



Open Research Online

Citation

Tombs, Steve (2015). Crisis, what crisis? Regulation and the academic orthodoxy. *Howard Journal of Criminal Justice*, 54(1) pp. 57–72.

URL

<https://oro.open.ac.uk/42002/>

License

None Specified

Policy

This document has been downloaded from Open Research Online, The Open University's repository of research publications. This version is being made available in accordance with Open Research Online policies available from [Open Research Online \(ORO\) Policies](#)

Versions

If this document is identified as the Author Accepted Manuscript it is the version after peer review but before type setting, copy editing or publisher branding

Crisis, What Crisis? Regulation and the Academic Orthodoxy

STEVE TOMBS

Professor of Criminology, The Open University

Abstract: What can criminology or socio-legal studies tell us about the causes of the financial crisis – a failure of regulation, at the very least – or ways in which further such crises might be prevented, mitigated, responded to? The article begins by setting out the emergence and dimensions of the academic orthodoxy on regulation – a series of shared assumptions regarding feasible and desirable forms of regulation. Then it undertakes a quantitative and qualitative content analysis of work on regulation and the crisis to assess the extent to which this orthodoxy has been reassessed in the light of events since 2007.

Keywords: criminology; socio-legal studies; financial crisis; regulation; orthodoxy

Events in the world have dramatically reinforced the scholarly community's vital responsibility to probe deeply the causes of market and governance failures, and then to begin to identify and evaluate ways that institutions – private and public, national and international – can try to overcome, prevent, or mitigate such failures. (Braithwaite, Coglianese and Levi-Faur 2008, p.381)

This quotation, made by the founding editors of the journal *Regulation & Governance*, sets out a challenge for those who study regulation. Several observations on the 'events in the world' – the financial, then economic, crises that rolled out across many parts of the globe from the end of 2007 – seem incontrovertible, and are a context for this article. First, that much of what was enmeshed in the aetiology of 'the crisis' involved not just harm but various forms of crime engaged in by major financial institutions across the world. Second, that one of the causes of the crisis was not just risk-taking behaviour on the part of these institutions, but the nature and level of regulation at both national and international levels which either allowed or encouraged such activities – in other words, the crisis represented not just forms of corporate crime and harm, but state complicity in these. Third, that the state-corporate relationships which generated these harms and crimes are, to put it mildly, in urgent need of reform.

A question thereby raised is this: what can criminology or socio-legal studies tell us about the causes of the crises or ways in which further such crises might be prevented, mitigated, responded to? This is pertinent to ask of criminology, since one of the phenomena at issue in the crisis is

potential or actual crime, and certainly widespread harm. And it is also a question of direct relevance for socio-legal studies because, in general, this is the place where much academic work on regulation gets done. This central question provides the context within which this article proceeds. The focus is specifically upon British academia, albeit it is impossible to demarcate this clearly and neatly. The article begins by setting out what I consider to be the regulatory orthodoxy – a series of shared assumptions regarding feasible and desirable forms of regulation – before examining the extent to which this has been disturbed by, and reassessed in the light of, events since 2007, themselves a manifest failure of such forms of regulation. These considerations follow on from Braithwaite's challenge to scholars working in criminology, socio-legal studies, and related areas: such scholars have a 'vital responsibility to probe deeply' into causes and thereby to contribute to their social and political prevention. In short, I argue that such responsibilities have not been, and remain unlikely to be, met.

A Regulatory Orthodoxy

Over 20 years ago, in what became a rather acrimonious debate, Frank Pearce and I drew attention to what we called a 'Compliance' or 'Oxford' school of regulation studies (Hawkins 1990, 1991; Pearce and Tombs 1990, 1991). Yet even as we were engaged in that debate, the academic *and* policy scales had tipped decisively towards those forms of regulation and its enforcement which we were subjecting to critique. Our own arguments for alternative forms of regulation to those which then were dominant had already become generally accepted as unworkable, unrealistic, undesirable. By 2012, Almond and Colover (2012, p.1010) could characterise work on regulation via reference to a 'regulatory orthodoxy' and a "deterrence school" of thought'. The triumph of the 'compliance school', this 'regulatory orthodoxy', suggests a more selective use of the threat of prosecution as a 'last resort' and in general gives support to approaches that utilise enforcement rarely and prioritise compliance-centred, accommodative, self-regulatory strategies of risk *management* (Almond and Colover 2012, p.1000, italics in original).

Thus, across an apparently heterogeneous variety of regulation scholars, there has been a generalised rejection of 'deterrence-based' approaches. For example, scholars who describe or prescribe compliance-oriented (Hawkins 1984), twin-track (Gunningham and Johnstone 1999), smart (Gunningham and Grabosky 1998), problem-solving (Sparrow 2000), risk-based (Hutter 2001), private or market-based (Hutter 2006), or responsive (Ayres and Braithwaite 1992), really responsive (Baldwin and Black 2008), or really responsive risk-based (Black and Baldwin 2010) regulation, all assume that what is generally referred to as 'command and control' regulation, where the state prescribes closely what constitutes compliance and then responds punitively on the basis of a deterrence-oriented approach, is unsustainable. Thus:

In business regulation circles these days, there is not much contesting of the conclusion that consistent punishment of business non-compliance would be a bad policy, and that persuasion is normally the better way to go when there is reason to suspect that cooperation with attempting to secure compliance will be forthcoming. (Braithwaite 2002, p.20)

At the same time as we engaged in our ‘debate’ with Hawkins, Braithwaite was forging the concept of responsive regulation in an explicit effort to transcend what he viewed as a sterile debate over regulation versus deregulation – a concept which has been applied, developed, tested, affirmed, and subjected to critique across Australasia, North America and Western Europe in a diverse range of contexts from ‘corrections to school bullying to international peacemaking’ (Burford and Adams 2004, p.12; Nielsen and Parker 2009, pp.376–7; Wood *et al.* 2010). Central to responsive regulation is the prescription of a regulatory enforcement strategy whereby most regulatory activity with most companies involves forms of self-regulation, whilst the most punitive tactics need only to be resorted to in dealings with a small number of firms – hence regulation is pyramidal, the self-regulatory base being far larger than the punitive peak (Ayres and Braithwaite 1992).

