thinking are concerns that the assertion of control by state regulatory bodies is, in many cases, implausible. Set against this many instances of well-ordered economic and social relations are observable in environments where there is little state activity. This chapter invites the reader not to wholly discard conventional conceptions of the state

role in regulation. Indeed, other chapters in this volume deploy related arguments about variety in regulatory norms to enrich rather than challenge the idea of the regulatory state (Knill and Lenschow 2003). The alternative offered here is to think about governance in a different way so as to admit a wider range of norms, institutions and processes as constituting a way of thinking labelled ‘the post-regulatory state’.

2.Regulation and Control

Regulation scholars have not, generally, been agreed on what the target of their research should be. Economic theories of regulation have tended to follow economic thinking generally in positing a sharp distinction between markets and regulation {Daintith 1997: 8-9). On this analysis the state provides basic rules of contract and property rights which are essential to the transactional basis of a capitalist economy and regulation is deployed where the market is judged to fail, for example because of natural monopoly, information problems or externalities (Baldwin and Cave 1999: chapter 2). Hayek (1982: vol 1: 52) characterised markets as a form of ‘spontaneous order’, amenable to improvement through fine tuning of the general rules of law, but in which specific interventions or commands would destroy the balance of the market ordering. Regulators could never know enough about how the market operated to intervene effectively. Political science has tended largely to follow the economic analysis in its characterisation of the sharp distinction between regulation and markets (Mitnick 1980: Wilson 1980). Sociological analysis, oriented towards the analysis of power in its diverse forms, has tended to reject this sharp distinction. Shearing (1993), for example, argues that regulation is a central

factor in shaping conduct generally and is *constitutive* of markets. I suggest that a defining characteristic of ‘post-regulatory state’ thinking generally is a loosening of the sharp distinction between states and markets and between the public and the private. Julia Black (2001a) has described this process of rethinking regulation as one of ‘de-centring’.

Underlying the scepticism about the regulatory state the various analyses have in common an attempt to grapple with the problem of control. At the highest level of abstraction any system of control consists of (1) some kind of standard, goal, or set of values against which perceptions of what is happening within the environment to be controlled are compared through (2) some mechanism of monitoring or feedback which in turn triggers (3) some form of action which attempts to align the controlled variables, as they are perceived by the monitoring component with the goal component (Hood, Rothstein and Baldwin 2001: 23-27). For classical regulation the goal component is represented typically by some legal rule or standard, the feedback component by monitoring by a regulatory agency, government department or self-regulatory organisation and the realignment component by the application of sanctions for breach of standards.

These component functions of control are often split between different organisations. The United States is rather exceptional in the extent to which all three components are often delegated to regulatory agencies. Within most OECD countries regulatory rule-making is assigned to legislative bodies, monitoring is split between government departments, specialist agencies and non-state bodies, with formal capacity to apply sanctions reserved

to the courts at the initiation of the monitoring organisations or some third party (Francis 1993). Accordingly it may be helpful to think about regulation in terms of regimes with diffuse parts (Eisner 2000: chapter 1). Socio-legal research has shown that the operation of such classical regulatory regimes frequently diverges from the hierarchical model suggested here because, for example, of incomplete monitoring, a lack of common understanding of the interpretation of regulatory rules (Reichman 1992), and enforcement practices which are patchy and/or oriented towards negotiating consensual solutions to problems with regulatees rather than routinely applying formal sanctions (Grabosky and Braithwaite 1986). The whole architecture of regulation built upon the rule of law is undermined by the elaboration of the numerous ways in which regulatory law is liable to be fuzzy (Cohn 2001).

The post-regulatory state takes these observations and works with them to identify greater variety in control processes which invoke other bases of control than hierarchy and state law – notably the norms and practices of society or communities; the tendency towards rivalry or competition in organisational settings; and the capacity of design (for example of buildings or software) for controlling behaviour. In each case hierarchical structures or state law may have a partial role in the control system, but not a monopoly. Related to this is a shift in our understanding of who controls and who is controlled within regimes.

3. The Regulatory State

The concept of the 'regulatory state' was developed to contrast a distinctive and emergent form of governance from the practices and institutions of the welfare state (Sunstein 1990b; Majone 1994 Pildes and Sunstein 1995; Loughlin and Scott 1997; Braithwaite 2000; Moran 2001a; Moran 2001b; Moran 2002). The welfare state deploys the instruments of public ownership, direct state provision of benefits and services, integration of policy making and operational functions. By contrast the regulatory state governance form involves a complex set of changes in public management involving the separation of operational from regulatory activities in some policy areas (sometimes linked to privatization), a trend towards separating purchasers and providers of public services (through policies of contracting out and market testing) and towards separation of operational from policy tasks within government departments and the creation of executive agencies. Each of these policies shifts the emphasis of control, to a greater or lesser degree, from traditional bureaucratic mechanisms towards instruments of regulation. Government departments (or nominated agencies or self-regulatory bodies) now regulate the provision of services (setting down standards, monitoring for compliance and enforcing) through the instruments of statutory regulation and contract and their near relations self- and co-regulation and quasi-contract. Linked to these changes greater emphasis is placed on formal rules and monitoring by free-standing agencies. Regulatory state developments not only reform the manner in which public power over economy and society is exercised, but also draw into the process areas of social and economic life in which controls were characterised predominantly as self-regulatory in character (Moran 2001b: 22-23).

Even as the process of displacement of the welfare state instruments was beginning a number of distinctive literatures were emerging which were sceptical either of the descriptive utility or normative desirability of the concept of regulation. In a comprehensive review of the literature on the regulatory state Moran offers a number of possible conclusions as to the validity and utility of the regulatory state concept. Most optimistically the regulatory state literature may identify a central aspect of the 'new governing paradigm' of governance. It may just be a useful fiction, good for enabling increasingly specialised scholars to communicate with one another. Alternatively, regulatory states may exist, but with a 'character contingent on national setting' (Moran 2002: 412).

Moran's own review is very much oriented to the US and UK experience, within which quite distinctive patterns in the emergence of regulatory governance can be identified. In the United States the rise of the regulatory state is linked to a cultural preference for private economic activity, and a concomitant requirement for the state to steer that activity to secure social and economic objectives. A key growth period in the American regulatory state was associated with the New Deal and then with the enhancement of social rights in the 1960s (Sunstein 1990a). By the 1990s American public policy was seeking to move beyond the regulatory state through processes of 'reinvention' (Pildes and Sunstein 1995). Conversely the UK regulatory state has arisen out of a *withdrawal* of the state from key economic activities in the 1980s and 1990a, a by-product of the centralising manner with which the policy was carried out.