A slightly distinct – but now increasingly voluminous – variant within regulation literature has sought to establish a ‘risk-regulation’ paradigm (see, for example, Black and Baldwin 2010). Since the publication of *Responsive Regulation*, the use of risk technologies to inform regulatory targeting – as part of the pyramidal approach to enforcement – has become part and parcel of the regulatory landscape, with risk-based forms of regulation now ubiquitous across UK regulatory bodies (Black 2005; Hutter 2005; Rothstein, Huber and Gaskell 2006). Conceptually, the ‘risk-regulation’ couplet has established itself as academically pre-eminent in the past decade – not least through the work of the Centre for the Analysis of Risk and Regulation,¹ of which more below. In practical terms, and ‘In a striking wave of regulatory homogenization, risk-based regulation is becoming widespread across the globe and in areas as diverse as environment, finance, food, and legal services’ (Black and Baldwin 2012, p.2).

What appear to be diverse literatures share several assumptions. One is that state capacity has dwindled with respect to private actors and ‘the market’, while state resources are not, and never will be, sufficient for the task of overseeing compliance with regulation. A second is that this requires a targeting of regulatory resources at those firms or sectors where risk is greater or the chances of non-compliance are more significant, or both. Third is that the preferred regulatory option is to leave the management of risks to institutions beyond the state – notably to business organisations and their managements themselves, but also to other private actors including trade associations, insurers, and investors – so that corporations should be encouraged to act as responsabilised, self-managing, risk-mitigating organisations. A fourth assumption is that this is not only desirable but also feasible, because corporations can, and do, have moral commitments to preventing and mitigating risks – they are not reducible to artificial amoral, calculating, profit-driven entities.

Such work both cohered with, as well as provided further impetus to or legitimation for, a prevailing regulatory literature and practice, one within which their concept of responsive regulation is intimately linked to more recent and current ideas around risk-based regulation. Thus, for example, in the UK the ‘modernised’ Labour Party, coming to government in 1997, committed itself precisely to transcending regulation/deregulation, drawing upon the Third Way discourse popularised by Giddens in the context of a communitarianism shared by Braithwaite (Tombs 2002). The key initiative within this programme of regulatory reform was the Hampton Report, which explicitly acknowledged Ayres and Braithwaite’s concept of responsive regulation to claim ‘a general acceptance among business and regulators that inspections are an inefficient enforcement mechanism in lower-risk or high-performing businesses, and that risk assessments should inform the work programmes of Inspectorates’ (Hampton 2005, p.27). More recently, at international level, the Organisation for Economic Co-operation and Development (OECD), in setting out ten *Draft International Best Practice Principles for Improving Regulatory Enforcement and Inspections*, explicitly proposed the concept of responsive regulation as one of these principles (OECD 2013, pp.5,14), as an essential element of part of an overall risk-based approach.

The construction of this orthodoxy was far from inevitable, and certainly not lacking in agency. In the early 1990s, Pearce and Tombs had argued that compliance-oriented arguments found their clearest expressions through the work of researchers associated with the Oxford Centre for Socio-legal Studies. A decade later, the key institutional site for logically related regulation discourse was to be found at the Centre for the Analysis of Risk and Regulation (CARR) at the London School of Economics. CARR has been a significant initiative. Established in October 2000 with £2.58 million from ESRC funding, with a further £2.86 million in October 2005, it has also generated significant funding from private sector sources, including £4.7 million from Deutsche Bank (February 2000), £2.1 million from PriceWaterhouseCoopers (July 2000) and sums in excess of £200,000 from AON (February 2001) and BP Amoco (January 2000), respectively (Freedom of Interest (FoI) Request, February 2012). Through its very title, it helped firmly establish the risk-regulation couplet.

The continuity of ideas from Oxford and CARR is partly explained through the circulation of personnel. Hutter, Black, Lloyd-Bostock and Hawkins all held prominent roles at each institution. Moreover, these academic relationships extended across international borders as, for example, Bardach,² Braithwaite, Gunningham and Parker were all visitors to CARR. Key institutional centres of the regulatory orthodoxy include Regnet (the Regulatory Institutions Network,³ located at The Australian National University, Canberra) and the Penn Program on Regulation, which have trilateral institutional links and between which circulate similar personnel. These are also the home of the founding editors of the key academic journal outlet for the orthodoxy, *Regulation & Governance* (see Braithwaite, Coglianese and Levi-Faur 2007), with an editorial board including key figures of the orthodoxy.⁴ The leading book series to publish

monographs and collections of orthodoxy scholars was the Oxford Socio-Legal Studies Series:⁵ Keith Hawkins was a long-time general editor, with an editorial board containing a majority of staff from Oxford's Centre for Socio-Legal Studies.

Whether intentionally or not, such intellectual, interpersonal and institutional relationships have the net effect of marking out an academic and political terrain as constituting the acceptable range of views (see also Davies 2011; Tombs and Whyte 2003). In his critique of liberal interventions in seeming opposition to the contemporary politics of security over liberty, Jackson (2011) sets out forensically how, despite this seeming opposition, such liberal critique *ultimately aligns* itself with the dominant ideology and thus the state – so that it is critique in appearance only, and so may actually perform a legitimating function. Intriguingly, Jackson advances his argument through a critique of the work of leading liberal public intellectuals who seem to represent an apparently diverse set of views and with internal disagreements, the cumulative effect of which is, through their occupation of the same essential logic, not least commitments to liberal democracy and free market capitalism, and to human rights *within* these, to seek to offer a “third model” or “middle way” between alternatives’ (p.170).

The proclaimed option of representing or identifying a middle ground is far from coincidence, for here is the central liberal claim of being able to *balance* opposing concerns. Jackson consistently notes the significance of the balance metaphor in liberalism – a discursive device widely used (Pantazis and Pemberton 2012, pp.656–7, 660–2). The shared ‘politics of compromise’ (Jackson 2011, p.171) so-generated demarcates the terrain of legitimate and acceptable political critique, position and response, serving to ‘marginalise and delegitimize conflict and deny any potential for truly alternative politics’ (p.174), not least any which would reject the legitimacy and validity of capitalism.

Here we find perfect analogies with the regulatory orthodoxy. Two intimately related balances are always-already central within this orthodoxy. First, the need to balance the socially productive effects of private corporate activity against the deleterious ones: worker, consumer, community and environmental protection is always to be balanced against the (never contested!) ‘right’ of private corporations to accumulate, which in turn produces social benefits in the form of employment, goods and services, tax revenues, and so on. Second, the desire to regulate must always be balanced against the need to recognise the necessity of, and even to valorise, risk and risk-taking – a claim which ranges from the banal observation that there is no such thing as a risk-free society to the highly-ideological claim that risk-taking entrepreneurialism is the motor of contemporary capitalism. Taking these two observations together, the regulatory orthodoxy takes as unquestioned the relative freedom of private capital to accumulate whilst accepting some – albeit always unspecified and indeed relatively unexplored – levels of socialised harms as a consequence of this. This is the axis around which any ‘balance’ is to be achieved.

Crisis What Crisis? Academic Business as Usual

In this section, I wish to indicate that, at least on the proxy measure of the publication of ongoing or recent research work, fallout from the crisis within criminology in general and regulation studies in particular has been notable for its absence. Then, and somewhat differently, this section notes that the regulatory orthodoxy has hardly been disturbed at all by the failures of the forms of regulation it described, sought to conceptualise, and consciously or unconsciously, implicitly or explicitly, advocated for some 25 years or so.

One way of assessing the extent to which British criminology and socio-legal studies has responded to the crisis is to examine the extent to which it has formed the subject matter of empirical, analytical, theoretical or normative research and writing. Now, one can be generous and say that it is more likely that such work might be found in journals rather than books – the crisis began to unfold in Autumn 2007, so it may be the case that book-length studies which take it as a focus are still in the pipeline. One would expect, if this were the case, to find some presence of the topic in criminology or socio-legal journals.

What follows is a quantitative content analysis of six British-based journals from January 2009⁶ to end 2013. The *British Journal of Criminology* and *Criminology & Criminal Justice* are two high-profile journals related to the professional association, the British Society of Criminology. *Theoretical Criminology* is the main British-based theoretical organ of criminology, so that if the crisis had prompted any theoretical or conceptual reflexivity or reconsiderations, then one might expect to see these represented here. The *Journal of Law and Society* and *Social & Legal Studies* are contexts in which one finds issues related to the interactions of states and corporations, in the form of regulation, treated relatively regularly. *Regulation & Governance* has established itself as a key forum for discussions of regulation and is very much a product of, and vehicle for, the regulatory orthodoxy.

What one finds from a review of the subject matter of all articles in these journals across a five-year period – summarised in *Table 1* – is that out of a total of 922 articles, just 13 pieces deal at all centrally with the economic crisis, with six of these appearing in one special issue of one journal (*Regulation & Governance*, December 2013). That is, just over 1% (1.4%) treated the crisis as a thematic issue, seeking to understand either its aetiology or legal and regulatory responses to this.

A more qualitative survey of these pieces provides a further indication that the crisis has hardly shattered long-standing ways of thinking about regulation and regulatory strategies. The premise for the piece by Moschella and Tsingou (2013) – an introduction to the special issue, which seeks ‘to shed light on an often understudied aspect in regulation literature: the pattern of regulatory change’ (p.407) – is that it is ‘now widely recognized that regulatory failures contributed to the onset of the global financial crisis’ (p.407). In this context, Rixen (2013) examines the role of shadow banking in the crisis, revealing the regulatory response as ineffec-

TABLE 1
 Crisis Related Articles in the Context of all Articles in Six British Criminological and Socio-legal Journals, January 2009–December 2013

Journal	Total articles	Crisis related	Crisis-related article
<i>British Journal of Criminology</i>	279	3 ⁷	Braithwaite 2009; Dorn 2010; Xenakis and Cheliotis 2013.
<i>Criminology & Criminal Justice</i>	127	0	
<i>Journal of Law and Society Regulation & Governance</i>	126	3 ⁸	Bholat, Dunn and Gray 2012; Block 2013; Frerichs 2013
	136	6 ⁹	Baker 2013; Helleiner and Thistlethwaite 2013; Moschella and Tsingou 2013; Rixen 2013; Verbruggen 2013; Young 2013 ¹⁰
<i>Social & Legal Studies</i>	125	1 ¹¹	Alessandrini 2011
<i>Theoretical Criminology</i>	129	0	
Total	922	13	

tive and piecemeal: competing demands on states at international and national levels (competition for finance capital and capture by national financial interests groups, as opposed to the demands of electorates to regulate) force governments to attempt to square circles with symbolic, and ultimately ineffective, reform measures. Young (2013) explores the lobbying of the financial services sector since the financial crisis, arguing that in the face of new proposals for regulation, such lobbying is less likely to focus upon vetoing regulatory proposals at the stage of policy formulation, more on advancing self-regulatory strategies at the agenda setting stage of policy making. Baker's (2013) central interest is in the nature of policy change, scrutinising the political, institutional, and informational phenomena which prevent radical change in macroprudential policy. Somewhat differently, but still with a focus on the post-crisis regulatory landscape, Verbruggen (2013) argues that national and international governmental actors can, and should, create the necessary preconditions to strengthen private regulatory enforcement, as it can also enhance their own regulatory capacity, in particular, in transnational contexts. Alessandrini (2011) explores a novel approach to the regulation of financial derivatives, the Ecuadorian Proposal for a New Regional Financial Architecture, while Helleiner and Thistlethwaite (2013) focus on the post-crisis emergence of a domestic coalition in the US for stronger regulation over carbon markets.¹²