In other European states more limited trends towards regulatory governance can be ascribed to attempts by the European Union institutions to complete the single European market, requiring not only the liberalization of utilities sectors once dominated by national monopolists, but also that the states create independent regulatory capacities to promote competition, for example by ending cross-subsidies and promoting non-discrimination by dominant incumbents (Henry, Mathey and Jeunemaître 2000). The EU policy institutions place considerable emphasise on law and hierarchical control as cornerstones of reform processes (Wilks 1996). This characteristic makes it difficult to envision EU policy readily moving towards post-regulatory governance structures which make greater use of non-legal control mechanisms and non-state institutions. However, there is growing evidence of the EU institutions using new governance approaches which give greater discretion to regulatees and member states as to how objectives are met, and which create lower levels of obligation, for example because they have non-binding soft law at their core (Knill and Lenschow 2003). Such new approaches to governance reflect, in part, a recognition of the problems of steering member states and their citizens through coercive regulatory instruments, both from the perspective of legitimacy and effectiveness. The difficulties of regulatory governance in the EU are reflected in global governance more generally in debates as to the extent to which distinctive or autonomous supranational regulatory or legal orders can be created (Held 2002). For some autonomous global governance institutions represent a threat to democratic state governments, while for others such supranational regulatory initiatives are only likely to be effective when anchored to the capacities of sovereign states (Weiss 1998). A third

perspective suggests that supranational linkages of non-state regulatory actors are likely to be powerful within structures of global governance (Ronit 2001).

If we look elsewhere in the OECD we find different patterns again. Governance of economic activities in post-war Japan, for example, has been dominated by monolithic state ministries engendering close and informal relationships with key businesses (Kagan 2000: 225-6). Limited evidence of more formal and juridical enforcement styles only qualifies this picture slightly (Kagan 2000: 229-231). We might respond to these observations either by suggesting that the regulatory state literature has little to say about the Japanese case, or suggest that international pressures will create 'pressures for more transparent and hence more legalistic modes of regulation' (Kagan 2000: 241). In other words if the regulatory state concept fails to capture the characteristics of the current regime then it will, almost inevitably, have relevance to the future. This hypothesis is questioned in a path-breaking study of 'cooperative capitalism' in Japan which suggests that as the power of the ministries both to protect and regulate industry is diminished the vacuum is being filled by trade associations exercising self-regulatory functions, and extensive cooperation by firms within particular industries, a development supported by competition laws which are lenient in respect of restrictive agreements (Schaede 2000: 7). Schaede (2000: 3) further suggests that this form of development is more typical of Asian and continental European countries than the regulatory governance style which has emerged in the 'Anglo-American' countries.

Grabosky (1994) has offered the most sustained criticism of the regulatory state concept, rejecting, in particular, its focus on state activities and exclusion of non-state governance institutions. Grabosky (1995), whose focus is on Australia, the United States and the United Kingdom, points to well established and growing trends to enlist non-state actors in regulatory governance (See also Anleu, Mazerolle and Presser 2000; Gunningham and Grabosky 1998; Kraakman 1986; Scott 2002). There is also an important role for spontaneous market order (for example purchasing decisions and contractual terms of large firms) in such areas as environmental protection and equality (Grabosky 1994; Richardson forthcoming). Thinking in terms of the regulatory state is neither descriptively accurate nor normatively desirable. Whereas the central target of Grabosky's analysis is the assumption that the key actors in regulatory governance are state actors, the main target of this chapter is the assumption that the key instruments and relationships are based on state law and hierarchy.

4. Theories of the Post-Regulatory State

The diverse theoretical perspectives which touch on the question set out in the introduction offer a number of different critiques which can be expressed with the following statements: (i) The capacity of law to exert control is limited; (ii) Control based on law is marginal to contemporary processes of ordering; (iii) State law is only likely to be effective when linked to other ordering processes. The first of these statements forms a core part of the descriptive analysis of the Legal Theory of

Autopoiesis (LTA), and the second is a central descriptive claim of the Foucauldian literature on governmentality. LTA and theory of responsive regulation each offer a version of the normative claim of the third statement. This section of the chapter offers a detailed critique of these different theoretical positions and the following section looks at how these theories might conceive of a post-regulatory state.

a. Legal Theory of Autopoiesis

For the legal theory of autopoiesis (LTA) the problem of control is a problem of communication. Autopoiesis is a term developed initially in biological sciences, derived from Greek words meaning self-producing, and refers to the idea that law reproduces itself according to its own norms. The problem which the theory addresses is centrally concerned with the difficulties that politics, economy, society and law have in communicating with each other and thus exercising control. Can legislatures create new legal rules and simply expect that they will be translated into laws which are effective in the legal system and which produce the desired changes in behaviour by economic and social actors? The central hypothesis of LTA is that such an expectation would, generally, be far-fetched. LTA provides an explanatory theory for the problems of regulatory control with some ideas as to how such problems might be addressed.

Developing a systems theory perspective associated with the work of Niklas Luhmann LTA perceives the world as consisting of differentiated and autonomous social sub-systems (Anleu 2000: 44).¹ These sub-systems – the political, the legal, the social and the

economic are the sub-systems central to regulation – are said to be cognitively open but normatively and operatively closed. Thus a sub-system is open to ‘facts, situations and events of its environment’ (Luhmann 1992: 145). This means that no sub-system is immune from the stimulation of its external environment, but such stimulation occurs as disturbance or perturbation. Stimuli are processed according to the normative structure of the sub-system and not the normative structure of the external environment. In the case of the legal system the distinctive character of its differentiation is its adoption of a binary code - in which actions are classified as legal or illegal, lawful or unlawful - to which its operations are oriented (Luhmann 1992: 145-6).

To take a simple regulatory example, within the political sub-system there may be legislation created which assigns criminal penalties to breaches of rules set down in a regulatory statute. The legislation is the instrument of communication between political and legal sub-systems. The legal sub-system, operationalised through a court, receives the legislation on its own terms, processing it according to the wider normative principles of criminal law. The instrumental objectives of the political sub-system in prohibiting the targeted conduct are of no interest within the legal sub-system. The legal norms emphasise principles protective of defendants such as a requirement that intent is proven, that guilt is proved beyond reasonable doubt, etc. The stringent application of these principles often cuts across the instrumental objectives of a regulatory regime (Scott 1995).