Braithwaite's analysis is one of the few pieces focused upon the aetiology of the crisis, indeed on the terrain of crime prevention: examining crimes associated with Enron as well as those events leading up to the 2007 crisis, he explores the value of negative licencing. Thus, as regards the financial crisis, he argues, consistent with the model of responsive regula-

tion, and its general communitarianism and reintegrative ethos, that ‘the threat of negative licensing might be used to motivate restorative justice that transforms the ethical culture, particularly the bonus culture, of banks’ (Braithwaite 2009, p.439). By contrast, Xenakis and Cheliotis (2013) offer a wide-ranging examination of the relationships between economic downturn and crime through a focus on austerity-ravaged Greece, an analysis which defines crime widely – so focusing upon the linkages between corruption, common property and violent offences, and illicit political violence in the context of economic downturn.

For Dorn (2010), the crisis exposed the ways in which dominant forms of regulation created common blind spots, and he argues for a ‘regulatory diversity’ which corresponds to:

a political strategy of democratic steering of regulatory agencies, diluting, if not displacing, the currently dominant notion of financial market regulation as a purely ‘technical’ discourse. In concrete terms, this implies shifting systemic regulatory oversight responsibilities away from ‘independent’ agencies, to government bodies and/or departments that are held accountable to their parliaments and electorates. (p.23)

Dorn, in fact, began his article thus: ‘Criminology may still be making up its mind whether the emergence of the crisis in global financial markets is a matter for it or for other disciplines’ (p.23). The benefit of hindsight allows us to respond to Dorn’s then equivocal statement – both British criminology and socio-legal studies appear collectively to have made up their minds that the emergence, dynamics and fallout from the crisis is *not* a matter for either as a discipline. And the lack of such interest is *not* confined to Britain. For example, McGurrian (2013) noted late in 2013 that only:

a small handful of white-collar criminologists in the U.S. have studied the current financial crisis . . . Only critical criminologist and integrative theorist Gregg Barak, has taken on, in book form, the challenging task of researching the financial crimes of large investment.

To Barak’s text we might add reference to Will, Handelman and Brotherton (2012), while at the time of writing, there has not been one criminologically-related text emerging from Britain which has centred on this topic. As for journals, there has been one special issue of a leading US criminology journal – ‘The global economy, economic crisis, and white-collar crime’ (*Criminology and Public Policy*, 9, 2010) – devoted to the crisis, as well as a volume of the *Western Criminology Review* (14, 2013) largely devoted to Barak’s analysis of the same. Beyond the US, there has appeared a volume of the annual edited collection *Sociology of Crime, Law and Deviance* (Deflem 2011), as well as ‘an unknown number of journals’ in other European countries; see, for example, the Dutch *Justitiële Verkenningen* ‘The credit crunch’, 2009/06¹³ (Huisman 2012/13, p.8).

For the discipline of criminology as a whole, of course, this relative silence might be expected. As Pontell, Black and Geis (2014) have recently

put it: ‘Not surprisingly, with its overwhelming emphasis on crimes of the relatively powerless, criminology generally failed the challenge of the Great Economic Meltdown’ (p.8). This coheres with numerous critiques of the seemingly inherent inabilities of criminology as constituted academically adequately to incorporate issues of corporate, state, or, indeed, mass crime and harm, not to be rehearsed here. Suffice to say:

Our failure to tackle this topic is symptomatic of a hole in the very fabric of criminology: the discipline’s failure to research and theorise those in positions of relative power. Most ‘Introduction to Criminology’ textbooks feature a chapter on how corporate crime, state crime and human rights abuse are under-researched, to then just go back to talking about drug-addicts and violent teenagers. (Krause 2013)

This point being made however, the editors of the special issue of *Criminology and Public Policy* were able to conclude in a way which takes us to the heart of the nature of the ‘response’ to the crisis by criminologists and, indeed, regulation scholars more specifically – and the problems with such a response:

There is currently a remarkably optimistic consensus in some academic quarters about how to reduce the harm caused by privileged predators. The heart of it lies in the presumed promise of pluralistic, cooperative approaches, and responsive regulation. These assumptions highlight the need for enhanced prevention, more diverse and more effective internal oversight and self-monitoring, and more efficient and effective external oversight. They have gained use throughout a variety of regulatory realms, many since their earliest, albeit embryonic, formulation nearly three decades ago . . . They make sense theoretically, and we endorse them. We do so not because they have a record of demonstrable success but principally because sole or excessive reliance on state oversight and threat of criminal prosecution is difficult, costly, and uncertain. Still, we are mindful, as others should be, that the onset of the Great Recession occurred during and despite the tight embrace of self-regulation, pluralistic oversight, and notions of self-regulating markets by policy makers and many academicians. (Grabosky and Shover 2010, pp.641–2)

The optimism here is as staggering as it is unavowedly unfounded. These authors state quite explicitly that an academic consensus persists in its ‘assumptions’ regarding the ‘presumed promise of pluralistic, cooperative approaches, and responsive regulation’ – albeit that the policy approaches they suggest have no ‘record of demonstrable success’!

Similarly, the one special issue of any British-based journal devoted to issues of regulation and the crisis (see *Table 1*) points to at least one general conclusion, namely that:

The crisis and the reactions in its aftermath, marked by political activism and calls for re-regulation, have led a number of commentators to identify a general reorientation in the philosophy that underpins global financial governance. The argument is that the pendulum has moved away from deregulation, self-regulation, and market discipline to a more assertive and interventionist role for the public sector. However, the evidence assembled in this special issue does not provide clear-cut support for these propositions. While it is true that the activity and

competence of the technical and expert policy communities analyzed in the case studies that follow was initially discredited, their grip on the regulatory process has not been seriously dented. (Moschella and Tsingou 2013, p.409)

These are clear indications that the crisis has not disrupted the academic nor policy assumptions regarding regulation. Certainly what is not on dominant agendas are considerations of any forms of more state-centred, more interventionist, nor more punitive forms of regulation.

To underpin this insularity and complacency, it is worth turning, briefly, to a special issue of *Risk Regulation*, the in-house organ¹⁴ of CARR (Centre for the Analysis of Risk and Regulation 2008), which has, since its formation in 2000, and as claimed above, become the central institutional vehicle in defining the field of legitimate regulatory study in Britain and beyond. Therein, there is little sense that much has changed for the legitimacy of a particular approach to regulation – it may, in fact, have been rendered more significant and more urgent. Thus, the then current director asked:

what does this financial crisis and calls for a new financial architecture mean for the academic study of regulation and risk? Have academics been asleep on the job and are they now required to radically revise their reading lists . . . regulation as an academic subject was not asleep at the wheel because the study of unintended consequences and inevitable failures featured in research over the last few decades – not just at CARR . . . Just what caused contemporary events and discussion on continuing regulatory responses will occupy social scientists for years to come, but so far little suggests that the key regulation literature assumptions need revision. (Lodge 2008, p.13)

This tone of a generally self-serving form of reflection is echoed by CARR's former director, who advises that the financial crisis is not merely economic but is 'also a crisis of knowledge and ideas that demands a response from the social sciences'. But her recognition that the 'world has changed' seems not to have disturbed the risk-regulation balancing act. Thus, 'in today's radically changed world, the kind of work we do at CARR has become critically important . . . we now know that questions of trust and ethics, of expertise and responsibility, are fundamental to the very foundation of a market'. Claiming that 'CARR staff have worried about such themes for many years', it is somewhat disingenuously claimed that such work has proceeded 'without suggesting that one theme or approach trumps others' (Hutter *et al.* 2008, p.3). Further emphasising the need for balance, another contribution urges that:

Now is not the time for a regulation see-saw, moving first to strong, then back to weak . . . We must learn that the 'scientific' models of risk and business activity need to be underwritten and overseen by an ethos of responsible behaviour. We must learn that organizations need to re-assemble a sustainable trust and confidence structure across national borders and so bring Europe together. And we must learn that whatever we do, any solution has to embrace all the global players. (Hutter and Dodd 2008, p.6)

Conclusion

The characteristic feature of the new regulation is that it has been shaped by the financial institutions themselves, and its purpose has been to ensure the ability of the financial system to grow and extract profits. It has not contributed in the slightest to avoiding financial bubbles nor to imposing the costs of financial crises onto those responsible for them. On the contrary, contemporary regulation has led to society bearing the brunt of financial disasters, while private individuals associated with finance have reaped the benefits of expansion. Society has little to expect from more regulation of the type we have known for four decades now. (Lapavistas 2014)

One can read most criminological and socio-legal literature on regulation and find virtually no reference whatsoever to the financial crisis, its aetiologies, its political and economic consequences, its aftermath of drip, drip revelations regarding widespread corporate crimes, harms and immoralities – and where there are such concerns they proceed with little sense that they might entail rethinking regulation. In general, this literature proceeds *as if* the events of 2007/08 have not happened, *as if* trust in the responsible corporation remains possible, *as if* the state remains incapable of regulating a ‘free’ economy, and *as if* the basic assumptions of the literature hold true, simply in need of more research funding for further research for greater fine-tuning within but never questioning of its liberal pluralist paradigm.

In sum, the academic literature on regulation is a small industry, a torrent of self-referential banality from which considerations of power, capital, class *and even crime* are notable for their absences. Therein, regulation is viewed largely as a technical issue, a search for mechanisms to empower anthropomorphised, essentially responsible firms to comply with law, in a world of stakeholders and conversations, where those who might suggest resort to criminal law are simplistic, anachronistic embarrassments, a world where power is never concentrated but dispersed, where sources of influence are polycentric, and where the state is certainly decentred, relatively and increasingly impotent, just one amongst a range of actors, not least those which inhabit the private sector itself. So regulation might be responsive, better, smart, twin-tracked and risk-based – but it is always so ‘realistic’ that it is never about controlling pathological, calculating, profit-maximising entities as one element of a broader struggle for social justice.

Ironically, other disciplines – and most notably political economy, economics, political science and international relations – as well as even leading establishment figures such as Joseph Stiglitz and Paul Krugman, have explored the crisis more or less usefully and as a means of arguing for, variously, punitive intervention, innovative solutions like debt write-offs, or even transformation of social relations. In other words, disciplines beyond those which deal centrally with regulation – criminology and socio-legal studies – have explored regulatory solutions beyond tinkering with the forms of regulation which have prevailed, while the regulation orthodoxy has signally failed to do so. Where are the regulatory

scholars who are even considering alternative forms of bank ownership, re-appropriation, state controls on exchange and interest rates and of international capital flows, debt audits and corporate and or individual sanctions as interventionist, potentially punitive and infrastructural state responses?