It may be the case that differentiated sub-systems are well-aligned with each other in particular domains. It is said, for example, that in many legal systems contract law and market principles of exchange within the economy have a reasonable fit with each other (Teubner 1993: 92). Similarly the organisational forms used for business organisations and corporations law statutes are often quite well aligned. For LTA these alignments represent 'structural coupling' between systems. Such linkages are perceived as being a product of 'co-evolution' (Hutter 1992).

The leading exponent of LTA, Gunther Teubner describes his hypothesis as to the effects of the inherent problems of communications between sub-systems in terms of a 'regulatory trilemma'. At its simplest the trilemma describes the three types of problem that can arise in the relationship between law and other sub-systems: law may be irrelevant to the other sub-system and of no effect ('mutual indifference'); through creeping legalism law may damage the other system which is to be regulated through inhibiting its capacity for self-reproduction; the self-reproductive capacity of the legal sub-system may be damaged through an 'oversocialisation of law' (Teubner [1987] (1998): 406-414); Anleu 2000: 47).

The aspect of the analysis which has received most attention is creeping legalism or juridification damaging other sub-systems (Santos 2002: 55-61). This is equally a problem for the welfare state as for the regulatory state (Anleu 2000: 51). If we take the example of a regulatory regime over a utilities sector, decisions might largely be taken through negotiation over the needs of the sector consistent with a view as to what the

regulatory policy requires. Law is present, but on the boundaries of regulatory interaction. Changes within the regulated sector, for example liberalization and an influx of new firms, might shatter the regulatory consensus and cause law to be drawn into the resolution of disputes more frequently. This is not simply about litigation, but also an increasing presence for lawyers in drafting documents and negotiating over regulatory decision making. To the extent that lawyers operate within the meaning structures of the legal system they will seek to import legal norms about how things are done. This is perhaps most true in court settings where judges are likely to resolve questions through appeal to the general norms of administrative or contract law rather than values more directly related to the instrumental objectives of the regulatory regime (Scott 1998). For Teubner this poses the risk that private law will be further fragmented as it is asked to provide solutions to problems outside its normative experience or it will be hybridised and combined with other normative structures as it seeks to respond (Teubner 1998).

Applying LTA to empirical questions provides a distinctive insight into problems of regulatory control. It displaces a linear governance pattern in which policy is translated into legislation, then regulatory action and regulatory effects with an image of ‘a multitude of autonomous but interfering fields of action in each of which, in an acausal and simultaneous manner, recursive processes of differences take place’ (Paterson and Teubner 1998: 457). The challenge, in these terms, is to find ways to reduce or minimize the differences between the different fields of action through securing ‘structural coupling’ (Paterson and Teubner 1998: 457). Such effects arise in quite unpredictable ways. This may be investigated empirically by drawing complex cognitive maps to

demonstrate the self-regulatory processes of the various fields of action and to show their points of communication or non-communication (Paterson and Teubner 1998: figures 5 and 6).

LTA envisions a post-regulatory state in which the legal sub-system relates to other sub-systems not through highly specified, or materialised, regulatory law, but rather through working with the grain of the understanding of ordering within other sub-systems. Put another way, the successful implementation of regulatory law is dependent on achieving some measure of 'structural coupling' (Teuber [1987] (1998): 415; cf Clune 1991/2). For Teubner the interesting ways to address the problem do not follow the economic theorists down a de-regulatory route emphasising the control functions of markets, but rather towards more sophisticated, abstract and indirect forms of regulatory intervention, which he describes as 'control of self-regulation' (see also Black 1996) but which is also captured in the concepts 'collibration' (Dunsire 1996) 'reflexive law' 'meta-governance' (Jessop 1998, 2003) and 'meta-regulation' (Morgan 1999; Parker 2002). This approach recognises the 'inner logic' of social systems and sets law the challenge of seeking to steer those social systems. A key aspect of this approach is re-casting the function of law from direct control to proceduralisation (Black 2000; Black 2001b). Such a shift in regulatory law would not end processes of juridification, but 'would help steer the process into more socially compatible channels.(Teuber [1987] (1998): 428). This modest conception of law's capabilities has led to a concern with targeting the internal management systems of regulated entities in order to secure compliance with regulatory goals (Gunningham and Grabosky 1998; Parker 2002).

Thinking about the problem of the relationship between mechanisms of global governance and regulatory law Teubner (1997) himself has invoked ideas of legal pluralism as a complement to LTA. It is, claims Teubner, civil society rather than international governance organisations which is generating effective global regulatory rules (cf Braithwaite and Drahos 2000). Effective in the sense that they are structurally coupled to the economic sub-system to which they apply. The key example he cites is the *lex mercatoria*, the ancient system of legal rules governing economic transactions, but he refers also to the regimes established within multinational enterprises to govern their global affairs. We could think also of international rules governing such matters as sustainability of forests and the protection of the environment from chemical pollution (Gunningham and Grabosky 1998: chapter 4; Gunningham and Sinclair 1999; Meidinger 2002).

The legal theory of autopoiesis highlights important limitations to the use of law as a regulatory instrument, encouraging us to think about the normative structures within other sub-systems which might provide the key to control in respect of particular sets of values. The theory suggests a modest role of law in steering or proceduralising those activities over which control is sought, thus seeking control indirectly. It is implausible to think of direct hierarchical control, and thus we must think of ways of intervening which work with the recursive practices of sub-systems, seeking, for example, the alignment of regulatory norms set by legislators, legal norms generated as a response by the legal sub-system, and the activities over which control is sought. The capacity of the analysis to

offer causal explanations and to predict the outcomes of particular interventions makes it extremely difficult to sell as a policy tool (Paterson and Teubner 1998: 454-5).

b. Governmentality

The governmentality literature, originating with Foucault's well known lecture, emphasises the disparate practices and technologies which control and govern in contemporary states. The central problem addressed by the theory is the observation that much of the governance or control seen in modern societies is not focused on law and the state. Such an analysis leads to a conception of regulation which is pluralistic or decentred in character. A central characteristic of the governmentality literature is the approach to power, and the deployment of power for the purposes of governing. Foucault saw the art of government as representing a continuum between the power we have to govern ourselves, families and environment and the sovereign power of the state (Foucault 1991: 91-92). Thus conventional approaches to governmental power, which emphasise its legitimacy and basis in consent (Hindess 1996: 105ff) are displaced by greater emphasis on 'local or capillary power' (Hunt 1993: 272). This is not to say that Foucault claimed to have developed any general theory of power. Indeed it has been suggested that Foucault's approach to power has more to offer legal scholarship in terms of methodology for understanding power than as providing a theory of power (Simon 1994: 954).

However, it would be wrong to think of governmentality scholarship as conceiving of a shift towards a post-regulatory phase of governance. The diffusion of power and the emergence of new practices and technologies of control which are not dependent upon the sovereign state was in full swing in the eighteenth century. The governmentality scholarship invites us to re-conceive the nature of regulatory governance rather than highlighting recent change. A number of Foucault-influenced legal scholars attribute the turn in legal scholarship away from a traditional conception of power oriented around legal sovereignty and consent towards a more diffuse and fragmented conception largely to the work of Foucault (Murphy 1997: 204). I think it might equally well be attributed to pluralisms of the kind found in both legal scholarship and political science. Certainly the political science version of pluralism has been very influential in regulatory legal scholarship.

By the same token attention to private government in legal scholarship long pre-dates Foucault. The American critical legal studies movement looked to the work of Robert Hale, a law and economics scholar working in the first half of the twentieth century, to support arguments which undermine the juridical public/private distinction (Duxbury 1990: 434). For Hale it was the possession of *economic* power which grounded the capacity of non-state actors to govern or coerce. Such private government calls for regulation of the inequalities which result. Foucault's analysis moves beyond these economic arguments by identifying other sources of power, central among these being professional expertise – whether in psychiatry, medicine or actuarial science (Rose 1994).

We can also detect the rise of professional power in constructing and practising within regulatory fields (Dezalay 1996).

Law had a somewhat marginal place in Foucault's explication of governmentality. Government was not by law, but rather the use of law was one amongst a 'range of multiform tactics' for governing (Foucault 1991: 95). Some with governmental power will have greater capacity to deploy law and others less. For Foucault mercantilism, as a tactic of government, was defeated because it was excessively dependent on sovereign power of the law. Mercantilism was premised upon a thin theory of government wedded to sovereignty (Foucault 1991: 98). The ascendancy of 'governmentality' in the eighteenth century was a product of the recognition of the wide range of tactics for governing and, necessarily, a more limited role for law. Hunt describes Foucault's views on modernity in terms that as the sovereignty of the monarch is displaced so is law, as the expression of sovereign will, expelled (Hunt 1993: 272). . The idea that sovereign law has been displaced by disciplinary power is premised on the two being incompatible, the operation of one excluding the operation of the other (Santos 2002: 6).

This idea of the expulsion of law is premised upon a definition of law as sovereign law which is contestable. Legal pluralism scholarship offers the most vigorous challenge to such a monolithic concept of law, with its emphasis on the plurality of forms and sources of law (Hunt 1993: 307, 320ff). There is plenty of justiciable law which, though by definition it is ultimately backed by state authority, which is nevertheless made locally either through the rather traditional form of delegation of statutory power (Murphy 1997:

203) (for example to local authorities and corporations) or through contract. Beyond that which is justiciable there are local rules and standards made within families, communities and organisations constituting self-government and government of others.

A key move made by pluralistic regulation scholars is to emphasise that law is just one form of effective norm. Norms are effective because they form part of a wider scheme of regulation which has monitoring and behaviour-modifying mechanisms. These may or may not be part of the legal system. This is not a new insight – it was a core aspect of the ‘sociological jurisprudence’ movement of the early twentieth century and is a basic tenet of both sociological and psychological understandings of ordering. The novelty lies in applying this conception of ordering through legal and non-legal norms to regulatory fields. In her study of educational reforms Anne Barron has emphasised the key role of law in the reform process. It is not that statutory reform has ‘itself generated change within schools’, rather law has tended to act on the ‘discourses and practices’ already found within the school system, ‘triggering their elaboration or refinement; modifying them in ways that imbues them with a certain institutional force and stability.’ (Barron 1996: 196).

The governmentality literature offers a modest conception of the role of law in the ordering of society. Highlighting the diffuse technologies and practices through which control occurs, it displaces the state from the centre of our thinking about ordering. Recent work by Alan Hunt, for example, places ‘self-governance’ at the centre of a study of moral regulation, with a rather tangential relationship to the legal regulation of the

state (Hunt 1999). Mariana Valverde's (1998) study of alcoholism examines the wide variety of state regulatory measures which form a rather peripheral part of the governance of alcohol consumption.

The governmentality literature is less strong, perhaps less interested, in suggesting how this reconception of ordering might be deployed in future regulatory policy. More generally it is difficult to discern any normative agenda. It is a literature which is at its most effective in reformulating our understanding through the analysis of the micro-detail of particular social and institutional practices. The reluctance to develop general knowledge which might ground a normative approach to governance issues has generated considerable debate within the governmentality literature as to the responsibilities of scholars to develop critique (O'Malley, Weir and Shearing 1997; Stenson 1998).

c. Responsive Regulation

The theory of responsive regulation is centrally concerned with designing regulatory institutions and processes which stimulate and respond to the regulatory capacities which already exist within regulated firms, attempting to keep regulatory intervention to the minimum level necessary to secure the desired outcomes, but while retaining the capacity to intervene more (in terms of more stringent enforcement or the introduction of a more interventionist regime).

On the basis of the governmentality analysis regulation, if not always law, is a key constitutive element of contemporary societies (cf Hut 1993: chapter 13; Shearing 1993). The emphasis on regulation, particularly within the theory of responsive regulation, highlights a residual role for law at the apex of pyramids both of regulatory enforcement and regulatory technique. Thus the enforcement pyramid envisages most regulatory interaction will be in the nature of education and advice ('persuasion') to regulatees. Where compliance is not forthcoming regulators will escalate their enforcement activity, with warning letters and then civil or criminal penalties. The most stringent sanctions (for example licence revocation) at the apex of the pyramid (Ayres and Braithwaite 1992: 35). Regulators and regulatees have incentives to operate largely at the base of the pyramid with relatively informal interaction. The technique pyramid has governments encouraging businesses to self-regulate at the base of the pyramid. Where self-regulation is not forthcoming or effective governments may become involved with enforced-self-regulation, under which firms are required to set down rules for themselves and report them a regulatory agency for monitoring and enforcement. Where enforced self-regulation is not deemed effective governments need the capacity to be able to escalate to command regulation, first with discretionary punishment and then with non-discretionary punishment (Ayres and Braithwaite 1992: 39).