In his reflections on the financial crisis, Moran (2010) concludes that there are three lessons that regulation academics ‘must urgently take on board’. First, that ‘*Democracy matters*’: a 30-year experiment ‘designed to insulate regulation from democratic politics . . . proved to be a disaster’. Second, ‘*Ideology matters*’, pointing to the fact that this same period had seen a ‘*naturalisation of markets*: an exercise in ideological hegemony that pictured them as subject to quasi-scientific determined laws’. Third, he recognised that powerful ‘*Interests matter*’, specifically ‘a new Anglo-American plutocracy in the markets’, the ‘fantastic wealth of the financial sector’ and a hegemony within which ‘the stories of regulation before the crisis . . . are of timidity and subordination on the part of public regulators’ (all italics in original).

Now, we can agree with all of these observations – but the logic of the regulation orthodoxy seems virtually immune from being affected by them. To take Moran’s exigencies in turn: for the orthodoxy, *democracy* entails the liberal balancing act so that the right of capital to generate private profits is reduced to one of several social interests; *ideology* is the characteristic of those, such as Pearce and Tombs (and others), who see corporations as inherently destructive and criminogenic; while the *interests* of power and the powerful are virtually entirely absent from their analyses. In general, as I have argued, responses to the crisis by academics working in and around the orthodoxy, have been either absent or complacent, lazy, self-referential and self-serving. The net effect of these, whether conscious or not, and bolstered by the reassertion of the neoliberal idea in the wake of the crisis, has been that the hegemony of the regulatory orthodoxy has been rapidly re-established. Across this orthodoxy, regulation is ever-more reduced to pragmatic tools and techniques (‘toolkits’) for balancing interests. And this, in turn, is an effect of the fact that liberal-pluralism predominates and continues always-already to delegitimize alternative approaches to regulation.

Thinking about, and beyond, regulation – to follow Lapavistas’s challenge at the head of this section – is analogous to Jackson’s (2011) conclusion to his critique of security intellectuals, thus:

confrontation with the logic of security must involve, if not begin with, confrontation with the intellectuals that provide it with a critical source of legitimacy and render it closed to critique . . . A truly alternative politics . . . must refuse outright to work with the logic of security and eschew all validity of a reformist approach. (p.185)

The regulatory orthodoxy is, for critical scholarship, part of the problem, not the solution. Regulation must be viewed not as a set of technical ameliorations to a world where private accumulation is always prioritised

over social protection, but as an object of struggle, power, and social forces. Despite their protestations, the non-ideological work of the liberal orthodoxy is highly ideological and politicised, and needs to be challenged – following Jackson, this means eschewing narrow reform and daring to engage in radical intellectual work which not only reinstates the possibilities of regulatory options, but recognises that regulation by a capitalist state can only ever deliver a more effectively functioning capitalism. Thus the real focus of regulation study must be on the symbiotic relationships between corporate and state forms, an exigence which means transcending the boundaries of criminology and socio-legal studies and embracing a wider political economy of transformation.¹⁵

Notes

- 1 See <http://www2.lse.ac.uk/researchAndExpertise/units/CARR/home.aspx> (accessed 1 November 2013).
- 2 Co-author of the touchstone anti-‘punitive’ enforcement text, *Going by the Book* (Bardach and Kagan 1982).
- 3 RegNet ‘is an internationally acclaimed interdisciplinary program that serves as the central node for a network of centres, projects, institutions, practitioners and academics involved in exploring and understanding critical domains of regulation’. Available at: <http://regnet.anu.edu.au/> (accessed 1 November 2013).
- 4 See [http://onlinelibrary.wiley.com/journal/10.1111/\(ISSN\)1748-5991/homepage/EditorialBoard.html](http://onlinelibrary.wiley.com/journal/10.1111/(ISSN)1748-5991/homepage/EditorialBoard.html) (accessed 1 November 2013).
- 5 See <http://ukcatalogue.oup.com/category/academic/series/law/osls.do> (accessed 1 November 2013).
- 6 2009 might reasonably be the first year in which one might see articles on the crisis appearing in print.
- 7 Not counted in this total is an article which dealt more generally with the ways in which white-collar offenders tend not to form the stuff of folk devils nor their offences form the basis for wider moral panic (Levi 2009).
- 8 Not included in this total is a further piece which deals with a specific aspect of the FSA’s approach to regulation (Georgosouli 2011).
- 9 Not included in this total is one of the five pieces selected for the 2013 special issue on regulation after the crisis, namely Henriksen (2013), which examines the relationships between policy models, paradigm shifts and the constitution of agency; what is included in this total is one of the ‘regular articles’ in this same issue (Helleiner and Thistlethwaite 2013). Also not included in the total is a piece which examines two paradigmatic views of regulation and the contrasting ways in which these might inform an analysis of the reform of bank regulation (Simon 2010).
- 10 All of these appeared in the special issue, *Regulating Finance after the Crisis: Unveiling the Different Dynamics of the Regulatory Process* (Moschella and Tsingou 2013).
- 11 Two papers in this journal during this period consider aspects of the regulation of financial services, but not in a way that at all touches upon any aspects of the crisis, namely Lippert and Williams (2012) and Snider (2009).
- 12 The three other pieces cited in *Table 1* deal much more tangentially with the crisis, seeing this as a catalyst for reorientations of the relationships between the disciplines of law, sociology and economics (Bholat, Dunn and Gray 2012; Block 2013; Frerichs 2013).
- 13 See <http://english.wodc.nl/onderzoeksdatabse/jv200906-de-kredietcrisis.aspx?cp=45&cs=6797> (accessed 30 January 2014).
- 14 Not included in the analysis summarised in *Table 1* since it is not a refereed journal.
- 15 Acknowledgement: This article draws on work undertaken during Leverhulme Research Fellowship RF-2011-173.