One might say that responsive regulation brings the idea of law back into governance, irrespective of whether law is actually invoked or actually perceived as a reason for cooperating with regulators or making self-regulation work. Central aspects of the theory are the development of pyramidal approaches to enforcement and the application of

regulatory technique. The enforcement pyramid, reasoned inductively from empirical analyses, has regulators using low level sanctions such as advice and warnings at the base of the pyramid and only escalating to more drastic remedies in the event that regulatees are unresponsive at the lower level. Higher-level sanctions might include application of fines, prosecutions and revocation of licences. Within the theory a regulator with the credible capacity to escalate to high-level sanctions should be able to operate mainly at the lower levels of the pyramid – ‘speaking softly while carrying a big stick’. The technique pyramid has governments encouraging businesses to self-regulate at the base of the pyramid with the potential for escalating to more intrusive techniques should self-regulation prove ineffective (Ayres and Braithwaite 1992).

Key aspects of the responsive regulation theory are vulnerable to claims that few countries exhibit a sufficiently unified or strong state capacity for regulatory power to be capable of sustained manipulation to secure desired regulatory outcomes. Contemporary regulatory law is rarely within the control of a single regulatory unit with capacity to deploy law coherently for instrumental purposes. Within the Westminster democracies legislatures are jealous of their power to make rules and to establish and reform regimes. Legislatures are additionally reluctant to delegate to agencies powers to apply formal legal sanctions (a prejudice commonly reinforced by the protections afforded in human rights legislation). Additionally key powers are held by non-state actors deriving from information, wealth and organisational capacities (Dainith 1997; Hood 1984; Scott 2001). Powerful businesses may dominate the interpretation and application of regulatory

legislation. Interest groups's rhetorical stances may render problematic the legitimacy of formal rules when they are applied.

In the Japanese case the criticism is that the responsive regulation model 'builds on the assumption of a strong regulatory state, with existing precedents and a large legal machinery – a condition that does not exist in Japan' (Schaede 2000: 271). Self-regulation in Japan is typically more independent of the state than would be true in many other OECD countries. If, under these conditions, self-regulation is effective notwithstanding the absence of credible capacities by the state to escalate regulatory technique it appears to challenge the general validity of the responsive regulation theory in this aspect. Deakin and Cook (1999), referring to the German case, suggest the effectiveness of commercial norms in regulating business transactions is linked to their fit with principles of high level commercial law, rather than to presence of state regulatory capacities.

The consequences of interdependencies within Westminster-style regulatory regimes are that it is difficult to imagine circumstances when enforcement agencies can coherently deploy law to pursue instrumental objectives in securing compliance. Put more starkly enforcement pyramids are likely to be broken, incomplete or outside the control of instrumentally-oriented agencies (Haines 1997). In one empirical study it was suggested that occupational health and safety inspectors who appeared to be using a pyramidal strategy are in fact frequently using a split approach in which routine inspection activities occur in the base segments of the pyramid whereas reports of workplace injuries are met

with responses almost exclusively in the upper, punitive half of the pyramid (Gunningham and Johnson 1999: 122). This represents a more general pattern of regulatory responses to resource limitations within which it is more usually a matter of selecting the appropriate arrow from the quiver rather than running through the pyramidal approach with each regulatee. Accordingly there are ‘different points of entry’ to the enforcement pyramid, determined by reference to the characteristics of the regulatee and risk or nature of any infraction (Gunningham and Johnson 1999: 124-5).

With pyramids of regulatory technique legislators and/or regulators are liable to find it difficult to show credible commitment to escalating techniques on instrumental grounds without the dilution of such processes by the normal political considerations. The scope for such political considerations will vary according to the structure of dependencies within the regime. These limits to the application of the theory of responsive regulation cannot be corrected by educating agencies, business, government and interest groups better in what the model requires. They are, to a lesser or greater extent, structural features of contemporary societies and their governance structures and represent a vindication of Foucault’s dispersed power governmentality model. This objection has been addressed by re-conceiving the enforcement pyramid in three dimensions, with government and agencies on one face, regulated businesses on the second face and third parties (whether NGOs or other businesses) on the third face (Gunningham and Grabosky 1998: 398). This elaboration of the enforcement pyramid has the merit of modelling empirical evidence in a manner truer to the multi-party environments which typically characterise regulatory regimes. It demonstrates that control may be exercised even

where state bodies are unable or unwilling to use their powers. So, for example, the capacity of an NGO to ‘name and shame’ or to take direct action against a business may constitute the peak sanctions in an enforcement pyramid. It envisages not only different parties, but also different instruments of control (Gunningham and Grabosky 1998: 399-400). This pluralist reconception of the pyramidal approach makes clear the limitations for instrumental or integrated regulatory action. The potential for multiple and overlapping control possibilities which might operate indirectly is reminiscent of the approach within autopoietic theory which seeks to re-balance checks already within the systems – referred to as ‘collibration’ (Dunsire 1996).

It is not clear how compatible even a modified theory of responsive regulation is with theories of legal pluralism. The difficulty centres on the privileging of state law conceived of as substantive norms and procedures of enforcement. Responsive regulation may be re-worked to focus on the legitimacy of the procedures by which regulatory norms are generated or of the institutions within which they are implemented (Vincent-Jones 2002b). In this formulation the theory takes us away from the inductively reasoned scholarship of Ayres and Braithwaite to the normative concerns of Nonet and Selznick (1978).

For some the responsive regulation model has been insufficiently ambitious. Parker (1999: 71) suggests that it could ‘provide a normative foundation for solving general problems of doing justice in democratic societies.’ The enforcement pyramid should be deployed not only by regulators but by ‘mothers, lovers, bosses, creditors, unions, and

generals struggling for justice in child-rearing, relationships, employee management, finance, industrial relations, international trade, and warfare'. In one of the key elaborations of the responsive regulation theory Parker (1999: 76) offers a pyramidal model in which indigenous ordering is at the base with informal justice in the middle segment and formal legal justice at the apex. This innovation marries legal pluralism with responsive regulation, recognising the capacities for control or ordering without state law. Where legal pluralists might question Parker's model is in her retention of the Braithwaitian assumption that effectiveness of indigenous ordering at the base of the pyramid is dependent upon the credible capacity of escalation to more formal law at the apex of the pyramid.