References

- Alessandrini, D. (2011) 'Regulating financial derivatives? Risks, contested values, and uncertain futures', *Social & Legal Studies*, 20(4), 441–62.
- Almond, P. and Colover, S. (2012) 'The criminalization of work-related death', *British Journal of Criminology*, 52, 997–1016.
- Ayres, I. and Braithwaite, J. (1992) *Responsive Regulation: Transcending the Deregulation Debate*, Oxford: Oxford University Press.
- Baker, A. (2013) 'The gradual transformation? The incremental dynamics of macroprudential regulation', *Regulation & Governance*, 7(4), 417–34.
- Baldwin, R. and Black, J. (2008) 'Really responsive regulation', *Modern Law Review*, 71, 59–94.
- Bardach, E. and Kagan, R.A. (1982) *Going by the Book: The Problem of Regulatory Unreasonableness*, Philadelphia, PA: Temple University Press.
- Bholat, D., Dunn, A. and Gray, J. (2012) 'Share and share alike? Hedge funds, human rights, and owning enterprise in Britain', *Journal of Law and Society*, 39, 185–212.
- Black, J. (2005) 'The emergence of risk based regulation and the new public management in the UK', *Public Law, Autumn*, 512–49.
- Black, J. and Baldwin, R. (2010) 'Really responsive risk-based regulation', *Law & Policy*, 32, 181–213.
- Black, J. and Baldwin, R. (2012) 'When risk-based regulation aims low: approaches and challenges', *Regulation & Governance*, 6, 2–22.
- Block, F. (2013) 'Relational work and the law: recapturing the legal realist critique of market fundamentalism', *Journal of Law and Society. Special Issue: Towards an Economic Sociology of Law*, 40, 27–48.
- Braithwaite, J. (2002) 'Rewards and regulation', *Journal of Law and Society*, 29, 12–26.
- Braithwaite, J. (2009) 'Restorative justice for banks through negative licensing', *British Journal of Criminology*, 49, 439–50.
- Braithwaite, J., Coglianese, C. and Levi-Faur, D. (2007) 'Can regulation and governance make a difference?', *Regulation & Governance*, 1, 1–7.
- Braithwaite, J., Coglianese, C. and Levi-Faur, D. (2008) 'Change and challenge in regulation and governance', *Regulation & Governance*, 2, 381–2.
- Burford, G. and Adams, P. (2004) 'Restorative justice, responsive regulation and social work', *Journal of Sociology and Social Welfare*, 31, 7–26.
- Centre for Analysis of Risk and Regulation (2008) *Financial Crisis Special*, London: Centre for Analysis of Risk and Regulation, London School of Economics and Political Science.
- Davies, J. (2011) *Challenging Governance Theory: From Networks to Hegemony*, Bristol: Policy Press.
- Deflem, M. (Ed.) (2011) *Economic Crisis and Crime: Series in Sociology of Crime, Law, and Deviance*, Bingley: JAI Press/Emerald Publishing Group.
- Dorn, N. (2010) 'The governance of securities: Ponzi finance, regulatory convergence, credit crunch', *British Journal of Criminology*, 50, 23–45.
- Frerichs, S. (2013) 'From credit to crisis: Max Weber, Karl Polanyi, and the other side of the coin', *Journal of Law and Society. Special Issue: Towards an Economic Sociology of Law*, 40, 7–26.
- Georgosouli, A. (2011) 'The FSA's "Treating Customers Fairly" (TCF) initiative: what is so good about it and why it may not work', *Journal of Law and Society*, 38, 405–27.
- Grabosky, P. and Shover, N. (2010) 'Editorial conclusion. Forestalling the next epidemic of white-collar crime: linking policy to theory', *Criminology & Public Policy. Special Issue: The Global Economy, Economic Crisis, and White-Collar Crime*, 9, 641–54.
- Gunningham, N. and Grabosky, P. (1998) *Smart Regulation: Designing Environmental Policy*, Oxford: Clarendon.

- Gunningham, N. and Johnstone, R. (1999) *Regulating Workplace Safety: Systems and Sanctions*, Oxford: Oxford University Press.
- Hampton, P. (2005) *Reducing Administrative Burdens: Effective Inspection and Enforcement*, London: HM Treasury/HMSO.
- Hawkins, K. (1984) *Environment and Enforcement*, Oxford: Clarendon.
- Hawkins, K. (1990) 'Compliance strategy, prosecution policy and Aunt Sally: a comment on Pearce and Tombs', *British Journal of Criminology*, 30, 444–66.
- Hawkins, K. (1991) 'Enforcing regulation: more of the same from Pearce and Tombs', *British Journal of Criminology*, 31, 427–30.
- Helleiner, E. and Thistlethwaite, J. (2013) 'Subprime catalyst: financial regulatory reform and the strengthening of US carbon market governance', *Regulation & Governance. Regulating Finance after the Crisis: Unveiling the Different Dynamics of the Regulatory Process*, 7, 496–511.
- Henriksen, L. (2013) 'Economic models as devices of policy change: policy paradigms, paradigm shift, and performativity', *Regulation & Governance. Regulating Finance after the Crisis: Unveiling the Different Dynamics of the Regulatory Process*, 7, 481–95.
- Huisman, W. (2012/2013) 'White-collar crime and the economic crisis', *ESC Newsletter*, 8–12. Available at: <http://www.escnewsletter.org> (accessed 30 January 2014).
- Hutter, B. (2001) *Regulation and Risk: Occupational Health and Safety on the Railways*, Oxford: Oxford University Press.
- Hutter, B. (2005) *The Attractions of Risk-Based Regulation: Accounting for the Emergence of Risk Ideas in Regulation* (CARR discussion paper, 33), London: Centre for Analysis of Risk and Regulation, London School of Economics and Political Science.
- Hutter, B. (2006) *The Role of Non-state Actors in Regulation* (CARR discussion paper, 37), London: Centre for Analysis of Risk and Regulation, London School of Economics and Political Science.
- Hutter, B. and Dodd, N. (2008) 'Social systems failure? Trust and the credit crunch', *CARR on Crisis: Risk and Regulation*, December, 4–5.
- Hutter, B., Lodge, M., Miller, P. and Power, M. (2008) 'Introduction: CARR on crisis', *CARR on Crisis: Risk and Regulation*, December, 3.
- Jackson, W. (2011) 'Liberal intellectuals and the politics of security', in: M. Neocleous and G. Rigakos (Eds.), *Anti-Security*, Ottawa, Canada: Red Quill Books.
- Krause, M. (2013) 'Wasted potential – towards a criminology of the financial crisis', *Criminologia*, 17 June. Available at: <http://criminologia.de/2013/06/wasted-potential-towards-a-criminology-of-the-financial-crisis/> (accessed 1 December 2013).
- Lapavistas, C. (2014) 'Interview with CJ Polychroniou', *Truthout*, 26 January. Available at: <http://www.truth-out.org/news/item/21383-costas-lapavistas-discusses-the-financialization-of-capitalism> (accessed 1 February 2014).
- Levi, M. (2009) 'Suite revenge? The shaping of folk devils and moral panics about white-collar crimes', *British Journal of Criminology*, 49, 48–67.
- Lippert, R. and Williams, J. (2012) 'Taking exception: the cases of financial and urban governance', *Social & Legal Studies*, 21, 51–72.
- Lodge, M. (2008) 'Towards a new age of regulation', *CARR on Crisis: Risk and Regulation*, December, 12–13.
- McGurrin, D. (2013) 'Theft of a nation symposium: introduction', *Western Criminology Review*, 1 August. Available at: <http://www.readperiodicals.com/201308/3118452791.html> (accessed 15 January 2014).
- Moran, M. (2010) *Regulation and the Financial Crisis: Keynote Address* (European Consortium for Political Research Standing Group on Regulatory Governance, University College Dublin, 18 June). Available at: <http://www.trisheconomy.ie/index.php/2010/06/23/regulation-and-the-financial-crisis/> (accessed 1 September 2013).