The responsive regulation theory offers us an inductively reasoned model for regulating both more effectively and with greater consent. It seeks to 'transcend' the deregulation debate by showing the continuing relevance and possibility of regulatory activity in a period of profound scepticism. It has the great merit that when shown the various pyramids many regulators and policy makers immediately seem to understand them descriptively and offer examples. But the retention of a strong and unified state within the model is a significant weakness, since it renders the theory problematic in situations characterised either by fragmented or weak states. In the context of this paper the weakness feeds through into assumptions about how law may work within regulatory regimes.

5. Characterising the Post-Regulatory State

A critical analysis of the three theoretical perspectives discussed in the previous section provides the basis for questioning the capacity and desirability of depending on state law and hierarchical forms of control within the regulatory state, and provides the basis for conceiving of a post-regulatory state. The main focus of the preliminary analysis is alternative conceptions of control – alternatives to state law and alternatives to hierarchical control. We see variety in the components of control systems – the form which goals or standards take, the mechanisms for feedback or monitoring, and the mechanisms for realigning where deviation from the standards is detected, and variety in who is controlling and who is controlled.

a. Variety in Norms

We can think of the core norms of the regulatory state as primary and secondary legislation, the only forms of rule making in which the state uses its monopoly of legal force over economic and social actors. Even here there is a plurality of state actors with formal rule making capacity (including agencies, sub-national governments, supranational institutions, as with the EU) such that rules may be multiple and overlapping with meaning assigned to regimes through processes of interpretation which are contingent upon a variety of non-legal factors (Scott 2001). A condition of ‘internal legal pluralism’ arises where there co-exist ‘different logics of regulation carried out by different state institutions with very little communication between them.’ (Santos 2002: 95). Such conditions may be facilitated by the tendency of state actors deploy a wide

range of alternative forms of norm. Thus instruments of ‘soft law’ (more accurately portrayed in French as *normes douces*) such as guidance, circulars, letters of comfort are widely deployed with the intention of shaping the behaviour of those to whom they are directed, but without the necessity of using formal law (Lex For 2000: 53). Soft law instruments enable departments and agencies to avoid the more elaborate procedural requirements of formal law and/or to address issues outside their formal mandates. State organisations may also use terms set down in contracts as instruments of control, either in the context of normal procurement processes (Daintith 1979, or in the context of creating statutory regimes based on contractual or near-contractual governance (Vincent-Jones 2002a). Contractual rules are, for the most part, set by the parties but underpinned by state laws relating to their enforcement and the filling in of gaps. Socio-legal research has found that in particular sets of business relationships strict contractual rules play a limited role in governing the conduct of the parties (Macaulay 1963). It is difficult to develop a more general hypothesis as to the importance of state law for underpinning contractual relations.

Contractual rules are also extensively used as regulatory instruments by non-state actors. Such rules take both collectivised and individuated forms. Collectivised contractual rules are typically used to establish and make binding self-regulatory regimes. While it may be correct to think of signing up to membership of a self-regulatory regime (in the absence of irresistible market or governmental pressures) as voluntary, within common law countries at least, a member is then bound by the rules and procedures set down. Self-regulatory bodies are frequently much more complete regulators, in the sense that they

combine rule making, monitoring and sanctioning powers within a single organisation, something which is rare for state regulatory agencies (Scott 2002). Norms are also set down in individuated contractual agreements, enabling large companies to exert controls over the conduct of both their customers and their suppliers, not only through setting down rules, but also through introducing processes of monitoring, audit or certification for compliance.

A further form of non-state rule making, not linked to contract, is found in processes of standard-setting or normalisation. Private standards institutes in the industrialised states date from the early part of the twentieth century and have developed into extensive bureaucracies receiving state support both through funding and through the incorporation of standards into legal regulatory requirements. More recently general and specialised standardization bodies have emerged at the supranational level, notably in the European Union. Such private standards are also rendered effective through their incorporation into contracts.

The post-regulatory analysis of the plural legal norms emphasises the development of principles and practices for regulating rule making. A well developed example of such meta-regulation is found in the principles for control over the imposition of regulatory burdens developed in the United States, United Kingdom and many other OECD countries (Froud, Boden and Ogus 1998, Pildes and Sunstein 1995). These regimes have in common procedural requirements that rule makers carry out regulatory impact assessments on new regulatory rules. Such regimes typically apply to primary and

secondary legal rules. The Australian federal government applies its regulation review regime additionally to soft law instruments made by public authorities (Productivity Commission 2001). The Australian National Competition Policy involves the federal Office of Regulation Review assessing the progress made by state and territory governments in reducing regulatory measures which reduce competition, and includes the capacity for the federal Treasurer to apply financial sanctions (Morgan 1999). The UK government has extended the regulatory reform regime by administrative measures to encompass regulatory burdens imposed on the public sector, pursuing reviews of the burdens applying to public hospitals, schools, local government and universities.

State use of contracts as regulatory instruments over the public sector is also subject to quite developed regimes in many OECD countries. It was common practice in the UK for public authorities to use procurement processes to pursue unrelated policy objectives such as minimum wage and anti-discrimination policies through imposing contractual conditions. This practice was substantially ended by the application by domestic rules on compulsory competitive tendering and EU procurement rules which preclude taking such considerations into account when entering into contracts. The Australian Commonwealth government continues to pursue industrial policy, pay equity and environmental policies through its procurement rules, a preference which has precluded its accession to the WTO Agreement on Government Procurement (Department of Finance and Administration; Department of Finance and Administration 2002).

The theoretical literature linked to the legal theory of autopoiesis (LTA) further envisages the proceduralisation of self-regulatory regimes (Black 1996; Black 2000; Black 2001b). Such meta-regulatory rule making might involve the setting of minimum standards for particular types of standards set by individual firms or organisations, as with attempts to set minimum terms for manufacturers' guarantees.² More typical of such regimes is that they set minimum standards for collective codes of conduct developed through trade associations. The UK Office of Fair Trading (OFT) has used statutory powers to approve consumer codes under the Fair Trading Act 1973 to set down minimum standards that codes should comply with, including the provision of effective consumer redress regimes (Scott and Black 2000: chapter 2). The UK Enterprise Act 2002 has reformed the regime, now requiring the OFT to issue minimum standards and to grant a common approval mark to schemes which are approved. The 'reinventing regulation' initiative in the US has spawned a number of attempts to use Braithwaite's 'enforced self-regulation' model, under which firms are either required or incentivised to write their own rules. The Environmental Protection Agency, for example, encouraged businesses to develop their own regimes in return for less burdensome regulation (Freeman 1997), though the leading scheme, Project XL appears to have failed because of 'delays in approval, ongoing demands for information' and bureaucratic resistance (Eisner 2002: 25). This kind of initiative does, in any case, fall short of the kind of proceduralized law suggested by LTA.

A wide variety of norms is deployed in regulatory governance. In this section we have noted that formal legal rules may be developed by state and non-state bodies in a form

other than primary and secondary legislation, and in particular through contract. We have also noted that instruments of soft law, which are not legally binding, are of considerable importance to state bodies, both government departments and agencies. Such soft law norms typically derive at least some of their force from their location within a matrix of hierarchical state power. For example, an agency may prefer to operate through guidance which is effective because all parties know that legal rules are likely to be forthcoming if the guidance is not followed. Alternatively there may be a willingness to follow guidance as part of a more general pattern of cooperation. Other norms entail the deployment, or least existence, of non-hierarchical mechanisms of control, as with social norms, standards relating to price and quality set through competition. These are discussed in the next section.

b. Variety in Control Mechanisms

If a central characteristic of the regulatory state is an emphasis on hierarchy as an instrument of control, then a key feature of the post-regulatory state is a shift towards other bases for control. This is a key theme of the governance literature. This change may be one of thinking rather than underlying mechanisms, since it has long been clear that the period of organised capitalism is characterised by a mixture of state, market and community within social control processes (Offe 2000; Santos 2002: 44-51). The shift in thinking is well exemplified in the work of Lawrence Lessig with his division of control mechanisms into four basic types – law; social norms; markets; architecture. Lessig (1999) observes that contemporary developments in information technology give a

particular prominence to the architecture of software as an instrument of control. Among the most celebrated aspects of Foucault's analysis of changes in disciplinary power was his revival of Bentham's panopticon model of prison design and claim that this architecturally oriented form of governance over prisoners was emblematic of a shift towards government through surveillance (Foucault 1977: 195-228). A wide range of studies emphasise different forms of spatial control (Newman 1972; Shearing and Stenning 1985; Katyal 2002; Merry 2001). In its more basic forms control or regulation by architecture could not be less responsive. There is no enforcement pyramid with a concrete parking bollard, no exceptions to the application of the complete exclusion of parking, even if we can imagine any number of emergencies which a parking regulator (and an even greater number of drivers) might think justified an exceptional approach. Lawrence Lessig's (1999) well-known metaphor 'code is law' captures his assertion that the controls which are built into computer software (whether at the instance of firms or government) offer an architectural alternative to the deployment of legal rules. Code can be deployed to inhibit international arbitrage by consumers of DVDs or to prevent access to particular websites by unsupervised children, to provide two examples, each without the potential or actual application of legal sanction.

The search for greater variety in bases of control is consistent with the 'law of requisite variety', developed in cybernetics to capture the idea that in order to exert effective control, the controller must have at least as much variety in its control mechanisms as the system to be controlled (Beer 1966). We have elsewhere adopted the central four part division of the bases of control, though making significant revisions to the terminology

and characterisation of the four bases. We label these hierarchy, community, competition and design (Murray and Scott 2002). Perhaps most importantly we attach greater significance to the various hybrid forms of control which can be derived from the four basic types. The theory of responsive regulation is very much organised around the development of hybrid forms which deploy hierarchy and community as their basis, notably in the well known model of ‘enforced self regulation’ (defined as the activities of individual firms without and with direct monitoring and approval in setting and applying standards to themselves). Indeed, we could say that LTA, responsive regulation and governmentality are each peculiarly interested in one or more forms of self-regulation as a key basis for contemporary governance. Responsive regulation also draws on a hierarchy/competition hybrid in the model of partial industry regulation.

c. Variety in Controllers

Within the regulatory state literature state regulatory bodies are accorded a special place. In contrast no special legitimacy or value is placed on attributing control functions to state bodies – government departments, agencies and courts – within post-regulatory state thinking. Standard setting is observed at supranational level through a wide range of general and specific governance institutions. Trade associations operate both nationally and internationally to set standards, for example in respect of environmental protection. Businesses and NGOs frequently have both the interest and the capacity to monitor the activities both of government and businesses for compliance with norms of their or others’ making. Thus can banks, insurers, accreditation bodies and credit rating agencies

all be thought of as contributing at least some components of control systems over risk-related behaviour and compliance with more general standards (Anleu, Mazerolle and Presser 2000: 72-; Heimer 2002; Richardson forthcoming). It is quite common for airlines and other carriers to be given incentives to effectively monitor for compliance with immigration rules and refuse passage to those in breach. Trade unions and NGOs may be formally empowered as enforcers of regulatory rules, for example in respect of occupational health and safety, animal welfare and consumer protection. NGOs may alternatively seek such powers through the use of media, litigation and other strategies to modify the behaviour of those seen in breach of implicit or explicit standards. When we use competition as the basis for control we may be empowering individuals to control through the aggregation of their market or other competitive behaviour.

d. Variety in Controllees

The regulatory state literature has traditionally viewed businesses as the key regulatees. The post-regulatory state perspective takes a wider view, recognising that the behaviour of a wider range of actors are relevant to the outcomes of ordering of social and economic life. Thus we may study controls over government itself, both in its regulatory activities noted above, and its more general capacities (Hood et al, 1999). We may also think about individuals as targets of control, using variety in control mechanisms to secure outcomes which might have been sought otherwise through regulating businesses. Furthermore we may be selective about who we control. Partial industry regulation may be applied either where only a segment of a particular sector poses policy problems (as

with dominant incumbents in the utilities or broadcasting sectors) or because we observe that the relationship between partial control and unregulated behaviour produces superior outcomes to either no or complete regulation (Ayres and Braithwaite 1992). Many regulatory bodies now use risk analysis to determine who they regulate and how intensively. Thus low risk activities or organisations may fall substantially outside the regime, while riskier businesses are subjected to the full rigor of the regime.

6. Conclusion

The noun in the title to this paper is not used in the sense of the body politic denoted in the phrases welfare state and regulatory state. Rather the post-regulatory state is a state of mind which seeks to test the assumptions that states are the main loci of control over social and economic life or that they ought to have such a position and role. In the age of governance regulatory control is perceived as diffused through society with less emphasis on the sovereign state. This preliminary investigation of the legal dimension to the post-regulatory state is a long way from asserting the unimportance of law to contemporary regulation. At a descriptive level the analysis offers a wider array of norm-types and control mechanisms relevant to understanding regulatory governance than is common in functionalist analyses of the regulatory state. Normatively the analysis is suggestive of alternative functions for law to asserting command. In particular it emphasises the role of law in structuring or proceduralising both state and non-state activities which are

premised upon alternative instruments and/or institutions of control. But there are both theoretical and empirical challenges to be addressed.