- Moschella, M. and Tsingou, E. (2013) 'Regulating finance after the crisis: unveiling the different dynamics of the regulatory process', *Regulation & Governance. Regulating Finance after the Crisis: Unveiling the Different Dynamics of the Regulatory Process*, 7, 407–16.
- Nielsen, V. and Parker, C. (2009) 'Testing responsive regulation in regulatory enforcement', *Regulation & Governance*, 3, 376–99.
- OECD (2013) *Public Consultation on Best Practice Principles for Improving Regulatory Enforcement and Inspections: Draft Report Submitted to the Public for Comments*. Available at: <http://www.oecd.org/gov/regulatory-policy/enforcement-inspections.htm> (accessed 1 August 2013).
- Pantazis, C. and Pemberton, S. (2012) 'Reconfiguring security and liberty: political discourses and public opinion in the new century', *British Journal of Criminology*, 52, 651–67.
- Pearce, F. and Tombs, S. (1990) 'Ideology, hegemony and empiricism: compliance theories of regulation', *British Journal of Criminology*, 30, 423–43.
- Pearce, F. and Tombs, S. (1991) 'Policing corporate "skid rows": safety, compliance, and hegemony', *British Journal of Criminology*, 31, 415–26.
- Pontell, H., Black, W. and Geis, G. (2014) 'Too big to fail, too powerful to jail? On the absence of criminal prosecutions after the 2008 financial meltdown', *Crime, Law and Social Change*, 61, 1–13.
- Rixen, T. (2013) 'Why reregulation after the crisis is feeble: shadow banking, offshore financial centers, and jurisdictional competition', *Regulation & Governance. Regulating Finance after the Crisis: Unveiling the Different Dynamics of the Regulatory Process*, 7, 435–59.
- Rothstein, H., Huber, M. and Gaskell, G. (2006) 'A theory of risk colonisation: the spiralling regulatory logics of societal and institutional risk', *Economy and Society*, 35, 91–112.
- Simon, W. (2010) 'Optimization and its discontents in regulatory design: bank regulation as an example', *Regulation & Governance*, 4, 3–21.
- Snider, L. (2009) 'Accommodating power: the "common sense" of regulators', *Social & Legal Studies*, 18, 179–97.
- Sparrow, M. (2000) *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance*, Washington, DC.: Brookings Institution Press.
- Tombs, S. (2002) 'Understanding regulation?', *Social & Legal Studies*, 11, 111–31.
- Tombs, S. and Whyte, D. (2003) 'Researching the powerful: contemporary political economy and critical social science', in: S. Tombs and D. Whyte (Eds.), *Unmasking the Crimes of the Powerful: Scrutinising States and Corporations*, New York: Peter Lang.
- Verbruggen, P. (2013) 'Gorillas in the closet? Public and private actors in the enforcement of transnational private regulation', *Regulation & Governance. Regulating Finance after the Crisis: Unveiling the Different Dynamics of the Regulatory Process*, 7, 512–32.
- Will, S., Handelman, S. and Brotherton, D. (Eds.) (2012) *How they Got away with it: Lessons from the Financial Meltdown*, New York: Columbia University Press.
- Wood, C., Ivec, M., Job, J. and Braithwaite, V. (2010) *Applications of Responsive Regulatory Theory in Australia and Overseas* (Occasional Paper 15, June), Canberra, Australia: Regulatory Institutions Network.
- Xenakis, S. and Cheliotis, L. (2013) 'Crime and economic downturn: the complexity of crime and crime politics in Greece since 2009', *British Journal of Criminology*, 53, 719–45.
- Young, K. (2013) 'Financial industry groups' adaptation to the post-crisis regulatory environment: changing approaches to the policy cycle', *Regulation & Governance. Regulating Finance after the Crisis: Unveiling the Different Dynamics of the Regulatory Process*, 7, 460–80.