One empirical problem with the analysis is that it fails adequately to reflect the impetus within governments to resort to ‘command and control’ regulation. Disasters and scandals of one kind or another routinely call forth responses which emphasise more prescriptive rules, more powerful regulatory authorities and related features. We need only think of the responses to BSE in Europe and the Enron collapse in the United States, each with global reverberations. Unrelated to this is a concern identifiable within governments in the US, UK, Australia and elsewhere with asserting control over public sector bodies which has tended to generate more formal and externalized regulatory controls, dependent to a greater degree than hitherto on law. Set against this there are examples where the official response to disasters characterized as regulatory failure have been to *reduce* the intensity of external regulatory oversight and place more emphasis on the internal capacities of regulatees, as with occupational health and safety regulation in the UK oil industry following the Piper Alpha disaster (Paterson and Teubner 1998: 474) and where controls over government bodies is asserted not through command and control but through trying to stimulate self-regulation and competition (Hood, James and Scott 2000). But these examples of post-regulatory thinking appear to be more the exception than the rule.

The whole concept of the ‘post-regulatory’ may also be problematic, first because it might be taken to imply progression towards superior, as opposed to different, ways of

thinking about governance. But also, because it raises the difficulty of addressing those jurisdictions where evidence for the emergence of a regulatory state is limited. Pre-regulatory states, such as those of North Asia, arguably demonstrate more of the kind of post-regulatory approach than would be true of the UK and the US, for example in the emphasis on informal steering of self-regulatory mechanisms. If we think of official policies towards developing countries the agenda of the international financial institutions for the governance of developing countries is oriented around building up rather than displacing state capacity (World Bank 1997). Thus, under the influence of international organisations, many states are looking to construct the institutions which will make state governance more effective, rather than to dismantle them (Levy and Spiller 1996). We may therefore prefer to think of points on a continuum between regulatory and non-regulatory states within which some countries move towards the regulatory end and, to the extent to which they exhibit post-regulatory (or pre-regulatory) approaches, this represents a shift towards the non-regulatory end.

A theoretical objection to this paper is to recognise that processes of control not focused on state law are important, but claim that such processes do not come within the rubric of regulation which is defined to refer only to that subset characterised by the deployment of state law by state agencies in instrumental fashion. This objection is at the heart of the project begun with this paper. My response is to say that the ‘enlarging the regulatory envelope’ effects of my analysis are only a by-product and that the main reason for looking beyond the regulatory state is to secure a better understanding of the core state governance functions and the relationship between them and other ordering processes.

Put another way, we enrich our understanding of regulation when we have better tools to understand the pervasiveness of non-state law and non-hierarchical control processes and their effects on regulatory processes as they are more conventionally conceived. Such an approach enables us to re-focus the analysis in three ways.

First, there is the suggestion of a role for law in regulatory settings which is less concerned with setting down rules and powers. A common theme in contemporary governmentality and responsive regulation scholarship is an emphasis on what Foucault called 'conduct of conduct' (Rose 2000) but which has similarities to what Christine Parker, building on her responsive regulation work, refers to as Meta-Regulation (Parker 2002: 297) . It is no coincidence that a similar emphasis on the steering of internal control mechanisms is also found in the legal scholarship influenced by LTA. Is this hybrid form, with its emphasis on legal underpinning for indirect control over internal normative systems capable of generating a new consensus on the role of law in regulation? This approach is defined by its retention of a central place for hierarchy as a steering mechanism. A post-regulatory state might look beyond hybrid forms which loosen command-based legal control, but, as with responsive regulation, retain it in at least some residual form such that ends are ultimately set and determined by the sovereign state.

Second, the paper is suggestive of providing greater recognition to other types of legal and non-legal norms in processes of control. Where such norm structures exist or can be stimulated they may be preferable (because they may be more effective or more efficient)

to regulatory law. Third, and linking the first two points, we might ask to what extent the hierarchical control dimension to regulation may be displaced by control processes built on community, competition and design, either singly or in hybrid combination? This shift has variously been described as a move away from hierarchies towards heterarchies (Black 2001a: 145) or networks (Salamon 2001: 1628). A governmentality approach recognises, indeed emphasises, situations where control arises from exercise of power not underpinned by sovereign law, though there is a hint of the role of sovereign law in underpinning hybrid governance arrangements in the governmentality literature too (Stenson 1998: 337). Examples here include the electrical manufacturers who program DVD players only to read North American-coded DVDs and the communities which exercise control through defining what is thinkable or doable. Some processes which lack state law underpinning may even deliver what are perceived as public interest objectives, such as development of software for controlling internet access (a contested case) and the granting of consumer remedies in excess of legal rights.

The key here may be to identify the conditions under which the incentives for acting within competitive or community control structures are sufficiently (if not totally) aligned with conceptions of public interest, such that the state law underpinning is unnecessary. This would be a broad brush exercise, rather than a micro-policy analysis, and arguably accords with what governments already do in determining the boundaries of regulatory intervention. I am broadly sympathetic to the view that markets are unable to function without some (however distant) underpinning of state law (Shearing 1993). That argument needs further investigation in the case of community-based and design-based

control which appear more radical when proffered distinctly from any hierarchical or sovereign law underpinning. Viewed in this way the post-regulatory state may provide a way of thinking about regulatory governance which is complementary to the regulatory state literature, generating both new insights and new challenges.

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* Colin Scott is Reader in Law in the ESRC Centre for the Analysis of Risk and Regulation at the London School of Economics and Political Science. The research and writing of this paper were carried out while I was on secondment as Senior Fellow in Public Law, Law Program and Regulatory Institutions Network, Research School of Social Sciences, Australian National University. This paper was originally presented at the Politics of Regulation Workshop, Universitat Pompeu Fabra, Barcelona, November 2002. I am grateful to John Braithwaite, Imelda Maher, Michael Moran, Anthony Ogus and Peter Vincent-Jones for comments on an earlier draft of this paper.

¹ Approaches to control premised upon systems theory can also be found in the public administration literature, notably in the work of Dunsire (1996) and Hood (1984). See also Kickert (1993); t'Veld, Termeer, Schaap and van Twist 1991.

² For example in Directive 1999/44/EC on Consumer Guarantees OJ L 171/12, 7.7.1999, Article 6.